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Naked Self-Interest? Why the Legal Profession Resists Gatekeeping

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NAKED SELF-INTEREST? WHY THE LEGAL PROFESSION RESISTS GATEKEEPING

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Abstract

This Article asks and answers the following question: why does the legal profession resist gatekeeping? Or, put another way, why do lawyers resist duties that require them to act to avert harm to their corporate client, its own shareholders, and—possibly—the capital markets? While acknowledging that the economic self-interest of the profession is an undeniable force fueling the bar's opposition to gatekeeping, this Article argues that the characterization of naked rent-seeking behavior is too simplistic. It argues that economic self-interest exerts a more subtle influence than the conventional story would suggest. In addition, the legal profession's resistance to gatekeeping is grounded in lawyers' internalization of attitudes held by the corporate managers serving as the clients' representatives and lawyers' lack of empathy for potential shareholder-victims. In short, under-examined psychological forces other than economic self-interest loom large in the profession's resistance to gatekeeping.

I. INTRODUCTION

On July 10, 2009, after an eight week federal jury trial, Joseph P. Collins was found guilty of securities and wire fraud. He was convicted for scheming with the executives of now-bankrupt financial services and commodities brokerage firm, Refco,[1] to conceal $2.4 billion of debt from lenders and investors.[2] What's interesting is that Collins wasn't one of

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1. "Refco" refers to Refco Group Ltd. and its successor entity Refco Inc.

2. Chad Bray, *Former Refco Lawyer Convicted of Fraud, Conspiracy*, WALL ST. J., July 11, 2009; Mark Hamblett, *Attorney Convicted of 5 Counts in $2.4 Billion Federal Fraud*, 242 N.Y.

those executives. He was instead their lawyer. And he wasn't just a small solo practitioner acting as the prototypical "mob" lawyer. Instead, Collins was a partner of the large and prestigious law firm of Mayer Brown LLP and head of the firm's derivatives practice.

According to Assistant U.S. Attorney Christopher Garcia, Collins played an indispensable role in facilitating "massive sham loan transactions."[3] Garcia accused Collins of enabling Refco executives to hide hundreds of millions of dollars in debt by concealing various "round trip" loan transactions in which Refco parked debt at a holding company during accounting reviews and shortly thereafter moved the debt back to Refco.[4] Garcia also argued that Collins prepared documents that lied about the company's debt position, duping a private equity firm which bought a controlling stake in Refco, and later enabling Refco executives to fleece public investors to the tune of $500 million.[5]

"Why? Why did [Collins] lie for Refco?" Garcia asked the jury with rhetorical flourish. "Because it was his biggest client from 1997 through the collapse of Refco. This man made more than $40 million for his firm."[6]

Taking the stand, Collins claimed, perhaps predictably, the defense of ignorance: "I didn't personally spend a lot of time. I delegated them . . . . I didn't structure them. I didn't negotiate them. I didn't talk to customers about them. They just didn't require much of my time."[7] Collins insisted that it was not his job to monitor his client's transactions, which would have simply been impossible.

We may never know the ultimate truth about "whether Joe Collins was on the inside or the outside—whether [the executives] kept him out of the loop, whether they kept him at arm's length, whether they lied to him so he could represent Refco."[8] Nevertheless, Collins' claim that he just didn't know remains troubling in light of Refco's long rap sheet of rogue transactions and prior criminal prosecutions[9] and the bizarre nature of various loan transactions. It's frankly tough to understand how Collins could have missed the red flags. As one former Mayer Brown lawyer noted, "It's hard for me to understand how anyone could work on loan documents and not ask, 'What is the purpose behind this loan?' . . . . When you're doing a financing, knowing the use of proceeds is important to understand whether the loan is illegal."[10] At the very least, the conviction

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L.J., July 13, 2009, at 1.

3. Mark Hamblett, *Defense Claims Refco Officials Lied to Lawyers About Fraud*, 241 N.Y. L.J., May 14, 2009, at 1 (internal quotation marks omitted).

4. *Id.*; Mark Hamblett, *Collins Takes Stand to Defend His Role as Attorney for Refco*, 241 N.Y. L.J., June 19, 2009, at 1 [hereinafter Hamblett, *Collins Takes Stand*]; Mark Hamblett, *Judge Declines to Grant Mistrial over Jury Unrest in Collins Case*, 242 N.Y. L.J., July 10, 2009, at 1.

5. Hamblett, *supra* note 3; Hamblett, *Collins Takes Stand*, *supra* note 4.

6. Hamblett, *supra* note 3 (internal quotation marks omitted).

7. Hamblett, *Collins Takes Stand*, *supra* note 4 (internal quotation marks omitted).

8. Hamblett, *supra* note 3 (internal quotation marks omitted).

9. *See* Susan Beck, *Target Practice*, 30 AM. LAW., Nov. 2008, at 84, 87 (recounting the history of citations and criminal sentences of Refco's former executives—stretching back to 1969).

10. *Id*. at 88 (internal quotation marks omitted).

of Collins is a stunning reminder that the problem of lawyers' acquiescence in massive financial frauds hasn't gone away and won't anytime soon.[11]

The last major scandal plagued with allegations of lawyer misconduct[12] is now known by the single word "Enron." When that disaster was brought to light, Congress responded swiftly by enacting § 307 of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley § 307" or just "§ 307"),[13] the "first federal statute in American history to regulate lawyers directly and broadly."[14] The statute gave to the Securities and Exchange Commission (SEC) an explicit, sweeping mandate to establish "minimum standards of professional conduct" for lawyers "appearing and practicing before the Commission in any way in the representation of [public] issuers."[15] By enacting Sarbanes-Oxley § 307, Congress formally recognized lawyers' role as "gatekeepers"—"private intermediaries who can prevent harm to the securities markets by disrupting the misconduct of their client representatives."[16]

But, as any lawyer then practicing recalls, the legal profession was horrified by this pro-regulatory turn of events. Just as it had done in previous battles with the SEC over lawyers' gatekeeping obligations,[17] the organized bar[18] aggressively lobbied against the passage of § 307.[19] When

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11. Indeed, sometimes lawyers are the *primary* perpetrators of fraud. For a recent news story, see, for example, Benjamin Weiser, *Lawyer Pleads Guilty in $400 Million Fraud*, N.Y. TIMES, May 12, 2009, at A23 (reporting on New York lawyer Marc S. Dreier's guilty plea for perpetrating a fraud of $400 million).

12. *See* Sung Hui Kim, *Lawyer Exceptionalism in the Gatekeeping Wars*, 63 SMU L. REV. 73, 89 n.110 (2010) (summarizing law firms' alleged involvement in the Enron scandal); Milton C. Regan, Jr., *Teaching Enron*, 74 FORDHAM L. REV. 1139, 1140 (2005) (discussing the assumption of lawyers' required services in the Enron scandal).

13. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 307, 116 Stat. 745, 784 (codified at 15 U.S.C. § 7245 (2006)).

14. William H. Simon, *After Confidentiality: Rethinking the Professional Responsibilities of the Business Lawyer*, 75 FORDHAM L. REV. 1453 (2006). Professor William Simon notes that the second such federal statute was the "'Jobs Act'" provision, which requires tax advisors to disclose transactions having a potential for tax avoidance or evasion. *Id.* at 1453 & n.2.

15. 15 U.S.C. § 7245 (2006). As further defined by the regulations, lawyers deemed to be "appearing and practicing before the Commission" (and thus covered by Part 205) include all lawyers who communicate with the SEC, represent issuers in their dealings with the SEC, and advise on matters pertaining to securities laws. *See* Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release No. 33-8185, 68 Fed. Reg. 6296, 6297 (Feb. 6, 2003) (codified at 17 C.F.R. § 205.2(a)(1)(i)–(iii) (2006)) [hereinafter SEC Final Rule]. Also, only attorneys for SEC-reporting companies are covered by the rule. *See id.* § 205.2(h).

16. This definition of "gatekeepers" first appeared in Sung Hui Kim, *Gatekeepers Inside Out*, 21 GEO. J. LEGAL ETHICS 411, 413 (2008), but is modified and adapted from that set forth in Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53 (1986) (describing "gatekeeper liability" as "liability imposed on private parties who are able to disrupt misconduct by withholding their cooperation from wrongdoers").

17. Those gatekeeping battles are discussed in Kim, *supra* note 12, at 77–93 (canvassing the battles going back to the 1970s).

18. For simplicity and ease of reading, I will often refer to the view from "the organized bar," or "the legal profession" to represent what I have found to be the dominant voice that has emerged

those efforts failed, lawyers circled the wagons and fought against the SEC's rulemaking to implement § 307.[20] The bar took special aim at the SEC's two "noisy withdrawal" proposals. These proposals (1) required lawyers to resign if intra-corporate remedies to rectify material law violations proved to be futile and (2) required lawyers (or, alternatively, companies) to report lawyers' withdrawal "based on professional considerations" to the SEC.[21] (Auditors have been subject to a similar reporting obligation since 1995.)[22] Just as predictably, the SEC backed down from its noisy withdrawal proposals, making both the notice to the SEC and the lawyer's withdrawal entirely discretionary.

At the core of the bar's opposition was hostility to the general notion of "lawyer as gatekeeper"—that lawyers should have any obligations to the public or the capital markets that could put them at odds with their client representatives. Although the bar might tolerate lawyers as attack dogs (at least unofficially in advertisements[23] and beauty contests), it rejects both officially and unofficially the idea of lawyers as watchdogs.[24] Official comments in the SEC administrative rulemaking process complained that the proposed rules could "eviscerate the attorney's

within the legal profession to protest external regulation by the SEC. However, I acknowledge that there is no monolithic view of the bar and that our legal profession comprises heterogeneous communities of lawyers with competing normative visions. *See, e.g.*, Theodore Schneyer, *Professionalism as Politics: The Making of a Modern Legal Ethics Code*, *in* LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 95, 140 (Robert L. Nelson et al. eds., 1992) (noting the "heterogeneity of ethical views" within the legal profession); Tanina Rostain, *Sheltering Lawyers: The Organized Tax Bar and the Tax Shelter Industry*, 23 YALE J. ON REG. 77, 96–109 (2006) (identifying the anti-tax shelter faction of the tax bar).

19. *See* Susan P. Koniak, *Corporate Fraud: See Lawyers*, 26 HARV. J.L. & PUB. POL'Y 195, 220–21 (2003).

20. *See* RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY 579 (2009) ("It is widely believed that the ABA moved to adopt the amendments to Rule 1.13 and Rule 1.6 to forestall the SEC's consideration and adoption of the proposed mandatory noisy withdrawal regulations.").

21. *See* Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release No. 33-8150, 67 Fed. Reg. 71,670 (proposed Nov. 21, 2002); Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release No. 33-8186, 68 Fed. Reg. 6324 (proposed Jan. 29, 2003).

22. *See* 15 U.S.C. § 78j-1 (Supp. IV 1998); Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 301(b)(3), 109 Stat. 737, 762, 763 (codified at 15 U.S.C. § 78j-1(b)(3) (2006)).

