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The Fall of Legal Ethics and the Rise of Risk Management

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COLLOQUY

The Fall of Legal Ethics and the Rise of Risk Management

ANTHONY V. ALFIERI*

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INTRODUCTION

“Maybe I’m just naive.”¹

* Professor of Law and Director, Center for Ethics and Public Service, University of Miami School of Law. © 2006, Anthony V. Alfieri. Earlier versions of this Article were presented in faculty workshops at the University of Georgia Law School, the Florida International University College of Law, and the Washington & Lee University School of Law. I am grateful to Gerald Backman, Adrian Barker, Naomi Cahn, Bob Gordon, Ellen Grant, Amelia Hope, Peter Margulies, JoNel Newman, Mitt Regan, Rob Rosen, Tom Shaffer, Bill Simon, Frank Valdes, and faculty workshop participants for their comments and support.

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This Essay is dedicated to the students, teachers, and friends of the Center for Ethics & Public Service in celebration of its 10th Anniversary. Since 1996, the Center has trained over 400 fellows and interns; educated over 13,000 members of the Florida bar, bench, law school, university, and civic communities; and dedicated more than 100,000 student hours to public service.

1. MILTON C. REGAN, JR., *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* 368 (2004) (quoting David Goelzer, general counsel for the Bucyrus-Erie Corporation).

Ten years ago, the University of Miami School of Law started an interdisciplinary clinic, the Center for Ethics & Public Service, dedicated to the mission of educating and training law students in ethical judgment, professional responsibility, and community service. The Center established three guiding principles to achieve that mission: university-wide, cross-disciplinary collaboration; public-private partnership; and leadership mentoring.² Last fall I announced to a new crop of clinical students that our course on Ethics and Public Service would no longer solely emphasize ethics and professional responsibility. Instead, I explained, we would stress lawyer malpractice, loss prevention, and professional liability. The legal profession and its regulation under the law of lawyering, I continued, had changed. To understand this regulatory shift, I insisted, we would turn greater attention to the assessment and management of risk. In the new century, risk management would triumph.

Doubtless, veteran teachers of legal ethics and professional responsibility will recognize my opening classroom remarks as a kind of pedagogic gambit, an attempt to seize student attention and overturn settled expectation. To my initial surprise, and ultimate consternation, the gambit worked, evolving from a useful heuristic tool into a comprehensive framework readily adopted by students to rationalize the field of lawyer regulation. When I shared this gambit anecdotally with academics and practitioners in the field, neither experienced ethics teachers nor seasoned professional liability lawyers seemed surprised by the student reaction. Both groups acknowledged the growing embrace of risk management in the regulatory norms and narratives of the legal profession. A quick glance at the casebooks, conferences, and practice materials across the field confirms this widening embrace.³ Academic and media accounts, particularly reports of contemporary corporate scandals,⁴ verify its expanding hold.

The purpose of this Essay is to explore the normative implications of that embrace for lawyers, law firms, and professional regulation. The thesis of the Essay is that the widespread adoption of risk management mechanisms (for example, in-house advisors and internal controls, outside consultants and external audits, conflicts of interest protocols, and continuing legal education training) actually diminishes the appreciation of the moral choices facing lawyers in practice and the other-regarding obligations of lawyers in society. Indeed, the

2. The Center emphasizes both faculty-student and student-to-student mentoring and leadership training tailored to encourage law reform initiatives and non-profit ventures. See Anthony V. Alfieri, *Teaching Ethics/Doing Justice*, 73 *FORDHAM L. REV.* 851, 857-62 (2004) (describing the mission and history of the Center for Ethics & Public Service).

3. National conferences annually addressing risk management in the legal profession include the American Bar Association Center for Professional Responsibility National Conference on Professional Responsibility, the Legal Malpractice & Risk Management Conference, and the Association for Professional Responsibility Lawyers Conferences.

4. For a discussion of current and previous corporate scandals, see generally LOREN FOX, *ENRON: THE RISE AND FALL* (2002); KENNETH R. GRAY, LARRY A. FRIEDER & GEORGE W. CLARK, JR., *CORPORATE SCANDALS: THE MANY FACES OF GREED* (2005); BETHANY MCLEAN & PETER ELKIND, *THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON* (2003).

technology of risk assessment and regulation, implemented through internally and externally prescribed policies,⁵ subtly discounts the daily necessity of moral discretion and the constant calling of public obligation. As a result, lawyers and law firms underestimate the burdens of moral agency in the discretionary decisionmaking of advocacy and counseling. Equally important, they neglect the duties of social responsibility to clients, third parties, and the public. In sum, they discard the highest ambitions of professionalism displayed in traditions of independence, service, and trust.

Both moral discretion and other-regarding obligations figure prominently in the work of Milton Regan⁶ and William Simon.⁷ Leading voices in the field of modern legal ethics and lawyer regulation, Regan and Simon recently contributed two significant books to the literature on the profession: Regan's *Eat What You Kill: The Fall of a Wall Street Lawyer*⁸ and Simon's *The Practice of Justice: A Theory of Lawyers' Ethics*.⁹ The books erect helpful theoretical and contextual frameworks for the analysis of lawyers and law firms in contemporary corporate practice. This Essay draws on, and sympathetically extends, their current work on legal ethics in the large law firm setting of corporate law.¹⁰ In this way, it lays the groundwork for a more sustained study of the hazards and safeguards of risk management and professional liability in law and society.

The Essay is divided into five parts. Part I describes the 1994 fall of John Gellene—a thirty-seven-year-old bankruptcy partner at the venerable Wall Street law firm of Milbank, Tweed, Hadley & McCloy (“Milbank”)—under the weight of a federal criminal prosecution for making false declarations in a high-stakes corporate bankruptcy proceeding.¹¹ Part II links Gellene's fall to the fraying

5. Here, the internal/external distinction turns on the source of the risk management technique. Internal sources stem from lawyer and law firm self-regulation. External sources spring from malpractice insurance carriers outside the firm.

6. For an overview of Regan's work on the large law firm and corporate practice, see Milton C. Regan, Jr., *Corporate Norms and Contemporary Law Firm Practice*, 70 GEO. WASH. L. REV. 931 (2002); Milton C. Regan, Jr., *Ethics, Law Firms, and Legal Education*, 55 ME. L. REV. 363 (2003); Milton C. Regan, Jr., *Foreword: Professional Responsibility and the Corporate Lawyer*, 13 GEO. J. LEGAL ETHICS 197 (2000); Milton C. Regan, Jr., *Taking Law Firms Seriously*, 16 GEO. J. LEGAL ETHICS 155 (2002).

7. For Simon's recent writing on the ethics of corporate law practice, see William H. Simon, *Whom (Or What) Does the Organization's Lawyer Represent?: An Anatomy of Intraclient Conflict*, 91 CAL. L. REV. 57 (2003); William H. Simon, *Wrongs of Ignorance and Ambiguity: Lawyer Responsibility for Collective Misconduct*, 22 YALE J. ON REG. 1 (2005).

8. See REGAN, *supra* note 1.

9. WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* (1998). For appraisals, see Rob Atkinson, *Lawyering in Law's Republic*, 85 VA. L. REV. 1505 (1999) (reviewing WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* (1998)); Symposium, *The Practice of Justice by William H. Simon*, 51 STAN. L. REV. 867 (1999).

10. For the purposes of this Essay, large law firms will be defined broadly to include multi-office, multi-state, and multi-national firms in excess of 260 lawyers. See *Am Law 200: A Guide to Our Methodology*, AM. LAW., Aug. 1, 2005 (noting the average size of The Am Law 200's Second Hundred law firms at 260 lawyers).

11. For commentary on the prosecution, see Steven M. Biskupic, *A Criminal Prosecution for Violating Bankruptcy Rule 2014: A Strong Standard or Simply Strong Proof?*, 9 J. BANKR. L. & PRAC.

connection between legal ethics and the classical norms of the profession and moral community. Part III traces the rise of risk management norms in lawyer regulation and law firm organization, tracking the development of risk-controlling norms in law and society, and their flawed application in the instant case. Part IV offers a critique of risk management from the perspective of discretionary norms, highlighting ethical and management deficiencies in the conduct of the Milbank corporate bankruptcy team. Part V considers the revival of accountability and compliance norms in the resurgent regulation of corporate practice. The Essay concludes with a discussion of the jurisprudential and practical significance of risk management norms within the regulatory traditions of the legal profession.

I. THE FALL OF JOHN GELLENE

“How had he fallen so far so fast?”¹²

This Part documents the fall of John Gellene, culling from the detailed account of his misconduct in Regan’s fascinating case history of corporate law-in-action in *Eat What You Kill*. Gellene’s fall comes during a new era of financial scandals engulfing not only corporations and their accountants, bankers, directors, and officers, but also lawyers, financial advisors, lobbyists, and law firms. This era, here roughly bounded by the federal administrative sanctioning of the New York law firm Kaye Scholer¹³ in 1992 and the bankruptcy of the corporate titan Enron in 2001,¹⁴ coincides with the historical transformation and sociological reorganization of the large law firm.¹⁵

301 (2000); Peter J. Henning, *Targeting Legal Advice*, 54 AM. U. L. REV. 669, 685–86 (2005); Charles W. Wolfram, *Lawyer Crimes: Beyond the Law?*, 36 VAL. U. L. REV. 73, 78 & n.16 (2001).

12. REGAN, *supra* note 1, at 12.

13. For helpful accounts of the federal investigation and punishment of Kaye Scholer, see Anthony E. Davis, *The Long-Term Implications of the Kaye Scholer Case for Law Firm Management—Risk Management Comes of Age*, 35 S. TEX. L. REV. 677 (1994); Robert W. Gordon, *A Collective Failure of Nerve: The Bar’s Response to Kaye Scholer*, 23 LAW & SOC. INQUIRY 315 (1998); William H. Simon, *The Kaye Scholer Affair: The Lawyer’s Duty of Candor and the Bar’s Temptations of Evasion and Apology*, 23 LAW & SOC. INQUIRY 243 (1998); David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye, Scholer*, 66 S. CAL. L. REV. 1145 (1993). See also James O. Johnston, Jr. & Daniel Scott Schecter, *Introduction: Kaye, Scholer and the OTS—Did Anyone Go Too Far?*, 66 S. CAL. L. REV. 977 (1993); Ted Schneyer, *From Self-Regulation to Bar Corporatism: What the S&L Crisis Means for the Regulation of Lawyers*, 35 S. TEX. L. REV. 639 (1994).

14. For evaluations of lawyer conduct in the Enron case, see John C. Coffee, Jr., *Understanding Enron: “It’s About the Gatekeepers, Stupid,”* 57 BUS. LAW. 1403 (2002); Roger C. Cramton, *Enron and the Corporate Lawyer: A Primer on Legal and Ethics Issues*, 58 BUS. LAW. 143 (2002); Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185 (2003); Susan P. Koniak, *Corporate Fraud: See, Lawyers*, 26 HARV. J.L. & PUB. POL’Y 195 (2003); Donald C. Langevoort, *The Organizational Psychology of Hyper-competition: Corporate Irresponsibility and the Lessons of Enron*, 70 GEO. WASH. L. REV. 968 (2002); William H. Widen, *Enron at the Margin*, 58 BUS. LAW. 961 (2003). See also ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS (Nancy B. Rapoport & Bala G. Dharan eds., 2004) (collection of essays).

15. The recent literature on lawyer regulation highlights the importance of the culture and structure of large law firms. See Robert W. Gordon, *The Ethical Worlds of Large-Firm Litigators: Preliminary*

Regan's account of Gellene and Milbank proceeds against the backdrop of the changing role of lawyers, law firms, and legal ethics in corporate and bankruptcy practice. The focal points for this penetrating account are the cultural and socioeconomic forces that shape practice in the large Wall Street law firm and thus inform both professional ideals and ethical ambitions. To gauge the strength of these cultural and socioeconomic forces, Regan dissects the partner tournament at Milbank, the norms of transactional lawyers in large firms, and the moral universe constructed by elite teams of specialists within corporate and bankruptcy law.¹⁶

Regan's contextual study responds to the growing call for practice-based treatments of lawyers' work.¹⁷ To mount his narrative-driven case study, Regan conducted an extensive investigation, including interviews with corporate and bankruptcy lawyers, investment bankers, and financial advisors well-versed in the corporate restructuring of financially distressed companies. The locus of that investigation was the bankruptcy of the Bucyrus-Erie Corporation (hereinafter "Bucyrus"), a long-standing Wisconsin mining tool manufacturer. Regan documents the history of Bucyrus, sketching its economic condition, leveraged buyout, post-buyout financial transactions, and reorganization plan.¹⁸ From that initial historical rendering, he sketches the Bucyrus bankruptcy filing, disclosure trial, and fee hearing. Together these vibrant sketches form the landscape for the subsequent federal criminal investigation, prosecution, and trial of John Gellene.

A. HISTORY AND SOCIOLOGY OF THE LARGE LAW FIRM

Regan explores the broader significance of the Gellene criminal prosecution for the history and sociology of large law firm practice in American society. Alert to the "distinct practice cultures" within large law firms, Regan discerns specialty-specific "norms and understandings of ethical obligations" attendant to particular types of organizations and fields of practice.¹⁹ These norms and understandings, he explains, help determine "how lawyers identify, frame, and resolve ethical questions" within law firms, practice groups, and litigation or transactional "deal" teams.²⁰ Accordingly, he urges sensitivity to the differential

Observations, 67 *FORDHAM L. REV.* 709 (1998); Geoffrey C. Hazard, Jr. & Ted Schneyer, *Regulatory Controls on Large Law Firms: A Comparative Perspective*, 44 *ARIZ. L. REV.* 593 (2002); Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 *STAN. L. REV.* 503 (1985); Randall S. Thomas, Stewart J. Schwab & Robert G. Hansen, *Megafirms*, 80 *N.C. L. REV.* 115 (2001).

16. See REGAN, *supra* note 1, at 37–42.

17. See *id.* at 4 (remarking that "case studies can be an especially valuable way to deepen our understanding of the complex interaction between context and individual character"). For useful recent studies of private practice, see JOHN P. HEINZ ET AL., *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR* (2005); MICHAEL J. KELLY, *LIVES OF LAWYERS: JOURNEYS IN THE ORGANIZATIONS OF PRACTICE* (1994); CARROLL SERON, *THE BUSINESS OF PRACTICING LAW: THE WORK LIVES OF SOLO AND SMALL-FIRM ATTORNEYS* (1996).

18. See REGAN, *supra* note 1, at 71–94.

19. *Id.* at 4.

20. *Id.*

“incentives, opportunities, and pressures” confronting lawyers in large law firms.²¹

Regan begins his exploration with a deftly distilled history and sociology of the large law firm from the late nineteenth century to the early twenty-first century.²² He ties the emergence of the large law firm to the nineteenth century industrialization of the American economy, particularly the post-Civil War era of railroad, oil, coal, and steel enterprises. To Regan, the scale and scope of those enterprises, coupled with the 1870 creation of the Interstate Commerce Commission and the 1890 passage of the Sherman Antitrust Act, “strained the boundaries of existing organizational forms, legal rules, and capital markets” giving rise to the need for “coordinated, intensive, and ongoing legal services” beyond the ken of solo and small firm practitioners beset by increasing overhead costs (e.g., library, telephone, and typewriter) and limited economies of scale.²³ Despite this expanding need, Regan notes, more integrated law firm organizational models did not hold sway until the first two decades of the twentieth century with the inception of the law firm Cravath, Swaine & Moore (“Cravath”).²⁴ The Cravath model of systematic law firm integration gained widespread favor on Wall Street, especially the adoption of the “up or out” policy for the hiring and promotion of associates. Regan cites that policy as the root of the modern “promotion to partner tournament” prevalent in Wall Street law firms.²⁵

Surveying Wall Street during the first two-thirds of the twentieth century, Regan finds large law firms insulated from competitive market forces and operated in cartel-like fashion to control costs and salaries.²⁶ Culturally integrated by the common religious backgrounds and customs of their socioeconomically elite members, the firms enjoyed loose internal management and substantial

21. *Id.*

22. *See id.* at 16–23; *see also* WAYNE K. HOBSON, *THE AMERICAN LEGAL PROFESSION AND THE ORGANIZATIONAL SOCIETY, 1890–1930* (1986); BERYL HAROLD LEVY, *CORPORATION LAWYER: SAINT OR SINNER?* (1961); ERWIN O. SMIGEL, *THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN?* (1964).

23. *See* REGAN, *supra* note 1, at 17. For the relevant background history, *see* Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise: 1870–1920*, in *PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA* 70 (Gerald L. Geison ed., 1983) and Robert W. Gordon, “*The Ideal and the Actual in the Law*”: *Fantasies and Practices of New York City Lawyers, 1870–1910*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* 51 (Gerald W. Gawalt ed., 1984).

24. *See* REGAN, *supra* note 1, at 20; *see generally* ROBERT T. SWAINE, *THE CRAVATH FIRM AND ITS PREDECESSORS, 1819–1948* (1946) (providing the history and development of the firm).

25. REGAN, *supra* note 1, at 21 (questioning “whether the tournament is conducted on a level playing field, how many associates actually aspire to be a partner, and the extent to which the tournament is responsible for the rapid growth of large law firms”). *See generally* MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* (1991). *But see generally* George Rutherglen & Kevin A. Kordana, *A Farewell to Tournaments? The Need for an Alternative Explanation of Law Firm Structure and Growth*, 84 VA. L. REV. 1695 (1998) (rejecting a tournament theory as an explanation for firm growth).

