A BUSINESS ETHICS PERSPECTIVE ON SARBANES-OXLEY AND THE ORGANIZATIONAL SENTENCING GUIDELINES

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This Article assesses the ability of Sarbanes-Oxley and other recent changes in the law and stock exchange listing requirements to reduce the incidence of fraud and to increase the reporting of financial misconduct. It begins by examining the individual decision-makers within a corporation and analyzing their intentions and behaviors under the Theory of Planned Behavior. It then examines the ability of the organization to influence the employees' intentions and behaviors through codes of ethics and compliance programs, and finds growing support for the usefulness of integrity-based compliance programs. Finally, the Article considers how the Sarbanes-Oxley legislation and Organizational Sentencing Guidelines modifications influence corporations to adopt compliance programs and to proactively manage their organizational cultures in a way that improves the ethical behavior of their employees. It also provides additional reform proposals related to the structure and processes of the firm, and discusses the role of the law in incorporating intermediary groups into the process of assisting and encouraging firms to develop ethical corporate cultures.

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Introduction

Fraudulent activity within the workplace is widespread. One recent survey[1] found that five percent of respondents had witnessed "falsification or misrepresentation of financial records" within the past year.[2] Another provides evidence that this number is three times as great for those specifically involved in accounting and finance.[3] The costs of such abuses are tremendous. In its *2006 Report to the Nation on Occupational Fraud and Abuse*, the Association of Certified Fraud Examiners ("ACFE") estimates that companies are losing approximately five percent of their revenue to occupational fraud,[4] which equals $652 billion each year.[5]

Congress enacted the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley") to restore public trust in the markets. Among its ways of achieving this, Sarbanes-Oxley attempts to improve organizational ethics by defining a code of ethics as including the promotion of "honest and ethical conduct," requiring disclosure on the codes that apply to senior financial officers,[6] and

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1. This survey had a sample size of 3015 responses, which included respondents that varied in employer size and industry, job position, tenure, and other characteristics. Ethics Res. Ctr., National Business Ethics Survey: How Employees View Ethics in Their Organizations 1994–2005, at 99–107 (2005) [hereinafter NBES] (providing a description of the methodology and the characteristics of the respondents and their organizations).

2. NBES, *supra* note 1, at 25. This number was unchanged from the NBES survey in 2003. *Id.*

3. KPMG Forensic, Integrity Survey 2005–2006, at 4 (2006), *available at* http://www.404institute.com. For an overview of the techniques firms use to manage earnings, see Mark W. Nelson et al., *How Are Earnings Managed? Examples from Auditors*, 17 Acct. Horizons 17 (2003).

4. Ass'n of Certified Fraud Exam'rs, ACFE Report to the Nation on Occupational Fraud & Abuse 4 (2006), *available at* http://www.acfe.com/documents/2006-rttn.pdf [hereinafter ACFE 2006]. The ACFE defines occupational fraud as: " 'The use of one's occupation for personal enrichment through the deliberate misuse or misapplication of the employing organization's resources or assets.' " *Id.* at 6. The report further classifies occupation fraud into the categories of: asset misappropriation (theft of the organization's assets), corruption (an employee using their position in an organization to obtain a benefit contrary to their duty to that organization), and fraudulent statements (falsifying financial statements to make the organization look more profitable than it is). *Id.* at 10–11.

5. *Id.* at 4, 8.

6. Sarbanes-Oxley Act of 2002 § 406(a), 15 U.S.C. § 7264(a) (Supp. III 2003) (requiring corporations "to disclose whether or not, and if not, the reason therefor, such issuer has adopted a

including provisions to encourage whistleblowing.[7] The Securities Exchange Commission's implementing rules expand the disclosure requirement on the code of ethics to include codes that apply to the chief executive officer and further develop the definition of a code of ethics.[8] In addition, Sarbanes-Oxley mandated that the United States Sentencing Commission review the Organizational Sentencing Guidelines ("OSG"). [9] As a result of this review,[10] the Sentencing Commission modified the OSG to redefine an "effective" compliance program as one that includes efforts to "promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law."[11] Following the lead of Sarbanes-Oxley, the New York Stock Exchange ("NYSE") and the NASDAQ both adopted listing requirements that compel firms to adopt and disclose codes of ethics for all directors, officers, and employees of the company.[12]

Many managers challenge such attempts to "legislate" ethical behavior, even if they recognize the importance of proactively managing the ethical environment of their firms.[13] Some commentators argue that the methods

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code of ethics for senior financial officers, applicable to its principal financial officer and comptroller or principal accounting officer, or persons performing similar functions"). Corporations are also required to disclose "any change in or waiver of the code of ethics for senior financial officers." *Id.* § 406(b).

7. *See id.* § 301(4) (requiring audit committees to establish procedures for employees to submit concerns about questionable accounting practices); *id.* § 806 (providing for protection of employee whistleblowers).

8. 17 C.F.R. §§ 228.406, 229.406 (2003). The final definition of a code of ethics requires:

> written standards that are reasonably designed to deter wrongdoing and to promote:
>
> (1) Honest and ethical conduct, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships;
>
> (2) Full, fair, accurate, timely, and understandable disclosure in reports and documents that a registrant files with, or submits to, the Commission and in other public communications made by the registrant;
>
> (3) Compliance with applicable governmental laws, rules and regulations;
>
> (4) The prompt internal reporting of violations of the code to an appropriate person or persons identified in the code; and
>
> (5) Accountability for adherence to the code.

17 C.F.R. § 229.406.

9. Sarbanes-Oxley Act, § 805(a)(5) (requiring that the Sentencing Commission review the guidelines to ensure that they are "sufficient to deter and punish organizational criminal misconduct"); *see also id.* §§ 905, 1104.

10. Prior to Sarbanes-Oxley, the Sentencing Commission was already planning a review of the guidelines due to the ten-year anniversary of the guidelines. News Release, U.S. Sentencing Comm'n, Sentencing Commission Convenes Organizational Guidelines Ad Hoc Advisory Group (Feb. 21, 2002), *available at* http://www.ussc.gov/PRESS/rel0202.htm.

11. U.S. Sentencing Comm'n, U.S. Sentencing Guidelines Manual § 8B2.1(a)(2) (2004).

12. NASD and NYSE Rulemaking: Relating to Corporate Governance, Exchange Act Release No. 34-48745, 81 SEC Docket 1586 (Nov. 4, 2003), *available at* http://www.sec.gov/rules/sro/34-48745.htm.

13. *See* Letter from Robert S. Fine, General Counsel, Johnson & Johnson, to the Advisory Group on Organizational Guidelines 2 (May 16, 2002), http://www.ussc.gov/corp/pubcom_302/PC_302.htm ("[I]t would be profoundly wrong . . . to *require* that every organization include ethics as a part of its compliance program.").

used to attempt to improve a firm's ethical behavior—codes of conduct and compliance programs—are ineffective and costly.[14] Others claim that these mechanisms may actually lead to more illegal or unethical behavior, because firms can adopt a compliance program that provides the benefits of a mitigated sentence under the sentencing guidelines without actually changing the firm's operations.[15]

This Article assesses the ability of the above changes to reduce the incidence of fraud and to increase the reporting of financial misconduct. Approaching these issues in Part I, I look specifically at the individual decision-makers within the organization and the ethical problems they face. For the purposes of this paper, that decision is whether or not to participate in fraudulent activity or to blow the whistle on those that do.[16] To understand the individual's decision, I use the Theory of Planned Behavior ("TPB"). The TPB is a widely tested theory from the field of social psychology. It is a parsimonious model but has significant power in explaining variations in intentions. The simplicity of the model also makes it useful for understanding and explaining the various studies that have been conducted on ethical behavior in organizations.

In Part II, I move upward to the level of the organization and examine its influence on the employee's intentions and behaviors. Section II.A reviews the research on managing ethics and compliance programs, while Section II.B analyzes compliance programs through the TPB. With that understanding, Part III takes another step back to consider how legislation such as Sarbanes-Oxley, or the OSG, does and can influence corporations to take actions that will improve the ethical behavior of their employees.

I. Understanding Individual Ethical Decision-Making in Organizations: The Theory of Planned Behavior

Icek Ajzen developed the TPB[17] based on the earlier Theory of Reasoned Action ("TRA") that he developed with Martin Fishbein.[18] The TPB

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14. Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 Wash. U. L.Q. 487, 491 (2003).

15. William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 54 Vand. L. Rev. 1343, 1405–06 (1999).

16. The ACFE report finds that frauds are detected more often by tips (i.e., whistleblowers) than by audits (internal or external) or internal controls. ACFE 2006, *supra* note 4, at 28–29 (finding that 34% of frauds were discovered by tips, at least 64% of those tips were from employees, and an additional 18% of tips were from anonymous sources, which likely included at least some employee tips). For public corporations, tips accounted for 40% of detected frauds. *Id.* at 33. Tips are especially important for uncovering fraud committed by high level executives, who can more easily avoid internal controls than lower level employees. *Id.* at 29. Almost half of the cases of owner or executive fraud were detected by employees. *Id.* The pre–Sarbanes-Oxley fraud report also showed the importance of employee tips relative to internal controls or external audits. Ass'n of Certified Fraud Exam'rs, 2002 Report to the Nation: Occupational Fraud and Abuse 11 (2002), *available at* http://www.acfe.com/documents/2002RttN.pdf [hereinafter ACFE 2002].

17. *See generally* Icek Ajzen, *The Theory of Planned Behavior*, *in* 50 Organizational Behavior and Human Decision Processes 179 (1991).

claims that there are three determinants of a person's intentions, which then determine a person's actual behavior.[19] First, there is a person's *attitude* toward the behavior, which is a measure of the person's evaluation of the behavior as "good" or "bad."[20] The antecedents of attitudes include both behavioral beliefs about the action and outcome evaluations. Behavioral beliefs are the expected consequences of a behavior (e.g., a belief that an act will increase my job security) and outcome evaluations are the actor's assessment of those consequences (e.g., a belief that it is good to have job security).[21] Second, a *subjective norm* refers to the social pressure a person feels from important others to perform or refrain from performing the behavior and to the person's motivation to comply with those pressures.[22] Third, there is the actor's *perceived behavioral control*, which is a measure of the person's ability to perform the behavior, based on their past experience, competence, and any expected obstacles they may face.[23] Although each determinant will have an impact on a person's intentions toward a behavior, the relative importance of each determinant will vary based on the circumstances and the behavior studied. For example, two employees, each with a positive attitude toward whistleblowing, may engage in different behaviors if they face different social pressures in their environments.

To improve the above model, Ajzen has suggested the inclusion of *moral obligation* as an additional determinant of intentions in situations where ethical behavior is involved.[24] Moral obligations refer to a duty or obligation that "is sanctioned by one's conscience as right."[25] In addition to one's own moral belief system, these moral obligations can come from laws, professional codes of ethics, and other similar sources.[26] Researchers have

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18. *See generally* Martin Fishbein & Icek Ajzen, Belief, Attitude, Intention, and Behavior: An Introduction to Theory and Research (1975). The Theory of Planned Behavior is an extension of the Theory of Reasoned Action, with the difference being the addition of the "perceived behavioral control" determinant. Lisa Beck & Icek Ajzen, *Predicting Dishonest Actions Using the Theory of Planned Behavior*, 25 J. Res. Personality 285, 286 (1991).

19. Beck & Ajzen, *supra* note 18, at 286. There may be moderating variables that affect the relationship between a person's intentions and actual behaviors. *See* Icek Ajzen, *Nature and Operations of Attitudes*, 52 Ann. Rev. Psychol. 27, 46–47 (2001).

20. Ajzen, *supra* note 17, at 188; Beck & Ajzen, *supra* note 18, at 286.

21. Annetta M. Gibson & Albert H. Frakes, *Truth or Consequences: A Study of Critical Issues and Decision Making in Accounting*, 16 J. Bus. Ethics 161, 165 (1997).

22. Ajzen, *supra* note 17, at 195. The antecedent to subjective norms are normative beliefs. *Id.* at 189, 195–96.

23. Ajzen, *supra* note 17, at 182–84; Beck & Ajzen, *supra* note 18, at 286. The antecedents to perceived behavioral control are control beliefs. Ajzen, *supra* note 17, at 189; *see also id.* at 196 (noting further that control beliefs can be based on the observation of the experience of others). Perceived behavioral control should also have a direct impact on behavior. *Id.* at 184–85. It should also be noted that with the TPB, each determinant is expected to influence the other determinants. *See id.* at 182 (providing a figure representing TPB and indicating the reciprocal influences of the determinants).

