"Tone at the Top" and the Communication of Corporate Values: Lost in Translation?

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ABSTRACT

Many firms that were involved in large-scale corporate frauds had strong corporate codes of ethics and values statements. These firms were also subject to considerable social pressures to be mindful of their reputations; frauds are "negative reputational events." Notably, the frauds not infrequently involved possible, or even outright, illegality.

Why didn't these strong forces—strong codes of ethics and firms' clear interest in maintaining a good reputation, as well as the fear of legal liability—do more to prevent the frauds? It seems hard to imagine that serious misdeeds could occur if the top management was committed to preventing them. But top management, especially the CEOs, are sending messages declaring precisely such a commitment. Might they be sending, verbally or nonverbally, other, countermanding or dilutive, messages? Our aim here is to raise this issue and consider how it might be explored.

INTRODUCTION

Major corporate scandals in the recent, and not so recent, past come readily to mind. The scandals have sometimes involved behavior that was illegal; they have also involved behavior that, at a minimum, was close to the line of illegality. Lying to customers is clearly illegal; "pressuring" salespeople to do so presents a harder case for law, but is certainly contrary to a consensus view of what ethics requires.

For each scandal, particularly the more recent ones, the company involved had a code of conduct, a code of ethics, or both, and made many other pronouncements as to the strength and quality of its culture and its

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commitment to doing the right thing. Indeed, as we will discuss further below, one of the most notoriously scandal-ridden companies of recent times, Enron, had an exemplary code of ethics.[1]

Given the scandals we know about, and those not yet discovered, we already know that the law's force is limited. The harmful behavior we have seen has not been sufficiently deterred nor, many think, does it seem to be sufficiently punished after the fact. Even beyond what law could prohibit, society wants and encourages an ethical penumbra. Corporations are increasingly required—and expected—to have corporate codes and disclosures about those codes; they are increasingly expected and encouraged to commit to having a corporate culture in which ethics and values are sacrosanct, and they increasingly proclaim that they are doing so. But the scandals continue apace.

We cannot know whether, but for these forces, there would be far more scandals. Certainly, evidence suggests that corporate codes of ethics and conduct are helpful, even if apparently insufficient, to deter corporate misbehavior.[2] But why aren't the codes and the other forces more helpful?

We raise here a possible answer to this question: that there might be a "tone at the top"—the top being the chief executive officer (CEO) and other senior management—that somehow dilutes or countermands the corporation's code of ethics and counters these other forces.

Corporate misbehavior is clearly not just a matter of a few rotten apples—something systemic is occurring, that probably reflects a flawed corporate culture. But how is such a culture, which goes against the values articulated in the corporate code of ethics, created and transmitted within the organization? One mechanism could be that the CEO (or the top management team, or both, i.e., the "tone at the top") is key in creating a corporate culture that may neutralize the intended message of the code of ethics. As the leader of the firm, the CEO is likely to have the power to

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1. Letter from Ken Lay, Office of the Chairman, to All Employees (July 1, 2000), http://www.agsm.edu.au/bobm/teaching/BE/Cases_pdf/enron-code.pdf [https://perma.cc/326K-NBX3] ("As officers and employees of Enron Corp, its subsidiaries, and its affiliated companies ('Enron' or collectively the 'Company'), we are responsible for conducting the business affairs of the Company in accordance with all applicable laws and in a moral and honest manner." The memo lists Enron's values: Respect, Integrity, Communication, and Excellence. It also notes that "Enron stands on the foundation of its vision and values. Every employee is educated about the Company's vision and values and is expected to conduct business with other employees, partners, contractors, suppliers, vendors, and customers keeping in mind respect, integrity, communication, and excellence. Everything we do evolves from Enron's vision and values statements."); *see also* AM. LAW INST., PRINCIPLES OF THE LAW: COMPLIANCE, RISK MANAGEMENT AND ENFORCEMENT: TENTATIVE DRAFT NO. 1 (2019); ENRON, CODE OF ETHICS (2000), http://mishkenot.org.il/Hebrew/docs/ethics/קודים%20אתיים%20של%20ארגונים%20עסקיים/Enron%20Code%20Of%20Ethics.pdf [https://perma.cc/689Q-AGPT]; *infra* note 20 and accompanying text.

2. *See generally* Marion S. Mogielnicki, *Corporate Codes of Conduct and Business Principles in Light of the Goldman Sachs Lawsuit Settlement*, REV. BUS. & FIN. STUD., 2011, at 57.

shape the values and behaviors of his subordinates (or choose subordinates who already share his values). While testing this theory is beyond the scope of this Article, we identify some techniques from the burgeoning field of textual analysis, as well as noting some work examining other types of cues, which could help identify dilutive or countermanding messages.

We should note four considerable challenges underlying an inquiry into this issue. First, a significant proportion of the available corporate messages, including the CEO's letters and speeches, are sanitized, certainly by the time they become publicly available. A company's website, corporate code, and public filings will be reviewed by people who are mindful of the principal audiences for such communications: "the public" (including customers and investors) and regulators. In any event, these are not the audiences to whom the "messages" we are searching for—the dilutive or countermanding messages—would be intended. The same is true of CEO appearances before Congress, which often occur when the CEOs are being chastised.[3] The CEOs will be continually mindful that they need to convey their great concern for law and ethics, and for what their companies did that may have violated one or both. Thus, examining less scripted communications will be particularly important. One major source is securities law filings under Regulation Fair Disclosure (FD). FD was enacted to deal with the issue of selective disclosures, requiring a public filing of the disclosures made to a limited group. Some such disclosures are spontaneous, and thus not infrequently unscripted. For instance, a company spokesperson might disclose something to one audience, perhaps in response to a question; FD would require a public disclosure of the information.[4]

Even in scripted communications, there may be ways to find useful data. Indeed, such communications may reflect a CEO's managerial style and convey her leadership decisions, which also have the ability to shape

3. *See, e.g.*, Bill Chappell, *'It Was Installed For This Purpose,' VW's U.S. CEO Tells Congress About Defeat Device*, NPR (Oct. 8, 2015), https://www.npr.org/sections/thetwo-way/2015/10/08/446861855/volkswagen-u-s-ceo-faces-questions-on-capitol-hill [https://perma.cc/ST7T-JSZC]; Ian Duncan, *Boeing CEO to Acknowledge Mistakes in Testimony on Deadly 737 Max Crashes*, WASH. POST (Oct. 28, 2019), https://www.washingtonpost.com/local/trafficandcommuting/boeing-ceo-to-acknowledge-mistakes-in-testimony-on-deadly-737-max-crashes/2019/10/28/bfe61824-f997-11e9-8190-6be4deb56e01story.html [https://perma.cc/LG3W-DJWP]; Emily Flitter, *Wells Fargo C.E.O. Is Grilled on Capitol Hill*, N.Y. TIMES (Mar. 12, 2019), https://www.nytimes.com/2019/03/12/business/wells-fargo-ceo-sloan.html [https://perma.cc/PD6C-Z4P4]; Farhad Manjoo, *What Jack Dorsey and Sheryl Sandberg Taught Congress and Vice Versa*, N.Y. TIMES (Sept. 6, 2018), https://www.nytimes.com/2018/09/06/technology/jack-dorsey-sheryl-sandberg-congress-hearings.html [https://perma.cc/T7VN-XYE9]; *Mark Zuckerberg Testimony: Senators Question Facebook's Commitment to Privacy*, N.Y. TIMES (Apr. 10, 2018), https://www.nytimes.com/2018/04/10/us/politics/mark-zuckerberg-testimony.html [https://perma.cc/2E9X-FGBJ].

4. Selective Disclosure and Insider Trading, 17 C.F.R. §§ 240, 243, 249 (2000).

culture. For instance, Wells Fargo's annual reports for many years touted how much cross-selling they did: pictures of people who had, as the captions to the photos read, numbers of Wells Fargo products in the double digits, were prominently featured.[5]

A second challenge is the difficulty of quantifying or rank ordering how "bad" a firm is. The measurement should presumably take account of the firm's financial restatements, enforcement actions by the Securities and Exchange Commission (SEC) and litigation against it, and the results thereof, including the amounts of fines, penalties, or settlements the firm pays or agrees to pay. But how can this information yield a ranking? The process is far from mechanical.

A third challenge is in making inferences about how the "tone" affects the outcome. "We care more about profits than anything else" (or "it isn't so bad, everyone does it" or "if we get caught we will be able to avoid consequences") is a message that can wreak havoc, but what havoc is attributable to the tone, and when might the havoc have been or be wreaked? One possibility is to examine shifts in the tone of messages and firm behaviors before and after a firm experiences CEO turnover due to exogenous circumstances, such as the CEO's death or retirement. Proceeding in this manner will make it far more likely that the change in the leader (and his tone), rather than underlying changes in the circumstances surrounding the firm, were responsible for the shifts in overall corporate tone and subsequent corporate behavior.

