Introduction

A core question in the study of white collar crime is how to prevent corporations from breaking the law. Much attention has focused on punishing corporate crime. Indeed, conversations in the public fora often call for punishing corporate executives more severely. We only need to think about how in the aftermath of the 2008 financial crisis, progressive politicians called for stricter punishment of banks. Now, with more recent scandals such as at Wells Fargo, we are hearing their calls resound even more loudly. For instance, US Senator Elizabeth Warren is one of the most vocal supporters of stricter corporate punishment. In March 2018, she introduced a bill in Congress introducing stricter sanctions for corporate executives. As she explained: “When they break the law, Wall Street executives should be trading in their pinstriped suits for orange jumpsuits. After wrecking the economy in 2008, too many executives got off scot-free while millions of hardworking people lost their homes and savings. That’s why I introduced the Ending Too Big to Jail Act.”

The belief is that punishing corporations and their executives more severely will prevent future wrongdoing. Certainly, this idea is partly a reaction against the impunity of corporate actors, as for many years, major cases of corporate misconduct did not result in strong sanctions either against the corporation or against the executives involved (Garrett 2014; Pontell et al. 2014; Steinzor 2014). Undoubtedly, impunity does sustain misconduct and crime. As the economist Thomas Piketty explained in 2016 in response to the tax haven scandals that came to light after the publication of the so-called Panama Papers: “Let there be no mistake: only repeated application of sanctions of this type, at the slightest non-compliance, will enable the credibility of the system to be established and an end seen to this climate of lack of transparency and widespread practice of impunity for many decades” (Piketty 2016).

However, the question is whether punishment will, in and of itself, deter corporate crime and violations. Unfortunately, the existing science does not provide strong evidence that punishment consistently and effectively deters corporate wrongdoing. A recent systematic review of all available studies about corporate deterrence found that: “The evidence fails to
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show a consistent deterrent effect of punitive sanctions on individual offending, company-level offending, geographic-level offending, or offending among studies using an ‘other’ unit of analysis” (Simpson et al. 2014). Critically, this is not just another study in the literature. This study, which constitutes the most comprehensive, rigorous, and up-to-date review of all available scientific evidence about deterrence for corporate crime and misconduct across a range of corporate crimes, failed to find a deterrent effect.

There are several explanations for why corporate deterrence is difficult. A first reason is that just like for individual crime (Nagin 2013), certainty of punishment matters more than severity of punishment. Further, stronger sanctions will only start to have an effect if a tipping point of certainty is achieved (Brown 1978; Chamlin 1991). However, because of the complexity of corporate organizations and processes, detecting corporate violations in the first place is quite challenging (Gray and Scholz 1991; Pontell et al. 1994; Gray and Mendeloff 2005; Henrieques 2011; Gray and Silbey 2014; Plambeck and Taylor 2016). In fact, stronger punishment threats can actually lead to more investment to prevent getting caught and ultimately result in a cat-and-mouse game (cf. Plambeck and Taylor 2016). For instance, when Volkswagen (VW) discovered that California and US regulators knew about their cheating, their initial response was to improve the software and hide their cheating through a recall (Ewing 2017). Further, when wrongdoing is actually detected, it remains difficult to prosecute (Pontell et al. 1994). Finally, even when it is successfully prosecuted, penalty fines often remain uncollected (Ross and Pritikin 2010).

A second reason is that deterrence is subjective (cf. Apel 2013). Oftentimes, corporate executives who are supposed to be deterred simply are not aware of the certainty and severity of punishment (Thornton et al. 2005). For some companies, the expected penalties are seen as the price of business and made part of the budget. At VW, high-level engineers and executives had since 2006 received penalties in other cases, but in the words of New York Attorney General Eric Schneiderman: “They had concluded we can survive this type of penalty.” Indeed, even with the massive damages and penalties VW had to pay after it finally admitted to its cheating (setting aside 25 billion USD), in 2017 it had its highest sales ever and retained its number 1 ranking in car sales, and in 2018 it further extended its lead over Toyota.

These findings do not mean that corporate crime and wrongdoing should not be punished. Certainly, punishment must be administered when wrongdoing is uncovered. However, these findings do mean that punishment in and of itself is not enough to prevent future violations and damages. A comprehensive approach to white collar crime looks beyond punishment, and also identify what can be done within the organization.

