HARMONIZING GOVERNANCE, RISK MANAGEMENT, AND COMPLIANCE THROUGH THE PARADIGM OF BEHAVIORAL ETHICS RISK

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ABSTRACT

Governance, risk management, and compliance (GRC) are critical functions within companies—this much we know. Yet business leaders remain largely unsure of how to manage these functions effectively. The evidence is both anecdotal, as seen by recent corporate scandals, and research-based, as business law scholars levy sustained critiques against corporate compliance and governance effectiveness. At least part of the failing of GRC stems from its lack of coherent theory; there has been little attempt to harmonize the various GRC functions and determine what is at their core. Instead, the business and academic community has been content with the simple acknowledgment that GRC contains both overlaps and differences among its components. This Article offers a more principled analysis. It argues that governance, risk management, and compliance can best be understood through a behavioral ethics risk paradigm. Using behavioral ethics, criminological, and network theory, the Article explains that individual unethical decision-making within the firm is at the heart of "conduct risk," which in turn is at the core of GRC. When conduct risk is misunderstood and ignored, as is the case in most companies, it not only creates corporate compliance lapses, but it may also cause systemic risk that can swamp corporate governance. Once this dynamic is understood, effective GRC can be properly seen as an exercise in managing behavioral ethics risk within the firm. After providing the necessary theoretical framework, the Article turns to the practical, offering strategies companies can use to identify and mitigate this newly understood risk.

INTRODUCTION

The story is horrific. In December 2018, a 29-year-old female patient of a long-term care facility operated by Hacienda HealthCare in Phoenix gave birth to a child despite being in a vegetative state for the past fourteen years.[1] A few weeks later, based on DNA evidence, a male nurse was arrested and charged with sexual assault and abuse of a vulnerable adult.[2] Although the case is ongoing and the nurse has pleaded not guilty, there can be no doubt that a serious criminal assault was committed against the patient, almost assuredly by a Hacienda employee.

While the terrible nature of a story such as this is difficult to comprehend, it nonetheless might be viewed, and possibly dismissed, as an isolated act of depravity by a disturbed individual. Indeed, Hacienda issued a statement soon after the nurse's arrest, saying it would "accept nothing less than a full accounting of this absolutely horrifying situation, an

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1. Amelia McDonell-Parry, *Woman in 14-Year Coma Gives Birth in Arizona*, Rolling Stone (Jan. 23, 2019, 4:54 PM), https://www.rollingstone.com/culture/culture-news/coma-bi rth-woman-arisona-hacienda-healthcare-776902/ [https://perma.cc/786V-FXT3].

2*. Id.*; Terry Tang, *Lawyer: No Proof Nurse Raped Arizona Patient Who Had Baby*, Associated Press (Jan. 23, 2019), https://www.apnews.com/2c385edbbf8147cdafee5cbb4cd b3bb8 [https://perma.cc/UA7G-8B3F].

unprecedented case" of employee wrongdoing.[3] While on one level, that is undoubtedly true—it is a horrifying situation, and one that is unprecedented in most companies, even those in the healthcare industry. But on another level, the case exemplifies something incredibly common in corporate America: an employee commits an unethical or criminal act at work, which triggers an investigation into that act, ultimately calling into question the governance of the entire organization.

What happened at Hacienda after the nurse's arrest demonstrates the point. A special investigator was hired by the company to determine what occurred.[4] Such an investigation would include whether background checks were conducted on the nurse and others interacting with the patient, how her caretakers seemingly missed that she was pregnant for nine months, and whether there was additional wrongdoing by staff or management.[5] Answering these questions is critical not only for this patient, but also for the broader compliance and risk management functions at Hacienda.[6]

However, the special investigator was not able to get the answers he sought. Only a few weeks after beginning the investigation, he abruptly resigned, citing "intolerable working conditions" that "complicated [his team's] ability to be successful."[7] He was not speaking of the entire company, only Hacienda's board of directors. The special investigator told local news outlets that management was "working really hard" and trying to "do the right thing" to further the investigation, but that certain board members had not allowed him to do his job effectively.[8]

The special investigator's resignation was only the beginning. A day later, "all hell broke loose" at the company.[9] Hacienda's new CEO, who

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3. Alanna Vagianos, *Health Facility CEO Resigns After Woman In Vegetative State Raped Multiple Times*, HuffPost (Jan. 10, 2019), https://www.huffingtonpost.com/entry/hacienda-healthcare-vegetative-birth-rape-ceo-resigns_us_5c34dde2e4b05d4e96bd1e15?ncid=tweetlnkushpmg00000024 [https://perma.cc/VZ22-SMDC].

4. Matt Kelly, *Governance Nightmare in Arizona*, Radical Compliance (Mar. 3, 2019), http://www.radicalcompliance.com/2019/03/03/governance-nightmare-arizona-hacienda/ [https://perma.cc/DC5Y-6Z9N] (explaining that the special investigator was a former Maricopa County prosecutor).

5. *Id.*

6. *Cf.* Todd Haugh, *The Criminalization of Compliance*, 92 NOTRE DAME L. REV. 1215, 1222–24 (2017) [hereinafter, *Criminalization*] (discussing the three spheres of compliance programs—education, monitoring, and enforcement—which are especially relevant in the highly regulated field of healthcare).

7. Robert Anglen & Stephanie Innes, *Patient Rape Case: Investigator Quits, Says Hacienda Board Stymied Him*, AZCENTRAL, (Mar. 1, 2019, 7:24 PM), https://www.azcentral.com/story/news/local/arizona-investigations/2019/03/01/9-hacienda-healthcare-managers-quit-rick-romley-ends-investigation/3028617002/ [https://perma.cc/MR6C-GFLM].

8. *Id.*

9. *Id.*

had just come into the position after the prior CEO was ousted because of the patient assault, resigned in protest. The COO, as well as the director of patient services, followed.[10]   But before their resignations could be accepted, Hacienda's chairman of the board, aided by another board member, fired all three and had them escorted out of the offices by police.[11] This set off another wave of resignations, including a board member and five senior executives. Among those was the director of corporate compliance, who would have been integral to ensuring that compliance improvements suggested by the special investigator were implemented. Finally, the chairman stepped down, ending his 38-year term on Hacienda's board.[12]

Subsequent investigations indicate that the chairman and other board members had been engaging in self-dealing and nepotism for years.[13] Additionally, the CEO who had left initially is now facing allegations that he sexually harassed employees.[14] The Arizona Attorney General's Office has stepped in, launching a wide-ranging "investigation into patient care, financial fraud, and sexual-harassment claims" at the company.[15] Although state officials have taken over the Phoenix facility to prevent it from closing, it is unclear whether Hacienda, which "also operates two for-profit companies that sell medical equipment and provide home-health care," as well as multiple nonprofit children's hospitals, group homes, and immunization clinics, will survive.[16] In roughly two months, the company went from running multiple well-respected care facilities to being on the verge of closing. All beginning with the terrible act of a single employee.[17]

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With time, the question of what exactly happened at Hacienda HealthCare will likely be answered, providing some small measure of justice for the assaulted patient and her family. As soon as that occurs, however, another equally important question will arise: how can Hacienda prevent something like this from happening again?

This question is critical whenever a company faces scandal, be it from governance failures or isolated employee wrongdoing. In fact, if

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10*. Id.*

11. Anglen & Innes, *supra* note 7; Kelly, *supra* note 4.

12. Kelly, *supra* note 4.

13*. See* Anglen & Innes, *supra* note 7 (reporting that "Pomeroy brokered health insurance for roughly 800 Hacienda employees through his private company, reaping lucrative commissions").

14*. Id.*

15*. Id.*

16*. Id.*

17*. Id.*

generalized, the question is one that business leaders, not to mention corporate governance scholars, have been asking for quite some time—how can companies prevent bad acts by their employees? Unfortunately, the answers given so far have been less than satisfying.[18] Indeed, whole areas of corporate law and strategy are aimed at the general topic of preventing wrongdoing and governance failures, and at least three overlapping corporate functions—governance, risk management, and compliance (GRC)—consider it directly. These functions continue to gain prominence in today's world, which seems besieged by corporate scandal.[19]

That GRC is becoming more prominent is a good thing. After all, the goals of GRC's constituent parts are laudable. Risk management is aimed at identifying, analyzing, and planning for various risks the company faces, all with the intention of mitigating them so business can function more effectively. The goal of compliance is to make sure the company and its agents are following applicable laws and norms. The two functions overlap in substance and form: non-compliance, either by an individual employee or at the organizational level, creates risk; and both compliance and risk can be managed by organizational governance processes. Thus, a company that puts in place processes to lessen compliance failures will consequently lesson its "conduct risk," which ultimately leads to more effective governance of the entire organization.[20] Hacienda offers a dramatic example of what happens when failure occurs at all three levels of GRC; virtually every stakeholder—patients, employees, managers, investors, and the larger community—is harmed.

But saying that failures of governance, risk management, and compliance are important, or even terrible, only goes so far. What corporate leaders are trying to figure out is what to do going forward—how do they manage the GRC functions effectively and proactively to prevent

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18. *See, e.g.*, Amit S. Mukherjee, *Why We're Seeing So Many Corporate Scandals*, HARV. BUS. REV. (Dec. 28, 2016), https://hbr.org/2016/12/why-were-seeing-so-many-corpor ate-scandals [https://perma.cc/PQQ2-V3T6] (suggesting that corporations can avoid scandals through "more attention to both institutional norms and ethical leadership").

19. GEOFFREY P. MILLER, THE LAW OF GOVERNANCE, RISK MANAGEMENT, AND COMPLIANCE 1 (2014) (describing the corporate functions of governance, risk management, and compliance as "in vogue").