24. Ajzen, *supra* note 17, at 199.

25. Nancy B. Kurland, *Sales Agents and Clients: Ethics, Incentives, and a Modified Theory of Planned Behavior*, 49 Hum. Rel. 51, 59 (1996) [hereinafter Kurland, *Sales Agents*].

26. *Id.*

included this determinant in empirical studies: most find it a useful addition to the model, but some find that moral obligation functions primarily as an additional determinant of a person's attitude.[27]

Overall, hundreds of studies on a wide variety of issues have confirmed the value of the TPB (and the TRA).[28] However, only a handful of studies have used these theories in studying organizational members' decisions in business ethics situations.[29] The studies, reviewed briefly in the next section, generally find strong support for the usefulness of these theories in understanding unethical behavior and whistleblowing. In addition, various other studies on organizational ethics that did not specifically use the TPB are directly relevant for helping us understand how organizations influence these determinants both positively and negatively.

A. *Fraud and Whistleblowing in TPB Studies*

Studies using the TPB[30] have looked at the intentions of public accountants[31] and chief financial officers to engage in fraud,[32] and managers to violate generally accepted accounting principles ("GAAP").[33] These studies all find support for the TPB model in predicting intentions, and also find that among the determinants, attitudes have the greatest impact on intentions.[34] In one study, the researchers were able to manipulate the three

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27. Mark Conner & Christopher J. Armitage, *Extending the Theory of Planned Behavior: A Review and Avenues for Further Research*, 28 J. Applied Soc. Psychol. 1429, 1442–44 (1998).

28. For a review of these studies, see Conner & Armitage, *supra* note 27. For an introduction to the research methodologies, see Jillian J. Francis et al., Constructing Questionnaires Based on the Theory of Planned Behaviour: A Manual for Health Services Researchers (2004), http://www.rebeqi.org/ViewFile.aspx?itemID=212. To measure intentions and the predictor variables of intentions, researchers construct questionnaires that ask respondents both direct and indirect questions related to the variable of interest. *Id.* at 9.

29. On the potential for and challenges of using the TRA for business ethics empirical research, see generally Donna M. Randall, *Taking Stock: Can the Theory of Reasoned Action Explain Unethical Conduct?*, 8 J. Bus. Ethics 873 (1989).

30. For the purposes of this paper, references to TPB also include studies that use the TRA.

31. Howard F. Buchan, *Ethical Decision Making in the Public Accounting Profession: An Extension of Ajzen's Theory of Planned Behavior*, 61 J. Bus. Ethics 165 (2005); Gibson & Frakes, *supra* note 21. Buchan treats the firm's ethical climate as a separate determinant of intentions, as opposed to influencing the subjective norms determinant. Buchan, *supra*, at 169–70. In addition, Buchan includes a variable for moral sensitivity for moral obligation. *Id.* at 168. The vignettes used in the study by Buchan included actions such as billing personal expenses to the firm or breaking client confidentiality to benefit to the firm. *Id.* at 178–79. The vignettes in the Gibson and Frakes study included situations clearly against the Code of Professional Conduct (e.g., a conflict of interest) and situations that could possibly be justified under a very liberal interpretation of the Code (e.g., accepting business you were not qualified to perform). Gibson & Frakes, *supra* note 21, at 164–65, 167.

32. Nancy Uddin & Peter R. Gillett, *The Effects of Moral Reasoning and Self-Monitoring on CFO Intentions to Report Fraudulently on Financial Statements*, 40 J. Bus. Ethics 15 (2002).

33. Tina D. Carpenter & Jane L. Reimers, *Unethical and Fraudulent Financial Reporting: Applying the Theory of Planned Behavior*, 60 J. Bus. Ethics 115 (2005).

34. Buchan, *supra* note 31, at 175; Carpenter & Reimers, *supra* note 33, at 125; Gibson & Frakes, *supra* note 21, at 166; *see also* Uddin & Gillett, *supra* note 32, at 19–20, 30 (finding that attitudes had a greater impact on the intention to commit fraud than did subjective norms for both

determinants with a positive or negative influence, which then affected the actor's intention.[35] For example, the researchers manipulated attitude by telling the research subjects that the corporation specifically encouraged (or discouraged) the GAAP violation used in the study.[36] Although the above studies generally did not include the moral obligation determinant, Kurland's studies[37] on the intention of insurance sales agents to disclose information to prospective buyers[38] found that moral obligation was the strongest predictor of intentions.[39] It is also important to note that individual agent characteristics (such as experience level and professional accreditation) and commission did not have significant impacts on intentions.[40]

With respect to whistleblowing, there are two studies testing the TPB. First, Randall and Gibson found general support for the TPB,[41] including the moral obligation determinant.[42] Similar to the studies above, they also found that attitude had a stronger impact on intent than did subjective norms.[43] To help illustrate how the TPB is applied, we can take a closer look at the items that make up the determinants. For example, of the items making up the attitude variable used in the study, the outcome measure of protecting the safety of patients was independently significant.[44] In other words, the real potential to improve the health of a patient gave the nurses a positive attitude toward whistleblowing. With respect to normative beliefs, the relevant others that were independently significant were family members, fellow

low and high moral reasoners and high and low self-monitors). However, with all the studies on TRA and TPB, there are measurement issues, and the possibility that the structure of the questionnaire and the questionnaire process itself may influence the relative importance of the determinants. *See* Shmuel Ellis & Shaul Arieli, *Predicting Intentions to Report Administrative and Disciplinary Infractions: Applying the Reasoned Action Model*, 52 Hum. Rel. 947, 962 (1999).

35. Carpenter & Reimers, *supra* note 33, at 123–24.

36. *Id.* at 122.

37. Nancy B. Kurland, *Ethical Intentions and the Theories of Reasoned Action and Planned Behavior*, 25 J. Applied Soc. Psychol. 297 (1995) [hereinafter Kurland, *Ethical Intentions*]; Kurland, *Sales Agents*, *supra* note 25.

38. The study involved agents' intentions to disclose information on sales commission and product quality to prospective buyers. Kurland, *Sales Agents*, *supra* note 25, at 62.

39. Kurland, *Ethical Intentions*, *supra* note 37, at 305–06, 309. She found support for all of the determinants. Kurland, *Sales Agents*, *supra* note 25, at 67. Perceived behavioral control contributed the least explanatory power, though the author notes problems with reliability of the perceived behavioral control scale she used in the study. Kurland, *Ethical Intentions*, *supra* note 37, at 307–08.

40. Kurland, *Sales Agents*, *supra* note 25, at 66–67. However, the design of the study's questionnaire may have influenced those results. *See id.* at 67 n.11. In addition, the organization Kurland studied attempted to hire and retain only those sales agents that were not commission-driven. *Id.* at 68.

41. Donna M. Randall & Annetta M. Gibson, *Ethical Decision Making in the Medical Profession: An Application of the Theory of Planned Behavior*, 10 J. Bus. Ethics 111 (1991).

42. *Id.* at 117–19. The vignettes used in the study varied whether the scenario indicated that the doctor or nurse simply made a mistake or was incompetent and had made many similar mistakes in the past. *Id.* at 114. The study found that nurses were equally likely to report nurses or doctors, but more likely to report errors based on incompetence. *Id.* at 118.

43. *Id.* at 117–18. The perceived control variable was not significant, but there was little variation in the variable, making it of limited use in the study. *Id.* at 118.

44. *Id.* at 117–18.

nurses, and doctors with whom the nurse worked directly.[45] The views of top management, supervisory nurses, or the nursing professionals in general were not independently significant.[46]

In a second study,[47] Ellis and Arieli used the TRA to study officers in the Israeli Defense Forces and their intentions to report misconduct by an officer of a higher rank than themselves.[48] They found a close connection between attitude and subjective norms, but overall found that subjective norms were a significantly better predictor of intention to report misconduct.[49] In addition, it is important to note that other studies, not using the TPB, have found evidence that moral obligations (based on role obligations) and attitudes influence whistleblowing intentions or behavior.[50]

B. *Summary*

Based on the TPB, if someone is considering taking actions that she knows is likely to misrepresent financial information, then her decision will be influenced by: her attitude toward the act, the social pressures to engage in the act, her perceived behavioral control over being able to complete the act successfully, and her sense of moral obligation. The same is true for someone trying to decide if she should report a coworker's or a manager's fraudulent activity to the company's ethics hotline, a supervisor, or an ombudsperson.

The studies discussed above provide support for the use of the TPB in predicting individuals' intentions in situations involving organizational

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45. *Id.*

46. *Id.* Other studies, however, have found that supervisor support is positively related to whistleblowing intentions, though there is less evidence for a relationship with whistleblowing behavior (and it may be a negative relationship). *See* Jessica R. Mesmer-Magnus & Chockalingam Viswesvaran, *Whistleblowing in Organizations: An Examination of Correlates of Whistleblowing Intentions, Actions, and Retaliation*, 62 J. Bus. Ethics 277, 286–87 (2005).

47. Ellis & Arieli, *supra* note 34.

48. *Id.* at 954.

49. *Id.* at 959, 962.

50. *See* Mesmer-Magnus & Viswesvaran, *supra* note 46, at 285–86 (providing a meta-analytic examination of twenty-six studies on whistleblowing). Evidence of the influence of attitudes and their antecedent beliefs included an employee's approval of whistleblowing and the belief that whistleblowing was in one's best interest. *Id.* at 285. The ethical climate of the organization—which can capture some of the social pressures influencing normative beliefs—was also a consistent predictor of whistleblowing beliefs and intentions. *Id.* at 286–87. An additional study, not included in the review by Mesmer-Magnus and Viswesvaran, found that the belief that "nothing could be done to remedy the situation" was the main reason given by observers of wrongdoing who chose not to report it. Janet P. Near et al., *Does Type of Wrongdoing Affect The Whistle-Blowing Process?*, 14 Bus. Ethics Q. 219, 238 (2004). This provides further support for the importance of the attitude determinant.

The review of whistleblowing studies by Mesmer-Magnus and Viswesvaran challenges the idea that intentions to blow the whistle strongly predict actual whistleblowing behavior. Mesmer-Magnus & Viswesvaran, *supra* note 46, at 292. *Contra* Bart Victor et al., *Peer Reporting of Unethical Behavior: The Influence of Justice Evaluations and Social Context Factors*, 12 J. Bus. Ethics 253, 257–59 (1993) (finding that intention to blow the whistle was the strongest predictor of actual whistleblowing behavior).

fraud and whistleblowing. In general, attitudes are a stronger predictor than subjective norms, but that relationship changes based on the behavior studied, and the variables seem to influence each other. There was less support for the perceived behavioral control variable. That seems to be explained either by measurement issues in the research design or by the actors' beliefs that they have complete control over the behavior (e.g., the nurses in the Randall and Gibson study may believe that reporting misconduct does not require any special "skills, abilities, time, will power or opportunity"[51]). The next section provides a review of the empirical evidence on managing ethics in organizations and combines those findings with the TPB model to understand how the organization can influence these determinants.

II. Managing Ethics in Organizations

A. *Corporate Compliance Programs and Ethical Behavior*

The goal of a code of conduct and compliance programs is to ensure that (1) employees act lawfully and in ways consistent with the values and rules embodied in the code; (2) employees report behavior that is inconsistent with the code; and (3) the company takes actions to prevent the non-compliant behavior from occurring again.[52] Although voluntarily adopted compliance programs have almost universal support, critics challenge the role they play in corporate criminal law.[53] Section II.A.1 reviews the criticism that compliance programs are ineffective. Section II.A.2 reviews the empirical studies on implementation and finds that there is growing evidence that properly implemented compliance programs have a positive impact on various behaviors that—as explained by the Theory of Planned Behavior in Section II.B—will lead to less fraud and more whistleblowing.

1. *Criticism of Mandatory Compliance Programs*

Because a firm can significantly reduce or even escape liability for having an "effective" compliance program under the OSG, including a code of ethics, compliance programs are essentially mandated by the law.[54] However, critics complain that there is no evidence that ethics codes and compliance programs actually reduce illegal behavior.[55] Support for these

51. Randall & Gibson, *supra* note 41, at 119.

52. *See* Mark S. Schwartz, *Effective Corporate Codes of Ethics: Perceptions of Code Users*, 55 J. Bus. Ethics 323, 325 (2004) [hereinafter Schwartz, *Effective Corporate Codes*] (discussing "code effectiveness").

53. Krawiec, *supra* note 14, at 488–89.

54. *See* U.S. Sentencing Comm'n, Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines 31–32 (2003), http://www.ussc.gov/corp/advgrprpt/AG_FINAL.pdf (discussing the potential for directors to be in violation of their duty of care if they do not take advantage of the reduced penalty possibilities under the OSG by adopting a compliance program).