This chapter examines three options, each of which has drawn academic and practical attention. First, we discuss internal compliance management systems. These are systems that are supposed to help organizations manage their compliance and become better equipped at preventing illegal behavior by organizational members. Legal systems, including that of the United States, have introduced legal incentives to stimulate corporations to adopt these systems. The second way to prevent white collar crime from within the organization is through whistleblowers. Staff and workers in corporations have much better knowledge of wrongdoing than external regulators. The chapter will discuss how successful whistleblowers have been in aiding the control of corporate crime and misconduct. Finally, the chapter will discuss the role of internal monitoring as a check on rule-breaking behavior. Three forms of internal monitoring will be discussed: private third-party monitors, technological forms of monitoring, and mandated monitors that corporations have to adopt following prosecution settlements. The chapter will conclude by reflecting critically on what these studies mean for the prevention of white collar crime and corporate wrongdoing.
Corporate Compliance Management Systems

Over the past two decades, there has been rapid growth in corporations adopting compliance management schemes. One of the driving forces is that the law actually incentivizes these practices. For instance, US law offers lenient treatment for companies that have an "effective compliance and ethics program." Consequently, it is unsurprising that we see many companies adopt compliance management systems in the aftermath of major scandals and prosecutorial investigations. Siemens is a prime example. This German electronics giant had been bribing governments worldwide to get favorable contracts overseas, funneling an estimated total of 1.4 billion USD to officials in Asia, Africa, and Latin America. Once its massive bribery scheme was uncovered, Siemens became part of a major US criminal investigation. As the investigation proceeded and Siemens began negotiations with the US Department of Justice (DOJ), it developed new anti-corruption compliance policies, including a handbook, web-based complaints channels, improved financial controls, and an anti-corruption tool kit operated by 150 dedicated staff members. These efforts cost Siemens over $150 million, and expanded its compliance operation to 500 staff members. This helped Siemens get more lenient treatment, as the DOJ asked the court to give a lower sentence. As the DOJ sentencing memo stated: "The reorganization and remediation efforts of Siemens have been extraordinary and have set a high standard for multinational companies to follow. These measures, in conjunction with Siemens' agreement to retain a Monitor ... for a term of four years, highlight the serious commitment of Siemens that it operates in a transparent, honest, and responsible manner going forward."

There are two ways to view what happened at Siemens. We may see this as a typical case where a major multinational company got caught red-handed in criminal activities that were structural and endemic to the organization, and then got off lightly. After all, no major executives were actually sent to prison and the company simply had to pay a fine. Siemens' compliance reforms effectively reduced the company's liability and enabled it to receive favorable treatment from the DOJ.

Alternatively, we can see Siemens as a complex organization that needed to initiate a broader compliance management reform to prevent bribery throughout its worldwide operations. Here, even if all the top managers had been sentenced to spend years in prison, this would not have automatically prevented similar misconduct from continuing. Bribery had become a major part of the Siemens operations and was well ingrained throughout its business practices across many countries. Punishing the top executives in and of itself does not automatically change the culture of a large organization with several hundred thousand employees. Altering the behavior of such an organization is very different from doing so on an individual level. It requires knowing what happens in the organization, what the organizational processes are, and the incentives and values that sustained the bribery for so long.

The official rationale for adopting compliance management systems is that they help organizations install mechanisms that prevent misconduct and crimes. If misconduct does occur, they also help deal with those infractions at the earliest possible moments. The question is whether corporate compliance management systems, such as the one adopted by Siemens, actually do prevent corporate crime and wrongdoing. Unfortunately, the body of scientific literature does not provide a simple answer.

Some studies directly question whether compliance management can be effective. Marie McKendall and her colleagues, for instance, studied whether ethical compliance programs (consisting of ethical codes, ethics communication, ethics training, and the incorporation of ethics into human resource management practices) could reduce occupational health
and safety violations. Studying 108 large American firms, McKendall and colleagues found no positive effect associated with the programs and further found that these programs failed “to support a commonly held assumption that the types of corporate ethical compliance programs advocated by the 1991 Uniform Sentencing Guidelines will result in less organizational illegality” (McKendall et al. 2002, p. 367). On this basis they concluded that ethical compliance management may be more about “window-dressing” (or at least a marketing ploy to differentiate firms from competitors) than actually improving corporate behavior and reducing violations. The authors also concluded that “if meaningful ethics programs are to be developed, they must be supported by top management; this factor is more important than external controls such as the sentencing guidelines. Institutionalizing ethics involves more than codes and training; it must be supported by a culture change and examples of ethical leadership from top management” (McKendall et al. 2002, p. 379). In sum, they found that on its own, compliance management is not enough.