20. *See* Tom Butler, et al., *A Systematic Approach for Managing and Supervising Conduct Culture and Risk* 2–3 (Governance, Risk, & Compliance Tech. Ctr., 2017), https://e 9a5d5c6.stackpathcdn.com/wp-content/uploads/2017/08/GR3C-Conduct-Risk-2017-_-Final. pdf [https://perma.cc/NZU2-WUQ5] (outlining ways to manage conduct risk*); see also* Deloitte, *Conduct Risk: Improving Culture Across the Enterprise*, WALL ST. J. (May 14, 2018, 12:01 AM), http://deloitte.wsj.com/riskandcompliance/2018/05/14/conduct-risk-impr oving-culture-across-the-enterprise/ [https://perma.cc/XB4T-QLBD] (defining conduct risk as "unethical business practices, individual behaviors, and organizational behaviors that have led to outcomes that have harmed either individual players or the financial system").

future failures?   That is the truly vexing question facing diligent companies.

But here too there has been a decided lack of answers. For decades, we have been trying to determine "what works and what hurts" in corporate governance without much resolution.[21] Reasons for this are many, but the fact remains that GRC's increased importance has not resulted in a corresponding increase in its efficacy. This has been lamented in both corporate and academic circles.[22] All agree that we have more, and more sophisticated, corporate tools and metrics these days, yet we remain unclear on how to use them to improve the governance of our organizations.

With that in mind, this Article suggests a new theoretical construct for GRC, one organized around the concept of behavioral ethics risk management. This approach, which works inside-out from compliance to governance, offers a better way to understand the risks associated with compliance failures like those occurring at Hacienda and how to combat them to improve corporate governance. What this paradigm does better than existing notions of GRC is focus on what is at the heart of these related functions: individual ethical decision-making. Drawing from the fields of behavioral ethics, criminology, and network theory, this Article will explain how individual unethical decisions are made, how that leads to compliance failures, and how those failures may spread conduct risk throughout a company.[23] This discussion will highlight how risk emanating from unethical employee decision-making, if left unaddressed, may result in significant, even catastrophic, risk to the firm—either by creating or amplifying it. Often this is risk companies do not see, and therefore cannot proactively seek to mitigate.

Once this newly understood risk is identified and explored, the Article turns to how it should be addressed. A series of risk assessment and compliance strategies are offered, ones that focus on the decision-making

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21. *See* Linda Klebe Treviño et al., *Managing Ethics and Legal Compliance: What Works and What Hurts*, 41 CAL. MGMT. REV. 131, 132 (1999) (exploring the efficacy of deterrence-based compliance programs in Fortune 1000 firms).

22. *See, e.g.*, Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 491, 510–15 (2003) (arguing that "a growing body of evidence indicates that internal compliance structures do not deter prohibited conduct within firms" and finding little support for their inclusion as a central feature of negotiated governance).

23. The paradigm argued for in this Article follows from my work on corporate compliance and behavioral ethics. *See, e.g.*, *Criminalization, supra* note 6 (conceptualizing corporate compliance as a mirror of criminal law principles); Todd Haugh, *Nudging Corporate Compliance*, 54 AM. BUS. L.J. 683 (2017) (analyzing ways in which companies can nudge employees into certain behaviors); Todd Haugh, *The Power Few of Corporate Compliance*, 53 GA. L. REV. 129 (2018) (analyzing certain failures in corporate compliance).

processes of individuals, as opposed to the broadly distributed, command-and-control type tools of traditional corporate compliance and governance. The idea is to avoid the trap of blindly following current "best practices," which are often misguided, and instead target the true precursors to corporate wrongdoing: individual unethical decision-making. By employing these strategies, companies may reduce their conduct risk and allow for more efficient and effective operations, which is the overarching goal of all companies' GRC efforts. It is also the only way to answer the important questions posed above.

This Article proceeds as follows. Part I explores, through a largely theoretical lens, how the related functions of GRC may be harmonized in the context of employee conduct. What becomes clear is that GRC effectiveness is a product of understanding employee ethical decision-making. Such decision-making is not binary—i.e., only good or evil—nor is it normally distributed across the company in a way that could create predictable conduct that is easily managed. Instead, it is driven by complex individual and social psychology that is best thought of as dynamic behavioral risk. Part II takes this insight and attempts to operationalize it. Using the Hacienda Healthcare case as a backdrop, examples of behavioral risk mitigation strategies that may be used throughout the life cycle of an employee are offered. Some are straightforward, others are controversial, but all have a common focus on identifying and fostering positive ethical decision-making within a firm. This is the best way to achieve sustainable gains in GRC and prevent wrongdoing at companies that may lead to catastrophic harm.

I. Behavioral Ethics Risk: What It Is and How It Spreads

The trend in scholarship analyzing GRC is to focus on its legal foundations or its implications for managers.[24] However, this approach skips an important step. Before getting to how GRC operates or how it can be maximized, one must consider what exactly it is—what it is made up of.

A. GRC and Its Ethical Decision-Making Core

To determine what GRC is, it is helpful to consider the relationship between its component parts. As others have pointed out, the functions of corporate governance, risk management, and compliance are distinct within corporations, yet they clearly overlap.[25] While this suggests a type of Venn

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24. *See* Miller, *supra* note 19, at 3 (describing the different areas of law that GRC is comprised of).
25. *Id.* at 3.

diagram, I believe the relationship is somewhat different.

The most straightforward way to conceptualize the relationship between the GRC functions is as a set of concentric circles, with compliance at the center, risk management as the second ring, and corporate governance as the third. This structuring recognizes that each function occupies a distinct definitional and substantive role in a company, but that all serve a common purpose. That purpose is to ensure the company is effectively managed to meet its welfare enhancing goals.[26] It also recognizes that the compliance function is central to GRC. This makes sense as non-compliance by members of an organization creates risk that must be managed if effective governance is to be achieved. Figure 1 shows this relationship.

Figure 1: GRC relationship

Before discussing the relationship further, particularly that of the compliance function, let us pause a moment to formally define terms. Beginning with the outermost circle, governance can be defined as the set of "processes by which decisions relative to risk management and compliance are made within an organization."[27] If this sounds a bit self-referential, it is. Firm governance is essentially "the structure of control within an organization," and that control is exercised through processes that guide individual action.[28] Because the firm only acts through its agents, governance processes are aimed at getting agents to act in accordance with the organization's interests, thus highlighting the risk and compliance components.

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26. *See generally* William W. Bratton, *Framing a Purpose for Corporate Law*, 39 J. CORP. L. 713 (2014) (providing an extended discussion of the purpose of markets and the role of corporate law).

27. MILLER, *supra* note 19, at 2.

28. *Id.*

Moving one level down, risk management is the "processes by which risk is identified, analyzed, included in strategic planning, and either reduced through risk mitigation tactics or accepted as inherent in activities that the organization wishes to conduct."[29] That is a way of saying that companies have to manage uncertainty. While risk management has become particularly complex these days, especially when firms attempt to model the systemic risk they face, it is enough for our purposes to think of risk management as the corporate function that tries to plan for the inherent uncertainty that occurs when organizations make decisions.[30] Those decisions range from long term strategic planning, to short term financial decisions, to managing personnel. Here, we will focus not so much on external risk created by competitors or changing markets, but on the risk emanating internally from employee actions—conduct risk.

The innermost circle is compliance. Although definitions vary, most commentators agree that "'[c]ompliance' is a system of policies and controls that organizations adopt to deter violations of law and to assure external authorities that they are taking steps to deter violations of law."[31] Put more succinctly, compliance is a set of processes companies use to ensure that employees "do not violate applicable rules, regulations or norms."[32] And if placed more directly in the context of GRC, corporate compliance can be defined as the processes by which a company polices its own behavior to ensure conformity with laws and norms.[33]

Because compliance is near the core of GRC efforts, it is important to go beyond a simple definition and understand what the function entails. Corporate compliance has two primary purposes. The first is deterring violations of criminal and civil law. On the criminal side, compliance is aimed at preventing violations of state and federal law, as well as quasi-criminal regulatory violations (i.e., regulations that can be criminally enforced).[34] In addition, compliance programs attempt to prevent violations of purely civil law, such as torts like harassment and

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29. MILLER, *supra* note 19, at 2; *see also Plain English Definitions*, ISO 31000 2018, http://www.praxiom.com/iso-31000-terms.htm [https://perma.cc/5YWM-YA9Y] (defining risk can as "the effect of uncertainty on objectives," with an "effect" being "a positive or negative deviation from what is expected").

30. *Id.*

31. Miriam H. Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 958 (2009).

32. Geoffrey P. Miller, The Compliance Function: An Overview 1 (Nov. 18, 2014) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2527621 [https://perma.cc/3YC3-9556].

33. MILLER, *supra* note 19, at 3.

34*. See* Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2082 (2016) (discussing how firms change their behavior based on compliance constraints).

discrimination among employees.[35] Put these together, and compliance programs are attempting to deter unlawful employee behavior, which reduces the risk that the company will be held responsible pursuant to respondeat superior legal liability.[36]

The second purpose of compliance is to generate positive norms within the company. Norm generation and enforcement—basically, following the internal rules of the organization—is often considered the "ethical culture" aspect of a company. Creating an ethical culture is often seen as the overarching goal of many companies' compliance initiatives.[37] Positive organizational culture and norms that go with it are important because they fill the gaps left by legal rules.[38] There simply are not laws governing every action one takes in a company, nor would we want that; positive norms help guide good conduct in the interstices. The hope being that through ethics and compliance programming employees will come to share a common belief about the company's "purpose (i.e., mission, strategy, and goals), [and] the necessary means to achieve it (i.e., systems, structure, and processes)," so that norms govern behavior and external legal incentives need not be triggered.[39]

In order to achieve these two purposes, compliance must simultaneously operate on multiple levels. Education and training, the first level, is essentially policy-setting by the company to its employees.[40] The company explains what the applicable laws and corporate rules are and how employees should comply with them. Monitoring, the second level, ensures that those rules are understood and followed, and that any violations are quickly identified and reported.[41] Monitoring can be direct,

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35. *See* Tanina Rostain, *General Counsel in the Age of Compliance: Preliminary Findings and New Research Questions*, 21 GEO. J. LEGAL ETHICS 465, 467 (2008) (explaining the role of compliance to enforce sexual harassment and anti-discrimination laws).

36. *See* Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559, 1570–74 (1990) (describing how corporate criminal liability is based on the doctrine of respondeat superior).