55. Krawiec, *supra* note 14, at 491.

arguments comes from empirical studies that find no relationship between codes and ethical behavior.[56] A recent review of studies on codes of ethics shows that approximately half of the studies found that codes were effective in reducing unethical behavior, and half did not find a significant relationship.[57] Thus, these studies do not establish clear support for whether or not codes of ethics directly reduce unethical behavior.

Many of these studies simply look at the presence or absence of a code of ethics or compliance program, without attempting to understand how the codes are used by employees within the organization.[58] With respect to codes of conduct, the view of these researchers and commentators seems to be that the code simply operates as a rulebook that employees read and then follow accordingly.[59] In practice, however, employees use codes in many different ways. For example, though an employee may already know that a certain action is "wrong" without the information provided in the code, the code can provide support for that employee to resist improper requests from supervisors or coworkers.[60] In other situations, the code may simply serve to raise general awareness about ethical issues in the firm or encourage an employee to seek the advice of others.[61] Overall, codes of ethics work in both direct and indirect manners to shape employee behavior.[62] Although codes may not directly lead to less illegal behavior, as Schwartz states, "it is hard

56. With respect to fraudulent financial reporting, see Arthur P. Brief et al., *What's Wrong with the Treadway Commission Report? Experimental Analyses of the Effects of Personal Values and Codes of Conduct on Fraudulent Financial Reporting*, 15 J. Bus. Ethics 183, 190–91 (1996). Using a role-playing exercise in a laboratory study, Brief finds that the presence of a code of conduct has no impact on the decision to engage in fraudulent financial reporting.

57. Schwartz, *Effective Corporate Codes*, *supra* note 52, at 325; *see also* Mark S. Schwartz, *The Nature of the Relationship between Corporate Codes of Ethics and Behaviour*, 32 J. Bus. Ethics 247, 249–50 (2001) [hereinafter Schwartz, *Nature*] (providing a table that reviews the studies on codes of ethics published before 2000 based on research methodology and study sample).

58. *See, e.g.*, Brief et al., *supra* note 56.

59. *See* Schwartz, *Nature*, *supra* note 57, at 258.

60. *Id.* at 256 (using the metaphor of a "shield" to describe one way that a code may influence employee behavior).

61. *Id.* at 255–56 (using the metaphors of a "magnifying glass" and a "sign-post" to describe ways that a code may influence employee behavior). It may also be the case that codes of ethics serve different functions for different types of employees. For example, employees committed to behaving ethically may use the code to support their positions, while those employees that do not feel a strong moral obligation to behave ethically may be deterred from unethical behavior due to sanctions for violating the code. Janet S. Adams et al., *Codes of Ethics as Signals for Ethical Behavior*, 29 J. Bus. Ethics 199, 201 (2001).

62. In addition to the three metaphors described in notes 60 and 61 and accompanying text, Schwartz provides five other metaphors that describe how codes of ethics may influence employee behavior in indirect and direct manners. Schwartz, *Nature*, *supra* note 57, at 256. His conclusions are based on interviews with fifty-seven individuals at four large Canadian companies. *Id.* at 251. Likewise, in an empirical study, Treviño and Weaver measured effectiveness of an ethics program not just by reduced unethical behavior, but also by ethics awareness, increased willingness of employees to discuss and seek advice on ethical issues, and other indirect influences on behavior. Gary R. Weaver & Linda Klebe Treviño, *Compliance and Values Oriented Ethics Programs: Influences on Employees' Attitudes and Behavior*, 9 Bus. Ethics Q. 315, 319 (1999).

to imagine how ethics could be made an integral part of a company's business practices without at least adopting a code of ethics."[63]

Just as critics argue that codes of ethics pushed on firms by the law are simply ignored within the firm, critics also argue that compliance programs are simply "window dressing" used by organizations to obtain favorable treatment under the OSG but having little impact on reducing illegal behavior.[64] As with codes of conduct, however, the firm's implementation of the compliance program is significantly more important than simply whether or not that firm has adopted one.

2. *The Implementation of Compliance Programs: Compliance-Based versus Integrity-Based Programs*

Starting with Lynn Sharp Paine's 1994 article *Managing for Organizational Integrity*, management researchers regularly distinguish between compliance-based programs and integrity-based programs.[65] A firm using a compliance-based program focuses its efforts on deterrence through threat of detection and punishment for violations of the law or code of conduct.[66] A firm using an integrity-based approach, on the other hand, focuses its efforts on establishing legitimacy with employees through internally developed organizational values and self-governance.[67] For example, whereas a compliance-based program focuses on teaching employees the laws and rules they must comply with, an integrity-based program focuses on integrating ethics into employees' decision-making and inspiring them to live up the company's ethical ideals.[68]

With an integrity-based program, obeying the law "is viewed as a positive aspect of organizational life, rather than an unwelcome constraint

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63. Schwartz, *Effective Corporate Codes*, *supra* note 52, at 324. In the NBES survey only 0.4% of employees were in an organization that had a strong ethical culture and no formal program. NBES, *supra* note 1, at 94. This provides some evidence that a formal program helps support the development of an ethical culture. *Id.*

64. Krawiec, *supra* note 14, at 491–92. For an empirical study supporting this claim, see Marie McKendall et al., *Ethical Compliance Programs and Corporate Illegality: Testing the Assumptions of the Corporate Sentencing Guidelines*, 37 J. Bus. Ethics 367, 375–76 (2002), which found that compliance programs consistent with the OSG had no impact on the incidence of OSHA violations. For an empirical study on the effectiveness of codes of conduct at reducing white collar crime, see Karen Schnatterly, *Increasing Firm Value Through Detection and Prevention of White Collar Crime*, 24 Strategic Mgmt. J. 587, 590, 603 (2003), which found that "a stronger and more complex code of conduct" reduces white collar crime.

65. Lynn Sharp Paine, *Managing for Organizational Integrity*, Harv. Bus. Rev., Mar.-Apr. 1994, at 106, 110–11.

66. *Id.* at 110.

67. *Id.* at 111; Andrew Brien, *Regulating Virtue: Formulating, Engendering and Enforcing Corporate Ethical Codes*, 15 Bus. & Prof. Ethics J. 21, 32–33 (1996) (stating that employees can be motivated to comply with codes of ethics by either enforcement mechanisms (i.e., fear of consequences for non-compliance) or engendering mechanisms (i.e., internalization of the code)).

68. Paine, *supra* note 65, at 113; Weaver & Treviño, *supra* note 62, at 317–18.

imposed by external authorities."[69] This is consistent with research pioneered by Tom Tyler that shows that obedience to the law is based on a sense of moral obligation to obey legitimate laws, rather than solely on threats of punishment.[70] In general, an integrity-based program is focused on creating a corporate culture where employees feel comfortable discussing ethical issues, they are rewarded for responsible behavior, and leadership demonstrates its commitment to ethics by personally living up to the company's standards and incorporating those values into strategic decisions.[71]

Although Paine based her original article on just a handful of case studies, subsequent research has confirmed that an integrity-based program is more effective than a compliance-based program in reaching positive outcomes for the firm. For example, Weaver and Treviño[72] found that all compliance programs had a positive impact on employees' awareness of ethical issues, willingness to seek advice, decision-making, and reduced observed unethical behavior.[73] The perception by employees that a compliance program was integrity-based, however, was a stronger predictor of those outcomes[74] and also was associated with employee willingness to report misconduct,[75] employee commitment to the firm, the belief that it is acceptable to submit "bad news" to management, and the belief that employees can live by their personal values at work.[76] Likewise, a separate study found that a compliance-oriented program had positive results with respect to similar outcomes, but that an integrity-based program was more effective in bringing about those results.[77]

Compliance-based programs and integrity-based programs are not mutually exclusive. Recent research suggests that a successful program will have elements of each.[78] A key factor is to find the right balance, avoiding

69. Paine, *supra* note 65, at 111.

70. *Id.*; *see also* Brien, *supra* note 67, at 25–26 (comparing codes of ethics to laws and stressing the importance of legitimacy and consent of the governed).

71. Paine, *supra* note 65, at 112.

72. Weaver & Treviño, *supra* note 62, at 326.

73. *Id.* at 328.

74. *Id.* at 329–30.

75. *Id.* at 328 (noting that the finding also required both a compliance- and integrity-based approach).

76. *Id.* at 325, 328.

77. Linda Klebe Treviño et al., *Managing Ethics and Legal Compliance: What Works And What Hurts*, 41 Calif. Mgmt. Rev. 131, 138–39 (1999) [hereinafter Treviño et al., *What Hurts*]. The authors based their study on the following specific outcomes: observed unethical/illegal behavior, awareness of ethical/legal issues, seeking advice, delivering bad news to management, reporting violations, improved decision making, and commitment to the organization. *Id.* at 132–35.

78. Weaver & Treviño, *supra* note 62, at 330; *see also* Brien, *supra* note 67, at 34–35 (arguing that failing to use enforcement mechanisms makes a compliance program "not credible," but solely using such mechanisms "fails to foster organizational virtue" and "is, ultimately, self-defeating").

overemphasis of the compliance aspect.[79] There is, however, a third way to implement a compliance program, which is simply to protect top management from liability. Employees believe that managers implement these programs solely to support claims that any misconduct must have arisen from a rogue employee violating the company's rules and its best efforts to control misconduct.[80] In those situations, compliance programs are ineffective, and potentially counterproductive, in achieving positive outcomes and positive intentions toward ethical behavior.[81]

Additional support for the above findings comes from surveys conducted by KPMG Forensic[82] and the Ethics Resource Center.[83] KPMG's survey found significant differences between firms that implemented a compliance program consistent with an "effective" program under the OSG and firms that had a compliance program without all of the elements of an effective program.[84] The differences—reported in Table 1—show significantly more positive behavioral beliefs toward ethical behavior in organizations with complete compliance programs. As discussed more fully below, according to the TPB, these beliefs should translate into reduced fraudulent behavior and increased whistleblowing behavior.

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79. Paine, *supra* note 65, at 111; *see also* Brien, *supra* note 67, at 38 (arguing that enforcement should only be used against those "who cannot be reformed through engendering programs alone" and that enforcement mechanisms such as surveillance should only be targeted at "known weak spots and reported problem areas"); *id,* at 39–41 (comparing enforcement of ethics codes to Ayres and Braithwaite's regulatory enforcement pyramid); Weaver & Treviño, *supra* note 62, at 330 ("When a values orientation is strong, compliance activities can be perceived as part of an overall system of support for ethical behavior. Without a strong values orientation, however, compliance activities may be perceived to be part of a system aimed only at detecting misconduct."). For a more general discussion about trying to find the right balance between rule-based compliance and more aspirational, ethics-based approaches, see David Hess et al., *The 2004 Amendments to the Federal Sentencing Guidelines and Their Implicit Call for a Symbiotic Integration of Business Ethics*, 11 Fordham J. Corp. & Fin. L. 725, 746–57 (2006) (discussing three distinct, but related, ways of building trust in organizations).

80. Treviño et al., *What Hurts*, *supra* note 77, at 138.

81. *Id.* at 136–37 (finding, for example, that employees are less comfortable delivering bad news or seeking advice on ethical issues when they perceive that the compliance program is designed only to protect management).

82. KPMG conducted its survey between November 2004 and March 2005. KPMG Forensic, *supra* note 3, at 23. KPMG mailed out 6797 surveys and received 4056 responses from people employed by firms of various sizes and in a wide range of industries. *Id.* at 23–26.

83. NBES, *supra* note 1.

84. KPMG Forensic, *supra* note 3, at 13–14. The KPMG study does not specifically mention the OSG. Also, the study does not provide information on whether or not there are other significant differences between the two groups of firms (e.g., company size, industry) that may affect the employees' responses.