Other scholars agree that compliance management is mere window-dressing (cf. Parker and Gilad 2011). Kimberly Krawiec, for instance, finds that “a growing body of evidence indicates that internal compliance structures do not deter prohibited conduct within firms and may largely serve a window-dressing function that provides both market legitimacy and reduced legal liability” (Krawiec 2003, p. 487). She concludes that this not only fails to improve corporate behavior, but also comes at a high cost for corporations adopting these programs. Similarly, Gary Weaver and colleagues looked at whether the top 1000 American industrial and service firms in the mid-1990s actually implemented the ethical compliance management practices that they so widely adopted. They found that “the vast majority of firms have committed to the low cost, possibly symbolic side of ethics management (e.g., adoption of ethics codes and policies, etc.). But firms differ substantially in their efforts to see that those policies or codes actually are put into practice” (Weaver et al. 1999c, p. 283). It seems that for these top firms in the 1990s, compliance management was more about checking-the-boxes” show of compliance management efforts than actually changing operations and improving corporate behavior.

Compliance management systems may have actually made matters worse. McKendall and her colleagues found that the more firms incorporated ethical compliance into their operations, the more likely they were to have “willful and repeat” violations (McKendall et al. 2002, p. 380). Moreover, employees get mixed messages. On the one hand, they see that their firm has publicly adopted a lofty ethics and compliance system. On the other hand, they see in everyday working practices that the firm does not “follow through.” What results is a form of corporate dissonance (Ewing 2017) that harms future compliance inside the company as employees will learn not to believe lofty messages from their leaders (Van Rooij and Fine 2018). Linda Treviño and Gary Weaver argue that such a mismatch may damage employee expectations of procedural justice (Treviño and Weaver 2001); procedural justice are thought to be strong motivators of compliance (Tyler 1997, 2006; Nagin and Telep 2017).

Part of the problem is, as Krawiec has argued, that it is remarkably difficult to determine what is a good, effective compliance management program (Krawiec 2003). Yet, according to law, corporations with a compliance management program get treated with much more leniency than those without. As Krawiec argues, “the indicia of an effective compliance system are easily mimicked and true effectiveness is difficult for courts and regulators to determine” (Krawiec 2003, pp. 491–492). For this reason, she explains, there will be more window-dressing. “Firms engaged in legally prohibited, but potentially profitable, conduct can reduce or eliminate firm-level liability by mimicking an effective compliance system, without reducing the incidence of prohibited conduct within the firm” (Krawiec 2003, p. 492).
There is ambiguity not just about which compliance programs may work, but also in what the law actually requires corporations to do. Lauren Edelman, in her study about employment discrimination compliance programs, shows that organizations often create so-called symbolic structures, such as special affirmative action officers and anti-discrimination codes. She argues that organizations are caught in a dilemma, as they must appear to care about the law, while also keeping costs at a minimum. Because the law is often unclear about what it exactly requires, organizations can overcome the dilemma simply by having compliance management processes. These then “serve as visible efforts to comply with law,” without actually achieving the substantive goals of the law, such as reducing actual employment discrimination (Edelman 1992). Thus, compliance management can become about the optics of serving the (often vague) letter of the law rather than its original spirit.

Other scholars are less negative. They find, instead, that there might be some evidence that corporations with compliance management programs do perform better than those without. Coglianese and Lazer, for instance, have studied how government-mandated compliance management programs, which they call management-based regulation, have fared in improving food safety, worker safety, and pollution prevention in the United States. They find that while there still is significant noncompliance with the management program standards, the programs did help to reduce risk, especially when independent monitoring and oversight is in place (Coglianese and Lazer 2003, pp. 724–725).

Parker and Nielsen agree that compliance management systems can make a difference, albeit only under certain conditions. Their study is one of the most comprehensive to date. The study surveyed 999 large Australian firms about 21 elements of their compliance management systems and compliance with competition and consumer protection law (Parker and Nielsen 2009). They found that of the 21 components of a compliance management system, only six played a positive role in enhancing compliance behavior, at least as reported on the survey. These six were “(a) having a written compliance policy, (b) a dedicated compliance function, (c) a clearly defined system for handling complaints from customers/clients, (d) a clearly defined system for handling compliance failures, (e) induction for new employees that includes compliance training, and (f) having had an external consultant review the compliance system” (Parker and Nielsen 2009, p. 28). Their findings thus show that a few, elements of compliance management systems can make a difference in curbing corporate misconduct.

However, Parker and Nielsen’s data also show that the majority of compliance management system elements play no role. These included having a hotline for complaints about compliance, using a compliance manual, using a computer-based training program for compliance, written policies to protect internal whistleblowers, requiring managers to frequently report on compliance, compliance performance indicators for employees, and internal employee discipline for noncompliance (Parker and Nielsen 2009, p. 24).

Consequently, Parker and Nielsen’s study presents mixed findings. It shows that we must look carefully at the actual elements of compliance management systems. Even elements most of us intuitively might think will work (e.g. whistleblower protection programs, having internal indicators and discipline to promote employee compliance) might not actually work. As we saw, these include many of the elements the DOJ had so proudly applauded Siemens for introducing as remedial action following its massive bribery scandal.