37. Griffith, *supra* note 34, at 2093–94 n.73.

38. Baer, *supra* note 31, at 960.

39. CATERINA BULGARELLA, SAI GLOBAL, PREDICTING RISK: A STRATEGIC CULTURE FRAMEWORK FOR THE C-SUITE, SAI Global 10 (2018), https://m.comms.saiglobal.com/res/sa iglob_mkt_prod1/SAI_Global_Strategic_Culture_Framework_Report_April2018.pdf [https: //perma.cc/CS99-NQQC].

40. James A. Fanto, *Advising Compliance in Financial Firms: A New Mission for the Legal Academy*, 8 BROOK. J. CORP. FIN. & COM. L. 1, 9 (2013) (describing the policy-setting aspect of compliance as the advising function of compliance); *see also* Griffith, *supra* note 34, at 2093 (explaining that the first core element of compliance is the customization of policies and procedures to the company).

41. Donald C. Langevoort, *Monitoring: The Behavioral Economics of Corporate*

through initial employee screenings and performance reviews, or indirect, through audits, hotline reports, and whistleblowing.[42] Enforcement, the third level, attempts to deter future violations by punishing wrongdoers.[43] Often this means a reprimand, but termination is common for many transgressions.[44] When laws are broken, a range of more serious sanctions for both the individual and the company are on the table.[45] These types of compliance violations in particular create significant conduct risk for firms.[46]

Through this discussion, it should be obvious that much of compliance—and therefore much of risk management and corporate governance according to our concentric structure—turns on individual employee behavior. If the individual agents of a firm act in a law-abiding and ethical manner, the company will likely avoid legal liability and compliance-related disruption of its business practices. This results in less conduct risk, positive governance, and ultimately a strong corporate culture of following the law and prosocial business norms.

Accordingly, companies' intent on creating effective GRC regimes must, at least in part, develop the "skill [of] predicting human behavior."[47] That behavior is predicated on individual decision-making, and more specific to our concerns, ethical decision-making. Thus, the core of compliance, and in turn much of GRC, is dependent on individual ethical decision-making. This is the sphere at the center of Figure 1 that completes the GRC relationship.

Compliance with Law, 2002 COLUM. BUS. L. REV. 71, 81 (2002).

42*. Id.* at 81–82.

43. Griffith, *supra* note 34, at 2099 (stating that "for a compliance function to be effective, it must enforce the rules").

44*. Id.* at 2097.

45*. See Criminalization*, *supra* note 6, at 1224 (stating that "[f]or serious wrongdoing, the threat of termination is just the beginning; cooperation by the company with a regulatory agency exposes employees to formal censure, fines, debarment, and even prison").

46. For example, Siemens A.G. reported spending more than $1 billion solely related to the government's inquiry into the payment of foreign bribes by individual executives. The reputational and operational costs were much higher. *See* Peter J. Henning, *The Mounting Costs of Internal Investigations*, N.Y. TIMES (Mar. 5, 2012), http://dealbook.nytimes.com/20 12/03/05/the-mounting-costs-of-internal-investigations/?r=0 [https://perma.cc/7Q5T-ZVX5] (reporting on the foreign bribe scandal).

47. Donald C. Langevoort, *Behavioral Ethics, Behavioral Compliance*, *in* RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 263 (Jennifer Arlen ed., 2016).

B. Individual Ethical Decision-Making and Behavioral Ethics

For many corporate leaders, considering GRC in this way—with the ethical decision-making of employees at its core—will be eye-opening.[48] Many business people think that governance, risk management, and compliance comes solely from board level leadership, or from an active general counsel. If you have good, strong leadership in these areas, you will have a good company. While leadership certainly helps, it leaves out the realities of how human beings—officers and lower-level employees alike—make decisions with an ethical component.

Even for those organizations that have come around to the view that firm governance is more than just leadership, there is often little understanding of how employees make ethical decisions, and even less understanding of how to incorporate that information into GRC practices. Luckily, the field of behavioral ethics provides significant insights, laying the foundation for the behavioral ethics risk management paradigm outlined below.

1.   The Behavioral Ethics Field and its Central Findings

The starting point for understanding ethical decision-making, then, is the field of behavioral ethics. The easiest way to explain the field is through a sound bite: it is the study of why "good people will do bad things."[49] While that is true, the statement's pithiness is its downfall; it papers over too much sophisticated research developed over the past twenty years. Unfortunately, there is no accepted comprehensive definition of the field to draw upon. Instead, we have to couple together a few different characterizations to understand behavioral ethics' critical features.

Early proponents of the field described it as the "scientific approach for studying perceptions of how we ought to treat one another . . . and how such perceptions influence behavior."[50] That explanation was useful because it made clear that ethical behavior could be studied systematically. But it also lacked practicality. Thus, some responded by defining the field as having the "aim[] [of] understand[ing] how even well-intentioned people can sometimes behave unethically."[51] Going a step farther, and more

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48. The same could be said for some legal and business academics, too.

49. Robert A. Prentice, *Behavioral Ethics: Can It Help Lawyers (and Others) Be Their Best Selves?*, 29 NOTRE DAME J.L. ETHICS & PUB. POL'Y 35, 36 (2015).

50. Robert Folger, *Deonance: Behavioral Ethics and Moral Obligation*, *in* BEHAVIORAL BUSINESS ETHICS 123, 125 (David De Cremer & Ann E. Tenbrunsel eds., 2012).

51. Jason Dana et al., *Ethical Immunity: How People Violate Their Own Moral Standards Without Feeling They Are Doing So*, *in* BEHAVIORAL BUSINESS ETHICS 201, 202

closely linking behavior and decision-making, behavioral ethics was called a study of the "systematic and predictable ways in which individuals make ethical decisions and judge the ethical decisions of others."[52]

These last two characterizations are important because they hint at the central findings of the many studies conducted under the behavioral ethics umbrella, ultimately leading us back toward our sound bite definition. That is, research has found that "cognitive heuristics, psychological tendencies, social and organizational pressures, and even seemingly irrelevant situational factors can make it more likely that good people will do bad things."[53] In plain terms, behavioral ethics research alerts us that while most people are moral individuals intent on doing right, we are not as ethical as we think we are.

Definitions aside for a moment, this last notion is key. Behavioral ethics studies show that most people will make moral decisions in line with their ethical beliefs, but because of cognitive obstacles, which may be exacerbated by external factors, many people will be blind to their own unethical conduct—they will engage in unethical acts without even realizing it, acts that they would condemn upon further reflection.[54] As one leader in the field puts it, we are ethical, "but only boundedly so."[55] While not exactly a perfect academic definition of the field, the insight is what matters to those concerned with improving GRC.

2.   The Decision-making Theory Underlying Behavioral Ethics

The central findings of behavioral ethics research provide a crucial understanding of ethical decision-making, but the issue of how remains. How does the ethical decision-making process operate so that it falls prey to these cognitive obstacles, thereby placing limitations on our ethical behavior?

For the answer, it is necessary to look outside the ethics field to behavioral psychology. Here we find dual process theory, also called dual thinking system theory—the concept that "human thought processes are subserved by two distinct mechanisms."[56] The idea, which has been

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(David De Cremer & Ann E. Tenbrunsel eds., 2012).

52. Max H. Bazerman & Francesca Gino, *Behavioral Ethics: Toward a Deeper Understanding of Moral Judgment and Dishonesty*, 8 ANN. REV. L. & SOC. SCI. 85, 90 (2012).

53. Prentice, *supra* note 49, at 36.

54*. See* YUVAL FELDMAN, THE LAW OF GOOD PEOPLE: CHALLENGING STATES' ABILITY TO REGULATE HUMAN BEHAVIOR 3–4 (2018) (discussing psychological foundations of behavioral ethics).

55. Prentice, *supra* note 49, at 36.

56. LAURI JÄRVILEHTO, THE NATURE AND FUNCTION OF INTUITIVE THOUGHT AND

validated through numerous studies across disciplines, is considered one of the great advancements in understanding how people make decisions when facing uncertainty.[57] Although dual process theory and its many offshoots were developed through decades of work by Daniel Kahneman and Amos Tversky,[58] which drew on the work of others before them,[59] one of the best summaries of the collective theory is provided by Jonathan Evans and Keith Frankish:

> These theories come in different forms, but all agree in positing two distinct processing mechanisms for a given task, which employ different procedures and may yield different, sometimes conflicting, results. Typically, one of the processes is characterized as fast, effortless, automatic, non-conscience, inflexible, heavily contextualized, and undemanding of working memory, and the other as slow, effortful, controlled, conscious, flexible, decontextualized, and demanding of working memory.[60]

To flesh this out a bit, the fast process is generally referred to as System 1. It is "evolutionarily old, and shared with most higher animals."[61] It operates primarily by associative memory and intuition, and is therefore governed by habit.[62] It is also difficult to control or modify. System 1 works very quickly; the mind offers associations rapidly, one idea being evoked after another, all linked effortlessly.[63] The speed and ease in which this thinking system operates means that "most of the work of associative thinking is silent, hidden from our conscious selves."[64] This makes System 1 thinking not seem like thinking at all.

DECISION MAKING 24 (2015) (internal citation omitted).

57. *See, e.g.*, FELDMAN, *supra* note 54, at 2 (explaining that the concept of two systems of reasoning is "at the core of extensive research in behavioral law and economics").

58*. See, e.g.*, Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974) (exploring the extent to which individuals rely on heuristics to simplify complex tasks into simpler judgment calls); Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979) (presenting a critique of traditional utility theory and offering an alternative theory "in which value is assigned to gains and losses rather than to final assets and in which probabilities are replaced by decision weights").

59*. See, e.g.*, Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q. J. ECON. 99 (1955) (revising the definition of the "economic man" to take into account the information and capacities a choosing organism realistically possesses).

60. IN TWO MINDS: DUAL PROCESSES AND BEYOND 1 (Jonathan St. B. T. Evans & Keith Frankish eds., 2009).

61. JÄRVILEHTO, *supra* note 56, at 25.

62. Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 AM. ECON. REV. 1449, 1451 (2003) [hereinafter, *Bounded Rationality*].