Table 1[85]

	Company *with* complete compliance program (Percent agreeing with the statement)	Company *without* complete compliance program (Percent agreeing with the statement)
Senior executives set an appropriate "tone at the top"	84%	29%
Senior executives value integrity over short-term goals	82%	28%
People feel motivated and empowered to "do the right thing"	90%	51%
People feel comfortable raising ethics concerns	85%	36%
People apply the right values to their decisions	90%	53%
There is minimal willingness to tolerate misconduct	84%	35%
There is minimal opportunity to engage in misconduct	80%	38%
Rewards are based on ends, not the means to achieve the ends	41%	57%
Would you feel comfortable reporting misconduct to a supervisor	88%	48%
If you reported misconduct, do you believe you would be satisfied with the outcome	68%	22%

Similar to KPMG's survey, The Ethics Resource Center's National Business Ethics Survey ("NBES") compiled information on firms' compliance programs,[86] but it also went further and looked at the organizations' cultures. The NBES assessed culture by surveying respondents on the presence of "ethics related actions" within an organization. Ethics related actions measure respondents' beliefs that fellow employees, supervisors, and management are willing to discuss ethical issues, support responsible conduct, serve as good examples of ethical conduct, and engage in other, similar actions.[87] Overall, they found that culture has a greater impact than a formal program on outcomes such as observed misconduct, reporting of misconduct, and perceived ability to handle misconduct if faced with such a

85. KPMG Forensic, *supra* note 3, at 14–19.

86. The NBES identified six key elements of a formal compliance program based on the OSG. Those elements are: (1) written standards; (2) ethics training; (3) mechanisms to provide employees with desired ethics advice or information; (4) anonymous reporting of misconduct; (5) discipline for those violating company standards; and (6) including ethical conduct in performance reviews. NBES, *supra* note 1, at 47.

87. *Id.* at 60–61.

situation.[88] In addition, the NBES showed that the presence of a formal program had a greater impact in organizations with a weak ethical culture.[89]

B. *Organizational Ethics and the Theory of Planned Behavior*

Given this general understanding of the importance of implementation, we can now take a closer look at the potential impact compliance programs have on the beliefs that form employees' intentions to engage in ethical behavior under the TPB. These sections examine each determinant of intentions—attitudes, subjective norms, perceived behavioral control, and moral obligations—in turn. It should be noted that these determinants influence each other and factors listed under one determinant may also affect other determinants. For example, subjective norms can influence intentions directly, or they can influence the beliefs that form an individual's attitude.[90] After reviewing the available research on each individual determinant, Section II.B.5 summarizes how compliance programs improve employees' intentions, encouraging ethical behavior.

1. *Improving Attitudes*

As discussed earlier, a person's attitude toward a behavior depends on his or her beliefs about what outcomes will follow from an action (behavioral beliefs) and the actor's evaluation of those outcomes as good or bad (outcome evaluations). If an employee does not expect that an action will create the desired result, then the employee will have a negative attitude toward the behavior. Thus, it is not surprising that when witnesses of misconduct are asked why they did not report the wrongdoing, they commonly respond that they did not think anything would be done (or could be done) to fix the problem.[91]

In the NBES, 45% of respondents that had witnessed some type of misconduct chose not to report it.[92] The most common reason respondents gave for not reporting was the belief that no corrective action would be taken.[93] This belief was selected by 59% of respondents as an important factor in their decision.[94] By contrast, those that indicated that they reported misconduct believed it was the right thing to do (99.5%), but they also believed that

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88. *Id.* at 79.

89. *Id.*

90. Robert J. Vallerand et al., *Ajzen and Fishbein's Theory of Reasoned Action as Applied to Moral Behavior: A Confirmatory Analysis,* 62 J. Personality & Soc. Psychol. 98, 108 (1992).

91. *See* Near et al., *supra* note 50, at 238 (finding that "nothing could be done to remedy the situation" was the main reason given by observers of wrongdoing that chose not to report it).

92. NBES, *supra* note 1, at 28. Twenty-six percent of respondents stated that they had witnessed some form of "misconduct." *Id.* at 16. This number rises to fifty-two percent when the respondents are provided with a list of examples of misconduct to choose from, as opposed to simply being asked about "misconduct" generally. *Id.* at 16–17.

93. *Id.* at 29.

94. *Id.*

corrective action would be taken (79%).[95] In addition to not believing the behavior would produce a desired outcome, non-reporting respondents had a negative attitude toward whistleblowing due to their fear of retaliation (46%) and a belief that retaliation could happen because they doubted that their reporting really would be anonymous (39%).[96]

Although potential whistleblowers may have negative attitudes due to fear of retaliation, others may have a negative attitude toward doing "the right thing" due to a fear of withheld rewards. The most likely sources for rewards are performance reviews, incentive compensation systems, and promotions. Employees are more likely to develop positive attitudes toward behavior that the organization rewards, even if it is unethical behavior.[97] If the incentive plan only recognizes the employee's end numbers, then the employee will be punished to the extent that lower numbers are the result of following the rules. On the other hand, if an employee believes that she is being rewarded for the means of achieving a result, and not just the ends, she will have a more positive attitude toward following the company's code of conduct and her own ethical values. An organization does not necessarily have to reward ethical behavior to improve attitudes, but it must assure an employee that she will not be punished for behaving ethically.[98] Through their own experience and the observation of the treatment of others, employees gain evidence that they are not "suckers" for following the rules while others who do not follow the rules achieve superior outcomes.[99]

In addition to the strong impact of reward systems, many argue that the business environment in general can cause individuals to behave less ethically than they otherwise would.[100] For example, one study found that changing the name of a social dilemma game from the "*Community* game" to the "*Wall Street* game" cut cooperative behaviors in half.[101] In this study, the framing of the problem likely influenced the basis of players' outcome evaluations, which in turn shaped their attitudes toward cooperation. Thus, negative attitudes toward cooperative behavior are always lurking in the

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95. *Id.* at 28. The other factors selected by respondents included the belief that they had the support of management (75%) or coworkers (72%); that they could report the incident anonymously (63%); and that no one else would or could report the incident (49%). *Id.* The percentages exceed 100% because respondents were asked to select all factors that apply. *Id.*

96. *Id.* at 29. The other factors selected by respondents included the belief that someone else would report the misconduct (24%) and the fact that they simply did not know whom to contact (18%). *Id.*

97. Carpenter & Reimers, *supra* note 33, at 118. For example, Carpenter and Reimers were able to manipulate the attitude variable by changing what behaviors they told subjects that management encouraged. *Id.* at 122–24.

98. *See* Adams et al., *supra* note 61, at 207.

99. *See* Victor et al., *supra* note 50, at 262.

100. *E.g.*, Adams et al., *supra* note 61, at 208.

101. Lee Ross & Donna Shestowsky, *Contemporary Psychology's Challenges to Legal Theory and Practice*, 97 Nw. U. L. Rev. 1081, 1099 (2003). In social dilemma games, actors have individual incentives not to cooperate with the group (to defect), but when they do so, the collective outcome is suboptimal. In other words, those who do not cooperate are free-riding on the efforts of those who do.

background and must be proactively managed by the firm. That is, if defection is the default in business organizations, then managers must take affirmative steps to change the framing of the problem and the structuring of rewards to engender positive attitudes.

2. *Changing Social Pressures*

The famous Asch studies dramatically illustrate the role of social pressures on organizational decision-making. In these experiments, subjects were asked to complete a simple line length matching exercise that they could do easily when alone.[102] However, when the subjects attempted to complete the exercise in a room with others who were all giving the same incorrect answer, the subjects consistently gave into social pressures and also selected the wrong line more than one-third of the time.[103] Thus, even when the subjects are sure they know the correct response, social pressures can create uncertainties about previous beliefs and even change behaviors.

In large business organizations, the pressures to conform and the uncertainty surrounding any decision can be significantly greater than in Asch's studies. Inexperienced managers must rely on local norms for guidance in periods of uncertainty,[104] which can lead to the continuation of wrongful activity. As one employee in a risk-management position at Enron stated:

> "If your boss was [fudging], and you have never worked anywhere else, you just assume that everybody fudges earnings . . . . Once you get there and you realized how it was, do you stand up and lose your job? It was scary. It was easy to get into 'Well, everybody else is doing it, so maybe it isn't so bad.' "[105]

In the Enron case, as in the Asch studies, the individual's thought that the act was wrong was overridden by social pressures to conform to local norms of behavior.

In other situations, a clear norm of behavior may not yet have emerged. For example, in Ellis and Arieli's study of whistleblowing in the military, the authors found that there was not a clear organizational norm of reporting misconduct among the officers.[106] Thus, when the officers faced a whistleblowing decision, they looked to others for guidance, which led to

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102. Solomon E. Asch, *Opinions and Social Pressure*, Sci. Am., Nov. 1955, at 31, 32–33, *reprinted in* The Social Animal 13, 15–16 (Elliot Aronson ed., 7th ed. 1995). When completing the exercise alone, subjects gave the correct answer more than ninety-nine percent of the time. *Id.*

103. *Id.*

104. For example, in situations of lying to customers or blowing the whistle to avoid physical harm to others, important referent others such as family members should strongly influence subjective norms. However, in situations involving complicated organizational issues with unclear standards of behavior, normative beliefs are likely to be strongly shaped by those with whom you most closely work.

105. John A. Byrne, Mike France & Wendy Zellner, *"The Environment was Ripe for Abuse"*, Bus. Wk., Feb. 25, 2002, at 118, 119.

106. Ellis & Arieli, *supra* note 34, at 963.

subjective norms having greater influence on intentions than did attitudes.[107] In these situations, a norm of unethical behavior has the chance to develop and spread through social pressures until it becomes the unquestioned standard.

To reduce such potentially negative social influences, the specific content of the code of conduct should help reduce the uncertainty surrounding the rules and values that guide employees. However, the social norms of the organization will still have significant influence on how the code is actually used in the organization. For example, Adam and Rachman-Moore found that employees believed that the social norms of the organization were significantly more important than training programs for influencing their commitment to the organization's values and rules.[108] These norms teach employees the true values of the firm and how the code of ethics actually works in practice.

Social pressures can also have a positive influence on ethical behavior. One way the firm can manage these social pressures is through codes of ethics. For example, a study by Adams and colleagues found that employees in firms with ethics codes viewed their fellow organizational members as being more ethical,[109] viewed the company as more supportive of ethical behavior, and were less likely to believe that they faced pressure to behave unethically.[110] This was true even though most employees could not recall the contents of their company's code of ethics.[111] In addition, the code had a positive impact on attitudes by making it more likely for an employee to believe that they would be satisfied with the outcome of an ethical dilemma they faced.[112] These results are consistent with the results of the KPMG survey reported in Table 1. Note, for example, that eighty-four percent of employees in companies with a complete compliance program stated that misconduct was not tolerated by others in the workplace, compared to just thirty-five percent of employees with a less complete code.[113]

3. *Control Systems and Control Beliefs*

Perceived behavioral control involves both internal and external factors. Internal factors include an employee's belief in her level of competence to carry out (or refuse requests to carry out) fraudulent activity, or her belief in

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107. *Id.* at 962–63.

108. Avshalom M. Adam & Dalia Rachman-Moore, *The Methods Used to Implement an Ethical Code of Conduct and Employee Attitudes*, 54 J. Bus. Ethics 225, 235 (2004). This is not to say, however, that formal training programs are unimportant, as the authors discovered in their more in-depth interviews with employees of the organization they studied. *Id.* at 238–40.

109. Adams et al., *supra* note 61, at 204, 206. This includes top management, supervisors, peers, and subordinates. *Id.* at 206–07.

110. *Id.* at 204, 206–07.

111. *Id.* at 207–08.

112. *See id.* at 204, 206.

113. KPMG Forensic, *supra* note 3, at 19; *supra* note 85 and accompanying Table 1.

her courage to report observed misconduct to management. External factors relate to the obstacles in the actor's way. For example, knowing that auditors will review financial statements should reduce an employee's belief that he could successfully falsify documents.

Although audits are perhaps the most well-known control, they are of course not foolproof, and they do not always significantly reduce an employee's perceived behavioral control. [114] In addition, simply increasing the aggressiveness of existing audits may do little to improve their deterrent effect.[115]

More aggressive monitoring in general is also more problematic than many believe. Langevoort, for example, identifies several behavioral tendencies that frustrate effective monitoring by supervisors[116] and argues that third-party auditing is less effective and significantly more costly than most people realize.[117] Monitoring with improperly designed sanctions may also be counterproductive. For example, Tenbrunsel and Messick found that the presence of a monitoring system with sanctions for non-compliance caused employees to view a social dilemma as a business decision (i.e., in terms of expected payoffs) rather than as a problem involving ethical issues to be resolved.[118] Then, when the penalties for misconduct were too low or there was little likelihood of detection, there was more wrongful behavior than when there was no sanctioning system in place.[119] Excessive monitoring can also reduce trust, or displace intrinsic motivations (moral obligations under the TPB) with extrinsic motivations (decision-making based on self-interested cost-benefit analyses).[120] Thus, not only is a control system both

114. *See* Arnold Schneider & Neil Wilner, *A Test of Audit Deterrent to Financial Reporting Irregularities Using the Randomized Response Technique*, 65 Acct. Rev. 668, 679–80 (1990). The authors found support for the deterrent effect of having either an internal or external audit, which suggests employees perceived less control, but the deterrent effect of audits was only proven in conjunction with other factors, such as the employee having limited financial incentives to engage in fraud and the fraud being of a type that was expected to gain auditor attention (e.g., a material misstatement involving a clear and obvious violation of GAAP). *See id.* at 670–71, 679–80.