More importantly, Parker and Nielsen argue, much in line with several other studies they cite, that compliance management systems on their own are not enough to improve organizational behavior. Such systems only work if they can operate in the right...
organizational system that has sufficient leadership support and values. Others in the field have come to similar conclusions (Weaver et al. 1999a, b). Parker and Nielsen even wonder whether compliance management systems can institute a “culture of compliance.” “Indeed, we cannot be sure that it is not the other way around – that better compliance ‘culture’ leads to greater implementation of compliance systems” (Parker and Nielsen 2009, p. 29).

Studies of corporate ethics codes also have mixed conclusions about their ability to help reduce unethical behavior. Kaptein and Schwartz (2008) reviewed the existing body of research on whether instituting an ethics code, which is a core part of most compliance programs, reduces unethical behavior. They found very mixed results: 35% of the studies found that such codes are effective, while 16% found only a weak relationship, 33% found no effect, 14% found mixed results, and one study in the sample found negative effects. Overall, we see that the simple adoption of a code in and of itself does not directly reduce unethical behavior (see also Kaptein 2011, p. 234). As Cooper notes, “A code of ethics cannot make people or companies ethical. But nor can hammers and saws produce furniture. In both cases they are necessary tools, which need intelligent design and use” (Cooper 1990, p. 8). In a follow-up study, Kaptein (2011) sought to understand what conditions then made these ethics codes more effective in reducing unethical behavior. He found that what counts most is whether workers perceive that their management sufficiently support and internalize these ethics codes. In addition, ethics codes will work better if their content addresses a broad set of ethics issues and if the organization properly communicates them to the employees (Kaptein 2011).

The body of scientific work on the effectiveness of compliance management programs is not conclusive. At worst, compliance management programs serve as window-dressing that allow corporations to maintain legitimacy and to receive lenient treatment from regulators, while undermining the internal legitimacy of the law and internal rules. At best, these programs are able to help prevent unethical and illegal conduct. But even in the most positive studies, we find hesitation. Corporate compliance management systems may sometimes, but not always, improve corporate behavior. What we find, then, is that installing a corporate compliance management system is not enough. Studies show that corporate leadership must be committed to compliance as well as ethics for compliance and ethics management programs to be effective. Many studies also stress the importance of a favorable corporate culture in which the programs can successfully operate. Furthermore, some argue that compliance management can only function well if there is some form of independent oversight.

These are vexing findings. The chief reason to have compliance management programs is that some or all of these conditions are missing. We have moved toward internal compliance management because independent oversight, often in the form of governmental enforcement, simply lacks the capacity to unearth illegal behavior hidden inside the corporation. We have developed compliance management systems because they may be able to change an unethical and criminal corporate culture. And we have compliance management systems to keep unethical leaders in check.

What we see here is that the law, most notably in the United States’ 1991 Federal Sentencing Guidelines, has incentivized companies to adopt systems for which there is very little evidence that they actually work. In the Siemens case, we see how much belief the DOJ places in these practices, without actually acknowledging the existing studies that question their effect.
Preventing Corporate Crime from Within

Whistleblowers

Apart from installing compliance management programs, corporate crime and wrongdoing can also be addressed by protecting workers who want to speak out against illegal behavior in the company. For example, some VW employees must have known about the fraudulent emissions software the German carmaker had been using to evade California pollution standards for its “clean diesel” engines. Or consider the “tell-alls” that many Siemens employees could have written about whom the company bribed and where, long before the scandals became public. While corporations may be able to hide illegal behavior from external inspectors, and even from internal compliance managers, employees often directly observe misconduct and crimes. If employees speak out about misconduct and crime in their organizations, they can help initiate action within and outside the company toward compliance.

Similar to what it did for compliance management programs, major legislation has provided an impetus to stimulate whistleblowers to come forward. The United States is again a good example. Since the 1986 False Claims Act (FCA), several major federal laws, including the 2002 Sarbanes–Oxley Act (SOX) (Rapp 2012 p. 74) and the 2012 Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank), provide protections for whistleblowers, for instance against retaliation by their employers. Some of these laws (FCA and Dodd–Frank) also incentivize employees to come forward by offering bounty rewards for bringing information to the Securities and Exchange Commission (SEC) that results in successful enforcement action (Rapp 2012).

The question remains, do these whistleblowing policies actually work? Studies inform us about two questions: first, whether whistleblowers actually come forward to speak out, and second, when they do, whether this helps correct and prevent corporate wrongdoing. Unfortunately, there is much more research on why employees do or do not speak out against their employers than there is on what speaking out may actually accomplish.