26. REGAN, *supra* note 1, at 24.

external autonomy from corporate clients.²⁷ In this purported “golden age,” Milbank stood out as the “epitome” of a traditional Wall Street law firm with strong ties to the corporate and social elite, particularly the Rockefeller family.²⁸

The golden age of the Wall Street law firm proved short-lived. In the late 1960s and early 1970s, Regan points out, large law firms confronted new market pressures generated by global corporate competition. Globalization pushed domestic and international corporations to increase productivity by reducing labor costs, enhancing technology, improving economies of scale by way of mergers and acquisitions, and expanding access to international capital markets via investment banks and venture funds.²⁹ Buffeted by the escalating use of strategic business litigation and the enactment of constraining legal regulation, efficiency-seeking companies encouraged law firm competition (“beauty contests”) and cost-effective service, while spurring the growth of in-house legal departments. Out of this competition flowed an active lateral market for lawyers where firm information (for example, billing rates, compensation, and revenues) traded openly and “rainmakers” dominated.³⁰

Heightened competition in the legal services marketplace, Regan explains, compelled large firms to rationalize their internal operations “along business lines,” establishing hierarchical infrastructures, recruiting professional managers, reorganizing practice departments, and implementing financial management systems.³¹ Aimed at bolstering partner profits, this business logic prodded law firms to merge with or acquire other lawyers, accentuate “high end”³² premium services, increase profit leverage (that is, the ratio of nonpartner lawyers to partners), and abandon seniority-based lockstep compensation systems in favor of entrepreneurial revenue incentives. The result tightened organizational controls but weakened informal social norms in law firms, wreaking market and cultural instability.³³

For Regan, the volatility of the legal services market and the disintegration of traditional law firm culture enlarged the influence of partnership tournaments, practice specialties, and project teams on the character of lawyer behavior in large law firms. Tournaments now feature an ongoing post-promotion partnership competition for compensation and status where survival hinges on attaining the rank of a “rainmaker” or, for “service” partners like John Gellene, forging mutually enriching alliances with a “rainmaker.”³⁴ At the same time, practice specialties like corporate and bankruptcy law continually construct distinctive behavioral norms generalizable across firms. Additionally, project teams, though

27. *Id.* at 26–27.

28. *Id.* at 30.

29. *Id.* at 31–34.

30. *Id.* at 34.

31. *Id.*

32. *Id.* at 35 (quoting Susan Hansen, *The Young and the Restless*, AM. LAW., Sept. 1995, at 69).

33. *Id.* at 37.

34. *See id.* at 37–38.

assembled for the limited duration of a transaction such as the Bucyrus bankruptcy reorganization, persistently induce cognitive perceptions of a shared moral universe.³⁵

B. THE TOURNAMENT OF LAWYERS

The tournament of lawyers sweeping Wall Street in the late twentieth century emerged at Milbank by the mid-1980s. In 1984 young partners pressed the firm to adopt a new "growth and diversification" plan emphasizing revenue and business generation.³⁶ Instituted in 1986, the plan modified partner compensation, expelling and reducing the earnings of unproductive partners ("deadwood"), and authorized partner lateral recruitment from rival firms specializing in lucrative corporate practice areas. Approved by the partnership in 1990, this strategic plan endorsed the augmentation of firm expertise in corporate transactions, especially bankruptcy and mergers and acquisitions. The plan culminated in the 1991 lateral hiring of Larry Lederman from the firm Wachtell, Lipton, Rosen, & Katz ("Wachtell Lipton").³⁷ Lederman, a hard-hitting entrepreneurial partner at Wachtell Lipton foreign to Milbank's Anglo-Saxon Protestant culture, maintained an extensive book of corporate and investment banking business.³⁸ By 1993, Lederman stood out as Milbank's "highest-paid and most powerful partner," described by colleagues as an "800 pound gorilla."³⁹

Gellene joined Milbank as an associate in 1980 and rose to partner in 1988, witnessing first-hand the transformation of Milbank from an old-line, "white shoe" law firm into an aggressive, market-driven business enterprise. That transformation imported an entrepreneurial culture of partner competition over the spoils of productivity and profitability. Regan reports that Gellene was keenly aware of this tournament culture and his vulnerable status as a "service" partner.⁴⁰ He portrays Gellene as beset by anxiety over his survival at Milbank, in fear of lower compensation and expulsion from the firm, and oppressed by

35. *Id.* at 40 (noting that lawyers regard specialty norms as legitimate because they mirror the "realities of practice in a particular field" manufactured by "'repeat players' who deal with one another on an ongoing basis").

36. *Id.* at 45.

37. *Id.* at 45-49.

38. *See id.* at 16 (describing Lederman's cultural background and personality at the firm). Historically, old-line Wall Street law firms openly discriminated in hiring on the basis of ethnicity, gender, race, and religion. Noting the "hegemony of Anglo-Saxon Protestant culture" in law firms during the early twentieth century, Jerold Auerbach explains that "[p]rofessionalism and xenophobia were mutually reinforc[ed]" and reiterated in rhetorical "themes of anti-urbanism, anti-Semitism, and nativism." *See* JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 99-100 (1976).

39. REGAN, *supra* note 1, at 15-16.

40. Regan describes Gellene, an honors graduate from Georgetown University and Harvard Law School, as intellectually gifted and intensely driven and hence highly accustomed to competing in, and winning, tournaments of achievement. In fact, Regan asserts, intellectual competition and accomplishment validated Gellene's sense of self-worth. *Id.* at 51-52.

personal workaholic tendencies.⁴¹ In 1993, Lederman asked Gellene to join the transactional team handling the Bucyrus financial restructuring, thereby introducing him to the company's general counsel, David Goelzer. Lederman, Toni Lichstein (a bankruptcy-related litigation partner), and two young associates formed the core of the Bucyrus legal team at Milbank. Regan notes that Gellene well-appreciated that "rainmaker" partners like Lederman controlled access to large, revenue-generating corporate debtor clients, valuable assets for "service" partners in the Milbank tournament.⁴²

The economic history of the Bucyrus-Erie Company dates back more than a century to its origins in Milwaukee, Wisconsin, as the mining and construction equipment manufacturer Becor Western Corporation ("Becor Western"). In 1988, a Becor Western management group, bolstered by the investment bank Goldman Sachs and its Broad Street Investment Fund, completed a leveraged buyout ("LBO") of Becor Western.⁴³ The LBO formed a holding company, B-E Holdings, Inc., and an operating company, Bucyrus-Erie Company. Milbank advised the Becor board in the transaction, while Wachtell Lipton, then led by Lederman, counseled the buyout group.⁴⁴ Mikael Salovaara, a rising young partner at Goldman Sachs and a manager of Goldman's Broad Street Investment Fund, aided the transaction.⁴⁵ In 1989, at Salovaara's recommendation, Bucyrus issued \$75 million in notes in an exchange transaction with existing bondholders.⁴⁶ In 1990, Jackson National Life Insurance Company ("JNL"), a Michigan corporation owned by Prudential Insurance Company of Great Britain, purchased \$60 million worth of the notes.⁴⁷ By that point, B-E Holdings and Bucyrus-Erie Company owed \$177 million to unsecured creditors.⁴⁸ Throughout this period, Lederman and Salovaara continued to advise Bucyrus on financial and legal matters.⁴⁹

In 1991, Salovaara left Goldman with his fellow partner, Alfred Eckert, to form Greycliff Partners in order to manage a "vulture" investment fund called South Street Fund. In 1992, staggered by a cash flow shortfall, an undercapitalization crisis, and a damaging 10K "going concern" filing by outside auditor Deloitte & Touche, Bucyrus entered a secured debt refinancing and equipment

41. Regan highlights Gellene's intensive work habits (such as billable hours approaching and sometimes exceeding 3000 annually) and his delinquency in submitting timely billing records ("daynotes"). He reports that the Milbank compensation committee twice penalized Gellene for such delinquency. *Id.* 51-53. See also Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 STAN. L. REV. 313, 372-73 (1985) ("The effect of penalizing attorneys for not billing enough is to pit lawyers against one another in a contest to avoid having low hours compared to their peers.").

42. REGAN, *supra* note 1, at 63.

43. *Id.* at 74.

44. *Id.* at 74-75.

45. *Id.* at 76-77.

46. *Id.* at 80.

47. *Id.* at 82.

48. *Id.* at 83.

49. *Id.* at 71-87.

sale-leaseback agreement with Salovaara's South Street Fund. In 1993, burdened by high interest rate payments on its outstanding debt and faced with a declining manufacturing environment, Bucyrus retained Milbank—represented by Gellene—and Jeff Werbalosky of Houlihan, Lokey, Howard & Zukin—a Minneapolis financial consulting firm—to consider corporate reorganization under Chapter 11 of the federal Bankruptcy Code.⁵⁰

Beginning in February 1993, Gellene and Werbalosky advised the Bucyrus board of directors on the financial restructuring of the company. To take advantage of the tax consequences of Bucyrus's net operating losses in the 1993 fiscal year and to preserve its long-term viability in manufacturing,⁵¹ Gellene and Werbalosky recommended swift board action to restructure the company by forming a creditors committee and negotiating an exchange of debt for equity (stock) in a new company combining B-E Holdings (the holding company) and Bucyrus (the operating company). The board's restructuring contemplated the simultaneous filing of a "prepackaged" bankruptcy reorganization plan and a Chapter 11 petition with the assent of the unsecured creditors committee, the U.S. Trustee charged with oversight, and the company's only secured creditor, South Street Fund. The plan would convert Bucyrus into a debtor-in-possession ("DIP") with corresponding disclosure and fiduciary duties. However, JNL, the company's largest unsecured creditor with \$60 million in bonds, quickly denounced the prepackaged plan and initially refused to join the creditors committee. In addition, JNL condemned all three of the pre-bankruptcy transactions—the Salovaara-orchestrated LBO, debt-equity exchange offer, and South Street sale-leaseback—as fraudulent conveyances unfairly benefiting the buyout group instead of the operating company. More boldly, JNL insisted that the Bucyrus board file a lawsuit against the parties to the pre-bankruptcy transactions and threatened to do so independently in lieu of such action. When the board declined to file suit in reliance upon Gellene's advice,⁵² JNL filed a fraud complaint in federal district court in New York against Goldman, Broad Street, and South Street. Subsequently, JNL proposed an alternative reorganization plan.⁵³

In early 1994, prompted by the SEC approval of its new stock registration statement for the restructured company, Bucyrus began soliciting pre-petition creditor committee support for the prepackaged plan. Filed on February 18 in federal bankruptcy court in Milwaukee, the Chapter 11 petition accompanying

50. *Id.* at 87–94. See 11 U.S.C.A. §§ 1101–1174 (West 2005).

51. Regan describes Bucyrus as an "old economy" manufacturing company with hard assets (production facilities) of sufficient value to warrant reorganization rather than auction in a liquidation sale. Reorganization pulled the bankruptcy into rancorous debtor-creditor negotiations over the relative priority of different claimants in the reorganized company. REGAN, *supra* note 1, at 355–56.

52. On lawyer liability in structured finance deals, see Bruce A. Markell, *The Folly of Representing Insolvent Corporations: Examining Lawyer Liability and Ethical Issues Involved in Extending Fiduciary Duties to Creditors*, 6 J. BANKR. L. & PRACT. 403, 413–24 (1997); Steven L. Schwarcz, *The Limits of Lawyering: Legal Opinions in Structured Finance*, 84 TEX. L. REV. 1, 31–33 (2005).

53. REGAN, *supra* note 1, at 97–135.

the plan included a requisite financial disclosure statement and an application for the appointment of Milbank as counsel to Bucyrus. At the preliminary hearing before U.S. Bankruptcy Judge Russell Eisenberg (and throughout subsequent negotiations with the creditors committee), JNL objected not only to Milbank's application, complaining of a potential conflict of interest in the dual representation of B-E Holdings and Bucyrus, but also to the inadequacy of Milbank's disclosure statement.⁵⁴

To pass muster as counsel for the DIP under the Bankruptcy Code, an applicant law firm must "not hold or represent an interest adverse to the estate."⁵⁵ Moreover, the applicant must be "disinterested."⁵⁶ To satisfy this statutory criteria, Rule 2014 of the Bankruptcy Code requires the applicant to file a declaration disclosing all "connections with the debtor, creditors, or any other party in interest."⁵⁷ Gellene's declaration disclosed Milbank's former representation of JNL and current, unrelated representation of Goldman Sachs. Citing no other connections with any other party in interest, the declaration proclaimed Milbank as a disinterested person.⁵⁸ Curiously, the declaration failed to disclose Milbank's concurrent representation of Salovaara in a contractual dispute with his Greycliff partner Alfred Eckert and in a debt purchase transaction relating to Busse Broadcasting Corporation, each arising in December 1993 and continuing into 1994.⁵⁹

Both JNL and the U.S. Trustee filed objections to Milbank's retention application, challenging Milbank's status as a disinterested person and contending that the entity interests of B-E Holdings stood directly or potentially adverse to the estate interests of Bucyrus. In March, following hearings on the retention application, Gellene filed a supplemental declaration amplifying his prior disclosures and announcing that B-E Holdings would retain local Milwaukee counsel, thus curing the alleged concurrent conflict. Once again, the declaration made no mention of Milbank's ongoing representation of Salovaara in matters related to the Greycliff Partners litigation or the Busse Broadcasting Corporation transaction.⁶⁰ Without further objection from JNL counsel and the U.S. Trustee, Judge Eisenberg approved the application and set the disclosure statement dispute for trial.⁶¹

The trial of the disclosure statement convened in June 1994. The adequacy of a disclosure statement turns on the release of all information material to the reorganization plan. After hearing opening and closing arguments and witness

54. *Id.* at 134-72.

55. *See* 11 U.S.C. § 327(a) (2000).

56. *See* 11 U.S.C.A. § 101(14) (West 2005).

57. *See* FED. R. BANKR. P. 2014.

58. REGAN, *supra* note 1, at 149-50.

59. *Id.* at 147.

60. *Id.* at 150-56. Milbank discontinued its representation of Salovaara in the Greycliff Partners litigation in April 1994, and in the Busse Broadcasting Corporation transaction in October 1994, resuming the latter representation in 1995 and continuing until 1997. *Id.* at 156-57.

61. *See id.* at 134-72.

examinations, Judge Eisenberg rejected Milbank's disclosure statement as inadequate, finding deficiencies in the estate's investigation of pre-petition transactions concerning Goldman Sachs—namely the LBO, note exchange, and sale-leaseback. Post-trial negotiations to amend the plan ensued during the summer months, culminating in November confirmation hearings and court-approved implementation of the revised plan in December. In spring 1995, Milbank applied for court-authorized professional compensation of \$1.96 million in fees and more than \$370,000 in expenses. Once again, JNL objected. In May 1996, following a November fee trial, Judge Eisenberg discarded that objection, upholding Milbank's entitlement to approximately \$1.86 million in previously awarded fees and expenses.⁶²

In December 1996, upon learning of Milbank's representation of Salovaara in the Greycliff Partners contractual dispute from subsequently obtained trial transcripts, JNL and Bucyrus filed motions for sanctions, disgorgement of Milbank's \$1.86 million fee award, and revocation of the order approving Milbank as Chapter 11 counsel for the bankruptcy estate. Bucyrus also filed a lawsuit against Milbank in Wisconsin state court seeking \$100 million in damages for fraud, breach of contract, malpractice, and breach of fiduciary duty.⁶³ After initially concealing the JNL sanction motion from Milbank's Bucyrus legal team, Gellene submitted an affidavit to the bankruptcy court accepting "full and complete responsibility" for the failure to disclose Milbank's concurrent representation of Salovaara and South Street, and claiming that his error constituted "a mistake in judgment" rather than an intentional violation of Federal Rule of Bankruptcy Procedure 2014.⁶⁴

Despite his sympathetic grasp of the situation, Regan dismisses Gellene's explanation of his repeated misconduct as unconvincing, noting Gellene's standing as an experienced bankruptcy lawyer and his recurring opportunity to rectify the nondisclosure error. Moreover, Regan excoriates Gellene for attempting to distinguish Salovaara's creditor status from other estate creditors, institutional or otherwise. In 1997, Judge Eisenberg found Milbank in violation of Bankruptcy Rule 2014.⁶⁵

In 1997, the U.S. Attorney's Office in Milwaukee launched a criminal investigation into Gellene's conduct in breaching Rule 2014. Plea negotiations with prosecutors from the U.S. Attorney's Office over whether to permit Gellene to plead guilty to a misdemeanor for contempt collapsed when U.S. Attorney Thomas Schneider demanded a felony prosecution. In December, a federal grand jury in Milwaukee indicted Gellene on three counts of violating

62. *See id.* at 173–202.

63. *See id.* at 209–13.

64. *Id.* at 214 (quoting Gellene). Milbank settled both the disgorgement lawsuit, returning the \$1.86 million fee, and the malpractice suit, paying an undisclosed amount estimated at \$27 to \$50 million. *Id.* at 231–32. In addition, the Milbank executive committee removed Gellene as a partner. *Id.* at 229.

65. *See id.* at 216.