63. DANIEL KAHNEMAN, THINKING, FAST AND SLOW 52 (2011).

64*. Id.*

In contrast is System 2. This is the slower reasoning process.[65] It is evolutionarily recent, typical to humans and likely only the most advanced primates.[66] System 2 is "serial, effortful, and deliberately controlled," subject to logic and rules, and it is engaged whenever we use thought in an organized manner.[67] The effort that this type of thinking requires is significant, but it is how the brain carefully addresses new tasks when there are no easy associations to make. System 2 is able to engage in abstract hypothetical thinking its counterpart cannot.[68] Not surprisingly, this reflective thinking system gives us the "experience of agency, autonomy, and volition."[69] The features of each thinking system are shown in Table 1.

Table 1: Dual systems of thinking

System 1 — Automatic thinking	System 2 — Reflective thinking
Associative	Deductive
Effortless	Effortful
Uncontrolled	Controlled
Fast	Slow
Emotional	Rule-following
Subconscious	Self-aware
Evolutionarily old	Evolutionarily recent
Shared with animals	Distinctively human
Non-linguistic	Linguistic
Low cognitive load	High cognitive load

Based on these descriptions, most would view System 2 as superior to System 1. But that is not entirely accurate. System 1 thinking is associative and not constrained by working memory, which makes it virtually effortless and therefore highly efficient.[70] Indeed, System 1 is uniquely suited for making the vast majority of our daily decisions, everything from walking and talking to driving a car and brushing one's teeth, because it can process several streams of information all at once. And, over time with enough practice, even complex decisions can become

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65. JÄRVILEHTO, *supra* note 56, at 25.

66*. Id.*

67*. Bounded Rationality*, *supra* note 62, at 1451.

68. Jonathan St. B.T. Evans, *In Two Minds: Dual-Process Accounts of Reasoning*, 7 TRENDS COGNITIVE SCI. 454, 454 (2003).

69. Pelle Guldborg Hansen & Andreas Maaloe Jespersen, *Nudge and the Manipulation of Choice: A Framework for the Responsible Use of the Nudge Approach to Behaviour Change in Public Policy*, 4 EUR. J. RISK REG. 3, 13 (2013).

70. Evans, *supra* note 68, at 454.

intuitive, falling under the System 1 process.[71]

But for most important decisions, particularly novel ones, System 2 thinking is the gold standard to ensure a thoughtful outcome. For example, this is the system one would choose to solve a complex math problem, write a poem, or contemplate pros and cons to make a difficult personal decision.[72] A difficulty arises, though, based on the greater cognitive load required to employ System 2—it is easily overwhelmed.[73] In fact, a person fully engaging their System 2 process can only do so for a very short time.[74] This results in a series of cognitive limitations that "typically manifest as the inability to focus attention."[75] The cause of these limitations is that effortful mental processes disrupt each other, while effortless ones do not. Thus, System 1 thinking tends to proliferate when we are under significant cognitive load, which is anytime we are facing non-routine decision, and System 2 thinking tends to narrow in scope.[76]

This last point is critically important to understanding ethical decision-making. While most of us believe that we make decisions carefully and deliberately, the behavioral research demonstrates that can only be true for a small subset of decisions.[77] That is because there is simply not enough mental energy to give every decision the full reflection it requires. So instead of making all or most of our decisions through System 2, studies show that System 1 is dominant.[78]

We are left, then, with a thinking system compromise. At best, System 2 can operate only as a watchful monitor, fully engaging when important mental tasks arise or when it is needed to correct a System 1-driven mental error.[79] But like all monitoring systems, System 2 cannot

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71. *See* Daniel Kahneman, *A Perspective on Judgment and Choice: Mapping Bounded Rationality,* 58 AM. PSYCHOL. 697, 699 (2003) [hereinafter *Perspective*] ("System 1 generate[s] *impressions* of the attributes of objects of perception and thought . . . . The label *intuitive* is applied to judgments that directly reflect impressions—they are not modified by System 2.").

72. RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 20 (2008).

73. *Id.* at 457.

74. KAHNEMAN, *supra* note 63, at 31.

75. JÄRVILEHTO, *supra* note 56, at 26.

76. *Id.*

77. *Bounded Rationality*, *supra* note 62, at 1467.

78. *See Bounded Rationality*, *supra* note 62, at 1467 ("Judgments and choices are normally intuitive, skilled, unproblematic, and reasonably successful."); *see generally* JONATHON HAIDT, THE HAPPINESS HYPOTHESIS: FINDING MODERN TRUTH IN ANCIENT WISDOM (2006) (using the image of a rider on an elephant to explain the relationship between System 1 and 2 thinking. The rider is System 2, which tries to steer the more powerful System 1 elephant under him, often unsuccessfully).

79. KAHNEMAN, *supra* note 63, at 44 ("One of the main functions of System 2 is to monitor and control thoughts and actions 'suggested' by System 1, allowing some to be

catch everything; some important decision tasks slip through the cracks. These decisions might be made correctly by the automatic System 1, but they also might be made by simple associative memory, with all its biases, heuristics, and other mental shortcuts baked in. This is what causes us to err in decision-making even when we know—or could figure out with little effort—what is right.[80]

3. Dual System Thinking and Ethical Decision-making

Although dual system theory was developed independently of moral decision-making, it has much to offer those trying to understand ethical decisions and behavior. In fact, dual system theory serves as the foundation for the central findings of behavioral ethics explained above—that individual ethical decision-making is bounded, even when we intend to behave ethically.[81]

No one has explored this subject quite so thoroughly as Yuval Feldman. His exhaustive review of behavioral science research, including that of behavioral psychology, behavioral economics, and behavioral ethics, leads to two important conclusions. The first is that moral judgments, a component of ethical decision-making, are made primary through System 1.[82] Citing the work of Jonathon Haidt, who is the leading scholar in the area, Feldman explains that while there is a "contentious debate still rag[ing]," it appears System 1 may undercut the thoughtful System 2 consideration of moral judgments.[83]

The second conclusion is not so contested. Behavioral ethics researchers have come to believe that self-interest is associated with the automatic thinking system.[84] This was first demonstrated in studies of conflict of interest, which found that "self interest tends to operate via automatic processes."[85] Additional studies show that a higher level of cognitive control is necessary for ethical behavior—acting unethically is much easier on "executive resources necessary to identify an act as

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expressed directly in behavior and suppressing or modifying others.").

80. KAHNEMAN, *supra* note 63, at 35–37.

81. FELDMAN, *supra* note 54, at 33–35.

82*. Id.* at 44.

83*. Id.* (citing Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814 (2001) and Fiery Cushman, Liane Young & Marc Hauser, *The Role of Conscious Reasoning and Intuition in Moral Judgment: Testing Three Principles of Harm*, 17 PSYCHOL. SCI. 1082 (2010)).

84. FELDMAN, *supra* note 54, at 44 (citing Don A. Moore & George Loewenstein, *Self-Interest, Automaticity, and the Psychology of Conflict of Interest*, 17 SOC. JUST. RES. 189, 193 (2004)).

85. Moore & Loewenstein, *supra* note 84, at 195.

immoral or unethical."[86]   This is consistent with a host of studies suggesting that when System 1 is activated, particularly do to cognitive depletion or time pressures, people behave less ethically than they otherwise would.[87]   Taking all the research together, it seems clear that we "grant[] System 1 the leading role" when making ethical decisions, causing us to initially "prefer outcomes that benefit ourselves."[88]   In other words, making unethical decisions, or at least ones that preference our own wellbeing over others, is likely our default decision-making condition. This is termed the "automaticity of self interest."[89]

But as we know from dual system theory more generally, that is not the end of the story.   Once System 2 has been activated, prompting thoughtful reflection, people often do "choose to behave in an ethically appropriate manner."[90]   Just as in other decision-making contexts, behavioral ethics researchers have found that System 2 can act as a watchful ethical monitor, jumping in to control the automatic self-interest each of us possess.[91]   However, this monitoring function has significant limits.   It works best when cognitive load is low and individuals are able to fully consider the ethical ramifications of a decision—these are the conditions in which we are most likely to act consistent with our morals.[92] When cognitive load is high, we become our less ethical selves.[93]

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86. Francesca Gino et al., *Unable to Resist Temptation: How Self-Control Depletion Promotes Unethical Behavior*, 115 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 191, 191 (2011).

87. FELDMAN, *supra* note 54, at 45.

88. Yuval Feldman, *Behavioral Ethics Meets Behavioral Law and Economics*, *in* THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 8 (Eyal Zamir & Doron Teichman eds., 2014); Minette Drumwright et al., *Behavioral Ethics and Teaching Ethical Decision Making*, 13 DECISION SCI. J. INNOVATIVE EDUC. 431, 433 (2015); Nicholas Epley & Eugene M. Caruso, *Egocentric Ethics*, 17 SOC. JUST. RES. 171, 179 (2004).

89. FELDMAN, *supra* note 54, at 3, 7 (calling the "automaticity of self-interest" one of behavioral ethics' basic tenets).

90. *Id.* at 8. *But see* David G. Rand et al., *Spontaneous Giving and Calculated Greed*, 489 NATURE 427 (2012) (finding that cooperation is intuitive and automatic, possibly because cooperative heuristics are developed in daily life where cooperation is typically advantageous).

91. *Bounded Rationality*, *supra* note 62, at 1467.

92. Moore & Loewenstein, *supra* note 84, at 193.

93. FELDMAN, *supra* note 54, at 8; Moore & Loewenstein, *supra* note 84, at 193.

C. Rationalizations as the Link Between Unethical Decision-Making and Unethical Behavior

The central findings of behavioral ethics, as well as the decision-making science underlying it, has significant ramifications for companies trying to predict and mitigate the conduct risk generated by its employees. Increasing System 2 thinking related to ethical decisions would seem to be an obvious path toward increasing GRC effectiveness. Unfortunately, however, the story is a bit more complicated. That is because System 2 thinking itself is part of the cause of unethical and illegal acts in business.

