
Disclosure-Driven Crime

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As illustrated by the recent Volkswagen emissions scandal and other large-scale corporate wrongdoing, business organizations and top executives with disclosure duties learn to be willfully blind to what is happening inside their organizations. Under pressure for results without inquiry into methods, middle management coordinates large-scale wrongdoing without consequence. The resulting insulation and entrenchment of middle management to coordinate large-scale wrongdoing is a problem that our enforcement approach must better address.

The Article describes the mechanisms of this harm. It then investigates developments in two proposed fixes — conspiracy prosecutions and especially willful blindness instructions — before advocating as more meaningful encouraging the engagement of individuals at all levels of a company to combat widespread corporate wrongdoing.

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The 2017 Academy of Legal Studies in Business awarded this Article the Distinguished Proceedings and Holmes-Cardozo prizes. The author would like to thank roundtable participants in the Zicklin Center on Business Ethics Research Normative Business Ethics Workshop at Wharton, as well as the Securities Regulation and Criminal Justice sections of the 2017-18 American Association of Law Schools. Additionally, the author is grateful to Professor Veronica Root and participants in the Notre Dame conference on Corporate Compliance and Organizational Change; Professor Andrew Lund and participants in the Villanova Business Law Colloquium; Professors Robert Prentice, Usha Rodrigues, Miriam Baer, Wendy Couture, Virginia Harper-Ho, Steve Chanenson, Jeffrey Gordon, Michael Klausner, Stephen Smith; and Nathaniel Stanger. *Columbia Law Review* editors invested in this Article and provided valuable feedback. The author is grateful to the *UC Davis Law Review* for agreeing to publish both this Article and its forthcoming sister work, *Beyond Disclosure Enforcement*. Finally, the author would like to thank family, friends, and colleagues who contributed to the development of this Article. The viewpoints expressed in the Article, and any errors, are my own.

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“Compliance is dead.”

— Matthias Kleinhempel, IAE Business School, at the October 2017 Volkswagen Foundation symposium on “Bribery, Fraud, Cheating — How to Avoid Organizational Wrongdoing” in Hannover, Germany.

INTRODUCTION

In January 2014, Volkswagen (“VW”) paid for advertising during the U.S. Super Bowl, the most expensive television time in the world,¹ to promote its “clean diesel” cars,² a technology that automotive specialists and technical professionals did not believe existed.³ Volkswagen’s Super Bowl ad starred “German engineers” — various people in white lab coats — receiving their “angels’ wings” as the company’s cars hit 100,000 miles on the road, and then suggesting that “rainbows shoot out of their butts” as the cars hit 200,000 miles.⁴ The company’s Vice President of Marketing for Volkswagen of North America explained: “It’s just a fun little story to tell our consumers about the products that we offer and the great engineering that goes

¹ *The Super Bowl: The Most Expensive 30 Seconds on TV*, NEWSWIRE (Jan. 25, 2013), <https://www.nielsen.com/cn/en/insights/news/2013/the-super-bowl-the-most-expensive-30-seconds-on-tv.html>. For the 2014 Super Bowl, the average cost to air a thirty-second spot was \$4 million. *Super Bowl Average Costs of a 30-second TV Advertisement from 2002 to 2018*, STATISTA (2018), <https://www.statista.com/statistics/217134/total-advertisement-revenue-of-super-bowls/> (last visited Oct. 6, 2018).

² See Patrick Coffee, *FTC Wants Volkswagen to Pay American Consumers for Deceptive “Clean Diesel” Ads*, ADWEEK (Mar. 29, 2016), <https://www.adweek.com/brand-marketing/ftc-wants-volkswagen-compensate-american-consumers-deceptive-clean-diesel-ads-170480>.

³ The fundamental engineering problem with VW’s advertised diesel efficiency is that “[m]easures that reduce output of nitrogen oxides, which can cause lung ailments, automatically increase production of soot particles, which can cause cancer.” Jack Ewing, *Court Sets Deadline for a Volkswagen Diesel Fix, but Solution Could Prove Elusive*, N.Y. TIMES (Mar. 24, 2016), <http://www.nytimes.com/2016/03/25/business/international/volkswagen-emissions-scandal-fix-hearing.html> [hereinafter *Court Sets Deadline*]. This mechanical trade-off between nitrogen oxides and soot cannot be solved by any existing diesel technology, especially in a cost-effective manner. *Id.* And VW’s engine technology was very similar to the engines of all the other manufacturers on the market. *Id.* General Motors’ former vice chairman Bob Lutz had “long badgered his engineers to match Volkswagen’s apparent diesel efficiency, and [he] now understands why they never could.” *Id.*

⁴ Motoren & Mehr, *TV-Spot: Wings — Volkswagen Game Day Commercial — Super Bowl 2014*, YOUTUBE (Jan. 29, 2014), <https://www.youtube.com/watch?v=S8x7NFYHtm8>.

behind them.”⁵ By mid-2015, Volkswagen followed its “angels’ wings” ad with “Old Wives’ Tale #4: Diesel is Stinky” and “Old Wives’ Tale #6: Diesel is Dirty.”⁶ In ad #4, one woman announces to the others, “It’s not the diesel . . . The new diesels don’t smell bad.”⁷ In ad #6, the woman proclaims that diesels “used to be dirty, [but] this is 2015,” and, after removing a white cloth from a tailpipe, “see how clean it is?”⁸ The company was completely committed to its “clean diesel” message, even funding research exposing monkeys and human volunteers to manipulated tailpipe fumes.⁹

But VW was blowing dirty smoke out its tailpipe and, per the company’s own advertisement, shooting rainbows out of its butt.¹⁰ As VW’s competitors had suspected, and independent lab tests later confirmed, the clean-diesel technology VW advertised was not technologically possible.¹¹ This was the “fun little story” the company was telling its consumers.¹² Without additional expensive and inconvenient modifications, suppressing nitrogen-oxide emissions to legal levels caused damage to the cars’ engines.¹³ VW was cheating emissions tests by having its cars run in their low-nitrogen-oxide state solely when the cars sensed that they were on testing rollers, and then polluting over forty times the legal limit while out on the road.¹⁴ In September 2015, the U.S. government publicly disclosed VW’s fraud,¹⁵

⁵ TheStreet: Investing Strategies, *Volkswagen Earns Its Wings in Its Fifth Consecutive Super Bowl Ad*, YouTube (Jan. 28, 2014), <https://www.youtube.com/watch?v=US7LpFXxlpq> (featuring Vinay Shahani, VP of Marketing, Volkswagen of North America).

⁶ Robert Gushel, *VW — Old Wives Tales About Diesel — Michael VW*, YOUTUBE (June 30, 2015), <https://www.youtube.com/watch?v=yl8B7bviTZU>.

⁷ *Id.*

⁸ *Id.*

⁹ See Rick Noack, *German Carmakers Backed Studies Exposing People and Monkeys to Toxic Car Exhaust*, WASH. POST (Jan. 29, 2018), <https://www.washingtonpost.com/news/worldviews/wp/2018/01/29/german-car-makers-backed-studies-exposing-people-and-monkeys-to-toxic-car-exhaust/>.

¹⁰ See Motoren & Mehr, *supra* note 4.

¹¹ See discussion and sources *infra* Introduction Section B & Part II.B.2.

¹² See TheStreet, *supra* note 5.

¹³ See discussion and sources *infra* Introduction Section B.

¹⁴ See *id.*

¹⁵ Letter from Phillip A. Brooks, Dir., Office of Civil Enft, to David Geanacopoulos & Stuart Johnson, Volkswagen Group of America, Inc. (Sept. 18, 2015), <https://www.epa.gov/sites/production/files/2015-10/documents/vw-nov-cao-09-18-15.pdf>.

and in January 2017, it settled with the company for \$4.3 billion in criminal and civil penalties.¹⁶

Even more disturbingly, however, VW's competitors had been engaging in similar deceptions. Within thirty months of May 2017, seven automakers publicly lowered their fuel-economy ratings, the French government was investigating Renault, and the U.S. government, after issuing previous warnings to Fiat Chrysler about installing defeat-device software, was suing the company.¹⁷

How could these frauds have been both so blatant and so widespread? As a former central bank employee describes conditions around the bank-interest-rate-setting LIBOR¹⁸ scandal, "we got it so wrong. We were looking for incidental breaches of technical regulations, not systematic crime."¹⁹ Regulators and others miss "the wood for the trees" when crimes become large-scale and systematic.²⁰

Through the Volkswagen example, this Article and its sister work²¹ examine the management response to messages that corporations receive from the combination of regulators, prosecutors, and civil cases brought to enforce U.S. law in the wake of large-scale corporate

¹⁶ Press Release, Dep't of Justice, Volkswagen AG Agrees to Plead Guilty and Pay \$4.3 Billion in Criminal and Civil Penalties; Six Volkswagen Executives and Employees are Indicted in Connection with Conspiracy to Cheat U.S. Emissions Tests (Jan. 11, 2017), <https://www.justice.gov/opa/pr/volkswagen-ag-agrees-plead-guilty-and-pay-43-billion-criminal-and-civil-penalties-six> [hereinafter DOJ Press Release].

¹⁷ Agence France-Presse, *Renault to be Investigated Over Diesel Emissions "Cheating,"* GUARDIAN (Jan. 13, 2017, 7:34 AM), <https://www.theguardian.com/business/2017/jan/13/renault-diesel-emissions-cheating-france-us-fiat-chrysler>; see Bob Sorokanich, *The Facts Behind Every Major Automaker Emissions Cheating Scandal Since VW*, ROAD & TRACK (May 25, 2016), <http://www.roadandtrack.com/new-cars/car-technology/a29293/vehicle-emissions-testing-scandal-cheating>; Mike Spector & Aruna Viswanatha, *U.S. Sues Fiat Chrysler Over Diesel Emissions*, WALL ST. J. (May 23, 2017, 4:23 PM), <https://www.wsj.com/articles/u-s-nears-suing-fiat-chrysler-over-diesel-emissions-1495553346>.

¹⁸ LIBOR is the Intercontinental Exchange London Interbank Offered Rate. It underpins some \$350 trillion in mortgages, corporate loans, government bonds, credit cards, student loans, and additional financial instruments around the world. *What Is "LIBOR,"* INVESTOPEDIA, www.investopedia.com/terms/l/libor.asp (last visited Oct. 6, 2018); Neha Sinha, *Who Uses Libor Data and Why?*, INVESTOPEDIA, www.investopedia.com/articles/investing/112014/who-uses-libor-data-and-why.asp (last visited Oct. 6, 2018).

¹⁹ Dan Davies, *How to Get Away with Financial Fraud*, GUARDIAN (Jun. 28, 2018, 1:00 AM), <https://www.theguardian.com/news/2018/jun/28/how-to-get-away-with-financial-fraud> [hereinafter *Financial Fraud*].

²⁰ *Id.*

²¹ J.S. Nelson, *Beyond Disclosure Enforcement*, 53 UC DAVIS L. REV. (forthcoming 2019) (on file with author) [hereinafter *Beyond Disclosure Enforcement*].

wrongdoing. This Article focuses on the criminal law as “regulation by prosecutor” becomes more common.²² As the Volkswagen case and others suggest, the legal message companies receive is the importance of disclosure as a method of communicating with regulators, investors, and the public rather than a more substantive call to run the business of the company to prevent physical harms to the public from air pollution and other bottom-line production choices. Unfortunately, enforcement of the law in this area hinges on what companies say rather than on what they *do*.²³ The Volkswagen case stands out for the company’s spectacular hubris in separating its disclosures to regulators, investors, and the public from how the company was managing itself internally. But similar scandals discussed *infra*²⁴ vary only in degree and not in managerial approach.²⁵

The core of this Article describes how large-scale wrongdoing is being driven into the level of middle management²⁶ as a company’s understanding of its liability from disclosure obligations largely insulates that level of the organization from scrutiny.²⁷ Meanwhile,

²² See discussion *infra* Part I.A.

²³ See also, e.g., Katelyn Polantz, Jeremy Herb & Marshall Cohen, *Prosecutors’ Opening Statement: “Paul Manafort Lied,”* CNN (July 31, 2018, 7:46 PM), <https://www.cnn.com/2018/07/31/politics/manfort-trial-jury-selection/index.html>

(boiling to a nub the government’s complicated eighteen-count white collar crime case against a U.S. president’s former campaign manager).

²⁴ See, e.g., discussion *infra* Introduction Section B & Part I.D (discussing corporate fraud activities across industries).

²⁵ See, e.g., *infra* notes 262-66 (describing examples of corporate wrongdoing).

²⁶ A common definition of middle management is individuals who “head specific departments (such as accounting, marketing, production) or business units, or . . . serve as project managers in flat organizations. Middle managers are responsible for implementing the top management’s policies and plans and typically have two management levels below them. Usually among the first to be slashed in the ‘resizing’ of a firm, middle management constitutes the thickest layer of managers in a traditional (tall pyramid shaped) organization.” *Middle Management*, BUS. DICTIONARY, <http://www.businessdictionary.com/definition/middle-management.html> (last visited Sept. 7, 2018).

²⁷ The author acknowledges that some academics regard each area of white collar regulation as its own regime, and they reject the description of these laws working together as an incentive system. Regarding disclosure as a system, however, is often how management scholars study regulation and how executives regard it. The analysis is used in law as well. See, e.g., Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 692-94 (1997) [hereinafter *Controlling Corporate Misconduct*] (surveying a variety of regimes and describing how firms react to patchworks of rules); Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2079 (2016) (describing the effect of “compliance” as a system of rules); Veronica Root, *Coordinating Compliance Incentives*, 102 CORNELL L. REV. 1003, 1010-11 (2017)

evidence from these scandals suggests willful blindness on the part of top management — even as top management puts pressure on the management below it to deliver results without inquiring into methods. These developments combine to enhance the power and entrenchment of middle management to commit large-scale wrongdoing.²⁸

This Article concludes with lines of investigation that lead to its sister article's proposal for reform. Partial improvement may exist in criminal-law fixes such as allowing corporate conspiracy prosecutions to penetrate the organization more broadly and expanding application of willful blindness instructions, but the Article argues that the more fundamental need is to remedy our disengagement with middle management. We should be applying what we know from social science to invest individuals at all levels of a corporation in its ethical future.

(describing compliance as a system of piecemeal rules that do not work well together).

²⁸ I agree with Professors Stephen Bainbridge and Todd Henderson that the modern corporation can be a beautiful thing that brings benefits to the world and greatly enhances our way of life. STEPHEN M. BAINBRIDGE & M. TODD HENDERSON, LIMITED LIABILITY: A LEGAL AND ECONOMIC ANALYSIS 1-2 (2016) (“Over the past several hundred years, corporate capitalism [has] been responsible for improving living standards in previously unimaginable ways — life expectancy in the capitalist West has doubled since 1900, and average global incomes have increased several fold over the same period.”). However, I disagree that limiting the individual liability of corporate agents for coordinated wrongdoing to the extent they are now protected is in either the corporation's or the public's best interest. *Contra id.* at 2 (extolling the corporation's protection against “wasteful fights among corporate participants (e.g., shareholders, workers, managers, etc.) about who should be responsible for corporate liabilities”). According to management literature, corporations should want to be protected from being hijacked through corruption of their corporate purposes. See J.S. Nelson, *Paper Dragon Thieves*, 105 GEO. L. J. 871, 873 n.2 (2017) [hereinafter *Paper Dragon Thieves*]; J.S. Nelson, *The Corruption Norm*, 20 J. MGMT. INQUIRY 280, 283-84 (2016) [hereinafter *The Corruption Norm*].

Furthermore, from a compensation perspective, the corporation's liabilities remain the corporation's liabilities. Corporations should still pay to disgorge the profits that they made from coordinated wrongdoing. See Nelson, *Paper Dragon Thieves*, *supra*, at 873-77, 874 n.7, 882-98, 881 n.43 (discussing DOJ settlements against big banks). There is no other way that victims of large-scale frauds can be compensated. But, because we know that the disgorgement of profits by corporations does not change behavior, see *id.* at 888-96, 888-91 nn.97-115, the purpose of imposing liabilities on individuals who coordinate the corporation's wrongdoing is to impact behavior and to keep the next fraud from reaching such a large scale. See generally Dealbook, *Where Does the Mortgage Settlement Money Go?*, N.Y. TIMES (Dec. 23, 2016), <http://www.nytimes.com/2016/12/23/business/dealbook/24mortgagelist.html> (tracking billions of dollars in settlements and their disbursement to victims after the banks take tax deductions and other write-offs).

A. *The Dangers from Not Having the Right Corporate Liability Rules*

In January 2017, in the last days of the Obama administration, federal prosecutors and Volkswagen Auto Group (“VW AG”²⁹ or “VW”) announced the \$4.3 billion settlement of criminal and civil charges against the company.³⁰ VW is enormous: the company employs 600,000 people worldwide, and in 2014 generated \$227 billion in revenue.³¹ The plea agreement’s statement of facts describes a more-than-ten-year scheme³² to develop illegal software that would enable VW vehicles to identify when they were being tested by regulators and perform differently under those conditions than when being driven by consumers on the road.³³ Under testing conditions, the vehicles would emit less air pollution, enabling them to pass the regulators’ tests, but harming their engines in the process.³⁴ Out on the road, the vehicles emitted up to forty times the legal pollution level.³⁵ The software, known as an illegal emissions “defeat device” under the Clean Air Act,³⁶ was refined in multiple forms and eventually installed on almost 600,000 vehicles sold in the U.S.³⁷

²⁹ AG is a German abbreviation for Aktiengesellschaft, a public limited company whose shares are offered to the public and whose shareholders’ liability is limited to their investment. *What Is “AG (Aktiengesellschaft),”* INVESTOPEDIA, <https://www.investopedia.com/terms/a/ag-aktiengesellschaft.asp> (last visited Oct. 6, 2018).

³⁰ DOJ Press Release, *supra* note 16.

³¹ Dipti Kapadia, *Volkswagen Emissions Scandal in Numbers*, WALL ST. J. (Oct. 9, 2015, 6:48 AM), <http://www.wsj.com/video/volkswagen-emissions-scandal-in-numbers/3B54B80D-4381-4813-AAED-8A5A2444F79A.html>.

³² The Volkswagen plea agreement identifies individuals engaging in the conspiracy from May 2006 to November 2015. Rule 11 Plea Agreement at para. 31, *United States v. Volkswagen, AG*, No. 16-CR-20394 (E.D. Mich. Jan. 11, 2016), <https://www.justice.gov/usao-edmi/page/file/930026/download> [hereinafter *VW Plea*]. Other research suggests that the scheme dates back at least to 2005, when management pulled Volkswagen out of talks to use Daimler AG’s technology. Christoph Rauwald, *How a Top-Secret Deal Could Have Stopped VW’s Diesel Scandal*, BLOOMBERG (Jan. 12, 2017, 9:00 PM), <https://www.bloomberg.com/news/articles/2017-01-13/vw-pulled-out-of-daimler-deal-before-embarking-on-diesel-cheat>. Yet by other calculations the fraud may have been on-going for seventeen years. The multi-district litigation discussed *infra* Parts I.B–C alleges that a part of VW AG, Audi, had developed a version of the illegal software by 1999. Amended Consol. Consumer Class Action Complaint at para. 224, Doc. No. 1804, *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Pods. Liab. Litig.* 3:15-md-02672-CRB (N.D. Cal. Sept. 2, 2016) [hereinafter *Consol. Complaint*]. This Audi version then spread across the rest of VW AG. *Id.* at 135-36; *accord VW Plea, supra* note 32, at para. 35.

³³ *VW Plea, supra* note 32, at para. 33-35.

³⁴ *Id.* at para. 47.

³⁵ *Id.* at para. 52.

³⁶ A “defeat device” is illegal under section 203(a)(3)(B) of the Clean Air Act. 42

There have now been at least five types of defeat devices discovered in VW AG cars, across multiple brand names.³⁸ Even before revelations of all those frauds,³⁹ a 2015 joint MIT/Harvard study concluded that the extra air pollution from VW's actions had contributed to the early deaths of sixty people in the U.S.⁴⁰ Worldwide, the defeat devices were installed in at least eleven million vehicles. Because air pollution harms are linked to population density, which tends to be higher in countries outside the U.S., the additional pollution is likely responsible for the early deaths of tens of thousands of people.⁴¹ By 2018, particulate air pollution has emerged as “the greatest threat to human life on the planet It has a larger impact on life expectancy than AIDS, than cigarette smoking, car crashes, and terrorism.”⁴²

Nitrogen oxide (“NOx”), the main pollutant that the defeat devices enable cars to emit, is a highly toxic substance that converts quickly into nitrogen dioxide, recognizable as a “reddish-brown gas with a pungent odor” that absorbs sunlight “to transform into the yellow-brown haze that blankets cities.”⁴³ The smog exacerbates “dozens of

U.S.C. § 7401, 7522 (2018). Regulations implementing the Act define a “defeat device” as a prohibited form of “auxiliary emission control device” that “reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use.” 40 C.F.R. § 86.094-2 (2017).

³⁷ VW *Plea*, *supra* note 32, at para. 72.

³⁸ See discussion *infra* Part II.A.

³⁹ Press Release, U.S. Env'tl. Prot. Agency, California Notify Volkswagen of Additional Clean Air Act Violations (Nov. 2, 2015), https://19january2017snapshot.epa.gov/newsreleases/epa-california-notify-volkswagen-additional-clean-air-act-violations_.html.

⁴⁰ Sarah Zhang, *New Study Links VW's Emissions Cheating to 60 Early Deaths*, WIRED (Oct. 30, 2015, 7:00 AM), <http://www.wired.com/2015/10/new-study-links-vws-emissions-cheating-59-deaths>.

⁴¹ Sarah Knapton, *Volkswagen Scandal: Nearly 12,000 Deaths Could Be Avoided If Industry Met Emissions Targets*, TELEGRAPH (Sept. 22, 2015, 10:00 PM BST), <http://www.telegraph.co.uk/news/health/news/11883416/vw-scandal-emission-target-death-rate.html> (noting that estimates suggest 500,000 people die each year from air pollution, 23,500 deaths each year are directly attributable to pollution from diesel cars, and that nearly 12,000 of those people a year may be dying because the car industry did not meet emissions promises).

⁴² Marketplace with Kai Ryssdal, American Public Media at 27:42 (Nov. 19, 2018), <https://one.npr.org/?sharedMediaId=669426615:669426617> (interview with University of Chicago economist Michael Greenstone).

⁴³ Shannon Hall, *VW Scandal Causes Small but Irreversible Environmental Damage*, SCI. AM. (Sept. 29, 2015), <https://www.scientificamerican.com/article/vw-scandal-causes-small-but-irreversible-environmental-damage>.

health problems, including asthma, bronchitis and emphysema.”⁴⁴ Nitrogen dioxide also washes “into the ground in the form of acid rain, which can kill plants and animals.”⁴⁵ These forms of environmental damages are especially dangerous because “there is no antidote” to them.⁴⁶ VW’s eleven million cars could be “responsible for nearly 1 m[illion] tonnes of air pollution every year, roughly the same as the UK’s combined emissions for all power stations, vehicles, industry and agriculture.”⁴⁷ Within the United States alone, the environmental damage from VW’s fraud is estimated to exceed \$450 million.⁴⁸

The VW scandal is representative of modern large-scale corporate wrongdoing. Within industries, the methods of large-scale crimes are echoing and repeating. Some intra-industry pattern may be the result of competitive pressure, but it may also signal cross-company communication. As noted above, within the auto industry, VW and its two emissions-scandal accomplices — Bosch, one of the world’s largest private companies that supplies parts for the entire industry, and IAV, an engineering group — are merely three of many suspected of large-scale cheating.⁴⁹ By 2018, almost no carmaker remains untouched. The list includes Ford, Fiat Chrysler (Jeep, Dodge, Alfa Romeo), GM, PSA (Peugeot, Citroën), Renault-Nissan, Mitsubishi, Kia, Subaru, Honda, Mazda, Hyundai, Volvo, BMW, Daimler AG’s Mercedes-Benz, and, of course, multiple VW brands (Volkswagen, Audi, Porsche, Seat, Skoda, Bentley, and Lamborghini).⁵⁰

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* (quoting Northwestern University engineering professor).

⁴⁷ Karl Mathiesen & Arthur Neslen, *VW Scandal Caused Nearly 1m Tonnes of Extra Pollution, Analysis Shows*, *GUARDIAN* (Sept. 23, 2015, 2:46 PM), <https://www.theguardian.com/business/2015/sep/22/vw-scandal-caused-nearly-1m-tonnes-of-extra-pollution-analysis-shows>.

⁴⁸ See Stephen R. H. Barrett et al., *Impact of the Volkswagen Emissions Control Defeat Device on U.S. Public Health*, 10 *ENVTL. RES. LETTERS* 1, 8 (2015), <http://iopscience.iop.org/article/10.1088/1748-9326/10/11/114005/pdf>.

⁴⁹ Joanna Walters, Graham Ruddick, & Sean Farrell, *VW Emissions Scandal Could Snare Other Firms, Whistleblower Claims*, *GUARDIAN* (Sept. 21, 2015, 11:45 PM), <https://www.theguardian.com/business/2015/sep/21/volkswagen-emissions-scandal-sends-shares-in-global-carmakers-reeling>.

⁵⁰ Miles Brignall, *Up In Smoke: The VW Emissions “Fix” Has Left Our Car Undriveable*, *GUARDIAN* (Mar. 25, 2017, 3:00 AM), <http://www.theguardian.com/money/2017/mar/25/vw-volkswagen-audi-skoda-seat-emissions-fix-left-car-undriveable>; Damian Carrington, *Four More Carmakers Join Diesel Emissions Row*, *GUARDIAN* (Oct. 9, 2015, 2:00 AM), <http://www.theguardian.com/environment/2015/oct/09/mercedes-honda-mazda-mitsubishi-diesel-emissions-row> (listing as also emitting high levels of NOx emissions).

Adding to theories of cross-company communication are July 2017 reports that VW, BMW, and Daimler have engaged in a two to three-decades-long antitrust cartel to suppress the price of car parts and competitive developments.⁵¹ More than 200 employees within the umbrella of five companies⁵² allegedly colluded through sixty working groups and over 1,000 meetings regarding subjects as diverse as auto development, gasoline and diesel motors, brakes and transmissions.⁵³

Coordination of wrongdoing appears to be spreading across companies, borders, and partners. To provide examples outside of the auto industry, the 2013 horsemeat-contamination-in-the-human-food-supply scandal reached all the way to Nestlé, the world's largest food

Mercedes-Benz, Honda, Mazda, Mitsubishi, Renault, Nissan, Hyundai, Citroen, Fiat, Volvo, and Jeep); Rishi Iyengar, *Hyundai and Kia Fined for Understating Carbon-Emission Figures*, TIME (Nov. 4, 2014), <http://time.com/3555696/hyundai-kia-fined-carbon-emissions/> (describing Hyundai and Kia as implicated in emissions fraud); Hyunjoo Jin, *VW, Audi, Bentley Sales Suspended by South Korea After Emissions Scandal*, AUTOMOTIVE NEWS (Aug. 2, 2016, 4:05 AM), <http://www.autonews.com/article/20160801/COPY/308019777/vw-audi-bentley-sales-suspended-by-south-korea-after-emissions-scandal>; *Lamborghini and Volkswagen Raided by Police in Wake of Emissions Scandal*, HNGN.COM (Oct. 19, 2015, 12:26 PM), <http://www.hngn.com/articles/141677/20151019/lamborghini-volkswagen-raided-police-wake-emissions-scandal.htm>; Kartikay Mehrotra & David Welch, *Why Much of the Car Industry Is Under Scrutiny for Cheating*, BLOOMBERG (Aug. 1, 2017, 11:57 PM), <https://www.bloomberg.com/news/articles/2017-08-02/why-it-seems-like-open-season-on-car-companies-quicktake-q-a>; Charles Riley, *Mitsubishi: We've Been Cheating on Fuel Tests for 25 Years*, CNNMONEY (Apr. 26, 2016, 9:20 AM), <https://money.cnn.com/2016/04/26/news/companies/mitsubishi-cheating-fuel-tests-25-years/index.html>; David Tracy, *Subaru Employees Altered Fuel Economy and Emissions Data During New-Car Inspections*, JALOPNIK (May 2, 2018, 4:50 PM), <https://jalopnik.com/subaru-employees-altered-fuel-economy-and-emissions-dat-1825720983>.

In January 2019, Fiat Chrysler agreed to “pay about \$800 million in fines and costs to settle lawsuits brought by states, car owners and the U.S. Justice Department, which said the company’s diesel-powered pickups and SUVs violated clean-air rules.” Ryan Beene, Kartikay Mehrotra & Gabrielle Coppola, *Fiat Chrysler Called ‘Bad Actor’ as U.S. Settles Emissions Suit*, BLOOMBERG (Jan. 10, 2019), <https://www.bloomberg.com/news/articles/2019-01-10/fiat-chrysler-agrees-to-pay-fine-recall-vehicles-in-diesel-case>. Illustrating a link through companies engaging in the same behavior, “German parts components-maker Robert Bosch GmbH, which supplied the engine control devices found to be rigged to pass emission tests” for Volkswagen as well, will also pay fines. *Id.* Bosch “will pay \$27.5 million as part of the settlement with consumers . . . [and] a total of \$103.7 million to 50 jurisdictions.” *Id.*

⁵¹ Daimler and VW admit their involvement to European Union authorities; BMW denies it. Frank Dohmen & Dietmar Hawranek, *Collusion Between Germany’s Biggest Carmakers*, SPIEGEL (July 27, 2017, 2:10 PM), <http://www.spiegel.de/international/germany/the-cartel-collusion-between-germany-s-biggest-carmakers-a-1159471.html>.

⁵² Volkswagen, VW’s Audi division, VW’s Porsche division, BMW, and Daimler. *Id.*

⁵³ *Id.*

company, and implicated the British and French arms of a Swedish food company, as well as Romanian, German, and other subcontractors.⁵⁴ In the technology sector, major companies have engaged in broad anti-poaching agreements to illegally constrain competition for skilled workers including Apple, Google, Intel, and Adobe, which together in 2015 paid \$415 million to nearly 65,000 affected workers. That revelation echoed a similar \$20 million anti-poaching settlement paid in 2013 by Intuit, Lucasfilm, and Pixar.⁵⁵ In the retail banking industry, the 2016-17 Wells Fargo scandal involving 3.5 million fraudulent customer accounts — sixty-seven percent more than originally reported — has rippled into the bank's wealth management division,⁵⁶ and the misconduct additionally implicates Prudential and Assurant, the bank's partners in the insurance industry.⁵⁷

One of the reasons why these scandals can be so widespread is that they are incubating for increasing lengths of time without public knowledge. VW's emissions fraud was an "open secret" inside the company and Bosch for over ten years.⁵⁸ Other reports trace the history of VW's device back to Audi in 1999, over seventeen years ago.⁵⁹ The Wells Fargo fraudulent-accounts scandal grew to 3.5

⁵⁴ Nestlé Roped into Horsemeat Scandal, EURACTIVE (Feb. 20, 2013), <https://www.euractiv.com/section/health-consumers/news/nestle-roped-into-horsemeat-scandal>; Laura Smith-Spark & Per Nyberg, *Meat Industry Under Scrutiny as Horsemeat Scandal Spreads*, CNN (Feb. 15, 2013, 4:12 PM), <http://www.cnn.com/2013/02/09/world/europe/uk-horsemeat-probe>.

⁵⁵ Jeff John Roberts, *Tech Workers Will Get Average of \$5,770 Under Final Anti-Poaching Settlement*, FORTUNE (Sept. 3, 2015), <http://fortune.com/2015/09/03/koh-anti-poach-order>.

⁵⁶ Uri Berliner, *Wells Fargo Admits to Nearly Twice as Many Possible Fake Accounts — 3.5 Million*, NPR (Aug. 31, 2017, 1:02 PM), <http://www.npr.org/sections/thetwo-way/2017/08/31/547550804/wells-fargo-admits-to-nearly-twice-as-many-possible-fake-accounts-3-5-million>; Emily Glazer, *Whistleblowers Detail Wells Fargo Wealth Management Woes*, WALL ST. J. (July 27, 2018, 4:14 PM), <https://www.wsj.com/articles/whistleblowers-detail-wells-fargo-wealth-management-woes-1532707096>; Deon Roberts, *More Problems at Wells Fargo: Feds Probing Sales Practice Concerns in New Area*, CHARLOTTE OBSERVER (Mar. 1, 2018, 1:11 PM), <https://www.charlotteobserver.com/news/business/banking/article202862974.html>.