Finally, determining how to use methodological tools, such as textual analysis, to measure diluting and countermanding messaging in communications from the top, is exceedingly difficult. Textual analysis has been employed in increasingly sophisticated ways to measure changes in texts of various kinds (including regulatory filings, press releases, transaction documents, interviews, and testimony, among many other examples), as to length, content, and use of boilerplate language, as well as positive and negative sentiment, both across firms and over time. The ends for which the measurement is done include predictions of profitability and assessments of trends over time. The work most relevant to the issue we raise probably concerns predictors of evasiveness. But even that work has its limits for our purposes: dilutive and countermanding messages are in the same family as evasiveness, but they are not precisely the same thing. Use could also be made of other sorts of behavioral cues,

5. *See, e.g.*, WELLS FARGO & CO., THE VISION THAT WORKS 15 (2009), https://www.wellsfargohistory.com/assets/pdf/annual-reports/2009-annual-report.pdf [https://perma.cc/2THN-P9C3].

such as non-verbal communication.[6] A growing body of research has started examining the role of non-verbal vocal cues elicited from CEOs' speeches in the capital market setting, such as in detecting financial misreporting and influencing investors' judgments.[7] These studies use innovative approaches, including analyzing CEO speech samples from their interactions with analysts and investors during earnings conference calls or video disclosures of corporate news and forecasts. While corporate video disclosures are currently limited (about twenty-five percent of Fortune 100 companies use some sort of video for disclosure purposes), the use of this medium is expected to grow significantly over time.[8]

Notwithstanding these challenges, we still believe it is worthwhile to at least make the case for the importance of the task and describe some preliminary thoughts as to how the inquiry might proceed. Evidence and intuition strongly suggest that the phenomenon we argue for must be real. All firms "say the right sorts of things." If a CEO wanted to convey that she "really meant it" as to compliance and ethics, it is reasonably well established that she would be able to do so and that this would have a real effect at the company.[9]

This Article proceeds as follows: Part II explains the increasing legal requirements and market, social, and regulatory pressures for firms to develop and articulate their commitments to ethics and values. Part III discusses the literature as to the influence of the CEO on what happens at the corporation. Part IV discusses textual analysis generally, highlighting literature that could be relevant to exploring how a CEO's tone affects his firm's ethics and values. Part V outlines some preliminary ideas as to how the inquiry might proceed. Part VI concludes.

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6. By "non-verbal" communication, we refer to any voice patterns, expressions, or body language that accompanies any speech or other form of communication made by the CEO, such as facial expressions, vocal patterns, hand gestures, and eye gazes.

7. *See* Jessen L. Hobson, William J. Mayew & Mohan Venkatachalam, *Analyzing Speech to Detect Financial Misreporting*, J. ACCT. RES. 50, 349–92 (2012); Nicole Cade et al., Using Video to Disclose Forward-Looking Information: The Effect of Nonverbal Cues on Investors' Judgments (Mar. 27, 2019) (unpublished manuscript) (on file with Seattle University Law Review).

8. *See* Ben Chodor, *Though Few Have, Now Is the Right Time to Embrace Video Earnings Calls*, ENTREPRENEUR (Aug. 28, 2014), http://www.entrepreneur.com/article/236817 [https://perma.cc/36HX-TLM9].

9. *See* Michael E. Brown et al., *Ethical Leadership: A Social Learning Perspective for Construct Development and Testing*, 97 ORG. BEHAV. & HUM. DECISION PROCESSING 117, 118–20 (2005); Linda K. Treviño et al., *A Qualitative Investigation of Perceived Executive Ethical Leadership: Perceptions from Inside and Outside the Executive Suite*, 56 HUM. REL. 5 (2003); Long-Zeng Wu et al., *CEO Ethical Leadership and Corporate Social Responsibility: A Moderated Mediation Model*, 130 J. BUS. ETHICS 819 (2015).

II. RESPONSES TO CORPORATE MISBEHAVIOR

A. Introduction

Bemoaning corporate misbehavior has a long history—and there is a great deal of behavior to bemoan. Certainly, before 2008, there had been many scandals, notably including the period that immediately preceded the enactment of Sarbanes-Oxley, which had Enron, WorldCom, and Adelphia. The 2008 financial crisis brought further attention to the problem, involving, as it did, many examples of behavior that involved fraud or at least highly unethical conduct. In the period since the financial crisis, banks, for instance, have been fined in excess of $300 billion for conduct that led up to the crisis, and other conduct as well.[10] Starting at some point in the last generation, it seems fair to characterize an important strain of commentary on corporate behavior as bemoaning unethical and sometimes illegal acts (or failures to act)—in short, corporate misbehavior.[11]

B. Requiring (or Encouraging) Ethics and Ethics Codes

Corporate codes of conduct and ethics have been an important part of the response to corporate misbehavior. Such codes are near-ubiquitous in the business world.[12] For public corporations in the U. S., since the early-mid 2000s, they have effectively become a legal necessity. SEC rules now require public issuers to disclose whether they have adopted a code of ethics for their senior financial executives and the CEO, and if not, why they have chosen not to.[13] The New York Stock Exchange (NYSE)

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10. Ben McLannahan, *Banks' Post Crisis Legal Costs Hit $300bn*, FIN. TIMES (June 7, 2015), https://www.ft.com/content/debe3f58-0bd8-11e5-a06e-00144feabdc0 (last visited Feb. 24, 2020).

11. See generally the various articles included in Temple Law Review's symposium edition: Donald C. Langevoort, *Caremark and Compliance: A Twenty-Year Lookback*, 90 TEMP. L. REV. 724 (2018); Paul E. McGreal, *Caremark in the Arc of Compliance History*, 90 TEMP. L. REV. 647 (2018).

12. Patrick M. Erwin, *Corporate Codes of Conduct: The Effects of Code Content and Quality on Ethical Performance*, 99 J. BUS. ETHICS 535, 536 (2011) ("Codes of conduct have recently become a nearly ubiquitous feature of modern business in North America[] and Europe[,] and have been established in the majority of large corporations worldwide[.]").

13. Pursuant to Sarbanes–Oxley, the SEC added Item 406 to companies' disclosure requirements. Item 406 reads in relevant part as follows:

> § 229.406 (Item 406) Code of Ethics.
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> (a) Disclose whether the registrant has adopted a code of ethics that applies to the registrant's principal executive officer, principal financial officer, principal accounting officer or controller, or persons performing similar functions. If the registrant has not adopted such a code of ethics, explain why it has not done so.
>
> (b) For purposes of this Item 406, the term *code of ethics* means written standards that are reasonably designed to deter wrongdoing and to promote:
>
> (1) Honest and ethical conduct, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships;

and the National Association of Securities Dealers Automated Quotations System (NASDAQ) now require listed companies to adopt a code of conduct for their directors, officers, and employees.[14] The Federal Sentencing Guidelines also effectively require companies to have ethics and compliance programs, which, as a practical matter, includes a code of ethics or code of conduct.[15] For ease of exposition, and because companies sometimes combine these documents, we use both terms, code of ethics and code of conduct, to refer to the code that governs the behavior of all employees within the firm, not just the top officials.[16]

> (2) Full, fair, accurate, timely, and understandable disclosure in reports and documents that a registrant files with, or submits to, the Commission and in other public communications made by the registrant;
>
> (3) Compliance with applicable governmental laws, rules and regulations;
>
> (4) The prompt internal reporting of violations of the code to an appropriate person or persons identified in the code; and
>
> (5) Accountability for adherence to the code.

17 C.F.R. § 229.406 (2000); *see also* Memorandum from Wilson Sonsini Goodrich & Rosati on the SEC Adopting Final Rules Regarding Code of Ethics Disclosure Under Section 406 of the Sarbanes–Oxley Act of 2002 (Feb. 2003), https://www.wsgr.com/cgu/pdfs/tab8-ethicsmemo.pdf [https://perma.cc/2HV8-QP22].

14. *Marketplace Rules § 5610*, NASDAQ STOCK MKT. (Jan. 11, 2013), http://nasdaq.cchwallstreet.com/NASDAQTools/PlatformViewer.asp?searched=1&selectednode=chp_1_1_4_4_8_12&CiRestriction=ethics&manual=%2Fnasdaq%2FMain%2Fnasdaq-equityrules%2F (last visited Jan. 19, 2020) ("Each Company shall adopt a code of conduct applicable to all directors, officers and employees, which shall be publicly available. A code of conduct satisfying this rule must comply with the definition of a 'code of ethics' set out in Section 406(c) of the Sarbanes-Oxley Act of 2002 ('the Sarbanes-Oxley Act') and any regulations promulgated thereunder by the Commission. See 17 C.F.R. § 228.406 and 17 C.F.R. § 229.406. In addition, the code must provide for an enforcement mechanism."); NYSE, *NYSE Listed Company Manual § 303A.10: Code of Business Conduct and Ethics*, https://nyseguide.srorules.com/listed-company-manual/document?treeNodeId=csh-da-filter!WKUS-TAL-DOCS-PHC-%7B0588BF4A-D3B5-4B91-94EA-BE9F17057DF0%7D—WKUS_TAL_5667%23teid-78 [https://perma.cc/25T2-7TTF] ("Listed companies must adopt and disclose a code of business conduct and ethics for directors, officers and employees, and promptly disclose any waivers of the code for directors or executive officers.").

15. U.S. SENTENCING GUIDELINES MANUAL § 8, (U.S. SENTENCING COMM'N 2018); Steven D. Gordon, *Implementation of Effective Compliance and Ethics Programs and the Federal Sentencing Guidelines*, *in* 2 CORP. COMPLIANCE ANSWER BOOK (2018). In 2004, amendments specifically referencing ethics were enacted. *See* U.S. SENTENCING GUIDELINES MANUAL (U.S. SENTENCING COMM'N, amended 2004).

16. "Q 2.6.3 How many codes of conduct should a company have? Sarbanes-Oxley mandates a code of ethics only for a select group of senior corporate officials: a company's principal executive officer, principal financial officer, principal accounting officer or controller, or persons performing similar functions. In contrast, the Sentencing Guidelines and the NYSE and NASDAQ rules require a code that is broadly applicable to a company's officers, employees, and (as appropriate) agents. For most companies, it would seem simplest to have only one code of conduct that applies to all officers, employees, and agents, and that either applies the Sarbanes-Oxley standards to all such persons, or else "adds on" the specific Sarbanes-Oxley requirements for the specified senior officers who are subject to them. Multiple codes of conduct applicable to different groups of officers and/or employees are likely to breed problems for the company." Gordon, *supra* note 15, at 2-16 to 2-17; *see also infra* note 20.

Congress's reaction to major corporate scandals in the early 2000s, including at Enron, WorldCom, and Adelphia, importantly included a focus on corporate ethics.[17] Other forces, notably Delaware corporate law's "Caremark" duties, strongly encourage greater attention to ethics, especially as it relates to possible law-breaking.[18] The American Law Institute's Principles project on Compliance, Risk Management, and Enforcement has a focus on ethics as well.[19]

C. Beyond Law

All these law-related developments have occurred in tandem with a broader societal focus on corporate values and ethics.[20] Poor corporate ethics, which likely resulted in (and from) poor "corporate cultures," have been identified as an important cause not only of the 2008 financial crisis, but also of other banking debacles before and since that time.[21] Also

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17. *See, e.g.*, Kathleen F. Brickey, *From Enron to Worldcom and Beyond: Life and Crime After Sarbanes-Oxley*, 81 WASH. U. L.Q. 357, 357–59 (2003).