§§ 152 and 1623 of the federal criminal law.⁶⁶ Section 152 prohibits false oaths or declarations in a bankruptcy proceeding.⁶⁷ Section 1623 forbids the use of a materially false document in a federal legal proceeding.⁶⁸

The federal criminal indictment stunned the bankruptcy and corporate law firm community. The first count of the indictment charged that Gellene had made a false declaration in his February 1994 affidavit by failing to disclose Milbank's concurrent representation of Salovaara, Greycliff Partners, and South Street. The second count applied the same charge of nondisclosure to Gellene's March 1994 amended declaration. The third count charged that Gellene made use of a false document—the March 1994 amended declaration—in support of his fee-related trial testimony in November 1995.⁶⁹

Unsurprisingly, Gellene pleaded not guilty to all three counts of the indictment.⁷⁰ In March 1998, the federal jury reached a guilty verdict on all counts.⁷¹ Acting under the federal sentencing guidelines, U.S. District Judge J.P. Stadtmueller imposed a fifteen-month concurrent sentence, with eligibility for two-months credit for good behavior; a fine of \$15,000; and two years of supervised release.⁷² The U.S. Court of Appeals for the Seventh Circuit upheld the sentence on appeal.⁷³

C. THE MORAL UNIVERSE OF CORPORATE BANKRUPTCY PRACTICE

Having meticulously charted Gellene's professional rise and fall, Regan turns from the history and sociology of the large law firm to the culture of corporate transactional lawyers, specifically the interpretive culture of ethics and ethics rule construction. To Regan, the transactional culture of corporate and bankruptcy lawyers molds the construction of ethics rules, creating shared meaning and mutual understanding. The breadth and complexity of large law firm corporate transactions ensnare conflicts of interest principles in that meaning-making process.

Regan concedes that ascertaining conflicts in a transactional setting requires intricate judgments and harbors profound consequences. For Gellene, the consequences of a full conflicts disclosure in the Bucyrus bankruptcy risked likely disqualification, a result anathema to his budding relationship with Lederman and antithetical to his vulnerable position in the Milbank partnership tourna-

66. *Id.* at 225–30.

67. *See* 18 U.S.C. § 152 (2000).

68. *See* 18 U.S.C. § 1623 (2000).

69. *See* REGAN, *supra* note 1, at 230–31.

70. *See id.* at 231.

71. *See id.* at 272.

72. *See id.* at 284–87. On the punishment of corporate crime under the Federal Sentencing Guidelines, see Diane E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 IOWA L. REV. 697 (2002); Dan K. Webb & Steven F. Molo, *Some Practical Considerations in Developing Effective Compliance Programs: A Framework for Meeting the Requirements of the Sentencing Guidelines*, 71 WASH. U. L. REV. 375 (1993).

73. *See* United States v. Gellene, 182 F.3d 578 (7th Cir. 1999).

ment.⁷⁴ For large law firm corporate transactional lawyers, especially bankruptcy specialists like Gellene, conflicts of interest are an ever-present facet of practice in multiple client and corporate family contexts.⁷⁵

Regan explains that transactional lawyers, unlike litigators, demonstrate a high tolerance for potential conflicts of interest in the familiar corporate circumstances of concurrent representation.⁷⁶ Part of that tolerance stems from the dense, interwoven nature of entity representation and transactional practice in corporate law. By design, corporate law interweaves disparate individuals and varied interests in joint undertakings dictated by form and need. Corporate entities involve manifold constituents (directors, officers, and shareholders) and common interests (financial and organizational). Corporate transactions entail multiple parties (buyer-seller, lender-borrower, and operating partner-holding company investor) and convergent interests (financial and situational). Both efficiency and commonality imply the logic of concurrent or simultaneous representation even in the face of conflicts.

Part of the transactional lawyer tolerance for conflicts also derives from the litigation-oriented content of the ethics rules regulating conflicts of interest.⁷⁷ The current rules and standards governing conflicts of interest in federal and state courts derive from nearly a century of regulatory history under the American Bar Association's ("ABA") Canons,⁷⁸ Model Code,⁷⁹ and Model Rules,⁸⁰ and the American Law Institute's Restatement of the Law Governing Lawyers.⁸¹ Embodied in ABA Model Rule 1.7, conflict of interest principles govern a lawyer's representation of adverse interests. Paragraph (a) of Rule 1.7 prohibits a lawyer from "represent[ing] a client if the representation involves a concurrent conflict of interest."⁸² That paragraph denotes a concurrent conflict of interest under one of two circumstances: either when "the representation of

74. REGAN, *supra* note 1, at 173–74.

75. *See id.* at 314–319. *See generally* SUSAN P. SHAPIRO, TANGLED LOYALTIES: CONFLICT OF INTEREST IN LEGAL PRACTICE 96–109 (2002) (describing conflicts of interest in corporate organizational settings); Kevin McMunigal, *Rethinking Attorney Conflict of Interest Doctrine*, 5 GEO. J. LEGAL ETHICS 823 (1992) (exploring risk avoidance in concurrent conflicts of interest); Marc I. Steinberg & Timothy U. Sharpe, *Attorney Conflicts of Interest: The Need for a Coherent Framework*, 66 NOTRE DAME L. REV. 1 (1990); W. Bradley Wendel, *Conflicts of Interest Under the Revised Model Rules*, 81 NEB. L. REV. 1363 (2003) (comparing rules for multiple client conflicts under Nebraska law with the 2002 Model Rules); W. Bradley Wendel, *The Deep Structure of Conflicts of Interest*, 16 GEO. J. LEGAL ETHICS 473 (2003) (assessing the roles of discretion and judgment in conflicts of interest in reviewing ANDREW STARK, CONFLICT OF INTEREST IN AMERICAN PUBLIC LIFE (2000) and CONFLICT OF INTEREST IN THE PROFESSIONS (Michael Davis & Andrew Stark eds., 2001)).

76. REGAN, *supra* note 1, at 314–21.

77. *Id.*

78. CANONS OF PROF'L ETHICS Canon 6 (1908) (governing both adverse and conflicting interests).

79. MODEL CODE OF PROF'L RESPONSIBILITY DR 5-101(A) (1983) (governing personal conflicts); *id.* at DR 5-105(A)–(C) (governing conflicts with other clients).

80. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2004).

81. *See generally* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 121–122, 125, 128, 130–131, & 135 (2000).

82. MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (2004).

one client will be directly adverse to another client;” or, alternatively, when “there is a significant risk that the representation of one . . . client[] will be materially limited by the lawyer’s responsibilities to another client, a former client, or a third person[,] or by a personal interest of the lawyer.”⁸³

Paragraph (b) of Rule 1.7 mitigates the prohibitions arising out of directly adverse and materially limited representations. Under paragraph (b), a lawyer may represent a client, notwithstanding the existence of a concurrent conflict of interest, when four conditions converge:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.⁸⁴

The Comment to Rule 1.7 enumerates general principles guiding the application of concurrent conflicts of interest analysis. Predicated on the “essential elements” of “loyalty and independent judgment,”⁸⁵ the principles steer the “[r]esolution of conflict of interest problem[s]” through a four-step, lawyer-directed analysis.⁸⁶ The first step requires the clear identification of the client.⁸⁷ The second step demands a “[determination] whether a conflict of interest exists.”⁸⁸ The third step asks “whether the representation may be undertaken despite the existence of a conflict.”⁸⁹ If the conflict proves “consentable,”⁹⁰ then the lawyer proceeds to the fourth step. That final step requires client consultation and “informed consent, confirmed in writing.”⁹¹

In identifying conflicts, the Rule 1.7 Comment further notes that both directly adverse and material limitation conflicts can arise in nonlitigation, transactional matters. Even without direct adversity, a nonlitigation conflict “exists if there is

83. *Id.*

84. MODEL RULES OF PROF’L CONDUCT R. 1.7(b) (2004).

85. MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 1 (2004).

86. MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 2 (2004).

87. *Id.*

88. *Id.*

89. *Id.*

90. The Comment links the consentability of a conflict to the circumstances of representation, permitting simultaneous representation “where the clients are generally aligned in interest even though there is some difference in interest among them” and where lawyers are able to “resolve potentially adverse interests by developing the parties’ mutual interests.” MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 28 (2004). In specific, “a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate.” *Id.* (commenting also that “a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other”).

91. MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 12 (2004).

a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests."⁹² That material risk "in effect forecloses alternatives that would otherwise be available to the client."⁹³ Factors relevant to the determination of a "significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict."⁹⁴

Reiterating this approach, the American Law Institute's Restatement of the Law Governing Lawyers puts forward a conflict of interest standard that similarly evaluates the nature, significance, and probability of an adverse or prohibited effect "in terms of factual predicates and practical consequences that are reasonably susceptible of objective assessment."⁹⁵ The question of prohibited effect turns on risk. The Restatement standard requires a substantial risk of adverse effect on the quality of lawyer representation. The notion of adverse effect refers to the quality of the representation rather than the quality of the result. The likelihood of a materially adverse effect is substantial when the circumstances of risk are significant and plausible, even if the effect is uncertain or improbable instead of immediate, actual, and apparent.⁹⁶ The Restatement "employs an objective standard by which to assess the adverseness, materiality, and substantiality of the risk of the effect on representation."⁹⁷ This standard looks to the "facts and circumstances that the lawyer knew or should have known at the time of undertaking or continuing a representation," not to the appearance of impropriety.⁹⁸

Like the Model Rules, the Restatement addresses concurrent client representation in both litigated and nonlitigated matters. Determining whether an adverse conflict of material client interest exists requires careful parsing of the circumstances of the representation. The Restatement recommends a three-pronged inquiry in complex, multiparty situations examining the predomination of issues common to the clients' interests, the impracticability of separate representation given the circumstances and size of each client's interests, and the extent of

92. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 8 (2004) ("For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others.").

93. *Id.* ("The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.").

94. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 26 (2004) ("The question is often one of proximity and degree.").

95. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 cmt. c (2000).

96. *Id.* § 121 cmt. c(iii).

97. *Id.* § 121 cmt. c(iv).

98. *Id.*; see also *id.* § 121 cmt. c(iii).

active judicial supervision of the representation.⁹⁹

For both the Model Rules and the Restatement, the main thrust of conflict analysis is risk and harm. Conflict situations require an assessment of the level of risk impinging on the client-lawyer relationship and the degree of harm weighing upon the representation. In situations of complex transactional negotiation and litigation, as in the Bucyrus bankruptcy, conflict analysis goes beyond superficial inquiry into the appearance of impropriety to a more searching examination of the risk of substantive harm to client interests, to the client-lawyer relationship, and to the vigor of lawyer representation.¹⁰⁰

In searching the culture of corporate transactional lawyers, Regan discovers marked normative tolerance for potential conflicts.¹⁰¹ He attributes this tolerance to corporate client preference for transactional lawyers equipped to act as “reputational intermediaries” with banks, underwriters, and joint venture partners.¹⁰² This efficiency-based preference springs from temporal and transaction cost savings. Regan finds a similar client preference for informality in negotiation and even in lawyer retention—for example, in the client assent to lawyer-requested conflict waivers.¹⁰³ The widespread intermediary function of corporate lawyers, coupled with negotiated informality, creates ambiguity in transactional contexts.¹⁰⁴ Regan remarks that such ambiguity affords corporate lawyers opportunities for self-serving rationalization and even self-deception when navigating multiple client relationships in corporate transactions, such as bankruptcy reorganization.¹⁰⁵

To illustrate this contextual process, Regan explicates the recent history of bankruptcy practice, tracking the economic movements and Bankruptcy Code revisions that reinvigorated the field, despite its inherently episodic and cyclical nature, complicated statutory and regulatory scheme, and specialized tribunals.¹⁰⁶ He nimbly describes the profit-motivated acquisition of small bankruptcy firms by large law firms like Milbank and the recurrent conflicts of interest spawned by their major institutional debtor clients in corporate bankruptcies where multiple parties, often former and current clients, clash over payouts.¹⁰⁷ Although he credits law firm objections to conflicts-related disqualification on policy and efficiency grounds and concedes the frequent

99. *Id.* § 128 cmt. d(iii).

100. *Id.* § 128 cmt. b (discussing the prohibition against conflicts of interest and its effect on effective legal representation).

101. REGAN, *supra* note 1, at 314.

102. *Id.* at 316.

103. *Id.* at 317–18.

104. *Id.* at 314–19.

105. *Id.* at 319.

106. *Id.* at 58, 326. For a general discussion of the changes in U.S. bankruptcy law, see DAVID SKEEL, *DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* (2001); Teresa A. Sullivan et al., *The Persistence of Local Legal Culture: Twenty Years of Experience from the Federal Bankruptcy Courts*, 17 HARV. J. L. & PUB. POL'Y 801 (1994).

107. REGAN, *supra* note 1, at 326–27.

statutory incoherence of the Bankruptcy Code as well as the inconsistent jurisprudence of bankruptcy courts, Regan underscores that Gellene plainly understood his mandatory disclosure duties under Rule 2014 and the imminent risks of disqualification in Wisconsin bankruptcy court, in contrast to more tolerant New York or Delaware federal courts.¹⁰⁸ Distorted by tournament motive, that understanding garnered justification from an alternative moral universe of practice. Animated by the ascendant norms of large firm bankruptcy practice, this moral universe shielded Gellene's conceptions of loyalty and independence because it posited joint interests among Salovaara, South Street, and Bucyrus in safeguarding the resources and manufacturing position of the company estate from the hostile claims of JNL.¹⁰⁹

Regan's adroit tracking of Gellene's professional fall from the sheltered preserve of elite law firm society demonstrates the importance of contextual understanding in legal ethics regulation. Without an appreciation for the history and sociology of the large law firm, its competitive tournament incentives, its practice specialty norms, and project team pressures, the gravity of the moral universe pulling corporate bankruptcy lawyers into risk-taking behavior would go unnoticed. The next Part considers whether this distinctive moral universe conforms to the classical norms of the profession.

II. CLASSICAL NORMS

“[T]hey were the kind of people you would just trust completely.”¹¹⁰

The classical norms of the profession historically informed both the culture and the sociology of large law firm corporate practice. They delineated character and regulated conduct. They commanded loyalty and consensus. And they defined public and private obligation.

Classical norms imbued law firm culture and sociology with the ideals of fraternity and community. They defined lawyer character and conduct in terms of wisdom, prudence, and craft-like virtuosity. They cultivated the values of firm loyalty and institutional consensus. And they celebrated lawyer public leadership and law firm civic-mindedness.

Regan's account of the Bucyrus bankruptcy shows the fragile entailments of classical norms lingering in tournament contests, transactional conventions, and moral constructions. Although no longer pervasive, the norms resurface in the turmoil of ambition, anxiety, and rationalization plaguing Gellene and the Milbank legal team. To Regan, Gellene's downfall and Milbank's complicity signal more than the self-conscious wrongdoing of dereliction or corruption.¹¹¹ Instead, their conduct reflects a changing normative environment where “highly

108. *Id.* at 291, 326–33.

109. *See id.* at 345–48.

110. *Id.* at 368 (quoting David Goelzer, general counsel for Bucyrus).

111. *Id.* at 350.

accomplished lawyers” and their “powerful law firms” strain the bounds of ethical judgment in the pursuit of productivity and profit.¹¹²

The normative judgments of John Gellene offend the classical norms of public professionalism.¹¹³ In law and ethics, Anthony Kronman, Robert Cover, and Tom Shaffer each offer classical visions of public professionalism. Kronman’s vision of classical norms tilts toward secular convention in urging the public virtue and wisdom of the lawyer-statesman.¹¹⁴ To Kronman, the lawyer-statesman accepts accountability and responsibility while keeping within the traditions of the legal order. Cover’s vision, by contrast, reaches out for normative diversity and dialogue beyond secular traditions among outsider ethical communities.¹¹⁵ For Cover, outsider dialogue creates new meanings and generates new voices silenced by the dominant legal order. Akin to Cover, Shaffer encourages moral dialogue subversive of the dominant order.¹¹⁶ Yet, for Shaffer, dialogue rises out of faith and community-affirming spirituality.

Classical norms infuse the contemporary professionalism movement in spite of interpretive contest over their meaning and regulatory force.¹¹⁷ This classical content is acutely pronounced in Kronman’s recent work.¹¹⁸ Kronman’s interpretation of classical norms is bound up in the vision of the lawyer-statesman. Inspired by a sense of civic trusteeship, this traditional vision compels lawyers to embrace the custodial work of conserving past professional ideals. The caliber and character of that work reveal the quality of lawyer judgment. To Kronman, the caliber of a lawyer’s mind and the virtue of his character derive from technical virtuosity as well as practical wisdom and prudence, which find their embodiment in good judgment.¹¹⁹

112. *Id.* at 350–51.

113. For exposition of the classical norms manifested in the ABA Canons, see Susan D. Carle, *Lawyers’ Duty to Do Justice: A New Look at the History of the 1908 Canons*, 24 *LAW & SOC. INQUIRY* 1 (1999) (focusing on the “justice” of a client’s case but touching on the purposes of an ethical code).