⁵⁷ Stacy Cowley, *Prudential Suspends Sales of Its Life Policies by Wells Fargo*, N.Y. TIMES (Dec. 12, 2016), <https://www.nytimes.com/2016/12/12/business/dealbook/wells-fargo-prudential-insure-policies.html>.

⁵⁸ Georgina Prodhon et al., *Volkswagen Probe Finds Manipulation Was Open Secret in Department: Newspaper*, REUTERS (Jan. 22, 2016, 11:24 AM), <http://www.reuters.com/article/us-volkswagen-emissions-investigation-idUSKCN0V02E7>; *accord Consol. Complaint*, *supra* note 32, at 151.

⁵⁹ *Consol. Complaint*, *supra* note 32, at 140. It was this Audi version that spread

million accounts over at least eleven years.⁶⁰ The Takata exploding airbag scandal affecting hundreds of millions of defective airbags has been traced back to seven automakers that may have been complicit for nearly twenty years.⁶¹ General Motors admits that it knew for more than a decade about the ignition switch malfunction that killed at least 124 people and maimed many more.⁶² As will be discussed, an irony of our overreliance on disclosure-based enforcement is that it is taking increasingly long to find out what we really need to know.⁶³ Emphasizing what companies' top executives say is not telling us what those companies really do. In fact, our flawed focus on top executives' statements may be further blinding us to companies' large-scale movements.

It should command our attention that these scandals are enormous in size, occur within diverse industries, and increasingly pull across companies and borders. To provide a sense of scale for the damages involved in white collar crimes, the FBI estimates that in 2014 the total cost of all property crime from burglary, larceny-theft, and motor vehicle theft was \$14.3 billion.⁶⁴ This total is a mere 0.06 percent of what the 2007–08 financial crisis cost the U.S. economy,⁶⁵ and sixteen

across the rest of VW. *Id.* at 135-36; accord *VW Plea*, *supra* note 32, at para. 35.

⁶⁰ Stacy Cowley, *At Wells Fargo, Complaints About Fraudulent Accounts Since 2005*, N.Y. TIMES (Oct. 11, 2016), <http://www.nytimes.com/2016/10/12/business/dealbook/at-wells-fargo-complaints-about-fraudulent-accounts-since-2005.html>.

⁶¹ Hiroko Tabuchi & Neal E. Boudette, *Automakers Knew of Takata Airbag Hazard for Years, Suit Says*, N.Y. TIMES (Feb. 27, 2017), <https://www.nytimes.com/2017/02/27/business/takata-airbags-automakers-class-action.html> (describing evidence against Ford, Honda, Nissan, and Toyota going back in part to 1999); *id.* (mentioning evidence against BMW); Hiroko Tabuchi, *A Cheaper Airbag, and Takata's Road to a Deadly Crisis*, N.Y. TIMES (Aug. 26, 2016), <https://www.nytimes.com/2016/08/27/business/takata-airbag-recall-crisis.html> (documenting the involvement of General Motors going back to the late 1990s).

⁶² *General Motors Announces 30th Recall of Year*, CBS NEWS (May 23, 2014, 10:37 PM), <http://www.cbsnews.com/news/general-motors-announces-30th-recall-of-year>; Chris Isidore & Evan Perez, *GM CEO: "People Died in Our Cars,"* CNN BUS. (Sept. 17, 2015, 2:46 PM), <http://money.cnn.com/2015/09/17/news/companies/gm-recall-ignition-switch>.

⁶³ See discussion *infra* Part I.A–C & Part II.A.

⁶⁴ *FBI Releases 2014 Crime Statistics*, FBI: UCR, <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/resource-pages/fbi-releases-2014-crime-statistics> (last visited Oct. 6, 2018).

⁶⁵ See Eleazar David Melendez, *Financial Crisis Cost Tops \$22 Trillion, GAO Says*, HUFF. POST (Feb. 14, 2013, 7:49 PM), http://www.huffingtonpost.com/2013/02/14/financial-crisis-cost-gao_n_2687553.html.

percent of the potential cost of the 2015–17 emissions-controls scandal at the single company of VW.⁶⁶

The numbers of people involved in the companies are significant as well. It is important here to challenge with evidence from VW and the management literature many lawyers' assumptions that there must be a single "evil genius" issuing the orders that mastermind large-scale frauds. The truth of modern corporate wrongdoing is often more complicated and disbursed as normally ethical people are put under pressure by the corporation to find ways to satisfy expectations, even if those methods cut corners or are outright illegal.⁶⁷ In the VW

⁶⁶ Alanna Petroff, *Volkswagen Scandal May Cost up to \$87 Billion*, CNN BUS. (Oct. 2, 2015, 12:51 PM), <http://money.cnn.com/2015/10/02/news/companies/volkswagen-scandal-bp-credit-suisse> [hereinafter *Volkswagen Scandal*]. It is difficult to collect accurate statistics on precisely how much white collar crime occurs each year. According to victimization studies, however, people and businesses are far more likely to be victims of white collar crime than of either traditional property crime or violent crime. Thirty-five percent of businesses report that they have been victims of white collar crime, and twenty-five percent of households report that they have been victims of white collar crime. Victimization rates for property crime and violent crime, by contrast, are eight percent and a little over one percent. Gerald Cliff & April Wall-Parker, *Statistical Analysis of White-Collar Crime*, in OXFORD RESEARCH ENCYCLOPEDIA OF CRIMINOLOGY 7 (2018) (citing statistics from a series of sources). Meanwhile, white collar crime enforcement appears to be at a historic low. By April 2018, prosecutions against white collar crimes have fallen to their lowest level in twenty years. *White Collar Prosecutions Fall to Lowest in 20 Years*, TRAC REPORTS, <http://trac.syr.edu/tracreports/crim/514/> (last visited Oct. 6, 2018). In addition, during the first year of the Trump administration, DOJ's fines against corporations fell off ninety percent. Jamiles Lartey, *Corporate Penalties Dropped as Much as 94% Under Trump, Study Says*, GUARDIAN (Jul. 25, 2018, 5:28 PM), <http://www.theguardian.com/us-news/2018/jul/25/trump-corporate-penalties-drop-public-citizen-study>.

⁶⁷ In the management literature, Linda Treviño and others warn of these systemic dangers. See, e.g., John M. Schaubroeck, Sean T. Hannah, Bruce J. Avolio, Steve W.J. Kozlowski, Robert G. Lord, Linda K. Treviño, Nikolaos Dimotakis, & Ann C. Peng, *Embedding Ethical Leadership Within and Across Organizational Levels*, 55 ACAD. OF MGMT. J. 5, 1053, 1054 (2012) ("We draw from Schein's 'embedding mechanisms' and 'shared cultural elements' and extend his theoretical framework by developing and testing a multilevel model linking leadership, shared cultural elements, and their direct and indirect effects on follower ethical cognitions and behaviors."); Niki A. den Nieuwenboer, João Vierira da Cunha, & Linda Klebe Treviño, *Middle Managers and Corruptive Routine Translation: The Social Production of Deceptive Performance*, 28 ORGANIZATIONAL SCIENCE 5, 781, 781 *et passim* (2017) ("We observed a similar deceptive performance phenomenon, defined as a situation wherein middle managers, through their employees, work to deceive others within the organization into believing that performance prescriptions are being met when they are not.").

In the legal literature, June Carbone, William Black (who crosses over from management), Lynn Stout, and others have recognized the dark side of certain pay incentives for employees within organizations. See, e.g., June Carbone, Naomi Cahn, & Nancy Levit, *WOMEN, HOBBSIAN MANAGEMENT, AND THE TRIPLE BIND* at 12 (early draft

emissions case alone, there were likely hundreds of people coordinating across at least three companies and five different name brands who made the cheating scheme possible.⁶⁸ As the *New York Times* reports, “[t]he sheer amount of work required to install the software in Volkswagen vehicles suggests that a large number of people were involved.”⁶⁹ The defeat-device “software had to be altered for each model and option package.”⁷⁰ And these changes had to be made in “11 million tainted diesel engines in more than thirty Volkswagen, Audi, Porsche, Seat and Skoda models, which were available around the world in dozens of variations.”⁷¹ Management explicitly benefitted from the massive wrongdoing happening on its watch, declined to ask obvious questions for as long as seventeen years, as well as engaged in an active campaign of misdirection and deception to cover up the conduct.⁷²

Yet when VW pleaded guilty, it was merely to failing to tell the truth about its deception. For perpetuating a more-than-ten-year scheme that has potentially cost tens of thousands of deaths from air pollution, the criminal charges against VW and seven of its executives are for covering up the organization’s crime in disclosures to regulators —

provided by authors) (“[R]ule-breaking helps insure loyalty not to the company, but to the insiders who protect their backs. It also produces the intense distrust of anyone perceived to be an outsider who might not be so willing to look the other way; in companies that value winning, customers, employees, even the company itself becomes pieces on a chess board useful to the extent that they help those caught up in corporate contests ‘to win.’”); WILLIAM K. BLACK, *THE BEST WAY TO ROB A BANK IS TO OWN ONE: HOW CORPORATE EXECUTIVES AND POLITICIANS LOOTED THE S&L INDUSTRY 2* (2d ed. 2014) (“Control frauds create a ‘fraud friendly’ corporate culture by hiring yes-men. They combine excessive pay, ego strokes (e.g., calling the employees ‘geniuses’), and terror to get employees who will not cross the CEO.”); *id.* (“Control frauds use an elegant fraud mechanism, the seemingly arm’s-length (independent) transaction that accountants consider the best evidence of value.”); Lynn A. Stout, *Killing Conscience: The Unintended Behavioral Consequences of “Pay for Performance,”* 39 J. CORP. L. 525, 534 (2014) (writing that incentive pay generally is “linked with opportunistic, unethical, and even excessive risk-taking”).

⁶⁸ See, e.g., *Consol. Complaint*, *supra* note 32, at 149 (citing VW-MDL2672-02559780, a spreadsheet detailing 8,565 entries and hundreds of individuals).

⁶⁹ Jack Ewing, *Supplier’s Role Shows Breadth of VW’s Deceit*, N.Y. TIMES (Feb. 1, 2017), <https://mobile.nytimes.com/2017/02/01/business/bosch-vw-diesel-settlement.html>.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² VW executives were specifically selected for their technical expertise, and the impossibility of “clean diesel”’s mechanical trade-off between NOx and soot was a basic engineering feature of the industry. See additional discussion *supra* note 3 and *infra* Part II.A.

not for the underlying pollution and harms themselves.⁷³ Although some may assert that the worst part of VW's crime is the company's cover-up and misleading of regulators,⁷⁴ regulators knew about VW's harms to the environment and human health long before the government acted.⁷⁵ As another consequence of our overemphasis on disclosure, the government acted forcefully ultimately only in response to being lied to by VW.⁷⁶

B. *How These Dangers Are Connected and What We Should Do About Them*

The more we scratch the surface of recent major corporate scandals, the more problematic issues emerge. First, the sheer scale, duration, and coordination involved in these scandals provide a window into modern international large-scale corporate wrongdoing.⁷⁷ Second, in order to escape liability, the company's C-suite officers and directors

⁷³ See discussion *infra* Part IB–C.

⁷⁴ This seems to have been the company's initial reaction as well. On the day that the scandal broke, the CEO of Volkswagen North America at the time, Michael Horn, apologized profusely for the cover-up — the company and its executives' statements — but did not mention environmental or other health harms. "Our company was dishonest with the EPA and the California Air Resources Board, and with all of you, and in my German words, we have totally screwed up." See Joann Muller, *VW's \$7 Billion Screwup: A Lesson in How to Destroy a Brand*, FORBES (Sept. 22, 2015, 8:39 AM), <https://www.forbes.com/sites/joannmuller/2015/09/22/vws-7-billion-screw-up-a-lesson-in-how-to-destroy-a-brand/> (quoting Michael Horn).

⁷⁵ See, e.g., Mike Brown, *Volkswagen Whistleblower: "We Gave EPA the Diesel Emissions Data in 2014,"* INT'L BUS. TIMES (Sept. 25, 2015, 12:58 PM), <https://www.ibtimes.com/volkswagen-whistleblower-we-gave-epa-diesel-emissions-data-2014-2114511>.

⁷⁶ See, e.g., J.S. Nelson, *The Criminal Bug: Volkswagen's Middle Management* 8-12 (Draft 2016-04-23 00:20, 2016) [hereinafter *The Criminal Bug*] (describing VW's cat-and-mouse game with U.S. regulators); see also Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 GEO. L. J. 1435, 1451 (2009) (defining "obstinacy offenses," and describing how "[o]bstinacy offenses condemn behaviors just because they make it more difficult for police to police, or prosecutors to prosecute, or judges to judge"); *id.* at 1441-42 ("The further a prosecution moves from redressing the core prohibitions of process offenses — such as acts that directly pervert a function of justice or compromise a collective interest in a healthy system — the less firm the moral justification for punishment The more attenuated the connection between the process offense and its pernicious effect, the more troubling its application. Outside the realm of violations that incontrovertibly merit punishment lies a no man's land where the lines between legitimate and illegitimate are far less clear. It is in this ambiguous space that the second well-established use of process charges — pretextual prosecution — thrives.").

⁷⁷ See discussion *supra* Introduction.

typically strain credibility to claim that they did not know what was happening before being confronted by regulators.⁷⁸ Their assertions of blindness, largely backed up by independent evidence with debates over a few months' difference in when they could have undeniably known, force us to ask how such insulation could be possible.⁷⁹ Third, even though settlements such as VW's result from some of the highest-profile and best-resourced prosecutions in the world, the actual charges to which the companies and their accomplices plead have little to do with the underlying substance of their crimes.⁸⁰

Through the representative case of VW, this Article explores these problems and asserts that they are connected. Our current disclosure-based enforcement system for corporate crime enables the growth and coordination of crimes by middle management across corporate forms. In putting the pieces of this puzzle together and setting up a second article for a solution, this Article breaks important new ground. No academic work before has identified middle management as key to these large-scale corporate crimes, has demonstrated how disclosure-based incentives drive corporate behavior to hide wrongdoing at this level, or has set up its investigation of proposed reforms to better invest individuals at all levels of the company in its ethical success.

This Article makes its argument in an Introduction, three Parts, and a Conclusion. Part I identifies the problem of wide-spread corporate wrongdoing being driven into the level of middle management. Part II describes what coordinated wrongdoing looks like in middle management using the Volkswagen case as an example. Part III presents the basis for future efforts to fix this criminal bug⁸¹ affecting not only VW, but echoing in other examples of large-scale corporate wrongdoing.

The Conclusion calls for rethinking our emphasis in the criminal law on the corporation and top management with disclosure duties, and instead focusing more substantively on engaging middle management in companies' ethical futures. By moving away from our overemphasis on top company and management disclosures, we may paradoxically be able to curtail the increasing scale, duration, and coordination of corporate wrongdoing that is causing enormous harm to the public.

⁷⁸ See discussion *infra* Part I.A & Part I.D.

⁷⁹ See discussion *infra* Part I.A.

⁸⁰ See discussion *supra* Introduction Section A & Parts I.A-C.

⁸¹ One of Volkswagen's most iconic products has been the VW bug. See *Beetle*, VW.COM, <http://www.vw.com/models/beetle.52740/section/offers/> (last visited Oct. 6, 2018).

I. WHY CRIME IS BEING DRIVEN INTO THE LEVEL OF MIDDLE
MANAGEMENT

This Article describes the messages that corporate management receives from the criminal law. A sister article explores similar messages to corporate management from civil law and international correlates.⁸² Although Volkswagen is an international company, its actions in the 2015-17 diesel emissions scandal were driven by its focus on the U.S. market, and the company has been highly conscious of its liabilities in this market.⁸³

A. *How Criminal Law Is Coming to Dominate Corporate Regulation*

It is debatable whether the current shape of U.S. law prevents prosecutors from effectively pursuing substantive claims for white collar crimes or whether these patterns have merely become the de facto norm of enforcement.⁸⁴ Professor Todd Haugh nicely summarizes the classic argument made by Professor William Stuntz nearly twenty years ago: “Because the criminal law is so broad, it cannot be enforced as written Therefore, decisions about enforcement fall on the executive, specifically prosecutors and law enforcement officers. This results in enforcement on the street that differs from the ‘law on the books.’”⁸⁵

Similarly, Professor Samuel Buell notes, despite the vast overcriminalization of behavior in U.S. law, first, “[m]ost business crimes . . . are in their structure” exploiting loopholes;⁸⁶ second, “federal prosecutors rely, in both street crime and white collar enforcement, on a relatively small number of bulwark criminal offenses,”⁸⁷ and third, white collar crimes⁸⁸ tend to be based on, and prosecuted, as fraud.⁸⁹ The data on prosecutions support this analysis:

⁸² Nelson, *Beyond Disclosure Enforcement*, *supra* note 21.

⁸³ See, e.g., Nelson, *The Criminal Bug*, *supra* note 76.

⁸⁴ Cf., e.g., SAMUEL W. BUELL, CAPITAL OFFENSES: BUSINESS CRIME AND PUNISHMENT IN AMERICA’S CORPORATE AGE 7 (2016) [hereinafter CAPITAL OFFENSES].

⁸⁵ Todd Haugh, *Overcriminalization’s New Harm Paradigm*, 68 VAND. L. REV. 1191, 1202 (2015) [hereinafter *Overcriminalization’s New Harm Paradigm*] (citing William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 519 (2001)).

⁸⁶ BUELL, CAPITAL OFFENSES, *supra* note 84, at 94.

⁸⁷ *Id.*

⁸⁸ Professor Buell lists these primary crimes as “securities, bank, government contracting, or other fraud; money laundering; tax evasion; criminal violation of environmental or food and drug laws; and obstruction of justice.” *Id.* at 95.

⁸⁹ See *id.* at 32 (“If malfeasance in the business world has a single concept at its core, it is fraud.”).

by 2016, 75.6 percent of all federal white collar cases charge a version of fraud.⁹⁰

As Professor Buell describes, “[i]f malfeasance in the business world has a single concept at its core, it is fraud.”⁹¹ Fraud, he concludes after a survey of its origins and applications, “is deception, with the getting of something from another as the object of the deception.”⁹² In the “intentional and wrongful deception worked upon the fraud victim — either a lie or the concealment of important information that the seller was obligated to disclose” — the lie or omission is key.⁹³

Professor Ellen Podgor’s research on criminal fraud reveals how imprecise the charge is. As she writes, although “[t]he focus of many white collar criminal offenses is fraud[,] . . . fraud is not a crime with prescribed elements.”⁹⁴ Fraud is instead a “‘concept’ at the core of a variety of criminal statutes.”⁹⁵ Application of fraud charges have been growing as “generic statutes such as mail fraud and conspiracy to defraud [are] being applied to an ever-increasing spectrum of fraudulent conduct.”⁹⁶

Federal law is not based on the Model Penal Code (“MPC”), but federal courts have used the MPC for guidance.⁹⁷ Within the MPC, however, the appearance of the term “fraud” is “limited.”⁹⁸ As Professor Podgor observes, “[t]here is no general fraud statute within the [MPC], nor are there mail or wire fraud provisions.”

Turning to common-law precedent as a source to understand fraud, Professor Podgor concludes: “The ‘classic definition’ of fraud in English law focuses on ‘deceit’ or ‘secrecy.’ In United States federal criminal law[,] the term is often synonymously used with the term ‘deceit.’ Deception is also the focus of [U.S.] civil fraud.”⁹⁹ As long as

⁹⁰ Author’s calculations from data supplied by the DOJ and grouped by TRAC reports. See *White Collar Crime Convictions Continue to Decline*, TRAC REPORTS (Apr. 7, 2016), <http://trac.syr.edu/tracreports/crim/421>.

⁹¹ BUELL, CAPITAL OFFENSES, *supra* note 84, at 32.

⁹² *Id.* at 44.

⁹³ See *id.* at 60.

⁹⁴ Ellen S. Podgor, *Criminal Fraud*, 48 AM. U. L. REV. 729, 730 (1999).

⁹⁵ *Id.* (citing ANTHONY ARLIDGE ET AL., ARLIDGE & PARRY ON FRAUD 33 (2d ed. 1996)).

⁹⁶ *Id.* at 730-31.

⁹⁷ *Id.* at 746 n.114 (quoting Kathleen F. Brickey, *Federal Criminal Code Reform: Hidden Costs, Illusory Benefits*, 2 BUFF. CRIM. L. REV. 161, 168 (1998) (“[F]ederal criminal law is not (and never has been) the tidy mix of homicide, theft, and burglary found in state criminal codes.”)).

⁹⁸ *Id.* at 746-47.

⁹⁹ *Id.* at 737 (internal citations omitted).

the term has focused on falsehoods — lies and, at times, omissions¹⁰⁰ — “the law does not define fraud; it needs no definition; it is as old as falsehood and as versable as human ingenuity.”¹⁰¹

Enforcement actions against corporations and individuals can be civil or criminal, and agreements are often made outside the courtroom. But, as Professor John Coffee, Jr., writes, “the dominant development in substantive federal criminal law over the last decade [before 1991] has been the disappearance of any clearly definable line between civil and criminal law.”¹⁰² With overcriminalization, “[t]he bottom line is that the criminal law seems to be expanding into a variety of areas where it is infeasible or even irrational to ignore the costs of law compliance.”¹⁰³

Professor Coffee identifies three features of overcriminalization that particularly affect the white collar landscape, and that have only grown since the date of his observations.

“First, the federal law of ‘white collar’ crime now seems to be judge-made to an unprecedented degree, with courts deciding on a case-by-case, retrospective basis whether conduct falls within often vaguely defined legislative prohibitions.”¹⁰⁴ This *ex ante* uncertainty about the outcome of cases may have the effect of making executives additionally cautious.¹⁰⁵

“Second, a trend is evident toward the diminution of the mental element (or ‘*mens rea*’) in crime, particularly in many regulatory offenses.”¹⁰⁶ There is a trend toward identifying certain behavior — mainly, as we shall see, statements in the form of disclosure to regulators, prosecutors, investors, and the public — as the basis of

¹⁰⁰ See BUELL, *CAPITAL OFFENSES*, *supra* note 84, at 60.

¹⁰¹ Podgor, *supra* note 94, at 739 (quoting Judge Holmes in *Weiss v. United States*, 122 F.2d 675, 681 (5th Cir. 1941)).

¹⁰² John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 193 (1991) [hereinafter *Unlawful*].

¹⁰³ See *id.* at 196-98.

¹⁰⁴ *Id.* at 198.

¹⁰⁵ Michael L. Seigel, *Corporate America Fights Back: The Battle over Waiver of the Attorney-Client Privilege*, 49 B.C. L. REV. 1, 12-13 (2008) (describing how uncertainty in criminal law makes corporate officers “more risk adverse”); see also, e.g., Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1532-33 (1998) (describing the impact of this uncertainty in the context of actions for securities fraud, which have the potential to be criminal or civil).

¹⁰⁶ Coffee, Jr., *Unlawful*, *supra* note 102, at 198.

liability rather than a deeper examination of executives' mental states in making such claims.¹⁰⁷

“Third, . . . the traditional public welfare offenses — now set forth in administrative regulations — have been upgraded to felony status.”¹⁰⁸ Traditional public welfare offenses were those in which there has been a presumption that the defendant should know that the behavior is harmful¹⁰⁹ (such as failing to enforce food safety standards, possessing an unregistered firearm, and shipping tainted cosmetics).¹¹⁰ Upgrading offenses that are based on the assumption that the

¹⁰⁷ See discussion *infra* Part I.A.

¹⁰⁸ Coffee, Jr., *Unlawful*, *supra* note 102, at 198.

¹⁰⁹ Professor Coffee cites Professor Sayre's examples in the *Columbia Law Review* of the sale of adulterated foods and violations of liquor and narcotic controls as examples of public welfare offenses that create liability “without regard to the mind or intent of the actor.” *Id.* at 198 n.19 (citing and quoting Francis Bowes Sayre, *Public Welfare Offenses*, 33 *COLUM. L. REV.* 55, 55 (1933)).

¹¹⁰ In 1985, the Supreme Court wrote that, through public welfare offenses, “Congress has rendered criminal a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety.” *Liparota v. United States*, 471 U.S. 419, 433 (1985). The Court provided several examples in that case, including the federal statute making it illegal to receive or possess an unregistered firearm, in which “the Government did not have to prove that the recipient of unregistered hand grenades knew that they were unregistered, [because] we noted that ‘one would hardly be surprised to learn that possession of hand grenades is not an innocent act.’” *Id.* (quoting *United States v. Freed*, 401 U.S. 601, 609 (1971)). Similarly, “a corporate officer could violate the Food, Drug, and Cosmetic Act when his firm shipped adulterated and misbranded drugs, even ‘though consciousness of wrongdoing be totally wanting.’” *Id.* (quoting *United States v. Dotterweich*, 320 U.S. 277, 284 (1943)). See also related discussion of responsible corporate officer doctrine, *infra* note 442.

Nonetheless, as Professor Stephen Smith has suggested, growth of the public welfare exception may be uncertain after *Staples v. United States*, 511 U.S. 600 (1994). See generally, e.g., Stephen F. Smith, *Proportional Mens Rea*, 46 *AM. CRIM. L. REV.* 127, 129-31 (2009). According to *Staples*, in the context of an unregistered machine gun, the statute's “silence [in identifying mens rea] by itself does not necessarily suggest that Congress intended to dispense with a conventional mens rea element, which would require that the defendant know the facts that make his conduct illegal.” *Id.* at 605. The Court reaffirmed that “[t]he existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.” *Id.* (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 (1978), and citing *Morissette v. United States* for support, 342 U.S. 246, 250 (1952)). Yet the *Staples* Court itself “emphasize[d] that [its] holding is a narrow one.” *Id.* at 619. The cure it required was merely that “the Government should have been required to prove that petitioner knew of the features of his AR-15 that brought it within the scope of the [National Firearms] Act.” *Id.*

defendant should know that the behavior is harmful diminishes the focus on mens rea even at the higher punishment level of felonies.¹¹¹

There are distinctions to be made between the prosecution of the corporation versus individuals within the corporation. As Professor Buell notes, it “is the nature of the corporation . . . to divide and diminish responsibility.”¹¹² That division and diminishment of responsibility includes not only the protection of investors behind limited liability for loss of their assets in the corporation, but also the division and diminishment of responsibility for misconduct by agents of the corporation on the corporation’s behalf.¹¹³ Abuse of the corporate form has evolved for large-scale entities.¹¹⁴ Rather than a single person hiding abuse through his control of the entire corporate form, the corporation hides its abuse by delegating to its agents pieces of abusive behavior.¹¹⁵ Even in attempted prosecutions of top executives, the former U.S. Deputy Attorney General describes how “[b]lurred lines of authority make it hard to identify who is responsible for individual business decisions and it can be difficult to determine whether high-ranking executives, who appear to be removed from day-to-day operations, were part of a particular scheme.”¹¹⁶

In regard to the corporation itself, Professor Jennifer Arlen notes that “a rule of ‘pure strict vicarious criminal liability’ best approximates the existing law governing corporate criminal liability, especially for those crimes which are of particular concern, such as securities fraud, government procurement fraud, and antitrust violations.”¹¹⁷ As Professor Vikramaditya Khanna refines the rule’s impact for management, “[u]nder respondeat superior, top management’s involvement does not influence whether the corporation will be liable, but it does influence for *how much* the

¹¹¹ See Coffee, Jr., *Unlawful*, *supra* note 102, at 198.

¹¹² BUELL, *CAPITAL OFFENSES*, *supra* note 84, at 24.

¹¹³ See Nelson, *Paper Dragon Thieves*, *supra* note 28, at 892-93, 898-99; accord Peter J. Henning, *Why It is Getting Harder to Prosecute Executives for Corporate Misconduct*, 41 VT. L. REV. 503 (2017).

¹¹⁴ Nelson, *Paper Dragon Thieves*, *supra* note 28, at 884; *id.* at 901-08 (providing examples); *id.* at 909-21 (describing resulting problems with application of conspiracy law).

¹¹⁵ *Id.* at 884, 901-02.

¹¹⁶ Sally Q. Yates, Deputy Attorney Gen., Remarks at the N.Y.C. Bar Ass’n White Collar Crime Conference (May 10, 2016), <https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-new-york-city-bar-association>.

¹¹⁷ Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUDIES 833, 840 (1994) [hereinafter *Potentially Perverse Effects*].

corporation will be liable.”¹¹⁸ Moreover, he notes, “top management’s involvement in wrongdoing also increases the prospect of liability for regulatory violations.”¹¹⁹

As Professor Veronica Root describes in terms of compliance, “specific statutory and regulatory admonishments . . . require firms within certain industries to implement discrete compliance programs,” which results in “piecemeal” imposition of “statutory and regulatory dictates.”¹²⁰ The enforcement of these rules is similarly piecemeal. As Professor Root demonstrates in the example of the Foreign Corrupt Practices Act (“FCPA”) alone, rules are enforced through a variety of authorities such as the Department of Justice Fraud Section, Department of Justice Antitrust division, the Securities and Exchange Commission, the Federal Trade Commission, the Federal Communications Commission, and the Department of the Treasury Office of Foreign Asset Control.¹²¹

Nonetheless, it remains true, as Professor Miriam Baer concludes, that “corporate compliance is a creature of federal criminal law.”¹²² As Professors Paul Robinson and John Darley succinctly summarize, due to overcriminalization, “most federal regulations are now routinely converted to federal crimes to give the regulators greater leverage in enforcement.”¹²³ And criminal law has a particular ability to focus the attention of individuals within an organization because conviction under it still retains the highest stigma — and, at least for management, the possibility of going to jail.¹²⁴

¹¹⁸ Vikramaditya S. Khanna, *Should the Behavior of Top Management Matter?*, 91 GEO. L.J. 1215, 1220 (2003).

¹¹⁹ *Id.* at 1222.

¹²⁰ Root, *supra* note 27, at 1010.

¹²¹ *See id.* at 1019-20.

¹²² Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 972 (2009).

¹²³ Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 479 (1997).

¹²⁴ *See* Gregory M. Gilchrist, *Individual Accountability for Corporate Crime*, 34 GA. ST. U. L. REV. 335, 342 (2018).

We ought to punish corporations qua corporations because the failure to do so fosters the dangerous message that corporations may price criminal conduct. Criminal law is special in that it entails a component of social condemnation. Corporations suffer none of the more dramatic bodily or psychological traumas routinely visited on real persons convicted of crimes; by removing even the societal expression of moral condemnation inherent in a criminal conviction, we leave corporations in a fundamentally different position relative to criminal law. For persons, the expression inherent in substantive criminal law is “thou shalt not” If corporations are subject

Regarding individuals, although Professor Buell believes that “individual criminal liability, in its basic structure, does not fit the problem of bad management that produces corporate crime,”¹²⁵ to the degree that managers may be individually liable, he again returns to the need to prove fraud.¹²⁶ He notes that, “[i]n cases of fraud by affirmative misrepresentation, this requirement generally includes that the defendant knew she was uttering falsehood,” although “[s]ome federal cases have suggested recklessness as to falsity might be sufficient for criminal liability.”¹²⁷ Meanwhile, “[l]aws that police honesty in dealings with the government usually authorize criminal sanctions only upon proof that an individual knew of the falsity of, for example, a regulatory filing.”¹²⁸

In terms of methods of practical enforcement, Professor Baer has written how internal corporate investigations are becoming a more common part of the landscape, and a tool upon which law enforcement increasingly both relies and that it rewards.¹²⁹ Individuals must then sometimes protect themselves from being scapegoated by their own organizations. Prosecutors consider the value of a corporation’s internal investigation when “deciding among the alternatives of seeking an indictment, entering into a [deferred prosecution agreement (“DPA”)] or a [non-prosecution agreement

only to civil penalties, the message is that everything is permitted, albeit priced. This is contrary to the nature and purpose of criminal codes, and it remains the best justification for imposing criminal liability on corporations. (internal citations omitted).

¹²⁵ Samuel W. Buell, *Criminally Bad Management*, in RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 59, 85 (Jennifer Arlen ed., 2018) [hereinafter *Criminally Bad*].

¹²⁶ See BUELL, CAPITAL OFFENSES, *supra* note 84, at 16 (“Only proof of an executive’s intent to defraud investors or the public can separate the criminal deal from the merely aggressive, or even stupidly aggressive, one.”); see *id.* at 51 (“For the powerful modern CEO of the big corporation, in an era of large and complex compensation, the legal concept of theft works poorly. The law needs to use the concept of fraud. For fraud, there must be some deception.”). For the FCPA, which is based on bribery, criminal liability depends on the “defendant having acted with a ‘corrupt’ state of mind, meaning the purpose of inducing the official to violate legal obligations.” See Buell, *Criminally Bad*, *supra* note 125, at 71 (citing 18 U.S.C. §§ 201, 666 (2018); *United States v. Bonito*, 57 F.3d 167 (2d Cir. 1995)).