23. Florida Bar v. Pape, 918 So. 2d 240, 242–43 (Fla. 2005) (barring attorney Marc Andrew Chandler from displaying his ad featuring a spike-collared canine with the catchy "1-800-PIT-BULL"); Nathan Koppel, *Objection! Funny Legal Ads Draw Censure*, WALL ST. J., Feb. 7, 2008, at A1.

24. *See, e.g.*, Letter from Ass'n of the Bar of the City of N.Y. to Jonathan G. Katz, Sec'y, Sec. & Exch. Comm'n 8 (Dec. 16, 2002), http://www.abcny.org/pdf/report/Sarbanes-Oxley%20Comments.pdf [hereinafter ABCNY 2002 Letter] ("[The proposed rules] assign a "watchdog" function to attorneys. . . . [A]ttorneys are required to report the misconduct of others even where the attorney played no role in any of the actions that led to the violation.").

traditional role as advocate, confidant and advisor"[25] and "risk destroying the trust and confidence many issuers have up to now placed in their legal counsel."[26] They worried that the proposals would "drive a wedge between client and the counsel who advised it on a matter"[27] and decried that "the Commission would be using the attorney as the Commission's eyes and ears to build a case against the client."[28] Lawyers maintained that by "requiring attorneys to police and pass judgment on their clients,"[29] lawyers for corporations would slide down the slippery slope from trusted counselor to policeman.[30]

Since the SEC's retraction of its noisy withdrawal proposals, much of the furor over gatekeeping has waned. But the battles are far from over. After the regulations promulgated under Sarbanes-Oxley § 307 were enacted, the American Bar Association (ABA) published a carefully crafted statement asserting that "lawyers for the corporation . . . are not 'gatekeepers' of corporate responsibility in the same fashion as public accounting firms."[31] Also, the Washington and California state bar associations openly flouted the SEC's authority to adopt its regulations

25. *See, e.g.*, *id*.

26. Letter from Am. Bar Ass'n to Jonathan G. Katz, Sec'y, Sec. & Exch. Comm'n 26 (Dec. 18, 2002) [hereinafter ABA Letter].

27. *See, e.g.*, Letter from 77 Law Firms to Jonathan G. Katz, Sec'y, Sec. & Exch. Comm'n (Dec. 18, 2002), http://www.sec.gov/rules/proposed/s74502/77lawfirms1.htm [hereinafter Law Firms Letter]; ABA Letter, *supra* note 26 ("We believe that [the SEC proposals] . . . risk destroying the trust and confidence many issuers have up to now placed in their legal counsel, creating divided loyalties and driving a wedge into the attorney-client relationship.").

28. Letter from Debevoise & Plimpton to Jonathan G. Katz, Sec'y, Sec. & Exch. Comm'n (Mar. 31, 2003), http://www.sec.gov/rules/proposed/s74502/debevoise1.htm.

29. Letter from Sullivan & Cromwell to Jonathan G. Katz, Sec'y, Sec. & Exch. Comm'n (Dec. 18, 2002), http://www.sec.gov/rules/proposed/s74502/sullivanc1.htm ("By effectively requiring attorneys to police and pass judgment on their clients, the basic attorney-client is altered fundamentally—instead of viewing attorneys as confidential advisors, clients may begin to view their attorneys as also being agents of the Commission. The resulting chilling effect on communications could result in less attorney involvement . . . .").

30. *See, e.g.*, Letter from Am. Corp. Counsel Ass'n to Jonathan G. Katz, Sec'y, Sec. & Exch. Comm'n (Dec. 18, 2002), http://www.sec.gov/rules/proposed/s74502/bnagler1.htm (noting that the proposed rules "take an unprecedented and unnecessary step toward changing the role of a corporate lawyer from one of a trusted legal counselor to one of a whistle-blowing policeman"); Letter from Am. Corp. Counsel Ass'n to Jonathan G. Katz, Sec'y, Sec. & Exch. Comm'n (Apr. 7, 2003), http://www.sec.gov/rules/proposed/s74502/acca040703.htm [hereinafter ACCA 2003 Letter] ("If we move toward regulations that turn lawyers into cops on the beat, we will be making a decision to fundamentally change the lawyer-client relationship from one based on trust and advice, to one inclined toward prosecutorial responsibilities."); Letter from Comm. on Prof'l Responsibility & Conduct, State Bar of Cal. to Jonathan G. Katz, Sec'y, Sec. & Exch. Comm'n (Apr. 4, 2002), http://www.sec.gov/rules/proposed/s74502/copracsbc040403.htm ("The Commission rules requiring or permitting disclosure of corporate secrets outside the corporate structure, however, will necessarily subvert and turn on its head the relationship of trust between client and lawyer.").

31. *Report of the American Bar Association Task Force on Corporate Responsibility*, 59 BUS. LAW. 145, 156 (2003).

(notwithstanding § 307).[32] Still today, the bar continues to denounce the SEC for targeting lawyers who are merely "engaged in what lawyers do," as if to suggest that lawyers should be immune from liability so long as their complicity is mediated through "legal services."[33]

And Sarbanes-Oxley § 307 may turn out to be just a prelude of things to come. As recently as July 30, 2009, Senator Arlen Specter of Pennsylvania introduced a bill[34] that would effectively reverse a 1994 U.S. Supreme Court decision that shielded law firms, accounting firms, and investment banks from investor lawsuits alleging aiding and abetting violations of § 10(b) and Rule 10b-5, the principal anti-fraud provisions of the Securities Exchange Act of 1934.[35] And in a brief filed on August 6, 2009, the SEC argued that law firms should be held primarily liable for knowingly providing false and misleading statements in companies' public disclosures.[36] As the Collins conviction demonstrates, lawyers' complicity in corporate securities fraud remains a timely, if understudied, issue.

In this Article, I ask and answer a fundamental question: *why* does the legal profession so stridently resist gatekeeping?[37] After all, aren't lawyers supposed to be "officers of the legal system," as touted by the ABA Model Rules of Professional Conduct?[38] Or, even if you reject that

32. *See* Roger C. Cramton et al., *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILL. L. REV 725, 799–808 (2004) (describing the SEC's stand-off with the Washington and California state bar associations, which challenged the SEC's authority to implement portions of Part 205 regulations).

33. *See, e.g.*, David B. Bayless, *Recent SEC Enforcement Actions Against In-House Lawyers: Its Impact on Legal and Compliance*, *in* INTERNAL INVESTIGATIONS 2008: LEGAL, ETHICAL & STRATEGIC ISSUES 665, 670, 676 (PLI Corp. Law & Practice, Course Handbook Series No. B-1679, 2008) ("[L]awyers, when engaged in what lawyers do, should not normally be the subject of enforcement actions. . . . Even assuming the SEC's allegations are true . . . , the type of conduct that those in-house lawyers engaged in is the type of conduct that lawyers typically undertake . . . . It is unusual, to say the least, for these types of actions to be the subject of an SEC enforcement action for securities fraud."). The implication that lawyers should be exempt from liability for providing legal assistance contradicts principles of tort, agency and criminal law, which do not excuse lawyers whose assistance furthers illegality. *See* Geoffrey C. Hazard, Jr., *How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct?*, 35 U. MIAMI L. REV. 669, 677–83 (1981).

34. *See* Liability for Aiding & Abetting Securities Violations Act of 2009, S. 1551, 111th Cong. (2009); Ameet Sachdev, *SEC Takes Sword to Shield Protecting Lawyers from Investors' Suits*, CHI. TRIB., Aug. 11, 2009, http://articles.chicagotribune.com/2009-08-11/news/0908100445_1_mayer-brown-refco-securities-fraud.

35. Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 191 (1994).

36. The SEC stated that a third party also may be primarily liable if the entity provides the false or misleading information that another person puts into a false statement. Brief for the SEC, Amicus Curiae, In Support of the Position of Plaintiffs-Appellants on the Issue Addressed and in Support of Neither Affirmance nor Reversal at 6, Pac. Mgmt. Co. v. Mayer Brown LLP, 603 F.3d 144 (2d Cir. 2010) (No. 09-1619-cv).

37. *See* Kim, *supra* note 12. Elsewhere, I have addressed the related but separate question of *how* lawyers go about waging their war against gatekeeping and what rhetorical techniques they employ to make their case. In this Article, I seek to explore *why* lawyers resist gatekeeping duties.

38. MODEL RULES OF PROF'L CONDUCT, PREAMBLE: A LAWYER'S RESPONSIBILITIES (2010) ("A

characterization, *why* do lawyers resist duties that only require them to avert gross harm to their corporate clients? We are now too familiar with the chaos unleashed by the massive frauds at Enron, WorldCom, Refco, Bernard L. Madoff Investment Securities, and Bear Stearns Asset Management Fund. So, why does the legal profession resist measures designed to avert potential financial calamity?

For many readers, the answer will be obvious: "It's the money, stupid!" Or in more scholar-speak, "It's about economic self-interest." Indeed, no lawyer wants to expand her financial liability with duties backed by civil or administrative sanction, and no profession wants to be shackled with additional rules that raise the costs of legal practice. On the one hand, economic self-interest is an undeniable force fueling the bar's opposition to gatekeeping. On the other hand, the characterization of naked rent-seeking behavior misses crucial subtleties and portrays a degree of "naive cynicism"—the inclination to think that others are more prone to bias than oneself could ever be.[39] While economic self-interest plays an important role here, it exerts a more complex influence than conventionally understood. Moreover, there are motivations other than self-interest that loom large in the bar's resistance to gatekeeping. And these complexities should inform our legal and social responses.

In Part I, I examine the role that economic self-interest plays in the bar's script of resistance. Drawing on insights from social cognition,[40] I advance an alternative understanding of the cognitive mechanisms by which self-interest shapes the bar's public stance. In Parts II and III, I identify two other psychological forces that influence the bar's motivations in subtle ways. First, lawyers overwhelmingly tend to internalize the anti-regulatory attitudes held by those senior corporate managers who typically serve as lawyers' de facto clients.[41] Although lawyers' self-interest is a

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lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."). Although attorney professional conduct is governed by the rules promulgated by the highest court in the state in which the attorney practices, most state professional conduct codes are modeled after the ABA's Model Rules.

39. *See, e.g.*, Adam Benforado & Jon Hanson, *Naive Cynicism: Maintaining False Perceptions in Policy Debates*, 57 EMORY L.J. 499 (2008); Joyce Ehrlinger et al., *Peering into the Bias Blind Spot: People's Assessments of Bias in Themselves and Others*, 31 PERSONALITY & SOC. PSYCHOL. BULL. 680 (2005); Nicholas Epley & David Dunning, *Feeling "Holier Than Thou": Are Self-Serving Assessments Produced by Errors in Self- or Social Prediction?*, 79 J. PERSONALITY & SOC. PSYCHOL. 861 (2000); Justin Kruger & Thomas Gilovich, *"Naive Cynicism" in Everyday Theories of Responsibility Assessment: On Biased Assumptions of Bias*, 76 J. PERSONALITY & SOC. PSYCHOL. 743 (1999); Dale T. Miller & Rebecca K. Ratner, *The Disparity Between the Actual and Assumed Power of Self-Interest*, 74 J. PERSONALITY & SOC. PSYCHOL. 53 (1998).