18. *See generally* Charles M. Elson & Christopher J. Gyves, *In Re Caremark: Good Intentions, Unintended Consequences*, 39 WAKE FOREST L. REV. 691 (2004); Claire A. Hill, *Caremark as Soft Law*, 90 TEMP. L. REV. 681 (2018).

19. *See generally* AM. LAW INST., PRINCIPLES OF THE LAW: COMPLIANCE, RISK MANAGEMENT AND ENFORCEMENT: TENTATIVE DRAFT NO. 1 (2019).

20. Note that for purposes of this Article, we are not rigorously distinguishing between "good culture," corporate ethics, and corporate values. Similarly, as discussed in the text accompanying note 16, we are treating codes of ethics and codes of conduct for present purposes in the aggregate, again not making distinctions. Ethics, and the subjects covered in codes of ethics and codes of conduct, are not synonymous, yet there is significant overlap among them, such that it seems fair to treat companies' pronouncements on ethics, codes of ethics and codes of conduct, and other related concepts, such as integrity and accountability together. As such, for this paper we consider all statements that disclose the company's policy on ethics, values, visions, goals, and conduct as part of the company's stated ethics and values. We refer sometimes to companies' codes of conduct and to their codes of ethics. While there is clearly a regulatory difference, and a difference in coverage and content could be articulated, many accounts treat them in combination. For instance, see Franklin Resources, Inc., *Code of Ethics and Business Conduct*, SEC (Oct. 17, 2005), https://www.sec.gov/Archives/edgar/data/38777/000119312505242624/dex14.htm [https://perma.cc/QT6Y-QGP9]; see also the definition of Code of Ethics from the draft of the American Law Institute's Principles project: "A written statement that embodies and formalizes the requirements and recommendations of an organization's ethical standards and its code of conduct." AM. LAW INST., *supra* note 19, at 1.

21. William C. Dudley, President and Chief Exec. Officer, Remarks at the Workshop on Reforming Culture and Behavior in the Financial Services Industry: Enhancing Financial Stability by Improving Culture in the Financial Services Industry (Oct. 20, 2014), https://www.newyorkfed.org/newsevents/speeches/2014/dud141020a.html [https://perma.cc/LH7B-YTC5]; FIN. STABILITY BD., GUIDANCE ON SUPERVISORY INTERACTION WITH FINANCIAL INSTITUTIONS ON RISK CULTURE: A FRAMEWORK FOR ASSESSING RISK CULTURE (Apr. 2014), https://www.fsb.org/wp-content/uploads/140407.pdf [https://perma.cc/R53X-GMMY]; THE GRP. OF THIRTY, BANKING CONDUCT AND CULTURE: A PERMANENT MINDSET CHANGE (2015), https://group30.org/images/uploads/publications/aaG30_Culture2018.pdf [https://perma.cc/M9MD-ENSB]. The Salz Review, which analyzed Barclays's practices that led to its problematic and illegal behavior, accorded considerable weight to the role of culture. See, for example, Section 8 of the Review, and Appendix B, both of which discuss culture at length. ANTHONY SALZ, SALZ REVIEW: AN INDEPENDENT REVIEW

relevant in this regard is the increasing rejection of pure shareholder primacy in favor of a more holistic conception of a corporation's place in and duty to the broader society. One result is that what might have been considered simply an aggressive business practice is now increasingly regarded as unethical and potentially yields at least a reputational cost.[22]

While there is no single definition of corporate culture, it is often conceptualized as a "system of shared values (that define what is important) and norms that define appropriate attitudes and behaviors for organizational members."[23] Culture is created and found in the collection of all written communications and of behaviors (implicit and explicit) that can spread through the organization as shared values and norms. Companies have always touted their good cultures.

Particularly since the 2008 financial crisis, culture has increasingly commanded the attention of companies, market participants, and society overall. But what does good culture mean and require? One challenge should be acknowledged: the types of behaviors that prompted the renewed attention to culture are hard to define with precision. Some principled defenses of the conduct at issue would be possible, but present

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OF BARCLAYS' BUSINESS PRACTICES 76–97, 177–97 (2013), http://online.wsj.com/public/resources/documents/SalzReview04032013.pdf [https://perma.cc/LLZ4-Q52U].

22. *See, e.g.*, Claire A. Hill, *Marshalling Reputation to Minimize Problematic Business Conduct*, 99 B.U. L. REV. 1193 (2019). The continuum of corporate behavior has at one end clearly and egregiously illegal or unethical practices, and at the other, an ideal involving fully informed, fully capable, and fully unfettered participants, not under any sort of duress or extremis. Under an ethos where shareholder profit at any cost is to be pursued, behavior that violates the spirit of the law while honoring the letter may be tolerated or even encouraged—sales, for instance, of complex financial products to people who are nominally but not actually sophisticated, where the latter fact is known to the sellers. *See* CLAIRE A. HILL & RICHARD PAINTER, BETTER BANKS, BETTER BANKERS 65–70 (2015). Codes of ethics have always facially rejected such behavior, but it has certainly been a fact of life, something that may be changing. Also relevant is the increasing focus on corporate social responsibility (CSR) and environmental, social, and governance issues (ESG) by investors. *See, e.g.*, Jenny Dawkins & Stewart Lewis, *CSR in Stakeholder Expectations: And Their Implication for Company Strategy*, 44 J. BUS. ETHICS 185 (2003); Levi S. Stewart, *Growing Demand for ESG Information and Standards: Understanding Corporate Opportunities as well as Risks*, 27 J. APPLIED CORP. FIN. 58 (2015); Letter from Larry Fink, Chairman & Chief Exec. Officer, BlackRock, to Major Corporate Chief Exec. Officers (2019), https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter [https://perma.cc/3FE2-HWA4]; *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans'*, BUS. ROUNDTABLE (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/LRM7-UVM3]. CSR, ESG, the Blackrock letter, and the CEO Business Roundtable letter are not primarily and expressly about corporate culture and ethics, but they are about the need for corporations to serve societies rather than just their shareholders. The letters weigh the bottom-line benefits against the bottom-line costs and reject the narrow instrumental focus on profits for profits' sake. For instance, the letters implicitly critique "pushing the envelope," or abiding by the letter of the law while violating what is arguably its spirit, to make greater profits.

23. Charles O'Reilly & Jennifer A. Chatman, *Culture as Social Control: Corporations, Cults, and Commitment*, 18 RES. ORG. BEH. 157, 160 (1996).

complications: the company would face pressure to soft-pedal some effects of the conduct. Obvious examples are outsourcing and aggressive tax planning. By contrast, we are concerned with behavior that those writing post-mortems of defective culture point to: generally illegal behavior; behavior that honors the letter of the law while violating its spirit; or behavior that takes advantage of a corporation's ability to foist bad consequences on others, such as excessive and irresponsible risk-taking. Any articulation of a company's desired culture straightforwardly condemns these types of behavior.

Companies talk now about their good culture in different ways, some more formal than others. Companies' websites and public filings are replete with mentions of their commitment to a good culture, which includes a commitment to ethics.[24] Companies describe themselves as having excellent cultures and great concern for integrity, ethics, and accountability.[25] Financial institutions post-crisis have voluminous mentions of how important their ethical and other values are to them. Consider the following message from a financial institution's website:

> Corporate culture and corporate values
>
> The impact of the economic crisis has made a long-term change of corporate culture in the financial sector absolutely imperative and cultural change is needed. We understand the message: Responsibility has to be the focus of our actions. In 2013, we laid the foundation for long-term change with the release of our new values and beliefs.[26]

Interestingly, this comes from the website of Deutsche Bank, a bank that has been, and continues at this writing to be, embroiled in various serious difficulties, including as to their conduct during the financial crisis, their role in manipulating LIBOR (the London Inter-bank Offered Rate), an interest rate used to set many other rates, and their business dealings contrary to law with firms subject to sanctions.[27] Another similar

24. *See, e.g.*, *Commitment to Ethics*, GEN. DYNAMICS, https://www.gd.com/en/responsibility/commitment-to-ethics [https://perma.cc/EYW9-ZJFC]; *Ethics and Integrity*, GEN. MILLS, https://www.generalmills.com/Responsibility/ethics-and-integrity [https://perma.cc/FRD5-2MBP].

25. *Commitment to Ethics*, *supra* note 24.

26. *Corporate Culture and Corporate Values*, DEUTSCHE BANK, https://www.db.com/cr/en/concrete-cultural-change.htm?kid=werte.inter.redirect [https://perma.cc/4ZAZ-YJBS].

27. *See, e.g.*, Nicholas Comfort, *Deutsche Bank's Legal Troubles Just Don't Seem to End: Timeline*, BLOOMBERG (Nov. 29, 2018), https://www.bloomberg.com/news/articles/2018-11-29/deutsche-bank-s-legal-troubles-just-don-t-seem-to-end-timeline [https://perma.cc/PZH3-FPMJ]; David Enrich, *A Mar-a-Lago Weekend and an Act of God: Trump's History with Deutsche Bank*, N.Y. TIMES (Mar. 18, 2019), https://www.nytimes.com/2019/03/18/business/trump-deutsche-bank.html [https://perma.cc/T77Q-PL83]; David Enrich, *Me and My Whistle-Blower*, N.Y. TIMES (Oct. 1, 2019), https://www.nytimes.com/2019/10/01/business/val-broeksmit-deutsche-bank-trump-whistle-blower

example—of a company touting its culture and ethics—is from Wells Fargo (WF), which has recently been caught engaging in both illegal and unethical behavior of various sorts, most notably opening accounts for customers without the customers' permission ("ghost accounts") to achieve sales quotas.[28] The then-CEO, John Stumpf, who held his position from 2007 to 2016 (when he was forced to resign on account of the ghost account scandal), said: "It's about culture. I could leave our strategy on an aeroplane seat and have a competitor read it and it would not make any difference."[29] In his statements following the scandal and in his testimony in the Congress, Stumpf asserted, "the culture of the company is strong" and is "based on ethics and doing what's right."[30] It is now well known that WF pushed employees to achieve extreme (and unrealistic) sales targets. Having high performance goals is not necessarily bad, but sufficient controls must be put in place to make sure employees do not break the law in pursuing their targets. And while WF's use of unrealistic performance goals is what has gotten the most attention, there was significant other problematic conduct during the period, some of which has yielded settlements between WF and the government (and WF and its shareholders); the position that WF had a good culture but for the ghost accounts is impossible to sustain,[31] and in any event, the ghost account scandal is so big that it alone precludes WF from claiming it had a good culture.