¹²⁷ Buell, *Criminally Bad*, *supra* note 125, at 71.

¹²⁸ *Id.*

¹²⁹ Miriam H. Baer, *When the Corporation Investigates Itself*, in RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 308, 311-12 (Jennifer Arlen ed., 2018).

(“NPA”)], or declining prosecution entirely.”¹³⁰ Professor Brandon Garrett has also amassed extensive data on the evolving scope and shape of DPAs and NPAs.¹³¹

The concept of “regulation by prosecutor” is spreading.¹³² As Professor Gregory Gilchrist describes, once there is triable evidence of wrongdoing in corporate cases, “prosecutors have expanded from serving only as post hoc adjudicators to also working as ex ante governors. That is, prosecutors have become regulators.”¹³³ Similarly, Professors Jennifer Arlen and Marcel Kahan conclude that this system has “transform[ed] prosecutors into firm-specific quasi regulators.”¹³⁴ Still the alleged hook for potentially governing a corporation’s long-term conduct de facto remains, as Professor Buell notes, charges of fraud based on defendants’ statements or omissions.¹³⁵ Moreover, as Professor Daniel Richman writes, “particularly in the white-collar crime area — evidentiary strength [in a given criminal case] is generally a function of prosecutorial effort, priorities, and institutional commitment.”¹³⁶

¹³⁰ *Id.* at 313; see also Miriam H. Baer, *Insuring Corporate Crime*, 83 IND. L.J. 1035, 1038, 1064-72 (2008) (delineating relevant factors).

¹³¹ Brandon L. Garrett, *Individual and Corporate Criminals*, in RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 40, 45-48 (Jennifer Arlen ed., 2018); Brandon L. Garrett, *The Corporate Criminal As Scapegoat*, 101 VA. L. REV. 1789, 1799-800 (2015) [hereinafter *The Corporate Criminal*]. Professor Garrett’s mention later in his *Criminal Scapegoat* article of middle management comports with this Article’s discussion of the VW case because the individuals charged in VW had disclosure duties, which, as the rest of the discussion above describes, is the major way that fraud prosecutions can be charged. See Garrett, *The Corporate Criminal*, at 1791-92.

¹³² See Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar*, 105 MICH. L. REV. 1713, 1714, 1715-20 (2007) (describing the growth of corporate monitors). See also generally Gregory M. Gilchrist, *Regulation by Prosecutor*, AM. CRIM. L. REV. (forthcoming 2018). Reasonably, as practitioners Anthony S. Barkow and Professor Rachel E. Barkow have written, “[t]he practice of regulation by prosecutors . . . raises a number of fundamental questions.” Anthony S. Barkow & Rachel E. Barkow, *Introduction*, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 1, 4 (Anthony S. Barkow & Rachel E. Barkow eds., 2011). This Article notes many of the issues that they raise including “the question of prosecutorial competence and legitimacy to set regulatory terms,” and the “comparative institutional competence of prosecutors to regulate as compared with traditional regulatory agencies like the SEC.” *Id.* at 5. But most of all, it and its sister work are interested in how “factors [can] be adjusted to improve the quality of [prosecutorial] participation.” *Id.*

¹³³ Gilchrist, *supra* note 132, at 2.

¹³⁴ Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation Through Nonprosecution*, 84 U. CHI. L. REV. 323, 327 (2017).

¹³⁵ BUELL, CAPITAL OFFENSES, *supra* note 84, at 60, *passim*.

¹³⁶ Daniel C. Richman, *Corporate Headhunting*, 8 HARV. L. & POL’Y REV. 265, 269

A detailed reading of federal prosecutors' Organizational Sentencing Guidelines and other Department of Justice ("DOJ") documents must be reserved for another occasion.¹³⁷ As Professor Garrett aptly summarizes, "what the guidelines say is one thing, and what prosecutors actually do in practice is another."¹³⁸ Furthermore, regardless of aspirational policy statements, "[i]ndividuals should be held accountable."¹³⁹ "[C]orporations that receive non-prosecution and deferred prosecution agreements typically manage to insulate individuals from prosecution When individuals are charged, they are typically low-level employees, not higher-ups, and they often do not receive jail time."¹⁴⁰

As Professor Garrett explains, in fiscal year 2012, over "8,500 people were convicted of fraud in federal courts."¹⁴¹ Yet only 200 or so organizations are prosecuted each year.¹⁴² Merely a third of even deferred prosecutions, which are supposed to "require the company to help prosecutors investigate any individuals involved," and non-prosecution agreements for years 2001 to 2012 involving corporations named an individual defendant.¹⁴³ Of the 255 total cases in which a corporation and individuals inside it were charged within those twelve years, the "lion's share of the individual prosecutions involved fraud, either securities fraud (16 cases) or some other type (38 cases)."¹⁴⁴

(2014) [hereinafter *Corporate Headhunting*].

¹³⁷ See generally Professor Arlen's analysis of the Guidelines' deficiencies, Jennifer Arlen, *The Failure of the Organizational Sentencing Guidelines*, 66 U. MIAMI L. REV. 321 (2012), and Professor Mark's analysis of the DOJ's Yates Memorandum, Gideon Mark, *The Yates Memorandum*, 51 UC DAVIS L. REV. 1589 (2018).

¹³⁸ Brandon L. Garrett, *The Metamorphosis of Corporate Criminal Prosecutions*, 101 VA. L. REV. ONLINE 60, 67 (2016) [hereinafter *Metamorphosis*].

¹³⁹ See *id.* at 71 (italics in original). But see Richman, *Corporate Headhunting*, *supra* note 136, at 274 (arguing against seeking additional individual prosecutions because, "[w]hether for lack of motivation or the inherent challenges of the task, neither the bureaucracy nor its masters have made much progress in devising performance metrics 'that go beyond case or scalp counting'" (quoting Daniel Richman, *Political Control of Federal Prosecutions: Looking Back and Forward*, 58 DUKE L.J. 2087, 2121 (2009), and citing Miriam H. Baer, *Choosing Punishment*, 92 B.U. L. REV. 577, 599 (2012)).

¹⁴⁰ Garrett, *Metamorphosis*, *supra* note 138, at 71.

¹⁴¹ BRANDON GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 83 (2014) [hereinafter *TOO BIG TO JAIL*] (citing U.S. Sentencing Commission, *2011 Sourcebook of Federal Sentencing Statistics* (2012), Table 3), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2011/Table03_0.pdf.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

Fifty-four cases against individuals within twelve years is a very small number, and “no individual officers or employees were prosecuted in cases involving banks violating laws related to money laundering.”¹⁴⁵ A “similar pattern held true for public companies that were convicted[:] [s]lightly fewer (25 percent, or 31 of 125) convicted companies or their subsidiaries had officers or employees prosecuted.”¹⁴⁶

As Professor William Laufer writes, when compliance is purchased by the corporation, management “winks” at the action of those below them and fosters a culture of “tacit acceptance of illegalities.”¹⁴⁷ It is another discussion whether large-scale wrongdoing then appears to survive corporations’ internal policing and compliance programs either because management potentially involved in the wrongdoing control the scope and impact of the policing, and/or because the programs themselves are ineffectively focused on collecting and reporting less-than-salient information.¹⁴⁸ As Professor Haugh notes, compliance has become “a multi-billion-dollar effort to avoid government intervention in business.”¹⁴⁹

Although criminal penalties receive significant attention, there are civil regulatory and private litigation-based penalties for business behavior as well. Professor Buell describes how, in the corporate context the “multiple forms of enterprise liability — private civil, civil regulatory, and criminal — are layered over one another.”¹⁵⁰ In the law of securities fraud, he notes that “class action plaintiffs, SEC enforcement lawyers, and DOJ prosecutors all enjoy potent authority to initiate big-ticket litigation.”¹⁵¹ And the method of enforcement by source may take many forms. Before the DOJ Fraud division, for example, Professor Root searched FCPA entries for “deferred

¹⁴⁵ *Id.* at 83-84.

¹⁴⁶ *Id.* at 84.

¹⁴⁷ William L. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1341, 1415 (1999).

¹⁴⁸ See J.S. Nelson, *Abusive Internal Corporate Controls* (forthcoming) (on file with author).

¹⁴⁹ Todd Haugh, *The Criminalization of Compliance*, 92 NOTRE DAME L. REV. 1215, 1215 (2017).

¹⁵⁰ Samuel W. Buell, *Potentially Perverse Effects of Corporate Civil Liability*, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 87, 87 (Anthony S. Barkow & Rachel E. Barkow eds., 2011) [hereinafter *Potentially Perverse*].

¹⁵¹ *Id.*

prosecution agreements, non-prosecution agreements, or guilty pleas.”¹⁵²

In 2012, Professor Kevin Davis had articulated a distinction between civil rules that emphasize disclosure versus the moral judgment inherent in criminal sanctions.¹⁵³ As Professor Coffee further notes about the historical distinction between civil and criminal law, “[t]he factor that most distinguishes the criminal law is its operation as a system of moral education and socialization Far more than tort law, the criminal law is a system for public communication of values.”¹⁵⁴

Yet as academics criticize the collapse of these distinctions in the law for criminalizing what would otherwise have been civil actions, the criminal law may be taking on the disclosure approach of civil law. This is the reverse implication of Professor Coffee’s observation about “the disappearance of any clearly definable line between civil and criminal law.”¹⁵⁵

One of the features that used to distinguish civil regimes’ focus on disclosure was their delegation of values to the marketplace. As Professor Davis writes in the context of debates around the passage of the FCPA, civil “[d]isclosure regimes deter by enabling embarrassment, by triggering naming and shaming. They work by exposing wrongdoers to condemnation by customers, suppliers, peers, and the public at large. What disclosure does not entail is explicit denunciation by the state; under a disclosure regime, denunciation is outsourced to society as a whole.”¹⁵⁶ Thus, for example, in its focus on disclosure as an implementing agency, the SEC “made it clear that it viewed *undisclosed* questionable foreign payments as bad for business.”¹⁵⁷

It is interesting now to pair Professor Davis’s observation about the thrust of civil law’s focus on disclosure with Professor Buell’s analysis of white collar crime’s de facto dependence on charges of fraud: the “lie or concealment of important information that the seller was obligated to disclose.”¹⁵⁸ In addition to how regulators extract

¹⁵² Root, *supra* note 27, at 1019.

¹⁵³ See Kevin E. Davis, *Why Does the United States Regulate Foreign Bribery: Moralism, Self-Interest, or Altruism?*, 67 N.Y.U. ANN. SURV. AM. L. 497, 500-01 (2012).

¹⁵⁴ Coffee, Jr., *Unlawful*, *supra* note 102, at 193-94.

¹⁵⁵ *Id.* at 193.

¹⁵⁶ Davis, *supra* note 153, at 500.

¹⁵⁷ *Id.* at 501 (emphasis in original).

¹⁵⁸ Cf. BUELL, CAPITAL OFFENSES, *supra* note 84, at 60.

information from corporations through reporting requirements,¹⁵⁹ the emphasis on fraud in practical enforcement is an important reason why corporations and their management interpret the law as focused on statements: what they say when, to whom, and how.¹⁶⁰

Furthermore, in the criminal white collar context, whole markets can be distorted to make fraud prosecutions impossible because the lie or omission only becomes chargeable when “the norms of the particular market make that behavior wrong.”¹⁶¹ A good example of this phenomenon is the 2015 *Litvak* case in which the Second Circuit overturned a securities trader’s convictions for fraud and false statements based on lies to the government because so many other people in the marketplace were doing the same thing.¹⁶² In other words, if everyone is lying, then no one commits an actionable crime of fraud.¹⁶³ Additionally, it is usually outright statements —

¹⁵⁹ This issue will be discussed more extensively in this Article’s sister work. See Nelson, *Beyond Disclosure Enforcement*, *supra* note 21.

¹⁶⁰ See, e.g., Murphy, *supra* note 76, at 1445-46:

[P]erhaps most importantly, process violations make excellent pretextual prosecutions because they are so easy to prove and hard to defend Compared to primary violations, process crimes can be far easier to prove. They rarely rely upon civilian witnesses or complex evidentiary structures and often present a series of straightforward elements that afford few defenses

In fact, the process crime may encompass a subset of the elements of the primary offense: rather than prove that defendant was on the corner on Friday selling narcotics, the prosecutor just has to prove that defendant was on the corner Friday but told the investigator it was Thursday And as technology improves methods of documentation and information transmission — whether in the form of email and voicemail records, urinalysis results, or electronic location trackers — capturing a suspect’s slightest transgressions may be as simple as pressing a button.

Id.

¹⁶¹ See BUELL, CAPITAL OFFENSES, *supra* note 84, at 73.

¹⁶² See *United States v. Litvak*, 808 F.3d 160, 182-83 (2d Cir. 2015) (holding that, despite the fact that Litvak admitted lying to the government on three different occasions, purchasers were supposed to have figured out the price of the bonds themselves, and the fact that Litvak’s statements may have been intended to “deceive, manipulate or defraud” should not be persuasive because the rest of the agents in the market were doing the same things). The author discusses the facts and implications of this case and others more extensively in Nelson, *Paper Dragon Thieves*, *supra* note 28, at 934-39, and Nelson, *The Corruption Norm*, *supra* note 28, at 280.

¹⁶³ The author has written elsewhere on the additional problem of incentives for shifting norms within and across industries. See, e.g., Nelson, *The Corruption Norm*, *supra* note 28, at 280.

documentable lies — that more easily become actionable liabilities, as opposed to omissions.¹⁶⁴

Denunciation of a seller's lie or concealment may be brought by the state under the criminal law, but that criminal law is still: (1) relying on a lie or omission — statements (i.e., disclosure); and (2) that lie or omission is only actionable, even in the criminal law, in the context of marketplace behavior and norms. As the overcriminalization discussion suggests, civil and criminal schemes thus start to converge both in their focus on statements (lies or omissions: i.e., disclosure choices), and in their dependence on the marketplace for the setting of acceptable norms.

The degree of sanction, and, at times, *who* is doing the sanctioning (public or private parties) may be different, but the triggers for the sanctions emphasize disclosure and its social context. Furthermore, when criminal law in the business world is based on policing what people say instead of what they do, it, like the civil law, surrenders its values definition and enforcement — and worse, its conditions for non-enforcement — to the marketplace.¹⁶⁵

Finally, another set of circular problems for attempting to hold middle managers inside corporations liable for fraud is that, outside of certain highly-regulated industries with independent rules, middle managers will not have committed fraud by merely telling their bosses what their bosses want to hear. Most of these middle managers, who are the vast majority of companies' structures, do not have disclosure duties or otherwise represent themselves and the company to regulators or the marketplace.¹⁶⁶ Unlike top executives, under the

¹⁶⁴ Proving criminal fraud for non-disclosure is particularly difficult because the prosecutor must first establish the outlines of the exact duty to disclose the information and how it was violated. See Buell, *Criminally Bad*, *supra* note 125, at 71. (“In cases of fraud by omission or nondisclosure, this requirement generally means that the defendant thought about her obligation to make disclosure and decided to disregard that duty in order to deceive the victim.”). Moreover, as in the case of Sarbanes-Oxley certification requirements, “[c]riminal violations of these statutes require proof that the signer knew that the financial statements were false; reliance on accountants, lawyers, and other delegates of responsibility is as much a defense under these laws as it has always been in cases of financial reporting fraud.” See *id.*

¹⁶⁵ Perhaps part of the appeal of criminalizing so much of the white collar world is trying to import a moral sanctioning into an area that seems to have so little.

¹⁶⁶ Cf., e.g., Miriam H. Baer, *Reconceptualizing the Whistleblower's Dilemma*, 50 UC DAVIS L. REV. 2215, 2249 (2017) (describing how difficult it may be for a prosecutor to know about or prove intent for a mid-level employee's involvement even when the employee falsifies documents). As Professor Baer writes, “[a]ssume the [mid-level employee] aids in the scheme by preparing fake invoices that effectively conceal the purpose of the illegal payments. There is nothing obviously illegal about

federal white collar criminal law discussed *supra*¹⁶⁷ and *infra*,¹⁶⁸ these middle managers typically make no direct misrepresentations to become the basis of defrauding the federal government or the marketplace.¹⁶⁹

Indeed, there may not be even civil fraud to allege internally. Because the people to whom middle managers do talk — their direct bosses — may be working with them on what to say and/or deliberately not asking the questions that might induce a fraudulent answer, there may be little actual deception.¹⁷⁰ Inside VW, this became a script with lines employees did not step outside, and it included warnings to recall e-mails that might say too much.¹⁷¹ This dynamic inside the corporation may then mirror the dynamic outside the corporation in which investors do not want to ask what Professor Buell describes as “the hard questions that either would have resulted in real, provable fraud or stopped these deals long before they got out of control.”¹⁷²

This Article focuses on managements’ reactions to the message that corporations and the individuals within them receive from the criminal law about disclosure and the importance of what they say or what prosecutors can prove that they *knew* and did not say. Such omissions become a focus at the end of the Article in discussing willful blindness instructions.

working with contractors or preparing documentation reflecting a company’s payments to those contractors. Accordingly, even if the government eventually becomes aware of the company’s [illegal] bribe, prosecutors may well lack requisite evidence of the [mid-level employee’s] state of mind.” *Id.*

¹⁶⁷ See discussion *supra* Part I.A.

¹⁶⁸ See discussion *infra* Parts I.B–D & Parts III.A–B.

¹⁶⁹ See, e.g., the full text of 18 U.S.C. § 371 (2018), *infra* n. 438 (requiring that “two or more persons conspire to commit any offense against the United States, or to defraud the United States, or any agency thereof . . .”). A discussion of securities fraud on the market will be part of this Article’s sister work. Problems with conspiracy liability and/or aiding and abetting charges are discussed *infra* Part I.D, Part II.A., notes 235-38, and in the author’s work elsewhere.

¹⁷⁰ See BUELL, CAPITAL OFFENSES, *supra* note 84, at 44 (noting that fraud is “deception, with the getting of something from another as the object of the deception”). See also discussion *supra* Intro Section B & note 67.

¹⁷¹ See discussions *infra* Part I.E, Part II.A.1, Part II.A.3, & Part II.B.2.

¹⁷² BUELL, CAPITAL OFFENSES, *supra* note 84, at 62. See also discussion *infra* Part I.B and note 185.

B. *What Is Wrong with Relying So Much on What People Say*

Turning to what is happening outside the corporation, there are many reasons why our current law is broken in relying so heavily on disclosure and the delegation of judgments to the market. As described above, this issue takes modified forms in the criminal law, as opposed to the civil law, but our emphasis on fraud in white collar crime brings these various forms together by focusing on lies and the norms of the market for when lies are perceived as lies. Although classical law-and-economics theory postulates that markets will provide the most efficient solution to enforcement problems,¹⁷³ a growing body of evidence now demonstrates that disclosure alone does not impact corporate behavior the way that law-and-economics theorists speculated.¹⁷⁴ The market does not well punish lies or omissions to enforce morality.

Initially, there are the practical problems of information overload, in which companies may hide the impact of disclosures in floods of documents to overwhelm the attention of investors and analysts.¹⁷⁵ A 2012 accounting study finds that the average number of pages devoted to management discussion, analysis, and footnotes in the previous twenty years has quadrupled; these sections are on track by the year 2032 to be over 500 pages.¹⁷⁶ As one company's audit committee member confidentially reports, because "[t]he volume [of disclosures] is increasing much faster than the rate of [meaningful] information provided . . . [w]e are not accomplishing transparency. In fact, we are creating obfuscation."¹⁷⁷ By 2013, the SEC Chairman herself

¹⁷³ See R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 1-15 (1960); Paul H. Rubin, *Law and Economics*, in THE CONCISE ENCYCLOPEDIA OF ECONOMICS (2008), available at <https://www.econlib.org/library/Enc/LawandEconomics.html> (describing the history and development of law-and-economics). See also generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (9th ed. 2014). Coase and other proponents admit that transaction costs and additional factors may prevent efficient market outcomes. Transaction costs, of course, can be present in all real-world situations; in the extreme, this admission comes close to becoming the loophole that swallows the theory.

¹⁷⁴ See James D. Cox & Randall S. Thomas, *SEC Enforcement Heuristics: An Empirical Inquiry*, 53 DUKE L.J. 737, 744-45 (2003) (listing, for example, many reasons why private suits fail to adequately enforce disclosure-based rules); see also Arlen, *Potentially Perverse Effects*, *supra* note 117, at 833-38; Jolls, Sunstein & Thaler, *supra* note 105 *passim*; Cass R. Sunstein, *Empirically Informed Regulation*, 78 U. CHI. L. REV. 1349 *passim* (2011).

¹⁷⁵ See KPMG & FIN. EXECS. RESEARCH. FOUND., *DISCLOSURE OVERLOAD AND COMPLEXITY: HIDDEN IN PLAIN SIGHT* 2-3 (2011).

¹⁷⁶ ERNST & YOUNG, *NOW IS THE TIME TO ADDRESS DISCLOSURE OVERLOAD* 1 (2012).

¹⁷⁷ ERNST & YOUNG, *DISCLOSURE EFFECTIVENESS* 2 (2014), <http://www.ey.com/>

questioned the impact of “detailed and lengthy disclosures about all of the topics that companies currently provide in the reports they are required to prepare and file.”¹⁷⁸

By 2016 Professor Gabriel Rauterberg, however, describes even more basic components of the market’s failure to achieve morally desirable results through disclosure alone. There is a fundamental incentive problem for investors that no amount of disclosure will ultimately address. As Rauterberg notes, “[i]t seems to be a curious myopia of business ethics . . . that it has largely sought to reimagine the ethics of managers without revisiting the ethics of owners or consumers”¹⁷⁹ As he correctly identifies, owners and consumers do not have the right incentives to enforce business ethics unless reforms are more systemic because ethical actions may result in short-term reductions in profit.¹⁸⁰ “[E]thical managers” are “soon . . . weeded out by less ethical owners, unless the latter [are] also converted. If profits [begin] to decline at a firm or even across an entire industry, shareholders . . . quickly assemble at the next board of directors meeting and select a new board.”¹⁸¹ Competitive optimization encourages this board to “promptly fire the ethical officers and replace them with less scrupulous successors.”¹⁸² Well-meaning managers may be “able to extract some private benefits — and create some public benefits — without repercussions,” but without systemic changes, unchecked competitive product markets and competition for corporate control “impose important limits” on ethical behavior.¹⁸³

Publication/vwLUAssets/EY-disclosure-effectiveness-november-2014/\$FILE/EY-disclosure-effectiveness-november-2014.pdf (quoting an audit committee member).

¹⁷⁸ Mary Jo White, Chair, U.S. Sec. & Exch. Comm’n, Speech at the National Association of Corporate Directors: The Path Forward on Disclosure (Oct. 15, 2013), http://www.sec.gov/News/Speech/Detail/Speech/1370539878806#_ftnref7.

¹⁷⁹ Gabriel Rauterberg, *The Corporation’s Place in Society*, 114 MICH. L. REV. 913, 925 (2016).

¹⁸⁰ *See id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *See id.* This is also a reverse implication of Professor Coffee’s famous argument in favor of disclosure that it “improve[s] the allocative efficiency of the capital market,” and therefore the productiveness of the economy as a whole. *See* John C. Coffee, Jr., *Market Failure and the Economic Case for a Mandatory Disclosure System*, 70 VA. L. REV. 717, 722 (1984).

This phenomenon demonstrates an ugly truth of market behavior as described by a former investment banking analyst after the LIBOR¹⁸⁴ scandal:

Investors don't want to be protected from fraud; they want to invest. Since the invention of stock markets, there has been surprisingly little correlation between the amount of fraud in a market and the return to investors. [For example, it has] been credibly estimated that in the Victorian era, one in six companies floated on the London Stock Exchange was a fraud. But people got rich.¹⁸⁵

In another example of how mere disclosure of information to the market fails to yield presumptively desirable ethical results, forcing companies to disclose information on the ratio of CEO pay to average worker pay was supposed to create pressure from the marketplace to make the discrepancy smaller. Empirical evidence, however, demonstrates that the system is not working. In 2017, news reports lead with "American corporate bosses continue to get bigger raises than their workers."¹⁸⁶ In fiscal year 2016, "pay for chief executives at 42 public U.S. companies rose 5.5% . . . from the prior year, widening the gap with average earnings of employees, which rose 2.8%."¹⁸⁷

Corporations perform cost-benefit analyses to determine their courses of action.¹⁸⁸ Although prosecutors may be focusing on fraud

¹⁸⁴ See "What is LIBOR," *supra* note 18.

¹⁸⁵ Davies, *Financial Fraud*, *supra* note 19. Davies' observation as a former market player dovetails interestingly with Professor Buell's observation from the vantagepoint of a former prosecutor about the reason why enforcement actions can at times not prove fraud. See BUELL, *CAPITAL OFFENSES*, *supra* note 84, at 62 ("The problem in the market for mortgage-backed securities wasn't lies. It was that the buyers didn't have enough incentive to ask the sellers the hard questions that either would have resulted in real, provable fraud or would have stopped these deals long before they got out of control."). The buyers did not want to "stop[] these deals long before they got out of control." *Id.* They, as Davies suggests, want to get "rich" instead. Davies, *Financial Fraud*, *supra* note 19.

¹⁸⁶ Anders Melin, *CEOs Widen Income Gap Over Staff as Survey Shows 5.5% Pay Jump*, BLOOMBERG (Mar. 8, 2017, 2:00 AM), <https://www.bloomberg.com/news/articles/2017-03-08/ceos-widen-income-gap-over-staff-as-survey-shows-5-5-pay-jump>.

¹⁸⁷ Ben DiPietro, *The Morning Risk Report: Values-Based Culture Pays Off for Companies*, WALL ST. J. (Mar. 8, 2017, 7:08 AM), <https://blogs.wsj.com/riskandcompliance/2017/03/08/the-morning-risk-report-values-based-culture-pays-off-for-companies/>.

¹⁸⁸ See Gary S. Becker, *Crime and Punishment: An Economic Approach*, in *ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT* 1, 25 (Gary S. Becker & William M. Landes eds., 1974) (articulating the economic theories for which Professor Becker would win the Nobel Prize).

cases, corporations know that pursuing business fraud cases can take a long time. The same analyst involved in LIBOR above explains that white collar trials “are not long and detailed because there is anything difficult to understand. They are long and difficult because so many liars are involved, and when a case has a lot of liars, it takes time and evidence to establish that they are lying.”¹⁸⁹

Not only is the market failing to hold companies accountable, U.S. regulators are even worse at taking action on violations. Even under administrations that appeared interested in punishing corporate misbehavior, “[w]hile the number of [company] filings increased by sixty percent between 1991 and 2000, the proportion of filings receiving review declined from twenty-one percent to eight percent. In 2001, the SEC completed full review of only sixteen percent of issuers, missing its stated goal by half.”¹⁹⁰ As Professor Buell advises in the context of securities fraud, “the SEC must try some cases and be happy to try more of them. The Enforcement Division very rarely goes to trial, and virtually never in cases against large corporations.”¹⁹¹

Even more of a problem for traditional law-and-economics theory, the current imposition of fines on a corporate entity may disgorge profits and provide compensation to the victims of large-scale wrongdoing, but it does not change business behavior.¹⁹² Like so many

¹⁸⁹ Davies, *Financial Fraud*, *supra* note 19.

¹⁹⁰ Natalya Shnitser, Note, *A Free Pass for Foreign Firms? An Assessment of SEC and Private Enforcement Against Foreign Issuers*, 119 YALE L.J. 1638, 1658 (2010).

¹⁹¹ Buell, *Potentially Perverse*, *supra* note 150, at 97.

¹⁹² See, e.g., Uri Gneezy, Stephan Meier & Pedro Rey-Biel, *When and Why Incentives (Don't) Work to Modify Behavior*, 25 J. ECON. PERSPECTIVES 191, 199-206 (2011) (providing examples of when and why structural incentives fail to have their intended effects, including in the “Wall Street Game” and other behavioral experiments with money); David C. Weiss, Note, *The Foreign Corrupt Practices Act, SEC Disgorgement of Profits, and the Evolving International Bribery Regime: Weighing Proportionality, Retribution, and Deterrence*, 30 MICH. J. INT'L L. 471, 506 (2009) (“The justification for [corporate] criminal punishment, in general, rests on either utilitarian or retributivist grounds.”); *id.* at 506-07 (“[D]eterrence can be particularly ineffective for punishing corporations.”).

It is true that, at extreme levels, corporations would consider fines for wrongdoing to be corporate “death sentences” at which levels they would be forced out of business. See Becker, *supra* note 188, at 25-27; see also *Fine and Punishment*, ECONOMIST (July 21, 2012), <https://www.economist.com/finance-and-economics/2012/07/21/fine-and-punishment> (walking through the extremes of Becker's theory for the imposition of fines on behavior). But fines that reach that level are neither practical nor desirable for many reasons. As compliance research has shown, there needs to be a balance before which “death sentence”-level compliance overly compels resources and stifles productivity. Cf. Robert C. Bird & Stephen Kim Park, *Turning Corporate Compliance into Competitive Advantage*, 19 U. PA. J. BUS. L. 285, 308 (2017) (“A firm may, for ex-

behavioral findings that threaten the theory of what lawyers have been taught, these management literature findings need to come more directly into the law. In contrast to law-and-economics expectations, empirical management studies establish that the net impact of most corporate fines on shareholders for wrongdoing is effectively zero.¹⁹³ Additionally, with the growth of institutional shareholders — even by 2009, seventy-three percent of the shares of the top 1,000 companies on U.S. markets were owned by institutional shareholders¹⁹⁴ —

ample, achieve state-of-the-art compliance but do so in a way that costs too much relative to the risk reduced.”); Arlen & Kraakman, *Controlling Corporate Misconduct*, *supra* note 27, at 692 (“Where corporate liability is justified, it must accomplish two goals: it must induce firms to select efficient levels of productive activity (the activity level goal) and to implement enforcement measures that can minimize the joint costs of misconduct and enforcement (the enforcement goal).”).

More importantly for this analysis, the criminology literature on policing suggests that “higher-touch” systems of enforcement, in which there are more interactions and interventions for lower-level of infractions, have more impact on over-all behavior. See INT’L ASSOC. OF CRIME ANALYSTS, *EFFECTIVE RESPONSES: HIGH CRIME AND DISORDER AREAS 16-18* (2015) (highlighting as describing best practices eight criminological studies with intensive engagement over minor behaviors to reduce rates of crime); *see also* LESLEY FREIMAN ET AL., *URB. INST., HOUSING ASSISTANCE AND SUPPORTIVE SERVICES IN MEMPHIS: BEST PRACTICES FOR SERVING HIGH NEEDS POPULATIONS 4* (2013) (“The available evidence suggests that high-touch supportive programs involving case management are particularly effective for improving the lives and opportunities for poor and vulnerable families living in concentrated poverty.”); *see also* Daniel Richman, *Response, Judging Untried Cases*, 156 U. PA. L. REV. PENNUMBRA 219, 219-21 (2007) (questioning the validity of our criminal justice system when so few cases go to trial). And these “higher-touch” systems in the corporate context must include interactions with mid-level management.

¹⁹³ See, e.g., Jason R. Pierce, *Reexamining the Cost of Corporate Criminal Prosecutions*, 41 J. MGMT. 892, 892 (2015), <http://jom.sagepub.com/content/early/2015/07/23/0149206315594845.abstract> (struggling with why “[s]cholars of management and related disciplines have consistently found that criminal convictions have negligible impacts on shareholder wealth despite theoretical expectations to the contrary.”); JOHN H. NUGENT, *ARE LARGE CORPORATE FINES LEVIED ON THE RIGHT PARTY AND DO THEY HAVE LONG TERM NEGATIVE CONSEQUENCES?* 10-11 tbls. 1, 2 (2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2050093 (acknowledging that a controversial area, but finding that “[t]he data . . . indicate[] that large fines exceeding \$30 million per se do not appear to uniformly affect stock prices before or after the fines are sustained. In fact, in Table 2 below, it can be seen that 15 of the 27 companies examined (56%); stock prices were higher after the fine than on the fine date. Similarly, stock prices for 15 of the 27 companies (56%) were higher 90 days after the fine versus stock prices 90 days before the fines were sustained. And in [the two cases in which] stock prices were lower after the fine than on the fine date (banking enterprises – BoA and JP Morgan), such changes in lower stock prices may have more to do with the continuing financial market imbroglio and uncertainty commencing in the 2007 period than because of the fines themselves.”).