40. Social cognition is the intersection between the traditionally separate fields of social psychology and cognitive psychology. For an overview of social cognition, see SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION: FROM BRAINS TO CULTURE (2008).

41. For the vast majority of legal representations and all representations governed by Sarbanes-Oxley § 307, the corporation is the *de jure* client, not any of its constituents, including the board, shareholders, or managers. However, given that all lawyers report directly or indirectly to

factor here as well, cognitive dissonance mechanisms more robustly explain this internalization phenomenon. Second, lawyers are inclined to be indifferent to (if not downright dismissive about) the interests of their clients' shareholders who stand to be the greatest beneficiaries of lawyer gatekeeping. Again, I do not deny the likely contributions of lawyers' self-interest here. But I argue that the abstractness of shareholders greatly hinders lawyers' ability to empathize with these particular victims of corporate malfeasance.

As supporting evidence, I offer primarily, though not exclusively, the rhetoric of the organized bar in opposition to the SEC's attempt to implement Part 205 regulations under Sarbanes-Oxley § 307. The particular source of rhetoric that I excavate comprises the bar's official comments filed during the notice-and-comment rulemaking process, and I pay special attention to those comments filed by collections of prominent law firms and bar associations.[42] To be sure, there are inherent limitations in any attempt to generalize about professional views from published sources, let alone the particular subset that I explore. Nonetheless, the carefully vetted nature of these comments should ensure that they are a reasonably representative sample of the official views from the bar.[43]

Although this Article mainly addresses lawyers' disputed role as capital markets' gatekeepers, it also illuminates the broader debate over whether "lawyers should help or resist their clients' attempts to evade or nullify regulation"[44] and whether lawyers are entitled to adopt the "Holmesian bad

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senior corporate managers who are vested with the authority to define corporate objectives and direct lawyers' activities, these managers serve as lawyers' *de facto* clients. *See* Sung Hui Kim, *The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983, 1008 (2005); Kim, *supra* note 16, at 443–44.

42. Let me briefly describe my methodology. On its Web site, the SEC listed 252 official comments to the Part 205 proposals. Due to errors on the Web site, only 243 of the comments were actually available for download. First, I personally reviewed carefully all the major comment letters—those submitted by large clusters of law firms, bar associations, and individual law firms who are reputable in the field of securities practice for purposes of understanding the types of arguments commonly asserted by the bar. I more quickly reviewed the rest. Second, two student research assistants coded the comment letters for the specific types of arguments made (e.g., lawyer as "zealous advocate," SEC as "prosecutor," or contrasting lawyers with auditors). Finally, I downloaded the comments into a database, which allowed me to conduct targeted text search queries. *Comments on Proposed Rule: Implementation of Standards of Professional Conduct for Attorneys*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/rules/proposed/s74502.shtml (last modified Apr. 22, 2004).

43. Because only those law firms who regularly practice securities law are likely to even know about the SEC's solicitation of comments or the filing procedures, comments filed with the SEC are likely to represent the views from those who have the greatest stake in the matter. And since these participants generally understand that their filed comments will be published on the SEC's public Web site, comments are likely to be carefully vetted before filing and thus will tend to reflect the central tendency of views of their constituents, as opposed to outlier views. Finally, since Sarbanes-Oxley § 307 represents the most recent and significant battle over gatekeeping obligations between the SEC and the bar, comments will tend to reflect, more or less, current understandings of the bar.

44. Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 12 (1988).

man view of law,"[45] which approaches the law as if law were the enemy.[46] These, too, are questions that will not recede anytime soon.

II. PURSUING LAWYERS' SELF-INTEREST

Professor Deborah Rhode could not have said it more bluntly: "[Lawyers' c]oncern about third-party lawsuits is the elephant in the room when bar ethics rules are debated."[47] None of this should surprise anyone who is familiar with either the history of the bar's professional rule-making[48] or the decades of social cognition research showing that we are motivated by our own economic self-interest[49] and that we tend to conflate "fairness" with that which benefits ourselves financially.[50] For example, in one classic study, student subjects were asked to *imagine* that they had worked different durations at a collaborative task. They were then queried as to what a just compensation would be both for themselves and for others who had "worked" more or less than they.[51] Subjects who "worked" longer hours tended to claim that an equal hourly wage was fair. Subjects who "worked" shorter hours tended to claim that equal pay, regardless of the number of hours worked, was fair.[52] In other words, their answers indicated that their fairness judgments were compromised by their desire for more money.[53]

In this particular experiment, no *real* money was on the line. But similar results have been confirmed in experiments with actual payoffs[54] and field studies in the real world.[55] Indeed, the existence of the self-serving bias is amply supported in the theoretical and empirical literature.[56]

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45. W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167, 1172–73 (2005).

46. *See* Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1191 (2003) (describing this "libertarian-antinomian" view); Kim, *supra* note 41, at 1013–14.

47. Deborah L. Rhode, *Moral Counseling*, 75 FORDHAM L. REV. 1317, 1333 (2006).

48. Schneyer, *supra* note 18, at 132–35 (noting the bar's preoccupation with matters of self-protection in crafting the Model Rules).

49. *See* Kim, *supra* note 41, at 1027–29, for a summary of research on the self-serving bias.

50. *See id.* at 1028.

51. David M. Messick & Keith P. Sentis, *Fairness and Preference*, 15 J. EXPERIMENTAL SOC. PSYCHOL. 418, 432, 434 (1979).

52. *Id.*

53. *Id.* at 434 ("[P]eople are capable of ignoring or compromising what they know to be ethically correct in order to achieve a hedonically more preferred outcome.").

54. *See* David M. Messick & Keith Sentis, *Fairness, Preference, and Fairness Biases*, *in* EQUITY THEORY: PSYCHOLOGICAL AND SOCIOLOGICAL PERSPECTIVES 61, 76–79 (David M. Messick & Karen S. Cook eds., 1983) (reporting on results of field study performed by Professor Eddy Van Avermaet).

55. *See* Kim, *supra* note 41, at 1028–29 (summarizing field studies, including public school teacher contract negotiations and practicing physicians recommending treatments or prescribing drugs for the sake of small gifts supplied by pharmaceutical companies and equipment suppliers).

56. Linda Babcock & George Loewenstein, *Explaining the Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON. PERSP. 109, 110 (1997); *see also* Kim, *supra* note 41, at 1027–29

Comment letters confirm lawyers' fear that gatekeeping duties might create further liability. Quite explicitly, they argue that lawyers "should not be exposed to liability for lapses in governance";[57] urge that lawyers not be sanctioned other than in connection with SEC disciplinary proceedings under Rule 102(e);[58] assert that the SEC's proposed rules "unreasonably increase[] counsel's exposure to lawsuits by private litigants";[59] warn that following the SEC's proposed rules "will inevitably draw the lawyer into litigation";[60] and urge that the SEC "expressly reaffirm its historic policy of restraint in bringing actions against attorneys for violation of professional conduct rules . . . ."[61]

And, for some, the issue is not merely one of higher regulatory burdens but of baseline survival. Comment letters suggest that following the SEC rules would lead to "career suicide,"[62] be "career-ending,"[63] or result in lawyers being "'black-balled' as to future representations."[64] Lawyers also fear that, one day, they may become structurally irrelevant. Comment letters voice concern that the "fallout" will be nothing less than the exclusion of "lawyers from the inner councils of the corporation"[65] or being "shut out of the client's inner circle";[66] clients "avoiding counsel

(summarizing the research on the self-serving bias).

57. ABCNY 2002 Letter, *supra* note 24, at 21.

58. *Id.* at 43–46.

59. *Id*. at 47–48; *see also* Comments of Corp., Fin. & Sec. Law Section of the D.C. Bar to Jonathan G. Katz, Sec'y, Sec. & Exch. Comm'n (Apr. 7, 2003), http://www.sec.gov/rules/proposed/s74502/cfslsdcbar040703.htm ("In attempting to comply with the part, the attorney will risk substantial personal liability, if the issuer or client then sues the attorney for the losses."); Letter from Cleary, Gottlieb, Steen & Hamilton to Jonathan G. Katz, Sec'y, Sec. & Exch. Comm'n (Dec. 18, 2002), http://www.sec.gov/rules/proposed/s74502/efgreene1.htm ("[T]he Commission's formulation . . . creates the risk that shareholders could seek to sue attorneys for breach of duties.").

60. Letter from N.Y. Cnty. Lawyers' Ass'n to Jonathan G. Katz, Sec'y, Sec. & Exch. Comm'n 8 (Apr. 1, 2003), http://www.nycla.org/siteFiles/Publications/Publications96_0.pdf [hereinafter NYCLA Letter] ("Any announcement that a lawyer has withdrawn for 'professional considerations' is nothing more than an invitation to investigate the reasons for the lawyer's withdrawal. . . . It will inevitably draw the lawyer into litigation . . . .").

61. ABA Letter, *supra* note 26, at 33 ("[I]t is important that the Commission expressly reaffirm its historic policy of restraint in bringing actions against attorneys for violation of professional conduct rules because of the chilling effect such actions would have on the ability of attorneys to effectively represent clients before the Commission.").

62. Letter from Elaine J. Mittleman, Esq. to Jonathan G. Katz, Sec'y, Sec. & Exch. Comm'n (Apr. 7, 2003), http://www.sec.gov/rules/proposed/s74502/ejmittleman040703.htm [hereinafter Mittleman Letter].

63. Letter from Skadden, Arps, Slate, Meagher & Flom LLP to Jonathan G. Katz, Sec'y, Sec. & Exch. Comm'n (Dec. 16, 2002), http://www.sec.gov/rules/proposed/s74502/skaddenarps1.htm.

64. Letter from Barrie Althoff, Att'y, to Jonathan G. Katz, Sec'y, Sec. & Exch. Comm'n (Dec. 17, 2002), http://www.sec.gov/rules/proposed/s74502/balthoff1.htm.

65. Letter from the Comm. on Sec. of the Bus. Law Section of the Md. State Bar Ass'n to Jonathan G. Katz, Sec'y, Sec. & Exch. Comm'n (Mar. 31, 2003), http://www.sec.gov/rules/proposed/s74502/adpoliakoff1.htm.

66. ACCA 2003 Letter, *supra* note 30.

with a reputation for caution and prudence"[67] or avoiding "consulting counsel on close or controversial legal questions";[68] clients "turning to attorneys less often";[69] or, worse yet, "losing the attorney-client relationship entirely."[70]

Concern about self-preservation is exacerbated by competitive market conditions, actual or perceived, both within and outside of the legal profession. Intense competition among law firms has placed a premium on lawyers' capacity to attract and retain clients, making it that much harder for lawyers to say no or to walk away on ethical grounds.[71] With respect to the larger market of selling business advice to large corporations, competition from accountants, investment bankers, and management consultants drive lawyers to cling more tightly to their confidentiality guarantees—one competitive advantage that lawyers can tout to their clients.[72] Also, fears of being displaced by the competition are magnified by the general anxiety about lawyers' relative decline in social status as compared to other professionals, such as investment bankers or management consultants.[73]

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67. Letter from the Fed. Regulation Comm. of the Sec. Indus. Ass'n to Jonathan G. Katz, Sec'y, Sec. & Exch. Comm'n (Apr. 7, 2003), http://www.sec.gov/rules/proposed/s74502/frcsia040703.htm [hereinafter SIA Letter].