114. See ANTHONY KRONMAN, *THE LOST LAWYER* 11–52 (4th prtg. 1995).

115. See *infra* notes 156–60 and accompanying text.

116. See *infra* notes 161–65 and accompanying text.

117. See Rob Atkinson, *A Dissenter’s Commentary on the Professionalism Crusade*, 74 *TEX. L. REV.* 259 (1995) (challenging assumption of “one true professional faith” and tendency toward overbroad condemnation of conduct); Robert W. Gordon, *Professionalisms Old and New, Good and Bad*, 8 *LEGAL ETHICS* 23 (2005) (pointing to the limits of professionalism as an ethical guide); W. Bradley Wendel, *Morality, Motivation, and the Professionalism Movement*, 52 *S.C. L. REV.* 557 (2001) (citing the ambiguities of professionalism); W. Bradley Wendel, *Professionalism as Interpretation*, 99 *Nw. U. L. REV.* 1167 (2005) (linking professionalism to the interpretation of legal norms).

118. See KRONMAN, *supra* note 114; see also SOL M. LINOWITZ & MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* (1996) (condemning the lowered standards of the legal profession). For criticism, see Marc Galanter, *Lawyers in the Mist: The Golden Age of Legal Nostalgia*, 100 *DICK. L. REV.* 549 (1996) (examining Kronman’s claim of declining virtue within the legal profession); David B. Wilkins, *Practical Wisdom for Practicing Lawyers: Separating Ideals from Ideology in Legal Ethics*, 108 *HARV. L. REV.* 458 (1994) (reviewing ANTHONY KRONMAN, *THE LOST LAWYER* (1993)).

119. See KRONMAN, *supra* note 114, at 15. The instant account offers a more generous reading of Kronman’s jurisprudence than my earlier depiction. See Anthony V. Alfieri, *Denaturalizing the Lawyer-Statesman*, 93 *MICH. L. REV.* 1204, 1229–30 (1995) (reviewing ANTHONY KRONMAN, *THE LOST LAWYER*:

Good judgment forms the core of Kronman's ideal of the lawyer-statesman.¹²⁰ Winnowed from the elements of practical wisdom, prudentialism, craft, and public service, the lawyer-statesman ideal imagines law as a craft-like activity.¹²¹ For Kronman, craft infuses professional life with personal meaning realized in advocacy, counseling, and a commitment to the public good.¹²² That commitment denotes civic spirit. Exemplified in excellence and wisdom, the spirit of civic responsibility connotes a special talent for judgment and leadership.¹²³ This talent coincides with the public good and, more germane here, extends to matters of private interest.¹²⁴

The pull of public and private interests tests character. Good character depends on the qualities of intellectual skill and excellence of judgment.¹²⁵ Kronman defines judgment as a superior ability to discern the public good.¹²⁶ That ability comes from both striving to be a connoisseur of the law and caring for the good of the law.¹²⁷ Connoisseurs of the law declare devotion to the law's well-being.¹²⁸ Devotion entails foresight, a character trait essential to practical wisdom.¹²⁹ For the lawyer-statesman, practical wisdom goes beyond love of the public good to an engagement in deliberation.¹³⁰ The virtue of statesmanship resides in the public leader exceptionally skilled in the wisdom of deliberation fostered for the good of the community.¹³¹ The special virtue of a civic leader flows from his extraordinary devotion to his community and from his superior capacity to discern its best interests.¹³²

Kronman's classical norms permit the lawyer to exercise practical wisdom in making hard judgments about incommensurable public and private interests. To Kronman, wise private or personal judgment hinges on the condition of integrity.¹³³ Wise public judgment, in contrast, rests on the condition of fraternity.¹³⁴ Lawyers demonstrate fraternity when they overcome personal or professional differences to participate in a deliberative debate about the best interests of their community.¹³⁵ Participation demands the deliberative arts of compassion and

FAILING IDEALS OF THE LEGAL PROFESSION (1993) and arguing that Kronman's emphasis on instrumental values in the ethics of lawyering causes him to place "faith in an artifact that privileges the mind and character of elite white, male, large-firm private lawyers").

120. See KRONMAN, *supra* note 114, at 15.

121. See *id.* at 14–17, 295.

122. See *id.* at 12.

123. See *id.* at 14–15.

124. See *id.*

125. See *id.* at 35.

126. See *id.*

127. See *id.* at 139.

128. See *id.* at 86.

129. See *id.* at 33–34.

130. See *id.* at 35.

131. See *id.* at 54.

132. See *id.*

133. See *id.* at 93.

134. See *id.*

135. See *id.* at 92–93.

detachment enlivened by a spirit of affectionate good will.¹³⁶ This spirit of civic friendship interweaves tolerance and union to establish fraternity.¹³⁷

The values and goals of fraternity guide the lawyer practices of judging, counseling, and advocacy. Kronman finds commonality in these practices, linking their exercise to deliberative wisdom and civic-mindedness. This linkage connects the means-ends calculations of client representation to larger considerations and other-regarding interests. These enlarged considerations and interests place lawyers and judges inside a common practice less differentiated by means-ends stratagems and more tempered by a concern for the good of the law itself.¹³⁸

To Kronman, the practice commonalities of judging and advocacy stem from a shared attitude of civic-mindedness employed in assessing the good of the legal order expressed in laws and the good of the community fostered by laws.¹³⁹ This dual assessment compels lawyers to neutralize the norms of client welfare in deference to the soundness of law and legal order. The good lawyer's public-spirited deference to law and legal order overrides competing loyalties to both clients and courts when moral conflicts intrude.¹⁴⁰

Kronman's deference to the traditions of law and legal order arises from a common law reverence for prudence. A mixture of intellectual capacity and temperament, prudence unites the qualities of wisdom and character to engage the moral pluralism of value conflict in law and lawyering. Typified by balance, prudentialism searches for a pragmatic accommodation of conflicting interests. This search calls upon the distinctive character traits, expert skills, and imaginative powers demonstrated by good lawyers in handling cases.¹⁴¹

For Kronman, prudence in handling cases resembles an art form. Honed from well-crafted deliberation, the prudence of the good lawyer comes from fastening an expert knowledge of the law to the imaginative ability of lawyering. This binding of law to lawyering serves the intrinsic purposes of the law itself, rather than the instrumental purposes of client interest or personal profit. Mastery of the art of craft in the service of the public good fuels the ambition of the lawyer-statesman.¹⁴²

Kronman's call for a public-spirited ambition to advance the good of the law requires lawyers to reconcile the imperatives of commerce with the moral aspirations of professionalism.¹⁴³ A product of practical wisdom and character virtue, reconciliation restores the non-instrumental role of the lawyer as a moral

136. *See id.* at 99–100.

137. *See id.*

138. *See id.* at 134 (observing the cooperative role between lawyers and judges).

139. *See id.* (discussing how lawyers' work includes that of judges'—"namely, the maintenance of the rule of law").

140. *Id.* at 143–46 (defining the good lawyer's public-spirited devotion to law as an essential component of craft).

141. *See id.* at 21, 238, 247–48.

142. *See id.* at 300–01, 316, 349–50, 359–63.

143. *See id.* at 316.

agent called to the law as a profession.¹⁴⁴ Faithful to the secular idea of law as a calling, Kronman regards lawyering as a kind of salvation.¹⁴⁵ The work of lawyering connects the individual to the collective in the public world of advocacy and counseling. That connection transforms the character and identity of the human personality. For Kronman, the personal fulfillment gleaned through meaningful connection to the world outside of the self accrues strength from traditional institutions and professional ideals.¹⁴⁶ Fulfillment wanes when the meaning-giving capacity of such institutions and ideals weakens against the weight of instrumental ends.¹⁴⁷

Disturbed by the instrumental transformation of large corporate law firms, the historical standard-bearers of the lawyer-statesman ideal, into mechanisms of single-minded profit and arid productivity, Kronman surveys the profession for an environment more hospitable to purposive commitments to craft, wisdom, and the public good.¹⁴⁸ His decades-long catalogue of changes in the culture, structure, and practice of the large law firm affirms the fall of the wise counselor and the rise of the mercenary technocrat in the profession. Echoing Regan, this catalogue compiles changes in firm size, staffing hierarchies, compensation systems, group specialization, and lawyer-firm continuity.¹⁴⁹ Both Kronman and Regan expose the harmful effects of these market-driven alterations, evinced by the loss of firm stability and lawyer solidarity.¹⁵⁰ Compounded by the unremitting growth of specialized knowledge and the continuing shift to a more ephemeral transactional client-firm relationship, these constraining effects narrow the opportunities for lawyers to develop the moral capacity for the ends-oriented judgments critical to third party and public deliberation. That deliberative capacity, at once client-centered and other-regarding, denotes the wise counselor.

The cultivated judgment and civic character of the wise counselor distinguishes the deliberative practice of law from the technical skills of lawyering. For the wise counselor, the law constitutes an intrinsic good, not an instrumental enterprise of commerce. Its non-instrumental valuation as an honorable calling with intrinsic rewards and satisfactions apart from mercantilism condemns the culture and customs of modern large firm corporate law practice. Dominated by managerial canons and marketplace imperatives, that culture devalues the virtues of character and craftsmanship crucial to Kronman's ideal of the lawyer-statesman.¹⁵¹

144. *Id.* at 316–17, 359–62, 366–68.

145. *See id.* at 370–72.

146. *See id.* at 371–72.

147. *See id.* at 370.

148. *Id.* at 272–314.

149. *Id.* at 273–83; REGAN, *supra* note 1, at 31–42.

150. *See* KRONMAN, *supra* note 114, at 278–79. Regan remarks, “All large firms . . . now inhabit a universe whose governing laws are those of the market.” REGAN, *supra* note 1, at 42.

151. *See generally id.* at 291–300.

The traditional ideal of a public-minded profession invoked by Kronman circulates in the republican norms of early ethics regimes.¹⁵² Urging greater accountability,¹⁵³ responsibility,¹⁵⁴ and public virtue,¹⁵⁵ republican norms enlarge the ambit of the lawyer's ethical situation.¹⁵⁶ This enlarged treatment of legal ethics as a reservoir of group or community norms has deep roots in the profession.¹⁵⁷ Drafters of both state and national codes point explicitly to the community-based normative underpinnings of ethics rules.¹⁵⁸ The rules encode norms in the text of the initial canons, the late century disciplinary rules and ethical considerations of the Model Code, and the current rules and comments of the Model Rules. Regulatory enforcement reaffirms these norms when supportive of other-regarding third party or public interests.¹⁵⁹

152. See Russell G. Pearce, *Lawyers As America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U. CHI. L. SCH. ROUNDTABLE 381, 384 (2001) (discussing how "common good" lay at the center of republican thought); Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241, 241 (1992); see also Norman W. Spaulding, *The Myth of Civic Republicanism: Interrogating the Ideology of Antebellum Legal Ethics*, 71 FORDHAM L. REV. 1397 (2003).

153. See Roger C. Cramton, *Furthering Justice by Improving the Adversary System and Making Lawyers More Accountable*, 70 FORDHAM L. REV. 1599, 1610–14 (2002); see also Roger C. Cramton, *Lawyer Conduct in the "Tobacco Wars"*, 51 DEPAUL L. REV. 435, 436–39 (2001) (noting that adversarial tactics of tobacco lawyers have been "morally objectionable"); David Luban, *The Bad Man and the Good Lawyer: A Centennial Essay on Holmes's The Path of Law*, 72 N.Y.U. L. REV. 1547, 1571, 1581 (1997) (examining Holmes's paradigmatic view of the lawyer as representative of the "bad man"); W. Bradley Wendel, *Informal Methods of Enhancing the Accountability of Lawyers*, 54 S.C. L. REV. 967, 968 (2003).

154. See Geoffrey C. Hazard, Jr., *Equality and Affiliation as Bases of Ethical Responsibility*, 61 LA. L. REV. 173, 173–74 (2000); Geoffrey C. Hazard, Jr., *Lawyer for the Situation*, 39 VAL. U. L. REV. 377, 379 (2004); Geoffrey C. Hazard, Jr., *Responsibility, Professional and Otherwise*, 31 CONN. L. REV. 1139, 1139 (1999).

155. See W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1, 26–29 (1999); W. Bradley Wendel, *Value Pluralism in Legal Ethics*, 78 WASH. U. L.Q. 113, 116–18 (2000).

156. Brandeis stands as the best exemplar of this enlarged scope of lawyer responsibility. See William H. Simon, *Babbitt v. Brandeis: The Decline of the Professional Ideal*, 37 STAN. L. REV. 565, 565–66 (1985); Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 YALE L.J. 1445, 1471 (1996); see also DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 237–38 (1988) (applauding the "Brandeisian vision of moral activism").

157. See W. Bradley Wendel, *Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities*, 54 VAND. L. REV. 1955, 1960 (2001). See generally W. Bradley Wendel, *Mixed Signals: Rational-Choice Theories of Social Norms and the Pragmatics of Explanation*, 77 IND. L.J. 1 (2002) (assailing normative weakness in rational-choice theories of social norms).

158. See Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1391 (1992); Susan P. Koniak, *Through the Looking Glass of Ethics and the Wrongs with Rights We Find There*, 9 GEO. J. LEGAL ETHICS 1, 1 (1995). See generally Roger C. Cramton & Susan P. Koniak, *Rule, Story, and Commitment in the Teaching of Legal Ethics*, 38 WM. & MARY L. REV. 145 (1996) (discerning community norms within ethics rules, narratives, and commitments).

159. See Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1182 (2003); Geoffrey C. Hazard, Jr., *State Supreme Court Regulatory Authority over the Legal Profession*, 72 NOTRE DAME L. REV. 1177, 1179 (1997); David B. Wilkins, *How Should We Determine Who Should Regulate Lawyers?—Managing Conflict and Context in Professional Regulation*, 65 FORDHAM L. REV. 465, 480 (1996); David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 834 (1992).

Contrary to Kronman, the bond between ethics and norms is fashioned from moral community, not simply the laws and customs of a prevailing legal order. Robert Cover finds this linkage embodied in the concept of a *nomos*.¹⁶⁰ To Cover, a *nomos* represents “a present world constituted by a system of tension between reality and vision.”¹⁶¹ When conceived as a world of law, a *nomos* “entails the application of human will to an extant state of affairs as well as toward our visions of alternative futures.”¹⁶² Ethics rules reflect the tension between the reality and vision of professionalism. The application of human will behind their drafting and enforcement comes by community will and state decree. That law-sanctioned decree imposes a dominant normative order on a social world composed of diverse ethical communities and contested ethical narratives.¹⁶³ The scattered redundancy of ethics rule formulation and enforcement at federal and state levels conforms to Cover’s anarchistic preference for normative diffusion and dialogue. Cover endorses the fragmentation of power and local control in law and politics; fragmentation articulates polycentric norms essential to moral diversity.¹⁶⁴

The vision of community-based norm articulation and moral aspiration also arises in the work of Thomas Shaffer. For Shaffer, justice is central to the normative universe of a community. Often expressed in a kind of prophetic vision,¹⁶⁵ community justice acquires substance from religion and religious faith.¹⁶⁶ Shaffer views religious norms as a source of moral responsibility, even when subversive of law.¹⁶⁷ His sponsored ethic of responsibility rests on spirituality realized in relation to others and in engagement with community.¹⁶⁸ The wellspring of prophetic vision, spirituality in law compels the transforma-

160. See Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983); cf. Anthony V. Alfieri, *The Ethics of Violence: Necessity, Excess, and Opposition*, 94 COLUM. L. REV. 1721, 1728 (1994) (examining the role of lawyers in Cover’s writings).

161. Cover, *supra* note 160, at 9.

162. *Id.*

163. See Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1301–02 (1982). See generally ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975) (tracing the moral dilemmas and dissonance spawned by the enactment and enforcement of the Fugitive Slave Law).

164. See Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 658–80, 682 (1981).

165. Theologically, Shaffer’s prophetic vision comes from a biblical sense of justice and spiritual renewal. See Thomas L. Shaffer, *Should a Christian Lawyer Sign Up for Simon’s Practice of Justice?*, 51 STAN. L. REV. 903 (1999) (reviewing WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS* (1998)); Thomas L. Shaffer, *The Irony of Lawyers’ Justice in America*, 70 FORDHAM L. REV. 1857 (2002).

166. See generally THOMAS L. SHAFFER, *ON BEING A CHRISTIAN AND A LAWYER: LAW FOR THE INNOCENT* (1981); Thomas L. Shaffer, *Legal Ethics and Jurisprudence from Within Religious Congregations*, 76 NOTRE DAME L. REV. 961 (2001).

167. See Thomas L. Shaffer, *Faith Tends to Subvert Legal Order*, 66 FORDHAM L. REV. 1089 (1998); see also Thomas L. Shaffer, *Client Counseling and Moral Responsibility*, 30 PEPP. L. REV. 591, 628 (2003).

168. On spiritual engagement as love and reconstructive community, see Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV.

tion of the profession into a responsive moral community.¹⁶⁹ Basic to spiritual fulfillment, that transformation entails both self-alteration and context-transcendence. Transcendence connects the self and the other in a moment of communion. That community-affirming moment enables the investigation of alternative types of client-lawyer relationships that neither devalue nor exclude moral commitment to others beside the client. At the crux of that investigation stands moral decisionmaking.

Lawyer moral decisionmaking abides in the general obligation to reconcile competing visions of the common good in law and ethics. Discharging this obligation requires lawyers to combat moral disassociation and to eschew self-interest in both advocacy and counseling. The abandonment of client and personal self-interest begins the process of reconciling client individual rights and lawyer social responsibilities. That process entrusts lawyers as custodians of community. Their custodial duty involves dialogue with clients and communities over the place and power of conscience in opposing self-dealing. Dialogue brings compassion and empathy for the interests of the other into the lawyering process.