To understand this, we have to turn to those researchers even more steeped in the study of unethical behavior than behavioral ethicists: criminologists. As far back as the 1940s, criminologists studying white collar and organizational crime have theorized how offenders move from unethical decision-making to unethical behavior.[94]

In his classic study of embezzlers, criminologist Donald Cressey found that three conditions are necessary for an occupational crime to occur. First, an individual must possess a non-shareable financial problem, i.e., a problem the person feels cannot be solved by revealing it to others.[95] Second, the individual must believe that the problem can be solved in secret by violating a trust.[96] Trust, of course, is essential to the operation of all organizations—the entire principle-agent and employer-employee relationship is built upon it.[97] Third, the individual must verbalize the relationship between the non-shareable problem and the unethical or illegal solution in "language that lets him look on trust violation as something other than trust violation."[98] Put another way, the individual conducts an internal dialogue that "reasons" the trust violation as acceptable. The paradigmatic example is a bank teller convincing himself that he is only "borrowing" the embezzled funds and will pay them back.[99] A more modern example is suggesting it is alright to violate campaign laws because

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94. *See, e.g.*, Edwin H. Sutherland, *White-Collar Criminality*, *in* DELINQUENCY, CRIME, AND SOCIAL PROCESS 349 (Donald R. Cressey & David A. Ward, eds. 1969) (including a reprint of an article drafted in 1940 by Sutherland, who is considered the "Godfather" of white collar crime, regarding causal theories of white-collar criminality).

95. *See* Donald R. Cressey, *The Respectable Criminal*, 3 CRIMINOLOGICA 13, 14–15 (1965) (noting that while this sounds sophisticated, it usually is not; the problem could be anything from gambling debts to business losses, anything that matters from "the psychological perspective of the potential offender").

96. MARK M. LANIER & STUART HENRY, ESSENTIAL CRIMINOLOGY 168 (3d ed. 2004).

97. JOHN R. BOATRIGHT, ETHICS AND CONDUCT OF BUSINESS 33–34 (2012).

98. Cressey, *supra* note 95, at 15.

99. *Id.*

all of Congress does it.[100]

This last step, what criminologists call "verbalizations," has been called "the crux of the problem" of white collar and corporate crime.[101] Criminologists do not view verbalizations as simple, after-the-fact excuses that offenders use to relieve their culpability upon being caught. Instead, they see verbalizations as "vocabularies of motive," words and phrases used by offenders that label unethical behavior as appropriate.[102] Importantly, this means that an offender's rationalizations are created before the unethical or illegal behavior occurs. "The rationalization is [the offender's] motivation"—it not only justifies his behavior to others, but it makes the behavior intelligible, and therefore actionable, to himself.[103] Thus, rationalizations permit behavior to proceed that would otherwise be unacceptable to an offender. Table 2 sets forth the eight most common rationalizations used by white collar offenders and examples of corresponding verbalizations.[104]

Table 2: White collar rationalizations

Rationalization	Definitional example
Denial of Responsibility	*"I am not a criminal, what I did was an accident"* or *"it was an emergency, I needed it"*
Denial of Injury	*"nobody got hurt"* or *"I did not steal, I just borrowed"*
Denial of the Victim	*"I am the real victim"* or *"they got what they deserved"*
Condemning the Condemners	*"the government is corrupt or unfair"* or *"the law and the government are unjust"*
Appeal to Higher Loyalties	*"I did it for the company"* or *"I always help out a friend"*
Metaphor of the Ledger	*"I've done more good than bad in my life"*
Claim of Entitlement	*"I deserve this"* or *"I have earned the right to have this"*
Claim of Relative Acceptability/Normality	*"there are others worse than me"* or *"everybody else is doing it"*

The concept of rationalizations is so powerful—and so critical to understanding unethical and illegal employee acts—because it provides the bridge between individual ethical decision-making and unethical behavior.

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100. Matthew Choi, *'I Think I'd Take It': Trump Says He Might Not Report Foreign Help to FBI in 2020*, POLITICO (June 12, 2019, 7:32 PM), https://www.politico.com/story/20 19/06/12/trump-fbi-foreign-information-1362788 [https://perma.cc/VWX8-Z7ST].

101. Cressey, *supra* note 95, at 15.

102. *Id.*

103. DONALD R. CRESSEY, OTHER PEOPLE'S MONEY: A STUDY IN THE SOCIAL PSYCHOLOGY OF EMBEZZLEMENT 94–95 (1973).

104. The definitional examples are drawn from Paul Michael Klenowski, *"Other People's Money": An Empirical Examination of the Motivational Differences Between Male and Female White Collar Offenders* 56, 67 (May 2008) (unpublished Ph.D. dissertation, Indiana University of Pennsylvania) (on file with author) (internal citations omitted).

Behavioral ethics research suggests that we default toward unethical decision-making, and therefore unethical action, because we are driven by self-interested System 1 thinking.[105] At the same time, criminological research tells us that we come up with ways to convince ourselves—consciously and subconsciously—that we are acting ethically.[106] This is System 2 thinking justifying our System 1 conclusions. Our supposed watchful ethical monitor is not just asleep at the switch, but is actively working against us—or, more accurately, working for our unethical selves.

Why exactly this occurs is unclear, but researchers suggest that we have developed this mechanism to accommodate the countervailing aspects of living in a "hypersocial" world, one that rewards self-interested behavior but also social cooperation.[107] The rationalization process redefines how we look at our own behavior so as to square our self-perception as a "good person" with the self-interested unethical or illegal behavior we are contemplating.[108] In a way, rationalizations trick the System 2 reflective thinking process that would otherwise intervene to contain the "automaticity of self interest."[109] This is not a product of intentional amorality for most people; instead, they are blind to the "correction their mind applies as it weighs ethical concerns against other motives."[110]

D. The Spread of Unethical Behavioral within Organizations

The above suggests that companies trying to proactively use GRC processes to lessen conduct risk are in a somewhat untenable position. If the behavioral ethics and criminological research suggest that both System 1 and System 2 are feeding unethical decision-making and behavior, companies would appear to be fighting an uphill battle against employee wrongdoing and the risk it creates. Unfortunately, the picture gets worse

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105. FELDMAN, *supra* note 54, at 44.

106*. Id.* at 17; Cressey, *supra* note 95, at 15.

107. Elizabeth Kolbert, *That's What You Think: Why Reason and Evidence Won't Change Our Minds*, THE NEW YORKER, at 66 (Feb. 27, 2017), https://www.newyorker.com/magazine/2017/02/27/why-facts-dont-change-our-minds [https://perma.cc/JKB9-6KMT] (citing HUGO MERCIER & DAN SPERBER, THE ENIGMA OF REASON: A NEW THEORY OF HUMAN UNDERSTANDING (2017)); *see also* Jonathon Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814, 818 (2001) (describing that moral reasoning is an effortful process, engaged in after a moral judgment is made, in which a person searches for arguments that will support an already-made judgment).

108. Vikas Anad et al., *Business as Usual: The Acceptance and Perpetuation of Corruption in Organizations*, 18 ACAD. MGMT. EXECUTIVE 39, 40–43 (2004).

109. FELDMAN, *supra* note 54, at 3, 7 (calling the "automaticity of self-interest" one of behavioral ethics' basic tenets).

110. BULGARELLA, *supra* note 39, at 7.

before it gets better. That is because behavioral ethics research also suggests that unethical behavior can spread easily within companies through social and organizational networks, ratcheting up the conduct risk companies face.

We have long known that social and organizational ties can have significant impacts on ethical behavior.[111] But only recently have we come to understand the behavioral mechanisms behind those impacts. One group of researchers coalescing around Francesca Gino has published a series of studies addressing whether being exposed to the unethical behavior of others to which you have an association increases dishonesty.[112] Gino and her colleagues found that student participants who observed fellow students cheat on a task were much more likely to cheat themselves.[113] Another study found that when student participants felt "psychologically close" to cheating students, the participants cheated in higher numbers themselves and viewed selfish behavior as "less unethical or wrong."[114] Taken together, these and other studies suggest that "people copy the behavior of in-group members," using that behavior to justify and rationalize their own unethical conduct.[115]

These findings raise an obvious question, though: how psychologically close must one be to those in-group members to have an effect on ethicality? If psychological closeness is limited to familial connections, for example, that may not have significant application in most organizational settings. The answer, however, is that even scant psychological closeness is enough to influence ethical decision making. In the studies referenced above, the only thing the cheating students had in common was seemingly attending the same college—they did not personally know each other.[116] Cheating rates increased when the study participants observed a fellow student cheat who was simply wearing a t-shirt with the same college logo as their own college.[117] Even more

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111.   FELDMAN, *supra* note 54, at 48; Klebe Treviño et al., *supra* note 21, at 138–41.

112.   Francesca Gino, Shahar Ayal & Dan Ariely, *Contagion and Differentiation in Unethical Behavior: The Effect of One Bad Apple on the Barrel*, 20 PSYCHOL. SCI. 393 (2009); Francesca Gino & Adam D. Galinsky, *Vicarious Dishonesty: When Psychological Closeness Creates Distance from One's Moral Compass*, 119 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 15 (2012).

113.   Gino, Ayal & Ariely, *supra* note 112, at 396–97.

114.   Gino & Galinsky, *supra* note 112, at 23.

115.   Cilea Moore & Francesca Gino, *Ethically Adrift: How Others Pull Our Moral Compass from True North, and How We Can Fix It*, 22 RES. ORGANIZATIONAL BEHAV. 53, 57 (2013).