A common finding in the whistleblower studies is that potential whistleblowers face tremendous obstacles and risks. Regardless of all the legal protections, many whistleblowers get fired (Alford 2007, p. 223; Dyck et al. 2010; Sawyer et al. 2010) or “quit under duress” (Dyck et al. 2010, p. 2216). If they continue at their job, many are demoted and come to work with much less satisfaction, often in a hostile environment (Sawyer et al. 2010, pp. 88–89). Employees who stay on face the risk of retaliation. Alford, in his study based on conversations with whistleblowers, explains, for instance, how in one case a nuclear physicist whistleblower was first moved to a broom closet, then lost his computer, and finally was put to work in the mailroom (Alford 2007, p. 230)! Alford concludes that when whistleblowers remain with their employer they can suffer an “endless chain of abasement” (Alford 2007, p. 230). Some employers have also retaliated by forcing whistleblowers to undergo “psychiatric fitness-for-duty examinations” (Liyanarachchi and Newdick 2009, p. 41). Those employees who are forced to leave their job, or quit voluntarily, often find that their whistleblowing history hurts their chances in the job market. In fact, studies show that potential employers may see whistleblowers as disloyal (Schmidt 2005; Fincher 2009; Gonzalez 2010) and less attractive to hire (Liyanarachchi and Newdick 2009, p. 40; Dyck et al. 2010). Studies also find that whistleblowers can incur large financial, social, and personal costs. While their claims are investigated, whistleblowers may have very expensive legal fees; they need lawyers to protect them (Earle and Madek 2007; Carson et al. 2008) especially if their employer sues them (as happens in about a quarter of cases; Sawyer et al.
The whole procedure can bring tremendous stress and anxiety, which can affect their personal relations at home and actually often results in divorce and/or substance abuse (Alford 2007; Rapp 2012). Clearly, the legal protections for whistleblowers are not sufficient to protect those speaking out and do not offer enough guarantees for those considering whether to come forth.

The next question is, if whistleblowing does occur, what effect does it have on corporate wrongdoing? Here we have far less literature to consult, as few studies have sought to link whistleblowing to corporate misconduct. The few studies available cast doubt on the actual effect of whistleblowing on compliance.

One way to study the effects of whistleblowing is to look at changes in corporate misconduct and wrongdoing that have occurred after the whistleblower protection laws came into effect. Richard Moberly examined whether the whistleblower protections of SOX that were installed in 2002 had much effect in motivating the early disclosure of major fraud in subsequent years (Moberly 2012). His conclusion is that whistleblowers did not significantly help to uncover the massive corporate fraud that resulted in the 2008 financial crisis and Great Recession. He relates how major financial institutions simply failed to respond when their employees disclosed instances of major and systemic fraud. Rather than addressing the fraud, firms often would retaliate against whistleblowers. Moberly finds that one problem had been that—due to internal codes of ethics procedures—employees would first have to report to their supervisors, who had great power to “block and filter the reports” (Moberly 2012, p. 37). Moreover, he concludes that whistleblowers were powerless against the pervasive fraudulent corporate culture. “All of these statistics and evidence suggest that Sarbanes–Oxley, above all else, failed to change corporate culture sufficiently to address misconduct when employees report it” (Moberly 2012, p. 38).

Another way to understand whistleblowing would be to measure whether individual firms with strong whistleblower protections have a better compliance record than those without. Parker and Nielsen, as we saw above, have carried out such an analysis in their study of compliance management programs at 999 large Australian firms. They conclude that, unfortunately, organizations with such whistleblower protection policies do not have better compliance behavior than those without. However, they do find that a clearly defined system to handle external complaints by clients/customers positively affects compliance behavior; it seems that companies may respond more to their clients than to their employees (Parker and Nielsen 2009).

Thus, the few studies about the effects of whistleblowing do not clearly show that it enhances compliance behavior; in fact, whistleblower programs may have negative effects. Garry Gray, in his 2009 study about how Canadian workers were granted the right to speak out about work safety violations, discusses what he calls “responsibilization.” By this, he means that by having the right to speak out, workers can become responsible for reporting misconduct. However, often the right to speak out is not matched with the actual ability to speak out and might go against an engrained corporate culture of misconduct and vested hierarchies in the workplace. When there is a major accident, employees will be blamed for not using their right to speak out, even though they never truly had the ability to do so (Gray 2009).

Finally, and most importantly, research has shown that whistleblowers only alter corporate conduct under specific conditions (Near and Miceli 1996; Miceli et al. 2013). Studies find that whistleblowing will be more effective the greater the credibility and power of both the whistleblower and the recipient of the complaint, and the lesser the credibility and power of the actual wrongdoer the complaint addresses. In other words,
whistleblowing fails when a weak whistleblower makes a complaint with a weak complaint manager about a powerful wrongdoer. They also find that the level of criminal behavior involved and the extent to which the behavior is of vital importance to the organization matters. In other words, if the complaint is about a major felony, and about behavior that is not part of the core business model of the company, the whistleblower is more likely to succeed in getting the company to address it. Finally, they find that whistleblowing works best in firms that are open to outside influence and pressure, and in organizations that have a culture supporting compliance (Near and Miceli 1996; Dasgupta and Kesharwani 2010, p. 63; Miceli et al. 2013).