The rediscovery and integration of classical norms into the lawyering process draws direction and strength from the work of Kronman, Cover, and Shaffer. Although they present distinct secular and nonsecular visions of the lawyer in society, they share commitments to fellowship and community bound alternately by prudential deliberation, moral dialogue, and spiritual faith. They also share in the belief that private self-interest may be overcome in the pursuit of a greater public good. The next section explores how risk management norms may impoverish moral dialogue and thereby hamper the pursuit of the public good.

III. RISK MANAGEMENT NORMS

“He comes into compliance just enough to get paid.”¹⁷⁰

Risk management norms permeate contemporary law and society. Fabricated surrogates for unstable social norms,¹⁷¹ they reflect the moral anxiety of modern

985 (1990); Anthony E. Cook, *The Death of God in American Pragmatism and Realism: Resurrecting the Value of Love in Contemporary Jurisprudence*, 82 GEO. L.J. 1431 (1994).

169. See Thomas L. Shaffer, *Lawyers as Prophets*, 15 ST. THOMAS L. REV. 469, 469–71, 477–78 (2003). See generally Thomas L. Shaffer, *Lawyers and the Biblical Prophets*, 17 NOTRE DAME J.L. ETHICS & PUB. POL’Y 521, 521 (2003) (“Much of what admirable lawyer-heroes have done . . . has been prophetic in the biblical sense”); Thomas L. Shaffer, *Towering Figures, Enigmas, and Responsive Communities in American Legal Ethics*, 51 ME. L. REV. 229 (1999) (discussing communitarian legal ethics).

170. REGAN, *supra* note 1, at 54 (quoting Bob O’Hara, Milbank partner).

171. On the relationship between law and social norms, and their impact on behavior and change, see ERIC POSNER, *LAW AND SOCIAL NORMS* (2000); Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253 (1999); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997).

lawyers and the societal disappointment in their ethical regulation. Simon ties this professional and popular disenchantment to the shallow moral aspiration and stunted social role of lawyers.¹⁷² Disenchantment comes from inside the profession, in the clamoring of bar associations and courts, and from outside, in the reproof of insurance carriers and legislative bodies.¹⁷³ Both role and aspirational constraints gain unfortunate reinforcement from state bar codes and disciplinary doctrines. The heart of that limitation lies with the meaning of legality and justice.

Simon attributes a crabbed vision of legality and justice to the overarching commitment to client loyalty in conventional views of ethics and lawyering. That categorical imperative narrows the nature and purpose of law and the legal system to a moral terrain unmindful of third party and public interests. On this terrain, ethical conventions confine decisionmaking to a restricted range of problem-solving considerations. This fixed range prescribes a small number of factors appropriate for ethical evaluation. Beyond that range of legitimate factors, decisionmakers exert no discretion.¹⁷⁴ In this way, conventional decisionmaking defines ethical legitimacy not in the discretionary consideration of other-regarding interests concerning legality and justice, but rather in the client-promoting pursuit of "any goal . . . through any arguably legal course of action,"¹⁷⁵ and its corollary principle of lawyer self-aggrandizement.

Risk management norms operate in a similarly constrained fashion. Installed to control risk and prevent loss, they dictate a variety of administrative and management techniques for minimizing legal liability.¹⁷⁶ The assessment of risk combines technical and moral calibrations. Applied broadly, the calibrations seek to measure and mitigate risk-taking conduct, shifting and spreading its consequences over participants and affected populations. Predominantly utilitarian, risk classifications assign moral blame¹⁷⁷ and create moral opportunity.¹⁷⁸ That opportunity engenders both moral risk¹⁷⁹ and responsibility.¹⁸⁰ Character-

172. See SIMON, *supra* note 9, at 1–4; William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988) (sketching a theory of ethical discretion in lawyer decisionmaking).

173. See Anthony E. Davis, *Professional Liability Insurers as Regulators of Law Practice*, 65 FORDHAM L. REV. 209, 211–19 (1996) (discussing how professional liability insurance augments existing ethical rules or creates new classes of restricted conduct); Charles Silver, *Professional Liability Insurance as Insurance and as Lawyer Regulation: Response to Davis*, 65 FORDHAM L. REV. 233, 234–41 (1996).

174. SIMON, *supra* note 9, at 8–9.

175. Simon, *supra* note 172, at 1085.

176. See John D. Graham, *Legislative Approaches to Achieving More Protection Against Risk at Less Cost*, 1997 U. CHI. LEGAL F. 13, 14–16 (1997) (discussing how people handle the everyday dimensions of risk); James G. March & Zur Shapira, *Managerial Perspectives on Risk and Risk Taking*, 33 MGMT. SCI. 1404, 1410–11 (1987) (showing how business managers avoid risk rather than accept it).

177. See Tom Baker, *Containing the Promise of Insurance: Adverse Selection and Risk Classification*, in RISK AND MORALITY 258, 262–63 (Richard V. Ericson & Aaron Doyle eds., 2003).

178. See Jonathan Simon, *Risking Rescue: High Altitude Rescue as Moral Risk and Moral Opportunity*, in RISK AND MORALITY, *supra* note 177, at 375, 399–401.

179. For analyses on moral hazard in different contexts, see CAROL HEIMER, REACTIVE RISK AND RATIONAL ACTION: MANAGING MORAL HAZARD IN INSURANCE CONTRACTS 28–48 (1985); Tom Baker, *On*

centered accounts of such responsibility afford new forms of institutional governance and social regulation.¹⁸¹

The moral utilitarianism of risk management surfaces in modeling systems for business,¹⁸² finance,¹⁸³ insurance,¹⁸⁴ and medicine.¹⁸⁵ It also inheres in tort law,¹⁸⁶ particularly medical malpractice¹⁸⁷ and lawyer malpractice.¹⁸⁸ Engrafted from business enterprise models¹⁸⁹ to ameliorate the deteriorating bonds of law firm culture,¹⁹⁰ utilitarian calculations account for salutary developments in

the Genealogy of Moral Hazard, 75 TEX. L. REV. 237 (1996); Seth J. Chandler, *The Interaction of the Tort System and Liability Insurance Regulation: Understanding Moral Hazard*, 2 CONN. INS. L.J. 91 (1996); Deborah A. Stone, *Beyond Moral Hazard: Insurance as Moral Opportunity*, 6 CONN. INS. L.J. 11 (1999).

180. See EMBRACING RISK: THE CHANGING CULTURE OF INSURANCE AND RESPONSIBILITY (Tom Baker & Jonathan Simon eds., 2002).

181. For skeptical accounts of corporate governance trends, see William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343 (1999); Robert Eli Rosen, *Risk Management and Corporate Governance: The Case of Enron*, 35 CONN. L. REV. 1157 (2003); David A. Skeel Jr., *Creditors' Ball: The 'New' New Corporate Governance in Chapter 11*, 152 U. PA. L. REV. 917 (2003).

182. See 2 BETTY VAN DER SMISSEN, LEGAL LIABILITY AND RISK MANAGEMENT FOR PUBLIC AND PRIVATE ENTITIES ch. 23, 1–18 (1990). See generally THOMAS L. BARTON ET AL., MAKING ENTERPRISE RISK MANAGEMENT PAY OFF (2002) (studying enterprise-wide risk management in businesses).

183. See generally George S. Oldfield & Anthony M. Santomero, *Risk Management in Financial Institutions*, 39 SLOAN MGMT. REV. 33 (1997).

184. See Jeffrey S. Grange, *Risk Management and the "Rogue" Trader: Trading-Related Losses, Director & Officer Liability, Prudent Risk Management, Insurance Risk Transfer, the Role of Education*, 69 FORDHAM L. REV. 329, 332–33 (2000); Neil D. Levin, *Insurance Supervision Meets the Marketplace: The Regulatory Response to Derivatives as a Risk Management Tool in the Insurance Industry*, 69 FORDHAM L. REV. 17, 17 (2000).

185. See Bryan A. Liang, *The Effectiveness of Physician Risk Management: Potential Problems for Patient Safety*, 5 RISK DECISION & POLICY 183, 194–99 (2000). See generally DAVID E. MARCINKO, INSURANCE AND RISK MANAGEMENT STRATEGIES FOR PHYSICIANS AND ADVISORS (2005); Frank V. Lefevre et al., *A Survey of Physician Training Programs in Risk Management and Communication Skills for Malpractice Prevention*, 28 J.L. Med. & Ethics 258 (2000).

186. See Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 LAW & SOC'Y REV. 275, 285 (2001); A.G. Celli, Jr., Note, *Toward a Risk Contribution Approach to Tortfeasor Identification and Multiple Causation Cases*, 65 N.Y.U. L. REV. 635, 636–37 (1990); Gary T. Schwartz, *The Ethics and the Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 313, 314–15 (1990).

187. See Tom Baker, *Medical Malpractice and the Insurance Underwriting Cycle*, 54 DEPAUL L. REV. 393, 396–98 (2005); Sarah Guyton, *An Institutional Perspective on the Medical Malpractice Crisis*, 13 ANNALS HEALTH L. 571, 573–75 (2004).

188. See John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 RUTGERS L. REV. 101, 102–04 (1995); Manuel R. Ramos, *Legal Malpractice: No Lawyer or Client Is Safe*, 47 FLA. L. REV. 1, 3–5 (1995); Manuel R. Ramos, *Legal Malpractice: Reforming Lawyers and Law Professors*, 70 TUL. L. REV. 2583, 2586–88 (1996); Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1663–65 (1994).

189. On the intersection of business and legal ethics, see Rob Atkinson, *Connecting Business Ethics and Legal Ethics for the Common Good: Come, Let Us Reason Together*, 29 J. CORP. L. 469, 510–24 (2004); Rob Atkinson, *Growing Greener Grass: Looking From Legal Ethics to Business Ethics, and Back*, 1 U. ST. THOMAS L.J. 951, 960–81 (2004).

190. On moral decay in law firm culture, see Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV.

internal controls,¹⁹¹ supervision,¹⁹² and in-house advisory structures.¹⁹³ Likewise, they contribute to considerations of law firm discipline¹⁹⁴ and partner expulsion.¹⁹⁵

Carefully mapped, risk management approaches for lawyers and law firms extend to malpractice insurance,¹⁹⁶ loss prevention,¹⁹⁷ and institutional infrastructure.¹⁹⁸ Characterized by firm-wide or practice-wide policies and procedures “designed to minimize risk,”¹⁹⁹ risk management systems establish best practice protocols to control factors that regularly lead to malpractice claims and ethics complaints. Law practice management consultants, for example, point to conflicts of interest as a recurrent risk factor creating malpractice exposure for a firm. Management consultants recommend firm-wide risk avoidance strategies, warning about the peril of “eat-what-you-kill” compensation systems that encour-

705, 720–46 (1998); William J. Wernz, *The Ethics of Large Law Firms—Responses and Reflections*, 16 GEO. J. LEGAL ETHICS 175, 186–97 (2005).

191. See Colleen L. Rest, *Electronic Mail and Confidential Client-Attorney Communications: Risk Management*, 48 CASE W. RES. L. REV. 309, 310–12 (1998).

192. See Irwin D. Miller, *Preventing Misconduct by Promoting the Ethics of Attorneys’ Supervisory Duties*, 70 NOTRE DAME L. REV. 259, 275–76 (1994).

193. See Elizabeth Chambliss & David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms*, 44 ARIZ. L. REV. 559, 565 (2002); Jonathan M. Epstein, *The In-House Ethics Advisor, Practical Benefits for the Modern Law Firm*, 7 GEO. J. LEGAL ETHICS 1011, 1012 (1994); Peter R. Jarvis & Mark J. Fucile, *Inside an In-House Legal Ethics Practice*, 14 NOTRE DAME J.L. ETHICS & PUB. POL’Y 103, 104–06 (2000); Peter J. Winders, *Law Firm General Counsel Extravagance or Necessity?*, 15 PROF. LAW. 1 (2005).

194. See Note, *Collective Sanctions and Large Law Firm Discipline*, 118 HARV. L. REV. 2336 (2005); see also Elizabeth Chambliss & David B. Wilkins, *A New Framework for Law Firm Discipline*, 16 GEO. J. LEGAL ETHICS 335, 335–36 (2003).

195. See Geoffrey C. Hazard, Jr., *The Underlying Causes of Withdrawal and Expulsion of Partners from Law Firms*, 55 WASH. & LEE L. REV. 1073, 1073–75 (1998).

196. See Susan Saab Fortney, *Legal Malpractice Insurance: Surviving the Perfect Storm*, 28 J. LEGAL PROF. 41, 43–45 (2004); Frederic L. Goldfein, *Legal Malpractice Insurance*, 61 TEMP. L. REV. 1285, 1285–86 (1988); Andrew S. Hanen & Jett Hanna, *Legal Malpractice Insurance: Exclusions, Selected Coverage and Consumer Issues*, 33 S. TEX. L. REV. 75, 77–78 (1992); Jett Hanna, *Legal Malpractice Insurance and Limited Liability Entities: An Analysis of Malpractice Risk and Underwriting Responses*, 39 S. TEX. L. REV. 641, 641–44 (1998).

197. For a look at loss prevention and malpractice generally, see Mark Bassingthwaigite, *Insurance Show and Tell: Make Sure Your Malpractice Carrier Knows About Your Firm’s Loss Prevention Efforts*, 89 A.B.A. J. 36 (2003); George M. Cohen, *Legal Malpractice Insurance and Loss Prevention: A Comparative Analysis of Economic Institutions*, 4 CONN. INS. L.J. 305 (1997).

198. See Elizabeth Chambliss & David B. Wilkins, *Promoting Effective Ethical Infrastructure in Large Law Firms: A Call for Research and Reporting*, 30 HOFSTRA L. REV. 691, 697 (2002); see also Ted Schneyer, *A Tale of Four Systems: Reflections on How Law Influences the “Ethical Infrastructure” of Law Firms*, 39 S. TEX. L. REV. 245 (1998).

199. ANTHONY E. DAVIS, *RISK MANAGEMENT: SURVIVAL TOOLS FOR LAW FIRMS* 16 (1995). Davis defines “risk” in terms of “any danger that, if not controlled, may lead to any consequence unintended by and actually or potentially harmful to a law firm or practitioner.” *Id.* at 15; see also John A. Edginton, *Managing Lawyers’ Risks at the Millennium*, 73 TUL. L. REV. 1987, 1989–90 (1999) (outlining risk management principles for law firms); William H. Fortune & Dulaney O’Roark, *Risk Management for Lawyers*, 45 S.C. L. REV. 617, 618–19 (1994) (suggesting that lawyers “manage . . . risk by practicing defensive law”); Bao Q. Tran & Jonathan P. Tomes, *Risk Analysis: Your Key to Compliance*, ACC DOCKET, Nov.–Dec. 2003, at 38–54 (discussing how to assess risk and review such assessments).

age the hoarding of work and discourage the mentoring of young lawyers, and admonishing that a firm culture of distrust breeds a stressful working environment and fuels lawyer burnout.²⁰⁰

Unsurprisingly, risk management consultants make little mention of the potentially adverse or undesirable consequences of law firm-based loss prevention systems. Like other public and private risk assessment and management technologies, firm loss prevention systems work to identify, measure, and reduce risk-taking and loss-producing behavior embedded in the litigation and transactional routines of practice.²⁰¹ Tom Baker adverts to this mundane, embedded quality in describing the “complex, relational nature of risk.”²⁰² More broadly, both Baker and Jonathan Simon point to the use of risk narratives in the social construction of practice organizations and environments²⁰³—here the tournament environment of large law firm competition, practice group expectation, and deal team motivation to accrue greater profit and revenue.

Consistent with the work of Baker and Simon, the rhetoric and technology of risk management constructs the social reality of large law firm practice by reframing individual and collective incentives for ethically responsible conduct. By altering compliance incentives, risk management technologies can prevent as well as promote risk-taking and loss-causing behavior. In acknowledging this causal relation, Baker and Simon neither exaggerate the incentive effects nor underestimate the ethical or social benefits of risk management. Both incentive effects and social benefits determine the performative role and goal of risk management. Incentive effects include cynically disguising mercantile tournament commitments in loss prevention rhetoric, irresponsibly designing management technologies to tempt risk-taking behavior, and overstating Babbity-like claims of utility.²⁰⁴ Social benefits include practicality,²⁰⁵ collaboration,²⁰⁶ and decisional clarity.²⁰⁷

No catalogue of incentive effects or positive externalities will prove that law firms can effectively manage ethical risks. Additionally, no catalogue will prove

200. See Suzanne Rose, *Risk Management: Is the Culture of Your Firm Inviting Malpractice or Ethics Violations?*, 41 TENN. B.J. 22, 23–24 (2005) (counseling law firms on risk avoidance through culture modification).

201. See Tom Baker & Jonathan Simon, *Embracing Risk*, in *EMBRACING RISK: THE CHANGING CULTURE OF INSURANCE AND RESPONSIBILITY*, *supra* note 180, at 1–25.

202. Baker, *supra* note 179, at 289.

203. See Tom Baker & Jonathan Simon, *Embracing Risk*, in *EMBRACING RISK: THE CHANGING CULTURE OF INSURANCE AND RESPONSIBILITY*, *supra* note 180, at 18.