Another example is Enron. As noted earlier, Enron famously had an exemplary code of ethics[32] yet proved to have been engaging in

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.html [https://perma.cc/C4TF-AQNL]; Luke Harding, *Deutsche Bank Faces Action Over $20bn Russian Money-Laundering Scheme*, GUARDIAN (Apr. 17, 2019), https://www.theguardian.com/business/2019/apr/17/deutsche-bank-faces-action-over-20bn-russian-money-laundering-scheme [https://perma.cc/NGV2-Y92D]; Giulia Saudelli, *Deutsche Bank's 5 Biggest Scandals*, DW.COM (Nov. 29, 2018), https://www.dw.com/en/deutsche-banks-5-biggest-scandals/a-46510219 [https://perma.cc/F54V-88H4]. A new book on the recent history of Deutsche Bank, including its scandals, is DAVID ENRICH, DARK TOWERS: DEUTSCHE BANK, DONALD TRUMP, AND AN EPIC TRAIL OF DESTRUCTION (2020).

28. Matt Egan, *The Two-year Wells Fargo Horror Story Just Won't End*, CNN (Sept. 7, 2018), https://money.cnn.com/2018/09/07/news/companies/wells-fargo-scandal-two-years/index.html [https://perma.cc/JNT7-QGJH]; Ethan Wolff-Mann, *Wells Fargo Scandals: The Complete List*, YAHOO (Mar. 12, 2019), https://finance.yahoo.com/news/wells-fargo-scandals-the-complete-timeline-141213414.html [https://perma.cc/8A92-ZYD2].

29. Francesco Guerrera, *Wells Fargo Cracks the Whip*, FIN. TIMES (Aug. 24, 2008), https://www.ft.com/content/83f02918-7069-11dd-b514-0000779fd18c (last visited Jan. 19, 2020).

30. Susan M. Ochs, *The Leadership Blind Spots at Wells Fargo*, HARV. BUS. REV. (Oct. 6, 2016), https://hbr.org/2016/10/the-leadership-blind-spots-at-wells-fargo [https://perma.cc/UPM6-SQJW].

31. *See generally* Jackie Wattles et al., *Wells Fargo's 17-Month Nightmare*, CNN (Feb. 5, 2018), https://money.cnn.com/2018/02/05/news/companies/wells-fargo-timeline/index.html [https://perma.cc/H52U-54PU].

32. Enron's code is sometimes available on eBay and sells for quite a bit of money; the description, and the comments are predictably wry. *See generally* William Hageman, *For Sale on*

considerable unethical and illegal activity, causing the company to collapse. Enron claimed to conduct its operations in accordance with its core ethical values, as evidenced in the statement by Kenneth Lay in 2000:

> We want to be proud of Enron and know that it enjoys a reputation for fairness and honesty and that it is respected. Gaining such respect is one aim of our advertising and public relations activities, but no matter how effective they may be, Enron's reputation finally depends on its people, on you and me. Let's keep that reputation high.[33]

The subsequent fate of the company revealed how far the directors and officers of Enron had deviated from its stated core values to the detriment of employees and shareholders.

D. Restating the Issue

Even before, but especially since, Enron's downfall, companies have been adopting and touting their codes of conduct and ethics and communicating their strong commitments to "doing the right thing." However, unethical and problematic corporate behavior persists. Apparently, having a code of ethics and stating, even often, one's commitment to particular lofty values is not sufficient, even coupled with the increasing importance placed on having a good reputation.[34] Whatever companies are saying about their ethics and values, the reality may be quite different—they may be engaging in "cheap talk."[35]

The "reality" for this purpose is that there is probably a dilutive or countermanding message coming from the firm's top management, in particular the CEO, through their verbal and/or non-verbal communications: they may be setting a contrary "tone." The next Part describes the concept of "tone at the top" and discusses evidence of its force and effect.

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eBay: The Enron Ethics Manual and Much More, CHI. TRIB. (Jan. 28, 2002), https://www.chicagotribune.com/news/ct-xpm-2002-01-28-0201280116-story.html [https://perma.cc/5YDG-JPFT] ("If you just have to own a copy of Enron's Code of Ethics book—yes, there really is such a thing—there are about three dozen of them available, 'in mint condition . . . apparently unread,' according to one seller").

33. Simon Webley & Andrea Werner, *Corporate Codes of Ethics: Necessary but Not Sufficient*, 17 BUS. ETHICS 405, 406 (2008).

34. *Id.* A gap between policy and practice is likely rooted in two problems. *Id.* First, an inadequately designed ethics policy and second, the lack of such formal ethics programs being embedded in the organizational culture that supports ethical behavior. *Id.* at 406–08. Interestingly in this regard, the 'mechanical' aspect of whether an organization's compliance program is stand-alone or more embedded in its organization may have an effect on a corporation's adherence to ethical values. *See* Tammy L. MacLean & Michael Behnam, *The Dangers of Decoupling: The Relationship Between Compliance Programs, Legitimacy Perceptions, and Institutionalized Misconduct*, 53 ACAD. MGMT. J. 1499 (2010).

35. Luigi Guiso et al., *The Value of Corporate Culture*, 117 J. FIN. ECON. 60, 71 (2015).

III. TONE AT THE TOP

A. Evidence on Tone at the Top

We begin with the CEO. The CEO—being the leader of the firm—has a central and powerful role in influencing the mindset and values of employees and in setting the tone at the top which permeates throughout the organization.[36] Leadership conveys a message. As Mary Jean Vignone points out, "Leaders' Words Sculpt Reality."[37] Is the message conveyed by the company's leadership consistent with the stated vision and values of the company? Or might it indicate tolerance, if not encouragement, of values contrary to those in the code?

How is this channel associated with the ensuing practice of a corporation's values? We posit that all else equal, when a CEO makes a disclosure or a statement, other managers and employees will take the CEO's verbal and accompanying non-verbal cues as primary guidance for their conduct and corporate values. Thus, a CEO that conveys values similar to the corporate code of values and conduct will reinforce such values and culture. On the other hand, a CEO may recite the values in the corporate code, but may give cues, verbal or non-verbal that send quite a different message to the company's employees. We argue that such opposing signals obtained from the company's leader are likely to override the message articulated in the written code of conduct statement.[38] Stated differently, given that having codes and making statements about the importance of values, good culture, and related matters, are effectively required, if the CEO does not convey that the company "really means it," a company may stumble, with its codes and CEO and senior-management statements affirming the company's values seen as carrying little meaning or weight.

The role of the tone at the top has been argued to be a key factor in an organization's ethical culture and conduct[39]: "[W]orkers generally get

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36. *See* Cynthia A. Montgomery, *Putting Leadership Back into Strategy*, HARV. BUS. REV., Jan. 2008, at 54; Andrew W. Lo, *The Gordon Gekko Effect: The Role of Culture in the Financial Industry* 3–6 (Nat'l Bureau of Econ. Research, Working Paper No. 21267, 2015).

37. Mary J. Vignone, *Family, Buildings, and Wars: Organizational Conceptual Metaphors*, 44 OD PRAC. 34, 35 (2012).

38. We note that it is likely that the CEO directly interacts more often with other top management, senior officers, and board of directors, rather than other lower level employees. We assume that these higher up officers are likely to interpret and embody the CEO's tone and pass this on to other lower level employees working under them.

39. *See* Lo, *supra* note 36, at 3–4; Mark S. Schwartz, *Developing and Sustaining Ethical Corporate Culture: The Core Elements*, 56 BUS. HORIZONS 39, 44–46 (2013); *see also* GORDON DONALDSON & JAY W. LORSCH, DECISION MAKING AT THE TOP: THE SHAPING OF STRATEGIC DIRECTION (1983); EDGAR H. SCHEIN, ORGANIZATIONAL CULTURE AND LEADERSHIP (1985); Webley & Werner, *supra* note 33, at 411.

their ethical cues by observing what their bosses do."[40] Similarly, Andrew Lo describes one source of the transmission of values conducive to corporate failure might occur in a top-down approach, initiating from the leadership and authority structure in the firm.[41] Mark Schwartz finds that one factor the employees, managers, and ethics officers he interviewed considered important, with respect to the effectiveness of the organization's code of ethics, is senior management support.[42]

Evidence in several studies provide more support for these arguments. For instance, Treviño et al., conducted a survey of more than 10,000 U.S. employees and found that when employees perceived that supervisors and executives care about ethics and values as much as the bottom line, all of the corporate outcomes were significantly more positive.[43] Guiso et al., used a novel survey dataset created by the Great Places to Work Institute[44] to document a positive association between employees' high perception of management integrity and good corporate outcomes, including higher productivity, profitability, better industrial relations, and higher level of attractiveness to prospective job applicants.[45]

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40. Harvey S. James, Jr., *Reinforcing Ethical Decision Making through Organizational Structure*, 28 J. BUS. ETHICS 43, 54 (2000).

41. Lo, *supra* note 36, at 3–6.

42. Mark S. Schwartz, *Effective Corporate Codes of Ethics: Perceptions of Code Users*, 55 J. BUS. ETHICS 321, 338 (2004).