When viewed together, these preconditions for successful whistleblowing present fundamental problems. Whistleblowing, by its very nature, often entails lower-level employees, with lesser power and credibility, reporting on higher-level staff and management. Consequently, whistleblowing often has a low chance of successfully achieving internal changes and ending wrongdoing, while the risks to whistleblowers are great. Moreover, whistleblowing is particularly necessary in organizations where wrongdoing is structural, and where it is part of their culture or business model. But when wrongdoing is this deeply engrained, the studies show that whistleblowing will be less likely to succeed in ending it. Furthermore, while non-anonymous whistleblowing may be more effective, anonymity is a vital precondition for employees who may fear retaliation and social repercussions to come forth in the first place (Lee and Fargher 2013, p. 283).

Independent Internal Monitoring

There is one other option to enhance internal compliance management. Rather than rely on a paper compliance system or on internal employees, corporate compliance can also improve through independent monitoring to oversee internal operations. Sometimes firms do so voluntarily, and other times they do so only when forced by prosecutors as part of settlements.

One type of independent monitoring is when companies hire a third-party firm to carry out inspections of their operations. This can be beneficial for firms who work with many subcontractors, or who have operations in multiple jurisdictions and who do not trust compliance reports from within their own organization. Such independent inspections can also aid external governmental regulators who themselves do not have the resources to do sufficient inspections and who can now use monitoring data that is arranged by the regulated company themselves.

Short and Toffel have done a series of studies about these third-party monitors. They find that there is variation in how well monitors do their job. Some monitors may inspect more leniently. They show, for instance, that monitors unearth fewer violations if they have less experience and training, and if they have been at the factory to audit previously (Short et al. 2016). More worrying, Short and Toffel (2015) also find that there may be integrity issues with these third-party monitors. Third-party monitors may not be as independent as one would hope. Their study shows that monitors will be more lenient if they are directly paid by the firm they inspect, if there is more competition for their monitoring services, if they have a longstanding relationship with said firm, and if they hope that this firm becomes their customer for other non-monitoring goods and services they may supply.

Thus, the practice of hiring external monitors may not result in a truly independent audit. Instead, third-party monitoring can become a commercial transaction in which the
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monitor tries to please the audited firm (Short and Toffel 2015). The lesson here is that the expected win-win for compliance, where the corporation pays for external monitors that can help with independent oversight at less cost to governmental regulators, may often not exist. The more the corporation pays for the oversight, the less independent and stringent the monitoring will be.

Corporations can also monitor compliance through electronic surveillance technology. In such cases, corporations can bypass individual employees and directly observe whether there is any illegal behavior within their operations. Such electronic monitoring is an attractive way to get better information about compliance behavior in larger organizations. Electronic monitoring can operate around the clock and in any place the company needs – and all of this at relatively low costs, especially when compared to any human form of monitoring (Staats et al. 2016). Electronic surveillance may also directly promote compliance. Employees will know that they are monitored and this in and of itself may reduce wrongdoing. Moreover, the monitoring data may give employees feedback so that they can also learn about their behavior and improve it, especially for behavior that they may be less aware of (Gerber et al. 2008; Yoeli et al. 2013; Pierce et al. 2015; Staats et al. 2016, p. 1565).

There have been a few studies about the effects of electronic monitoring on compliance behavior. Some find positive results. Lamar Pierce and his colleagues studied, for instance, what happens when restaurants install a theft monitoring system in order to reduce employee theft. Using data from 392 restaurants, they found that the electronic surveillance works well. In those cases, it not only helped to reduce employee theft, but also improved worker productivity (Pierce et al. 2015).

Other studies warn that monitoring may not always work and may, at some point, even backfire. Bradley Staats and his colleagues have studied how the introduction of electronic monitoring in 71 hospital units affected compliance with hand hygiene rules. While compliance initially increased when the monitoring was introduced, over the course of three and a half years, it gradually declined (Staats et al. 2016). The paper estimates that should they have been able to continue the study, this decline would have completely eroded any positive effects of monitoring on compliance after about 43 months. Staats and colleagues explain the reduction that eventually set in as a process of desensitization, meaning that employees simply got used to the monitoring and no longer responded strongly to it (Staats et al. 2016, p. 1579).