68. Letter from Corp. Comm. Bus. Law Section, The State Bar of Cal. to Jonathan G. Katz, Sec'y, Sec. & Exch. Comm'n (Dec. 16, 2002), http://www.sec.gov/rules/proposed/s74502/tghoxiq1.htm.

69. Letter from The Ass'n of the Bar of the City of N.Y. to Jonathan G. Katz, Sec'y, Sec. & Exch. Comm'n 16 (Apr. 7, 2003), http://www.abcny.org/pdf/report/300062186_4.pdf [hereinafter ABCNY 2003 Letter]; NYCLA Letter, *supra* note 60, at 16 ("[C]orporate officers or employees may not turn to lawyers for advice . . . .").

70. Mittleman Letter, *supra* note 62.

71. *See* Kim, *supra* note 16, at 430–36; MILTON C. REGAN, JR., EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER 304–06 (2006).

72. *See, e.g.*, Greg Billhartz, *Can't We All Just Get Along? Competing for Client Confidences: The Integration of the Accounting and Legal Professions*, 17 ST. LOUIS U. PUB. L. REV. 427, 445–47 (1998) (describing the role that confidentiality plays in the competitive jockeying between the legal and accounting professions); John Gibeaut, *Squeeze Play*, A.B.A. J., Feb. 1998, at 47 ("[T]he bar's best consumer-oriented argument: While accountants may be cheaper and faster, they cannot offer broad-ranging confidentiality or loyalty to their clients and the protections those duties try to guarantee."). To be sure, strictly speaking, *pure* business advice is not protected by the attorney-client privilege, *see, e.g.*, United States v. Adlman, 68 F.3d 1495, 1499–1500 (2d Cir. 1995); although it may potentially be covered by the professional duty of confidentiality, which prohibits a lawyer from revealing any information "relating to the representation of a client" without the client's consent. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2010).

73. *See* Yves Dezalay & Bryant G. Garth, *The Confrontation Between the Big Five and Big Law: Turf Battles and Ethical Debates as Contests for Professional Credibility*, 29 L. & SOC. INQUIRY 615, 635–36 (2004) (noting the relative decline in status of lawyers and the deeper threat posed by the accounting profession to the practice model of elite corporate law firms—a model that relies on *noblesse oblige* and recruitment from a higher socio-economic echelon); REGAN, *supra* note 71, at 319 (noting that investment bankers "enjoy greater power, prestige, and income than do lawyers").

One example illustrates this point. Lawyers "reacted with dismay"[74] when in 1998 Congress recognized a qualified accountant-client privilege between clients and accountants who represent them in non-criminal tax proceedings before the Internal Revenue Service (IRS) and federal court (for suits brought by or against the United States).[75] In fact, the ABA formally opposed the accountant-client privilege.[76] ABA members considered the privilege to be the "latest encroachment by nonlawyers into activities that are best handled by attorneys."[77] They argued that the legal and accounting professions "cannot be treated congruously for purposes of privileged communications"[78] and maintained that the limited privilege "is a dangerous first step down a slope that could lead to a blending of the two professions."[79]

Similar fears have been vocalized about the encroaching competition from large accounting firms[80] that threatens to unify accounting and legal services under the single umbrella of multi-disciplinary partnerships (MDPs).[81] In denouncing MDPs' impingement on lawyers' turf, lawyers have accused accountants of being too close to business and not sufficiently independent from client influence.[82] This sounds like the pot calling the kettle black when lawyers overwhelmingly acknowledge that the practice of law is a business.[83] Moreover, criticizing accountants for

74. Elijah D. Farrell, *Accounting Firms and the Unauthorized Practice of Law: Who Is the Bar Really Trying to Protect?*, 33 IND. L. REV. 599, 625 (2000) (internal quotation marks omitted) (quoting Bruce Balestier, *Under One Roof: ABA Faces Arrival of Lawyer-Accountant Pairings*, N.Y. L.J., Nov. 19, 1998, at 5).

75. Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 (codified at 26 U.S.C. § 7525(a)(1)–(2)(B) (2000)). Prior to the Act, communications between taxpayer and accountant were protected only when the accountant was hired by the taxpayer's attorney. This privilege does not apply to written communications relating to the promotion of corporate tax shelters.

76. *Confidentiality: IRS Reform Law Creates New Privilege Between Taxpayers and Tax Practitioners*, 14 LAW. MANUAL ON PROF. CONDUCT (ABA/BNA) 364 (1998), http://lawyersmanual.bna.com/mopw2/3300/split_display.adp?fedfid=442026&vname=mopcnotallissues&fcn=13&wsn=527350000&fn=442026&split=0 [hereinafter ABA/BNA, *IRS Reform Law*] (reporting that the ABA formally opposed the extension of the privilege to cover accountant-taxpayer communications).

77. Lance J. Rogers, *Unauthorized Practice: ABA President Creates Commission to Review Multidisciplinary Practice Issues*, 14 LAW. MANUAL ON PROF. CONDUCT (ABA/BNA) 390 (1998).

78. ABA/BNA, *IRS Reform Law*, *supra* note 76.

79. *Id.* (quoting comments from the president of the New York State Bar Association) (internal quotation marks omitted).

80. *See, e.g.*, Gibeaut, *supra* note 72, at 44 (noting that some lawyers view the threat from accounting firms as "a sort of Armageddon for the [legal] profession").

81. *See* Bryant G. Garth & Carole Silver, *The MDP Challenge in the Context of Globalization*, 52 CASE W. RES. L. REV. 903, 909 (2002) (defining MDPs roughly as "professional service organizations offering legal services as part of a larger entity focused on business advice" and describing the various types).

82. *See, e.g.*, Lawrence J. Fox, *MDPs Done Gone: The Silver Lining in the Very Black Enron Cloud*, 44 ARIZ. L. REV. 547, 548, 553–54 (2002); Garth & Silver, *supra* note 81, at 906–07.

83. *See, e.g.*, Chris Klein, *Big-Firm Partners: Profession Sinking*, NAT'L L.J., May 26, 1997,

lacking independence from their clients sharply contradicts the bar's repeated caricatures of accountants as independent "public watchdogs" during the debates over Sarbanes-Oxley § 307.[84]

Of course, the bar would flatly reject the characterization that lawyers are motivated by raw self-interest. In opposing MDPs, for example, lawyers insist that they "are not engaged in turf protection."[85] Similarly, comments filed in connection with the SEC's regulations implemented under Sarbanes-Oxley § 307 take great pains to avoid suggesting that the minimization of liability for lawyers is an end unto itself. Instead, the comments raise the specter of civil or administrative liability only insofar as it might compromise lawyers' zeal on behalf of their clients.[86] But social cognition research casts doubt on our ability to ascertain accurately our various motivations and suggests that it is tough, if not impossible, to identify and isolate the effect of self-interest on our own cognitions.[87]

To provide a concrete example of the process by which various motivations, including self-interest, can warp our cognitions, recall your reaction to the U.S. Supreme Court opinion in *Bush v. Gore*,[88] which

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at A1 (reporting that 82.7% of partners polled from the 125 biggest law firms believe that the profession has changed for the worse and "the law has become a fiercely dollar-driven business").

84. *See, e.g.*, NYCLA Letter, *supra* note 60 ("Accountants are the public's watchdogs, attorneys are their client's counselors."); SIA Letter, *supra* note 67 (noting the Supreme Court's statement that "an accountant serves a 'public watchdog function' and 'owes ultimate allegiance to the corporation's creditors and stockholders, as well as to the investing public'" (quoting United States v. Arthur Young & Co., 465 U.S. 805, 818 (1984))); Letter from Latham & Watkins to Jonathan G. Katz, Sec'y, Sec. & Exch. Comm'n (Dec. 18, 2002), http://www.sec.gov/rules/proposed/s74502/latham1.htm (also noting that the Supreme Court has observed that "an accountant serves a 'public watchdog function'").

85. *Unauthorized Practice: New York State Bar Creates Panel to Study Multi-Disciplinary Practice*, 14 LAW. MANUAL ON PROF. CONDUCT (ABA/BNA) 341 (1998) (quoting the president of the New York State Bar Association).

86. *See, e.g.*, ABA Letter, *supra* note 26, at 33 (describing what effect third-party liability would have on lawyers' incentives).

87. As Professors Richard Nisbett and Timothy Wilson argued in their seminal review article, we may have little or no introspective access to our higher-order cognitive processes, such as those involved in judgments, decision-making, and social behavior. Based on evidence from research on cognitive dissonance, attribution processes, problem solving, bystander intervention, and experiments specifically designed to test for this phenomenon, they suggest the following: when asked about whether a particular stimulus played a role in one's decision or judgment, instead of retrieving a memory of our cognitive processes, we tend to recruit a culturally supplied a priori theory to explain the causal link between that stimulus and our response. Richard E. Nisbett & Timothy DeCamp Wilson, *Telling More than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOL. REV. 231, 231–32 (1977); Timothy DeCamp Wilson & Richard E. Nisbett, *The Accuracy of Verbal Reports About the Effects of Stimuli on Evaluations and Behavior*, 41 SOC. PSYCHOL. 118, 118 (1978). Professor Ziva Kunda described Nisbett and Wilson's 1977 article as "highly influential." ZIVA KUNDA, SOCIAL COGNITION: MAKING SENSE OF PEOPLE 268 (1999). Professors Susan Fiske and Shelley Taylor noted that "there is a substantial amount of anecdotal evidence from psychological studies" to support Nisbett and Wilson's hypotheses. FISKE & TAYLOR, *supra* note 40, at 198.

88. 531 U.S. 98 (2000).

effectively decided who would be the U.S. president in 2000. If you voted for Albert Gore, you probably viewed the five-Justice majority opinion as a "travesty of constitutional law"[89] and were astonished by how those Justices adopted whatever legal arguments would guarantee George Bush's crowning.[90] Indeed, 673 law professors felt the need to write so publicly.[91] Or, if you voted for Bush, you probably applauded the Supreme Court for reigning in an errant and activist Florida Supreme Court that had violated federal constitutional principles in its handling of the presidential election.[92]

I'm uninterested in who was "right" in some substantive moral or legal sense. Far more intriguing is that each side in this partisan battle sincerely believed that only the other was acting disingenuously and opportunistically.[93] How can two groups of people look at the same set of facts and come to opposite conclusions?[94] This question, which may be intriguing to law readers, produces something like a collective yawn from psychologists and behavioral economists. Decades of research demonstrate that both sides were simply motivated to do so.[95]

There are so many representative studies to proffer that it's hard to choose. Here are three. In one classic field study, a film of a particularly raucous Princeton-Dartmouth football game was shown to students of both universities.[96] Although both groups viewed the same game, each side

89. Richard A. Epstein, *"In such Manner as the Legislature Thereof May Direct": The Outcome in* Bush v. Gore *Defended*, 68 U. CHI. L. REV. 613, 613–14 (2001) (describing how liberals viewed the *Bush v. Gore* decision).

90. Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1408–09 (2001) (suggesting that *Bush v. Gore* appeared to be motivated by the "'low' politics of partisan political advantage").

91. *See The Rule of Law*, http://www.the-rule-of-law.com/archive/supreme/ (last visited Oct. 14, 2010).

92. Epstein, *supra* note 89, at 614 (defending the concurring opinion based on Article II, § 1, Clause 2 of the U.S. Constitution); *see also* Jonathan K. Van Patten, *Making Sense of* Bush v. Gore, 47 S.D. L. REV. 32, 32 & n.† (2002) (defending *Bush v. Gore* and disclosing that the author is Republican and voted for George W. Bush).

93. In fact, on almost every aspect of the Bush/Gore presidential election, the public was divided on the issues, and those views highly correlated with political affiliation. For example, 94% of Bush supporters thought the Supreme Court's ruling was fair and justifiable while only 17% of Gore supporters did. Sixty-six percent of Gore supporters thought that the Justices were influenced by their "personal political views" while 31% of Bush supporters did. *See* Ehrlinger et al., *supra* note 39, at 680 (reporting 2000 Gallup Poll results).

94. For an exploration of this phenomenon in the context of allegations of discrimination, see Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1100 (2008).

95. To be sure, motivated reasoning is not the only possible explanation for divergent inferences and conclusions from the same stimuli. Indeed, any inherently ambiguous stimulus will generate multiple interpretations even without motivation. That said, if a particular set of inferences seems to align perfectly with perceived economic self-interest, it's hard to claim that self-interested motivation isn't a driver. *See* DANIEL GILBERT, STUMBLING ON HAPPINESS 170–76 (2005) (describing how we interpret inherently ambiguous stimuli).

96. Albert Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 J. ABNORMAL & SOC. PSYCHOL. 129 (1954). It should be noted that studies that illustrate the mechanism of motivated reasoning are also illustrative of more specific cognitive biases, e.g., confirmation bias

essentially witnessed two different games. "The Princeton fans saw a continuing saga of Dartmouth atrocities and occasional Princeton retaliations. The Dartmouth fans saw brutal Princeton provocations and occasional measured Dartmouth responses."[97] Each side saw "a game in which their team was the 'good guys' and the other team was the 'bad guys.'"[98]

In another study, subjects with views on both sides of the capital punishment debate were presented with randomly selected but mixed evidence on the deterrent effect of the death penalty.[99] After reviewing the same mixed bag of evidence, each side became more polarized: subjects tended to uncritically accept evidence supporting their own positions while critically discounting equally probative evidence that ran counter to their positions.[100] And greater expertise doesn't seem to eliminate the power of motivation: in subsequent studies, established scientists and scientists in training displayed this same tendency.[101]

Finally, in yet another study, subjects were presented with identical litigation materials abstracted from an actual lawsuit involving a motorcycle-car collision.[102] When asked to predict how much the judge would award the plaintiff if negotiations stalled, subjects randomly assigned to play the plaintiff predicted that they would receive much larger awards than the amounts predicted by subjects randomly assigned to play defendant.[103] Moreover, each side tended to recall more informational details that supported its position.[104]

These studies are among the many cited to support the existence of "motivated reasoning."[105] Motivation, or any desire or preference for a

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and self-serving bias.

97. LEE ROSS & RICHARD E. NISBETT, THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY 72 (1991) (describing the Hastorf and Cantril study).

98. Leigh Thompson, *"They Saw a Negotiation": Partisanship and Involvement*, 68 J. PERSONALITY & SOC. PSYCHOL. 839, 840 (1995) (describing the Hastorf and Cantril study).

99. Charles G. Lord, Lee Ross & Mark R. Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2100 (1979); Kari Edwards & Edward E. Smith, *A Disconfirmation Bias in the Evaluation of Arguments*, 71 J. PERSONALITY & SOC. PSYCHOL. 5, 5 (1996).

100. ROSS & NISBETT, *supra* note 97, at 72–73.

101. *See* Jonathan J. Koehler, *The Influence of Prior Beliefs on Scientific Judgments of Evidence Quality*, *in* 56 ORGANIZATIONAL BEHAVIOR AND HUMAN DECISION PROCESSES 28, 28–55 (1993).

102. *See* Linda Babcock et al., *Biased Judgments of Fairness in Bargaining*, 85 AM. ECON. REV. 1337, 1338 (1995); Kim, *supra* note 41, at 1029.

103. Kim, *supra* note 41, at 1029.

104. Thompson, *supra* note 98, at 840.

105. KUNDA, *supra* note 87, at 211 (noting the "emerging consensus that motivation and affect can and do affect judgment" and citing sources therein). For other examples of motivated reasoning, see Peter H. Ditto & David F. Lopez, *Motivated Skepticism: Use of Differential Decision Criteria for Preferred and Nonpreferred Conclusions*, 63 J. PERSONALITY & SOC. PSYCHOL. 568, 568–84 (1992) (describing three different experiments involving the preferred and non-preferred conclusions of cognitive processes); Lee Sigelman & Carol K. Sigelman, *Judgments of the Carter-Reagan Debate: The Eye of the Beholders*, 48 PUB. OPINION Q. 624–28 (1984) (describing "the

particular outcome, will affect our reasoning through "reliance on a biased set of cognitive processes" that are involved in "forming impressions, determining one's beliefs and attitudes, evaluating evidence, and making decisions."[106] When engaged in reasoning tasks, instead of relying on all available knowledge, we tend to selectively access a subset of beliefs, knowledge constructs, inferential rules, and facts residing in our memories to support our favored conclusions.[107]

What all of this suggests is that your views about whether the 2000 presidential election was wrongly or rightly decided by the Supreme Court were shaped by your motivation, i.e., your desire for your candidate to win. It should also come as no surprise, then, that—in the context of the debates over gatekeeping—lawyers will rely on cognitive processes that are already skewed toward an outcome in line with their pre-existing views. And, given the omnipresent tendency to favor that which economically benefits oneself, those pre-existing views are likely to be in sync with lawyers' self-interest. Moreover, as the death penalty studies predict, when faced with strong counter-arguments, lawyers (like everyone else) are likely to dig in their heels rather than moderate their views.

I don't want to overstate my point. The fact that the motivation of self-interest can distort or color our judgments does not mean that we are free to conclude *whatever* we want simply because we want to.[108] Even some conservative legal scholars who defended the result in *Bush v. Gore* could not bring themselves to endorse the particular equal protection rationale advanced by the majority.[109] (The same might be said of progressive legal scholars who liked the result in *Roe v. Wade* but not its reasoning.) While the selective search for reasons to bolster our argument may be deeply flawed and partisan, our ability to justify our desired conclusions is nonetheless constrained, for example, by our understanding of reality as constructed by prior knowledge and plausibility.[110]

In sum, lawyers, like everyone else, are generally motivated to espouse positions that favor their perceived self-interest. But this generally happens not through any overt or explicit cost-benefit calculation "but through a subtle and implicit reconfiguration of preferences, self-conception, and motivation."[111] In fighting against regulation, lawyers subjectively see themselves as not arguing (principally) about the money. My point is that even though they may be sincere in this self-understanding, they may still

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impact of prior cognition and affect on judgments of the outcome of the 1980 Carter-Reagan debate").

106. Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480, 480 (1990).

107. *Id.* at 483; *see also* GILBERT, *supra* note 95, at 176–87.

108. KUNDA, *supra* note 87, at 224.

109. *See, e.g.*, Epstein, *supra* note 89, at 614 (describing the court's holding on equal protection grounds as a "confused nonstarter at best" and endorsing the "more potent" argument that the rulings of the Florida Supreme Court "ran afoul of Article II, Section 1, Clause 2 of the U.S. Constitution, which provides that 'Each State shall appoint, in such Manner as the Legislature Thereof May Direct,'" the state's electors).

110. KUNDA, *supra* note 87, at 224–32.

111. Kim, *supra* note 41, at 997.

be arguing (principally though not exclusively) about the money. So, to the exasperated cynic's claim that "It's about the money, stupid!" we can all agree on the one hand. On the other hand, it's much more subtle and complex than that.

III. INTERNALIZING MANAGERS' INTEREST

Why do lawyers resist gatekeeping? Not only is it in lawyers' economic self-interest (as processed through motivated reasoning), but it is also in the self-interest of those senior corporate managers who are vested with the authority to define corporate objectives and instruct lawyers on how to meet them. It should not surprise us that most managers (regardless of whether or not they are orchestrating corporate frauds) dislike even the suggestion that a lawyer might go over their heads to snitch on them.[112] Sociologists have amply documented that corporate managers are generally hostile to regulation: they overwhelmingly espouse laissez-faire economic policies and see regulation as a threat to their autonomy.[113] And, quite understandably, few managers will elect to be morally hectored by their lawyer—only to be billed $400 per hour for the enlightenment. Predictably, the comment letters from the Business Roundtable and the Securities Industry Association reflect business's aversion to regulatory meddling into managerial prerogatives.[114]

What's more interesting is why lawyers would adopt managerial anti-regulatory preferences on the issue of lawyer gatekeeping as their own. Of course, as suggested above, in the gatekeeping context, managers' views happen to correspond with lawyers' perceived economic self-interest. But that captures only part of the story. It fails to adequately explain the empirical finding that, on certain matters, most lawyers adopt managers'

112. Stephen M. Bainbridge & Christina J. Johnson, *Managerialism, Legal Ethics, and Sarbanes-Oxley Section 307*, 2004 MICH. ST. L. REV. 299, 322.

113. *See, e.g.*, ROBERT JACKALL, MORAL MAZES: THE WORLD OF CORPORATE MANAGERS 4 (1988); W. MICHAEL REISMAN, FOLDED LIES: BRIBERY, CRUSADES, AND REFORMS 1 (1979); Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255, 278 (1990) (citing studies); Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503, 515 (1985) (referring to this finding and citing studies); Elliott J. Weiss, *Social Regulation of Business Activity: Reforming the Corporate Governance System to Resolve an Institutional Impasse*, 28 UCLA L. REV. 343, 373–77 (1981) (citing studies).

114. *See* Letter from the Bus. Roundtable to Jonathan G. Katz, Sec'y, Sec. & Exch. Comm'n (Apr. 8, 2003), http://www.sec.gov/rules/proposed/s74502/brt040803.htm (arguing that either noisy withdrawal proposal "would undermine the relationship between attorneys and their organizational clients and deter officers, directors and employees from seeking advice from counsel on sensitive matters"); SIA Letter, *supra* note 67 (arguing that "the [reporting out] rule will make it extremely common for corporate officials to shy away from seeking legal advice, or to trim what they tell their lawyers"); *id.* (expressing opposition (1) to requiring lawyers to "independently review the business judgment" of the issuer's audit committee or board of directors and (2) to allowing the subordinate in-house attorney to report evidence of material violation directly to the CEO or QLCC (and thus bypassing her supervisory attorney) unless special circumstances dictate otherwise).

positions *even when doing so is against their own self-interest*.[115] It also ignores the extended process of acculturation that lawyers undergo to arrive at their currently held positions and attitudes. Thus, a more comprehensive explanation for why lawyers resist gatekeeping must account for the psychological mechanisms by which lawyers come to adopt the views of corporate managers, independent of lawyers' perceived self-interest.