43. Linda Klebe Treviño et al., *Managing Ethics and Legal Compliance: What Works and What Hurts*, 41 CAL. MGMT. REV. 131 (1999).

44. Interestingly, Wells Fargo has been listed among Great Places to Work for multiple years, with employee engagement scores in the top quintile of U.S. companies. *See* BRIAN TAYAN, *The Wells Fargo Cross-Selling Scandal*, *in* STANFORD CLOSER LOOK SERIES PAPER 2 (2019), https://www.gsb.stanford.edu/sites/gsb/files/publication-pdf/cgri-closer-look-62-wells-fargo-cross-selling-scandal.pdf [https://perma.cc/Z44P-FYD4].

45. Guiso et al., *supra* note 35, at 3. Nevertheless, the public perception of ethical leadership is not comforting. A Gallup survey of more than 1,000 U.S. adults conducted in 2010 found that only 15% perceived business executives as having 'very high' or 'high' honesty and ethical standards. As a comparison, they perceived 28% of auto mechanics and 23% of TV reporters to have such ethical standards. *See Honesty/Ethics in Professions*, GALLUP, https://news.gallup.com/poll/1654/honesty-ethics-professions.aspx [https://perma.cc/4FNS-VQ26]. In fact, a similar view is also shared by corporate executives. Graham et al., use a novel survey and interview-based analysis of 1,348 North American firms to document that over half of senior executives believe that corporate culture is a top-three driver of firm value. About 92% of the executives believe that improving their culture would increase their firm's value, only 16% believe their culture is where it should be. *See* John R. Graham et al., *Corporate Culture: Evidence From the Field* (Nat'l Bureau of Econ. Research, Working Paper No. 23255, 2017). The perceived culture in the banking industry, in particular, has also been suspect—especially following the financial crisis. For instance, Cohn et al., provides experimental evidence suggesting that the prevailing business culture in the banking industry weakens and undermines the honesty norm. They show that when subjects' professional identity as bank employees is rendered salient, a significant proportion of them become dishonest. In addition, they show that bank employees with more materialistic values have a greater tendency to act dishonestly. Alain Cohn et al., *Business Culture and Dishonesty in the Banking Industry*, 516 NATURE 86 (2014).

Anton Valukas's report to General Motors' Board of Directors concerning the GM cars' ignition switch recall is also informative in this regard. The switches were defective, resulting in injuries and, in some cases, deaths. The report notes that notwithstanding a culture where safety was supposedly paramount, that message was undermined:

> The messages from top leadership at GM - both to employees and to the outside world - as well as their actions were focused on the need to control costs. We [those preparing the report] heard repeatedly from GM personnel about the focus on cost-cutting and the problems it caused. For example, an engineer stated that an emphasis on cost control at GM "permeates the fabric of the whole culture." Cost cutting impacted all aspects of the business. Keeping projects on time - because of the impact on cost - became a paramount concern. One witness expressed concern that the cost-and time-cutting principles known as the "Big 4" emphasized timing over quality. . . . Those responsible for a vehicle were responsible for its cost, but if they wanted to make a change that incurred cost and affected other vehicles, they also became responsible for the costs incurred in the other vehicles.[46]

The idea that the language of top corporate leaders can be a very powerful indicator of a CEO's motivations was initially proposed in the literature by Joel Amernic and Russell Craig (they refer to this as "CEO-speak").[47] Amernic and Craig argue that a keen understanding of the words and language of business leaders (that reflect how they think) helps to comprehend their inner self, their corporate philosophy, and their motivations for their corporate behavior. In subsequent research they focus on the language of CEO accountability, particularly as it relates to financial reporting, auditing risk, and tone at the top, using linguistic software to analyze collections of CEO letters to shareholders in 1998 and 2006 for large U.S. and U.K. based companies, with a view to gaining insight into tone at the top.[48] They find that an examination of these letters reveal valuable insights to the intentions of CEOs, and the intended culture and tone at the top of their organizations. Their analysis of Jack Welch's

46. ANTON R. VALUKAS, REPORT TO BOARD OF DIRECTORS OF GENERAL MOTORS COMPANY REGARDING IGNITION SWITCH RECALLS 250 (2014).

47. JOEL AMERNIC & RUSSELL CRAIG, CEO-SPEAK: THE LANGUAGE OF CORPORATE LEADERSHIP (2006).

48. JOEL AMERNIC ET AL., THE INSTITUTE OF CHARTERED ACCOUNTANTS OF SCOTLAND, MEASURING AND ASSESSING TONE AT THE TOP USING ANNUAL REPORT CEO LETTERS (2010); Russell Craig & Joel Amernic, *Detecting Linguistic Traces of Destructive Narcissism At-a-Distance in a CEO's Letter to Shareholders*, 101 J. BUS. ETHICS 563 (2011). The software package is called DICTION, which subjects 500-word segments of text to analysis, searching for distinctive linguistic markers—such as master variables labelled "insistence," "embellishment," "complexity," "optimism," "certainty," and "realism." *Id.*

communications when he was CEO of General Electric revealed a tone at the top which stressed the constructs of certainty, optimism, activity, and realism, but excluded commonality.[49] Their analysis of the Enron letters reveal strong indicators of hubris and haughtiness, with indications that Skilling and Lay thought their organization was immune to wider processes in the macro-economy.[50]

The words, language, and non-verbal cues are *one* means by which the CEO can set a tone for the organization. The various actions and corporate choices that the CEO makes are also likely to be key channels for how a leader can spread certain values throughout the company (and these may not be mutually exclusive). For instance, Mark Schwartz provides the example of Paul O'Neill, former Alcoa CEO, who demonstrated through his actions that caring for his employees and their safety was his primary concern.[51] He was said to have visited plants and employees regularly; he indicated that there would be no budget limits on ensuring safety matters and distributed his personal phone number to get reports on safety failures. He even visited injured employees in person.[52] Southwest Airlines CEO Herb Kelleher was known to help his employees load bags on planes, sing with them at holiday parties, be a friend to them and not just a boss, and remember every one of their names. He achieved a remarkable camaraderie with his employees. They returned their affection for him through their full engagement and dedication to their work.[53] In one instance, on Bosses' Day, 16,000 employees of Southwest Airlines chipped in to purchase a full-page ad in USA Today to express their affection for Kelleher.[54]

The leadership styles of certain CEO personalities can also create a culture and environment that may lead to undesirable outcomes. Davidson et al. find that materialistic CEOs, as identified by their ownership of luxury goods, although not more likely to perpetrate fraud themselves, lead firms in which non-CEO insiders have relatively high probabilities of perpetrating fraud.[55] The probability of erroneous financial reporting is also higher in firms run by materialistic (versus non-materialistic (or

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49. AMERNIC ET AL., *supra* note 48, at vii.

50. *Id.* at viii.

51. Schwartz, *supra* note 42, at 46.

52. *Id.*

53. Kevin Freiber & Jackie Freiber, *20 Reasons Why Herb Kelleher Was One of the Most Beloved Leaders of Our Time*, FORBES (Jan. 4, 2019), https://www.forbes.com/sites/kevinandjackiefreiberg/2019/01/04/20-reasons-why-herb-kelleher-was-one-of-the-most-beloved-leaders-of-our-time/#4f80ce8eb311 [https://perma.cc/SY4N-HS3Z].

54. *Id*.

55. Robert Davidson, Aiyesha Dey & Abbie Smith, *Executives' "Off-the-Job" Behavior, Corporate Culture, and Financial Reporting Risk*, 117 J. FIN. ECON. 5, 8 (2015).

frugal)) CEOs.[56] Davidson et al. interpret these results on fraud and reporting errors as indicative of materialistic CEOs overseeing relatively loose control environments.[57] These CEOs shape such control environments by hiring CFOs who are also materialistic, facilitating compensation packages that provide incentives to misreport, and shaping their boards to lower the quality of monitoring.[58] Similar evidence is reported by Bushman et al., who find that, consistent with the notion of CEOs influencing corporate culture, non-CEO executives in banks with materialistic CEOs more aggressively exploited insider trading opportunities around government intervention during the financial crisis (than those in banks with non-materialistic CEOs).[59] Xiaoding Liu documents that firms with a high "corporate corruption culture," measured as the average corruption attitudes of officers and directors of a company (based on the corruption in the insider's country of ancestry), are significantly more likely to engage in various types of corporate misbehavior, including earnings management, accounting fraud, option backdating, and opportunistic insider trading.[60]

B. Beyond Tone at the Top

It is also plausible that "tone at the top" does not have a first-order effect on corporate outcomes. Other factors could be key in this respect, such as the incentive compensation contracts and other performance-based compensation offered to managers (and lower-level employees), and the governance and control systems in place in the company (such as the board of directors).[61] Much research exists on how the quality of internal controls, various aspects of corporate governance, and compensation

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56. *Id.* The psychology literature defines "materialism" as a fundamental aspect of the human value system, characterized by a devotion to material needs and desires, the importance one attaches to worldly possessions, and the worship of things. *See, e.g.*, Marsha L. Richins & Floyd W. Rudmin, *Materialism and Economic Psychology*, 15 J. ECON. PSYCH. 218, 218 (1994).

57. Davidson et al., *supra* note 55, at 12.

58. *Id.* at 6.

59. Robert M. Bushman et al., *Bank CEO Materialism: Risk Controls, Culture and Tail Risk*, 65 J. ACCT. & ECON. 191, 192 (2018).

60. Xiaoding Liu, *Corruption Culture and Corporate Misconduct*, 122 J. FIN. ECON. 307, 308 (2016).

61. In this regard, we acknowledge that there are a host of communications (both verbal and non-verbal) that are not observable, which can also shape the culture and conduct in organizations. Several of these may be related to how the CEO communicates issues relating to compensation packages, governance standards, his leadership style, etc. For instance, what if the CEO publicly and conspicuously lauds the highest bonus recipients, where the bonuses are awarded for the results of salesmanship that sometimes crosses the line? To what extent is the resultant unethical and perhaps illegal behavior a result of the CEO's tone, or does the bonus itself explain the behavior? But our premise is that the speeches we are able to observe and analyze serve as a proxy that adequately captures the CEO's general demeanor and use of language in all his/her communications.

structures, are related to corporate cultures, behaviors, and outcomes.[62] Nevertheless, to the extent that the CEO and top leadership team can shape these aspects of the corporation, they are creating an environment conducive to certain types of behaviors—which themselves also serve as inputs into shaping the culture of the organization.