More troubling, Staats and colleagues found that when some of the hospital units removed the monitoring, compliance rates even fell below the pre-monitoring period. What may have happened here, they argue, is that the introduction of the monitoring system “crowded out” the social norms and personal morals that sustained individual compliance of the hospital workers studied (cf. Gneezy and Rustichini 2000). Similarly, they note that monitoring is highly dependent on the actual organizational setting in which it is deployed. They hold that “organizations looking to build process compliance must think about how electronic monitoring fits within a broader system encompassing not only technology, but also norms, culture, and leadership, among other things” (Staats et al. 2016, p. 1580).

Electronic surveillance is thus a promising way for organizations to create better compliance, particularly in the short term. We must realize, however, that such surveillance may not have long-term effects, and also that it may undermine intrinsic motivations that are so vital to building a lasting compliant culture.

The third form of independent monitoring is hiring an external manager to oversee a compliance transformation (Root 2016). This most often happens in the aftermath of a
major scandal and prosecutorial settlement. The hope, of course, is that an external mon-
itor with sufficient authority can ensure that the compliance management process is actu-
ally effective in creating a lasting behavioral change, and that such a monitor is sufficiently
independent from the company to evaluate it critically and act on behalf of protecting the
public interest and the law (Root 2016).

Prosecutors increasingly impose such monitors on firms caught breaking the law. Siemens,
for instance, had to hire a monitor as part of its remedial action following its mas-
sive bribery operation. And Citibank was forced to hire a monitor to guarantee that the
bank properly returned $2.5 billion dollars in mortgage relief to homeowners it had hurt
with its predatory lending and mortgage practices.13 Another example is how HSBC, the
British bank, had to hire a monitor after it had been caught moving billions around the
financial system for Mexican drug lords, terrorists, and governments on official sanctions
lists.14 VW was similarly forced to hire an independent monitor following its emissions
fraud scandal.15

So, do these imposed independent monitors work well to create more sustainable com-
pliance? At present, we still lack an empirical answer to this question, as no one has con-
ducted a rigorous study about the effect of monitorships on compliance. What we have are
several studies, mostly by law professors who analyze the history, process, and variation in
the operation of monitorships, and extrapolate conclusions about their effectiveness. Rather
than provide concrete answers, unfortunately, these studies mostly raise concerns.

A first issue is whether monitors actually have a broad enough mandate not just to
oversee the surface-level institutionalization of a compliance management process, but to
actually seek to go deeper into the organization to try to force a cultural change (Ford and
Hess 2008, pp. 704–707). A second problem is that monitors often lack sufficient qualifica-
tions to manage a compliance transformation process. Many have only very limited and
mostly legal experience (Ford and Hess 2008). Most monitors are former prosecutors that
now work for private law firms serving corporate clients. Prosecutorial experience helps
prepare them to prosecute wrongdoing, and private practice helps them aid corporations to
manage liability; neither experience helps them in making the organization become more
compliant and fundamentally alter its behavior. Also, there is a danger of nepotism, as
current prosecutors select former colleagues who have moved to private practice to be
monitors (which can be a very lucrative assignment; Ford and Hess 2008).

Meanwhile, monitors operate in organizations that are not necessarily supportive. At
the time of the settlement, firms will agree to almost anything if it keeps them from
being formally indicted and prosecuted. The monitor is thus forced upon them at a
moment of weakness. As soon as the settlement is set, the firm will try to mitigate the
burden such monitor imposes on them (Ford and Hess 2008, p. 706). Veronica Root
finds that corporations can be very successful at this, stating that “private organizations
are co-opting the use of monitorships, which may transform the nature of monitorships
from a quasi-governmental enforcement mechanism to a privatized reputation remedi-
ation tool” (Root 2016, p. 109).

Here the core problem is that monitors may lack full independence. The best way to
ensure independence is to select monitors who have not had any prior business relations-
ships with the organization, and then enforce a long-term ban on such relationships follow-
ing the end of the monitorship. In practice, such a rule is not strictly enforced, in part
because some deem it overly burdensome on monitors and their firm, and in part because
in some specialty areas, there may not be a monitor who both meets such requirements and
is willing to serve (Ford and Hess 2008).
Conclusion

Corporate crime and wrongdoing are tricky problems. They occur in organizations that are powerful, internally complex, and able to both hide misconduct and resist change. A deterrence strategy, on its own, is not sufficient to create a sustained form of compliance. Punishment, of course, is necessary, especially to end impunity and reassure those who are in compliance (Gunningham et al. 2005; Thornton et al. 2005). But for corporate compliance problems, a broader organizational change is needed. Legislators and regulators, including those in the United States, have introduced a number of approaches such as: incentivizing firms to develop compliance management and ethics programs, offering protection and incentives for whistleblowers, and imposing independent monitorships on companies caught breaking the law.