The well-known and widely documented theory of cognitive dissonance helps provide such an explanation. Cognitive dissonance theory predicts that when a person's behavior is inconsistent with her prior self-image or attitudes to such a degree that dissonance or "psychic unrest" is aroused,[116] her internal attitudes will shift to generate greater alignment with her behavior in an effort to reduce the dissonance.[117]

Here's one representative study involving an experimenter asking subjects to eat fried grasshoppers.[118] In the first group, an intentionally *pleasant* experimenter did the asking; in the second group, an intentionally *unpleasant* experimenter did.[119] About half of the subjects in both conditions agreed to eat a grasshopper.[120] While both groups of subjects initially held similar negative attitudes about eating grasshoppers,[121] only

115. *See infra* notes 143–55 and accompanying text.

116. Dissonance is aroused if the "expected outcome of behaving inconsistently with one's attitude is an event that one would rather not have occur." PHILIP G. ZIMBARDO & MICHAEL R. LEIPPE, THE PSYCHOLOGY OF ATTITUDE CHANGE AND SOCIAL INFLUENCE 114 (1991) (internal quotation marks and external source omitted); *see* Joel Cooper & Russell H. Fazio, *A New Look at Dissonance Theory*, *in* 17 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 229, 229–30 (Leonard Berkowitz ed., 1984).

117. *See* LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE 1–3 (1957); ZIMBARDO & LEIPPE, *supra* note 116, at 107–23; Kim, *supra* note 41, at 1011. Stated in motivational terms, "people are motivated to adopt the attitude they had been led to express, and it is this motivation that provokes attitude change." KUNDA, *supra* note 87, at 217. For discussions of cognitive dissonance theory as pertaining to lawyers, see, for example, David Luban, *Integrity: Its Causes and Cures*, 72 FORDHAM L. REV. 279, 279–80 (2003); Gordon, *supra* note 44, at 57.

Cognitive dissonance scholars argue that these attitude shifts are motivated by the need to attain some degree of consistency and equilibrium for purposes of organizing and acting upon vast stores of information in a way that economizes cognitive effort. *See* Dan Simon & Keith J. Holyoak, *Structural Dynamics of Cognition: From Consistency Theories to Constraint Satisfaction*, 6 PERSONALITY & SOC. PSYCHOL. REV. 283, 284–85 (2002).

118. ZIMBARDO & LEIPPE, *supra* note 116, at 116; Philip G. Zimbardo et al., *Communicator Effectiveness in Producing Public Conformity and Private Attitude Change*, 33 J. PERSONALITY 233, 236 (1965).

119. The positive experimenter was rated high on being "calm, courteous, mature, clear-thinking," and "neither tactless nor hostile to others." The negative experimenter was evaluated as "not a warm person, is primarily bossy, tactless, demanding, snobbish, not genuinely interested in the subject, egotistical, and somewhat insincere and not very calm." *Id.* at 251–52. In both groups, all subjects reported having the freedom to choose whether or not to eat them and that the experimenter did not exert much in the way of "direct pressure." *Id.* at 242.

120. *Id*. at 241. Thus, "public conformity was unrelated to communicator differences." *Id.* at 254.

121. *Id*. at 246 (noting no differences in initial attitude positions between communicator conditions). This disparity also held even under incentive conditions. *Id.* at 247.

the subjects in the second group (unpleasant experimenter condition) overwhelmingly reported *liking* the taste of grasshoppers after trying them.[122] As the authors of the study explained, for those subjects whose attitudes changed, the pretext of yielding to the request of an affable experimenter ("How could I refuse such a nice fellow?") was plainly not available.[123] Given their inability to disclaim ownership for their behavior that conflicted with their prior attitudes,[124] their only plausible recourse was to convince themselves that grasshoppers were quite palatable after all. Stated another way, the psychic discomfort that naturally arose while engaged in counter-attitudinal behavior (munching on grasshoppers) was diminished when subjects unconsciously took the path of least resistance and changed their internal attitudes to move in line with their behavior.

Just as interesting, the change in attitudes had behavioral implications. After eating the grasshoppers and filling out the post-experimental attitude questionnaires, subjects were then asked to consent to being identified in army survival training manuals as persons who had tried grasshoppers and liked them.[125] A far greater percentage of subjects in the unpleasant experimenter group gave strong endorsements of grasshoppers than those in the pleasant experimenter group.[126]

This grasshopper study is meant simply to convey the gist of a phenomenon that has been extensively studied and verified. Extrapolating such findings to the lawyer-client relationship, we can predict that experienced lawyers who have long and dutifully performed the directives of their client representatives will have re-aligned their attitudes to match the views of their clients to achieve greater consistency between their actions and attitudes.

At this point, one could object that lawyers should experience no attitude change because lawyers can point to their hefty fees as the obvious explanation behind their actions. But people—even lawyers—do not like to think of themselves as bought and paid for[127] and thus will resist the insinuation that they are doing it just for the money. Indeed, experiments testing cognitive dissonance theory reveal that attitude shifts are *more* likely with larger monetary payments (as compared to smaller monetary payments) *if* such larger payments could plausibly be interpreted as

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122. *Id*. at 245 (noting that the negative communicator is much more effective in changing attitudes in the desired direction (55%) than the positive communicator (5%)).

123. *Id.*

124. Barry R. Schlenker et al., *Self-Presentational Analysis of the Effects of Incentives on Attitude Change Following Counterattitudinal Behavior*, 39 J. PERSONALITY & SOC. PSYCHOL. 553, 555 (1980) (noting that numerous studies have found that subjects must appear to be responsible in order for attitude change to occur following counter-attitudinal behavior and citing studies).

125. Zimbardo et al., *supra* note 118, at 247–48.

126. Thirty-seven percent in the negative communicator condition gave strong endorsements while only 11% did so in the positive condition. *Id.* at 248.

127. *See, e.g.*, AMER. BAR ASS'N, ". . . IN THE SPIRIT OF PUBLIC SERVICE:" A BLUEPRINT FOR REKINDLING LAWYER PROFESSIONALISM 30 (1986) (complaining that "too many practitioners have 'sold out to the client'" and advocating that "the duty to the system of justice must transcend the duty to the client").

bribes.[128] So long as individuals are able to perceive that they have freely chosen their behavior, as opposed to having succumbed to outside pressure, internal attitude shifts are likely.[129]

Moreover, at least two other factors should militate in favor of attitude shifts. First, internal attitudes are more likely to shift toward the position implied by the behavior if that behavior consists of role-playing. Research on role-playing suggests that when people actively adopt another's persona, they are more likely to come to identify and empathize with that person's perspective.[130] For example, when college students were asked to actively construct arguments in favor of the military draft for college students, they came to adopt those views, more so than students who had merely heard or recited those same arguments.[131] In another seminal study, heavy smokers who adopted and acted out the role of someone who was receiving a diagnosis of lung cancer ended up expressing stronger beliefs that smoking causes lung cancer as compared to a control group of heavy smokers who merely listened to recordings of the active role-playing sessions.[132] Moreover, the role-players subsequently reported smoking on average 10.5 fewer cigarettes per day than the control subjects. Remarkably, this difference persisted until a follow-up study conducted six months later.[133] In short, active role-playing is more likely to generate internal attitude shifts than mere passive exposure to information.

To a large degree, lawyers engage in role-playing when doing their clients' bidding. Although many lawyers don't formally advocate in court on behalf of their clients, they do write letters, file forms, negotiate, sign documents, make telephone calls, meet counterparties and regulatory authorities, and lobby (often against proposed regulation) on behalf of their clients. Unlike the surgeon or plumber, the lawyer "act[s] in the place of the client, [which] require[s] the direct involvement of the lawyer's moral faculties—*i.e.*, his capacities to deliberate, reason, argue and act in the public arena."[134] The lawyer must, at least to a degree, channel the client's values and preferences when acting as the client's voice-box. In effect, the

128. Schlenker et al., *supra* note 124, at 568–71 (finding that when payment is introduced in a context that increases subject's concerns about moral evaluations relevant to bribery, a direct relationship occurred between magnitude of payment and attitude change).

129. ZIMBARDO & LEIPPE, *supra* note 116, at 111–13; *see also* Lisa M. Fairfax, *Easier Said than Done? A Corporate Law Theory for Actualizing Social Responsibility Rhetoric*, 59 FLA. L. REV. 771, 803–04 (2007).

130. ZIMBARDO & LEIPPE, *supra* note 116, at 102.

131. *See* Irving L. Janis & Bert T. King, *The Influence of Role Playing on Opinion Change*, 49 J. ABNORMAL & SOC. PSYCHOL. 211–18 (1954); Bert T. King & Irving L. Janis, *Comparison of the Effectiveness of Improvised Versus Non-Improvised Role-Playing in Producing Opinion Changes*, 9 HUM. REL. 177–86 (1956).

132. Irving L. Janis & Leon Mann, *Effectiveness of Emotional Role-Playing in Modifying Smoking Habits and Attitudes*, 1 J. EXPERIMENTAL RES. PERSONALITY, 84–90 (1965).

133. Leon Mann & Irving L. Janis, *A Follow-Up Study on the Long-Term Effects of Emotional Role Playing*, 8 J. PERSONALITY & SOC. PSYCHOL. 339, 341 (1968).

134. Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 76 (1980); *see also* Kim, *supra* note 41, at 1011.

lawyer becomes "an extension of the legal, and to an extent the moral, personality of the client."[135] Consistently role-playing on behalf of the client may lead to the integration of some of the client's views into the lawyer's enduring belief structures.[136]

Second, internal attitudes are more likely to shift when the counter-attitudinal behavior is highly public.[137] People "tend to feel obliged to stand by their public deeds."[138] This is in part due to people's "self-presentational" concerns—our general need to establish, maintain, and refine a favorable image of ourselves before real or imagined audiences.[139] The fear of being labeled a "hypocrite," "liar," "two-faced," or a "fool"[140] may generate the type of psychic unrest that is ultimately responsible for causing attitude change.[141] Moreover, since public behaviors are more verifiable by third parties, they "cannot easily be denied or distorted in the person's mind."[142] By contrast, a person's attitudes or beliefs are relatively malleable, unstable constructs.

When lawyers represent their clients, they often do so in the public arena. Whether lawyers are transacting business or litigating, they are frequently acting as the client's intermediary to counterparties, courts, government agencies, or other third parties. Accordingly, those public behaviors cannot easily be dismissed as mere aberrations or explained away with other justifications. Bereft of other plausible explanations for engaging in such public behaviors, lawyers' views will move in line with clients' views.

To be clear, to predict that lawyers' attitudes will move toward those of their clients' managers does not mean that lawyers will automatically become champions of their clients' political causes or become card-carrying members of the American Chamber of Commerce. As suggested by Professor Robert Gordon, the more common response may be to "withdraw into technique, into the professional cult of craftsmanship and competence for its own sake, or just into the cynicism that seems to be our profession's main defense mechanism."[143] But even adopting that (weaker) attitude would be more consistent with what most corporate managers view as the proper passive role of corporate lawyers.[144]

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135. Postema, *supra* note 134, at 77.