115. Wilfred C. Uecker et al., *Perception of the Internal and External Auditor as a Deterrent to Corporate Irregularities*, 56 Acct. Rev. 465, 477–78 (1981) (finding that an increase in perceived aggressiveness of internal or external auditing had no additional deterrent effect on the decision to materially overstate net income).

116. Donald C. Langevoort, *Monitoring: The Behavioral Economics of Corporate Compliance With Law*, 2002 Colum. Bus. L. Rev. 71, 85–90 (2002).

117. *Id.* at 93–100; *see also* Lawrence A. Cunningham, *The Appeal and Limits of Internal Controls to Fight Fraud, Terrorism, Other Ills*, 29 J. Corp. L. 267, 270 (2004) ("[A]uditors know controls and audits are inherently limited processes, while lawyers invest more confidence that these processes can assure substantive results. The resulting expectations gap adds pressure to use more controls and audits that simultaneously promote the appearance of control and reduce actual control.").

118. Ann E. Tenbrunsel & David M. Messick, *Sanctioning Systems, Decision Frames, and Cooperation*, 44 Admin. Sci. Q. 684, 684 (1999).

119. *Id.* at 695–96.

120. *See* Langevoort, *supra* note 116, at 96–99. *But see* Angela L. Coletti et al., *The Effect of Control Systems on Trust and Cooperation in Collaborative Environments*, 80 Acct. Rev. 477 (2005) (finding that control systems can improve trust). *See generally* Bruno S. Frey, Not Just for

costly and less effective than many people expect, but it may also have a negative effect on the other determinants of intentions to act ethically under the TPB.

A corporation's culture can also have a significant impact on employees' perceived behavioral control. Many employees face strong pressures from leadership to engage in unethical behavior,[121] and even though they have a negative attitude toward the behavior, they feel that they have no other alternative but to obey.[122] This is illustrated by the well-known Milgram experiments, in which subjects administered supposedly life-threatening electric shocks to an actor they believed to be another study participant because an authority figure ordered them to do so.[123] Research in accounting and auditing has empirically verified the ability of authority figures to use obedience pressure to force subordinates to violate professional standards.[124] Although the Milgram experiments may be interpreted as removing actors from the TPB, as they are simply submitting to legitimate authority and not acting upon their intentions,[125] for our purposes, the basic lessons are clearly relevant. Many organizations have a corporate culture that emulates the Milgram experiment by seeking to reinforce and strengthen hierarchal control by expecting employees to simply "do as they're told" and not consider other alternatives.[126] Not surprisingly, employees in corporations with such

the Money (1997) (discussing the relationship between extrinsic and intrinsic motivations and their impact on personal motivation).

121. NBES found that 10% of employees felt pressure to violate the law or their companies' standards. NBES, *supra* note 1, at 41. Of those, 20% indicated that they feel such pressure "all the time" and another twenty-four percent indicated "fairly often." *Id.* The source of those pressures was primarily top management (indicated by 36% of respondents) and middle management (39%). *Id.* at 43.

122. *See* Kurland, *Ethical Intentions*, *supra* note 37, at 308.

123. Stanley Milgram, Obedience to Authority (1st Perennial Classics ed. 2004). In the Milgram experiments, subjects were ordered to give a "learner" (an actor not visible to the subject) increasingly greater shocks each time the learner gave a wrong answer. Even as the learner pounded on the wall in protest and eventually fell silent with the higher voltage shocks, the subjects continued to shock the learner on the experimenter's orders, with sixty-five percent of the subjects administering the highest possible shock (labeled as "XXX"). *Id.* at 32–35.

124. *See* Stan Davis et al., *The Effect of Obedience Pressure and Perceived Responsibility on Management Accountants' Creation of Budgetary Slack*, 18 Behav. Res. Acct. 19, 31 (2006); F. Todd DeZoort & Alan T. Lord, *An Investigation of Obedience Pressure Effects on Auditors' Judgments*, 6 Behav. Res. Acct. 1 (1994).

125. Milgram, *supra* note 123, at 132–43; *see also* David M. Messick & Rafal K. Ohme, *Some Ethical Aspects of the Social Psychology of Social Influence*, *in* Power and Influence in Organizations 181, 197 (Roderick M. Kramer & Margaret A. Neale eds., 1998); DeZoort & Lord, *supra* note 124, at 7–8.

126. Linda Klebe Treviño et al., *The Ethical Context in Organizations: Influences on Employee Attitudes and Behaviors*, 8 Bus. Ethics Q. 447, 460 (1998) [hereinafter Treviño et al., *Ethical Context*]. An illustrative example of such pressures in large organizations comes from KPMG's process of convincing partners to develop and sell "aggressive" (and potentially illegal) tax shelters. Lynnley Browning, *How an Accounting Firm Went From Resistance to Resignation*, N.Y. Times, Aug. 28, 2005, at A1. The person that would later become chief financial officer of KPMG regularly sent out emails stating "you will do this now" in large, red font. *Id.* Another senior officer responded to tax partners' questions on the appropriateness of a strategy by stating they were "either on the

cultures observe more unethical behavior, and they are less willing to discuss ethical issues, deliver bad news to supervisors, or report violations.[127]

4. *Managing Moral Obligations*

An individual's sense of moral obligation to follow the company's code of conduct clearly depends upon individual differences in ethical values, but it also depends upon factors within the organization's control.[128] Procedural justice within the organization is a primary way that firms can foster positive moral obligations toward its rules. Procedural justice refers to the fairness of the implementation of a company's policies and procedures, both formally and informally.[129]

Tom Tyler, the leading scholar on procedural justice in organizations, states that organizations can seek compliance with their rules either through a command-and-control approach focused on monitoring, deterrence, and punishment (consistent with the compliance-based approach discussed earlier) or a self-regulatory approach focused on an employee's internal motivations and ethical values (consistent with the integrity-based approach).[130] Tyler finds that the self-regulatory approach is more effective in gaining employee rule-following than a command-and-control approach.[131] To gain the benefits of a self-regulatory approach, the organization can enhance the legitimacy of the rules through a fair process of application and as a result influence an employee's moral obligation to follow the rules.[132] Thus, if upper management acts in a manner that shows that the company's code of ethics does not apply to it, then employees will recognize the un-

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team or off the team." *Id.* Eventually, sixteen former KPMG partners were charged with criminal offenses, including the author of the aforementioned e-mails and the person quoted above. Andrew Parker, *10 More Charged in KPMG Tax Fraud Case*, Fin. Times, Oct. 18, 2005, at 30; *see* Lynnley Browning, *Defendants File a Flurry of Motions Challenging the KPMG Tax-Shelter Case*, N.Y. Times, Jan. 13, 2006, at C3.

127. Treviño et al., *Ethical Context*, *supra* note 126, at 468–69; Treviño et al., *What Hurts*, *supra* note 77, at 136–37, 143–44.

128. Tom R. Tyler, *Promoting Employee Policy Adherence and Rule Following in Work Settings: The Value of Self-Regulatory Approaches*, 70 Brook. L. Rev. 1287, 1287–88 (2005).

129. Daniel P. Skarlicki & Robert Folger, *Retaliation in the Workplace: The Roles of Distributive, Procedural, and Interactional Justice*, 82 J. Applied Psychol. 434, 435 (1997); Victor et al., *supra* note 50, at 254. Employees' perceptions of procedural justice depend on (1) the quality of the organization's decision making procedures (e.g., use of objective evidence), (2) the quality of the organization's treatment of people (e.g., respecting individual's rights), (3) the company's formal rules and values statements, and (4) the application of the rules and the general treatment of the employees by the local supervisor. Tyler, *supra* note 128, at 1309–11. Procedural justice, as defined by these four components, is distinct from the employees' perceptions of the fairness of the outcomes of the process. *Id.* at 1311.

130. Tyler, *supra* note 128, at 1289–91; Tom R. Tyler & Steven L. Bladder, *Can Businesses Effectively Regulate Employee Conduct? The Antecedents of Rule Following in Work Settings*, 48 Acad. Mgmt. J. 1143, 1143–45 (2005).

131. Tyler & Bladder, *supra* note 130, at 1148, 1153.

132. *Id.* at 1154.

fairness and feel no obligation to follow the company's rules.[133] The organization can also improve self-regulation by encouraging employees to act upon their values, which creates congruence between the company's rules and employee values.[134] The perception of congruence between employee and company values is also influenced by procedural justice.[135]

Organizations have also been successful in positively influencing intentions and behaviors by changing employees' role requirements. Studies by Victor and Treviño found that more employees felt a personal obligation to report peers when the code of conduct or their specific job required this behavior.[136] Simply changing role requirements is likely not sufficient, however, as employees still must accept that responsibility.[137]

5. *Integrity-Based Programs and the TPB*

This empirical evidence on determinants provides support for the claim that compliance programs consistent with the OSG, and most importantly integrity-based programs, can improve employees' intentions that lead to ethical behavior. First, integrity-based programs improve attitudes by creating the perception of more positive outcomes from ethical behavior. The presence of a compliance program helps potential whistleblowers believe that that they will be satisfied with the consequences of reporting.[138] Employees also will be more likely to believe that the company's reward system will not punish them for doing the right thing.[139] Integrity-based programs also influence attitudes by encouraging employees to judge outcomes based on their own values (leading to increased compliance with a

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133. Tyler, *supra* note 128, at 1307; *see also* Langevoort, *supra* note 116, at 109 (noting that if employees perceive that management itself is not following the values embodied in the code of ethics, then employees will view the compliance program as unfair and have a lowered desire to comply). Employees may also respond to unfair treatment with retaliation against the employer as a way to punish the firm for unfair treatment. *See* Tyler, *supra* note 128, at 1307. *See generally* Skarlicki & Folger, *supra* note 129.

134. Tyler & Bladder, *supra* note 130, at 1153–54.

135. Tyler, *supra* note 128, at 1305–06. Tyler states that "fair organizational procedures and processes are hypothesized to foster a sense that corporate authorities are legitimate and that the organization itself possesses moral values similar to those of the individual." *Id.* at 1306.

136. Linda Klebe Treviño & Bart Victor, *Peer Reporting of Unethical Behavior: A Social Context Perspective*, 35 Acad. Mgmt. J. 38, 60 (1992) (finding that role responsibility influenced intentions to report misconduct, but the test design did not include actual reporting behavior); Victor et al., *supra* note 50, at 259–60 (finding that role responsibility influenced intentions to report misconduct, which in turn influenced actual reporting behaviors).

137. Treviño & Victor, *supra* note 136, at 60–61.

138. *See supra* note 85 and accompanying Table 1. Effective compliance programs had this impact on firms regardless of their corporate culture. NBES, *supra* note 1, at 82–83.

139. *See supra* note 85 and accompanying Table 1 (reporting survey findings that with a complete compliance program, employees are less likely to believe that rewards are only based on ends and more likely to believe that executives value integrity over short-term goals).

code of ethics) rather than directing them toward focusing only on their own individual payoffs.[140]

Second, compliance programs influence subjective norms by reducing social pressure for unethical behavior[141] and creating an environment where employees feel free to discuss ethical issues and seek advice.[142] By opening up communications on ethical issues within the organization, employees are able to voice their opinions actively, and more responsible norms of behavior emerge.[143] Employees are also more likely to seek out expert advice that will give them clear answers to their ethical dilemmas, as opposed to the alternative of following the crowd in the face of uncertainty. In support of this, the NBES found that in organizations where coworkers talk about ethics and support organizational standards,[144] employees at all levels of the firm observe less misconduct and are less likely to be exposed to situations involving misconduct.[145]

Third, integrity-based programs enhance an employee's perceived behavioral control, increasing her willingness to refuse to engage in fraud and to report observed misconduct. The NBES survey found that employees in a corporation with ethics training or a strong corporate culture believed they were prepared to handle any problems they may face.[146] Through training, they felt they had the skills and resources necessary to follow through with their intentions. Likewise, a study involving chief financial officers found that training on their company's code of ethics made it more likely that they would use the code in strategic decisions because the training provided them with a higher level of perceived behavioral control over its use.[147]

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140. *See supra* notes 100–101 and accompanying text (discussing how the business environment can shape an employee's framing of outcome evaluations); *supra* notes 130–135 and accompanying text (discussing Tyler's work on procedural justice and self-regulation); Weaver & Treviño, *supra* note 62, at 329–30 (finding that an integrity-based program creates the perception that you can act on your own values at work).