116.   Gino, Ayal & Ariely, *supra* note 112, at 396.

117.   *Id.* ; *see also* Francesca Gino, Jun Gu & Chen-Bo Zhong, *Contagion or Restitution? When Bad Apples Can Motivate Ethical Behavior*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 1299, 1299–1300 (2009) (relating a similar experiment that tested selfish behavior).

striking, trivial similarities such as sharing a birthday can create the same closeness that leads to increased unethicality.[118] This suggests a close co-worker relationship, or even just employment by the same company, could similarly impact ethical decision-making.[119]

Such insights into how social dimensions impact ethical decision-making take on special significance when considering the networks—social and organizational—that exist within companies. If close connections and in-group dynamics influence unethical behavior, that means employees who are joined by psychological closeness, even if it is very slight, may be more prone to commit violations of laws or norms when others around them are doing so.[120] And when these individuals are linked together in a network, the number and harm of those violations increases.[121] In other words, individual wrongdoing can be "contagious," spreading quickly through an organizational network in unexpected ways.[122]

Sociologist and network theorist Mark Granovetter's study of how riots occur supports this proposition. Granovetter posited that potential rioters—the persons in a crowd milling around and witnessing the group's actions—have a "threshold" for joining.[123] This threshold differs for each participant based on their own ethical decision-making, i.e., the level at which their mind allows potential bad behavior to be operationalized. Granovetter created a model that assigned 100 potential rioters a number from 0 to 99, which corresponded to their individual thresholds—the person with the zero threshold would begin rioting all on his own, the person with the 1 threshold would see one person rioting and join in, on and on until the last person joined.[124] This model suggested that riots would "grow like wildfire, eventually sucking in even people with very high [individual] thresholds."[125] But the model also suggested that if just

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118. Gino & Galinsky, *supra* note 112, at 23–24.

119. This is consistent with research indicating two people reviewing a transaction, the so-called four-eyes principle, may not be any more beneficial than a single person audit. *See* Johann Graf Lambsdorff, *Preventing Corruption by Promoting Trust: Insights from Behavioral Science* 1, 5 (Univ. of Passau, Faculty of Bus. and Econ., Working Paper No. V-69-15, 2015), http://hdl.handle.net/10419/125558 [https://perma.cc/F2GC-WZBL].

120. Gino & Galinsky, *supra* note 112, at 23; *see also*, Kristin Smith-Crowe & Danielle E. Warren, *The Emotion-Evoked Collective Corruption Model: The Role of Emotion in the Spread of Corruption Within Organizations*, 25 ORG. SCI. 1124, 1165 (2014) (providing a model showing how corruption might spread through emotion even to well intentioned and morally engaged population).

121. Gino & Galinsky, *supra* note 112, at 23.

122. Gino, Ayal & Ariely, *supra* note 112, at 398.

123. Mark Granovetter, *Threshold Models of Collective Behavior*, 83 J. SOC. 1420, 1422 (1978).

124*. Id.*

125. MARK BUCHANAN, NEXUS: SMALL WORLDS AND THE GROUNDBREAKING SCIENCE OF

one person early on had a slightly higher threshold, say a 6 instead of a 4, the riot would end before it gained momentum because the next threshold would never be reached.

This simple model led Granovetter to better understand actual riot behavior, in which the "equilibrium number of rioters" does not build uniformly, but rather appears to jump up drastically at a certain point.[126] He found that riot size increased by a factor of seven—an explosion more than a wildfire—after crossing a seemingly arbitrary point.[127] Granovetter suggested that this phenomenon was caused by the relationships between the active and potential rioters; he believed friendships were lowering individual thresholds to joining the riot. Accordingly, if some number of people in the crowd were friends with those rioting, the overall riot participants would skyrocket along with the harm caused. Granovetter called this the "bandwagon" effect.[128]

This finding is consistent with the behavioral ethics research on psychological closeness. Granovetter's modeling shows how individual ethical decision-making, as influenced by personal relationships, creates significant and oftentimes unexpected conduct risk.[129] When there is an in-group relationship creating psychological closeness between a wrongdoer and others in the group, the others' thresholds to unethical behavior are lowered. And if one or more of the wrongdoers is an important part of a network of related individuals—they are the center of the group, so to speak—they possess an outsized ability to lower many individual thresholds all at once. This spreads bad behavior in an unpredictable and highly volatile manner—it becomes contagious and explodes because of the bandwagon effect. Thus, a company's social and organizational network—and who within it is making unethical decisions and committing unethical acts—can greatly impact the ethicality of the entire organization.[130] This is how a few unethical decisions by key individuals can translate into systemic behavioral ethics risk for a company.

Consider the story of Hacienda. Investigations of the company indicate that key decision-makers had been engaged in unethical, and possibly illegal, behavior for years. The longtime CEO "had been accused of sexual harassment numerous times by employees since 2006."[131] Yet he

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NETWORKS 107 (2002).

126. Granovetter, *supra* note 123, at 1428.

127*. Id.* at 1425.

128*. Id.* at 1429 (describing two factors that have a role in changing the effects of threshold distributions, including "social structure").

129*. Id.*

130*. See* Gino, Ayal & Ariely, *supra* note 112, at 397 (suggesting unethical behaviors such as cheating, stealing, and dishonesty are "contagious" within business organizations).

131. Kelly, *supra* note 4.

remained in the position until the patient assault. At the same time, Hacienda's board chairman appears to have allowed conflicts of interest to go unchecked for years. For example, he "brokered health insurance for roughly 800 Hacienda employees through his private company for decades, reaping lucrative commissions on the contracts."[132] In addition, at least four children of board members were hired by the company, some in managerial and senior executive roles.[133]

While these practices may not be illegal, they are certainly unethical. As unethical decisions are made in an organization, especially by leaders who come into contact with and influence all employees in the organization's network, unethicality spreads because the thresholds for wrongdoing are lessened. It is easier for everyone to rationalize their questionable behavior. This does not mean the chairman and CEO are directly responsible for the patient assault, but it does explain how an organization ostensibly focused on patient care could create an atmosphere—a culture—allowing it to happen. If those in charge do not appear to care about putting patient care above their own interests, why would a group of hospital staff? And as staff see each other engage in unethical behavior, the thresholds for doing wrong decrease. In this way, the unchecked automaticity of self-interest by one group creates conduct risk for another—risk that ultimately can overcome whatever GRC functions are in place. At Hacienda, this allowed a terrible injury to a helpless woman.

II. BEHAVIORAL ETHICS RISK: MANAGING A NEW PARADIGM

The above offers a more accurate—and arguably more challenging—paradigm of GRC, one that is organized around individual unethical decision-making and how it may spread in an organization. This Article suggests it is a significant cause of compliance failures and an important driver of conduct risk facing companies, which highlights the question posed at the outset: how can business leaders and compliance professionals prospectively manage this newly identified risk? How can we prevent bad things from happening at Hacienda or any other company?

The short answer is that behavioral ethics risk can be managed through the same means by which it originates. By understanding,

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132. Robert Anglen, *Rape at Health-Care Facility Reveals Questionable Deals, Nepotism by Board Leaders*, AZCENTRAL (Feb. 19, 2019, 9:29 AM), https://www.azcentral.com/story/news/local/arizona-investigations/2019/02/19/hacienda-healthcare-board-where-patient-raped-history-questionable-deals-nepotism-thomas-pomeroy/2864358002/ [https://perma.cc/YP2F-2AKP].

133*. Id.*

targeting, and even harnessing the ethical decision-making processes occurring at the individual employee level, companies can increase compliance and build ethical culture. That is to say, they can increase GRC effectiveness from the inside-out, helping employees understand and adapt their own ethical decision-making to foster positive behavior. As individual ethical transgressions are lessened, so is the spread of bad conduct, allowing ethical culture to grow organically within the organization—all of which lessens behavioral ethics risk. While there are no quick fixes, the following offers a series of behavioral practices that companies can employ as part of their GRC efforts.

A. Assessing Individual Employees' Behavioral Ethics Risk

Companies can begin managing behavioral ethics risk at the hiring process. This occurs through two different, yet related methods. The first is by screening for conduct risk.[134] Most companies use educational background, employment history, and in-person interviews to select candidates, and then screen for past bankruptcies or criminal violations as a final check. But this does little to identify all but the most egregious wrongdoers, and the common metrics are highly imperfect indicators of future unethical decision-making.

Instead, companies can explicitly screen for propensity to make ethical decisions. For example, prospective or probationary employees can be asked to take the Defining Issues Test, which questions respondents on how they would address a series of moral vignettes, providing an ethicality assessment based on the principle of justice.[135] Another assessment, the Mach IV, determines a person's propensity toward Machiavellian-type behavior, or the lack of concern with conventional morality.[136] And a third, the Cognitive Reflection Test, measures how likely someone is to fall prey to "impulsive erroneous responses" that may signal a lack of System 2 thinking.[137] These diagnostic tools have been around for years and are well validated; yet they have not been widely used in business to identify conduct risk.

In addition, researchers have recently developed a test to measure rule

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134. For a general discussion of misconduct risk as it relates to the financial crisis, see Christina P. Skinner, *Misconduct Risk*, 84 FORDHAM L. REV. 1559 (2016).

135. Kelly Richmond Pope, *Measuring the Ethical Propensity of Accounting Students: Mach IV Versus DIT*, 3 J. ACAD. ETHICS 89, 89–90 (2005).

136*. Id.* at 90.

137. Shane Fredrick, *Cognitive Reflection and Decision Making*, 19 J. ECON. PERSP. 25, 27 (2005).

orientation.[138] This tool may be particularly useful for companies because it assesses how an individual considers rules—whether rules should be followed in a rigid manner or are subject to exception.[139] In other words, there is now a diagnostic that measures our feelings about rules and our propensity to rationalize rule breaking—essentially, what a person's threshold to unethical or illegal behavior might be.[140] While companies must be careful how they collect and use diagnostic information, these assessments offer a baseline of individual behavioral ethics risk, a critical compliance metric under this new GRC paradigm.[141]

The second method to begin managing behavioral ethics risk at the hiring stage relates to framing. Framing is relatively well-understood at this point, *i.e.*, that how something is described impacts its perceived value.[142] According to the research, when people contemplate an uncertain risk, they are heavily influenced by the frame in which that decision is made.[143] For example, framing a decision as one that may cause loss means it will be chosen less than one framing the same decision as causing a type of gain.[144]

Goldman Sachs uses framing, and a good bit of fear-driven aversion to loss, to set the tone for ethical decision-making and culture at the firm. Goldman invites its analyst interns seeking full-time employment to attend a rigorous training and orientation program.[145] Firm personnel warn the

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138*. See* Adam Fine et al., *Rule Orientation and Behavior: Development and Validation of a Scale Measuring Individual Acceptance of Rule Violation*, 22 PSYCHOL. PUB. POL'Y & L. 314, 323 (2016) (employing a scale measuring tool to predict law violation).