136. ZIMBARDO & LEIPPE, *supra* note 116, at 115–16 (citing studies).

137. *Id*. at 115.

138. *Id*.

139. Roy F. Baumeister, *A Self-Presentational View of Social Phenomena*, 91 PSYCHOL. BULL. 3 (1982). This motivation need not be a consciously experienced one; nor does one's public image need to be accurate in an objective sense. *Id.*

140. *See id.* at 11.

141. *Id*. at 11–14 (citing studies).

142. ZIMBARDO & LEIPPE, *supra* note 116, at 115–16.

143. Gordon, *supra* note 44, at 57.

144. The prevailing managerial view is that, even on matters entailing tremendous legal risks, lawyers are there to assess legal risk and implement decisions made by senior corporate managers. *See* Robert Eli Rosen, *Risk Management and Corporate Governance: The Case of Enron*, 35 CONN. L. REV. 1157, 1169, 1172 (2003); Kim, *supra* note 41, at 1017. To be sure, client representatives who *do* want lawyers to be their corporations' consciences do exist. *See, e.g.*, Gordon, *supra* note

Sociological evidence is consistent with the hypothesis that large firm lawyers have internalized the views of their client representatives. Professor Robert Nelson's 1985 study of 224 lawyers in four large Chicago law firms[145] is telling. Nelson found that although corporate lawyers were politically more liberal on general social issues than the business clients that they represented,[146] most lawyers displayed strong identification with managerial interests on issues relating to their law practice. When asked to "play king" and explain "what they would change about the law that they practice if they had the necessary legislative and judicial power,"[147] lawyers tended to support proposals that would benefit their clients.[148] They favored changes that benefited management over organized labor, lending institutions over consumer-borrowers, wealthy taxpayers,[149] and antitrust and litigation defense.[150] Lawyers came out against government regulation in the fields in which they practice, favoring the reduction of government power, especially the power of the IRS and the SEC.[151] Recently published sociological research on 787 members of the Chicago bar[152] confirms Nelson's findings that corporate lawyers are considerably more supportive of corporate power than the general population—in spite of otherwise generally liberal political leanings.[153] As summed up by Nelson, "[g]iven an unconstrained power to change the law, the majority [of lawyers] would change the law to suit the interests of their clients."[154]

44, at 25 (citing sources).

145. Nelson, *supra* note 113, at 509. The findings of the study have also been reported in ROBERT L. NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM 31–32 (1988) (discussing methodology).

146. Nelson, *supra* note 113, at 515 (reporting data on attitudes about the government's role in policing the marketplace and concluding, based on the data, that "[B]usinessmen are substantially more optimistic about the capacity of the market than are the legal elites who represent them."). For example, when soliciting responses to the statement, "The protection of consumer interests is best insured by a vigorous competition among sellers rather than by federal government intervention," lawyers were split equally between agreeing and disagreeing with this statement (43.3% agreed, 43.3% disagreed). *Id*. By contrast, in a separate study referred to by Nelson, when businessmen were asked a similar question, 74% or three-quarters, had more faith in competition than regulation. *See* NELSON, *supra* note 145, at 238–39.

147. Nelson, *supra* note 113, at 521.

148. NELSON, *supra* note 145, at 247 ("In all, 80.2 percent of the responses suggested that the proposed changes would have salutary effects for clients."). By contrast, slightly more than "6 percent of the proposals favored liberal social issues, increased access to the courts, or support for legal services to the poor." *Id.* at 247.

149. Nelson, *supra* note 113, at 522, 524 (reporting finding that lawyers favored reducing taxes, especially estate and capital gains taxes).

150. *Id.* at 524–25.

151. *Id.* at 524.

152. JOHN P. HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 19 (2005).

153. *Id.* at 200 (noting that, "[B]y 1995 the percentage of the public that was critical of the power of large companies was more than twice the percentage among the lawyers."). In other words, lawyers were less than half as likely as the general public to be critical of corporate power.

154. Nelson, *supra* note 113, at 525.

There is one particularly interesting finding in Nelson's 1985 study. Lawyers broadly acknowledged that the deregulatory reforms that they desired would have, at least in the short-run, an adverse impact on their practices. Only 6% of lawyers believed that their work would expand while two-thirds believed that there would either be little to no effect or their work might even be substantially reduced.[155] As Nelson concluded, "The results show such a strong identification with the interests of clients—even to the point of putting clients' long-term interests above [lawyers'] short-term [financial] interests."[156] Again, the self-interest story is more complicated. To be sure, clear and indisputable evidence of lawyers acting counter to their own economic self-interest is hard to find.[157] But the existence of a few such examples is tough to reconcile with any Procrustean view that economic self-interest, simplistically conceived, is the exclusive and all-encompassing force shaping lawyers' views.

Turning to the bar's reaction to post-Enron calls for reform, we see evidence of lawyers internalizing managers' views in statements expressing solicitude for potentially misbehaving managers. Although a potential material law violation is a serious issue for any public corporation, voices from the bar minimize the graveness of the matter. For example, a leading member of the organized ethics bar describes a serious law violation as a mere "lapse"[158] in judgment and describes the managers committing malfeasance as people who simply "do not do the 'right thing.'"[159] We are warned that these managers will be "judged with the benefit of twenty-twenty hindsight."[160] Commentators sometimes frame the failure to rectify a material law violation as management's prerogative: it is simply the client's choice "not to follow the lawyer's advice,"[161] or a mere "difference of opinion"[162] with the lawyer, or an "honest disagreement with

155. *Id.* at 526 (noting that one-third perceived no great consequences and one-third thought the reforms might substantially reduce their work). Also, the response that was twice as common as all others was that the proposed reforms will lower client legal costs. *See* NELSON, *supra* note 145, at 247.

156. Nelson, *supra* note 113, at 526–27.

157. *See* Gordon, *supra* note 113, at 274 (noting a few historical examples in which lawyers pushed for reforms that ran counter to their clients' interests but acknowledging that such occurrences are rare and "that most lawyers' policy groups seek only to minimize both clients' and lawyers' exposure to regulation and liability").

158. Lawrence J. Fox, *The Fallout From Enron: Media Frenzy and Misguided Notions of Public Relations Are No Reason to Abandon Our Commitment to Our Clients*, 2003 U. ILL. L. REV. 1243, 1246, 1255 ("[W]e really would not need regulators anymore, because each client's lawyer . . . not only has the obligation to make sure that the client conforms to the law, but also is liable, along with the client, when the client *lapses*." And "lawyers will be hired to be on watch, . . . ready to sound the clarion call when the client should *lapse*." (emphasis added)).

159. *Id.* at 1246.

160. *Id.*

161. *Id.*

162. ABCNY 2002 Letter, *supra* note 24, at 10 ("Reasonable people, even prudent attorneys, can differ in drawing the conclusion that an officer or employee has breached a duty or broken a law. That difference of opinion cannot be turned into a basis for disciplinary sanction.").

that counsel."[163] The implication, of course, is that managers are entitled to break the law. Consistent with this outlook, calls for reforming lawyer conduct are seen as a tremendous overreaction to a marginal problem—the senior manager's mere "difference of opinion."

By contrast, the bar portrays hypothetical lawyers who demand the rectification of law violations as *contemptuous*. They are seen as "over-anxious,"[164] as "cry[ing] wolf" to chief legal officers,[165] acting in an "imprudent and uninformed manner,"[166] and making "mountains" out of "mole hills."[167] Commentators fear and envision the scenario where the manager will be forced "to acquiesce in following the lawyer's advice even when in good faith [he] strongly disagrees with the advice and the advice may be wrong or highly debatable."[168]

Of course, lawyers crying wolf is a possibility in any regulatory regime. After all, no matter what rule one chooses, there will always be a risk that some lawyers will err in their interpretation of the rule or that the rule, as applied, will catch or chill innocent conduct. But this argument begs the question: as between the lawyer and the non-lawyer, who better to determine whether the law has been violated? Presumably, lawyers, by virtue of their education and training, have superior expertise in identifying most law violations.[169] And, among the various gatekeeping professionals, lawyers are most qualified "to advise on what would satisfy the purpose

163. Letter from 79 Law Firms to Jonathan G. Katz, Sec'y, Sec. & Exch. Comm'n (Apr. 7, 2003), http://www.sec.gov/rules/proposed/s74502/79lawfirms1.htm ("Significantly, clients will understand the potential adverse consequences of consulting counsel and thereafter having an honest disagreement with that counsel.").

164. ABCNY 2003 Letter, *supra* note 69, at 19 ("In fact, if numerous public disclosures turn out to be the result of nothing more than over-anxious lawyers allowing their conservatism to result in disagreements with clients resulting in public disclosure, clients as a whole will become more and more leery of working with, or disclosing information to, cautious counsel and the risk of failures to comply with laws will only increase.").

165. Letter from Sullivan & Cromwell LLP (Apr. 7, 2003), http://www.sec.gov/rules/proposed/s74502/sullivan040703.htm ("The rule thus effectively requires counsel to 'cry wolf' to chief legal officers.").

166. *Id.* ("Investors will not be well served by a hair-trigger reporting requirement that forces a prudent and honest attorney to act in an imprudent and uninformed manner.").

167. ABCNY 2003 Letter, *supra* note 69, at 19 ("[I]f reporting out becomes relatively common and a number of cases prove to be the result of 'mole hills' built into 'mountains' by attorneys engaged in defensive thinking due to their fear of being second-guessed by the Commission, investors may actually become immune to an attorney's notice of withdrawal.").

168. Law Firms Letter, *supra* note 27 ("The threat of withdrawal thus may effectively force a client to acquiesce in following the lawyer's advice even when in good faith it strongly disagrees with the advice and the advice may even be wrong or highly debatable.").

169. John C. Coffee, Jr., *The Attorney as Gatekeeper: An Agenda for the SEC*, 103 COLUM. L. REV. 1293, 1306 (2003). To be sure, lawyers are not necessarily the most adept at identifying law violations that are classifiable as "pure accounting frauds." That said, many frauds—even the elaborate ones concocted by Enron managers—are not "pure accounting frauds" and require the substantial assistance (witting or unwitting) of lawyers. *See* Regan, *supra* note 12, for a detailed account of what roles lawyers played in the Enron transactions.

and spirit, as well as letter, of the law."[170] From this perspective, it is strange to exempt from gatekeeping those professionals who are presumably most adept at determining law violations.[171]

In addition, the bar's overwhelming emphasis on the risks of over-inclusion (i.e., the risk of frequent "false alarms") assumes the empirical proposition that risk-averse lawyers will be prone to ratting out their client representatives. But, as I have argued elsewhere,[172] the fear should be just the opposite. By virtue of the nature of the lawyer-client relationship in the corporate context, lawyers will remain subject to enormous pressures to overlook management wrongdoing, notwithstanding their gatekeeping obligations.[173] Moreover, the theoretical fear of rampant whistle-blowing is undercut by the real-world experience of auditors. Since the Private Securities Litigation Reform Act of 1995, auditors have been statutorily obligated to report to the SEC any unrectified material illegalities encountered in the course of their work for public company clients.[174] The evidence strongly indicates that auditors remain deeply reluctant to make such reports.[175] The bar's selective emphasis on only one set of risks—the risk of over-inclusion—reflects just how strongly lawyers have adopted managers' points of view.