141. *See supra* notes 109–111 and accompanying text (citing evidence that compliance programs create the perception that the organization supports the values in the code of ethics). In addition, integrity-based programs create the perception that management and coworkers are supportive of ethical behavior.

142. *See supra* note 85 and accompanying Table 1; Weaver & Treviño, *supra* note 62, at 320–21.

143. *See generally* Scott Sonenshein, *Business Ethics and Internal Social Criticism*, 15 Bus. Ethics Q. 475 (2005) (developing a theoretical model of internal social criticism).

144. These are some of the factors that the NBES refers to as "ethics related actions" or ERAs. NBES, *supra* note 1, at 60. ERAs, along with the extent to which employees believe members of their organization are held accountable for their actions, make up the index the NBES uses to classify a firm as having an ethical culture. *Id.* at 74, 76.

145. *See id.* at 89–92.

146. *Id.* at 88 (finding that eighty-three percent of employees in firms with ethics training felt well prepared to handle risk situations, compared to sixty-six percent of employees in firms without training). Employees at all levels of the firm with a stronger corporate culture felt more prepared to handle situations potentially involving misconduct. *Id.* at 89–92.

147. John M. Stevens et al., *Symbolic or Substantive Document? The Influence of Ethics Codes on Financial Executives' Decisions*, 26 Strat. Mgmt. J. 181, 185, 192 (2005).

Fourth, integrity-based programs cause employees to feel empowered to act upon their own values and moral obligations.[148] The employee feels in control, as the company will not discourage her from acting on her moral beliefs. And, as shown by Tyler's work, this increases an employee's moral obligation to follow company rules.[149]

Of course, there are limitations to the empirical studies reported here. Other evidence is based on surveys conducted by nonprofit organizations and accounting firms that also have significant limits, such as not controlling for other potential influencing variables.[150] Nonetheless, the empirical evidence does strongly point in the same direction and, at a minimum, encourages additional research in this area.

III. Legislating Ethics in Organizations: Small Steps toward Reducing Fraudulent Behavior

Based on the analysis above, there is strong evidence to believe that properly implemented compliance programs can improve ethical behavior in organizations and reduce the high levels of fraud that currently exist. The conclusion by some commentators that compliance programs are a failure is premature; we are still a long way from having firms implement "effective" compliance programs. Consider for example that the NBES found that only 41% of firms with over 10,000 employees (and 26% overall) had implemented all of the elements of an effective program under the OSG.[151] In addition, only 22% of the organizations in their study had both an ethical corporate culture based on the study's criteria and all of the elements of an effective compliance program.[152]

The analysis in this section focuses on the smaller steps that can be taken to improve the current system of compliance programs under Sarbanes-Oxley and the OSG. I do not address questions of whether there should be a radical change in corporate criminal liability[153] or whether Sarbanes-Oxley should be repealed or drastically reformed. I also do not address larger issues that would have a significant (but indirect) impact on ethics in corporations, such as returning corporations to a focus on long-term value[154] or reforming executive compensation.[155] Instead, the challenge

148. Weaver & Treviño, *supra* note 62, at 317, 329–30.

149. *See supra* notes 130–135 and accompanying text.

150. For a discussion of the research methodology challenges when studying ethical behavior, see generally Michael J. O'Fallon & Kenneth D. Butterfield, *A Review of The Empirical Ethical Decision-Making Literature: 1996–2003*, 59 J. Bus. Ethics 375, 403–05 (2005) and Donna M. Randall & Maria F. Fernandes, *The Social Desirability Response Bias in Ethics Research*, 10 J. Bus. Ethics 805 (1991).

151. NBES, *supra* note 1, at 56.

152. *Id.* at 94.

153. *See* Laufer, *supra* note 15 (suggesting changes in corporate criminal liability).

154. *See* Dean Krehmeyer et al., Breaking the Short-Term Cycle (2006), *available at* http://www.corporate-ethics.org/pdf/Short-termism_Report.pdf (providing recommendations for what CEOs, asset managers, investors, and analysts need to do to break out of the cycle of focusing

I consider in this section is the role of the law in pushing firms to adopt "effective" compliance programs.

A. *Why Don't Firms Adopt Integrity-Based Compliance Programs?*

To understand why firms are not implementing integrity-based corporate compliance programs, we can place top management into two categories: (1) those that seek an effective compliance program but have priorities elsewhere that prevent effective adoption; and (2) those that adopt compliance programs simply as a form of "insurance" and therefore are uninterested in fully implementing the program beyond features easily observed by outsiders. We can refer to the first category as the *misguided* executives and the second category as the *misleading* executives.

The misguided executives believe, correctly, that internal controls are a useful deterrent to fraud. However, they are also likely to believe that the solution to any problem is simply more controls. In general, managers have a bias toward adopting compliance-based programs focused on monitoring and sanctions,[156] which causes them to find little value in other mechanisms such as anonymous reporting hotlines and ethics training.[157] Likewise, prosecutors and judges reviewing programs are also likely to have a bias toward more controls,[158] which will influence how managers implement

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only on short-term gains); Lawrence E. Mitchell, Corporate Irresponsibility: America's Newest Export (2001) (providing policy recommendations for how to refocus managers on long-term growth).

155. *See* John C. Bogle, The Battle for the Soul of Capitalism 25–26 (2005) (stating that excess executive compensation goes hand-in-hand with pressures for managed earning in the firm). *See generally Symposium on Bebchuk & Fried's* Pay without Performance, 30 J. Corp. L. 1 (2005) (providing various perspectives on the problems of executive compensation and potential reforms).

156. *See* Chip Heath, *On the Social Psychology of Agency Relationships: Lay Theories of Motivation Overemphasize Extrinsic Incentives*, 78 Organizational Behav. & Hum. Decision Processes 25, 36 (1999) (finding that in agency situations, principals have a bias toward assuming that their agents are more motivated by extrinsic rewards such as pay and job security, as opposed to intrinsic rewards, than they are). This bias toward extrinsic incentives is not a new phenomenon. In 1973, Harry Levinson wrote that when he asked managers to visualize the central image between the metaphorical "carrot" and "stick" (representing rewards and punishments) they responded that the image was a jackass. Harry Levinson, The Great Jackass Fallacy 10 (1973). That image, according to Levinson, represented what was wrong with relying solely on extrinsic rewards and punishments; managers were treating their employees as stubborn and stupid "jackasses" that need to be manipulated in order to do their jobs appropriately, rather than seeing the importance of focusing on trust, openness, and employee emotional motivations. *Id.* at 9–11. (I thank Ed Freeman for bringing this reference to my attention.)

157. *See* ACFE 2002, *supra* note 16, at 12 (finding that, based on a scale from 1 (effective) to 8 (ineffective), managers ranked internal controls 1.62 on average, but ranked anonymous reporting and ethics training 5.02 and 4.86 respectively). A 2005 survey of ninety-five large firms by Ernst & Young found that 53% of firms had increased their level of monitoring in the last eighteen months and 50% plan to further increase their programs in the next eighteen months. Ernst & Young, Corporate Regulatory Compliance Practices 28 (2005), *available at* http://www.ey.com/global/download.nsf/US/Compliance_Survey_-_Corporate_Regulatory_Compliance/$file/CorporateRegulatoryCompliance.pdf. In addition, 49% of firms have moved to centralize their monitoring programs, and another 41% plan to do so in the future. *Id.*

158. Langevoort, *supra* note 116, at 105, 113 (stating that "integrity-based systems will often deliberately be designed in such a way that they look particularly leaky" and that it is a natural

their programs. With limited time and resources to devote to their compliance programs, it is reasonable to expect such managers to focus more of their efforts on internal controls and less on developing an integrity-based program.

The changes to the OSG that emphasize a strong ethical culture should help refocus management's attention. However, section 404 of Sarbanes-Oxley competes with the OSG and encourages management to focus on internal controls. Section 404 and its reporting requirements place a priority on internal controls and consume management's time.[159] Thus, even if the OSG legitimizes a focus on the firm's corporate culture, the demands of section 404 may leave management with little time and resources to devote to those matters, and we continue to have misguided executives.

The misleading executives, on the other hand, intentionally seek only to adopt a "paper" program and to decouple it from actual operations. These managers are aware that prosecutors are typically unable to distinguish between sincere and insincere attempts at implementing a compliance program, and therefore seek only to adopt the appearance of "good corporate citizenship."[160] These managers use compliance programs as insurance to protect the firm and themselves from liability for illegal behavior that results from the true corporate culture they foster inside the firm.[161] The remainder of this section considers potential reforms to encourage both types of managers to adopt integrity-based programs.

B. *Encouraging Integrity-Based Programs*

The behavior of a corporation depends on both its hardware and software. Hardware refers to the firm's "structure and processes," while software refers to the "norms and culture" of the firm. [162] As stated by Beinhocker, "[t]he two sides must be consistent and mutually reinforcing to create a coherent social architecture."[163] The law is, of course, limited in its ability to shape a firm's social architecture, but it can directly influence the firm's hardware and indirectly influence the firm's software. Influencing positive change in the firm's software through integrity-based programs should be the primary goal of any legislative intervention, including interventions involving the firm's hardware. The primary means of influencing

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reaction for judges to say in hindsight that the company could have prevented the wrongful act with additional controls).

159. Matt Krantz, *More Finance Chiefs Are Dropping Out*, USA Today, Mar. 24, 2005, at 1B (noting that more and more CFOs are quitting their jobs because of the time demands of Sarbanes-Oxley and the way it has changed the nature of their jobs).

160. Laufer, *supra* note 15, at 1406–08.

161. *Id.*

162. *See* Eric D. Beinhocker, *The Adaptable Corporation*, McKinsey Q., Spring 2006, at 76, 84.

163. *Id.* (referring to corporate strategy, but consistent with our discussion of integrity-based programs).

the firm's software is through top management's commitment to an integrity-based program.[164]

1. *Hardware Fixes*

In general, we should be reluctant to have the law mandate specific hardware features, as a one-size-fits-all approach rarely works and firms need flexibility to adapt their compliance programs to their unique situations. In addition, once the law mandates a certain structure, experimentation on new ways of doing things is at risk of being cut off. Certain hardware requirements, however, can potentially increase commitment to ethics and alter priorities without interfering substantially with management's need for flexibility. For example, the ethics codes requirements under Sarbanes-Oxley and the SEC implementing rules provide only general guidelines and leave corporations with the flexibility to develop their own content.[165] Although a code of ethics as a hardware requirement can have a positive impact on intentions to behave ethically,[166] they require the commitment of top management to ensure that they have a significant impact. To this end, a code of ethics can be supplemented by mechanisms that require direct leadership involvement, allow employees to voice concerns directly to leadership, and require companies to actively evaluate the effectiveness of their ethics programs.

The first step in focusing top management's attention on organizational ethics and legitimizing the importance of compliance programs is to require devotion of their time to these matters. Many firms' initial response to the OSG was to adopt the necessary structures and processes in form, but in a manner that did little to change top management's involvement.[167] Many

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164. *See* Gary R. Weaver et al., *Corporate Ethics Programs as Control Systems: Influences of Executive Commitment and Environmental Factors*, 42 Acad. Mgmt. J. 41, 52–53 (1999).

165. Note, *The Good, The Bad, and Their Corporate Codes of Ethics: Enron, Sarbanes-Oxley, and the Problems with Legislating Good Behavior*, 116 Harv. L. Rev. 2123, 2135–36 (2003). This note goes on to argue that the flexibility granted to firms to draft their own codes and then disclose those codes will have little effect on improving ethical behavior, and may actually be counterproductive. *Id.* at 2137–39.

166. *See supra* notes 109–112 and accompanying text (finding that the presence of a code of ethics creates the perception among employees that the firm supports ethical behavior and therefore improves attitudes toward that behavior); *see also supra* note 147 and accompanying text (noting a study that finds financial officers are more likely to use the company's ethics code in strategic decisions if they have had training on the code, which has a positive impact on their perceived behavioral control).