139*. Id.*

140*. Id.* at 315.

141. *See* FELDMAN, *supra* note 54, at 136 (describing Walmart's use of a screening test for new hires that predicts discriminatory behavior).

142. The most readily understood type of framing is called "attribute framing," when "a product or option is described using a positive or negative attribute label." Chris Janiszewski, Tim Silk & Alan D. J. Cooke, *Different Scales for Different Frames: The Role of Subjective Scales and Experience in Explaining Attribute-Framing Effects*, 30 J. CONSUMER RES. 311, 312 (2003).

143. KAHNEMAN, *supra* note 63, at 364.

144. *Id.* at 364–66. A good example of this is the following: If you were suffering from a serious health condition and trying to determine whether you would agree to a treatment, your doctor might say, "Of one hundred patients who have this condition, ninety are alive in five years." That would make you feel pretty good about the odds, and you would be much more likely to move forward with the treatment. But, if the doctor said, "Of one hundred patients who have this condition, ten are dead after five years," you would not. It is the same objective information, so a rational decision maker should not be influenced differently. Yet they are because framing the decision around death creates a negative reference, which the automatic System 1 judges the decision against. *See also* THALER & SUNSTEIN, *supra* note 72, at 36–37 (describing framing effects and providing numerous examples).

145. Julia La Roche, *This Is How the Goldman Sachs Analysts Who Got Fired Were*

analysts repeatedly that cheating on skills tests is not tolerated.[146] In one test, which is not particularly difficult, interns are told they cannot conduct outside research, yet they are given access to computers with Internet connections.[147] This sets up a clear test of whether an intern's watchful monitor can govern the obvious advantages of unethical behavior, the type that could be easily rationalized away. Recently, Goldman dismissed twenty interns from its program for Googling answers.[148] Dismissing the violators not only eliminated future conduct risk emanating from the rule violators, but it also helped establish the proper ethical frame—building a culture of honesty is paramount at the firm and a great loss will occur to those who ignore firm values for short-term gain.[149]

B. Identifying and Monitoring Employees Posing Heightened Behavioral Ethics Risk

Once an employee joins a company, efforts should be directed at identifying and monitoring problematic ethical decision-making. Companies should start by identifying those individuals in the company's network who possess outsized ethical influence. These are the employees that, by virtue of their position in the company's social or organizational hierarchy, "tie an entire . . . [organizational] network together."[150] As explained above, these employees have the ability to generate significant conduct risk and spread it throughout the firm.[151]

How are these employees identified? The company's organizational chart is a useful starting point because it provides a sense of professional reach, but it only goes so far in showing ethical influence. For example, as seen with the recent Wells Fargo fake accounts scandal, the CEO was not the origin or driver of the unethical behavior.[152] The true influencers at the

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Cheating, BUS. INSIDER (Oct. 19, 2015), http://www.businessinsider.com/goldman-sachs-an alysts-fired-for-cheating-2015-10 [https://perma.cc/BK9Z-CWUA].

    146*. Id.*

    147*. Id.*

    148*. Id.*

    149. See John C. Hollwitz & Donna R. Pawlowski, *The Development of a Structured Ethical Integrity Interview for Pre-Employment Screening*, 34 J. BUS. COMM. 203, 214–16 (1997) (outlining procedures for structured pre-employment ethics interviews).

    150. BUCHANAN, *supra* note 125, at 114.

    151. Gino, Ayal & Ariely, *supra* note 112, at 397.

    152*. See* INDEPENDENT DIRECTORS OF THE BOARD OF WELLS FARGO & COMPANY SALES PRACTICES INVESTIGATION REPORT 50 (Apr. 10, 2017), https://www08.wellsfargomedia.com /assets/pdf/about/investor-relations/presentations/2017/board-report.pdf [https://perma.cc/JR 64-HL66] (outlining the factors that culminated in the fake account scandal). This is true of a number of corporate scandals. *See e.g.*, Peter Eavis, *How Much Could the 1MDB Scandal Cost Goldman Sachs?*, N.Y. TIMES (Dec. 9, 2018), https://www.nytimes.com/2018/12/09/bu

bank were a few regional managers connected to the head of the community banking division; they were the "hubs" of the network through which behavioral compliance risk spread.[153]   Accordingly, compliance personnel need to identify those in the company who are the true catalysts of potentially unethical behavior. While most discussions of corporate culture focus on "tone at the top," that may not be where significant behavioral ethics risk lies.[154]

But sometimes it is. That would very much appear to be the case at Hacienda, where both the CEO and a key board member were engaged in unethicality. When this is the case, it is very difficult for conduct risk to be lessened and GRC practices improved. That is because every message concerning culture and compliance from leadership is at odds with what others at the company know: that the rhetoric is meaningless. This feeling breeds System 2 rationalizations, particularly ones focused on relative acceptability or normality.[155] Only the terrible harm to a patient and the extreme outside scrutiny appear to have caused the other board members to reevaluate their acquiescence to the CEO and his contemporaries.[156]

But such behavioral risk was also likely present in smaller pockets at Hacienda.   Otherwise, how is it that a team of caretakers, security personnel, and other staff could so blatantly fail in their roles? Each of the employees having contact with the patient had a supervisor, team leader, or co-worker who set the norms of conduct in their various spheres. If those people were making unethical decisions—and it appears they were, given that properly caring for the incapacitated is an ethics-laden act—then that conduct could easily spread. It likely became the norm at Hacienda to go through the motions with regard to patient care, allowing the automaticity of self-interest to take precedent over the interests of others.

Once it is determined who in the organization is an ethical influencer,

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siness/dealbook/goldman-1mdb-penalties.html [https://perma.cc/T3FZ-D5SZ] (indicating that the bribery scandal is likely localized to a few, powerful players within the bank tied to a single Malaysian financer).

    153. BUCHANAN, *supra* note 125, at 85.

    154*. See, e.g.*, Hon. Patti B. Smith, Chair, U.S. Sentencing Comm'n, Remarks at the Twelfth Annual Compliance and Ethics Inst. (Oct. 7, 2013), https://www.ussc.gov/sites/defa ult/files/pdf/training/organizational-guidelines/special-reports/saris-remarks-annual-compliance-and-ethics-institute.pdf   [https://perma.cc/69YM-49B2] ("[T]he guidelines emphasize the importance of a 'tone from the top' and the need for internal corporate monitoring and auditing as a means of deterring organizational crime."); Benjamin van Rooij & Adam Fine, *Toxic Corporate Culture: Assessing Organizational Processes of Deviancy*, 8 ADMIN. SCI. [1], [27] (2018) ("Toxic culture [is] not just a matter of one bad CEO, one bad set of incentives, or the tone at the top. Certainly, the fish can rot from the head, but that certainly is not the only way it rots.").

    155*. Criminalization*, *supra* note 6, at 1258.

    156*. See* Kelly, *supra* note 4 (describing board member resignations).

they should be assessed for individual behavioral compliance risk. The diagnostic tools discussed earlier are a good start, but assessing risk is dynamic and multifaceted. Fortunately, conducting risk assessments as part of the GRC function is familiar to most companies.[157] However, companies must keep in mind that they are trying to identify ethical decision-making risk, not the more familiar business process and enterprise risk.[158]

One company taking the correct approach is Morgan Stanley, who now asks its risk and compliance officers to evaluate "material risk-takers."[159] For example, a trader that frequently hits trading limits, misses compliance trainings, or fails to take mandatory holidays imposed to uncover fraud would raise concern. Once identified, such an employee would be monitored for risk-taking behavior, and how they managed it would factor into promotion and compensation decisions. This could lead to bonus reductions or even termination for cause.[160]

Companies that routinely deal with safety concerns, such as those in the manufacturing space, can also provide positive examples. For instance, Alcoa in Russia was able to change its entire culture, including that of bribery and corruption, by focusing on improvements in safety at its aluminum stamping plants.[161] Once key employees understood that the company was serious about improving their lives by making sure that they would return home safely each day—in part by more heavily monitoring and then dismissing chronically unsafe workers—those employees adopted a culture of rule following.[162]

Ideally, however, a behavioral risk evaluation would consider many other factors that impact ethical decision-making, and do so more prospectively. Behavioral ethics research has demonstrated that factors related to stress and depleted mental resources cause ethical decision-making shortcuts, so assessments should consider if employees are under such strain—caused either by personal issues or company pressures.[163]

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157. *See* Robert C. Bird & Stephan Kim Park, *Turning Corporate Compliance into Competitive Advantage*, 19 U. PENN. J. BUS. L. 285 (2017) (discussing corporate approaches to identifying legal, regulatory, and compliance risk).

158. *Id.*

159. Olivia Oran, *Wells Fargo Scandal Reignites Debate about Big Bank Culture*, REUTERS (Sept. 28, 2016), https://www.reuters.com/article/us-wells-fargo-accounts-culture-analysis/wells-fargo-scandal-reignites-debate-about-big-bank-culture-idUSKCN11Y1S1 [https://perma.cc/953C-N4U8].