This literature demonstrates the influence of CEOs on corporate culture, through "tone at the top" and through other mechanisms as well. We discuss in the next Part some techniques that might be used to explore the CEO's influence on a critical facet of corporate culture: whether the CEO's language and non-verbal signals might dilute or countermand the firm's stated ethical values.

IV. USING TEXTUAL ANALYSIS TO ANALYZE CORPORATE COMMUNICATION

A. An Overview of Textual Analysis

While a detailed introduction to textual analysis is beyond our scope, it is helpful to consider what it can look for and how it could proceed. This will help us understand how an analysis of the relevant communications can help discern a "tone at the top" that dilutes or countermands pro-ethics messages as articulated in the company's code of ethics and other ethics-related pronouncements. The kinds of communications that have been studied in the corporate realm include SEC filings, press releases, and earnings calls. We should note that while we focus our discussion on CEO communications for simplicity,[63] the "top" also includes others in the highest levels of senior management.

Textual analyses focus on both the structure ("lexical analysis") and meaning ("semantic analysis") of communications. In the former category, one seemingly simple approach would be to compare volumes of words between companies or at one company over time. Of course, insofar as we are comparing volumes of words on ethics or culture, there needs to be a determination of which words count, a point to which we will return. Another lexical approach would be to assess one or more companies' use

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62. *See, e.g.*, Daniel W. Collins et al., *Corporate Governance and Backdating of Executive Stock Options*, 26 CONTEMP. ACCT. RES. 403 (2009); David J. Denis et al., *Is There a Dark Side to Incentive Compensation?*, 12 J. CORP. FIN. 467 (2006); Hollis A. Skaife et al., *Internal Control Over Financial Reporting and Managerial Rent Extraction: Evidence from the Profitability of Insider Trading*, 55 J. ACCT. & ECON. 91 (2013); Jillian Grennan, A Corporate Culture Channel: How Increased Shareholder Governance Reduces Firm Value (Mar. 31, 2019) (unpublished manuscript) (on file with Seattle University Law Review).

63. We focus primarily on CEOs' speeches in this discussion due to the relative ease of availability of such data. However, subsequent research could also examine non-verbal cues, such as facial expressions, if a suitable and sufficient sample of corporate video disclosures is available. *See* Nicole Cade et al., *supra* note 7, at 8.

of boilerplate, stock phrases or formulations, to describe their approach towards ethics.[64]

Textual analysis holds considerable promise but faces considerable challenges. Semantic analysis, for instance, has to deal with the fact that even in real-time communications, there is not always complete consensus on what is meant. Attempting to parse oral communications that are transcribed presents additional difficulties. Language is simply not mechanically interpretable. Tone and context matter a great deal. For instance, one huge focus has been "sentiment analysis." Sentiment analysis makes use of a list of words that have been coded as positive,

64. According to Tim Loughran and Bill McDonald**,** these methods consist of lists of words that share common sentiments, such as positive, negative, or uncertain, and are used to measure the sentiment of a document. The lists of words are used to search and count words in a document; the count of words is then used to provide a comparative measure of sentiment. This measure is obtained dividing the number of words associated with a particular sentiment by the total number of words in the document. For instance, higher proportions of positive words in a document indicate a more optimistic tone. Words with different meanings but the same spelling add challenges to the use of these lists**.** Literature shows that the most commonly used lists of words to measure the tone or sentiment of a document are the Henry word lists. *See* Tim Loughran & Bill McDonald, *Textual Analysis in Accounting and Finance: A Survey*, 54 J. ACCT. RES. 1187 (2016) [hereinafter Loughran & McDonald, *Textual Analysis in Accounting and Finance*]. *See generally* Angela K. Davis et al., *The Effect of Manager-Specific Optimism on the Tone of Earnings Conference Calls*, 20 REV. ACCT. STUD. 639 (2015); James S. Doran et al., *Earnings Conference Call Content and Stock Price: The Case of REITs*, 45 J. REAL ESTATE FIN. & ECON. 402 (2012); Elaine Henry, *Are Investors Influenced by How Earnings Press Releases are Written?*, 45 J. BUS. COMM. 363 (2008); S. McKay Price et al., *Earnings Conference Calls and Stock Returns: The Incremental Informativeness of Textual Tone*, 36 J. BANKING & FIN. 992 (2012). There are also other word lists, such as the Harvard General Inquirer (GI) word lists: Kathleen Weiss Hanley & Gerard Hoberg, *The Information Content of IPO Prospectuses*, 23 REV. FIN. STUD. 2821 (2010); S. P. Kothari et al., *The Effect of Disclosures by Management, Analysts, and Business Press on Cost of Capital, Return Volatility, and Analyst Forecasts: A Study Using Content Analysis*, 84 ACCT. REV. 1639 (2009); Loughran & McDonald, *supra*; Paul C. Tetlock, *Giving Content to Investor Sentiment: The Role of Media in the Stock Market*, 62 J. FIN. 1139 (2007); Paul C. Tetlock et al., *More than Words: Quantifying Language to Measure Firms' Fundamentals*, 63 J. FIN. 1437 (2008); Steven L. Heston & Nitish R. Sinha, *News Versus Sentiment: Predicting Stock Returns from News Stories* (Fin. & Econ. Discussion Series 2016-048), https://www.federalreserve.gov/econresdata/feds/2016/files/2016048pap.pdf [https://perma.cc/TTY3-4JJH]. *See also* Hailiang Chen et al., *Wisdom of Crowds: The Value of Stock Opinions Transmitted Through Social Media*, 27 REV. FIN. STUD. 1367 (2014); Angela K. Davis et al., *Beyond the Numbers: Measuring the Information Content of Earnings Press Release Language*, 29 CONTEMP. ACCT. RES. 845 (2012); Angela K. Davis & Isho Tama-Sweet, *Managers' Use of Language Across Alternative Disclosure Outlets: Earnings Press Releases Versus MD&A*, 29 CONTEMP. ACCT. RES. 804 (2012); Ronen Feldman et al., *Management's Tone Change, Post Earnings Announcement Drift and Accruals*, 15 REV. ACCT. STUD. 915 (2010); Diego Garcia, *Sentiment During Recessions*, 68 J. FIN. 1267 (2013); Baixiao Liu & John J. McConnell, *The Role of the Media in Corporate Governance: Do the Media Influence Managers' Capital Allocation Decisions?*, 110 J. FIN. ECON. 1 (2013); Tim Loughran & Bill McDonald, *When Is a Liability Not a Liability? Textual Analysis, Dictionaries, and 10-Ks*, 66 J. FIN. 35 (2011) [hereinafter Loughran & McDonald, *When Is a Liability Not a Liability?*]; Jonathan L. Rogers et al., *Disclosure Tone and Shareholder Litigation*, 86 ACCT. REV. 2155 (2011); David H. Solomon et al., *Winners in the Spotlight: Media Coverage of Fund Holdings as a Driver of Flows*, 113 J. FIN. ECON. 53 (2014); *Diction Optimism and Pessimism word lists*, DICTION: THE TEXT-ANALYSIS PROGRAM (July 2019), https://www.dictionsoftware.com/ [https://perma.cc/3EG9-DLSH].

negative, or uncertain to determine the overall tone or sentiment of a phrase or document.[65] But it is not easy to determine the sentiment of a phrase or document. Among the difficulties sentiment analysis has faced is that a sentence such as "[f]or these and other reasons, these competitors may *achieve greater* acceptance in the marketplace than our company, limiting our ability to *gain* market share and customer loyalty and *increase* our revenues," from an annual report, could (mistakenly) be scored as positive.[66] More recent refinements are addressing this issue, hopefully minimizing, if not eliminating, mistakes in classification of positive versus negative sentiment.[67] In this regard, Tim Loughran and Bill McDonald emphasize the importance of field-specificity. They developed a list of words that better reflect the tone of financial documents than do negative word counts.[68] They demonstrate—and caution—that lists of words developed for other fields significantly misclassify financial documents.[69]

An interesting and, for our purposes, particularly useful, line of work involves studies of tone in communications, with particular attention paid to the audience.[70] For instance, Kris Boudt and James Thewissen provide evidence that strategic positioning of positive and negative words in the CEOs' letters to shareholders is used as a subtle form of impression management. They found that managers tend to present information ordered so as to give a reader a more positive perception of the underlying message.[71]

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65. The lists of words are used to search and count words in a document. The count of words then is used to provide a comparative measure of sentiment. This measure is obtained by dividing the number of words associated with a particular sentiment by the total number of words (tokens) in the document. Higher proportions of positive words in a document indicate a more optimistic tone. Words with different meanings but the same spelling add challenges to the use of these lists.

66. Mehran Azimi & Anup Agrawal, *Is Positive Sentiment in Corporate Annual Reports Informative?*, CLS BLUE SKY BLOG (Aug. 26, 2019), http://clsbluesky.law.columbia.edu/2019/08/26/is-positive-sentiment-in-corporate-annual-reports-informative/ [https://perma.cc/S7T6-CTCC].

67. *See id.* (describing the authors' paper on the subject, and also containing a discussion of the work of Loughran and McDonald, the leading authors in this area); *see also* Ronen Feldman, *Deep Linguistic with Deep Learning*, YOUTUBE (July 15, 2019), https://www.youtube.com/watch?reload=9&v=dO8CXS-l0i4 [https://perma.cc/BPM7-GKVR].