204. See William H. Simon, *The Ethics Teacher's Bittersweet Revenge*, 94 GEO. L.J. 1985 (2006). Incentive effects may also implicate moral hazard. For Baker, “‘moral hazard’ refers to the tendency for insurance against loss to reduce incentives to prevent or minimize the cost of loss.” Baker, *supra* note 184, at 239. Without more, it is unclear whether risk management systems create moral hazard by encouraging or tempting “good people to do wrong” *Id.* at 241.

205. Simon, *supra* note 204, at 1987 (“Risk management forces attention to practical consequences of professional responsibility decisions, at least insofar as consequences are measured by liability.”).

206. *Id.* at 1988 (“The risk management view is resolutely collaborative.”).

207. *Id.* at 1990 (“[L]ike ethics teaching, risk management encourages clear articulation of ethical decisions.”).

that firm management procedures can cause harmful or beneficial consequences. And surely no catalogue will prove that such consequences warrant the abandonment of individual lawyer fault and collective firm responsibility for misconduct. Yet the idea of “*governing through risk*” remains compelling in the literature of insurance and law office management. To Baker and Simon, “the core idea of governing through risk is the use of formal considerations about risk to direct organizational strategy and resources.”²⁰⁸

Regan’s case study of the Bucyrus representation illustrates the dangers attendant to formal and informal considerations of risk regulation in large law firm governance. In undertaking the dual representation of Bucyrus and Salovaara-South Street in spite of potentially adverse and materially limiting conflicts of interest, Milbank breached its fiduciary duties to Bucyrus by failing to make reasonable efforts to establish and to enforce ethics rule-mandated internal firm policies and procedures designed to detect and resolve directly adverse and materially limiting conflicts of interest.²⁰⁹ Furthermore, Milbank breached its fiduciary duties by failing to provide reasonable assurance that all lawyers in the firm conformed to the rules of ethics.²¹⁰

ABA Model Rule 5.1 regulates the responsibilities of firm partners, managers, and supervisory lawyers.²¹¹ Section (a) of Rule 5.1 mandates reasonable efforts by partners and other lawyers possessing comparable managerial authority in a law firm to ensure that their firm has in effect measures giving reasonable assurance that all lawyers conform to applicable ethics rules. Section (b) mandates reasonable efforts by a supervisory lawyer, here Lederman as corporate practice group leader, to ensure that other lawyers, Gellene and the Milbank legal team, conform to such rules. Section (c) mandates reasonable remedial action when the lawyer “knows of the conduct at a time when its consequences can be avoided or mitigated.”²¹²

The Comment to Rule 5.1 points out that “[i]n a large firm, or in practice situations in which intensely difficult ethical problems frequently arise, more elaborate procedures may be necessary.”²¹³ Under Rule 5.1, Milbank’s partners, managers, and supervisory lawyers could not assume that Lederman, Gellene, or any other member of the Bucyrus legal team would inevitably conform to the rules. Because “the ethical atmosphere of a firm can influence the conduct of all

208. See Baker & Simon, *supra* note 180, at 11.

209. See REGAN, *supra* note 1, at 215–16.

210. See *id.* at 314–24.

211. See MODEL RULES OF PROF’L CONDUCT R. 5.1 (2004); see also MODEL CODE OF PROF’L RESPONSIBILITY DR 1-102 & DR 1-103(A) (1983); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 cmt. g (2000) (“For the purpose of identifying conflicts of interest, a lawyer should have reasonable procedures, appropriate for the size and type of firm and practice, to detect conflicts of interest, including procedures to determine in both litigation and nonlitigation matters the parties and interests involved in each representation.”); ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 96-401 (1996) (citing lawyer supervisory obligations under Rule 5.1).

212. See MODEL RULES OF PROF’L CONDUCT R. 5.1 (2004).

213. See MODEL RULES OF PROF’L CONDUCT R. 5.1 cmt. 3 (2004).

its members," each of Milbank's partners, managers, and supervisory lawyers had at least indirect responsibility for all work being done by the firm.²¹⁴

The Bucyrus representation signals Milbank's institutional failure to establish conflict of interest oversight and enforcement procedures, and Milbank lawyers' individual abdication of their supervisory responsibilities. That failure resulted in the impermissible dual representation of Bucyrus and Salovaara-South Street. Neither Larry Lederman nor Toni Lichstein, nor any other Milbank partners, managers, or supervisory lawyers, intervened to halt that dual representation or interceded to audit Gellene's former or current corporate clients for similar disqualifying conflicts.²¹⁵ Milbank's failure to establish and enforce internal firm policies and procedures designed to detect and resolve directly adverse and materially limiting conflicts of interest, its failure to provide reasonable assurance that all lawyers in the firm conformed to the rules, and its failure to take reasonable remedial action to prevent disqualifying conflicts of interest in their dual representation violated axiomatic ethics rules and the basic tenets of risk management.

Standing alone, however, risk management tools would not have saved Milbank's Bucyrus representation from ethical censure. Perversely, risk management systems may actually imperil lawyer ethical judgment and moral reasoning. Oftentimes those systems put lawyer moral decisionmaking in jeopardy by shifting responsibility for hard normative judgments to others inside the firm bureaucracy, such as in-house ethics advisors and committees. By diminishing a lawyer's *individual* responsibility for making moral choices about his role in law and society, firm-devised risk spreading systems may induce a kind of moral apathy. Institutional indifference to the daily necessity of individual discretion in determining the scope of lawyer obligation to clients, third parties, and the public inhibits moral development and hobbles professional independence.²¹⁶

Furthermore, wedded to categorical styles of ethical decisionmaking, risk management systems urge lawyers to vindicate client interests at the expense of underlying legal merit. Vindication prompts judgments based on concrete client-centered norms applied narrowly to the particular facts of a case. Under this constricted logic, the promotion of justice, and the corresponding elevation of system-wide procedural and substantive norms, diverges from the pursuit of client private goals.

The systemic preference for private values in risk management regulation undermines the aspirational tradition of legal professionalism. That tradition honors fidelity to law and to a greater ideal of public justice in addressing legal ethics problems. Simon points to recurring analytic tensions in distinguishing

214. *See id.*

215. *See generally* REGAN, *supra* note 1.

216. *See* Milton C. Regan, Jr., *Risky Business*, 94 GEO. L.J. 1957, 1966 (2006) ("[C]onceptualizing ethics as a matter of avoiding liability can influence [personal] dispositions, attitudes, and motives, and therefore how someone exercises her discretion."); SIMON, *supra* note 9, at 109–37.

substance from procedure, purpose from form, and broad from narrow framing in resolving ethics problems.²¹⁷ These tensions are aggravated by the thin norms of justice and legal merit embedded in legal ethics codes.

Ethics codes, Simon laments, furnish neither a substantive yardstick for evaluating legal merit nor a procedural compass for conducting that evaluation. Absent a merit-based substantive benchmark and an alternative procedural matrix, the codes rely on formal, narrowly tailored issue-framing methodologies to reach decisions. Reliance precludes the contextual formulation of a decision-making method combining substantive purpose, pragmatism, and particularized fact. An interpretive method of this sort, Simon asserts, harnesses lawyer knowledge to substantive law. The institutionalization of that "high-commitment lawyering" method requires an enforcement structure built from contextual norms, strengthened by voluntary rule commitments, and supervised by bar associations, courts, legislatures, and public regulatory agencies.²¹⁸ Most important, it requires the exercise of lawyer discretion.

Discretion suffers under law firm risk management systems. Designed to prevent loss and minimize liability for law firms, the systems produce both moral risk and opportunity for lawyers. Moral risk, whether displayed in amoral or ethically risk-taking behavior, emerges from a mix of lethargy and utilitarianism. Lethargy marks lawyer overreliance on firm risk management systems. The morally lethargic lawyer is a kind of free rider, enjoying the benefits of risk management systems without contributing to their substantive content, enforcement, or maintenance. Utilitarianism elevates private client loyalty over public and professionalism values. The morally utilitarian lawyer exploits under-inclusive gaps in risk management systems to advance client interests at the expense of public accountability and professional compliance. And yet, when grounded in the norms of legality and justice, risk management systems also furnish lawyers with the moral opportunity to exercise discretion on behalf of higher values. The next section examines the substance of discretionary norms.

IV. DISCRETIONARY NORMS

"[Y]ou just couldn't imagine it"²¹⁹

The integration of discretionary norms into conventional risk management systems seeks to enhance traditions of lawyer accountability independent of disciplinary or regulatory law enforcement. Internal to practice and the rhetoric of professionalism, discretionary norms draw from the resources of the law itself, chiefly legality and justice. Simon's justice-seeking version of discretion in lawyering involves purposive and practical judgments about case selection

217. See SIMON, *supra* note 9, at 138–69.

218. See *id.* at 205. For earlier, less amenable accounts of Simon's jurisprudence, see Anthony V. Alfieri, *(Er)Raceing an Ethic of Justice*, 51 STAN. L. REV. 935 (1999); Anthony V. Alfieri, *Impoverished Practices*, 81 GEO. L.J. 2567, 2619–29 (1993).

219. REGAN, *supra* note 1, at 368 (quoting David Goelzer).

and strategy. Predicated on qualified conceptions of autonomy from state authority and the dominant legal order, the judgments connect case selection and strategy to the promotion of legality and justice. Both conceptions of autonomy imply the exercise of lawyer discretion.²²⁰

Simon's discretionary approach to ethical decisionmaking enables lawyers to refuse legally permissible courses of action and to rebuff potentially enforceable legal claims.²²¹ Tied to reflective judgment, this twin rebuke turns on a concurrent assessment of the merits of a client's claims relative to the merits of third party claims joined with or adjacent to the representation. Reconciliation of the conflicting merits of competing client and third party goals is integral to this assessment. Considerations of justice remain basic to that reconciliation.²²²

Simon links ethical discretion to the traditional ambition of direct lawyer participation in the elaboration and implementation of legality and justice. Redeeming that ambition requires independence from client goals and state laws sufficient to vindicate legal merit and justice.²²³ Vindication depends on the relevant circumstances of the particular case. Particularized by design, discretionary norms address the complexity of client case goals with the flexibility of judicial decisionmaking. Accustomed to multiparty and multiclaim contexts, that style of decisionmaking entails practical judgments about the internal and relative merit of competing claims and goals.²²⁴ Pragmatic in nature, the judgments first assess the extent to which a client's goals and claims are grounded in the law. Next, the judgments consider the interests at stake, especially the extent to which the representation may equalize access to the legal system. For Simon, the sensitivity of this interest analysis to the unequal distribution of legal services in society permits a good faith accounting of relative merit.²²⁵

Judgments of internal merit, by comparison, warrant the evaluation of conflicting legal values implicated directly in a client's claim or goal. Variable in form, legal value conflicts display the previously mentioned tensions found in the clash between substance and procedure, and in the contest between overbroad and narrow framing. Like Cover,²²⁶ Simon cautiously delegates responsibility for such conflict resolution to state decisionmakers, invoking the lawyer duty to intervene if bias or incompetence infects the state decisionmaking process.²²⁷

To both Cover and Simon, the strongest assurance of a just decisionmaking process is the soundness of its dispute resolution procedure.²²⁸ The value of

220. See Simon, *Ethical Discretion in Lawyering*, *supra* note 172, at 1083–84.

221. See *id.* at 1083.

222. See *id.* at 1083, 1091.

223. See *id.* at 1144.

224. See *id.* at 1090–91.

225. See *id.* at 1093–94.

226. See COVER, *supra* note 163, at 201–56.

227. See Simon, *Ethical Discretion in Lawyering*, *supra* note 172, at 1096–98.

228. See SIMON, *supra* note 9, at 139–40.

process compels reasonable intervention to render applicable procedure effective and to forego disruption of its operation. Triggered by ineffective or unjust procedure, this interventionist duty confers direct responsibility on the lawyer for the substantive validity of the decision at stake. That duty, Simon explains, requires difficult judgments about the purpose and form of procedural rules. The clearer the relevant purposes, the more binding their grip on the lawyer.²²⁹

The definitional frameworks of competing claims and goals guide discretionary judgments of procedural purpose and form. The broad and narrow framing of an issue, take for example conflicts of interest in bankruptcy reorganization, contributes to party and third party perception of adversity and to the chances of negotiated or adjudicated resolution. Simon gives lawyers responsibility for determining the broad or narrow framing of the issues in a particular case, announcing general standards of relevance to guide that framing. The standards include interpretive plausibility, practical impact, knowledge, and institutional competence.²³⁰ Applied to the Bucyrus bankruptcy, the standards suggest both the interpretive implausibility of Gellene's narrow conflict framing and the adverse practical impact of his dual representation on debtor and creditor perception of the integrity of the bankruptcy process. Milbank lacked the institutional competence to rescue that process.

The deep commitment to the legal values of merit, substance, procedure, and purpose grounding Simon's discretionary approach facilitates lawyer good faith judgments about legality and justice in advocacy and counseling. The Bucyrus bankruptcy shows that a lack of good faith by Gellene and a scarcity of client commitment by Salovaara-South Street to the norms of legality and justice undercut the legitimacy of lawyer discretion. Obtaining that commitment through lawyer-client or joint client-client normative consensus seems unlikely in the Bucyrus context of intense party conflict between Salovaara-South Street and JNL. Entrenched party discord also condemns republican appeal to communal dialogue and deliberation of the common good.²³¹

Simon's emphasis on the legal values of internal merit and goal selection illustrates the danger of Gellene's unrelenting ends-orientation to ethical decision-making. By discarding relative merit, that orientation abandoned the pursuit of consensus and legality. From the standpoint of discretion, Gellene possessed the capacity to frustrate the goals of both clients and third parties. For Simon, that legitimate capacity empowers lawyer infringement on client claim and goal autonomy. The path to infringement is carved from the jurisprudence of balancing. Lawyer balancing of legal interests in the Bucyrus bankruptcy and elsewhere offers a pragmatic method of resolving countervailing categorical claims of loyalty, legality, and justice. Fundamental to lawyer normative judgment, the effective balancing of categorical norms requires conditions of reasoned, cooper-

229. See Simon, *supra* note 172, at 1103.

230. See *id.* at 1108-09.

231. Long-run claims of justice fail to revive this republican appeal. See SIMON, *supra* note 9, at 53-76.

ative, and inclusive deliberation in the interests of legality and justice.

Gellene and Milbank breached their deliberative duties to Bucyrus and consequently failed to act in Bucyrus's best interest as a financially distressed entity. Each failed to warn Bucyrus's board of directors of directly adverse and materially limiting conflicts of interest, and failed to counsel the board on the appropriate resolution of such conflicts. Moreover, each failed to explain client identity to Bucyrus's constituent directors, officers, and creditor shareholders, and failed to counsel Bucyrus to obtain independent representation.²³²

ABA Model Rule 1.13 regulates the representation of an entity organization as client.²³³ Section (a) of Rule 1.13 posits that a lawyer retained by an organization represents the organization acting through its duly authorized constituents.²³⁴ Section (b) mandates that the lawyer for an organization proceed as is reasonably necessary in the best interest of the organization. This duty applies when the lawyer knows that a constituent director, officer, or shareholder "is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization."²³⁵ Remedial measures include referring the matter to a higher authority or, when sufficiently serious, to the highest authority in the organization, ordinarily the board of directors.²³⁶ The Comment to Rule 1.13 notes that "[t]he organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body," adding that "under certain conditions highest authority reposes elsewhere, for example, in the independent directors of a corporation."²³⁷ Section (f) regulates the identification of the client. It directs the lawyer in dealing with an organization's directors, officers, and shareholders to "explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."²³⁸

The Comment to Rule 1.13 adds, that in circumstances of organization-constituent adversity, "the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential

232. REGAN, *supra* note 1, at 71-172.

233. See MODEL RULES OF PROF'L CONDUCT R. 1.13 (2004); see also MODEL CODE OF PROF'L RESPONSIBILITY EC 5-18 & 5-24 (1983) (discussing the responsibilities of a lawyer retained or employed by a corporation); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 16, 49, 96 & 131 (2000) (discussing a lawyer's duties to a client in general, breach of fiduciary duty, representation of organizations, and conflicts of interest in representing organizations, respectively). See generally ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-365 (1992) (discussing conflicts of interest in representing trade associations as clients); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 91-361 (1991) (discussing representation of a partnership).