¹⁹⁴ Luis A. Aguilar, Comm’r, U.S. Sec. and Exch. Comm’n, *Speech at Georgia State*

investors are less interested in corporate reputation and tend to measure value in terms of profit, regardless of its sources.¹⁹⁵

As Oxford Business School Professor Colin Mayer describes, empirical evidence demonstrates that shareholders do not punish corporations in their stock value when the corporation causes harm to those who are not its own investors or customers.¹⁹⁶ Perversely, in fact, “there is evidence that” when the corporation is penalized by a regulator for such abuses to other parties “the share price of the corporation goes up.”¹⁹⁷ As Professor Mayer explains,

[T]he stock market is a very selfish policeman. It only inflicts penalties on corporations which, by their actions, have damaged the corporation itself. Where the corporation has damaged other people or corporations, then far from penalizing it, the stock market might even reward it for enhancing its profits.¹⁹⁸

We must re-examine our premise in disclosure-based enforcement that monitoring statements to markets and regulators will reliably put pressure on corporations and the people within them to make ethical decisions. We cannot assume that the market will discipline companies for their broader harms to society instead of for more narrow management choices in business operations to produce profit. In fact, we may now have to confront evidence of the very opposite: explicit reward for harmful behavior when the company is able to externalize costs. If we as a society want companies to follow ethical guidelines not to harm others, then we must be more explicit in articulating those guidelines and engaging the power of regulation to

University (Apr. 19, 2013), <https://www.sec.gov/news/speech/2013-spch041913laahtm>.

¹⁹⁵ See, e.g., Stephen Choi & Marcel Kahan, *The Market Penalty for Mutual Fund Scandals*, 87 B.U. L. REV. 1021, 1025 (2007) (“[W]e find significant withdrawals only when a scandal portends that continued wrong-doing will likely result in future harm to the fund investors. For scandals where the risk of future harm to the fund investors is low, however, we find no statistically or economically significant withdrawals.”). But see Vijay S. Sampath et al., *Corporate Reputation’s Invisible Hand: Bribery, Rational Choice, and Market Penalties*, 151 J. BUS. ETHICS 743, 743, 754 & tbl. 5, 757 (2018) (finding that, of losses observed, “reputational penalties account for 81.8¢ of every dollar of share value loss,” meaning that penalties for market firms may originate from consumers if not investors).

¹⁹⁶ COLIN MAYER, *FIRM COMMITMENT: WHY THE CORPORATION IS FAILING US AND HOW TO RESTORE TRUST IN IT* 47 (2013).

¹⁹⁷ *Id.* (citing John Armour, Colin Mayer & Andrea Polo, *Regulatory Sanctions and Reputational Damage in Financial Markets* (Eur. Corp. Governance Inst., Finance Working Paper Series, No. 300, 2010)).

¹⁹⁸ *Id.*

enforce them. And we have a gaping hole in our legal engagement with corporations. That hole, as the Volkswagen example will illustrate, is at the level of middle management.

The next section of this Article describes the charges against VW and how they did not fit the substantive wrongdoing taking place within the company. The subsequent section illustrates how coordinated wrongdoing manifests in middle management. The last section of the Article describes developments for fixing the criminal law in application of conspiracy doctrine to more business cases and in evolution of willful blindness standards. Ultimately, however, the Article finds that criminal law fixes will not be the answer without reforms to engage all levels of a company — explicitly including middle management.

C. Charges Do Not Fit the Substantive Wrongdoing

As the discussion about the narrowness of criminal charges based on disclosure suggests, the charges brought in the VW case did not fit the breadth of substantive wrongdoing within the company. Plea deals may modify charges, but in VW's case, as in others, the same charges have been in place from the beginning.¹⁹⁹ Because the charges then reflect what prosecutors prioritizing the case believe they could prove in court, weaknesses in the charges signal underlying weaknesses in the law and our enforcement system.

The criminal charges against VW and its executives are for covering up the organization's crime, not for the crime itself. VW and its top executives merely pleaded guilty to not telling the truth about their deception. From the beginning of the case, the charges against VW and variously against its executives have been (1) conspiracy to defraud the government, (2) obstruction of justice, and (3) entering goods into the country by false statement.²⁰⁰ VW AG has pleaded guilty to all three charges.²⁰¹ Two executives in U.S. custody have pleaded guilty to conspiracy to defraud the government, and one also to false statements.²⁰² Versions of the same disclosure-based charges

¹⁹⁹ See Indictment at 15-23, U.S. v. Liang, No. 2:16-cr-20394 (E.D. Mich. June 6, 2016) [hereinafter *Liang Indictment*]; Second Superseding Indictment at 11-33, U.S. v. Dorenkamp, No. 2:16-cr-20394 (E.D. Mich. Jan. 11, 2017) [hereinafter *Six Executives Indictment*]; Third Superseding Information at 6-11, U.S. v. Volkswagen AG, No. 2:16-cr-20394, (E.D. Mich. Jan. 11, 2017) [hereinafter *VW AG Indictment*].

²⁰⁰ *Liang Indictment*, *supra* note 199; *Six Executives Indictment*, *supra* note 199; *VW AG Indictment*, *supra* note 199.

²⁰¹ *VW Plea*, *supra* note 32, at 1-3.

²⁰² Rule 11 Plea Agreement at 1-2, U.S. v. Liang, No. 16-cr-20394 (E.D. Mich. Sept.

are pending against six additional VW executives.²⁰³ The six executives remain abroad, and Germany is unlikely to extradite them to the United States.²⁰⁴ This result is thus the practical end of VW's high-profile criminal case.²⁰⁵

9, 2016) [hereinafter *Liang Plea Agreement*] (conspiracy to defraud the government only); Rule 11 Plea Agreement at 2, U.S. v. Schmidt, No. 16-cr-20394, (E.D. Mich. July 26, 2017) [hereinafter *Schmidt Plea Agreement*] (conspiracy to defraud the government and false statements).

²⁰³ See *Six Executives Indictment*, *supra* note 199, at 11 (charges of conspiracy to defraud the government against all six defendants); *id.* at 32 (charges of making false statements in violation of the Clean Air Act against four defendants); *id.* at 35 (charges of wire fraud against four defendants). In addition, as this Article was in press, another indictment was announced against ex-CEO Winterkorn, who remains outside U.S. jurisdiction in Germany. See Adrienne Roberts & Christina Rogers, *Volkswagen Ex-CEO Martin Winterkorn Indicted in Emissions Probe*, WALL ST. J. (May 4, 2018, 5:21 AM), <https://www.wsj.com/articles/volkswagen-ex-ceo-martin-winterkorn-indicted-in-emissions-probe-1525378593> [hereinafter *Volkswagen Ex-CEO*].

²⁰⁴ See Karin Matussek, *VW Executives Safe from U.S. Extradition in Home Country*, AUTOMOTIVE NEWS (Jan. 12, 2017, 10:19 AM), <http://www.autonews.com/article/20170112/OEM02/170119907/vw-executives-safe-from-u.s.-extradition-in-home-country> [hereinafter *VW Executives Safe*].

²⁰⁵ The Trump government does not seem particularly interested in pursuing corporate crime. See, e.g., Patricia Hurtado, *White-Collar Prosecutions Fall to 20-Year Low Under Trump*, BLOOMBERG (May 25, 2018, 3:00 AM), <https://www.bloomberg.com/news/articles/2018-05-25/white-collar-prosecutions-fall-to-20-year-low-under-trump>; Charlie Savage & Maggie Haberman, *Trump Abruptly Orders 46 Obama-Era Prosecutors to Resign*, N.Y. TIMES (Mar. 10, 2017), <https://www.nytimes.com/2017/03/10/us/politics/us-attorney-justice-department-trump.html>.

In addition, the three federal agencies with which VW reached civil resolutions were the U.S. Environmental Protection Agency (EPA), the U.S. Customs and Border Protection (CBP), and the DOJ Civil Division. All three agencies' charges establish deficiencies only in VW's disclosures. The civil settlements will be discussed extensively in this Article's sister work, *Beyond Disclosure Enforcement*.

The EPA settlement establishes liability on the basis that the emissions-defeat device software was "not disclosed in the Certificate of Conformity applications" under the Clean Air Act. Third Partial Consent Decree at 2, In re: Volkswagen "Clean Diesel" Litigation, No. 3:15-md-02672-CRB (N.D. Cal. Jan. 11, 2017). The EPA had alleged violations of 42 U.S.C. § 203(a)(1), (2), (3)(A), (3)(B) (2018) of the Clean Air Act. *Id.* at 1. The CBP settlement is based on "alleged misrepresentations, omissions, or submission of inaccurate information on importation and entry pertaining to compliance with environmental laws and emissions requirements." Settlement Agreement at 2, U.S. Customs and Border Protection v. Volkswagen AG (Jan. 11, 2017), <https://www.justice.gov/opa/press-release/file/924411/download>. The DOJ Civil Division settlement is for manipulation of the financial system under a theory that "VW represented to its United States customers, United States dealers, and others in the United States that the Subject Vehicles met applicable United States emissions standards and designed a specific marketing campaign to market these vehicles to United States customers as 'clean diesel' vehicles." Settlement Agreement at 3, Dept. of Justice v. Volkswagen (Jan. 11, 2017), <https://www.justice.gov/opa/press-release/file/924406/>

But on these disclosure-based charges, even the company and its sole executive who have pleaded guilty have never taken responsibility for VW's real crimes in harms to human health and the environment.²⁰⁶ In a street setting, this is similar to committing murder and merely being charged with lying to the police about where the body is hidden. Where are the charges for the underlying crime? This flaw in charges is not isolated to treatment of the VW scandal. For example, in February 2017, Takata's criminal settlement for nearly twenty years of exploding airbags affecting one out of every five cars on the American road was a single count of wire fraud.²⁰⁷ Three of its executives with disclosure duties were charged with the same form of misrepresentation.²⁰⁸

The three criminal statutes to which VW AG pleaded guilty are 18 U.S.C. § 371, 18 U.S.C. § 1512, and 18 U.S.C. § 542.²⁰⁹ The VW criminal settlement covers emissions-control defeat devices on over 500,000 cars in the U.S. including seven 2.0-liter diesel engine VW-brand models, six 3.0-liter diesel VW and Audi models, and the diesel Porsche-brand Cayenne.²¹⁰

Under 18 U.S.C. § 371, the company admits to conspiring to defraud the United States, committing wire fraud, and violating the Clean Air Act.²¹¹ Although presented in multiple parts, as explained in more detail in the note below, this charge merely boils down to

download. The civil monetary penalty was collected under FIRREA, the Financial Institutions Reform, Recovery and Enforcement Act of 1989, 12 U.S.C. § 1833a (2018). *Id.* at 6. Based on VW's misrepresentations, the "loans, leases, and floorplan financing of Volkswagen vehicles" contaminated pools of asset-backed securities that federally-insured financial institutions purchased and for which they served as trustees. *Id.* at 3-4.

²⁰⁶ Later settlements did finally include a small monetary penalty to be paid to the EPA and California for environmental compensation. For a detailed discussion of VW's civil settlements, see Nelson, *Beyond Disclosure Enforcement*, *supra* note 21.

²⁰⁷ Mike Spector & Mike Colias, *Takata Pleads Guilty to Criminal Wrongdoing, Agrees to Pay \$1 Billion in Penalties*, WALL ST. J. (Feb. 27, 2017, 6:20 PM), <https://www.wsj.com/articles/auto-makers-knew-takata-air-bags-were-dangerous-plaintiffs-allege-1488233045>.

²⁰⁸ See Hiroko Tabuchi & Neal E. Boudette, *3 Takata Executives Face Criminal Charges Over Exploding Airbags*, N.Y. TIMES (Jan. 13, 2017), <https://www.nytimes.com/2017/01/13/business/takata-airbag-criminal-charges.html>. Similar to as in Volkswagen, the top executives live abroad (here Japan) and, as of press time, have not been extradited back to the United States. Mike Spector, *Takata Executives Criminally Charged in U.S. Probe of Faulty Air Bags*, WALL ST. J. (Jan. 13, 2017, 5:36 PM), <https://www.wsj.com/articles/takata-executives-criminally-charged-in-u-s-probe-of-faulty-air-bags-1484325097>.

²⁰⁹ *VW Plea*, *supra* note 32, at 2-3.

²¹⁰ *Id.* at ex. 2-8 & 2-9.

²¹¹ *Id.* at 2-5.

misrepresentation.²¹² Under 18 U.S.C. § 1512, VW obstructed justice by concealing or destroying evidence — also, in essence, lying.²¹³ And under 18 U.S.C. § 542, it entered goods by false statement.²¹⁴

To emphasize again how circular our disclosure enforcement system is, the counts of conspiracy to defraud the United States and violating the Clean Air Act do not contain a substantive offense in violating the Clean Air Act. The violation of the Clean Air Act was *not* for the emission levels themselves. The elements of the Clean Air Act violation were that: (1) the “defendant knowingly made (or caused to be made) a false material statement, representation, or certification, or omission of material information;” that (2) “was in a notice, application, record, report, plan or other document required to be filed or maintained under the Clean Air Act [42 U.S.C. § 7413(c)(2)(A)];” and (3) the “statement, representation, certification, or omission of information, was material.”²¹⁵ The Clean Air Act violation was for lying in a document required under the Act. That is still a charge for lying, not a substantive charge for the damage from emissions violations.²¹⁶

²¹² See *id.* First, the law requires that “two or more persons conspired . . . to defraud the United States or one of its agencies . . . in this case, the Environmental Protection Agency . . . by dishonest means.” *Id.* at 3. Second, there was “a violation of the wire fraud statute [18 U.S.C. § 1343]” requiring that the “defendant knowingly participated in, devised, or intended to devise a scheme to defraud in order to obtain money or property;” that the “scheme included a material misrepresentation or concealment of a material fact;” that the “defendant had the intent to defraud;” and the “defendant used (or caused another to use) wire, radio or television communication in interstate or foreign commerce in furtherance of the scheme.” *Id.* at 4-5. And third, the “defendant knowingly made (or caused to be made) a false material statement, representation, or certification, or omission of material information;” that “was in a notice, application, record, report, plan or other document required to be filed or maintained under the Clean Air Act [42 U.S.C. § 7413(c)(2)(A)];” and the “statement, representation, certification, or omission of information, was material.” *Id.* at 5.

²¹³ See *id.*

²¹⁴ *Id.* at 6-7.

²¹⁵ *Id.* at 5.

²¹⁶ A further objection may be that, had VW not lied about polluting the air, it might not have polluted the air. But companies are increasingly receiving waivers for behavior anyway. Telling the truth for companies is having fewer and fewer consequences. Disclosure of the behavior can even have the paradoxical effect of protecting the company from prosecution through formal and informal government waivers of enforcement. See, e.g., Maddie McMahon, *Defining Declinations: A New Enforcement Action*, GAB | THE GLOBAL ANTICORRUPTION BLOG: LAW (June 25, 2018), <https://globalanticorruptionblog.com/2018/06/25/defining-declinations-a-new-enforcement-action/> (“In recent years, the US Department of Justice (DOJ) has, with increasing frequency, been resolving alleged violations of the Foreign Corrupt Practices Act (FCPA)

On the same day that VW's federal settlement was announced, the DOJ filed an indictment against six VW executives.²¹⁷ The executives' indictment was similarly flawed and dependent on the same disclosure-based charges.

The named executives served as public faces of the company in its interactions with regulators rather than deeper-level engineers who also coordinated the code.²¹⁸ The facts of the filings would establish that middle managers ordered, pressured their subordinates, and explicitly facilitated large-scale coordinated wrongdoing.²¹⁹ Meanwhile, the charges in the indictments merely assert that the individuals, like VW itself, misrepresented or omitted facts to

with formal declinations (that is, a statement that the DOJ will not prosecute the corporation). Indeed, the possibility of resolution through declination is a centerpiece of the DOJ's new Corporate Enforcement Policy (CEP).”).

Even in the last days of the Obama administration, fewer than one in eight federal agency criminal referrals of corporations lead to actual prosecution, and only 7.4 percent of referrals for white collar crime. David Dayen, *Obama's Justice Department Likes Criminally Prosecuting People, but not Corporations*, THE INTERCEPT (Jan. 20, 2016, 10:14 AM), <https://theintercept.com/2016/01/20/obama-justice-department-likes-criminally-prosecuting-people-but-not-corporations>. During the Trump administration, the DOJ has been even more reluctant to prosecute corporations for alleged wrongdoing, even when it allegedly understands the scope of what has occurred. See, e.g., Ben Protess, Robert Gebeloff, & Danielle Ivory, *Trump Administration Spares Corporate Wrongdoers Billions in Penalties*, N.Y. TIMES (Nov. 3, 2018), <https://www.nytimes.com/2018/11/03/us/trump-sec-doj-corporate-penalties.html> (describing the experiences of Walmart, Barclays, and Royal Bank of Scotland, among other corporations, with the DOJ under Trump). And when there are fines or settlements, those are vastly lower as well. DOJ's corporate fines in the last year have dropped ninety percent. Jamiles Lartey, *Corporate Penalties Dropped as Much as 94% Under Trump, Study Says*, GUARDIAN (July 25, 2018, 5:28 PM), <http://www.theguardian.com/us-news/2018/jul/25/trump-corporate-penalties-drop-public-citizen-study>. EPA's compliance penalty fines are down ninety-four percent. *Id.*

²¹⁷ See *Six Executives Indictment*, *supra* note 199, at 1.

²¹⁸ The six executives are Oliver Schmidt — the only one of the six to be arrested — VW's head of U.S. compliance who allegedly lied repeatedly to government regulators; Heinz-Jacob Neusser, an executive who represented the company at new car shows; Jürgen Peter, who worked in Germany to invent the excuses that VW AG would use with American regulators and pleaded with colleagues for them to “Come up with a story please”; Richard Dorenkamp, who spoke often at industry gatherings; Bernd Gottweis, VW's internal “fireman” who warned ex-CEO Winterkorn that U.S. regulators were investigating VW's defeat devices; and Jen Hadler, who had a doctorate in engineering but pushed VW's fraudulent “clean diesel” strategy. Jack Ewing, *Volkswagen's Diesel Scandal: Who Has Been Charged?*, N.Y. TIMES (Jan. 13, 2017), <https://www.nytimes.com/2017/01/13/business/volkswagen-diesel-emissions-executives.html>.

²¹⁹ See *Six Executives Indictment*, *supra* note 199.

regulators or the public — in other words, liability for covering up the fraud, not for orchestrating and perpetuating it.²²⁰

Count One against all individual defendants alleges violation of 18 U.S.C. § 371, the charge of defrauding the government to which VW AG pleaded guilty — with the same flaws as described in the text and footnotes above. Counts Two through Ten against four of the six defendants allege violations of the Clean Air Act on the same misrepresentation basis above that the defendants “did knowingly make and cause to be made, false material statements, representations, and certifications in, and omit and cause to be omitted material information from, notices, applications, records, reports, plans, and other documents required pursuant to the . . . Act.”²²¹ Counts Eleven through Eighteen against four of the six defendants allege misrepresentation through wire fraud and charge punishment as principals.²²²

In July 2017, the sole executive from the second indictment in U.S. custody, former VW head of U.S. Compliance, Oliver Schmidt, pleaded guilty to conspiracy and false statements,²²³ insisting in his sentencing letter to the judge that his loyalty had led him to be “misused by my own company.”²²⁴ He regrets having followed the “script, or talking points” that had “been approved by management[-]level supervisors at VW, including a high-ranking in-house lawyer.”²²⁵

The only other individual previously charged in the VW scandal is the company’s U.S. Leader of Diesel Competence, James Liang, who also spoke to regulators.²²⁶ In September 2016, he pleaded guilty to one count under 18 U.S.C. § 371, the same charge of defrauding the government to which VW AG would plead.²²⁷

Meanwhile, hauntingly missing from the U.S. individual indictments are several people described in the VW settlement as committing internal wrongdoing without making outside statements on behalf of

²²⁰ *Id.* at 11-12, 32-33, 35-36.

²²¹ *Id.* at 32.

²²² *Id.* at 35-36 (applying 18 U.S.C. § 1343 (wire fraud) and 18 U.S.C. § 2 (punishment as principal)).

²²³ *Schmidt Plea Agreement*, *supra* note 202, at 1-2.

²²⁴ Bill Vlasic, *Volkswagen Official Gets 7-Year Term in Diesel-Emissions Cheating*, N.Y. TIMES (Dec. 6, 2017), <https://www.nytimes.com/2017/12/06/business/oliver-schmidt-volkswagen.html>.

²²⁵ *Id.*

²²⁶ *Liang Indictment*, *supra* note 199, at 8; *Liang Plea Agreement*, *supra* note 202, at 5.

²²⁷ *Liang Plea Agreement*, *supra* note 202, at 2.

the company. Prosecutors know the identity, for example, of “Supervisor B,” “senior executives [who] rebuffed a group of Volkswagen engineers who had discovered the illegal software,” and “Attorney A.”²²⁸ According to the VW plea statement of facts, in 2006, “Supervisor B” specifically overruled engineers who had “raised objections to the propriety of the defeat device,” ordered them to continue, and “instructed those in attendance . . . not to get caught.”²²⁹ In 2012, a group of senior executives who had received a presentation on the illegal software from nervous engineers “encouraged the further concealment of the software” and “instructed the engineers . . . to destroy the document they had used to illustrate the operation of the defeat device software.”²³⁰ In 2015, as regulators were closing in and had issued a litigation hold notice to VW, “Attorney A” urged engineers to destroy documents relevant to the defeat device, and at least two other VW AG employees contacted employees at another company to delete their documents as well.²³¹ As a result of “Attorney A”’s instructions, at least forty employees deleted thousands of documents,²³² but many of those documents were later recovered through computer forensic examinations.²³³

D. *The Message from Criminal Law that Corporations Receive*

What then is the message that management receives from white collar prosecutions? The message that corporations and their management receive from the current focus on disclosure in enforcement is that they have the most to fear from what they *say* to regulators, investors, and consumers, as opposed to what they *do* within their organizations.²³⁴ The answer that top executives in these large-scale scandals have found to externalize costs in the pursuit of

²²⁸ Jack Ewing, *More VW Executives Could Be Charged, Court Documents Suggest*, N.Y. TIMES (Jan. 13, 2017), <https://www.nytimes.com/2017/01/13/business/volkswagen-emissions-scandal-charges.html>.

²²⁹ *VW Plea*, *supra* note 32 ex. 2-14.

²³⁰ *See id.* at ex. 2-18, 2-19.

²³¹ *Id.* at exs. 2-28 – 2-30.

²³² Jack Ewing, *Inside VW’s Campaign of Trickery*, N.Y. TIMES (May 6, 2017), <https://www.nytimes.com/2017/05/06/business/inside-vws-campaign-of-trickery.html> [hereinafter *VW’s Campaign*].

²³³ *See VW Plea*, *supra* note 32 ex. 2-30.

²³⁴ *See, e.g.*, multiple sections on reviewing and cautioning directors about the contents of public statements. DIRECTOR’S HANDBOOK: A FIELD GUIDE TO 101 SITUATIONS COMMONLY ENCOUNTERED IN THE BOARDROOM 185-88 (Frank M. Placenti, ed., 2017) (including “Reviewing Corporate Press Releases” and a ten-chapter section on “Shareholder Engagement and Communication”).

profits without incurring individual criminal penalties is to rely on middle management that does not speak to regulators or the market. Even as C-suite executives of companies may face removal for a company's wrongdoing, they put pressure on the rest of the company below them to achieve results without inquiring into the methods that the agents use to achieve those results.²³⁵ Although the very lowest-level individuals in a company may be unsophisticated enough to hand prosecutors an easy case in which they have single-handedly committed all the elements of a crime,²³⁶ the vast majority of middle management in companies escapes prosecution by dividing up the elements of crimes among agents of the corporation such that no single person commits all the elements of a triable crime.²³⁷ In a separate work, this author has described how the law has lost its ability to tie the behavior of these individuals within the body of a corporation together through conspiracy, aiding and abetting, and other types of prosecutions.²³⁸

Our over-emphasis on disclosure-based prosecution makes lack of accountability for the vast majority of middle management worse. Setting up the facts of the 2015-17 VW scandal, two parts of the disclosure-driven pattern that enables large-scale fraud emerge.

First, the most obvious consequence of a disclosure-dependent incentive system for business organizations is that individuals with disclosure obligations do not ask about wrongdoing within the organization because they do not want to have to tell. This system leads to willful blindness towards coordinated agent wrongdoing

²³⁵ Nelson, *Paper Dragon Thieves*, *supra* note 28, at 930-31 (describing top management incentives and dynamics at Wells Fargo to "goose" the company's stock through unethical pressure on employees to cross-sell products).

²³⁶ See, e.g., Frank Partnoy, *Few Traders are Likely to be Deterred by Verdict on Tom Hayes*, FIN. TIMES (Aug. 4, 2015), <https://www.ft.com/content/9a1019b8-3a94-11e5-bbd1-b37bc06f590c> (describing how a low-level employee's prosecution merely "provides a road map of what not to do" in handing cases to authorities).

²³⁷ Nelson, *Paper Dragon Thieves*, *supra* note 28, at 892-93, 898-99.

²³⁸ *Id.* at 896-900, 908-14. Judges have been upset about these implications too. As one court protests, application of the intracorporate conspiracy doctrine "require[s] that any person enlisted into a conspiracy necessarily become an 'agent,' and therefore he cannot be a conspirator because there is only a single entity, but this cannot be right." *Allison v. Chesapeake Energy Corp.*, No. 12-0900, 2013 WL 787257, at *10 (W.D. Pa. Jan. 29, 2013). As another court further explains, because "a corporation can act only through its employees, the element of concert is missing in the 'aiding and abetting' context just as in the conspiracy context." *People ex rel. Herrera v. Stender*, 152 Cal. Rptr.3d 16, 38 (Cal. Ct. App. 2012) (quoting *Janken v. GM Hughes Elecs.*, 52 Cal. Rptr. 2d 741, 755 (Cal. Ct. App. 1996)).

within the company.²³⁹ This Article explores willful blindness in much greater detail *infra*.²⁴⁰ The phenomenon is related to the “ostrich problem” among top U.S. executives.²⁴¹ As Professor Garrett documents the behavior of metaphorically putting one’s head in the sand rather than be accountable for wrongdoing, “[e]xecutives have insulated themselves” from Sarbanes-Oxley reporting liability “by requiring certificates from subordinates so they can defend themselves by showing how they relied on reviews by others.” This Article’s analysis additionally comports with Professor Garrett’s most recent data on white collar prosecutions.²⁴² He shows that those who are convicted of crimes on behalf of the organization are the executives in the company who have disclosure-based obligations to regulators and the public, not CEOs and board members above, nor the vast majority of middle management below the disclosure representatives.²⁴³

Disclosure-based prosecutions may increasingly impose liability on individuals with disclosure obligations, but this merely leads to arbitrary executive turnover. Former Deputy Attorney General Sally Yates referred to this phenomenon as appointing a designated “Vice President of Going to Jail.”²⁴⁴ Disclosure-based regulation shoots the messenger in charge of conveying information, and fails to provide incentives for the messenger to more deeply investigate the substance of his message.²⁴⁵ Taking a disclosure-only approach signals that we

²³⁹ This phenomenon is also referred to as the “ostrich problem” with corporate enforcement. See, e.g., GARRETT, *TOO BIG TO JAIL*, *supra* note 141, at 280.

²⁴⁰ See detailed willful blindness discussion *infra* Part III.B.

²⁴¹ The reference to “ostrich” behavior is from a myth that an ostrich will bury its heads in the sand rather than deal with the immediate problems around it. See *id.*; see also generally Sarah Chang, *Do You Have an Ostrich Problem on Your Hands?*, MUSE, <https://www.themuse.com/advice/do-you-have-an-ostrich-problem-on-your-hands> (last visited Oct. 6, 2018) (describing the term and its origins in psychology).

²⁴² GARRETT, *TOO BIG TO JAIL*, *supra* note 141, at 280.

²⁴³ Cf. Garrett, *The Corporate Criminal*, *supra* note 131, at 1802-03 (“Of the individuals charged in these cases, thirteen were presidents, twenty-six were CEOs, twenty-eight were CFOs, and fifty-nine were vice presidents . . . [T]he best known was Bernard Ebbers, convicted at trial for securities fraud at MCI (WorldCom).”).

²⁴⁴ Matt Apuzzo & Ben Protess, *Justice Department Sets Sights on Wall Street Executives*, N.Y. TIMES (Sept. 9, 2015), <http://www.nytimes.com/2015/09/10/us/politics/new-justice-dept-rules-aimed-at-prosecuting-corporate-executives.html> (quoting Deputy Attorney General Yates).

²⁴⁵ Ironically, even the DOJ knows that this phenomenon is happening. *Id.* Similarly, public figures have declined to make statements on issues about which they should be informed for fear of being held to their words. Cf., e.g., Spicer: *Providing Evidence for Trump’s Wiretap Claims “Above My Pay Grade,”* GUARDIAN (Mar. 8, 2017, 3:50 AM), <https://www.theguardian.com/us-news/video/2017/mar/08/spicer-providing-evidence-for-trumps-wiretap-claims-above-my-pay-grade-video>.

do not want to hear what the message really is. Additionally, the high rate of executive turnover further discourages executives' interest in uncovering fraud, and it shortens their tenure so that they are not able in practical terms to correct wrongdoing within the company even if they do know about it.²⁴⁶

Enabling the flaws in disclosure-driven executive behavior, corporate boards fail to exert the pressure to investigate that they should.²⁴⁷ As senior counsel to many companies explains, “[e]very board of directors already knows that a major compliance failure can cause vast reputational damage At the board level, the problem isn’t a lack of deterrents. The problem is denial.”²⁴⁸ Because individual jail time, if served at all, will typically be served only by executives with disclosure responsibilities, directors fail to probe the full scale of issues themselves.²⁴⁹

Directors also fail to push executives to investigate the full scale of wrongdoing.²⁵⁰ Using an example from outside of VW to show how pervasive these problems are, Wells Fargo’s 2017 board investigation of the company’s 3.5 million false accounts “depict[s] the board as hoodwinked by bank executives who withheld important facts.”²⁵¹ Yet,

²⁴⁶ This author has written separately on the increases in CEO compensation as their legal risks for the job increase. See J.S. Nelson, *The Corporate Conspiracy Vacuum*, 37 CARDOZO L. REV. 249, 287-88 (2015) [hereinafter *The Corporate Conspiracy Vacuum*].

²⁴⁷ *Stone v. Ritter*, 911 A.2d 362, 364-65 (Del. 2006) (finding monitoring duties consistent with the duty of good faith and loyalty); *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 961 (Del. Ch. 1996) (establishing the basic duties of the board to monitor corporate acts). A separate work by this author describes how corporate law on board duties permits the failure and abuse of internal compliance systems, largely a flaw in having to prove scienter to establish lack of good faith. This board incentive not to know about problems further feeds into the “don’t ask, don’t tell” system. See J.S. Nelson, *Abusive Internal Controls* (on file with author).

²⁴⁸ Ben DiPietro, *The Morning Risk Report: Is PG&E Sentence a Sign of Things to Come?*, WALL ST. J. (Jan. 30, 2017, 7:21 AM), <https://blogs.wsj.com/riskandcompliance/2017/01/30/the-morning-risk-report-is-pge-sentence-a-sign-of-things-to-come/> (quoting Scott Killingsworth, senior counsel at law firm Bryan Cave).

²⁴⁹ *Id.* Furthermore, U.S. law may be further diverging in the protection of directors more than a corporation’s officers. See, e.g., Deborah DeMott, *Corporate Officers as Agents*, 74 WASH. & LEE L. REV. 847, 849 (2017) (arguing that “an officer’s breach of her duties of care, competence, and diligence should be assessed against a standard of ordinary or simple negligence, as is the case for agents generally, not the less demanding standard of gross negligence applicable under Delaware law to directors’ breaches of their more generalized duty of care”).

²⁵⁰ See DiPietro, *supra* note 248.

²⁵¹ Stacy Cowley & Jennifer A. Kingson, *Wells Fargo to Claw Back \$75 Million From 2 Former Executives*, N.Y. TIMES (Apr. 10, 2017), <https://mobile.nytimes.com/2017/>

as the board's own report concludes, "[m]any things collectively should have raised suspicion" from the fact that "[c]ustomers were failing to . . . put money into, their new accounts at alarming rates" to the fact that "[r]egional managers were imploring their bosses to drop sales goals, saying they were unrealistic and bad for customers."²⁵² Thus, for all of these reasons, high-level management often are allowed to have limited knowledge of what a company's agents are doing because they do not want to know and have a disincentive to ask.²⁵³

Second, removing and/or discouraging oversight of a company at the top ranks empowers middle management to expand the scope of wrongdoing and coordination under and across corporate forms.²⁵⁴ Evidence of this growing phenomenon can be seen in what has now become public about the actions of agents during the 2015-17 VW scandal.²⁵⁵ In addition, mid-level managers are the individuals within a company most threatened by an agent's unwillingness to comply, and they have the most direct control over a potential whistleblower's job and future.