68. They also examined five types of words, or word classifications: positive words, uncertain words, litigious words, strong modal words, and weak modal words. "We link the word lists to 10-K filing returns, trading volume, return volatility, fraud, material weakness, and unexpected earnings." Loughran & McDonald, *When Is a Liability Not a Liability?*, *supra* note 64, at 47.

69. *Id.* at 44.

70. *See generally* Lorenzo Patelli & Matteo Pedrini, *Is the Optimism in CEO's Letters to Shareholders Sincere? Impression Management Versus Communicative Action During the Economic Crisis*, 124 J. BUS. ETHICS 19 (2013). There is also work on CEO tone in communications to other constituencies, including analysts. *See, e.g.*, Angela K. Davis et al., *The Effect of Manager-Specific Optimism on the Tone of Earnings Conference Calls* (Sing. Mgmt. U. School of Acct., Working Paper No. 2013/14-01).

71. *See generally* Kris Boudt & James Thewissen, *Jockeying for Position in CEO Letters: Impression Management and Sentiment Analytics*, 48 FIN. MGMT. 77 (2019).

The research in all these areas is proceeding at a very fast pace. Today's challenges are being identified and, in some cases, will be quickly met.[72]

B. Beyond the General: How Might Countermanding or Dilutive Messages Be Found?

An inquiry of the sort we are proposing needs an in-depth analysis of how a firm talks about ethics and values. One method, targeted phrases methodologies, which allows targeting of specific words or phrases in a document, has been used in work on ethics. For instance, in one article, Tim Loughran, Bill McDonald, and Hayong Yun considered the frequency of the word "ethics" (and its variants) along with the phrases "corporate responsibility," "social responsibility," and "socially responsible" in 10-K filings; they found that higher counts are associated with "sin" stocks, low corporate governance measures, and class action lawsuits brought in the year subsequent to the filing.[73] Work measuring culture, notably organizational culture, using natural language processing, is increasingly

72. Other approaches for textual analysis include machine learning techniques. These approaches train an algorithm to identify texts' characteristics or patterns across a collection of documents. *See* Emmanouil K. Ikonomakis et al., *Text Classification Using Machine Learning Techniques*, 4 WSEAS TRANSACTIONS ON COMPUTERS 966, 966–67 (2005); Loughran & McDonald, *Textual Analysis in Accounting and Finance*, *supra* note 64, at 1190. There are also methods attempting to expressly take into account and correct for researcher subjectivity, such as the "Naïve Bayes learning machine model." *See* Loughran & McDonald, *Textual Analysis in Accounting and Finance*, *supra* note 64, at 1209. This model uses the Bayes' theorem, which is a mathematical formula used for calculating conditional probabilities. *See* James Joyce, *Bayes' Theorem*, STAN. ENCYCLOPEDIA OF PHIL. (Sept. 30, 2003), https://plato.stanford.edu/entries/bayes-theorem/ [https://perma.cc/UB32-3P2X]. The Naïve Bayes method is advantageous because it is the most established methodology (one of the oldest); it is able to process a large amount of data; and it excludes researcher subjectivity when measuring the tone of a document in business communication. *Id.* In addition, although the Naïve Bayes model achieves higher accuracy than the list of words measures, it does not take into account the relationship between words and the context of the text in the sentence; thus, the ability to measure the positive tone of a document is limited. *See* Mehran Azimi & Anup Agrawal, Is Positive Sentiment in Corporate Annual Reports Informative? Evidence from Deep Learning 9 (July 2019) (unpublished manuscript) (on file with Seattle University Law Review). A more sophisticated method seems to outperform the word-based approaches and the Naïve Bayes model. Azimi and Agraval propose a machine learning technique called deep learning to measure positive sentiment in corporate annual reports (10-K public filings) and to evaluate whether that measurement is informative. Their findings suggest that "the market underreacts to positive sentiment and overreacts to negative sentiment in the 10-K filing during the filing period." *Id.* at 5. The "[n]egative sentiment reflects more concerns and uncertainty about the future," which results in a major divergence of opinions among investors. *Id.* Overall, they found that positive sentiment in the public filings (10-K filings) is informative and that techniques such as Word2Vec and deep learning used for textual analysis can provide more reliable insights about the sentiment of a document. *Id.* at 2–3, 7–8.

73. *See* Tim Loughran et al., *A Wolf in Sheep's Clothing: The Use of Ethics-Related Terms in 10-K Reports*, 89 J. BUS. ETHICS 39, 42 (2009).

being done and is apt to be of use as well to the inquiry we are suggesting.[74] In particular, the paradigmatic types of organizational cultures identified include some that stress results or hierarchy, and others that are more familiar or innovation-focused.[75] Textual analysis that distinguishes among these cultures should be of use to the inquiry we suggest.

Another category of work particularly relevant to the inquiry considers indicia of deception. This work is also more apt to include a consideration of something other than words—pauses, throat clearing, or other non-verbal cues.[76] Craig et al. explored the possibilities of searching for linguistic characteristics of top management to find signals of deceptive conduct.[77] They analyzed the language used in the letters signed by the Chair of the Indian multi-national company Satyam, Ramalinga Raju. They applied four quantitative methods: frequency of personal pronoun use,[78] positive and negative tone,[79] frequency of words of extreme emotion,[80] and actual versus expected word use frequency as indicated by DICTION 5.0 software.[81] The authors found that the CEO's choice of

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74. *See, e.g.*, Sheela Pandey & Sanjay K. Pandey, *Applying Natural Language Processing Capabilities in Computerized Textual Analysis to Measure Organizational Culture*, 22 ORGANIZATIONAL RES. METHODS 765, 767 (2019) (discussing the use of natural language processing to measure organizational culture). On organizational culture, see generally Michael D. Watkins, *What is Organizational Culture? And Why Should We Care?*, HARV. BUS. REV. (May 15, 2013), https://hbr.org/2013/05/what-is-organizational-culture [https://perma.cc/R3WZ-RZ26].

75. *See Organizational Culture Types*, OCAI ONLINE, https://www.ocai-online.com/about-the-Organizational-Culture-Assessment-Instrument-OCAI/Organizational-Culture-Types [https://perma.cc/PJZ9-U2PV].

76. *See, e.g.*, Christie M. Fuller et al., *An Analysis of Text-Based Deception Detection Tools*, *in* AMCIS 2006 PROCEEDINGS 418 (2006); Sarah Ita Levitan et al., *Linguistic Cues to Deception and Perceived Deception in Interview Dialogues*, *in* PROCEEDINGS OF NAACL-HLT 1941, 1942 (2018), https://www.aclweb.org/anthology/N18-1176.pdf [https://perma.cc/K88E-YB9B]; Rada Mihalcea & Carlo Strapparava, *The Lie Detector: Explorations in the Automatic Recognition of Deceptive Language*, *in* PROCEEDINGS OF THE ACL-IJCNLP 2009 CONFERENCE SHORT PAPERS 309 (2009); Smita Gupta, Modelling Deception Detection in Text (Nov. 2007) (unpublished master's thesis, Queen's University), https://pdfs.semanticscholar.org/432b/eb546779fd680a37f4da45cb31218ef2723b.pdf [https://perma.cc/5YGY-3PPS]. Among the popular press works on this subject are Paul M. Clikeman, *The 10 Tell-Tale Signs of Deception: The Words Reveal*, FRAUD MAG., Jan.–Feb. 2012.

77. *See* Russell Craig et al., *Exploring Top Management Language for Signals of Possible Deception: The Words of Satyam's Chair Ramalinga Raju*, 113 J. BUS. ETHICS 333, 339–41 (2013).

78. *Id.* at 337–38; *see also* Arijit Chatterjee & Donald C. Hambrick, *It's All About Me: Narcissistic Chief Executive Officers and Their Effects on Company Strategy and Performance*, 52 ADMIN. SCI. Q. 351, 364 (2007); Frank Bournois & Sébastien Point, *A Letter from the President: Seduction, Charm and Obfuscation in French CEO Letters*, 27 J. BUS. STRATEGY 46 (2006).

79. *See generally* Henry, *supra* note 64 (analyzing positive and negative tone in earnings press releases).

80. *See generally* David F. Larcker & Anastasia A. Zakolyukina, *Detecting Deceptive Discussions in Conference Calls*, 50 J. ACCT. RES. 495 (2012) (noting that deceptive CEOs use extreme positive emotion).

81. *See generally* Robin Sydserff & Pauline Weetman, *Developments in Content Analysis: A Transitivity Index and DICTION Scores*, 15 ACCT., AUDITING & ACCOUNTABILITY J. 523 (2002)

words "changed noticeably during the five annual report letters prior to the collapse" of the company, as results showed that the number of financial misstatements he made increased.[82] Based on this evidence, the authors suggest that patterns of words used by the CEO of a company over time are likely to reflect signals of deceptive conduct.[83] One author summarized "sets of linguistic markets for deception detection":

- Decreased frequency of first-person pronouns (I, mine, myself, etc.)—a subconscious attempt by the author to disassociate from the deceptive content;
- Decreased frequency of exclusive words (or, but, without, etc.)—to keep the content simple, concrete, and without abstractions in order to avoid faltering while being repeatedly interrogated;
- Increased frequency of negative emotion words (anger, abandon, hate, etc.)—a reflection of the subconscious feeling of guilt involved with being deceptive;
- Increased frequency of action verbs (move, run, lead, etc.)—as a form of distraction to keep the "story" moving while the basic content remains simple and insignificant.[84]

The task at issue for purposes of our inquiry is difficult, but again, new and better tools are rapidly being developed.

V. PRELIMINARY IDEAS AS TO HOW THE INQUIRY MIGHT PROCEED

What might be looked at—and what might be looked for? Again, our argument is that, notwithstanding a stated commitment to ethics and values, companies are somehow countermanding or diluting that message sufficiently to yield the kind of corporate misbehavior we have seen and continue to see.

Several types of countermanding or diluting messages come to mind. Some could relate to the strong need for profits by any means necessary—demands to bring in more revenue, to cut costs more aggressively, or to play accounting games to make it appear as though there is more revenue or fewer costs. The derision of the source of a company's revenues—as though customers deserve to be taken advantage of—is another possibility.