160. *Id.*

161. BRAD AGLE, AARON MILLER & BILL O'ROURKE, THE BUSINESS ETHICS FIELD GUIDE 162–64 (2016).

162. *Id.*

163. *See* Francesca Gino et al., *Unable to Resist Temptations: How Self-Control Depletion Promotes Unethical Behavior*, 115 ORGANIZATIONAL BEHAV. & HUM. DECISION

Another evaluative tool is to identify employees who regularly rationalize. While this may be more difficult to objectively monitor, one way to assess the propensity to rationalize is to hold employee roundtables in which rule breaking and ethical dilemmas are discussed. Fairly quickly, employees will offer a host of rationalizations justifying various behaviors. Parsons, an international engineering company, hosts an internal website where it poses hypothetical ethics problems and asks employees to vote on how they should be resolved; the responses indicate what rationalizations are being employed by individuals and groups.[164] Finally, although counterintuitive, employees engaged in creative tasks are at heightened ethical risk.[165] Compliance personnel should assess business units and job categories where creativity is expected and add that to the behavioral risk assessment schedule. Specific behavioral risk factors will vary depending on an individual's place in an industry, a company, a business unit, and a sub-group—and will change over time—but thoughtful compliance professionals should be able to craft a behavioral risk matrix that considers many of these factors.[166]

For the employees who do exhibit heightened behavioral ethics risk, and even more so for those that are also ethical influencers, the company should allocate disproportionate compliance resources toward them. Such employees should receive more training, more monitoring, and be subject to more investigative inquiries. Put bluntly, compliance officers should be on a first-name basis with these employees. In addition, compliance tools should be tailored to these high-risk employees. Although it is framed as a management practice, global equipment and engineering consulting firm Barry-Wehmiller provides individualized ethics and compliance programing to its employees.[167] The company's CEO meets with each employee to understand their values, interests, goals, and personal and professional challenges. Employees are then slotted into an appropriate level of the firm's ethical leadership training curriculum.[168]

Processes 191 (2001) (finding that those without self-control resources were less likely to behave honestly). This, of course, requires companies to be introspective and honest about the pressures and incentives it is placing on employees.

164. Scott Killingsworth, *Modeling the Message: Communicating Compliance through Organizational Values and Culture*, 25 Geo. J. Legal Ethics 983 (2012).

165. Francesca Gino & Dan Ariely, *The Dark Side of Creativity: Original Thinkers Can Be More Dishonest*, 102 J. Personality & Soc. Psychol. 445 (2012).

166. *See* Roger Miles, Conduct Risk Management: Using a Behavioral Approach to Protect Your Board and Financial Services Business 37, 161 (2015) (explaining reference points that inform risk profile and listing five factors that increase conduct risk).

167. *See* Bob Chapman & Raj Sisodia, Everybody Matters: The Extraordinary Power of Caring for Your People Like Family 213–23 (2015) (explaining a company's employee-centered approach to business).

168. *Id.*

C. Mitigating Behavioral Ethics Risk

Regardless of an employee's ethical risk profile, every company's compliance program should be looking for opportunities to increase the ethical decision-making and behavior of its employees, officers, and directors. While most companies' programs attempt to educate and train employees on legal doctrines and company rules, this ignores the System 1 process that dominates ethical decision-making. It is simply unrealistic to expect employees to memorize a litany of complex rules, identify when those rules apply in complex and fast moving factual situations, and then harness their reflective thinking system to properly follow them. Not to mention also guarding against System 2 motivated reasoning.

A more fruitful approach is to aim compliance interventions at the inflection points where decision-making becomes behavior. Not only is this approach more consistent with behavioral theory, it recognizes the practicalities of "what actually happens" with employee thinking.[169] The idea is that companies must "frame [their] training around . . . specific, risky job tasks" to ensure unethical employee decision-making is properly targeted.[170] Doing otherwise "pushes all of the 'transfer' work to the employee," and transfer is the critical step in the application of learned knowledge.[171]

This can be done in simple and more complex ways. For example, a company could create a series of checklists that are task specific and directed at employee action. Broadcat, a startup compliance provider, has one called "Going Oversees On a Business Trip?" that contains check boxes for things such as getting company preapprovals for gifts and entertainment, securing computer files before travel, and carrying an ethics helpline phone number.[172] Although the checklist is simple and easy to understand, it is grounded in sophisticated behavioral science—it is a "precommitment device" for avoiding conduct risk. By committing to the company's antibribery provisions, and then being reminded of them while undertaking the task of overseas travel, employees are less likely to engage in risk-creating behavior when the temptation is highest.

On the more sophisticated side, JPMorgan uses proprietary software to monitor the email and telephone communications of its traders to ensure

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169. MILES, *supra* note 166, at 63.

170. RICARDO PELLAFONE, KEEPING COMPLIANCE SIMPLE 11, http://complianceandethics. org/wp-content/uploads/2016/10/Keeping-Compliance-Simple-Broadcat.pdf [https://perma. cc/6W53-G98D].

171. *Id.*; *see also* SUSAN AMBROSE ET AL., HOW LEARNING WORKS: 7 RESEARCH-BASED PRINCIPLES FOR SMART TEACHING (2010) (outlining seven different principles of teaching).

172. *Id.*

they "adhere to 'personal trading rules' and risk limits."[173] While this type of monitoring has been part of corporate compliance and risk management for years, JPMorgan's efforts are noteworthy because the bank's software algorithms attempt to predict unethical or illegal trading behavior and stop it before it occurs. Such "predictive monitoring" uses a series of alerts to nudge traders, and alert compliance staff, if they are about to violate a company or legal rule.[174]

Similarly, Starling Trust Services, another compliance-oriented startup focusing on the financial services sector, merges behavioral science, network theory, and machine learning to better understand and target organizational behavioral risk. By using the metadata of employee communications, Starling is able to identify groups of influence within a company and then build models of trust relationships based on that information.[175] From this, they can predict when trust is eroding in an organization, which may signal future unethical decision-making. And now, they are developing nudging technology to harness System 1 and 2 decision-making to combat the likely behavior proactively.[176]

Finally, not all behavioral ethics risk management strategies are aimed at stopping unethical behavior. Just as important is how a company fosters the ethical acts of its employees. Research shows that compliance and risk management messaging is more effective when it demonstrates that ethical behaviors are widely engaged in and supported in the organization.[177] The reason is likely related to how individuals rationalize their conduct. Positive compliance messaging of this type combats the notion that ethical decision-making is an isolated act, therefore to commit bad behavior is

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173. Portia Crowe, *JP Morgan Is Working on a New Employee Surveillance Program*, BUS. INSIDER (Apr. 8, 2015), http://www.businessinsider.com/jpmorgans-employee-surveillance-program-2015-4 [https://perma.cc/FY9R-3J43].

174. Hugh Son, *JP Morgan Algorithm Knows You're a Rogue Employee Before You Do*, BLOOMBERG (Apr. 5, 2015), http://www.bloomberg.com/news/articles/2015-04-08/jpmorgan-algorithm-knows-you-re-a-rogue-employee-before-you-do [https://perma.cc/S3P7-92MT].

175. Henry Engler, *Bank Culture Forum: Big Banks Gain More Understanding of Staff Conduct*, REUTERS (April 24, 2018, 8:09 PM), https://www.reuters.com/article/bc-finreg-bank-culture-forum-understandi/bank-culture-forum-big-banks-gain-more-understanding-of-staff-conduct-lack-common-standards-idUSKBN1HV27P [https://perma.cc/QS84-GD8G].

176. *Id.*; *see also* Julie DiMauro, *How to Find and Fix Behavioral 'Hot Spots,'* THE FCPA BLOG (Jan. 18, 2019, 8:08 AM), http://www.fcpablog.com/blog/2019/1/18/how-to-find-and-fix-behavioral-hot-spots.html [https://perma.cc/4FRF-B85Z] (explaining similar programs, albeit less high tech, at the Dutch National Bank and the Royal Bank of Scotland).

177. *See* Robert B. Cialdini et al., *Managing Social Norms for Persuasive Impact*, 1 SOC. INFLUENCE 3, 11–12 (2006); Lynn S. Paine, *Managing for Organizational Integrity*, 72 HARV. BUS. REV. 106, 111 (1994) (explaining that "[e]mployees may rebel against programs that stress penalties" and view compliance programs that do not address root causes of misconduct skeptically).

somehow normal.[178]   That means companies need to share genuine stories of their ethics and compliance successes, conveying the message that the majority of the company is committed to making ethical decisions.

One way to do so that takes advantage of network theory is to leverage ethical employees who are hubs of influence as "compliance ambassadors." This can take many forms. One is that these employees can be asked to identify gaps in compliance and "bring those issues back to HQ, with suggestions on how to fix them."[179]   This not only helps compliance officers who cannot anticipate every possible compliance risk, but it also strengthens in-group ethical behavior.[180]   Another behavioral focused approach is to ask these ambassadors to simply talk about ethics and compliance with their co-workers, including temptations and pressures that may cause ethical decision-making lapses. When System 1 biases and heuristics or System 2 rationalizations arise, they should be drawn out and explored.   The goal is for the ambassador, possibly with the help of compliance personnel, to raise "conscious awareness [of] certain patterns of self-exculpatory reasoning, and to flag them as suspicious."[181]   That way, employees will be less likely to use bounded ethical decision-making in the future.

CONCLUSION

The goal of this Article has been to outline key insights from research in behavioral ethics, criminology, and network theory to provide a new paradigm through which to harmonize corporate governance, risk management, and compliance.   By focusing on the core driver of compliance failures—individual unethical decision-making—the GRC functions at companies can be better understood and improved upon. A behavioral ethics risk management approach is best positioned to achieve the overarching goal of all companies' GRC efforts—the reduction of conduct risk to allow for more efficient and effective business operation. Events like those that occurred at Hacienda Healthcare demonstrate the importance of making lasting improvements in this area.

178*.   See* JAMES WILLIAM COLEMAN, THE CRIMINAL ELITE 197 (5th ed. 2002) (describing the claim of relative acceptability/normality rationalization).

179.   Richard Bistrong, *Are Your Sales Teams Compliance Ambassadors?*, THE FCPABLOG (Feb. 24, 2016, 9:28 AM), http://www.fcpablog.com/blog/2016/2/24/richard-bistrong-are-your-sales-teams-compliance-ambassadors.html [https://perma.cc/QS84-GD8G].

180.   Linda Klebe Treviño et al., *(Un)ethical Behavior in Organizations*, 65 ANN. REV. PSYCHOL. 635, 643 (2014); Gino, Ayal & Ariely, *supra* note 112, at 393.

181.   Joseph Heath, *Business Ethics and Moral Motivation: A Criminological Perspective*, 83 J. BUS. ETHICS 595, 611 (2008).