Ultimately, the lowest-level engineers at VW attached to engine design may be removed, as will the representatives of the company whose jobs it has been to provide material information to the public and regulators.²⁵⁶ But, as Professor Frank Partnoy notes about the limited impact of a case against a select low-level employee, "the evidence wielded by prosecutors provides a road map of what not to do."²⁵⁷ Similarly, Professor Rena Steinzor, writing in the context of industrial accidents, observes "a conservative legal strategy that requires presence at the scene of a disaster to prove *mens rea* . . . means that only low-to-mid-level supervisors have anything to fear. This cramped approach destroys the criminal law's capacity to

04/10/business/wells-fargo-pay-executives-accounts-scandal.html.

²⁵² *Id.*

²⁵³ See, e.g., Nelson, *Paper Dragon Thieves*, *supra* note 28, at 873 n.2, 874 n.7, 924 n.437, 925 n.439 & 932 n.480 (discussing the Wells Fargo scandal as another example of willful blindness).

²⁵⁴ This phenomenon is similar to the increase in power of professional legislative staff after the imposition of term limits on elected officials. See generally Nelson W. Polsby, *Constitutional Mischief: What's Wrong with Term Limitations*, AM. PROSPECT (Summer 1991).

²⁵⁵ See discussion *infra* Part II.B.2.

²⁵⁶ See *Six Executives Indictment*, *supra* note 199, at 1 (naming six VW executives with disclosure duties); Nelson, *Paper Dragon Thieves*, *supra* note 28, at 893-94 (discussing the Hayes case).

²⁵⁷ Partnoy, *supra* note 236.

motivate adoption of a safety culture that, to be meaningful, must be endorsed, funded, and implemented from the top down.”²⁵⁸ The point must be made also that large-scale coordinated wrongdoing requires buy-in at the level of middle management. As representatives who sign documents or make public statements cycle above them, the middle management that produces and coordinates fraud is under constant pressure to produce results without effective oversight of the methods with which they use to achieve those results.²⁵⁹

Why do we remain so focused on what people at the top of corporations say? Why can we not penetrate further into the corporation to receive more reliable information about what people within corporations *do*? Corporations, as management literature describes, are vehicles to motivate groups of individuals to reach common goals.²⁶⁰ Through social science, we study what those individuals do, how they act, and how they react under pressure and sets of incentives.²⁶¹ The law as currently enforced does not properly

²⁵⁸ RENA STEINZOR, *WHY NOT JAIL?: INDUSTRIAL CATASTROPHES, CORPORATE MALFEASANCE, AND GOVERNMENT INACTION* 220 (2015).

²⁵⁹ In certain industries, what the middle manager is doing might be independently criminal because it is heavily regulated, and/or the officer by his or her position may be subject to responsible corporate officer doctrine. This author has written previously about responsible corporate officer doctrine and believes it could be expanded. See, e.g., Nelson, *The Corporate Conspiracy Vacuum*, *supra* note 246, at 283-85. Nonetheless, in industries like Volkswagen’s, prosecuting the middle manager for substantive violations is more challenging because disclosure obligations do not apply, and the middle manager is not directly defrauding anyone. Furthermore, intracorporate conspiracy immunity prevents conspiracy prosecutions from tying middle managers’ behavior together with other individuals actively defrauding or committing offenses. The author has written about the failures of conspiracy prosecutions in the corporate context before. See, e.g., *id.* at 255-59 (documenting the intracorporate conspiracy doctrine and its spread); J.S. Nelson, *The Intracorporate Conspiracy Trap*, 36 *CARDOZO L. REV.* 969, 988-1002 (2015) [hereinafter *The Intracorporate Conspiracy Trap*] (illustrating how the doctrine works in practice to defeat prosecutions by examining the case of a mid-level manager within the Roman Catholic Church’s Philadelphia Archdiocese who systematically transferred predatory priests from parish to parish to cover up their sexual abuse). This Article includes a briefly updated conspiracy discussion *infra* Part III.A.

²⁶⁰ See, e.g., PETER F. DRUCKER, *THE ESSENTIAL DRUCKER: IN ONE VOLUME THE BEST OF SIXTY YEARS OF PETER DRUCKER’S ESSENTIAL WRITINGS ON MANAGEMENT* 4 (2001) (“[T]he fundamental task of management remains . . . to make people capable of joint performance through common goals, common values, the right structure, and the training and development they need to perform and to respond to change.”).

²⁶¹ See *id.* at 112 (“[E]ach manager’s job must be focused on the success of the whole. The performance that is expected of a manager must be derived from the performance goals of the business; his results must be measured by the contribution they make to the success of the enterprise.”).

engage these individuals in the vast middle of the corporation. This Article next explores how top and middle management have exploited this basic hole in our legal enforcement structure.

II. WHAT COORDINATED WRONGDOING LOOKS LIKE IN MIDDLE MANAGEMENT

In our current disclosure-based system, large-scale coordinated wrongdoing spreads in size and sophistication through the insulation of middle management from liability while top executives maintain plausible deniability through willful blindness, and a culture of fear prevents whistleblowers from coming forward.

Although the next Part of this Article uses examples from VW, the case study is representative of similar pressures at many corporations. For example, at Walmart, tremendous pressure from top management to achieve company goals has allegedly fueled a Mexican expansion bribery scandal, and employees have been pushed to work such long hours that they incur safety risks.²⁶² At United Airlines, a series of passenger abuse and related scandals allegedly stem from company pressure to cut costs, allocate seats, and not pay staff.²⁶³ At Wells

²⁶² Adam Hartung, *Walmart Investors Should Worry About Tracy Morgan Lawsuit — A Lot*, ADAMHARTUNG.COM (July 15, 2014), <http://adamhartung.com/walmart-investors-should-worry-about-tracy-morgan-lawsuit-a-lot> (“Pushed too hard to create success, Walmart leadership [in the alleged Mexican expansion bribery scandal] was at least skirting with the law if not outright violating it. I projected these problems would worsen, and sure enough by November the bribery probe was extended to Walmart’s operations in Brazil, China and India . . . [Similarly, in considering workplace hours violations, w]hat should concern investors is whether the long-term culture of Walmart — obsessed about costs and making the numbers — has created a situation where all through the ranks people are feeling the need to walk closer to ethical, and possibly legal, lines. While it may be that no manager told the driver [in a high-profile accident] to drive too fast or work too many hours, the driver might have felt the pressure from ‘higher up’ to get his load to its destination at a certain time – or risk his job, or maybe his boss’s.”).

²⁶³ Adam Hartung, *Why United Airlines Abuses Customers: The Risks of Operational Excellence*, FORBES (Apr. 10, 2017, 6:25 PM), <https://www.forbes.com/sites/adamhartung/2017/04/10/why-united-airlines-abuses-customers-the-risks-of-operational-excellence/#37f991c9bb10> (“[O]n Sunday, April 9, 2017 United Airlines forcibly removed a 69-year-old passenger [who was a doctor traveling back to see patients] from a flight, over his objections. United employees had Chicago Aviation Police board the plane, grab the passenger (who had a valid boarding pass) and drag him off the plane as if he were a hijacker. In the process the police banged his head on an armrest, leaving him battered and bloodied. When the passenger returned to the plane the police again forcibly manhandled him, restrained him and took him off the plane strapped onto a stretcher. . . . All so the airline could board a flight attendant that needed to reach the plane’s destination in order to make her next working flight. In other words, United’s front line management chose to

Fargo, top management pressure for product “cross-selling” has allegedly pushed the opening of 3.5 million fraudulent accounts and retribution against objecting employees.²⁶⁴ And at Uber, a pervasive culture of aggressive actions towards individuals and other entities as set from the top of the company has allegedly lead to a long list of abuses including the deception of regulators, the hacking of rivals, the stealing of trade secrets, the intimidation of journalists, the abuse of customers’ personal information, the manipulation of drivers, and a culture of sexual harassment.²⁶⁵ This short list of additional examples could have included myriad others.²⁶⁶

not only inconvenience a paying customer, but physically abuse that customer so the airline would maintain its operating crew schedule.”); *id.* (“CEOs, and leadership teams[] that focus on “operational excellence” as a strategy . . . become so focused on efficiency, cost cutting and business operations that they forget about customers — or anything else. All that matters is keeping the business operating, while trying to keep costs as low as absolutely possible. Management, from bottom to top, is rewarded for operational performance, while all other metrics are ignored. Including customer satisfaction.”); see also Christina Caron, *United Airlines Pauses Lottery for Bonuses After Employees Rebel Online*, N.Y. TIMES (Mar. 5, 2018), <https://www.nytimes.com/2018/03/05/business/united-airlines-employee-bonuses-lottery.html> (quoting a Los Angeles United Airlines worker explaining frustration with airline games affecting employee compensation to reach cost targets: “You [the United Airlines company] have the opportunity to do the right thing. WE are the face of your company. The morale is horrible and keeps getting worse. We feel like we’re not being heard and the tension is palpable.”).

²⁶⁴ Editorial, *Plenty More Villains at Wells Fargo*, N.Y. TIMES (Apr. 12, 2017), <https://www.nytimes.com/2017/04/12/opinion/plenty-more-villains-at-wells-fargo.html>.

²⁶⁵ Mike Isaac, *How Uber Deceives the Authorities Worldwide*, N.Y. TIMES (Mar. 3, 2017), <https://www.nytimes.com/2017/03/03/technology/uber-greyball-program-evade-authorities.html> (Greyball deception of regulators); Mike Isaac, *Inside Uber’s Aggressive, Unrestrained Workplace Culture*, N.Y. TIMES (Feb. 22, 2017), <https://www.nytimes.com/2017/02/22/technology/uber-workplace-culture.html> (sexual harassment, homophobia, and threatened violence as part of aggressive workplace culture); Mike Isaac et al., *Uber Hid 2016 Breach, Paying Hackers to Delete Stolen Data*, N.Y. TIMES (Nov. 21, 2017), <https://www.nytimes.com/2017/11/21/technology/uber-hack.html> (paying off hackers to conceal data breaches); Cade Metz, *Rebuking Uber Lawyers, Judge Delays Trade Secrets Trial*, N.Y. TIMES (Nov. 28, 2017), <https://www.nytimes.com/2017/11/28/technology/uber-waymo-lawsuit.html> (Waymo trade secrets theft trial); Jack Nicas & Greg Bensinger, *Uber Hacked and Surveilled Rivals, Alleges Ex-Manager in Letter*, WALL ST. J. (Dec. 15, 2017, 9:32 PM), <https://www.wsj.com/articles/uber-hacked-and-surveilled-rivals-alleges-ex-manager-in-letter-1513389333>; Rebecca Davis O’Brien & Greg Bensinger, *Uber Faces FBI Probe Over Program Targeting Rival Lyft*, WALL ST. J. (Sept. 8, 2017, 8:26 AM), <https://www.wsj.com/articles/uber-faces-fbi-probe-overprogram-targeting-rival-lyft-1504872001>; Noam Scheiber, *How Uber Uses Psychological Tricks to Push Its Drivers’ Buttons*, N.Y. TIMES (Apr. 2, 2017), <https://www.nytimes.com/interactive/2017/04/02/technology/uber-drivers-psychological-tricks.html>; Cale Guthrie Weissman, *This is What Caused Uber’s Broken Culture Problem*, FAST CO. (Feb. 27, 2017), <https://www.fastcompany.com/3068475/this-is-what-caused-ubers-broken-company-culture> (“[I]f the company focuses only on profit and scale, it leaves culture to be created

A. *The Mechanics of Disclosure-Driven Willful Blindness*

VW's behavior illustrates the impact on both top and middle management of the perceived importance of disclosure-based liability as opposed to liability for underlying actions. Because disclosure-based enforcement monitors what specific individuals at the top of the corporation say to regulators and the marketplace, we create a series of warped incentives within the main body of corporations.²⁶⁷ Top executives with disclosure duties appear to remain willfully blind to what is happening inside their organizations so that they do not have to disclose what those outside the company want to know.²⁶⁸ At the

on its own and sends the message that results by any means necessary trump everything else.”).

²⁶⁶ For example, in an analysis of rouge traders from the growing management field of organizational misbehavior arrives at similar conclusions about LIBOR manipulation. See “What is LIBOR,” *supra* note 18.

As the authors describe the pervasiveness of the manipulation:

The Financial Services Authority . . . counts 40 individuals directly involved, of which 13 were managers and five senior managers, who were aware of the [practice] of submission manipulation. The circumstances around management awareness were similar at other banks, exemplary Deutsche Bank, Rabobank . . . and Royal Bank of Scotland . . . Management's awareness and even its active involvement in the submission manipulation to mask problems concerning financial viability/liquidity sheds light on risk acceptance/allowance behavior[r] of involved financial institutions and corporate decision makers. Given the length of the collusive interaction scheme, which started in or at around 2005, it is remarkable how overconfident acting individuals and their management were in terms of the probability of detection.

HAGEN RAFELD ET AL., WHALE WATCHING ON THE TRADING FLOOR: UNRAVELLING COLLUSIVE ROGUE TRADING IN BANKS 24 (2018) (citing Financial Conduct Authority (FCA) findings from 2015 p. 34 for Deutsche Bank; 2013 pp. 4, 9 for Rabobank; and 2013 pp. 3, 19-20 for Royal Bank of Scotland).

²⁶⁷ This phenomenon is related to the “ostrich problem” with corporate enforcement. See, e.g., GARRETT, TOO BIG TO JAIL, *supra* note 141 at 279-80. Professor Vikramaditya Khanna has similarly suggested ways in which management's efforts may be less than sincere, including “if top management were involved in wrongdoing because (1) such involvement may generate few internal enforcement measures, (2) the enforcement measures may be “window dressing,” or (3) employees may not believe management will follow through with the enforcement measures.” Khanna, *supra* note 118, at 1237.

²⁶⁸ Professor Jennifer Arlen also has written about the perverse effect of imposing strict liability on corporations for their criminal conduct, including disincentives for enterprises to monitor compliance. Arlen, *Potentially Perverse Effects*, *supra* note 117, at 844-45.

same time, executives put pressure beneath them on middle managers and others to produce results without inquiry into methods.

Evidence of the resulting patterns — willful blindness by top management, and pressure on middle management to coordinate large-scale wrongdoing — can be seen throughout the VW emissions scandal.

For example, one of the striking features of the 2015-17 scandal at VW is how hard the top officers of the company tried to deny the evidence of cheating that the government repeatedly presented to them. Top officers at the company, even after they have been forced to resign, protest that they did not know of the cheating before the situation became obvious given the government's emissions data.²⁶⁹ Moreover, when VW finally admitted wrongdoing, even members of the company's supervisory board assert that they learned of the existence of illegal software in the company's products from media reports.²⁷⁰

How could VW's top executives — who almost uniformly possess strong technical engineering backgrounds — have known so little about what was happening inside the company?²⁷¹ Investigations of top officers do seem to conclude that, despite VW's otherwise very strong command-and-control culture, top executives insulated themselves from direct knowledge of the cheating for most of the ten-plus established years of the scandal.²⁷² If VW's top executives were not directing the large-scale fraud at the company that affected eleven million vehicles, which persisted through multiple engine re-designs over those ten years, and that was coordinated with outside suppliers, then who inside the company was?²⁷³ The evidence, as will be laid out in the next few sections, strongly suggests middle management.

²⁶⁹ See Reem Nasr, *VW US CEO: "This Company Has To Bloody Learn,"* CNBC (Oct. 8, 2015, 10:50 AM), <http://www.cnbc.com/2015/10/08/vw-us-ceo-i-had-no-knowledge-in-2014-of-defeat-devices-on-vehicles.html>.

²⁷⁰ Jack Ewing, *Volkswagen Inquiry's Focus to Include Managers Who Turned a Blind Eye*, N.Y. TIMES (Oct. 25, 2015), <https://www.nytimes.com/2015/10/26/business/international/volkswagen-investigation-focus-to-include-managers-who-turned-a-blind-eye.html> [hereinafter *Volkswagen Inquiry's*]. In addition, as this Article was in press, the first member of Volkswagen's supervisory board was arrested for potential witness tampering and interfering with a German investigation. William Boston, *Audi CEO Arrested in Emissions-Cheating Investigation*, WALL ST. J. (June 18, 2018), <https://www.wsj.com/articles/audi-ceo-arrested-in-emissions-cheating-investigation-1529316471>.

²⁷¹ See generally Jack Ewing, *Court Sets Deadline*, *supra* note 3.

²⁷² Prodhan et al., *supra* note 58 (citing results of VW's internal investigation); see also *infra* note 275 and accompanying text.

²⁷³ See text and sources *infra* Part II.A.

1. Plausible Deniability

VW top leaders' willful blindness to wrongdoing beneath them is a conscious choice. The failure of recent prosecutions has proven that walling themselves off from negative information protects executives at trial even against even strict liability because judges and juries are sympathetic to the defense of plausible deniability.²⁷⁴ The cultivation of plausible deniability across VW's directors and top executives is especially effective because they are an insular group led by the Porsche-Piëch families.²⁷⁵ Individuals at the top of the company look out for each other, and VW is known for promoting executives from within its own ranks.²⁷⁶ VW also now seems to be trying to restore to power the few individuals who had been suspended through its own investigation.²⁷⁷

Moreover, a key feature of VW's reorganization in response to the 2015-17 scandal will be the further removal of executives from reports about operations. This change continues to send the company in the wrong direction for accountability. In February 2016, the company explains that those individuals "who continue to report to the CEO

²⁷⁴ See Nelson, *Paper Dragon Thieves*, *supra* note 28, at 928-41. The concept of "[p]lausible deniability refers to circumstances where a denial of responsibility or knowledge of wrongdoing [cannot] be proved as true or untrue due to a lack of evidence proving the allegation. This term is often used in reference to situations where high ranking officials deny responsibility for or knowledge of wrongdoing by lower ranking officials. In those situations[,] officials can 'plausibly deny' an allegation even though it may be true." *Plausible Deniability Law and Legal Definition*, USLEGAL.COM, <https://definitions.uslegal.com/p/plausible-deniability/> (last visited Nov. 9, 2018).

²⁷⁵ JACK EWING, FASTER, HIGHER, FARTHER: THE VOLKSWAGEN SCANDAL 129-44, 264 (2017) (describing the history of the families' management that has shaped VW, as well as the families' continuing control over the supervisory board); see also Stephanie Baker, Naomi Kresge, & Christoph Rauwald, *The One Family That Could Fix VW and Why They Won't*, BLOOMBERG (Apr. 27, 2016, 9:01 PM), <https://www.bloomberg.com/news/articles/2016-04-27/this-billionaire-family-could-fix-vw-but-it-s-not> ("To maintain stability as the number of family members grows, the patriarchs have created structures designed to encourage the next generation to stick with the company The Porsche side of the clan isn't as restricted, but anyone who wants to sell must first offer their shares to other family members at a discount.").

²⁷⁶ See Danny Hakim, *VW's Crisis Strategy: Forward, Reverse, U-Turn*, N.Y. TIMES (Feb. 26, 2016), <http://www.nytimes.com/2016/02/28/business/international/vws-crisis-strategy-forward-reverse-u-turn.html>.

²⁷⁷ See *id.* VW also parted ways with its post-scandal head of compliance under suspicious circumstances within a year of hiring her. Patrick McGee, *VW Executive Brought in to Clean Up After Emissions Scandal Quits*, FIN. TIMES (Jan. 26, 2017), <https://www.ft.com/content/82368938-e3d2-11e6-8405-9e5580d6e5fb>. See also discussion *infra* Part II.C.

now have a more narrowly defined strategic role.”²⁷⁸ Thus, “[d]ecisions related to operations at the company’s 12 brands are increasingly delegated to the brand management.”²⁷⁹ The next CEO Matthias Müller²⁸⁰ would be freed loftily to “focus on larger strategic questions” and there will be “faster decision making at the individual brands” with even less top executive oversight of middle management.²⁸¹

Disclosure-driven plausible deniability can be demonstrated even through email exchanges within the company. In May 2014, a VW employee sends the head of U.S. compliance an email that reads “[a]s mentioned orally, VW [North America] . . . has the problem of high off cycle emissions[] that the EPA has now found out about and we must respond.”²⁸² The employee’s email additionally names several top executives coordinating a response.²⁸³ The head of compliance replies: “Are you crazy? Recall the email.”²⁸⁴

2. Pressure for Results Without Inquiry into Methods

VW’s executives exploit their cloak of plausible deniability to put pressure on their subordinates to cheat. As VW’s chairman of the supervisory board has admitted about the background of the scandal at the company, “[t]here was a tolerance for breaking the rules.”²⁸⁵

VW’s top executives, as is true of executives in many multinational corporations, set high expectations for the company.²⁸⁶ As an executive inside the company who spoke anonymously for fear of losing his job explains, VW’s leaders know only “one way of

²⁷⁸ William Boston, *Volkswagen’s Quality-Control Chief Frank Tuch Resigns*, WALL ST. J. (Feb. 8, 2016, 8:51 PM), <http://www.wsj.com/articles/volkswagens-quality-control-chief-frank-tuch-resigns-1454937362>.

²⁷⁹ *Id.*

²⁸⁰ Volkswagen announced in April 2018 that Volkswagen brand chief Herbert Diess would take over for CEO Matthias Mueller. See Alanna Petroff, *Volkswagen Names New CEO in Sudden Shift*, CNN BUS. (Apr. 13, 2018, 4:35 AM), <https://money.cnn.com/2018/04/12/investing/volkswagen-new-ceo-management/index.html>.

²⁸¹ Boston, *supra* note 278.

²⁸² *Six Executives Indictment*, *supra* note 199, at 29 (quoting employee email).

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ Jack Ewing, *VW Says Emissions Cheating Was Not a One-Time Error*, N.Y. TIMES (Dec. 10, 2015), <http://www.nytimes.com/2015/12/11/business/international/vw-emissions-scandal.html>.

²⁸⁶ Danny Hakim et al., *As Volkswagen Pushed to Be No. 1, Ambitions Fueled a Scandal*, N.Y. TIMES (Sept. 26, 2015), <http://www.nytimes.com/2015/09/27/business/as-vw-pushed-to-be-no-1-ambitions-fueled-a-scandal.html> [hereinafter *Ambitions*].

management[:] . . . Be aggressive at all times.”²⁸⁷ Inside VW “performance was driven by fear and intimidation,” and leadership was “a reign of terror” for employees.²⁸⁸ “Stories are legion in the industry about Volkswagen engineers and executives shaking in their boots prior to presentations,” afraid of being “fired instantly.”²⁸⁹ Germany’s *Der Spiegel* magazine has famously described VW’s culture as “North Korea without labor camps.”²⁹⁰

As a result, cheating becomes the method through which agents under the top management choose to satisfy the executives’ expectations.²⁹¹ In 2011, VW’s CEO told a distinguished gathering, “[b]y 2018, we want to take our group to the very top of the global car industry.”²⁹² As the media reports, “[o]ne way Volkswagen aimed to achieve its lofty goal was by betting on diesel-powered cars — instead of hybrid-electric vehicles like the Toyota Prius — promising high mileage and low emissions without sacrificing performance.”²⁹³ In 2007, VW “abandoned a pollution-control technology developed by Mercedes-Benz and Bosch and instead used internal technology.”²⁹⁴ Meanwhile, “the determination by Mr. Winterkorn, the company’s hard-charging chief executive, to surpass Toyota put enormous strain on his managers to deliver growth in America.”²⁹⁵ Mr. Müller, the subsequent CEO, admits that the current cheating began “after people inside Volkswagen realized that a new engine line could not comply with United States pollution limits.”²⁹⁶

²⁸⁷ Jack Ewing & Graham Bowley, *The Engineering of Volkswagen’s Aggressive Ambition*, N.Y. TIMES (Dec. 13, 2015), <http://www.nytimes.com/2015/12/14/business/the-engineering-of-volkswagens-aggressive-ambition.html> [hereinafter *Engineering*].

²⁸⁸ Bob Lutz, *One Man Established the Culture That Led to VW’s Emissions Scandal*, ROAD & TRACK (Nov. 4, 2015), <http://www.roadandtrack.com/car-culture/a27197/bob-lutz-vw-diesel-fiasco>.

²⁸⁹ See Doron Levin, *The Man Who Created VW’s Toxic Culture Still Looms Large*, FORTUNE (Oct. 16, 2015), <http://fortune.com/2015/10/16/vw-ferdinand-piech-culture> (describing employees’ fear of Ferdinand Piëch, the automaker’s former chairman, chief executive, and a top shareholder).

²⁹⁰ Ewing & Bowley, *Engineering*, *supra* note 287.

²⁹¹ See Hakim et al., *Ambitions*, *supra* note 286.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ Danielle Ivory & Jack Ewing, *Volkswagen U.S. Chief Knew of Potential Emissions Problems in 2014*, N.Y. TIMES (Oct. 7, 2015), <http://www.nytimes.com/2015/10/08/business/international/volkswagen-diesel-emissions-fix.html> [hereinafter *U.S. Chief Knew*].

The fundamental engineering problem with VW's advertised diesel efficiency is that "[m]easures that reduce output of nitrogen oxides, which can cause lung ailments, automatically increase production of soot particles, which can cause cancer."²⁹⁷ This mechanical trade-off between nitrogen oxides and soot cannot be solved by any existing diesel technology, especially in a cost-effective manner.²⁹⁸ And VW's engine technology was very similar to the engines of all the other manufacturers on the market.²⁹⁹ Thus, the obvious question is "why Volkswagen's top managers never asked themselves why their engineers succeeded where others had failed in producing relatively inexpensive diesel cars" that could meet the American emissions standards.³⁰⁰

As leaders responsible for the culture of a \$227 billion-dollar company, VW's top executives' responses to the scandal provide a window into their ability to disconnect the pressure that they apply from above from the behavior of their agents beneath them.³⁰¹ Although VW's leaders personally have strong technical engineering backgrounds and are selected for that application of their expertise,³⁰² Mr. Müller protests, "[d]o you really think that a chief executive had time for the inner functioning of engine software?"³⁰³ Given the magnitude of VW's fraud, blaming the blindness of its ex-CEO on his busy schedule is an interesting choice. Additionally, in a 2014 package sent to ex-VW CEO Winterkorn, the company's head of product safety had explicitly warned him that "[a] thorough explanation for the dramatic increase in NOx emissions cannot be given to the authorities [They] will then investigate the VW systems to determine whether Volkswagen implemented a test detection system in the engine control unit software ([a] so-called defeat device)."³⁰⁴

3. A Culture of Fear Suppresses Potential Whistleblowers

In understanding how the fraud inside VW happened, "[t]he failure of people inside the carmaker to sound warnings about illegal engine

²⁹⁷ Jack Ewing, *Court Sets Deadline*, *supra* note 3.

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ Kapadia, *supra* note 31.

³⁰² Ivory & Ewing, *U.S. Chief Knew*, *supra* note 296.

³⁰³ Editorial, *VW Needs to Come Clean, Now*, N.Y. TIMES (Oct. 8, 2015), <http://www.nytimes.com/2015/10/09/opinion/vw-and-michael-horn-need-to-come-clean-now.html> (quoting CEO Matthias Müller about his predecessor Martin Winterkorn).

³⁰⁴ Ewing, *VW's Campaign*, *supra* note 232.

software has emerged as a crucial element of the scandal.”³⁰⁵ Shareholder advocates and former employees of VW criticize the construction of a culture inside the company that “discouraged open discussion of problems, creating a climate in which people may have been fearful of speaking up.”³⁰⁶ VW’s internal investigation into the fraud has been hampered “by an ingrained fear” in the company’s culture “of delivering bad news to superiors.”³⁰⁷

Exchanges within the company further demonstrate its tight control over information. In 2012, for example, engineers seeking the source of hardware failures in the company’s cars identify the defeat-device and are ordered by VW executives to “destroy the document used to illustrate the operation of the cheating software.”³⁰⁸ In 2014, VW executives describe a non-profit research group’s presentation in which they acknowledge that “[s]ome presenters indicated that they suspected cheating We will have to be careful with going forward.”³⁰⁹ The head of U.S. compliance writes that “[w]ithin [Volkswagen Group of America, Inc.], the study is known only to [the Engineering and Environmental Office], and we want to keep it that way.”³¹⁰

A mechanism of control³¹¹ over dissent within the organization is VW’s compliance reporting system, which, as is typical of many companies, sends employees’ reports of violations right back to their direct supervisors who may have ordered the illegal behavior.³¹² Another mechanism is VW’s anonymous complaint procedure, again typical of many large corporations.³¹³ Experts now concede that, when

³⁰⁵ Ewing, *Volkswagen Inquiry’s*, *supra* note 270.

³⁰⁶ *Id.*

³⁰⁷ Jack Ewing, *Volkswagen Says Whistle-Blower Pushed It to Admit Broader Cheating*, N.Y. TIMES (Nov. 8, 2015), <http://mobile.nytimes.com/2015/11/09/business/international/volkswagen-says-whistle-blowers-pushed-it-to-admit-gas-car-cheating.html>.

³⁰⁸ *Six Executives Indictment*, *supra* note 199, at 20.

³⁰⁹ *Id.* at 29.

³¹⁰ *Id.*

³¹¹ Much of management literature describes processes within the corporation that control employees’ actions on behalf of the corporation. There are countless such examples. See generally, e.g., Antonio Davila & Angelo Ditillo, *Management Control Systems and Creativity*, in THE OXFORD HANDBOOK OF STRATEGY IMPLEMENTATION (Michael A. Hitt et al. eds., 2017).

³¹² See Stephen Dockery, *The Morning Risk Report: VW Whistleblower Appeal May Be Too Late*, WALL ST. J. (Nov. 13, 2015, 7:39 AM), <https://blogs.wsj.com/riskandcompliance/2015/11/13/the-morning-risk-report-vw-whistleblower-appeal-may-be-too-late/>; see also J.S. Nelson, *Abusive Internal Controls*, *supra* note 247.

³¹³ See Dockery, *supra* note 312 (quoting a whistleblower expert at the firm Choate).

a company's reporting mechanism is a mere hotline, protections for whistleblowers remain "woefully insufficient."³¹⁴ This author describes the weaknesses of whistleblower law at length in a separate work.³¹⁵

B. The Growing Power and Entrenchment of Middle Management to Commit Large-Scale Wrongdoing

Removing and/or discouraging oversight at the top ranks of a company empowers middle management to expand the scope and coordination of wrongdoing under the corporate form. The middle management of a company has no interest in halting the wrongdoing committed by agents when managers profit from this coordinated misbehavior and absorb no individual repercussions.

Three parts of VW's disclosure-driven behavior particularly implicate the coordination and control of middle management in the size, scope, and sophistication of the wrongdoing.

1. Coordination of Wrongdoing Under and Across Corporate Forms

Although VW officially "blamed a small group of engineers for the misconduct," commentators allege that "the scale of the problem suggests the involvement of separate engineering teams."³¹⁶ Software of the kind used to cheat the emissions controls "is heavily documented."³¹⁷ Especially in a command-and-control culture like VW's, it is "very unlikely" that even a "group of engineers could have taken the risk of modifying the software without approval at a high-level of management."³¹⁸ As a former regulator concludes, blaming fraud of this magnitude merely on a few engineers "just doesn't pass the laugh test."³¹⁹ The company's middle management had to be involved on a broad scale.

Coordinated agent wrongdoing in the VW case extends in sophisticated ways across corporate forms. Civil multi-district litigation against Bosch reveals, for example, a redacted spreadsheet on defeat-devices with 8,565 task entries representing hundreds of

³¹⁴ *Id.*

³¹⁵ J.S. Nelson, *Abusive Internal Controls*, *supra* note 247; *see also* J.S. NELSON & LYNN A. STOUT, *BUSINESS ETHICS: WHAT EVERYONE SHOULD KNOW* (forthcoming) (on file with author) (describing whistleblowing limitations).

³¹⁶ Ewing & Bowley, *Engineering*, *supra* note 287.

³¹⁷ Ewing, *Court Sets Deadline*, *supra* note 3.