(researching the application of diction analysis and accounting narratives); AMERNIC ET AL., *supra* note 48.

82. Craig et al., *supra* note 77, at 333.

83. *Id.*

84. *See* EILEEN FITZPATRICK, JOAN BACHENKO & TOMMASO FORNACIARI, AUTOMATIC DETECTION OF VERBAL DECEPTION: SYNTHESIS LECTURESON HUMAN LANGUAGE TECHNOLOGIES 101 (Graeme Hirst ed., 1st ed. 2015).

Other messages could include "everyone does it" (or a variant, "it just shows that we are smart if we do it"). There could also be the message that the firm would support "pushing the envelope," that it had the best lawyers who would get people out of trouble, or that ethics talk was just for show.[85] And, of course, the Wells Fargo ghost accounts fall into this category: the most direct messages were delivered by people far below senior management, but senior management certainly pushed the strong emphasis on profits—regardless of the methods it took to obtain them. Other examples of messages at the middle management level (likely inherited from the culture and tone set by top management) of deriding the source of the company's revenues are found in transcripts and emails of traders and other bankers, and are documented in a book one of us co-authored, *Better Banks, Better Bankers*,[86] and in a book by Frank Partnoy, *Fiasco*.[87] One CEO example from popular culture is Leona Helmlsey's oft-quoted line, "Only the little people pay taxes."[88] Helmsley was saying that anyone with resources and savvy gets out of paying taxes; those who do pay them are powerless suckers.

There are several approaches, using the methods discussed above, that might hold some promise. These include both lexical inquires, as to matters such as length and whether content is more or less boilerplate, and semantic inquiries, as to "meaning." Mostly, these would be comparisons between, on the one hand, the company's code of ethics and, on the other, other verbal (or non-verbal) communications. How much are such divergences correlated with differences in how "bad" the firm is, using some measure of "badness" that takes into account litigation and regulatory costs, reputation effects, financial restatements, and the like? There could be comparisons as to different companies, or as to one company over time, on all these dimensions. Dimensions of codes of ethics that could be explored as well include the extent to which they are shorter or longer than one another, how large a proportion of boilerplate language

85. Express messages are fairly readily found at the middle management level, but can we find them at the top? For instance, as to the "profits by any means necessary/deriding the customer" there are internal emails at Goldman Sachs from middle managers to salespeople, exhorting the salespeople to sell securities they strongly suspected were of low quality to credulous buyers, and offering them financial incentives to do so. *See* HILL & PAINTER, *supra* note 22, at 22–40; *see also* Josephine Nelson, *Disclosure-Driven Crime*, 52 U.C. DAVIS L. REV. 1487, 1489–93 (2019). The Article depicts a world in which the ultimate pressure for results at all costs comes from top management, but that top management has a way to distance itself from the more express and specific marching orders.

86. *See generally* HILL & PAINTER, *supra* note 22.

87. *See generally* FRANK PARTNOY, FIASCO: THE INSIDE STORY OF A WALL STREET TRADER (1999).

88. Robert W. Wood, *10 Notorious Tax Cheats: Queen of Mean Leona Helmsley Proved Little People Can Put You in Jail*, FORBES (Apr. 17, 2015), https://www.forbes.com/sites/robertwood/2015/04/17/10-notorious-tax-cheats-queen-of-mean-leona-helmsley-proved-little-people-can-put-you-in-jail/#42747952d087 [https://perma.cc/8X7P-846W].

the code contained, and how much the codes resemble one another as to both length and content. Moreover, messages of the sort that conceivably might be dilutive or countermanding, such as an emphasis on profits, could also be analyzed to determine how frequent, long, individualized, or "rote" they are. Of course, one could not possibly access all such messages, but there might be, for instance, an annual address to a particular audience as to which comparisons could be made. Finally, going beyond the "official" code of ethics, another possible inquiry might be changes over time or across firms of public pronouncements regarding their codes of ethics, such as those on their company's websites, as a function, again, of the firm's perceived ethical challenges (such as financial restatement, litigation, enforcement actions, or a decline in the company's reputation as measured by negative publicity or an influential reputational index).[89]

The linguistic inquiry could profitably be complemented with a non-linguistic inquiry. Here, there is far less available than for linguistic analysis. But the inquiry offers considerable promise. Non-verbal cues would seem to be such an important part of how people communicate, especially as to deciphering somewhat complicated messages such as those at issue here. Imagine trying to countermand an exemplary ethics code—facial expressions, pauses, and inflections might be particularly effective. In the GM report discussed above, there is a discussion of the "GM nod."[90] "The GM nod, [CEO] Barra described, is when everyone nods in agreement to a proposed plan of action, but then leaves the room with no intention to follow through, and the nod is an empty gesture."[91]

A study examining the divergence between a company's code of ethics and CEO communications faces many challenges, as outlined earlier. Large sample data on CEO verbal and non-verbal communications is extremely difficult, if not impossible, to obtain. One possibility is to start with a limited number of firms. Even though the inferences will be based on the small sample of companies examined, one can speculate that the results are likely to hold with regard to a larger sample of companies. An early step is to create a list of words that represent the code of ethics of a company. The words on such a list can be compared with the CEO's

89. *See, e.g.*, *Global RepTrak 100: Congratulations to 2019's Most Reputable Companies Worldwide*, REPUTATION INST. (2019), https://www.reputationinstitute.com/global-reptrak-100 [https://perma.cc/NFV2-XAK5]; Vicky Valet, *The World's Most Reputable Companies 2018*, FORBES (Mar. 15, 2018), https://www.forbes.com/sites/vickyvalet/2018/03/15/the-worlds-most-reputable-companies-2018/#2316ed6826d5 [https://perma.cc/M5QG-LUL5]. Another, somewhat complementary, inquiry might take, as a starting point, the company's public pronouncement about ethics (on, for instance, its website), tracking them as a function of, yet again, the firm's perceived ethical challenges.

90. VALUKAS, *supra* note 46, at 256.

91. *Id.*

communications.[92] As the best-known authors in the field, Loughran and Donald, state: "All textual analysis ultimately stands or falls by the categorization procedures."[93] One can then study whether the divergence between the two sets of words—representing the code of ethics and the CEO's communications—is correlated with various measures of corporate culture and misconduct.

Another promising option is to consider a field study. Data on successive CEOs' (verbal and non-verbal) communications within a firm following exogenous CEO turnovers might be obtainable. Shifts in the tone set by the CEOs—as to whether the tone diverges from or converges with, the ethics code—could be compared with corporate outcomes in the relevant periods.

Results from these inquiries could provide evidence that the divergence of a CEO's communication from the corporate code of ethics is associated with a breakdown in the firm's culture and ethics. Such an inquiry would complement the arguments in related literature that the language of leadership is likely to be a strong indicator of actual corporate cultural values.[94] It is clear that the company's stated ethics and values are being countermanded. Learning more about how this is occurring is an important inquiry, and there is much to suggest that CEO communications are a promising place to look.

CONCLUSION

Our aim in this Article is to draw attention to a puzzle. Companies tout their commitments to ethics and values, yet corporate misbehavior is widespread. Top management, especially CEOs, set the tone. It is hard to imagine that if a CEO was really committed to running an ethical firm—that is, to the firm doing what it (and she) says the firm is doing—that she could not successfully convey that message within the firm. It seems at least worth investigating, if not actually likely, that notwithstanding companies' codes of ethics and stated ethical values, notably including top-level pronouncements, the CEO in a firm that experiences a scandal is somehow countermanding or diluting the firm's pro-ethics messages. Indeed, intuition strongly suggests that something of the sort is going on, and the detailed reports that emerge after some of the better-known scandals evidence that countermanding or diluting messages are being conveyed and received (and acted upon). Recall this, from the Vakulas report on the GM ignition switch failure:

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92. *See* Guiso et al., *supra* note 35.

93. Loughran & McDonald, *When is a Liability Not a Liability?*, *supra* note 64.

94. *See, e.g.*, AMERNIC & CRAIG, *supra* note 47; AMERNIC ET AL., *supra* note 48.

> [T]he messages from top leadership at GM—both to employees and to the outside world—as well as their actions were focused on the need to control costs . . . . Keeping projects on time—because of the impact on cost—became a paramount concern. One witness expressed concern that the cost- and time-cutting principles . . . emphasized timing over quality.[95]

We end with two more examples from companies with strong codes of ethics. One is of correspondence from a senior Goldman Sachs banker to the CEO, Lloyd Blankfein, asserting that the firm's clients would not hold the firm's "making money for itself" (self-dealing, really) against it. In a September 26, 2007, e-mail to Lloyd Blankfein, Goldman's chief executive officer, a senior Goldman banker said:

> [T]he institutions don't and I wouldn't expect them to, make any comments like you're good at making money for yourself but not us. The individuals do sometimes, but while it requires the utmost humility from us in response I feel very strongly it binds clients even closer to the firm, because the alternative of taking your money to a firm who is an under performer and not the best, just isn't reasonable. Clients ultimately believe that association with the best is good for them in the long run.[96]

The final example concerns Wells Fargo's then-CEO John Stumpf, explaining the source of the cross-selling goal of eight accounts per person or household—a goal that could, said employees, only be fulfilled by creating "ghost accounts." "In the 2010 annual report, Mr. Stumpf said he often was asked why Wells Fargo had set a cross-selling goal of eight. 'The answer is, it rhymed with "great," he wrote. Perhaps our new cheer should be: 'Let's go again, for ten!'"[97]

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95. *See* VALUKAS, *supra* note 46, at 250.

96. HILL & PAINTER, *supra* note 22, at 3.

97. *See* Matt Levine, *Tough Targets and Short-Term Projects: Also Heartbeats, Covered Interest Parity, Baseball and Unicorn Food*, BLOOMBERG OPINION (Sept. 19, 2016), https://www.bloomberg.com/opinion/articles/2016-09-19/tough-targets-and-short-term-projects [https://perma.cc/3EST-6NYB].