Ironically enough, the available evidence indicates that these initiatives work best where they are needed the least. As we saw, compliance management and whistleblower protection work in situations where the wrongdoing is neither supported by powerful leaders nor systemic within the organization’s ranks or business operations. While such programs may curb minor wrongdoing at lower levels of the corporation, they do not work for the systemic culture of deviant behavior that has been at the root of many major cases, such as the years of fraudulent sales practices at Wells Fargo, the decades of emissions cheating at VW, and the repeated safety and environmental catastrophes at BP (Van Rooij and Fine 2018).

Yet, despite the science, the law continues to favor compliance management, whistleblower protection, and monitoring arrangements as “best practices” to reduce corporate misconduct. The law is not alone here in supporting these unproven internal approaches to deal with corporate wrongdoing. For businesses, internal compliance management, whistleblower protection, and monitoring, while costly, are strategies to alleviate legal sanctions or reduce liability. In many cases, these strategies even provide an opportunity to restore their reputation—sometimes (and ideally), like Siemens, going from fraud villain to compliance hero.

Meanwhile, the people whose job it is to regulate or prosecute corporate misconduct often fail to publicly express strong concerns about the effectiveness of these internal systems. Prosecutors and regulators appear continually pressed to show that they take corporate wrongdoing seriously, while being structurally challenged to create actual deterrence. The best they can hope for after a major scandal is the proud press release of another multi-billion-dollar settlement, with the installation of compliance management and monitoring to signal their commitment to future risk prevention, and maybe—if they get lucky—a successful verdict against individual executives. For most regulators, and especially prosecutors, achieving sustained behavioral change is simply not their most pressing concern.

So what about compliance professionals? These are the individuals who work in the emerging compliance industry, staffing compliance and ethics programs and developing whistleblower, complaint, and independent monitoring systems. Certainly, these professionals have difficult jobs. They are officially responsible for generating compliance, often where few would believe it possible. They do so from a position of limited power, with the immense risk that if they fail, they may be held individually liable. Moreover, many of them (especially lawyers) simply do not have adequate training in how to achieve behavioral and organizational change. All the while, they operate either as employee or hired consultant of a business that ultimately has its own interests that may not always align with compliance management.16

So how would one, working as a compliance manager, manage these expectations and risks? Would one truly focus on behavioral change and tie one’s own fate to successfully
changing a change-resistant organization? The pessimist in us says that the “easy” way out is to focus on managing corporate liability, ensuring that there are systems in place that (at least on paper) meet the requirements of regulators. The company will get what it wants, namely managed liability and the ability to shift blame downwards toward lower-level employees should things go awry. Regulators can show success as the company has installed the systems they demanded, while compliance managers can build ever-expanding systems that they alone know how to manage and operate at a lower personal risk.

Unfortunately, the available science is not that helpful here. At present, empirical knowledge about how to make these systems more effective is limited. This means that practitioners have very little to go on and often must design systems using anecdotal evidence or “common sense.” It also means that we do not really know how to define quality here. How do we know whether a compliance and ethics system is robust and worthy of the leniency of the Federal Sentencing Guidelines? How do we know what type of whistleblower scheme will actually enhance compliance? And what makes someone a good monitor?

In the almost three decades that have passed since these systems started in the 1990s, there has been much experimentation. Now that we have had decades of leniency for corporate compliance systems, over a decade of whistleblower protection in federal law, and also a decade of increased imposed monitorships, we should have sufficient data points for a rigorous empirical analysis. Yet we simply have too little good research that systematically shows what works and what does not.

There is an overarching lesson here. We need to redefine how we approach corporate crime and misconduct. Rather than always discussing the need for stricter punishment or merely complaining about the costs of compliance management, we need to become pragmatic. What matters when corporations break the law is that we effectively prevent future violations. This means, first of all, using every available insight about how punishment, social and personal norms, capacity, opportunity, and unconscious influences can be employed in these particular situations. We need to change the training of compliance professionals, with less focus on studying legislation, court cases, and legal procedures, and more on the criminology, psychology, sociology, and organizational science of how humans actually respond to rules. These insights must be translated to fit corporate organizational settings.

Notes

2 As stated in the Netflix Documentary Dirty Money, season 1, episode 1, minute 27:28.
5 https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2013/05/02/12-12-08siemensvenez-sent.pdf.
6 https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2013/05/02/12-12-08siemensvenez-sent.pdf.
9 Parker and Nielsen (2009, p. 28).
12 For an overview of the literature see Rapp (2012). The review below draws directly from his review.
15 https://www.reuters.com/article/us-volkswagen-emissions-idUSKBN17N1SD.
16 For similar points see Cunningham (2003, p. 269).

References