234. MODEL RULES OF PROF'L CONDUCT R. 1.13(a) (2004).

235. MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2004).

236. See *id.*

237. MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. 5 (2004).

238. MODEL RULES OF PROF'L CONDUCT R. 1.13(f) (2004).

conflict of interest, that the lawyer cannot represent such constituent and that such person may wish to obtain independent representation.”²³⁹ The lawyer’s issuance of a constituent adversity warning hinges on the facts of each case. Section (g) regulates the dual representation of an organization and its constituent directors, officers, and shareholders.²⁴⁰ It conditions dual organization-constituent representation on the conflict-of-interest provisions of Rule 1.7. When, as here, Rule 1.7 requires the organization’s consent, section (g) demands that “the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.”²⁴¹

Gellene and Milbank compounded their breach of deliberative duties under Rule 1.13 by failing to decline or withdraw from the representation of Bucyrus. Simultaneous with Rules 1.7 and 1.13, Rule 1.16 regulates declining and terminating representation.²⁴² Section (a) of the rule determines when a lawyer must decline²⁴³ or terminate²⁴⁴ representation.²⁴⁵ It prohibits a lawyer from representing a client and, where representation has commenced, compels a lawyer to withdraw from representing a client if the representation will result in violation of an ethics rule or law.²⁴⁶ The Comment to Rule 1.16 underlines that a lawyer should not accept representation in a matter unless it can be performed competently and without improper conflicts of interest.²⁴⁷

The collective misjudgments of Gellene and Milbank violated their fiduciary duties of care, competence, and undivided loyalty to Bucyrus. Regan views these misjudgments as a kind of myopia induced by tournament competition, corporate practice insularity, and transactional team allegiance.²⁴⁸ Conceding disturbing patterns of negligence and dishonesty in Gellene’s character, he closely scrutinizes the predecessor and successor events surrounding the Bucyrus bankruptcy. In predecessor events, he discerns a lack of candor and collegiality

239. MODEL RULES OF PROF’L CONDUCT R. 1.13 cmt. 10 (2004).

240. MODEL RULES OF PROF’L CONDUCT R. 1.13(e) (2004).

241. *Id.*

242. MODEL RULES OF PROF’L CONDUCT R. 1.16 (2004).

243. Under Model Rule 1.7, a conflict of interest may exist prior to representation. In that event, the rule directs declination of the representation, unless the lawyer obtains the informed consent of each client. The rule recommends the adoption of reasonable firm-wide procedures, appropriate for the size and type of firm practice, to determine the persons and issues embroiled in both litigation and nonlitigation conflicts. MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 3 (2004).

244. Alternatively, under Model Rule 1.7, a conflict may arise subsequent to representation. In such event, the rule ordinarily directs withdrawal from the representation, unless the lawyer obtains the informed consent of the client. MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 4 (2004).

245. MODEL RULES OF PROF’L CONDUCT R. 1.16(a) (2004).

246. *Id.*

247. MODEL RULES OF PROF’L CONDUCT R. 1.16 cmt. 1 (2004); *see also* MODEL CODE OF PROF’L RESPONSIBILITY DR 2-109(A), DR 2-110(A)–(C) (1983) (discussing acceptance of and withdrawal from employment); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 31–32 (2000). *See generally* ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 92-366 (1992) (discussing withdrawal when a lawyer’s services will otherwise be used to perpetrate a fraud).

248. REGAN, *supra* note 1, at 37–41, 298.

demonstrated by Gellene's delinquent and retrospective reconstruction of his billing records, his shunning of mentoring responsibilities related to Milbank's summer associate program, and his nine-year long misrepresentation of his New York and federal bar memberships to Milbank and the Wisconsin bankruptcy court.²⁴⁹ In successor events, Regan detects repeated misrepresentations in Gellene's colloquy with Judge Eisenberg regarding Milbank's misleading disclosure of its firm partners' ownership interest in litigation-related transportation fees, his false statement to a Colorado bankruptcy court regarding discovery noncompliance in connection with the Busse Broadcasting Corporation debt purchase transaction, his intentional alteration of opposing counsel's affidavit accompanying JNL's disgorgement motion, and his deceptive denials to Milbank partners concerning receipt of the JNL motion.²⁵⁰

Evaluating these events cumulatively, Regan identifies equal evidence of defensive dishonesty and active material deceit in Gellene's conduct. He attributes these errors of judgments to both character and circumstance. At the same time, he acknowledges that Gellene paid little heed to legality and justice norms, preferring crabbed readings of his categorical duties. To capture Gellene's moral universe, Regan situates his personal character in the broader context of the newly volatile market of large law firm practice. Within a highly competitive legal services market where law firms, practice groups, and transactional teams struggle to attract and retain clients, Regan asserts, the moral probity of individual lawyers becomes entwined with the corrosive formal and informal dynamics of multiple ethical environments.²⁵¹

In Gellene's case, this entwining of the individual and his environment, of character and circumstance, spiraled downward out of a calculated strategy by Milbank to invigorate its corporate transactional practice to exploit the surging demand for corporate bankruptcy representation. Like comparable Wall Street firms, Milbank recognized that its strategic maneuver risked conflicts of interest with former and current corporate clients, as well as doctrinal quarrels with bankruptcy courts in states less tolerant of debtor-creditor conflicts.²⁵² Milbank also realized that its lateral recruitment and elevation of "rainmaker" partners like Lederman drastically altered the culture of the firm.²⁵³

Nonetheless, Regan declines to attribute the Bucyrus debacle solely to the

249. *Id.* at 53–54, 60–62. In 1989, Milbank discovered that Gellene had neglected to acquire membership in the New York state bar and the federal bar, delaying his licensing for almost nine years, despite his assertions to the contrary. As a consequence, Milbank removed Gellene as a partner, reinstating him only after the state bar conducted a hearing and reached a decision to accept his application. By way of penalty, the 1991 reinstatement redesignated Gellene's partnership class, depriving him of two years of seniority. *Id.* at 60–62.

250. *Id.* at 198–99, 301. Gellene's neglect resulted in a court ordered default judgment against South Street and a loss of \$19.9 million. In submissions to the court, Gellene falsely attributed the delay to a conflict between Salovaara and Eckert. *Id.* at 301.

251. *Id.* at 37–42.

252. *Id.* at 57–59.

253. *Id.* at 63–70.

defective character of individuals or the corruption of organizations. Attentive to the complexities of individual and social psychology, he labors to appraise Gellene's personality and character in light of the culture of Wall Street partner tournaments, the norms of specialized practice fields, and the dynamics of deal teams, here immersed in the Bucyrus bankruptcy.²⁵⁴ In making this appraisal, he observes that the culture and norms of each firm, each field, and each team vary in accordance with the peculiar pressures, incentives, and temptations of the situation. More disquieting, he likens Gellene's personality to the majority of other corporate lawyers, noting the keen resemblance of traits and values.²⁵⁵

Able drawing on the insights of organizational theory, Regan describes Gellene's personality as well-suited to achieving tournament success in harshly competitive law firm practice environments. By now, he remarks, these partnership tournaments, specialized practice groups, and project teams dominate the modern culture of large firms. In fact, Gellene's status anxiety, case hoarding, and workload stress evince adaptive personality traits useful to professional life in large law firms. These highly functional traits, Regan admits, suggest that tournament survivors may be susceptible to strained moral rationalizations made necessary to justify the troubling outcomes of changing firm and market competitions.²⁵⁶ Contingent on the particularities of specific environments and reward systems, the rationalizations deform the perception and resolution of ethical issues.²⁵⁷ To the extent that the self-regarding norms of an invented organizational culture produce such ethical deformity in lawyers and law firms, they may be altered.

The alteration of the normative underpinnings of law firm tournament competitions, specialty practice expectations, and project team dynamics requires both the recollection and the intervention of other-regarding regulatory norms. The norms apply equally to litigation advocacy and transactional counseling. Rooted in traditional conceptions of legality and justice, they renew and reconstruct the crucial linkages connecting client claims and goals to legal merit, thereby recapturing the substantive logic of procedure and the intrinsic purpose of regulation. The next section considers the intervention of other-regarding regulatory norms.

V. REGULATORY NORMS

“‘[H]old him accountable.’”²⁵⁸

254. *Id.* at 344–47.

255. *Id.* at 4–6.

256. *Id.* at 41–42.

257. See RICHARD SENNETT, *THE CORROSION OF CHARACTER: THE PERSONAL CONSEQUENCES OF WORK IN THE NEW CAPITALISM* 99, 116 (1998); Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes, Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1423 (1997).

258. REGAN, *supra* note 1, at 272 (quoting Assistant U.S. Attorney Stephen Biskupic's closing federal prosecution argument).

The relative absence of other-regarding norms from risk management systems has not inhibited a growing revival of comparable regulatory norms within large law firms. At its best, that revival infuses professionalism with moral ambition and activism.²⁵⁹ Both ambition and activism may be seen unfolding in the ongoing rise of firm ethics advisors and in-house corporate counselors.²⁶⁰ Charged with rebuilding the ethical infrastructure of law firms, these institutional activists struggle to revise the boundaries of relevant ethical precepts and to accommodate the new economics of law firm governance.²⁶¹ Goaded by calls for law firm discipline²⁶² and the demands of corporate clients, their work continues to redefine the modern law firm as a business organization.

Regan's interest in the behavior of business organizations drives his analysis of large law firms and their changing regulatory culture. He treats modern law firms as business enterprises wrestling to accommodate and resist powerful market forces. Embattled by internal pressures and external forces, the firms strive to function as self-conscious economic entities seeking to improve efficiency and productivity, and to expand profits and market share.

Endeavoring to uphold ethical ideals against the onslaught of market exigencies, Regan attempts to identify governance and regulatory measures capable of fortifying the ethical infrastructure of law firm organization. The fortification of firm infrastructure results from a blend of formal policies and informal cultural norms. The key to this integration is compliance. For Regan, noteworthy examples of firm compliance-enforcing procedures include the formation of "new business" committees to review conflicts of interest generated by new clients and new matters, the conditioning of attorney billing code assignments on mandatory conflicts checks, the appointment of full-time in-house ethics advisers supported by adequate partner and associate staffing, the establishment of secondary partner review mechanisms for all firm-issued legal opinions, the implementation of partner approval protocols for letters prepared in response to client auditor information requests, the designation of in-house partner liaisons to consult with firm malpractice insurance carriers, and the sponsorship of interactive ethics training for lawyers and support staff.²⁶³

However laudatory these procedures, Regan concedes that they may prove

259. See Robert W. Gordon & William H. Simon, *The Redemption of Professionalism?*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 230-57 (Robert L. Nelson, David M. Trubek & Rayman L. Solomon eds., 1992).

260. See Robert L. Nelson & Laura Beth Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 *LAW & SOC'Y REV.* 457, 490 (2000); Robert Eli Rosen, *The Inside Counsel Movement: Professional Judgment and Organizational Representation*, 64 *IND. L.J.* 479 (1989).

261. See Elizabeth Chambliss, *The Scope of In-Firm Privilege*, 80 *NOTRE DAME L. REV.* 1721, 1758 (2005).

262. See Ted Schneyer, *Professional Discipline for Law Firms?*, 77 *CORNELL L. REV.* 1 (1991); see also Julie Rose O'Sullivan, *Professional Discipline for Law Firms? A Response to Professor Schneyer's Proposal*, 16 *GEO. J. LEGAL ETHICS* 1 (2002) (re-examining Professor Schneyer's argument for a respondeat superior standard to assure law firm compliance with ethics standards).

263. REGAN, *supra* note 1, at 358-59.

futile if adopted without instilling an organization-wide culture to reinforce ethical behavior.²⁶⁴ To fashion this culture, Regan looks to the practices of corporate legal compliance. Research on corporate compliance, he notes, points to the importance of organizational leadership (e.g., board directors and committees) in monitoring legal compliance. Effective monitoring requires resources, access to information, and independent auditors both inside and outside the organization. Monitoring also requires adequate supervision of practice groups, teams, and positions vulnerable to unethical or illegal behavior. Supervision bears great import for Regan. On his analysis, supervision promotes compliance when it works to educate and train employees about ethics and legality, monitor conduct through audits and certification, prevent efforts to shield management from incriminating knowledge, foster upstream and downstream communication, safeguard employees designated to receive reports of unethical conduct, and link compensation to compliance performance.²⁶⁵

Building an ethical infrastructure as a normative foundation to inculcate an organizational ethos of compliance is critical to Regan's vision of the modern law firm as a business enterprise.²⁶⁶ The inexorable cultural and economic transformation of the Wall Street law firm prods Regan to consider both the content and the context of corporate compliance programs. Regulated market contexts, he observes, subject corporations to public oversight and discipline by government bodies armed with specialized expertise and enforcement powers, including federal criminal prosecution referrals. Outfitted with the authority to impose civil and criminal liability, oversight agencies investigate statutory violations, reporting the results under the Organizational Sentencing Guidelines, and utilize compliance incentives, persuading corporations to avoid prosecution or obtain lenient treatment. Adverting to the benefits of this regulatory context, Regan notes the corporate development of programmatic compliance training and supervision, and the institutionalization of corporate ethics staffs within specific companies and across whole industries.²⁶⁷

Enlarging this contextual analysis, Regan analogizes the function of specialized law firm practice groups and task-differentiated corporate departments. Like corporate departments, Regan explains, law firm practice groups operate in accordance with rules promulgated by legislatures, administrative agencies, and courts. By way of example, he cites the congressional formulation of standards of conduct governing securities lawyers under the recent Sarbanes-Oxley legislation and the implementing rules of the Securities and Exchange Commission. He also cites Internal Revenue Service regulations governing the conduct of

264. *See id.*; *see also* Harvey S. James Jr., *Reinforcing Ethical Decision Making through Organizational Structure*, 28 J. BUS. ETHICS 43 (2000) (arguing that a formal organization structure, including compensation practices, performance and evaluation systems, and decision-making assignments, is necessary but not sufficient to promote ethical conduct).

265. REGAN, *supra* note 1, at 358–61.

266. *Id.* at 358.

267. *Id.* at 360.

lawyers in providing tax advice and issuing tax shelter opinion letters. In fact, he remarks, the regulatory promulgation of lawyers' ethical obligations extends to the Office of Thrift Supervision and the Federal Home Loan Bank Board in the field of banking, and to the Patent and Trademark Office in the field of intellectual property.²⁶⁸

Regan approves the federal trend toward lawyer regulation by specialized government bodies.²⁶⁹ Throughout he maintains that the assessment of lawyer and law firm conduct requires contextual awareness of specific workplace norms and practices. An awareness of the normative contests and practice dynamics indigenous to certain fields of law and lawyering enables regulatory entities to better grasp the categorical and discretionary obligations at hand in resolving ethics disputes. That regulatory grasp, Regan opines, should produce closely aligned street-level lawyer guidance. Accordingly, when forged by well-versed entities out of collaborative dialogue with affected corporate and legal actors, and cast to encapsulate the realism of particular practices among corporations, industries, and global markets, such guidance is more likely to be deemed fair and deserving of compliance.²⁷⁰

Regan supports this corporate compliance incentive thesis by utilitarian reference to enhanced regulatory enforcement. Reasoning in the context of corporate law practice, he contends that the designation of a public entity to participate intimately in the regulation of lawyers within its field of expertise countenances social concerns more effectively than an alternative bar disciplinary system lacking such specialized knowledge. Extending this logic to law firms, he emphasizes the importance of developing internal regulatory systems responsive to the recurrent ethical issues common to specialized practice groups and teams. The best practice systems (e.g., client databases, conflicts clearance checks, and standardized billing guidelines) vest responsibility for compliance measures and enforcement penalties in practitioner specialists working in cooperation with a firm-designated practice group ethics partner and a firm-wide ethics committee. Patterned after corporate compliance teams, this ethics speciality team clutches the activist norms of organizational culture to promote regulatory compliance.²⁷¹

Regan's focus on the centrality of organizational culture and ethos to both corporate enterprises and corporate law firms is decisive. From this stance, he declares "much of modern law practice is big business."²⁷² To Regan, however, that recognition counts only as "the first step in developing standards that offer a realistic possibility of preserving the distinctive values of the legal profes-

268. *See id.* at 361–66.

269. *Id.* at 366.

270. *Id.* at 361.

271. *Id.* at 365–66. *See generally* DAVID P. McCaffrey & David W. Hart, WALL STREET POLICES ITSELF: HOW SECURITIES FIRMS MANAGE THE LEGAL HAZARDS OF COMPETITIVE PRESSURES (1998) (describing the methods securities firms use for self-regulation).

272. REGAN, *supra* note 1, at 366.

sion.”²⁷³ Those distinctive values—accountability, legality, and justice—are fundamental to reviving the traditional ambitions of professionalism. To flourish, that revival must occur on more than an organizational plane. The revival must affirm personal values²⁷⁴ and professional independence.²⁷⁵ It must reinvigorate professionalism²⁷⁶ and professional reputation²⁷⁷ as aspirational norms consistent with the lawyer’s traditional problem-solving role in advancing public justice in community-based contexts.²⁷⁸ A reinvigorated professionalism celebrates integrity²⁷⁹ and virtue,²⁸⁰ as well as positive law obligation.²⁸¹ It reasserts lawyers as moral agents with corresponding duties of candor and honesty, duties desecrated by the contrived ignorance of Larry Lederman²⁸² and

273. *Id.*

274. See Mitchell M. Simon, *Navigating Troubled Waters: Dealing with Personal Values when Representing Others*, 43 BRANDEIS L.J. 415 (2005) (developing a framework for incorporating individual morality into daily legal choices).

275. See Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988) (identifying three aspects of independence and focusing on means of developing “autonomous social force”); Robert Eli Rosen, *Problem-Setting and Serving the Organizational Client: Legal Diagnosis and Professional Independence*, 56 U. MIAMI L. REV. 179 (2001) (discussing the significance of problem identification).

276. See Deborah L. Rhode, *The Professionalism Problem*, 39 WM. & MARY L. REV. 283, 315–25 (1998) (suggesting creative ways to strengthen professionalism).

277. See Milton C. Regan, Jr., *Professional Reputation: Looking for the Good Lawyer*, 39 S. TEX. L. REV. 549 (1998) (discussing the importance of reputation for legal work).