167. The lengths to which management will go to avoid involvement in a compliance program are illustrated in *Bishop v. PCS Administration (USA), Inc.*, No. 05 C 5683, 2006 WL 1460032 (N.D. Ill. May 23, 2006). In *Bishop*, PCS appointed the plaintiff, an in-house counsel, to be the company's Compliance Officer. *Id.* at *3. After reading the OSG's requirements that high level personnel head the compliance program, the plaintiff suggested that someone else head the program, and she would provide support. *Id.* This suggestion was rejected, as was her argument that the firm needed a compliance committee. *Id.* at *4. The plaintiff was then fired from the company, which she alleged was due to these efforts to prevent fraud. *Id.* at *5. On the importance of having top management involved and committed to ethics, see Gary R. Weaver et al., *Integrated and Decoupled Corporate Social Performance: Management Commitments, External Pressures, and Corporate Ethics Practices*, 42 Acad. Mgmt. J. 539, 547–48 (1999) (reporting the results of an empirical study

firms implemented their programs simply by tacking compliance program responsibilities onto the roles of certain officers and utilizing existing corporate structures.[168] For example, over half the firms in a survey conducted in the mid-1990s assigned a specific officer to be in charge of the compliance program, but fifty-four percent of those firms indicated that the officer spent less than ten percent of his or her time on ethics and compliance issues.[169] CEOs also did not increase their involvement. Two-thirds of ethics and compliance officers indicated that their CEO had communicated with them on ethics issues no more than two times per year.[170] In addition, one-third of CEOs had not attended a meeting with ethics as a primary focus, and an additional one-third had only attended one such meeting in the last year.[171] A more recent survey found that fewer than forty percent of U.S. boards received ethics and compliance training.[172]

In recognition of such deficiencies, the revised sentencing guidelines included provisions requiring: (1) "[h]igh-level personnel" "ensure" the effectiveness of the program; (2) leadership "be knowledgeable" about the program; (3) individuals in charge of the compliance program's operations, such as the chief ethics officer, have "direct access" to the board of directors (or a subcommittee),[173] and they should report at least annually to the board (or subcommittee) on the effectiveness of the program;[174] and (4) all corporate officers, including the board of directors, receive ethics training.[175]

All such changes should go a long way in ensuring that the top management and the board of directors are not "out of touch" with the ethical environment of the organization.[176] In addition, Sarbanes-Oxley ensures that officers and directors are fully aware of their firm's ethical environment through its requirement that the audit committee have a mechanism in place to hear concerns about questionable behavior.[177] Such requirements that

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finding that top management commitment was related to a firm adopting an integrated ethics program, as opposed to a program that could be easily established for window-dressing purposes and have no actual impact on day-to-day decision-making).

168. Gary R. Weaver et al., *Corporate Ethics Practices in the Mid-1990's: An Empirical Study of the Fortune 1000*, 18 J. Bus. Ethics 283, 283 (1999).

169. *Id.*, at 288. Thirteen percent of the respondents indicated that the officer spends 100 percent of his or her time on ethics and compliance issues. *Id.*

170. *See id.* at 291.

171. *Id.*

172. Ronald E. Berenbeim & Jeffrey M. Kaplan, Conference Board, Ethics Programs: The Role of the Board: A Global Study 31 (Marta Valezuelo ed., 2004).

173. U.S. Sentencing Comm'n, U.S. Sentencing Guidelines Manual § 8B2.1(b)(2) (2004).

174. *Id.* § 8B2.1 application note 3.

175. *Id.* § 8B2.1(b)(4).

176. *See* Linda Klebe Treviño, *Out of Touch: The CEO's Role in Corporate Misbehavior*, 70 Brook. L. Rev. 1195, 1208–09 (2005) ("[S]enior managers have significantly more positive perceptions of organizational ethics when compared to rank-and-file employees. Senior Managers are less likely to see ethics initiatives cynically and are more likely to perceive the internal ethical environment to be supportive of ethical conduct in the organization.").

177. Sarbanes-Oxley Act of 2002 § 301(4), 15 U.S.C. § 78j-1(m)(4) (Supp. III 2003). Treviño suggests that CEOs are "out of touch" with their firms' ethical climates because "due to fear and

directly involve the functioning of the officers and directors of the firm legitimize the importance of maintaining the ethical environment of the firm and should alter the priorities of the misguided manager. Likewise, the board of directors has access to information, and incentives to digest that information, that will make them better monitors of the misleading manager.

The next step in this line of reforms should be to require a board level ethics committee. In the United States, board level oversight of the ethics and compliance program is typically done by an audit committee.[178] In a recent Conference Board study, none of the U.S. corporations that responded to the survey had an ethics committee overseeing their compliance program.[179] By contrast, sixty-three percent of Japanese companies used an ethics committee.[180] The authors of the Conference Board report state that having a committee responsible for the compliance and ethics program of the firm allows the committee members to develop expertise on the topic and requires them to devote specific time to these issues.[181]

Amongst such a committee's potential responsibilities would be having direct responsibility over the organization's chief ethics officer.[182] If the chief ethics officer (or other individual responsible for the compliance program) is accountable to top management (directly or indirectly) instead of the board of directors, then the independence that officer needs to fulfill her duties—including providing the board with necessary information—may be compromised.[183] In recognition of such potential problems, the SEC now requires mutual funds to appoint a chief compliance officer who reports directly to the board of directors, meets in executive session annually with only the independent directors, and has her employment-related matters

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futility concerns, employees are unlikely to report ethical problems up the chain." Treviño, *supra* note 176, at 1208.

178. Berenbeim & Kaplan, *supra* note 172, at 13 (finding that seventy-seven percent of the firms that responded to their survey used an audit committee to oversee the ethics and compliance program).

179. *Id.* Their survey included seventy-seven large U.S. corporations. *Id.* at 34. Eighteen percent of firms used a governance committee. *Id.* at 13.

180. *Id.*

181. *Id.*

182. W. Michael Hoffman & Mark Rowe, The Ethics Officer as Agent of the Board: Leveraging Ethical Governance Capability in the Post-Enron Corporation, Paper Presented at the TransAtlantic Business Ethics Conference (Oct. 6-7, 2006) (on file with author) (arguing for ethics officers to be instated as direct agents of the board of directors); *see also* Christine Parker, *Reinventing Regulation Within the Corporation: Compliance-Oriented Regulatory Innovation*, 32 Admin. & Soc'y 529, 558–59 (2000) (citing with approval the practice of having the chief compliance officer report directly to the board (or one of its committees) and having the board of directors review any hiring or firing of compliance officers or their staff).

183. Hoffman & Rowe, *supra* note 182, at 6–9 (noting the strong potential for such conflicts of interest to impact an ethics officer's judgment, as well as create the perception amongst employees that the ethics and compliance program applies differently to top management); *see also* Office of Fed. Hous. Enter. Oversight, Report of the Special Examination of Fannie Mae 241 (2006), *available at* http://www.ofheo.gov/media/pdf/FNMSPECIALEXAM.PDF (criticizing Fannie Mae for the conflict of interest created by having the chief compliance officer also be responsible for the litigation department that defends the company against employee complaints).

(e.g., compensation, termination) subject to board approval.[184] Similar measures may be necessary for all chief ethics officers to ensure their effectiveness.[185]

An additional hardware adjustment is the requirement under the OSG that a firm "take reasonable steps . . . to evaluate periodically the effectiveness of the organization's compliance and ethics program."[186] The OSG creates a proactive obligation on firms to evaluate their programs on a regular basis, whereas the old standard only required firms to evaluate their programs in reaction to a violation.[187] This is a requirement that corporations, prosecutors, and judges need to take seriously. Any leniency granted to a firm under the OSG should require the firm to demonstrate that it has made sincere, good faith attempts to evaluate the effectiveness of its programs.[188] Langevoort argues that the overall evaluation of compliance programs should be based on industry best practices. [189] I firmly agree and further argue that the use of a best practices standard is especially important for judging firms' efforts at evaluating their programs.

Evaluation of compliance programs is an area where there is a need for innovation and sharing of experiences. Finding meaningful metrics is a significant challenge. One compliance officer compares measuring the effectiveness of compliance programs to determining if building a lighthouse was an effective use of resources: "How many ships didn't crash because the lighthouse was built?" [190] Dallas argues that the OSG should require firms to assess their ethical climate.[191] Determining an ethical cli-

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184. 17 C.F.R. § 270.38a-1 (2006); Compliance Programs of Investment Companies and Investment Advisers, Investment Advisers Act Release No. 2204, Investment Company Act Release No. 26,299, 68 Fed. Reg. 74,714 (Dec. 24, 2003).

185. *See* Office of Fed. Hous. Enter. Oversight, *supra* note 183, at 331–32. The report states that:

> [The Office of Federal Housing Enterprise Oversight (OFHEO)] has directed Fannie Mae to create a new Office of Compliance and Ethics that reports to the Chief Executive Officer and independently to the Compliance Committee [which must be staffed with at least three independent members of the board of directors]. The office is directed by an officer that has no other duties at Fannie Mae and who operates independently, including with regard to communication with the Board and OFHEO, particularly on matters of wrongdoing. . . . The head of the office cannot be removed without Board approval.

Id. at 332.

186. U.S. Sentencing Comm'n, U.S. Sentencing Guidelines Manual § 8B2.1(b)(5)(B) (2004).

187. Corporate Compliance Committee, ABA Section of Business Law, *Corporate Compliance Survey*, 60 Bus. Law. 1759, 1784 (2005).

188. *See Public Hearing Held by the Ad Hoc Advisory Group on Organizational Sentencing Guidelines*, *Plenary Session I*, 81–83 (2002), *available at* http://www.ussc.gov/corp/ph11_02/plenary1.pdf [hereinafter *Public Hearing*] (testimony of Lynn Sharp Paine).

189. Langevoort, *supra* note 116, at 115.

190. Ernst & Young, *supra* note 157, at 27.

191. Lynne L. Dallas, *A Preliminary Inquiry into the Responsibility of Corporations and Their Officers and Directors for Corporate Climate: The Psychology of Enron's Demise*, 35 Rutgers L.J. 1, 61–63 (2003).

mate is typically done through the use of a questionnaire.[192] However, only eleven percent of U.S. companies in a recent Conference Board survey used employee surveys to test the effectiveness of their programs.[193]

2. *Software Fixes*

Hardware fixes will not work without a change in the firm's software. For example, requiring firms to provide a mechanism for anonymous reporting should improve employee attitudes toward the behavior and increase the reporting of misconduct.[194] However, this mechanism will do little to change attitudes if employees do not believe they will actually have anonymity.[195] To actually change intentions, the firm must also improve the corporate culture around the hardware mechanisms, by implementing, for example, an integrity-based compliance program.[196] The law can encourage the development of ethical corporate culture by encouraging firms and mediating groups to work toward developing best practices. Further, the government could remove legal barriers that currently discourage the development of effective integrity-based programs.

The law can only influence a firm's culture indirectly. For example, studies by Weaver and colleagues found that regulatory pressures through the OSG influenced the scope of the corporation's compliance program (i.e., hardware mechanisms, especially those that are easily decoupled from actual operations) but not the implementation of an integrity-based program.[197] Likewise, Stevens and colleagues found that regulatory pressures were unsuccessful in encouraging financial executives to use the company's code of ethics in strategic decision-making.[198] Conversely, pres-

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192. *Id.* at 23–29; *see also Public Hearing*, *supra* note 188, at 99–103 (providing commentary on the use of employee surveys and other possible metrics to determine the effectiveness of a compliance program).

193. Berenbeim & Kaplan, *supra* note 172, at 22. For a potential explanation of this low number, see *infra* notes 224–229 and accompanying text for a discussion of the "litigation dilemma" faced by firms.

194. For example, the study by the ACFE found that firms without a hotline suffered $200,000 in losses and took twenty-four months to detect the fraud, compared to $100,000 in losses and fifteen months to detection for firms with a hotline. ACFE 2006, *supra* note 4, at 35. The report does not provide data on which firms had mechanisms in addition to a hotline, such as fraud training, that would affect those numbers. The NBES did not find any significant difference between firms with and without an anonymous means of reporting in the percentage of employees stating that they reported observed misconduct. NBES, *supra* note 1, at 87. Firms with anonymous reporting did, however, have less observed misconduct. *Id.* at 86. This latter finding suggests that employees contemplating wrongdoing had a lower perceived behavioral control due to the possibility of anonymous reporting (even though coworkers were not making use of the mechanism) and were therefore less likely to engage in the behavior.

195. *See supra* text accompanying note 96 (presenting survey results showing that of those that witnessed organizational misconduct but did not report it, thirty-nine percent indicated that fear that their report would not remain anonymous was an influencing factor in their decision).

196. Weaver & Treviño, *supra* note 62, at 324, 327 (finding that the reporting of misconduct required both a compliance-based and an integrity-based approach).

197. Weaver et al., *supra* note 167, at 547–48.

198. Stevens et al., *supra* note 147, at 188.

sure from market participants, such as customers, suppliers, banks, and shareholders, did make it more likely that executives would actually utilize the code of ethics.[199] Other factors that had a positive impact on the use of the code included beliefs that following the code of ethics would help create an ethical corporate culture and promote a positive image to stakeholders.[200] Thus, market pressures and perceived operating benefits from an ethical culture, but not regulatory pressures, are key mechanisms for getting firms to meaningfully implement their compliance programs through changes in their software.