³¹⁸ *Id.*

³¹⁹ Ewing & Bowley, *Engineering*, *supra* note 287.

individuals.³²⁰ Additional redacted documents from the same litigation show “special access” to the joint VW-Bosch project given in 2006 by Bosch to thirty-five VW and IAV engineering employees before the project massively expanded.³²¹

In order to reach across corporate forms, the employees coordinating the behavior had to have the degree of seniority and length of tenure to have formed the required personal networks not only within VW, but also across to employees in other companies to support and conceal frauds over more than ten years of engine re-designs.³²² These attributes of longevity further point to the significant involvement of middle management.

2. Middle Management’s Ability to Suppress Dissent

Not only does the insulation of middle management from prosecution permit middle managers to coordinate large-scale wrongdoing, but it also incentivizes and enables them to suppress dissent. VW’s middle management has put direct pressure on subordinates to commit wrongdoing before. As far back as 2004, a low-level American employee in VW’s compliance department objected that the company should disclose increasing reports of broken emissions-control parts to California air-quality regulators.³²³ It was a mid-level manager in Germany who ordered the American compliance personnel not to report the defect and to start hiding the item from future reports to regulators.³²⁴

Middle managers understand and exploit their insulation from disclosure-based regulation.³²⁵ In a 2015 VW example, a manager writes that another VW employee “should not come along” to a future meeting “so he would not have to consciously lie” to regulators.³²⁶ VW brand development later approves a script for employees to follow in meeting with regulators to continue concealing the defeat devices.³²⁷ After the 2015-17 VW emissions scandal became public, fifty

³²⁰ *Consol. Complaint*, *supra* note 32, at 149.

³²¹ *Id.* at 150.

³²² See Nelson, *Paper Dragon Thieves*, *supra* note 28, at 888-96 (discussing how individuals coordinate with each other within and across corporate structures).

³²³ Justin Scheck et al., *VW Kept Earlier Emissions Issue from Regulator*, WALL ST. J. (Dec. 8, 2015, 3:03 AM), <http://www.wsj.com/articles/vw-kept-earlier-emissions-issue-from-regulator-1449612215>.

³²⁴ *Id.*

³²⁵ See discussion *supra* note 259 and accompanying text.

³²⁶ *Six Executives Indictment*, *supra* note 199, at 31.

³²⁷ *Id.* at 31-32.

employees came forward to give evidence solely under a grant of internal amnesty who had not felt safe coming forward at the company before.³²⁸

Showing that mid-level management at VW is not alone in its incentives to suppress reporting, in 2015 reports surfaced that, for a decade, U.S. employees of the Japanese air-bag maker Takata had “raised concerns internally about misleading testing reports on air bags that later became prone to explosions.”³²⁹ As early as 2005, Takata’s middle management had insisted on “prettying up” the data, which included “removing unflattering test results.”³³⁰ By 2016, air bag explosions had been linked to the deaths of eleven people, and had prompted the recall of seventy million air bags in the U.S.³³¹ Takata has been fined \$70 million for these safety violations, and three top executives were charged.³³² No middle managers were charged, even though documents reveal exactly which middle managers participated.³³³

³²⁸ Ewing & Bowley, *Engineering*, *supra* note 287. Additionally, in 2016, a Michigan employee filed suit alleging that he was fired by the company in retaliation for trying to keep it from illegally deleting data. Erika Kelton, *14.7 Billion Reasons Why Volkswagen Should Have Welcomed Whistleblowers*, FORBES (Jun. 29, 2016), <https://www.forbes.com/sites/erikakelton/2016/06/29/14-7-billion-reasons-why-volkswagen-should-have-welcomed-whistleblowers/#6cc6eb667500>. His superior cursed at him, and the company continued to delete data for three more days. Jack Ewing, *VW Whistle-Blower’s Suit Accuses Carmaker of Deleting Data*, N.Y. TIMES (Mar. 14, 2016), <https://www.nytimes.com/2016/03/15/business/energy-environment/vw-diesel-emissions-scandal-whistleblower.html>.

³²⁹ Mike Spector, *Takata U.S. Employees Saw Problems in Air-Bag Tests*, WALL ST. J. (Nov. 24, 2015, 7:24 PM), <http://www.wsj.com/articles/takatas-u-s-employees-flagged-reporting-issues-over-air-bags-1448411043> [hereinafter *Takata U.S. Employees*].

³³⁰ *Id.*

³³¹ Mike Spector, *New Vehicles Found to Have Faulty Takata Air Bags*, WALL ST. J. (June 2, 2016, 1:38 AM), <https://www.wsj.com/articles/new-vehicles-found-to-have-faulty-takata-air-bags-1464796600>.

³³² Spector, *Takata U.S. Employees*, *supra* note 329; Tabuchi & Boudette, *supra* note 61. In June 2017, Takata declared bankruptcy but will survive as a component of Key Safety Systems. Brent Snively & Eric D. Lawrence, *Takata Deal Puts Key Safety Systems in Line to Leap into Big Leagues*, DETROIT FREE PRESS (June 26, 2017, 8:17 PM), <http://www.freep.com/story/money/cars/2017/06/27/takata-deal-puts-key-safety-systems-line-leap-into-big-leagues/430022001>.

³³³ See Tabuchi & Boudette, *supra* note 61. See generally Nelson, *Paper Dragon Thieves*, *supra* note 28, at 892-93 (describing similar examples in the Barclay’s foreign exchange trading settlement).

3. Repeating the Same Patterns of Fraud Even After Top Officers Leave

Even more disturbingly, scandals tend to repeat themselves when middle management becomes entrenched and heads roll only at the top of the corporate ladder. Consider VW's own history in this regard. In the 1970s, when the EPA began testing cars for tail-pipe emissions standards, VW was one of the first brands to be caught cheating.³³⁴

By 2005, VW was embroiled in a three-part German scandal involving private land deals, prostitutes, and the bribing of government officials.³³⁵ According to *Der Spiegel*, first, in a criminal case, "Schuster, the former Skoda director . . . allegedly used a network of international front companies in an attempt to land private deals with VW."³³⁶ Second, "[o]n a number of business trips, former personnel manager Klaus-Joachim Gebauer procured prostitutes for labor representatives, billing the charges to VW."³³⁷ Third, VW was improperly tied with government and union officials.³³⁸ Apparently "for decades influential SPD and IG Metall union officials abused their powers to use the company essentially as a self-service shop."³³⁹ The government of Lower Saxony owns roughly twenty percent of VW,³⁴⁰ and further allegations centered on "Sigmar Gabriel, a former governor of Lower Saxony and VW supervisory board member."³⁴¹ Gabriel had been secretly paid by VW while he was still "actively involved in politics."³⁴²

The top individuals in power during these scandals had been removed long before VW's 2015-17 scandal, but the pressure on middle management to produce results without scrutiny of methods has remained unchanged.³⁴³ Gebauer paid for prostitutes by

³³⁴ Hakim et al., *Ambitions*, *supra* note 286.

³³⁵ Dietmar Hawranek et al., *Scandal at Volkswagen: With Prostitutes and Shady Executives, There's No Love Left in this Bug*, SPIEGEL (July 18, 2005, 12:00 AM), <http://www.spiegel.de/international/spiegel/scandal-at-volkswagen-with-prostitutes-and-shady-executives-there-s-no-love-left-in-this-bug-a-365752-2.html>.

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ Catherine Boyle, *VW Scandal: \$7.3B Profit Warning But Damage Could Hit Germany*, CNBC (Sept. 23, 2015, 4:11 AM), <http://www.cnbc.com/2015/09/22/vw-scandal-germanys-reputation-on-the-line.html>.

³⁴¹ Hawranek et al., *supra* note 335.

³⁴² *Id.*

³⁴³ *See generally id.*; *see also* Boyle, *supra* note 340.

submitting invoices for over \$700,000 dollars by historical exchange rates “within two years without ever having turned in any receipts.”³⁴⁴ VW reimbursed Gebauer for these expenses after he wrote on a piece of paper, for example, “€6,880 [over \$7,500] spent, in the interest of the company, for the Group Works Council.”³⁴⁵ Because Gebauer achieved results, no one within the company questioned his methods.³⁴⁶ The inference for middle managers is to cheat for results until they may personally absorb repercussions.³⁴⁷

C. Net Impact of VW's Behavior

VW's gamble to conceal its fraud from regulators and focus solely on its disclosures has paid off for the company and its shareholders. It is true that VW has been hurt by the scale of the scandal, but ultimately the company is coming out ahead. As of March 2017, VW had agreed to pay \$25 billion in fines and other penalties, but early estimates had been \$87 billion.³⁴⁸

Most commentators agree that VW can survive its fines; in fact, they are well within easy net liquidity for a company VW's size.³⁴⁹ VW can pay its entire federal settlement penalty out of free cash flow.³⁵⁰ After a single 2015 loss of \$1.5 billion, VW made a 2016 net profit of \$5.76 billion.³⁵¹

In the end, VW's board and top management have achieved what they wanted. VW's driving ambition has been to become the world's number-one automaker.³⁵² In 2016, despite the scandal, the company became the world's number one automaker over Toyota.³⁵³

³⁴⁴ Hawranek et al., *supra* note 335 (noting the figure of €780,000 in 2005).

³⁴⁵ *Id.*

³⁴⁶ *See id.*

³⁴⁷ *See* Nelson, *Paper Dragon Thieves*, *supra* note 28, at 889-91 (discussing agent incentives).

³⁴⁸ *See* Editorial, *Europe's Sluggish Response to VW*, N.Y. TIMES (Mar. 10, 2017), <https://www.nytimes.com/2017/03/10/opinion/europes-sluggish-response-to-vw.html>; Petroff, *Volkswagen Scandal*, *supra* note 66.

³⁴⁹ Tom Schoenberg & Alan Katz, *How Hefty a Penalty Can VW Withstand?*, INDUSTRY WEEK (Sept. 27, 2016), <http://www.industryweek.com/treasury-cash-management/how-hefty-penalty-can-vw-withstand>.

³⁵⁰ *Id.*

³⁵¹ *The Week Ahead: Board to Decide Puerto Rico's Financial Future; Fed Rate Boost Is on Way*, N.Y. TIMES (Mar. 13, 2017), <https://www.nytimes.com/2017/03/12/business/board-to-decide-puerto-ricos-financial-future-fed-rate-boost-is-on-way.html> (converted to U.S. dollars from €1.4 billion and €5.4 billion).

³⁵² Hakim et al., *Ambitions*, *supra* note 286.

³⁵³ Kana Inagaki, *VW Overtakes Toyota as World's Biggest Automaker in 2016*, FIN. TIMES

Apparently, consumers simply do not care enough about the scandal, and VW was particularly buoyed by the Chinese market where sales for the year increased twelve percent.³⁵⁴

Even U.S. consumers seem to have forgotten this is the same company that staked its reputation on “clean diesel,” and sponsored those advertisements during the 2015 Super Bowl of its engineers sprouting angels’ wings.³⁵⁵ By May 2017, VW bragged that it has “almost returned to precrisis levels within just 1½ years . . . [a]nd this is all without the diesel model, which we have completely withdrawn from the U.S. market.”³⁵⁶ Additionally, many settlement terms have had silver linings for the company.³⁵⁷ Under its terms with the States’ Attorneys General and MDL litigants, VW has to put \$2 billion into electric vehicles.³⁵⁸ Conveniently, VW already unveiled its electric vehicles starting in 2013 auto shows.³⁵⁹ Now the company will be rewarded for putting money into them.³⁶⁰

VW’s continuing choices since its guilty plea further demonstrate the superficiality of disclosure-based enforcement in affecting its corporate culture. In January 2017, VW AG announced that its new head of compliance, Dr. Christine Hohmann-Dennhardt, a former

(Jan. 29, 2017), <https://www.ft.com/content/8c3471f8-e6b5-11e6-893c-082c54a7f539>.

³⁵⁴ Emel Akan, *How China Made Volkswagen the World’s Biggest Carmaker*, EPOCH TIMES (Feb. 16, 2017), <http://www.theepochtimes.com/n3/2223264-how-china-made-volkswagen-the-worlds-biggest-carmaker-2>.

³⁵⁵ Hakim et al., *Ambitions*, *supra* note 286.

³⁵⁶ See William Boston, *Volkswagen Brand Plots U.S. Turnaround — Again*, WALL ST. J. (May 7, 2017, 10:26 AM), <https://www.wsj.com/articles/volkswagen-brand-plots-u-s-turnaroundagain-1494155562> (quoting Herbert Diess, head of VW brand).

³⁵⁷ VW will also be able to wait out its federal monitor. As commentators have noted about monitors in the financial sector: “That’s been the tendency of multinational banks of late: Wait out the monitor or the [timing] of the enforcement action, and then go back to what they were doing before.” Samuel Rubinfeld, *New HSBC Probe Puts Culture in Question*, WALL ST. J. (Feb. 22, 2017, 7:13 AM), <https://blogs.wsj.com/riskandcompliance/2017/02/22/the-morning-risk-report-new-hsbc-probe-puts-culture-in-question-newsletter-draft/> (quoting anti-money-laundering expert Ross Delston). This form of compliance is not “the kind of change in course that’s long-lasting or penetrates the organization as a whole.” *Id.*

³⁵⁸ U.S. v. Volkswagen AG et al., No. 16-cv-295, at 6 (N.D. Cal. Oct. 25, 2016) (order granting the United States’ motion to enter proposed amended consent decree).

³⁵⁹ Press Release, Volkswagen AG, *New Golf Sportsvan Takes Golf Plus Concept Into the Future* (Sept. 8, 2013), <https://media.vw.com/en-us/releases/34>.

³⁶⁰ See, e.g., Alex Davies, *VW’s \$15B Diesel Settlement Might Actually Hurt Electric Cars*, WIRED (Oct. 17, 2016, 3:09 PM), <https://www.wired.com/2016/10/vws-15b-diesel-settlement-might-actually-hurt-electric-cars> (describing letter to the DOJ from VW’s competitors appealing “for an independent regulator to ensure VW’s spending doesn’t crush competition”).

judge who the company had hired from Daimler AG to clean up its image in the wake of the emissions scandal, would be leaving after just one year on the job.³⁶¹ The official company statement explains her departure as due to differences in the “understanding of responsibilities and future operating structures within the function she leads.”³⁶² Dr. Hohmann-Dennhardt had launched “a campaign to foster the culture of integrity within” VW.³⁶³ It is, of course, a separate irony that VW’s department for these efforts was entitled “Integrity and Legal Affairs,” highlighting the distinction between the two in the company’s thinking.³⁶⁴

VW’s official statement continues by thanking Dr. Hohmann-Dennhardt for her “outstanding expertise and experience to achieving important milestones, and for supporting the Group in revising its internal guidelines and procedures.”³⁶⁵ But it notes that Dr. Hohmann-Dennhardt would be immediately replaced by an economics graduate from the auditing department, not another individual of the same stature who might push for more substantive changes in company culture.³⁶⁶ The new head of compliance will be instead charged with “creat[ing] a more entrepreneurial and international organization” — not a compelling statement of ethics, values, or even a focus on consumer value. This is not the sign of a company interested in deeper reforms.

Also, as mentioned,³⁶⁷ no attorneys for the company have been charged despite the fact that they destroyed evidence, possibly multiple times, and allegedly fired a whistleblower who questioned company orders to destroy evidence.³⁶⁸ In March 2017, German

³⁶¹ Karin Matussek & Christoph Rauwald, *VW’s Integrity Chief Leaving Over Disputes After One Year*, BLOOMBERG (Jan. 26, 2017, 5:04 AM), <https://www.bloomberg.com/news/articles/2017-01-26/vw-compliance-chief-leaving-over-clashes-after-one-year-on-job>.

³⁶² *Id.* (quoting VW AG statement).

³⁶³ Press Release, Volkswagen AG, Dr. Christine Hohmann-Dennhardt to Leave the Volkswagen Group Board of Management by Mutual Agreement — Hiltrud Werner Appointed as Successor (Jan. 26, 2017), http://www.volkswagenag.com/en/news/2017/01/CHD_leaves.html.

³⁶⁴ *See id.*

³⁶⁵ *Id.*

³⁶⁶ *See id.*

³⁶⁷ See discussion of charges against VW and executives *infra* Part I.C.

³⁶⁸ See Sue Reisinger, *How VW’s In-House Lawyers Screwed Up a Litigation Hold*, LAW.COM (Jan. 12, 2017, 6:23 PM), <http://www.law.com/sites/almstaff/2017/01/12/how-vws-in-house-lawyers-screwed-up-a-litigation-hold> (describing the alleged actions of an unindicted in-house counsel who orchestrated deletion of potential evidence); Aruna Viswanatha, *Lawsuit Accuses Volkswagen’s U.S. Unit of Deleting Emissions-Related*

authorities raided the offices of VW's law firm Jones Day, in an indication that VW may still be withholding evidence.³⁶⁹

By April 2018, independent monitor Larry Thompson, a former U.S. Attorney and deputy attorney general, had prepared a confidential compliance report that even VW admits found that the company "had failed to hold executives accountable for wrongdoing that led to the huge emission fraud, and that it was not making a serious enough attempt to remake its culture."³⁷⁰

If VW has reacted significantly to being caught in the scandal, it has been to invest in more cozy relationships with regulators, even if it does not tell them the truth. In 2016, VW announced the opening of offices in downtown Washington, D.C. and other world capitals, as well as a new Audi government relations office in Sacramento.³⁷¹

III. FIXING A CRIMINAL BUG³⁷²

The very natural and immediate reaction that many observers have to revelations of large-scale corporate wrongdoing such as inside VW and other companies is to demand criminal prosecution of the top executives in charge. Yet those prosecutions are not being brought, and they have not been successful.³⁷³ Despite widespread mortgage fraud, for example, that led to the collapse of international markets in August 2007, created toxic assets that poisoned the financial system for years afterwards, and was responsible for the loss of forty to forty-five percent of the world's wealth, not a single top executive was held

Document, WALL ST. J. (Mar. 14, 2016, 3:59 PM), <http://www.wsj.com/articles/lawsuit-accuses-volkswagens-u-s-unit-of-deleting-emissions-related-documents-1457978876> (detailing the whistleblower's allegations).

³⁶⁹ See Jack Ewing & Bill Vlasic, *German Authorities Raid U.S. Law Firm Leading Volkswagen's Emissions Inquiry*, N.Y. TIMES (Mar. 16, 2017), <https://www.nytimes.com/2017/03/16/business/volkswagen-diesel-emissions-investigation-germany.html>.

³⁷⁰ Jack Ewing, *Overseer Faults Volkswagen's Reform Efforts Since Emissions Scandal*, N.Y. TIMES (Apr. 22, 2018), <https://www.nytimes.com/2018/04/22/business/overseer-faults-volkswagens-reform-efforts-since-emissions-scandal.html>.

³⁷¹ David Shepardson, *VW Replaces Top U.S. Lawyer as Seeks To Win Approval on Emissions Fix*, REUTERS (Feb. 4, 2016, 8:10 AM), <https://www.reuters.com/article/volkswagen-emissions-attorney-idUSL2N15J2BV>.

³⁷² *Beetle*, *supra* note 81 (advertising the iconic Volkswagen product: the VW bug).

³⁷³ See Nelson, *Paper Dragon Thieves*, *supra* note 28, at 921-41 (explaining how prosecutions have failed); see also Nelson, *The Intracorporate Conspiracy Trap*, *supra* note 259, at 988-1002 (analyzing the similar defeat of a prosecution against a mid-level manager within the Roman Catholic Church for transferring sexually predatory priests from parish to parish for eleven years).

criminally liable.³⁷⁴ The perceived injustice of that result and other examples has driven much of the current debate on curbing widespread corporate wrongdoing. As Judge Jed Rakoff of the Southern District of New York has written, “if . . . the Great Recession was in material part the product of intentional fraud, the failure to prosecute those responsible must be judged one of the more egregious failures of the criminal justice system in many years.”³⁷⁵

After having examined the mechanisms of widespread corporate wrongdoing as illustrated by the VW case, the remainder of this Article responds to calls for additional prosecution of top executives by examining recent movements in the two most promising methods within the criminal law. This Part briefly describes conspiracy law application to business prosecutions, and then more thoroughly investigates willful blindness instructions as a potential method for curing defects in criminal fraud prosecutions of VW-style large-scale corporate wrongdoing. Judge Rakoff has offered the suggestion to more commonly utilize willful blindness instructions, and both methods attempt to work within the criminal justice-based compliance system that we have. Particularly in exploring Judge Rakoff’s suggestion, there may indeed be promising movements in the federal courts of appeal on willful blindness standards since the U.S. Supreme Court’s broader acceptance of such instructions in its 2011 *Global-Tech*³⁷⁶ case. This observation has not been made before in legal scholarship.

However, at the end of its examination of willful blindness developments, this Article concludes that reforming willful blindness instructions alone will not solve our system’s inability to prevent large-scale corporate wrongdoing. Greater use of willful blindness instructions may, at most, help to plug some of the criminal law’s

³⁷⁴ See Jason M. Breslow, *As Deadlines Loom for Financial Crisis Cases, Prosecutors Weigh Their Options*, PBS (Jan. 22, 2013), <http://www.pbs.org/wgbh/frontline/article/as-deadlines-loom-for-financial-crisis-cases-prosecutors-weigh-their-options/> (“For more than four years, authorities have struggled to successfully prosecute a Wall Street bank or its executives for alleged misconduct during the financial crisis.”); Megan Davies & Walden Siew, *45 Percent of World’s Wealth Destroyed: Blackstone CEO*, REUTERS (Mar. 10, 2009, 12:31 PM), <http://www.reuters.com/article/2009/03/10/us-blackstone-idUSTRE52966Z20090310> (quoting The Blackstone Group L.P. CEO Stephen Schwarzman’s statement that “[b]etween 40 and 45 percent of the world’s wealth has been destroyed in little less than a year and a half,” which “is absolutely unprecedented in our lifetime”).

³⁷⁵ Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS (Jan. 9, 2014), <http://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/>.

³⁷⁶ See *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766-71 (2011).

weaknesses in having to catch top executives in overt lies — as opposed to more subtle omissions — and create a way for the criminal law to examine more of their behavior.

The problems with using criminal law to address the breadth and depth of systemic corporate wrongdoing are more fundamental. As we learn from the VW case, first, prosecutions take a long time and are hard to build properly without significant commitments of time, institutional priorities, and resources.³⁷⁷ VW is an unusual case in that it was granted large amounts of resources as a political priority — which is how we know so much about the details involved — but most such cases, especially after a change in political administration, are likely to disappear from view in favor of more immediate prosecutorial victories.³⁷⁸

Second, as many large companies like VW are international or multinational, concentrating more resources on prosecuting VW's ex-CEO Winterkorn, for example, is inefficient because he lives in Germany, and there is little likelihood that Germany would extradite him to face criminal charges in the U.S.³⁷⁹

Third, as the VW case suggests, increasing prosecution of top executives still does not engage middle management and help us understand what is happening inside companies. Top executives will remain under market pressure to produce economic results and they may continue to skate as close to lines of individual legal liability as they can.³⁸⁰ Middle managers under pressure to commit unethical acts still have little to fear from such prosecutions. They remain the cogs in the wheels and not responsible — deliberately so — for disclosing

³⁷⁷ See Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 600-03 (2005) [hereinafter *Al Capone's Revenge*]; Richman, *Corporate Headhunting*, *supra* note 136, at 272-74.

³⁷⁸ See Richman & Stuntz, *Al Capone's Revenge*, *supra* note 377, at 625-26 (describing the change in priorities to terrorism after the 9/11 terrorist attacks); Richman, *Corporate Headhunting*, *supra* note 136, at 274.

³⁷⁹ Cf. Matussek, *VW Executives Safe*, *supra* note 204. As this Article was in press, an indictment was announced against ex-CEO Winterkorn, but he remains outside U.S. jurisdiction in Germany with no plans for extradition. Roberts & Rogers, *Volkswagen Ex-CEO*, *supra* note 203.

³⁸⁰ See, e.g., THOMAZ WOOD JR. & ANA PAULA PAULINO DA COSTA, UNDERSTANDING CORPORATE FRAUD: HOW FRAUD AGENTS CREATE, IMPLEMENT AND (TRY TO) MAINTAIN THEIR SCAMS 7-11 (2015), http://www.academia.edu/15270109/Understanding_Corporate_Fraud_How_Fraud_Agents_Create_Implement_and_Try_to_Maintain_their_Scams (surveying the literature and frameworks for viewing organizational and individual patterns in creating large-scale corporate frauds).

what they actually do and putting the full pieces of the wrongdoing together.³⁸¹

Finally, as the VW case shows, clamping down even harder on criminal punishment gives middle managers who *do* feel uneasy about the unethical orders they are being given no place to go. Middle managers already have “higher rates of depression and anxiety than employees who occup[y] positions nearer either end of the hierarchy.”³⁸² There does need to be whistleblower reform — this author addresses that issue elsewhere³⁸³ — but in the meantime, even the government admits that whistleblowing is a miserable option for employees.³⁸⁴ And significant bounty awards are not commonly available to middle managers who are not high enough in a scheme to deliver the government a good case.³⁸⁵ Instead, the hundreds, if not thousands, of people for as many as seventeen years ordered to work on the emissions fraud inside VW need safe ways to report, and regulators need ways in which to listen to them.

We will only actually know what is happening inside companies when we better engage all levels of the organization in preventing large-scale corporate wrongdoing. How we can better engage middle management in companies’ ethical futures becomes the subject of this Article’s sister work.³⁸⁶

³⁸¹ See Nelson, *Paper Dragon Thieves*, *supra* note 28, at 930-33.

³⁸² Eric M. Anicich & Jacob B. Hirsh, *Why Being a Middle Manager Is So Exhausting*, HARV. BUS. REV. (Mar. 22, 2017), <https://hbr.org/2017/03/why-being-a-middle-manager-is-so-exhausting>.

³⁸³ J.S. Nelson, *Whistleblowing Reform* (forthcoming) (on file with author).

³⁸⁴ See, e.g., David Michaels, Asst. Sec’y of Labor, Occupational Safety & Health, *Whistleblowers and OSHA: Strengthening Professional Integrity* (May 11, 2010), <https://www.osha.gov/news/speeches/05112010> (“[I]t appears to me that there are a series of institutional, administrative and legislative barriers that stand between many whistleblowers and justice. These barriers, and our failure to protect legitimate whistleblowers creates an injustice for these workers, and it discourages other workers from asserting rights. When two-thirds of whistleblower complaints are dismissed, it sends workers a clear message — a very unfortunate message: ‘The odds are against you.’ This must change, but change will not come easily or quickly.”).

³⁸⁵ See Jennifer M. Pacella, *Bounties for Bad Behavior: Rewarding Culpable Whistleblowers Under the Dodd-Frank Act and Internal Revenue Code*, 17 U. PA. J. BUS. L. 345, 349-50, 376-77 (2015). *But see* Miriam H. Baer, *Reconceptualizing the Whistleblower’s Dilemma*, 50 UC DAVIS L. REV. 2215, 2219-20 (2017) (arguing that less “complicit” employees are more likely to report wrongdoing).

³⁸⁶ Nelson, *Beyond Disclosure Enforcement*, *supra* note 21.

A. *The Need for Substantive Individual Liability for Coordinated Corporate Crimes*

The author agrees with other commentators that individual liability for coordinated crimes is necessary to affect employees' behavior, but does not think that it is the only answer.³⁸⁷ The author has previously suggested greater use of conspiracy prosecutions in the business context, and would adapt those suggestions to explicitly touch these middle levels of management in which elements of crimes may be divided amongst individuals inside and across organizations.³⁸⁸

Conspiracy law was developed to address special dangers present in collective action. The structure of conspiracy law seeks to combat the problems of collective action both in magnifying consequences and in blind subservience to others within collective structures. Traditionally, criminal law has been highly suspicious of individuals acting in groups. As a survey on the origins of criminal conspiracy describes: "collective action toward an antisocial end involves a greater risk to society than individual action toward the same end."³⁸⁹ The U.S. Supreme Court explains:

[C]ollective criminal agreement — partnership in crime — presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group is formed. In sum, the danger which a conspiracy generates is

³⁸⁷ See, e.g., Garrett, *Metamorphosis*, *supra* note 138, at 71 ("Individuals should be held accountable."); Mendelsohn *Says Criminal Bribery Prosecutions Doubled in 2007*, 36 CORP. CRIME REP. 1, 22 (2008) ("It is our view that to have a credible deterrent effect, people have to go to jail.").

³⁸⁸ Nelson, *Paper Dragon Thieves*, *supra* note 28, at 908-21; Nelson, *The Corporate Conspiracy Vacuum*, *supra* note 246, at 255-62; Nelson, *The Intracorporate Conspiracy Trap*, *supra* note 259, at 975-88, 1013-23.

³⁸⁹ *Developments in the Law — Criminal Conspiracy*, 72 HARV. L. REV. 922, 923-24 (1959).

not confined to the substantive offense which is the immediate aim of the enterprise.³⁹⁰

Organized social groups have power to orchestrate actions far beyond what a single individual could accomplish. When the power of those social groups is directed towards anti-social ends, the law provides magnified penalties for those involved in conspiracies.

Although the 1962 Model Penal Code is not binding, it has served as a guide for federal courts interpreting conspiracy statutes.³⁹¹ The MPC defines “conspiracy” as:

A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he:

- (1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or

³⁹⁰ Callanan v. United States, 364 U.S. 587, 593-94 (1961).

³⁹¹ MODEL PENAL CODE § 5.03 (AM. LAW. INST., Proposed Official Draft 1962); see, e.g., Salinas v. United States, 522 U.S. 52, 64-65 (1997) (announcing in the RICO context that “[o]ur recitation of conspiracy law comports with contemporary understanding” and quoting the Model Penal Code extensively); *id.* (“[T]he American Law Institute’s Model Penal Code permitted a person to be convicted of conspiracy so long as he ‘agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime.’ As the drafters emphasized, ‘so long as the purpose of the agreement is to facilitate commission of a crime, the actor need not agree ‘to commit’ the crime.’ The Model Penal Code still uses this formulation.”) (citations omitted); see also Ocasio v. United States, 136 S. Ct. 1423, 1429-30 (2016) (quoting *Salinas* extensively for interpretation of the federal conspiracy statute 18 U.S.C. § 371). The consensus among federal courts to follow the MPC is even stronger for attempt liability. According to *United States v. Hernandez-Galvan*, “[t]he modern trend is a shift toward the ‘substantial step’ test from the Model Penal Code, which is now the majority view among the states and federal courts, including the Fifth Circuit This ‘substantial step’ test thus represents the generic, contemporary act requirement for attempt liability.” 632 F.3d 192, 198 (5th Cir. 2011) (citing *Sui v. Immigration & Naturalization Serv.*, 250 F.3d 105, 116 (2d Cir. 2001), which notes that the Model Penal Code test is “the most commonly used ‘attempt’ definition today”). *But cf.* Miriam H. Baer, *Insider Trading’s Legality Problem*, 127 YALE L.J. FORUM 129, 142-43 (2017) (“The story of the Model Penal Code and the enactment of state penal codes across the country during the latter half of the twentieth century is a story, at least on some level, of deliberation and foresight. Legislatures across the country attempted to reform their criminal codes and, in doing so, confronted basic questions about mens rea, its relation to certain crimes such as homicide, and more generally, overriding concepts such as conspiracy, complicity and attempt.”).

(2) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.³⁹²

The comments to the MPC describe a common “object of the conspiracy” and agreement among co-conspirators on its “result and conduct elements.”³⁹³ The MPC comments emphasize that the “mens rea does not include, however, a corrupt motive or an awareness of the illegality of the criminal objective.”³⁹⁴

To survey developments since the author last wrote on this topic, in its 2016 *Ocasio v. United States*³⁹⁵ case, the Supreme Court writes: “[T]he fundamental characteristic of a conspiracy is a joint commitment to an ‘endeavor which, if completed, would satisfy all of the elements of [the underlying substantive] criminal offense.’”³⁹⁶ Co-conspirators must “pursue the same criminal objective,” but each conspirator need “not agree to commit or facilitate each and every part of the substantive offense.”³⁹⁷ Thus “[a] defendant must merely reach an agreement with the ‘specific intent that the underlying crime be committed’ by some member of the conspiracy.”³⁹⁸

One could imagine this type of analysis being performed on the “endeavor which, if completed, would satisfy all of the elements of [the underlying substantive] criminal offense”³⁹⁹ among VW, Bosch, and IAV’s managers with intent to violate environmental laws or similar substantive statutes. This author and others have written previously about the inability to use RICO and other statutes to help prosecutors put together the pieces of crimes separated across individuals and entities.⁴⁰⁰ The author recognizes that there exist

³⁹² MODEL PENAL CODE § 5.03 (AM. LAW. INST., Proposed Official Draft 1962).