278. See William H. Simon, *Criminal Defenders and Community Justice: The Drug Court Example*, 40 AM. CRIM. L. REV. 1595 (2003) (describing the role of community courts to strengthen legal practice); William H. Simon & Charles F. Sabel, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004) (examining broader problem-solving role of lawyers in institutional reform litigation); William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127, 177–81 (2004) (discussing the reinvigoration of lawyers’ problem-solving role in relation to public concerns).

279. See Reed Elizabeth Loder, *Integrity and Epistemic Passion*, 77 NOTRE DAME L. REV. 841, 880 (2002) (highlighting integrity as applied to lawyers); David Luban, *Integrity: Its Causes and Cures*, 72 FORDHAM L. REV. 279 (2003) (identifying ways self-deception hinders integrity); Deborah L. Rhode, *If Integrity is the Answer, What is the Question?*, 72 FORDHAM L. REV. 333 (2003) (exploring ways to inculcate integrity during professional training).

280. See Heidi Li Feldman, *Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?*, 69 S. CAL. L. REV. 885 (1996) (applying virtue ethics to specific legal questions). See generally ROSALIND HURSTHOUSE, *ON VIRTUE ETHICS* (1999) (developing a means to apply Aristotelian understanding of virtue to contemporary choices); VIRTUE ETHICS (Roger Crisp & Michael Slote, eds., 1997).

281. See William H. Simon, *Should Lawyers Obey the Law?*, 38 WM. & MARY L. REV. 217 (1996); W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363, 424 (2004) (arguing that lawyers have an obligation to maintain a legitimate legal system); David B. Wilkins, *In Defense of Law and Morality: Why Lawyers Should Have a Prima Facie Duty to Obey the Law*, 38 WM. & MARY L. REV. 269, 290 (1996) (noting lawyers’ express commitment to obey the law).

282. See David Luban, *Contrived Ignorance*, 87 GEO. L.J. 957, 979 (1999) (arguing that lawyers should generally avoid willful ignorance, especially in regard to corporate clients’ efforts to enrich themselves); William H. Simon, *The Belated Decline of Literalism in Professional Responsibility Doctrine: Soft Deception and the Rule of Law*, 70 FORDHAM L. REV. 1881, 1881 (2002) (supporting the decline of literalism in professional responsibility); W. Bradley Wendel, *Professional Roles and Moral Agency*, 89 GEO. L.J. 667 (2001) (reviewing ARTHUR ISAK APPLBAUM, *ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE* (1999)) (connecting ordinary moral considerations

the lies of John Gellene.²⁸³ It also reclaims the values of honor and shame²⁸⁴ and the moral ideals of a heroic tradition.²⁸⁵

The revival of a regulatory ethos extends to clients as well. This revival reconfirms the client as a moral agent,²⁸⁶ not merely as a vehicle for lawyer whistle-blowing,²⁸⁷ and as an active partner in corporate governance and accountability.²⁸⁸ Sparked by the increased regulation of corporate entities through statutory incorporation of community norms,²⁸⁹ such as Sarbanes-Oxley,²⁹⁰ that renewed spirit implicates directors and officers²⁹¹ working to implement the

and professional role prescriptions); see also David Luban, *The Art of Honesty*, 101 COLUM. L. REV. 1763, 1774 (2001) (describing lawyers' failure to distinguish facts from truth).

283. For discussion on lying and lawyering, see Thomas L. Shaffer, *On Lying for Clients*, 1 J. INST. FOR STUDY LEGAL ETHICS 155, 175 (1996) (differentiating between morally acceptable and unacceptable lies by lawyers) and William H. Simon, *Virtuous Lying: A Critique of Quasi-Categorical Moralism*, 12 GEO. J. LEGAL ETHICS 433, 463 (1999) (arguing that lawyers' lies on behalf of their clients are only justified when there is an important competing moral value).

284. See W. Bradley Wendel, *Regulation of Lawyers Without the Code, the Rules, or the Restatement: Or, What Do Honor and Shame Have to Do with Civil Discovery Practice?*, 71 FORDHAM L. REV. 1567, 1569 (2003) (arguing for the use of honor as a restraint on legal practices).

285. See generally Rob Atkinson, *Liberating Lawyers: Divergent Parallels in Intruder in the Dust and To Kill a Mockingbird*, 49 DUKE L.J. 601, 604–05 (1999) (contrasting the paternalistic ethics of Atticus Finch and the more challenging ethics of Lucas Beauchamp); Constance Frisby Fain, *Characteristics of the Heroic Lawyer and Avoidance of Unprofessional Conduct*, 13 WIDENER L.J. 61 (2003) (describing how "heroic" lawyers benefit the profession); William H. Simon, *Moral Icons: A Comment on Steven Lubet's Reconstructing Atticus Finch*, 97 MICH. L. REV. 1376, 1377 (1999) (endorsing an understanding of Finch's morally complicated heroism); William H. Simon, *Moral Pluck: Legal Ethics in Popular Culture*, 101 COLUM. L. REV. 421, 421 (2001) (tracing the theme of "moral pluck" through John Grisham's novels, *L.A. Law*, and *The Practice*); W. Bradley Wendel, *Our Love-Hate Relationship with Heroic Lawyers*, 13 WIDENER L.J. 1 (2003) (noting that personal sacrifice is as important a quality of legal heroism as courtroom skill).

286. See generally David B. Wilkins, *Do Clients Have Ethical Obligations to Lawyers? Some Lessons From the Diversity Wars*, 11 GEO. J. LEGAL ETHICS 855 (1998) (analyzing clients as independent moral agents, particularly related to law firm diversity).

287. On the scope of disclosure and whistleblowing rules, see Richard W. Painter, *Toward a Market for Lawyer Disclosure Services: In Search of Optimal Whistleblowing Rules*, 63 GEO. WASH. L. REV. 221 (1995).

288. See Donald C. Langevoort, *The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability*, 89 GEO. L. J. 797, 805–17 (2001); see also Report of the American Bar Association Task Force on Corporate Responsibility, March 31, 2003, available at http://www.abanet.org/buslaw/corporateresponsibility/final_report.pdf (describing lawyer-director cooperation in corporate governance).

289. For an analysis of norm integration in legal rules and regulations, see Susan P. Koniak & George M. Cohen, *In Hell There Will Be Lawyers Without Clients or Law*, 30 HOFSTRA L. REV. 129 (2001) and Susan P. Koniak & George M. Cohen, *When the Hurlyburly's Done: The Bar's Struggle with the SEC*, 103 COLUM. L. REV. 1236 (2003).

290. For statutory provisions regarding attorneys and implementing regulations, see 15 U.S.C.A. §§ 7202, 7245, 7262 (2005); 17 C.F.R. § 205.3 (2005). See also Roger C. Cramton et al., *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILL. L. REV. 725 (2004); Lawrence A. Cunningham, *The Sarbanes-Oxley Yawn: Heavy Rhetoric, Light Reform (And It Might Just Work)*, 35 CONN. L. REV. 915 (2003).

291. See H. Lowell Brown, *The Corporate Director's Compliance Oversight Responsibility in the Post-Caremark Era*, 26 DEL. J. CORP. L. 1, 6 (2001) (discussing director and officer responsibility for compliance programs); Lynne L. Dallas, *A Preliminary Inquiry into the Responsibility of Corporations and their Officers and Directors for an Ethical Corporate Climate: The Psychology of Enron's Demise*,

best practices of risk management for the purposes of regulatory compliance²⁹² and norm enforcement.²⁹³ In this sense, client moral agency may join with lawyer self-regulation to combat fraud²⁹⁴ and mitigate corporate criminal liability.²⁹⁵ Wide-ranging in form, client interventions may arise in the corporate boardroom²⁹⁶ or on the board audit committee.²⁹⁷

The multifaceted revival of professionalism in regulatory accountability carries important consequences for legal education with respect to the teaching of ethics and professional responsibility. Indeed, the revival offers an opportunity to move beyond the formalist preoccupation with categorical rules and shift analysis to the ethos of organizational culture. It also provides an opportunity to construct new remedial interventions relevant to organizational entities and their unique cultures, interventions rooted in moral discretion. To be sure, the revival leaves more work to be done, for example in considering the place of racial diversity and equality in law firm tournaments²⁹⁸ and the effect of racial

35 RUTGERS L.J. 1, 4 (2003) (discussing officer and director responsibility to disclose unethical corporate culture).

292. See generally JEFFREY M. KAPLAN ET AL., COMPLIANCE PROGRAMS AND THE CORPORATE SENTENCING GUIDELINES: PREVENTING CRIMINAL AND CIVIL LIABILITY (Supp. 2005) (providing guidelines for corporate risk management and compliance programs).

293. See George H. Brown, *Financial Institution Lawyers as Quasi-Public Enforcers*, 7 GEO. J. LEGAL ETHICS 637 (1994); John C. Coffee, Jr., *Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response*, 63 VA. L. REV. 1099 (1977); Cristie L. Ford, *Toward a New Model for Securities Law Enforcement*, 57 ADMIN. L. REV. 757 (2005).

294. See Geoffrey C. Hazard, Jr., *The Client Fraud Problem as a Justinian Quartet: An Extended Analysis*, 25 HOFSTRA L. REV. 1041, 1044 (1997) (discussing when a lawyer should interdict client fraud); Donald Langevoort, *Where Were the Lawyers? A Behavioral Inquiry into Lawyers' Responsibility for Clients' Fraud*, 46 VAND. L. REV. 75, 78 (1993) (discussing lawyer ethical responsibilities in relation to client fraud).

295. See generally Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEG. STUD. 833 (1994) (analyzing corporate criminal liability and monitoring incentives); Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997) (reviewing duty-based corporate liability regimes); William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343 (1999) (discussing how corporate liability is increasingly pushed onto corporate agents); Geraldine Szott Moehr, *An Enron Lesson: The Modest Role of Criminal Law in Preventing Corporate Crime*, 55 FLA. L. REV. 937 (2003) (showing how criminal law failed to provide adequate deterrence); Dan K. Webb et al., *Understanding and Avoiding Corporate and Executive Criminal Liability*, 49 BUS. LAW. 617 (1994) (outlining various steps to avoid criminal liability).

296. See Geoffrey C. Hazard, Jr., *Ethical Dilemmas of Corporate Counsel*, 46 EMORY L.J. 1011, 1015 (1997) (analyzing a corporate lawyer's responsibility to bring compliance issues to the attention of the board); Geoffrey C. Hazard, Jr. & Edward B. Rock, *A New Player in the Boardroom: The Emergence of the Independent Directors' Counsel*, 59 BUS. LAW. 1389, 1418 (2004) (analyzing the ethical obligations of an independent lawyer-director).

297. See Lyman P.Q. Johnson, *The Audit Committee's Ethical and Legal Responsibilities: The State Law Perspective*, 47 S. TEX. L. REV. 27, 28 (2005) (reviewing the ethical obligations of the board of director's audit committee).

298. See David B. Wilkins, *From "Separate Is Inherently Unequal" to "Diversity Is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548 (2004).

partisanship on the profession.²⁹⁹ Likewise, it leaves more progress to be made on issues of access to justice,³⁰⁰ pro bono responsibility,³⁰¹ and service in the public interest.³⁰² And yet, in the work of Regan and Simon, modest progress has begun.

Here progress takes several forms. Statutory forms continue to emerge from federal and state legislatures and related administrative agencies charged with the promulgation, implementation, and enforcement of governing directives. Regulatory forms likewise persist, arising out of national and state bar associations engaged in rule adoption and amendment, opinion drafting, and disciplinary prosecutions. Juridical forms also carry on through federal and state court review of bar rules and sanctions, and through independent court supervision of misconduct-based civil and criminal prosecutions. Finally, educational forms of progress continue to materialize in classroom and clinical settings where contextual study, interdisciplinary instruction, and service-learning increasingly unfold together.

CONCLUSION

For clinical ventures like the University of Miami Law School's Center for Ethics & Public Service, the long progress ahead depends on gathering the insights gleaned from the work of Regan and Simon, as well as Kronman, Cover, Shaffer, and others, and then integrating those lessons into the mission of educating law students and training lawyers and legal activists. Critically instructive, their lessons help shape both the meaning and pedagogy of ethical

299. For historical background on racial partisanship in the legal profession, see generally David B. Wilkins, *A Systematic Response to Systemic Disadvantage: A Response to Sander*, 57 STAN. L. REV. 1915 (2005); David B. Wilkins, *On Being Good and Black*, 112 HARV. L. REV. 1924 (1999) (reviewing PAUL M. BARRETT, *THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA* (1999)); David B. Wilkins, *Partners Without Power? A Preliminary Look at Black Partners in Corporate Law Firms*, 2 J. INST. FOR STUDY LEGAL ETHICS 15 (1999); David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581 (1998); David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493 (1996).

300. See generally Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785 (2001) (examining numerous failures that lead to unequal access to justice and proposing alternatives); Deborah L. Rhode, *Access to Justice: Again, Still*, 73 FORDHAM L. REV. 1013 (2004) (same); Deborah L. Rhode, *Defining the Challenges of Professionalism: Access to Law and Accountability of Lawyers*, 54 S.C. L. REV. 889 (2003) (examining the challenges facing the enlargement of lawyer professionalism).

301. Compare Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 FORDHAM L. REV. 2415, 2418 (1999) (considering strategies to improve the "culture of commitment" to pro bono work), with Rob Atkinson, *A Social-Democratic Critique of Pro Bono Publico Representation of the Poor: The Good as the Enemy of the Best*, 9 AM. U.J. GENDER SOC. POL'Y & L. 129, 131 (2001) (arguing that an expanded system of tax-funded lawyers would be the best means to provide legal services to the poor).

302. See Debra Lyn Bassett, *Redefining the "Public" Profession*, 36 RUTGERS L.J. 721 (2005); Robert W. Gordon, *Private Career-Building and Public Benefits: Reflections on "Doing Well By Doing Good"*, 41 HOUS. L. REV. 113 (2004); David B. Wilkins, *Doing Well By Doing Good? The Role of Public Service in the Careers of Black Corporate Lawyers*, 41 HOUS. L. REV. 1 (2004); Deborah L. Rhode, *The Profession and the Public Interest*, 54 STAN. L. REV. 1501 (2002) (book review).

judgment. Inexorably, the meaning of ethical judgment must turn multidimensional, drawing on legal, philosophical, and theological elements. In the same way, the pedagogy of ethical judgment inevitably must stand multipronged, resting on traditional, simulated, and clinical methods of teaching. For the purposes of ascertaining the meaning of and developing a pedagogy of ethical judgments, all the normative categories surveyed here—classical, risk-management, discretionary, and regulatory—will prove useful. This task will begin with the hard work of mentoring at law school.³⁰³

Due in part to Regan and Simon, the form and content of law student and young lawyer mentoring must change to more fully account for the influence of organizational culture and the place of moral discretion in ethical decisionmaking. Last fall when I declared risk management triumphant in class, I tried to convey the profound shift in the profession signified by the rising norms and narratives of lawyer malpractice, loss prevention, and professional liability. Yet, struck by the profound alteration of the profession, my students misapprehended the regulatory lesson at stake.

In the same way, lawyers and law firms mistake the import of growing public regulation. The lesson is not to abandon professional ambitions and traditions in favor of risk management norms and procedures, or worse, to take advantage of opportunities for morally risk-taking behavior implanted in the ambiguity of governing norms and procedures. Rather, the lesson is to integrate risk management norms into the best traditions and highest ambitions of the profession. Somehow my students mistook that lesson.

Both lawyers and law teachers too often make the same mistake. For Shaffer, this error comes out of the failure to insist that professional responsibility is ultimately about ethics.³⁰⁴ Gauging this error, Shaffer urges law teachers to “try to find a way to focus on what ethics is before we get very far into the rules.”³⁰⁵ In this way, he adds, “one can eventually get into risk management, and perhaps one should, but it would be mostly irony.”³⁰⁶ Nonetheless, Shaffer cautions against operating from “instinctive and cultural moral judgment.”³⁰⁷ Instead, he prods law teachers “to get at ‘the meaning and pedagogy of ethical judgment.’”³⁰⁸

To be of use to law students and young lawyers, the lessons of ethical judgment and moral integration must be couched in the realities of modern

303. See Michael P. Allen, *Can Actions Teach Louder Than Words: The Role of Mentoring and Modeling in Teaching Professional Ethics: An Introduction (and a Confession)*, 14 WIDENER L.J. 323, 328 (2005); Thomas L. Shaffer, *On Teaching Legal Ethics with Stories About Clients*, 39 WM. & MARY L. REV. 421, 422–23 (1998); W. Bradley Wendel, *Teaching Ethics in an Atmosphere of Skepticism and Relativism*, 36 U.S.F. L. REV. 711, 713–14 (2002).

304. See Letter from Thomas L. Shaffer, Robert and Marion Short Professor of Law Emeritus, Notre Dame Law School, to Anthony V. Alfieri (Jan. 30, 2006) (on file with *The Georgetown Law Journal*).

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

practice. The large law firm stands atop the organization of modern practice at the intersection of character and culture. Regan traces contemporary ethical challenges to the cultural tensions arising from the habits of law firm tournaments, specialized practice groups, and project teams. Simon discerns the discretionary judgments embedded in the case and client-specific strategic decisions made daily within those practice groups and deal teams. For the moment, neither Regan nor Simon provides much concrete guidance in mapping the reintegration of discretionary and regulatory norms into the everyday practices of litigation and transactional deal-making. Teaching Simon's conception of moral discretion to law students and Regan's notion of regulatory ethos to lawyers are good places to start.