Sturm's context-based, problem-solving approach to reducing employment discrimination caused by a firm's culture is instructive for achieving our goal of software change.[201] Sturm's approach falls under the emerging category of regulation referred to as "new governance."[202] For Sturm, the law's role in encouraging the adoption of effective compliance programs is not only to provide incentives through liability avoidance, but also to provide "legitimacy, clout, and regular consideration" to issues that were "typically neglected or undervalued."[203] The potential for liability, however, creates a tension between actions that create economic benefits and are ethically responsible, on the one hand, and strategic actions designed to protect the firm from legal actions, on the other.[204]

To balance these tensions, Sturm recognizes the importance of key intermediary groups, such as nongovernmental organizations and professional networks, to mediating the relationship between the law and organizations.[205] These actors include professionals within the company, consulting firms, lawyers, employee groups, institutional investors, and insurance companies. All of these groups have the potential to develop and then widely disseminate knowledge on best practices for implementing integrity-based

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199. *Id.* at 183, 188.

200. *Id.* at 189–90. The authors of the study emphasize the influence of normative beliefs in conjunction with stakeholder pressure. *Id.* at 185.

201. *See* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 Colum. L. Rev. 458, 475–76 (2001). Sturm argues that a rule-enforcement approach to discrimination "discourages . . . proactive problem solving," which is a process that identifies the "organizational dimensions of the problem, encourages organizations to gather and share relevant information, builds individual and institutional capacity to respond, and helps design and evaluate solutions that involve employees who participate in the day-to-day patterns that produce bias and exclusion." *Id.* at 475.

202. *See* Bradley C. Karkkainen, Reply, "*New Governance" in Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 Minn. L. Rev. 471, 471–72 (2004); *see also* Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 Minn. L. Rev. 342 (2004) (providing an exhaustive overview of new governance regulation); Edward Rubin, *The Myth of Accountability and the Anti-administrative Impulse*, 103 Mich. L. Rev. 2073, 2108 (2005) (describing the OSG as one example of new public governance).

203. Sturm, *supra* note 201, at 521.

204. *See id.* at 522.

205. *Id.* at 523.

programs.[206] Each group, however, also has incentives to work against this approach. For example, firms may not wish to share information on an ethics program that gives them a competitive advantage, and lawyers may counsel against collecting information that could be used against the firm in a lawsuit.[207]

Take insurance companies for example. Griffith argues that corporations should be required to disclose the premiums they pay for directors' and officers' insurance, as those premiums provide market participants with valuable information on the quality of the firms' corporate governance.[208] In determining their premiums, insurance agents ask firms specific questions about their corporate culture, such as: "How does 'bad news' flow upward within the organization? Does the corporate culture encourage such news to be brought to the attention of senior management?"[209] To the extent that insurance companies focus on these matters of managing ethical behavior and develop expertise in analyzing a firm's culture and implementation of its compliance program, firms have an incentive to adopt an integrity-based program to receive lower premiums and, more importantly, to send the right signals to the market through the size of their premiums.[210] Insurance companies may, however, simply conduct more narrow reviews limited only to factors that reduce the probability they will have to make a payout for a covered claim, and they will not necessarily encourage procedures that lead to the sharing of best practices.[211] In addition, firms may be reluctant to have an insurance company conduct a complete audit, which potentially opens the firm to liability for uncorrected problems that are uncovered in the audit.[212]

Other mediating groups, with possibly a greater potential for change, can also be indirectly encouraged to play a more significant role in this area. As mentioned earlier as a hardware fix, prosecutors and judges should take seriously the OSG's requirement that firms regularly evaluate their programs. They should grant leniency only to those firms that can demonstrate that they are engaging in "best practices" to evaluate their program's effectiveness.[213] Through this requirement, firms will likely work with mediating organizations, such as consulting firms and other compliance professionals, which will further help in the development and then dissemination of effec-

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206. *Id.* at 524–37.

207. *Id.* at 545; *see also infra* notes 224–229 (discussing the litigation dilemma faced by firms).

208. Sean J. Griffith, *Uncovering a Gatekeeper: Why the SEC Should Mandate Disclosure of Details Concerning Directors' and Officers' Liability Insurance Policies*, 154 U. Pa. L. Rev. 1147, 1150–51 (2006).

209. *Id.* at 1177–78.

210. *Id.* at 1181–90.

211. Sturm, *supra* note 201, at 549–51.

212. *Id.*

213. *See supra* notes 186–189 and accompanying text.

tive techniques.[214] Some movement in this area is already occurring in response to Sarbanes-Oxley's ethics codes requirements and the OSG's recent requirements relating to the establishment of ethical corporate culture. For example, as of September 2006, the Society of Corporate Compliance and Ethics is offering an examination for those seeking to be Certified Compliance and Ethics Professionals ("CCEPs").[215]

Krawiec is rightly concerned that the involvement of mediating groups may lead to compliance professionals engaging in self-interested behavior and encouraging firms to adopt unnecessary and ineffective mechanisms that serve primarily to support the importance of these groups to the organization.[216] As Bagenstos states, " 'best practices' . . . would merely be the practices that are 'best' for . . . the intermediaries themselves."[217] This tendency can be countered, however, by government encouragement and development of knowledge and data on what makes a compliance program effective and by the sharing of best practices as suggested by Sturm. Following what Lobel refers to as "legal orchestration," government should seek out ways to more actively support the stakeholder network of intermediary groups necessary to achieve these goals.[218]

Based on her research on the roles of various actors in improving gender equity on university faculties, Sturm argues that successful intermediary groups utilize three main strategies.[219] First, they operate as "information entrepreneurs" by assisting and encouraging organizations to use knowledge from various sources (e.g., social science research, information particular to that organization's problems).[220] Second, they create new conversations and collaborations between various actors in the organization.[221] Third, they provide continual pressure for change.[222] Government can intervene by encouraging intermediary groups to enact these strategies and by assisting them in doing so more effectively. In addition to the "hardware" fixes described earlier, such support can come in a variety of forms, such as providing support for associations of compliance professionals, providing

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214. Sturm, *supra* note 201, at 559.

215. Society of Corporate Compliance and Ethics, CCEP Candidate Handbook (2006), *available at* http://www.corporatecompliance.org/CCEP/CCEP_2006_handbook.pdf. Sturm, however, argues against such practices, as she believes attempts to professionalize will cut off the development of necessary experience with new modes of thinking. Sturm, *supra* note 201, at 565.

216. Krawiec, *supra* note 14, at 528–36.

217. Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 Cal. L. Rev. 1, 27–28 (2006).

218. Lobel, *supra* note 202, at 422–23.

219. Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 Harv. J.L. & Gender 247, 290 (2006). Sturm distinguishes between "organizational catalysts" and "institutional intermediaries." *Id.* at 250–51. For purposes of this article, I collapse the two categories of actors into one.

220. *Id.* at 290–95.

221. *Id.* at 295–97.

222. *Id.* at 297–99.

research funding, assisting organizations in the development and standardization of their best practices, and then disseminating that information.[223]

In addition to taking steps to encourage firms and mediating groups to work toward developing best practices, the government should remove or minimize the legal hurdles preventing firms from collecting and utilizing the information necessary to evaluate their software and then move toward implementing more effective compliance programs. A primary hurdle is the so-called "litigation dilemma" faced by firms.[224] If a corporation follows the requirements for an effective program under the sentencing guidelines, then the information it collects during the monitoring and auditing of its performance could be used against it in litigation.[225] In addition, it is becoming routine for prosecutors to request that corporations waive attorney-client privilege and work-product protection to receive a reduced culpability score under the OSG.[226] These factors prevent the collection and flow of information within the firm that is necessary for the development of an effective program.[227] Especially harmful for developing integrity-based programs is that even information on employee attitudes and perceived subjective norms can be used against the firm in litigation.[228] Removing the litigation dilemma through some form of selective privilege for self-auditing[229] or

223. *See* Lobel, *supra* note 202, at 344–45, 399–404 (discussing how governments fulfill the "legal orchestration" role). For a general discussion of government strategies to improve corporate self-regulation through a similar "new governance" approach termed "meta-regulation," see Christine Parker, The Open Corporation: Effective Self-regulation and Democracy (2002).

224. U.S. Sentencing Comm'n, *supra* note 54, at 106.

225. *Id.*

226. *See* Henry W. Asbill, On Behalf of the National Association of Criminal Defense Lawyers, Before the United States Sentencing Commission Public Meeting Panel Discussion on the Attorney-Client Waiver and the Federal Sentencing Guidelines 2–3 (Nov. 15, 2005), *available at* http://www.ussc.gov/corp/11_15_05/Asbill.pdf (noting that eighty-five percent of respondents to a survey indicated that "waiver had been suggested, pushed for, or demanded" by prosecutors in cases with which they were involved).

227. Donald C. Klawiter, On Behalf of The American Bar Association, Statement Before the United States Sentencing Commission Public Meeting Panel Discussion on the Attorney-Client Waiver and the Federal Sentencing Guidelines 6 (Nov. 15, 2005), *available at* http://www.ussc.gov/corp/11_15_05/Klawiter-ABA.pdf. For a discussion of ways in which white-collar criminal law and its enforcement, including the OSG and Sarbanes-Oxley, create ethical dilemmas for management, see, for example, John Hasnas, *Ethics and the Problem of White Collar Crime*, 54 Am. U. L. Rev. 579 (2005).

228. U.S. Sentencing Comm'n, *supra* note 54, at 116 n.384 (citing *Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259 (N.D. Cal. 1992), where notes from a training session that involved a frank discussion on employee perceptions of discrimination in the organization were later used in a discrimination lawsuit against the organization); *see also id.* at 123–25 (highlighting the comments of a compliance consultant who believed an attorney would be committing malpractice if the attorney did not advise a company against using focus groups, surveys, and other mechanisms to understand the ethical climate of the firm).

229. *See generally* Michael Goldsmith & Chad W. King, *Policing Corporate Crime: The Dilemma of Internal Compliance Programs*, 50 Vand. L. Rev. 1 (1997) (developing proposed legislation for immunity for compliance program materials). *But see* Sturm, *supra* note 201, at 560–61 (arguing against a self-evaluative privilege in the discrimination context because it creates "perverse incentives").

placing limits on the use of waivers[230] is necessary to allow firms to develop an understanding of their corporate culture and work toward improving the ethical intentions and behaviors of employees.

Conclusion

Although the media attention on the scandals leading up to Sarbanes-Oxley was focused primarily on the Ken Lays, Jeff Skillings, and Andrew Fastows of the "C-Suite," a wide variety of employees at all levels of the firm participated in, or were at least aware of, the fraudulent activities that permeated their corporations.[231] The regulatory challenge is to find ways that the law can encourage those employees to report misconduct of superiors and coworkers, and more importantly, to refuse to engage in fraudulent practices in the first place. Great strides will be taken toward this goal if firms adopt integrity-based compliance programs. Empirical evidence provides strong support that such programs have a positive impact on employee attitudes, improve subjective norms, increase perceived behavioral control, and strengthen moral obligations. Through hardware mechanisms required by Sarbanes-Oxley, SEC implementing rules, and the OSG, we are moving in the direction of improving corporate compliance programs and encouraging the managerial commitment necessary for firms to develop ethical corporate cultures. To complement these hardware mechanisms, the government should find new ways of encouraging mediating groups to develop and share best practices, as well as place pressure on firms to adopt those practices.

230. Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 Am. Crim. L. Rev. 1095, 1179–81 (2006) (discussing proposals for more centralized control over waiver requests by prosecutors and allowing corporations to limit waiver to only the government). For arguments against changes in the Justice Department's current handling of requests for waiver of attorney-client privilege or work-product protection, see, for example, Mary Beth Buchanan, *Effective Cooperation by Business Organizations and the Impact of Privilege Waivers*, 39 Wake Forest L. Rev. 587 (2004).

231. Bethany McLean & Peter Elkind, The Smartest Guys in the Room: The Amazing Rise and Scandalous Fall of Enron 296–97 (2003) (discussing the various movie and song parodies the members of Enron's broadband finance group developed to celebrate their "earnings 'achievements' " done through "smoke and mirrors," which the general counsel reportedly ordered destroyed after the party); Scott Green, Manager's Guide to the Sarbanes-Oxley Act: Improving Internal Controls to Prevent Fraud 13 (2004) (noting how employees and managers in twenty-two different businesses were involved in CUC International's successful efforts to hide over $500 million in fake profits from an acquiring company).