³⁹³ *Id.* at explanatory note on § 5.03, subsection (1).

³⁹⁴ *Id.*

³⁹⁵ 136 S. Ct. 1423, 1429 (2016).

³⁹⁶ *Id.* (brackets in *Ocasio*) (quoting *Salinas v. United States*, 522 U.S. 52, 65 (1997)).

³⁹⁷ *Id.* (quoting *Salinas*, 522 U.S. at 63).

³⁹⁸ *Id.* (citations omitted) (emphasis omitted).

³⁹⁹ *Id.* (brackets in original) (quoting *Salinas*, 522 U.S. at 65).

⁴⁰⁰ Nelson, *Paper Dragon Thieves*, *supra* note 28, at 897 (“Unfortunately, however, after growth of the intracorporate conspiracy doctrine, RICO no longer applies to most business organizations and their employees. In fact, business organizations working together with outside agents can form new protected ‘enterprises.’”); Nelson, *The Intracorporate Conspiracy Trap*, *supra* note 259, at 983-87 (describing cases and development); see also David Warner, *Are the Corporation and Its Employees the Same?: Piercing the Intracorporate Conspiracy Doctrine in a Post-Enron World*, 55 KAN. L. REV. 1057, 1057, 1063-70 (2007) (writing that “[o]ne of the limitations of RICO is the

differences of opinion regarding broad conspiracy prosecutions in the legitimate corporate context,⁴⁰¹ but the possibilities and potential to prosecute for more substantive crimes beyond our dependence on fraud still bear discussion.

B. Reconsidering Willful Blindness

The other area of potential reform for fraud prosecutions against executives in cases on the scale of VW and similar examples is willful blindness. Judge Rakoff and others have suggested that prosecutors could ease their burden of proving intent in these white collar cases by relying on “willful blindness” or “conscious disregard.”⁴⁰²

Willful blindness may indeed be going through an evolution sparked in part by the Supreme Court’s decision in *Global-Tech*.⁴⁰³ This area of the law may now be a more flexible tool for prosecutors. This is an important point to be made in reconsidering the VW case and in evaluating the potential of future cases against executives based on similar willfully blind behavior. Because of how recent these developments are, the fact that this pattern has not been highlighted before, and associated controversy around these findings, this last section of the Article requires a much more detailed description of cases.

Willful blindness instructions are available in some areas of the criminal law, but remain generally incompatible with strict liability.⁴⁰⁴ Expanding the use of willful blindness instructions, however, would help prosecutors counter executives’ individual plausible deniability

intracorporate conspiracy doctrine” and starting to note the early implications of its development).

⁴⁰¹ See, e.g., Buell, *Criminally Bad*, *supra* note 125, at 73 (“[Although] American criminal law is far from naive about the problem of individuals who shield themselves from liability for the crimes of underlings . . . [t]his proof dynamic is unavailable in cases of corporate crime. Senior managers of even the most broken corporations spend most of their time on legitimate activities that have been licensed, indeed warmly welcomed, by state and federal governments.”).

⁴⁰² See Rakoff, *supra* note 375.

⁴⁰³ *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766-68 (2011).

⁴⁰⁴ See, e.g., GARRETT, *TOO BIG TO JAIL*, *supra* note 141, at 81. As Professor Garrett explains executives’ behavior in the context of corporations: “Formally, an ostrich defense [of putting their heads in the sand to escape the largest predators in the legal kingdom: prosecutors] does not work. The corporation does not have to possess any knowledge of wrongdoing under the strict *respondeat superior* rule. Informally, however, corporations can earn leniency or escape prosecution altogether by convincing prosecutors that they should not be punished for conduct that did not reach the higher levels of management.” *Id.*

defenses, especially after these defenses have proven so successful at trial.⁴⁰⁵ Willful blindness instructions might also prompt individuals to ask more questions about transactions and report more to authorities.⁴⁰⁶ Applying these instructions in additional parts of white collar law would not require new legislation, and fairly new Supreme Court language as now rippling through the federal circuits may support their adoption.⁴⁰⁷

Willful blindness instructions — also known as conscious avoidance instructions, “ostrich instruction,” and other terms⁴⁰⁸ — exist in all the federal circuits.⁴⁰⁹ Historically, the Ninth Circuit has used willful blindness instructions “rarely,” while the Second Circuit’s instructions were “commonly used.”⁴¹⁰ By the time of its 2011 *Global-Tech Appliances, Inc v. SEB S.A.*⁴¹¹ decision, however, the Supreme Court found that “every Court of Appeals — with the possible exception of the District of Columbia Circuit . . . has fully embraced willful blindness, applying the doctrine to a wide range of criminal statutes.”⁴¹²

⁴⁰⁵ See Nelson, *Paper Dragon Thieves*, *supra* note 28, at 926-41; discussion *supra* Part I.C & Part III.A–B.

⁴⁰⁶ See Alexander Egbert & Lizet Steele, *Money Laundering*, 53 AM. CRIM. L. REV. 1525, 1526 (2016).

⁴⁰⁷ The fact that a potentially broader acceptance of willful blindness instructions may be emerging is worth detailing here for others to see and examine as well. The U.S. Supreme Court’s 2011 decision in *Global-Tech* may have spurred additional comfort with application of willful blindness standards in certain federal courts of appeals. See, e.g., *Global-Tech Appliances*, 563 U.S. at 767-68 (“[E]very Court of Appeals — with the possible exception of the District of Columbia Circuit . . . has fully embraced willful blindness, applying the doctrine to a wide range of criminal statutes . . .”).

⁴⁰⁸ As a survey explains, “Courts and commentators employ several phrases interchangeably with willful blindness, including deliberate ignorance, conscious avoidance, purposeful avoidance, willful ignorance, deliberate shutting of the eyes, and conscious purpose to avoid the truth.” Jonathan L. Marcus, *Model Penal Code Section 2.02(7) and Willful Blindness*, 102 YALE L.J. 2231, 2231 n.1 (1993); see also FED. PRAC. & PROC. CRIM. § 499 (“Where knowledge is an element of the offense, an instruction on ‘willful blindness’ — sometimes termed an ‘ostrich’ instruction — is proper when a defendant claims a lack of knowledge and there is evidence supporting an inference of deliberate ignorance.”).

⁴⁰⁹ Marcus, *supra* note 408, at 2232.

⁴¹⁰ *Id.* (citing references).

⁴¹¹ 563 U.S. 754 (2011).

⁴¹² *Id.* at 767-68. The author of this Article proffers the following analysis of room for development in the willful blindness doctrine not necessarily to push the doctrine farther, but to note an opportunity for prosecutors who may be interested in pursuing these types of business-fraud cases if the author’s sister article’s reform proposal to better engage middle management is not adopted. *But see* Alexander F. Sarch, *Beyond*

Nonetheless, as Professor Buell writes, “the federal courts have been at pains to prevent this doctrine from being treated as anything less than a genuine, and justifiable, substitute for knowledge.”⁴¹³ Thus, “[w]illful blindness is not recklessness.”⁴¹⁴ Rather, “[a] defendant must *both* know of a substantial risk that the operative fact exists *and* take affirmative steps to avoid acquiring additional knowledge.”⁴¹⁵ Mere “[r]ed flags” would not be “sufficient to establish willful blindness.”⁴¹⁶ Nor is “[c]hronic inattention, as opposed to affirmative suppression of information.”⁴¹⁷ In sum, “[c]ourts seek a basis for concluding that the defendant all but knew, such as directive to others not to inform the defendant or an otherwise inexplicable failure to act in response to information.”⁴¹⁸

The drafters of the MPC include a version of willful blindness guidance in its “General Requirements of Culpability” under Section 2.02(7) as “Requirement of Knowledge Satisfied by Knowledge of High Probability.”⁴¹⁹ According to the MPC, “[w]hen knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.”⁴²⁰ The Second Circuit’s standard is much closer to this language than the Ninth Circuit’s.⁴²¹ The MPC’s commentary describes the provision as addressing “the situation British commentators have denominated

Willful Ignorance, 88 U. COLO. L. REV. 97, 103 (2017) (arguing that, “even under current law, the willful ignorance doctrine in its present form does not extend far enough” (emphasis in original)). Almost all the following cases discussed *infra* were not available to Sarch in writing his article if he submitted it a long time before going to press.

⁴¹³ Buell, *Criminally Bad*, *supra* note 125, at 72 (citing *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754 (2011); *United States v. Salinas*, 763 F.3d 869 (7th Cir. 2014)).

⁴¹⁴ *Id.*

⁴¹⁵ *Id.* (emphasis in original).

⁴¹⁶ *Id.*

⁴¹⁷ *Id.*

⁴¹⁸ *Id.*

⁴¹⁹ MODEL PENAL CODE § 2.02(7) (AM. LAW INST., Official Draft and Revised Comments 1985).

⁴²⁰ *Id.*

⁴²¹ *Compare, e.g.*, *United States v. Alvarado*, 838 F.2d 311, 314 (9th Cir. 1987) (citing *United States v. Pacific Hide & Fur Depot, Inc.*, 768 F.2d 1096, 1098 (9th Cir. 1985), *and United States v. McAllister*, 747 F.2d 1273, 1275 (9th Cir. 1984)), *with United States v. Rodriguez*, 983 F.2d 455, 457 (2d Cir. 1993) (quoting *United States v. Feroz*, 848 F.2d 359, 360 (2d Cir. 1988) (discussing formulation of Second Circuit’s “conscious avoidance” instruction)).

‘willful blindness’ or ‘connivance,’ the case of the actor who is aware of the probable existence of a material fact but does not determine whether the fact exists or does not exist.”⁴²²

Since the MPC’s codification, “despite the fact that the [MPC] is not considered binding authority . . . [t]he Supreme Court has approved of and been guided by the [MPC]’s definitions of knowledge and deliberate ignorance.”⁴²³ For example, in the 1969 case of *Leary v. United States*,⁴²⁴ “the Court formally approved the [MPC]’s definition of knowledge. Subsequently, each of the federal circuits has adopted this definition, indicating the general reliance on the [MPC] as a source of authority.”⁴²⁵

The MPC default criminal mens rea of at least recklessness is, of course, also not binding on the federal courts.⁴²⁶ Recklessness, according to the MPC, is when a person “consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct.”⁴²⁷ Under the MPC, “[t]he risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.”⁴²⁸

A basic problem with our understanding of willful blindness instructions at the federal level has been that federal criminal statutes and courts have been unclear and inconsistent about the level of mens rea that the willful blindness instructions would be filling in for.⁴²⁹ At the federal level, frustration with the fact that the texts of many federal criminal statutes do not contain a mens rea element has even spurred

⁴²² MODEL PENAL CODE § 2.02 cmt. 9 (AM. LAW INST., Official Draft and Revised Comments 1985).

⁴²³ Jessica A. Kozlov-Davis, *A Hybrid Approach to the Use of Deliberate Ignorance in Conspiracy Cases*, 100 MICH. L. REV. 473, 475 (2001).

⁴²⁴ 395 U.S. 6 (1969).

⁴²⁵ Kozlov-Davis, *supra* note 423, at 475.

⁴²⁶ See MODEL PENAL CODE § 2.02(3) (AM. LAW. INST., 1962) (“When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto.”).

⁴²⁷ MODEL PENAL CODE § 2.02(c) (AM. LAW. INST., 1962).

⁴²⁸ *Id.*

⁴²⁹ Additionally, of course, “[t]he Model Penal Code and the [U.S. Supreme Court’s] *United States Gypsum* opinion both reject the old common law distinction between specific and general intent — terms with varying definitions that have produced more confusion than clarity.” J. KELLY STRADER & SANDRA D. JORDAN, *WHITE COLLAR CRIME: CASES, MATERIALS, AND PROBLEMS* 16 (3d ed. 2015).

the introduction of legislation in Congress to adopt a baseline one.⁴³⁰ While those efforts have not passed,⁴³¹ certain senators have criticized these efforts as a “White Collar Criminal Immunity Act” and having the potential effect of “mak[ing] it much harder for the government to prosecute hundreds of corporate crimes — everything from wire fraud to mislabeling prescription drugs.”⁴³²

The U.S. Attorney’s Manual currently cites Fifth Circuit case law on wire and mail fraud for the broad statement that, “[a]s in any conspiracy, it is sufficient that the defendant *knowingly* joined the conspiracy in which wire fraud or mail fraud was a foreseeable act in furtherance of the conspiracy.”⁴³³ Yet, even in the *United States v. Leahy*⁴³⁴ case the manual quotes, the court does not include a mental standard in the same way for the same defendant’s charge of conspiracy to defraud the government. There, the court merely describes:

To obtain a conviction for conspiracy to defraud the United States under § 286, the government must prove beyond a reasonable doubt that the defendant entered into a conspiracy to obtain payment or allowance of a claim against a department or agency of the United States; that the claim was false, fictitious, or fraudulent; and that the defendant knew at the time that the claim was false, fictitious, or fraudulent.⁴³⁵

⁴³⁰ See Sarch, *supra* note 412, at 99 (citing Criminal Code Improvement Act of 2015, H.R. Res. 4002, 114th Cong. (2015)); see also Mens Rea Reform Act of 2017, S. 1902, 115th Cong. (2017), <https://www.govtrack.us/congress/bills/115/s1902>, (last visited Oct. 6, 2018) (introduced on Oct. 2, 2017 with a three percent chance of being enacted according to GovTrack on July 26, 2018); Matt Ford, *The Presence of Justice: Could a Controversial Bill Sink Criminal-Justice Reform in Congress?*, ATLANTIC (Oct. 26, 2017), <https://www.theatlantic.com/politics/archive/2017/10/will-congress-reform-criminal-intent/544014/>.

⁴³¹ Ford, *supra* note 430.

⁴³² *Id.* (quoting U.S. senators Dick Durbin and Elizabeth Warren).

⁴³³ U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ CRIMINAL RESOURCE MANUAL § 965 (Conspiracy to Violate the Mail Fraud or Wire Fraud Statutes), <https://www.justice.gov/usam/criminal-resource-manual-965-conspiracy-violate-mail-fraud-or-wire-fraud-statutes>, (last visited Oct. 6, 2018) (quoting *United States v. Leahy*, 82 F.3d 624 (5th Cir. 1996) (citing *United States v. Basey*, 816 F.2d 980, 997 (5th Cir. 1987)) (holding that once a defendant’s knowing participation in a conspiracy has been established, “the defendant is deemed guilty of substantive acts committed in furtherance of the conspiracy by any of his criminal partners”) (italics in original)).

⁴³⁴ 82 F.3d 624 (5th Cir. 1996).

⁴³⁵ *Id.* at 633 (citing *United States v. Lanier*, 920 F.2d 887, 892 (11th Cir. 1991)).

The *Leahy* court continues, that “[o]nce the government has established an illegal conspiracy, ‘it need only introduce ‘slight evidence’ to connect an individual defendant to the common scheme.’”⁴³⁶ The statute for conspiracy to defraud the government under 18 U.S.C. § 286 itself does not contain a mens rea element.⁴³⁷ Similarly, there is no mens rea in the language of 18 U.S.C. § 371 regarding “conspiracy to commit offense or to defraud United States.”⁴³⁸ Nor is there a mens rea element even in the language of the wire fraud⁴³⁹ and mail fraud⁴⁴⁰ statutes that the *Leahy* court was first interpreting.⁴⁴¹

⁴³⁶ *Id.* at 633-34 (quoting *United States v. Duncan*, 919 F.2d 981, 991 (5th Cir. 1990)).

⁴³⁷ 18 U.S.C. § 286 (2018). “Conspiracy to defraud the government with respect to claims” reads:

Whoever enters into any agreement, combination, or conspiracy to defraud the United States, or any department or agency thereof, by obtaining or aiding to obtain the payment or allowance of any false, fictitious or fraudulent claim, shall be fined under this title or imprisoned not more than ten years, or both.

⁴³⁸ 18 U.S.C. § 371 (2018). “Conspiracy to commit offense or to defraud United States” reads:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

⁴³⁹ 18 U.S.C. § 1343 (2018). “Fraud by wire, radio, or television” reads:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

⁴⁴⁰ 18 U.S.C. § 1341 (2018). “Frauds and swindles” reads:

Where has this left willful blindness as a substitute for an unknown mens rea? And when should a defendant otherwise have a duty to “know” basic facts regarding the illegality of his or her actions?⁴⁴²

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

⁴⁴¹ To clarify, the Supreme Court has determined that some level of mens rea is required for many of these statutes (*see, e.g., Staples v. United States*, 511 U.S. 600, 619 (1994), *Morrisette v. United States*, 342 U.S. 246, 250 (1952), and discussion *supra* at note 110, but there is not consistency in what that degree of mens rea should be, nor is there agreement how to interpret the level of mens rea across federal criminal statutes. For a concise survey of approaches, *see, e.g., STRADER & JORDAN, supra* note 429, at 14-18. As that text notes, in federal criminal law, even “‘willfulness’ may be defined differently. Instead of knowledge that the act violates a specific law, it may mean only that the defendant knew that the act was generally unlawful. In other circumstances, ‘willfulness’ may mean ‘purpose,’ ‘knowledge,’ or even ‘recklessness.’” *Id.* at 17 (internal citations omitted).

⁴⁴² The responsible corporate officer doctrine would fill these legal gaps in what a manager is presumed to know about events happening on his or her watch. The author has written about the responsible officer doctrine before. *See, e.g., Nelson, The Corporate Conspiracy Vacuum, supra* note 246, at 283-85; discussion *supra* note 259 (outlining situations when corporate actors are subject to liability under the “responsible corporate officer” doctrine). This is a controversial doctrine that some scholars believe should be limited to a few industries governed by the Food, Drug, and Cosmetics act, though it has also been applied in environmental law and other areas such antitrust and securities law. *See Michael W. Peregrine, The “Responsible Corporate Officer Doctrine” Survives to Perplex Corporate Boards*, HARV. L. SCH. FOR. ON CORP. GOVERNANCE & FIN. REG. (July 5, 2017), <https://corpgov.law.harvard.edu/2017/>

These are particularly important issues in business cases such as the VW example. This confusion has remained a serious practical problem because, as one commentator notes “the willful blindness doctrine is currently invoked most frequently under federal narcotics statutes, which are only prohibitory and involve no legal duty to know.”⁴⁴³

Historically, the U.S. Supreme Court has been slow to permit willful blindness instructions because of concerns such as these. In the 1952 case *Morrisette v. United States*,⁴⁴⁴ the Court is commonly understood to have held that “intent is a question of fact for the jury, and that it is improper to instruct the jury that the law raises a presumption of intent from the act.”⁴⁴⁵ In the 1979 case *Sandstrom v. Montana*,⁴⁴⁶ the Court held that “in a case in which intent is an element of the crime charged,” the jury instruction that “‘the law presumes that a person intends the ordinary consequences of his voluntary acts,’ violates the Fourteenth Amendment’s requirement that the State prove every element of a criminal offense beyond a reasonable doubt.”⁴⁴⁷

The *Federal Trial Handbook: Criminal*⁴⁴⁸ still cites the 1987 Ninth Circuit cocaine-possession *U.S. v. Alvarado*⁴⁴⁹ case for when willful blindness instructions, also known as *Jewell* instructions, may typically be given. According to the *Alvarado* court, “A *Jewell* instruction is properly given only when [the] defendant claims a lack of guilty knowledge and the proof at trial supports an inference of deliberate ignorance.”⁴⁵⁰ The court historically cautions: “The cases in which the facts point to deliberate ignorance are relatively rare.”⁴⁵¹ The concern, pre-movement of mens rea standards from overcriminalization, is that there will be a “risk that the jury will

07/05/the-responsible-corporate-officer-doctrine-survives-to-perplex-corporate-boards; see also Joseph G. Block & Nancy A. Voisin, *The Responsible Corporate Officer Doctrine — Can You Go To Jail For What You Don't Know?*, 22 ENVTL. L. 1347, 1350-51 (1992) (describing history and environmental applications). Yet, despite how unpopular the doctrine may be, responsible corporate officer doctrine may remain an area to watch in the future.

⁴⁴³ Marcus, *supra* note 408, at 2234.

⁴⁴⁴ 342 U.S. 246 (1952).

⁴⁴⁵ FED. PRAC. & PROC. CRIM., *supra* note 408, § 499.

⁴⁴⁶ 442 U.S. 510 (1979).

⁴⁴⁷ *Id.* at 512.

⁴⁴⁸ Stephen E. Arthur & Robert S. Hunter, *The Willful Blindness Instruction*, in 2 FEDERAL TRIAL HANDBOOK: CRIMINAL § 75:28 (4th ed. 2017).

⁴⁴⁹ 838 F.2d 311 (9th Cir. 1987), *rev'd*, 838 F. 2d 311 (9th Cir. 1988).

⁴⁵⁰ *Id.* at 314 (quoting *United States v. Pacific Hide & Fur Depot, Inc.*, 768 F.2d 1096, 1098 (9th Cir. 1985)).

⁴⁵¹ *Id.* (citing *United States v. McAllister*, 747 F.2d 1273, 1275 (9th Cir. 1984)).

convict on a standard of negligence: that the defendant should have known the conduct was illegal.”⁴⁵² The court asserted that “[i]nstead, the facts must support the inference that the defendant was aware of a high probability of the existence of the fact in question and purposely contrived to avoid learning all of the facts in order to have a defense in the event of a subsequent prosecution.”⁴⁵³

But what the federal appellate courts have articulated as their standards have somewhat belied their actions in these cases, even before the 2011 U.S. Supreme Court’s approval of willful blindness instructions in *Global-Tech*. Had there been more commentary on the subject, this could have been something that savvy defense lawyers might have brought to VW’s executives’ notice. For example, even in its 1987 *Alvarado* case above, the Ninth Circuit found the district court’s administration of willful blindness instructions — in fact, of *incorrect* willful blindness instructions — to be harmless error.⁴⁵⁴ It was “beyond any reasonable doubt” that the district court’s error affected the verdict.⁴⁵⁵

For its justification to make conclusions about Alvarado’s involvement in a drug crime, the court points to his co-defendant’s otherwise ambiguous circling back at the airport.⁴⁵⁶ As the court describes, “Oqueli-Hernandez certainly exhibited a peculiar manner of returning for and picking up Alvarado after leaving him stranded at the airport.”⁴⁵⁷ Moreover, “Oqueli-Hernandez admitted the contents of

⁴⁵² See *id.* Mitigating this concern to preserve application of the appropriate mens rea in the administration of willful blindness instructions is beyond the scope of this article, but has been attempted elsewhere. See, e.g., Alexander F. Sarch, *Willful Ignorance, Culpability and the Criminal Law*, 88 ST. JOHN’S L. REV. 1023, 1077-94 (2014) (“[W]illful ignorance really is as culpable as acting knowingly.”); cf. *Fishman Transducers, Inc. v. Paul*, 684 F.3d 187, 191-92 (1st Cir. 2012) (citing *United States v. Griffin*, 524 F.3d 71, 80 (1st Cir. 2008)) (elevating in a trademark case necessary levels of culpability for instructions by distinguishing criminal and civil behavior: “In federal civil litigation willfulness requires a conscious awareness of wrongdoing by the defendant or at least conduct deemed ‘objectively reckless’ measured against standards of reasonable behavior. The criminal standard is slightly more demanding because it requires a subjective indifference to risk for recklessness — sometimes called willful blindness — as the minimum condition for a willfulness finding.”).

⁴⁵³ *Alvarado*, 838 F.2d at 314.

⁴⁵⁴ *Id.* at 313-14 (“[T]he judge . . . gave an earlier rejected *Jewell* instruction . . . Both defense counsel objected to this instruction. The objection was denied.”); *id.* at 317 (holding administration of the incorrect instruction to be harmless error).

⁴⁵⁵ *Id.* at 317.

⁴⁵⁶ See *id.*

⁴⁵⁷ *Id.*

the black suitcase were his.”⁴⁵⁸ This is apparently the evidence that “lucidly demonstrates Alvarado attempted a smokescreen and a shell game to avoid having the black suitcase [that contained the cocaine] opened.”⁴⁵⁹ The court then moves on quickly to conclude that “[t]hus, it is abundantly clear the defendants were traveling together, knew of the cocaine, and joined in an attempt to import the cocaine without its detection. The jury had no choice. A guilty verdict on all counts was compelled.”⁴⁶⁰ How the *Alvarado* court jumps from its strong standard-of-review statements about the need for willful blindness instructions to remain “rare” to its actual examination of evidence and holding in the case, however, is not at all “abundantly clear.”⁴⁶¹

In the 1993 *United States v. Rodriguez*⁴⁶² case, also involving a suitcase full of cocaine, the Second Circuit not only approved use of willful blindness (conscious avoidance) instructions, but it went out of its way to distance itself from the Ninth Circuit’s standard of “rare” use.⁴⁶³ As the *Rodriguez* court wrote, “[i]n this Circuit, a ‘conscious avoidance’ instruction has been authorized somewhat more readily than elsewhere.”⁴⁶⁴ Citing *Alvarado*, the *Rodriguez* court noted “[i]n the Ninth Circuit, for example, the charge is to be given ‘rarely.’”⁴⁶⁵ But, “[w]e, on the other hand, have observed that the charge is ‘commonly used.’”⁴⁶⁶ The Second Circuit model instruction contains a much lower standard that: “the jury be told that knowledge of the existence of a particular fact may be inferred ‘(1) if a person is aware of a high probability of its existence, (2) unless he actually believes that it does not exist.’”⁴⁶⁷

However, back in the context of business cases like VW’s, Professor Buell describes a 2006 Second Circuit case as “push[ing] the envelope a bit in approving the use of a willful blindness argument” against

⁴⁵⁸ *Id.*

⁴⁵⁹ *Id.*

⁴⁶⁰ *Id.*

⁴⁶¹ Cf. Garrett, *Metamorphosis*, *supra* note 138, at 67 (summarizing his findings on prosecutors’ actions to conclude that “what the guidelines say is one thing, and what prosecutors actually do in practice is another”).

⁴⁶² 983 F.2d 455 (2d Cir. 1993).

⁴⁶³ *Id.* at 457.

⁴⁶⁴ *Id.*

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.* (citing *United States v. Fletcher*, 928 F.2d 495, 502 (2d Cir. 1991) and *United States v. Mang Sun Wong*, 884 F.2d 1537, 1542 n.5 (2d Cir. 1989) in noting different approaches).

⁴⁶⁷ *Id.*

Worldcom's Bernard Ebbers on the basis of "evidence that Ebbers threw reports in the trash without reading them."⁴⁶⁸

The real evolution in this area of conflicting statements and actions may be rippling through certain federal courts of appeal after the U.S. Supreme Court's 2011 *Global-Tech* decision. Now that this Article highlights and identifies these changes as a pattern across courts, defense lawyers may be more likely to talk to their clients like VW executives about potential liability for willfully blind behavior.

In *Global-Tech*, the Court appears much more comfortable with the willful blindness doctrine, and it even provides a business-case example to illustrate the doctrine's roots. As the Court introduces, "[t]he doctrine of willful blindness is well established in criminal law."⁴⁶⁹ In "[m]any criminal statutes [that] require proof that a defendant acted knowingly or willfully, . . . courts applying the doctrine of willful blindness hold that defendants cannot escape the reach of these statutes by deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances."⁴⁷⁰ The *Global-Tech* Court explains "[t]he traditional rationale for this doctrine is that defendants who behave in this manner are just as culpable as those who have actual knowledge."⁴⁷¹ According to the 1954 source it cites, the Court asserts that "up to the present day, no real doubt has been cast on the proposition that [willful blindness] is as culpable as actual knowledge."⁴⁷² The Court then cites the Ninth Circuit for the proposition that "persons who know enough to blind themselves to direct proof of critical facts in effect have actual knowledge of those facts."⁴⁷³

Global-Tech further grounds precedent for establishing the adoption of willful blindness instructions in the 1899 business case *Spurr v. United States*.⁴⁷⁴ As the Court notes, "[t]he case involved a criminal statute that prohibited a bank officer from 'willfully' certifying a check drawn against insufficient funds. We said that a willful violation

⁴⁶⁸ Buell, *Criminally Bad*, *supra* note 125, at 72 n.23 (citing *United States v. Ebbers*, 458 F.3d 110 (2d Cir. 2006)).

⁴⁶⁹ *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766 (2011).

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.* (citing J. Edwards, *The Criminal Degrees of Knowledge*, 17 MOD. L. REV. 294, 302 (1954)).

⁴⁷² *Id.*

⁴⁷³ *Id.* (citing *United States v. Jewell*, 532 F.2d 697, 700 (9th Cir. 1976) (en banc)).

⁴⁷⁴ *Id.* at 766-67. ("This Court's opinion more than a century ago in *Spurr v. United States*, 174 U.S. 728, 19 S. Ct. 812, 43 L. Ed. 1150 (1899), while not using the term 'willful blindness,' endorsed a similar concept.").

would occur ‘if the [bank] officer purposely keeps himself in ignorance of whether the drawer has money in the bank.’”⁴⁷⁵

Then the *Global-Tech* Court turns for guidance to the 1962 MPC, specifically quoting the two provisions of the Code initially discussed above.⁴⁷⁶ Citing *Leary*, and another case based on *Leary*’s analysis,⁴⁷⁷ the *Global-Tech* Court reaffirms that it uses “the Code’s definition as a guide in analyzing whether certain statutory presumptions of knowledge comported with due process.”⁴⁷⁸ *Global-Tech* thus approves of willful blindness instructions as also present in “many Courts of Appeals” that “(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact.”⁴⁷⁹ *Global-Tech* holds that adopting these two requirements “give[s] willful blindness an appropriately limited scope that surpasses recklessness and negligence.”⁴⁸⁰

Since the Supreme Court’s 2011 *Global-Tech* decision, decisions by certain federal courts of appeals may suggest an easier application of willful blindness instructions as long as it contains these two pieces. One of the reasons why this trend seems to have been missed by other writers as it was happening is that, while the cases below post-date *Global-Tech*, they do not cite the case. Perhaps certain appellate courts’ growing permissiveness towards these instructions is also part of their march towards overcriminalization generally.⁴⁸¹ But the Heritage Foundation did sound the alarm early. As a commentator wrote in the organization’s newsletter upon *Global-Tech*’s release, “In *Global-Tech Appliances v. SEB* . . . the Court . . . implied that the [willful blindness] doctrine properly applies in federal criminal cases, which would undermine traditional criminal-intent, or mens rea, protections against unjust criminal punishment.”⁴⁸² Perhaps, as that author concludes,

⁴⁷⁵ *Id.* at 767 (quoting *Spurr v. United States*, 174 U.S. 728, 735 (1899)).

⁴⁷⁶ *Id.* (“[A] 1962 proposed draft of the Model Penal Code, which has since become official, attempted to incorporate the doctrine by defining ‘knowledge of the existence of a particular fact’ to include a situation in which ‘a person is aware of a high probability of [the fact’s] existence, unless he actually believes that it does not exist.’” (quoting MODEL PENAL CODE § 2.02(7) (AM. LAW INST., Proposed Official Draft 1962)).

⁴⁷⁷ *Turner v. United States*, 396 U.S. 398 (1970).

⁴⁷⁸ *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 767 (2011).

⁴⁷⁹ *Id.* at 769.

⁴⁸⁰ *Id.*

⁴⁸¹ See overcriminalization discussion *supra* at Part I.A.

⁴⁸² Brian Walsh, *The Supreme Court’s Willful Blindness Doctrine Opens the Door to More Wrongful Criminal Convictions*, HERITAGE FOUND. (June 30, 2011), <https://www.heritage.org/report/the-supreme-courts-willful-blindness-doctrine-opens>

“[t]he result may be that more innocent Americans will face criminal conviction.”⁴⁸³ Or perhaps more executives who cultivate willful blindness towards actions within their organizations will re-think their decisions in light of this more generous doctrine.

As executives in companies like VW should note, the following survey of recent cases demonstrates this movement may be particularly significant in business cases.⁴⁸⁴ However, even in the 2014 firearms-smuggling case of *U.S. v. Galimah*, the Eighth Circuit broadly announced that:

Allowing a deliberate ignorance instruction does not alleviate the government’s burden of proving knowledge of the law. Instead, it sensibly recognizes the reality that one who has enough knowledge of the law to consciously avoid learning the definite truth is at least aware of the high probability that his conduct is illegal and is simply attempting to maintain deniability.⁴⁸⁵

Tax cases have long been a difficult area for application of willful blindness instructions after the 1991 U.S. Supreme Court case *Cheek v. U.S.*⁴⁸⁶ Even before *Global-Tech*’s 2011 permissiveness, however, several courts of appeals did apply willful blindness instructions in those cases. In 2010, the Third Circuit wrote “*Cheek* does not prohibit a willful blindness instruction that applies to a defendant’s knowledge of relevant tax law.”⁴⁸⁷ By 2015, the Seventh Circuit explicitly writes that “[w]e decline to extend the logic of *Cheek* — which dealt exclusively with a conviction under the tax code — to cases charged

the-door-more-wrongful-criminal.

⁴⁸³ *Id.*

⁴⁸⁴ Compare the appellate courts’ language in the following business cases with *United States v. Little*, 829 F.3d 1177, 1185 (10th Cir. 2016). In the case of a felon in possession of a firearm and possession of a stolen firearm, in which there was no evidence that the defendant had “deliberately avoided knowledge of the firearms,” the Tenth Circuit wrote: “Allowing a deliberate ignorance instruction premised on evidence of constructive knowledge reduces the standard for conviction from knowledge to recklessness or negligence.” *Id.* But see the Eighth Circuit’s drug case of *U.S. v. Haire* in which the court wrote: “We reject Haire’s contention that the willful blindness instruction lowered the government’s burden of proof, because the district court instructed the jury that it could not find he acted knowingly if he was merely negligent, careless, or mistaken as to the fact that his suitcase contained drug proceeds.” *United States v. Haire*, 806 F.3d 991, 998 (8th Cir. 2015).

⁴⁸⁵ *United States v. Galimah*, 758 F.3d 928, 932 (8th Cir. 2014).

⁴⁸⁶ 498 U.S. 192, 201 (1991) (“[T]he standard for the statutory willfulness requirement is the voluntary, intentional violation of a known legal duty.”).

⁴⁸⁷ *United States v. Stadtmayer*, 620 F.3d 238, 242 (3d Cir. 2010).

under the false claims statutes.”⁴⁸⁸ The Seventh Circuit holds instead that “[t]he government need not prove that the defendant acted willfully to prove a violation under the false claims statutes at issue here, which only require proof that a defendant made a claim upon the United States knowing that the claim was false.”⁴⁸⁹

Another example of this potential trend in broader application of willful blindness instructions is the 2012 First Circuit mortgage fraud case *United States v. Appolon*.⁴⁹⁰ The First Circuit writes that “[t]he purpose of the willful blindness theory is to impose criminal liability on people who, recognizing the likelihood of wrongdoing, nonetheless consciously refuse to take basic investigatory steps.”⁴⁹¹ In a statement of the law similar to *Global-Tech* but not citing the decision, the Fourth Circuit holds that “the government must show that (1) the defendant was aware of a high probability of wrongdoing and (2) consciously and deliberately avoided learning of the wrongdoing.”⁴⁹² As the Fourth Circuit explains, however, “[d]irect evidence is not required; ‘what is needed are sufficient warning signs that call out for investigation or evidence of deliberate avoidance of knowledge.’”⁴⁹³

The 2012 *Appolon* court cites three “red flags” in the mortgage fraud case that, “uninvestigated, suggest [the defendant] Lindley’s willful blindness.”⁴⁹⁴

First, MacPhee included in Lindley’s files two sets of loan documents for nearly every property involved in appellants’ scheme. Second, Lindley conducted several closings involving repeat buyers Third, Lindley conducted one closing involving a buyer, Andrew Caputo, who was listed on the HUD-1 form as living in a property which Levine had recently sold to a different straw buyer and for which Lindley had staged the closing.⁴⁹⁵

⁴⁸⁸ *United States v. Anzaldi*, 800 F.3d 872, 880 (7th Cir. 2015).

⁴⁸⁹ *Id.* at 880-81.

⁴⁹⁰ 695 F.3d 44 (1st Cir. 2012).

⁴⁹¹ *Id.* at 57 (quoting *United States v. Rothrock*, 806 F.2d 318, 323 (1st Cir. 1986)).

⁴⁹² *Id.* (citing *United States v. Pérez-Meléndez*, 599 F.3d 31, 41 (1st Cir. 2010); *United States v. Azubike*, 564 F.3d 59, 66 (1st Cir. 2009)).

⁴⁹³ *Id.* (quoting *Azubike*, 564 F.3d at 66).

⁴⁹⁴ *Id.* (citing *United States v. Frigerio-Migiano*, 254 F.3d 30, 35 (1st Cir. 2001)). The court also analyzed the willful blindness arguments of two of Lindley’s co-defendants. *Id.* at 63.

⁴⁹⁵ *Id.* at 57.

In rebuttal to the defendant's objections that each of these actions could be explained away with innocent circumstances or as casual oversights, the Fourth Circuit acknowledges "the plausibility of Lindley's explanations But the jury also was entitled to disbelieve those explanations, and to find, for instance, that Lindley was aware that his files held two sets of documents for certain properties."⁴⁹⁶ Most importantly, "if Lindley did not compare the two [sets of documents] to find out why, it was only because he was consciously avoiding the knowledge that they recorded different purchase prices or otherwise contained discrepancies."⁴⁹⁷ Failing to compare documents seems like behavior that could apply to an enormous number of business defendants.

As a 2015 case shows, there does still seem to be a distinction for certain appellate courts post-2011 *Global-Tech* between physical actions that they can observe the defendant taking and lack of action as psychological evidence of willful blindness. In its 2015 *U.S. v. Pierotti* case, the Seventh Circuit describes how "[d]eliberate avoidance" or "an ostrich instruction" may appear "in two forms: physical and psychological."⁴⁹⁸ The physical form "is simple enough, as it involves a defendant's going out of her way to avoid seeing or learning something she knows will confirm that her actions are illegal."⁴⁹⁹ By contrast, "[p]sychological avoidance . . . is often defined as the cutting off of one's normal curiosity by an effort of will; it does not encompass ordinary ignorance or lack of curiosity."⁵⁰⁰ Yet, even in 2009, the Seventh Circuit had displayed a permissive attitude toward psychological evidence of willful blindness, writing "[w]e acknowledge that distinguishing between deliberate avoidance and simple lack of mental effort, lack of curiosity, ordinary ignorance, or mere negligence often involves 'close calls.' But in cases such as this, we should defer to the district court's exercise of discretion to give the ostrich instruction."⁵⁰¹

By 2016 and 2017, the movement to loosen willful blindness instruction standards may be gaining steam. If the VW case and others like it were to be reconsidered today, prosecutors might find it easier to charge additional executives despite willfully blind behavior. In the

⁴⁹⁶ *Id.* (internal citation omitted).

⁴⁹⁷ *Id.*

⁴⁹⁸ *United States v. Pierotti*, 777 F.3d 917, 921 (7th Cir. 2015).

⁴⁹⁹ *Id.*

⁵⁰⁰ *Id.*

⁵⁰¹ *United States v. Ramirez*, 574 F.3d 869, 881 (7th Cir. 2009).

2016 healthcare fraud case *United States v. Barson*,⁵⁰² the Fifth Circuit approves willful blindness instructions because

Barson's acts in signing blank forms to allow Medicare to be billed for procedures under his number, opening a bank account in his name for the reimbursements, and signing blank checks for Shakhbazyan to draw on the account [were] sufficient to permit the jury to infer that Barson took pains to avoid personal knowledge of incriminating facts.⁵⁰³

In its 2017 *United States v. Fisch*⁵⁰⁴ case regarding a criminal defense attorney's convictions for conspiracy, obstruction of justice, money laundering, and tax evasion, the Fifth Circuit also upholds willful blindness instructions on evidence that the defendant "declin[ed] to ask questions about the legality of the proposed conduct."⁵⁰⁵ As the *Fisch* court describes: "Fisch testified that '[his partner, corrupt FBI agent Williams] kept me out of it. He kept me in the dark basically as far as what he was doing and how he was doing it. I didn't ask a lot of questions Whatever I knew is what he told me.'"⁵⁰⁶ Also important for the court is that Fisch "repeatedly testified that he 'didn't ask' specific questions of Williams."⁵⁰⁷

In the 2017 stolen property business case *United States v. Hale*,⁵⁰⁸ the Fourth Circuit examines the defendant's behavior in the case to find "ample evidence . . . that Hale took deliberate actions to avoid confirming that the goods were in fact stolen."⁵⁰⁹ As the appellate court writes, "Hale was careful never to ask Bridges about who 'her people' were or why so many of her goods were marked with stickers indicating that they belonged on the shelves of local stores. Instead, he had such stickers removed."⁵¹⁰ Additionally, despite the fact that the defendant knew from "his earlier dealings of the 'very big risk' that

⁵⁰² 845 F.3d 159 (5th Cir. 2016). Barson and his co-defendant had been convicted of "conspiracy to commit health care fraud and several substantive counts of health care fraud." *Id.* at 162.

⁵⁰³ *Id.* at 166.

⁵⁰⁴ 851 F.3d 402 (5th Cir. 2017).

⁵⁰⁵ *Id.* at 411.

⁵⁰⁶ *Id.*

⁵⁰⁷ *Id.*

⁵⁰⁸ 857 F.3d 158 (4th Cir. 2017). Hale had been convicted of "transporting stolen property in interstate commerce, knowing the goods to have been stolen; of conspiring to do the same; of making false statements in his tax returns; of failing to collect and pay employee taxes; and of obstructing justice." *Id.* at 161.

⁵⁰⁹ *Id.* at 169.

⁵¹⁰ *Id.*

individuals selling these types of goods could be fences, he elected not to require his suppliers to ever provide receipts or other documentation showing that they were obtaining their goods through legitimate channels, and he structured his operation in a manner that minimized his direct contact with them.”⁵¹¹

Also in the Fourth Circuit, in the 2017 bank-fraud case *United States v. Vinson*,⁵¹² the appellate court upholds the district court’s willful blindness instructions on evidence “at a minimum,” that the defendant had “deliberately failed to ask questions that might have incriminated him.”⁵¹³ Although applying a standard that “the government may ‘prove knowledge by establishing that the defendant deliberately shielded himself from clear evidence of critical facts that are strongly suggested by the circumstances,’” the *Vinson* court’s description of failing to respond to communications may be a business case new low bar.⁵¹⁴ As the court explains, the government’s evidence of willful blindness (deliberate ignorance) included that “Vinson requested the assistance of others to obtain bank funding Vinson needed but knew he could not obtain on his own, and that Vinson’s coconspirators then kept him abreast of details of their various schemes, even though Vinson did not always respond to their communications.”⁵¹⁵ “Thus,” the *Vinson* court concludes, “the trial court acted well within its discretion in charging the jury on willful blindness” because the government had established “‘at a minimum,’ that Vinson ‘deliberately failed to ask questions that might have incriminated him.’”⁵¹⁶

In the 2017 drug-distribution, money-laundering, and omitted tax filing *United States v. Delgrosso*⁵¹⁷ case involving how the defendant ran his car dealership, the Eighth Circuit approves of willful blindness instructions when the defendant merely admits not making “further inquiries” within his ability to do so.⁵¹⁸ As the court finds persuasive, “Delgrosso admitted that he never conducted a background check, confirmed Wright’s ownership of the vehicles he claimed to own, or

⁵¹¹ *Id.*

⁵¹² 852 F.3d 333 (4th Cir. 2017). Vinson had been convicted of “various offenses arising from his leadership of schemes wherein fraud was systematically utilized to keep his real estate empire afloat,” including conspiracy to commit bank fraud, defrauding the United States, and money laundering. *Id.* at 337, 348.

⁵¹³ *Id.* at 357.

⁵¹⁴ *Id.* (quoting *United States v. Jinwright*, 683 F.3d 471, 478-79 (4th Cir. 2012) (alterations and internal quotation marks omitted in the case)).

⁵¹⁵ *Id.*

⁵¹⁶ *Id.* (quoting Brief of Appellee at 69, *Vinson*, 852 F.3d 333 (No. 15-4384)).

⁵¹⁷ 852 F.3d 821 (8th Cir. 2017).

⁵¹⁸ *Id.* at 824, 829.

checked with any references or with Wright's probation officer."⁵¹⁹ The defendant "did not make such inquiries only because he was not hiring Wright to be in the 'full-time employment of Missouri Auto Group,' suggesting that he could have made such inquiries."⁵²⁰ The court concludes "[b]ecause Delgrosso admitted that he could have made further inquiries, the jury could have inferred that he and Cain 'intentionally failed to investigate' once they were put on notice of criminal activity."⁵²¹

Finally, in the 2017 *United States v. Juarez*⁵²² case against a twenty-year veteran of the Houston police force who abused his position to traffic drugs,⁵²³ the Fifth Circuit upheld a willful blindness instruction as to the defendant's knowledge regarding even his involvement in the conspiracy, as opposed to its purpose. As noted earlier, mens reas in conspiracy cases remains a particularly difficult area for courts.⁵²⁴ The note below further details how the Fifth Circuit here treads on territory in which the Second Circuit effectively found itself overruled before 2011's *Global-Tech*.⁵²⁵

The Fifth Circuit's 2017 *Juarez* decision examines whether there had been error for "the jury to conclude that Juarez knowingly joined the conspiracy if it found that Juarez 'deliberately closed his eyes to what

⁵¹⁹ *Id.* at 829.

⁵²⁰ *Id.*

⁵²¹ *Id.*

⁵²² 866 F.3d 622 (5th Cir. 2017).

⁵²³ Juarez had been convicted of "two counts related to his participation in a drug trafficking conspiracy." *Id.* at 625.

⁵²⁴ See conspiracy discussion *supra* Part IIIA.

⁵²⁵ In fact, a 1997 Second Circuit case that negated the mens rea requirement related to a defendant's involvement in the conspiracy had been explicitly overruled by 2006. In *United States v. Gabriel*, the Second Circuit wrote: "The general rule in criminal cases is that the government need not prove a knowing violation of the law — we see no reason that Congress would change that rule simply because a person caused an innocent intermediary to act If 'willfully' is interpreted to mean 'intentionally,' it has a role to fill — the government must prove that defendant intentionally caused another to act Accordingly, we conclude that the government is not required to prove a knowing violation of the law under section 2(b)." 125 F.3d 89, 101-02 (2d Cir. 1997) (overruling recognized by *United States v. Quattrone*, 441 F.3d 153, 176 (2d Cir. 2006)); cf. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 706 (2005) ("Only persons conscious of wrongdoing can be said to 'knowingly . . . corruptly persuad[e].' And limiting criminality to persuaders conscious of their wrongdoing sensibly allows § 1512(b) to reach only those with the level of 'culpability . . . we usually require in order to impose criminal liability.'" (quoting *United States v. Aguilar*, 515 U.S. 593, 602 (1995) and citing *Liparota v. United States*, 471 U.S. 419, 426 (1985))).

would otherwise have been obvious to him.”⁵²⁶ Initially the court carries a quote from a pre-2011 case to write that “[d]ue to concerns that a jury will convict a defendant for what [he] should have known rather than the appropriate legal standard, [this Court has] ‘often cautioned against the use of the deliberate ignorance instruction.’”⁵²⁷

Then wading directly into the area, *Juarez* describes how, although “[a] deliberate ignorance instruction is rarely appropriate; it should only be given ‘where the evidence shows (1) subjective awareness of a high probability of the existence of illegal conduct, and (2) purposeful contrivance to avoid learning of the illegal conduct.’”⁵²⁸ Specifically, “[t]he key aspect of deliberate ignorance is the *conscious* action of the defendant — the defendant consciously attempted to escape confirmation of conditions or events he strongly suspected to exist.”⁵²⁹ The court acknowledges that the “same evidence that will raise an inference that the defendant had actual knowledge of the illegal conduct ordinarily will also raise the inference that the defendant was subjectively aware of a high probability of the existence of illegal conduct.”⁵³⁰

As to the first prong of its two-part test, the “subjective awareness of a high probability of illegal conduct,” the *Juarez* court would accept evidence that “allow[s] a ‘glimpse’ into the defendant[’s] mind[] when there is no evidence pointing to actual knowledge.”⁵³¹ The court writes here that even “[s]uspicious and erratic behavior may be sufficient to infer subjective awareness of illegal conduct.”⁵³²

As to the second prong of its two-part test, the “purposeful contrivance to avoid learning of illegal conduct,” the *Juarez* court writes that “[n]ot asking questions can be considered a purposeful contrivance to avoid guilty knowledge.”⁵³³ Pointing by analogy to a 2007 case involving bank fraud and money laundering, the court writes that the mere action of those defendants “‘never request[ing] to examine the actual checks themselves,’ rais[ed] an inference that they

⁵²⁶ *Juarez*, 866 F.3d at 630.

⁵²⁷ *Id.* at 631 (quoting *United States v. Demmitt*, 706 F.3d 665, 675 (5th Cir. 2013), which quotes the pre-2011 case *United States v. Mendoza-Medina*, 346 F.3d 121, 132 (5th Cir. 2003)) (brackets in part of quote from *Juarez*).

⁵²⁸ *Id.* (quoting *United States v. Jones*, 664 F.3d 966, 979 (5th Cir. 2011)).

⁵²⁹ *Id.* (quoting *United States v. Lara-Velasquez*, 919 F.2d 946, 951 (5th Cir. 1990)) (emphasis in original).

⁵³⁰ *Id.*

⁵³¹ *Id.* (quoting *United States v. Nguyen*, 493 F.3d 613, 619-20 (5th Cir. 2007)).

⁵³² *Id.*

⁵³³ *Id.*

‘suspected or actually knew, but avoided further knowledge, about the non-existence of the down payment checks before the loans were dispersed.’⁵³⁴ The number of times that small acts occurred was important as well. The “‘sheer intensity and repetition in the pattern of suspicious activity coupled with [the defendants’] consistent failure to conduct further inquiry’ created an inference that the defendants purposefully contrived to avoid further knowledge.”⁵³⁵

The actual behaviors upon which the *Juarez* court upholds the second prong of the test then are fairly ambiguous. The evidence included “numerous occasions of socializing with Juarez, making cash payments to him, receiving his assistance in evading law enforcement, and purchasing firearms from him.”⁵³⁶ Admittedly, these small acts were repeated often.⁵³⁷ And importantly for the court, “Juarez consistently failed to make inquiries regarding the suspicious nature of these dealings.”⁵³⁸

But, in fact, at least one piece of evidence that the *Juarez* court uses against the defendant even possibly cuts the other direction to show that Juarez did not consider his involvement in the relationship to be part of the drug crimes for which he was convicted: “Grimaldo testified that Juarez told him directly that ‘he didn’t want to get involved in those types of issues,’ which Grimaldo took to mean that Juarez wanted to do business but did not want to be involved in drug dealing.”⁵³⁹ Yet the *Juarez* court concludes that the defendant’s “routinely suspicious behavior and his continual lack of inquiry into what his associates would do with the firearms, cash, and vehicles suggests that he purposefully contrived to remain ignorant regarding the Grimaldos’ drug conspiracy.”⁵⁴⁰ In sum, “[b]ecause the evidence supported a deliberate ignorance instruction, the district court did not abuse its discretion by giving the instruction to the jury.”⁵⁴¹

In reviewing these recent cases, after *Global-Tech*’s broad acceptance of willful blindness instructions, there may thus be more room for such instructions in certain federal courts of appeals. However, even if prosecutors bring additional future cases against executives in companies like VW, not all of these emerging applications of the

⁵³⁴ *Id.* (quoting *Nguyen*, 493 F.3d at 621-22).

⁵³⁵ *Id.* at 631-32 (quoting *Nguyen*, 493 F.3d at 622).

⁵³⁶ *Id.*

⁵³⁷ *Id.*

⁵³⁸ *Id.*

⁵³⁹ *Id.*

⁵⁴⁰ *Id.*

⁵⁴¹ *Id.*

instructions are necessarily desirable. This Article merely notes that these changes may be happening, and that prosecutors who are otherwise frustrated with their perceived inability to impact willful blindness behavior on the scale of VW and other examples should be aware of them.

The key to understanding this line of cases may be, as Professor Richman has suggested, proof of a “de facto requirement of blatant culpability — demanding that a defendant be shown to have had a subjective awareness of real wrongdoing.”⁵⁴² He argues that this “isn’t a bug in our system but a feature . . . anchored in our use of general jurisdiction prosecutors and judges and of lay jurors.”⁵⁴³ He describes how “[t]he complexity and expansive drafting of modern criminal statutes all too frequently hide the core criminality being targeted. But juries, judges, and hopefully prosecutors are looking for evidence of lying, cheating, and stealing.”⁵⁴⁴

Note though how Professor Richman’s description of the wrongdoing that “juries, judges, and hopefully prosecutors” seek to impose in convictions based on willful blindness instructions is a deeper intuition than dependence merely on a defendant’s statements in the form of lies or omissions. If companies such as VW understand prosecution to be based merely on disclosures, at least willful blindness better addresses omissions and may permit prosecutors to shoe-horn in analysis of a defendant’s other behaviors. We need tools beyond disclosure in the form of lies and omissions to reach actual behavior for evidence of “cheating[] and stealing.”⁵⁴⁵ Thus Judge Rakoff’s suggestion to rely more often on willful blindness instructions⁵⁴⁶ — especially because such convictions at heart rest on a “de facto requirement of blatant culpability”⁵⁴⁷ — may be promising.

Nonetheless, as the VW example also demonstrates, solely introducing willful blindness instructions more often into white collar criminal prosecutions will not fix larger economic pressures on middle management as well as — to be discussed further in this Article’s sister work — how the current disclosure system cabins reporting within organizations where it can be controlled and information

⁵⁴² Richman, *Corporate Headhunting*, *supra* note 136, at 270.

⁵⁴³ *Id.*

⁵⁴⁴ *Id.* at 271.

⁵⁴⁵ *Id.*

⁵⁴⁶ See Rakoff, *supra* note 375.

⁵⁴⁷ Richman, *Corporate Headhunting*, *supra* note 136, at 270.

suppressed.⁵⁴⁸ This Article's sister work proposes additional fixes for these elements of the problem.⁵⁴⁹

C. *Social Science Ideas for Exploration in a Sister Article*

This Article ultimately agrees with Professor Buell that there should be less criminalization of minor corporate conduct, but more external *regulation* of that conduct.⁵⁵⁰ Prosecutors are increasingly governing corporations through criminal and civil charges (based on fraud — so what corporations and top officers say), to the point of, as Professor Garrett well documents, years-long NPAs and DPAs redesigning corporations' reporting and disclosure systems.⁵⁵¹ But many executives very rationally still take on the odds of prosecution to pressure subordinates into these forms of misconduct.

Think about these odds from the perspective of top executives. If the market capitalization of the S&P 500 (the index of merely the top 500 U.S. publicly-traded companies listed on the New York Stock Exchange and NASDAQ⁵⁵²) is worth over \$24 trillion,⁵⁵³ and Professor Garrett's numbers show that an average of 4.5 executives a year are prosecuted with corporations,⁵⁵⁴ that is one prosecution for every \$5.3 trillion of large market capitalization. Meanwhile, the private-equity (non-public company) market capitalization is estimated at another \$5 trillion.⁵⁵⁵ Executives there need not generally make public statements

⁵⁴⁸ See *supra* Introduction & Part II.B.

⁵⁴⁹ See Nelson, *Beyond Disclosure Enforcement*, *supra* note 21; see also Nelson, *Engaging Middle Management* (forthcoming) (on file with author).

⁵⁵⁰ Buell, *Potentially Perverse*, *supra* note 150, at 88. ("If civil forms of control appear to lack sufficient bite, regulators seeking to control conduct within organizations will tend to reach for criminal remedies."); *id.* ("[A] system for regulating organizations that too soon and too often bypasses civil tiers to reach for the criminal capstone will become an inverted pyramid that will be unstable and lack a graduated scheme of incentives.").

⁵⁵¹ See, e.g., GARRETT, *TOO BIG TO JAIL*, *supra* note 141, at 47, 65-67.

⁵⁵² Formerly an abbreviation for the National Association of Securities Dealers Automated Quotations, and now a major exchange independent of that association.

⁵⁵³ Sibilis Research, *S&P 500 Total Market Cap & Float Adjusted*, SIBLIS RES., <http://sibilisresearch.com/data/total-market-cap-sp-500/> (last visited Oct. 8, 2016) (calculating S&P 500 market cap as of June 30, 2018 at \$24.15 trillion).

⁵⁵⁴ GARRETT, *TOO BIG TO JAIL*, *supra* note 141, at 84 (documenting fifty-four cases against individuals over twelve years).

⁵⁵⁵ MCKINSEY & CO., *THE RISE AND RISE OF PRIVATE MARKETS: MCKINSEY GLOBAL PRIVATE MARKETS REVIEW 2018*, at 3 (2018), <https://www.mckinsey.com/~media/mckinsey/industries/private%20equity%20and%20principal%20investors/our%20insights/the%20rise%20and%20rise%20of%20private%20equity/the-rise-and-rise-of-private-markets-mckinsey-global-private-markets-review-2018.ashx> (calculating "private markets' assets

or file quarterly reports. Together, these numbers net out to one prosecution per \$6.4 trillion of corporate activity. Getting paid even a tiny percentage of appreciation on \$6.4 trillion from pressuring one's subordinates to commit wrongdoing that prosecutors have a hard time tracing back to its source is a trade-off that many executives looking at those numbers might take.

In sum, we need more than our disclosure-based approach to enable us to understand what is happening inside a corporation and change its behavior. In law reviews, Professor Root documents illegal corporate recidivist behavior even with aggressive prosecutorial monitoring.⁵⁵⁶

Additionally, social science corporate recidivism studies conclude that, because wrongdoing tends to be a culture-based phenomenon within organizations, without more helpful and responsive imposition of individual liability within an organization, a strong predictor of repeat wrongdoing ironically is previous sanction of the entity for wrongdoing.⁵⁵⁷ Our emphasis on disclosure by top management effectively operates to shield the vast majority of remaining individuals, especially in middle management, from engagement.⁵⁵⁸ Only engaging these individuals significantly inside the corporation will change business behavior.⁵⁵⁹ Over time, corporate wrongdoing without such checks grows from small acts to worse ones.⁵⁶⁰

Professor Haugh draws on the social science literature to argue indeed that the overcriminalization of behavior discussed at the

under management . . . up 8 percent year on year . . . [to] surpass[] \$5 trillion in 2017").

⁵⁵⁶ Root, *supra* note 27, at 1006-07, 1018-29.

⁵⁵⁷ John M. Connor, *Recidivism Revealed: Private International Cartels 1990-2009*, 6 COMPETITION POL'Y INT'L 101, 102-03 (2010); Anthony J. Daboub et al., *Top Management Team Characteristics and Corporate Illegal Activity*, 20 ACAD. MGMT. REV. 138, 161 (1995); Qinqin Zheng & Rosa Chun, *Testing Corporate Immoral Recidivism*, 2011 ACAD. MGMT. PROC. 1, 5-6 (2011).

⁵⁵⁸ NELSON & STOUT, *supra* note 315; Nelson, *The Corporate Conspiracy Vacuum*, *supra* note 246, at 285-86; Nelson, *The Intracorporate Conspiracy Trap*, *supra* note 259, at 1019-23.

⁵⁵⁹ See Ian Maitland, *How Insiders Abuse the Idea of Corporate Personality* 106, 107-15, in *THE MORAL RESPONSIBILITY OF FIRMS* (Eric W. Orts & N. Craig Smith, eds., 2017); Eric W. Orts, *The Moral Responsibility of Firms: Past, Present, and Future*, in *id.*, at 206, 219-20; Timothy P. Glynn, *Beyond "Unlimiting" Shareholder Liability: Vicarious Tort Liability for Corporate Officers*, 57 VAND. L. REV. 329, 401-02, 410-11 (2004).

⁵⁶⁰ Lotfi Geriessh, *Organizational Culture and Fraudulent Financial Reporting*, 73 CPA J. 28, 30 (2003) (describing moral licensing); Kim Pernell, Jiwook Jung & Frank Dobbin, *The Hazards of Expert Control: Chief Risk Officers and Risky Derivatives*, 82 AM. SOC. REV. 511, 517 (2017) (providing a key example in action described in the text *infra* Part III.C).

beginning of this Article helps fuel rationalizations for the white collar criminal to commit crimes. As Professor Haugh explains, the “perceived illegitimacy” of overlapping and uncoordinated rules “provides space for would-be wrongdoers to rationalize their conduct. They see defenses to the law all around them, which they then internalize and incorporate into their own thought processes.”⁵⁶¹ In essence, “[b]y weakening the criminal law’s legitimacy, overcriminalization provides an environment ripe for rationalizations, in turn fostering the very conduct it seeks to eliminate.”⁵⁶²

Finally, social science studies of “moral licensing” effects suggest that unethical and risky behavior for profit within organizations may increase dramatically with someone else at the top to blame.⁵⁶³ The numbers are startling. For example, independent of other factors, banks that had appointed a chief risk officer (“CRO”) before the credit crisis, as required by disclosure-heavy regulations such as the Sarbanes-Oxley Act of 2002⁵⁶⁴ and Basel II,⁵⁶⁵ vastly increased their investments in risky financial instruments over similar banks without such officers.⁵⁶⁶ CRO banks raised their holdings of “over-the-counter options by 247 percent, swaps by 169 percent, and credit derivatives by 644 percent.”⁵⁶⁷

We enforce disclosure rules in place of substantive law. We end up merely policing statements, and we incorrectly assume that the market, with accurate information, will discipline behavior to create ethical outcomes.⁵⁶⁸ We now know from data on the marketplace that our assumptions of ethical enforcement are not true. Moreover, where middle management is insulated from that system, primarily relying on disclosure-based enforcement drives how individuals within corporations commit wrongdoing, and it does not actually give us the results that we want.

⁵⁶¹ Haugh, *Overcriminalization’s New Harm Paradigm*, *supra* note 85, at 1225.

⁵⁶² *Id.*

⁵⁶³ See, e.g., Emilio Castilla & Stephen Benard, *The Paradox of Meritocracy in Organizations*, 55 ADMIN. SCI. Q. 543, 543-76 (2010); Benoit Monin & Dale T. Miller, *Moral Credentials and the Expression of Prejudice*, 81 J. PERSONALITY & SOC. PSYCHOL. 33, 33-43 (2001); Pernell, Jung & Dobbin, *supra* note 563, at 517.

⁵⁶⁴ See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 15 U.S.C.).

⁵⁶⁵ BANK FOR INT’L SETTLEMENTS, INTERNATIONAL CONVERGENCE OF CAPITAL MEASUREMENT AND CAPITAL STANDARDS: A REVISED FRAMEWORK 204-25 (2004).

⁵⁶⁶ Pernell, Jung & Dobbin, *supra* note 560, at 525.

⁵⁶⁷ *Id.*

⁵⁶⁸ See discussion *supra* Part I.B.

We end up prosecuting the narrow things corporations and their top executives say, rather than keeping our eyes on what those organizations actually do. We need to re-think our method of engaging all levels of the corporation and not rely so heavily on disclosure-based prosecution. To circle back to where we started, without better engaging middle management, we miss “the wood for the trees.”⁵⁶⁹ After its VW discussion and review of criminal-law fixes, this Article brings two keys forward into its sister article’s proposal for reform. First, we must rethink our system of enforcement to focus beyond our too-well-trodden tools of disclosure. And second, our methods must engage middle management in efforts to ensure companies’ ethical futures.

CONCLUSION

Despite hanging a banner on its Wolfsburg factory in November 2015 that reads in translation “[w]e need transparency, openness, energy and courage,”⁵⁷⁰ VW has not in practice embraced any of these ideals. The lesson that the public should learn from such repeat large-scale scandals is that we must rethink our disclosure-based enforcement system.

The Volkswagen emissions scandal and others show that we cannot rely on our current disclosure-driven system to keep the public safe. We need more significant reforms to engage employees to come forward at every level.⁵⁷¹ As this Article’s sister work will argue, such changes should both better empower middle management and permit the collection of information across the marketplace to identify the broad patterns of misconduct that increasingly inflicting harm.⁵⁷² Even with potential changes in willful blindness instructions, rethinking our over-emphasis on disclosure-based prosecution must be an important part of better understanding and preventing future large-scale corporate wrongdoing.

⁵⁶⁹ Davies, *Financial Fraud*, *supra* note 19.

⁵⁷⁰ David Shepardson, *Kentucky Attorney General Sues Volkswagen Over Diesel Emissions*, REUTERS (Mar. 22, 2016), <https://www.reuters.com/article/us-volkswagen-emissions-kentucky-idUSKCN0WO2PS>.

⁵⁷¹ See J.S. Nelson, *Abusive Internal Controls*, *supra* note 247 (describing interaction with abusive internal corporate control).

⁵⁷² See Nelson, *Beyond Disclosure Enforcement*, *supra* note 21; see also Nelson, *Engaging Middle Management*, *supra* note 549.