IV. IGNORING SHAREHOLDERS' INTEREST

Again, why do lawyers resist gatekeeping? After all, doctors are required by state law to notify state welfare authorities when they see evidence of child abuse. They did not campaign against such obligations in the name of confidentiality or alignment with parental interests. Assuming that lawyers are generally not sociopaths, they too should care about the harms caused by their actions (or knowing inaction) to innocent third parties. If it is too much to ask lawyers for corporations to worry about harms suffered by innocent people who die of chemical leaks in Third World countries,[176] at least they should be concerned about formally recognized constituents of the corporation, to wit: shareholders. As a general matter, plausible material law violations committed by managers do endanger shareholder interests. Shouldn't lawyers care about shareholders' interests? Especially if they regard themselves (as the law does) as fiduciaries of their corporate clients?

Take, for example, the following text from the official comment of the law firm of Jones Day:

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170. Rhode, *supra* note 47, at 1331.

171. *See infra* note 207 and accompanying text.

172. *See* Kim, *supra* note 41, at 1075.

173. *See id.*; Kim, *supra* note 16, at 430–46.

174. 15 U.S.C. § 78j-l(b)(1) (2006); *see also* Securities Exchange Act of 1934, Pub. L. No. 73-291, § 10A(b), 48 Stat. 881 (as amended in 1995, 2002 & 2010).

175. *See* Coffee, *supra* note 169, at 1306 (citing sources showing extremely low auditor report rates for both immaterial and material illegalities covered by the reporting obligation).

176. *See, e.g.*, Eric A. Lustig, *The Bhopal Disaster Approaches 25: Looking Back to Look Forward*, 42 NEW ENG. L. REV. 671, 671–75 (2008) (introducing symposium issue on Bhopal).

> In a corporate setting, under the ABA Rules[, the attorney's] client is the corporation. Attorneys are advocates. The touchstone of the attorney's professional and ethical obligation is the attorney's duty to the client, not some undefined duty to "the market" or "*public investors*," and especially not to the government agency that, among other roles, can bring an enforcement proceeding against the client.[177]

The above disclaimer of the relevance of shareholder (and other) interests is repeated in a number of comment letters.[178] To be sure, the above statement is a technically accurate restatement of the law governing lawyers. A lawyer's fiduciary duty is owed to the organization alone, and not to any of its individual constituents.[179] Accordingly, when substantial harm to the organization is threatened by constituent wrongdoing, the

177. Letter from Jones Day to Jonathan G. Katz, Sec'y, Sec. & Exch. Comm. (Apr. 7, 2003), http://www.sec.gov/rules/proposed/s74502/jonesday040703b.htm (emphasis added).

178. *See, e.g.*, Letter from Clifford Chance to Jonathan G. Katz, Sec'y, Sec. & Exch. Comm. (Dec. 18, 2002), http://www.sec.gov/rules/proposed/s74502/clifford1.htm ("We do not believe, however, that a lawyer for a company has an obligation to investors or potential investors in that company, including individual shareholders."); Letter from Munger, Tolles & Olson LLP to Jonathan G. Katz, Sec'y, Sec. & Exch. Comm. (Jan. 6, 2003), http://www.sec.gov/rules/proposed/s74502/munger010603.htm [hereinafter Munger, Tolles, & Olson Letter] ("[S]hareholders are no more the client than are officers or directors."); Letter from L.A. Cnty. Bar Ass'n to Jonathan G. Katz, Sec'y, Sec. & Exch. Comm. (Dec. 18, 2002), http://www.sec.gov/rules/proposed/s74502/maroni1.htm [hereinafter LACBA Letter] ("We believe that the fiduciary duties of an attorney for an entity are owed to the entity itself, not separately to the shareholders."); Letter from Corp. Comm., Bus. Law Section, The State Bar of Cal. to Jonathan G. Katz, Sec'y, Sec. & Exch. Comm. (Dec. 16, 2002), http://www.sec.gov/rules/proposed/s74502/tghoxiq1.htm ("[A]n attorney who represents a corporation represents the entity, but does not thereby also represent the shareholders."); ABA Letter, *supra* note 26, at 9 ("The Commission . . . correctly characterizes the organization, and *not its shareholders* or other constituencies, as the client. This distinction is important in identifying to whom a lawyer owes duties–namely the organization and not particular shareholders, whose interests may differ." (emphasis added)); ABCNY 2002 Letter, *supra* note 24, at 46 ("The Commission Should Clarify That Attorneys Subject To The Proposed Rule Owe A Duty Solely To Their Client, The Corporate Entity, And Not To Investors, And Should Modify The Language In The Proposed Rules To Clarify That There Is No Private Right Of Action For Violation Of The Proposed Rule." (formatting modified)).

179. For authority on the identity of the client in the organizational context, see MODEL RULES OF PROF'L CONDUCT R. 1.13(a) & cmt. 1 (2010) ("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents. . . . Officers, directors, employees and shareholders are the constituents of the corporate organizational client."); MODEL CODE OF PROF'L RESPONSIBILITY EC 5–18 (1980) ("A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity."); Yablonski v. United Mine Workers of America, 448 F.2d 1175, 1181 (D.C. Cir. 1971); 2 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 96 cmt. b (2000) ("By representing the organization, a lawyer does not thereby also form a client–lawyer relationship with all or any individuals employed by it or who direct its operations . . . .").

lawyer must proceed in the best interests of the organization.[180]

But, as a practical matter, one cannot assess the harm to the organization without considering the violation's impact on the company's share price, which determines whether the company can reasonably obtain public financing in the future. And plausible cases of material law violations under Sarbanes-Oxley § 307 are likely to negatively impact share price.[181] Of course, considering the company's share price necessarily implicates shareholder interests.

My goal here is not to wade into the contentious normative debate about the primacy of shareholders, directors, or managers in the corporate governance literature.[182] I'm asking a simpler, and arguably prior, question about underlying empirics. Given that shareholders' and the corporation's interests are intertwined in the relevant factual situation, what (psychologically) explains the indifference to the potential harm befalling their clients' shareholders?

Perhaps this indifference is a natural consequence of internalizing the views of corporate managers, who may feel latent disdain about shareholder constituents who, if sufficiently consolidated or organized, can potentially upset managerial agendas.[183] Perhaps this indifference is also a by-product of the formation of a strong in-group identity. Psychologist Henri Tajfel and his colleagues have demonstrated that the "'mere categorization' of people into different nominal groups . . . can elicit favoritism toward in-group members" and disparagement of out-group

180. 2 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 96 cmt. F (2000) (noting that, "[I]f the threatened injury is substantial the lawyer must proceed in what the lawyer reasonably believes to be the best interests of the organization.").

181. At least some of the violations serious enough to trigger the reporting procedures under Part 205 and Sarbanes-Oxley § 307 would qualify as securities frauds. In those cases, the corporation's own shareholders are deemed to be the victims of fraud. Assuming that most significant frauds are eventually revealed, the corporation must ordinarily compensate the defrauded shareholders—either through judgment or settlement. This potentially enormous payout will be charged against earnings and will result in a negative share price adjustment. For those material law violations not involving securities frauds, many of them will nonetheless be imputed to the corporation—either expressly by statute or by operation of the principle of respondeat superior. Accordingly, the company itself may be subject to civil or criminal liability, which would, in turn, adversely impact share price. Also, in the long run, a pattern of material violations will likely undermine the company's share price by impairing the company's reputation for financial integrity. Thus, there should be no doubt that plausible cases of material law violations may negatively impact share price, necessarily implicating both the corporation's and its shareholders' interests. *See* Kim, *supra* note 12, at 132–33.

182. *See, e.g.*, Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 836 (2005); Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735, 1735 (2006); Leo E. Strine, Jr., *Toward a True Corporate Republic: A Traditionalist Response to Bebchuk's Solution for Improving Corporate America*, 119 HARV. L. REV. 1759, 1759–60 (2006).

183. One classic situation where managerial interests may diverge significantly from shareholder interests is with respect to acquisitions and anti-takeover defenses. *See, e.g.*, Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561, 586–88 (2006).

members.[184] Accordingly, to the extent that lawyers socially identify themselves with management and not shareholders, they are likely to favor management and derogate shareholders, who may be regarded as the out-group.

Another explanation is that lawyers simply cannot garner the threshold amount of empathy for shareholders, who—with some exceptions—are statistical victims of managerial misconduct. We can all recall instances where specific victims of misfortune draw tremendous public attention and sympathy. Need I say more than "Baby Jessica"?[185] By contrast, we all know how difficult it is to persuade the general public that we should all share the financial burden of providing health care for the millions of unnamed, uninsured Americans. As noted by Nobel laureate Thomas Schelling in his economic analysis of risk, the death of a known individual invokes "anxiety and sentiment, guilt and awe, responsibility and religion. . . . But most of this awesomeness disappears when we deal with statistical deaths."[186] More ominously, Joseph Stalin once said, "The death of a single Russian soldier is a tragedy. A million deaths is a statistic."[187]

Research on behavioral decision-making in psychology and economics reveals that people show less empathy for statistical victims (who have not yet been identified) than for identifiable victims.[188] In one field experiment conducted by Professors Deborah Small and George Loewenstein, researchers approached potential donors with a letter requesting money to buy materials for a house to be built for a needy family through the Habitat for Humanity organization.[189] Excluding names, the letter briefly described the characteristics of several families on the waiting list to move into homes. Researchers informed half of the participants that the recipient family "has been selected" and the other half that the family "will be selected" from the list. In neither condition were participants told about which particular family had been or would be selected.[190]

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184. ROSS & NISBETT, *supra* note 97, at 40 (citing findings by psychologist Henri Tajfel); Henri Tajfel, *Experiments in Intergroup Discrimination*, 223 SCI. AM. 96, 101–02 (1970) (reporting finding that simply classifying children based on their preferences for the paintings of Paul Klee or Wassily Kandinsky resulted in subjects' allocating greater money to members of their in-group as opposed to the out-group); *see also* Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1533–34 (2005); Kim, *supra* note 41, at 1022.

185. Eighteen-month old Jessica McClure, widely known as "Baby Jessica," was trapped in a Texas well for fifty-eight hours in 1987. In response to media pleas, the family received more than $700,000 in public donations for the rescue effort. Karen E. Jenni & George Loewenstein, *Explaining the "Identifiable Victim Effect,"* 14 J. RISK & UNCERTAINTY 235, 235–36 (1997); Deborah A. Small & George Loewenstein, *Helping* a *Victim or Helping* the *Victim: Altruism and Identifiability*, 26 J. RISK & UNCERTAINTY 5, 5 (2003).

186. Thomas C. Schelling, *The Life You Save May Be Your Own*, *in* PROBLEMS IN PUBLIC EXPENDITURE ANALYSIS 127, 142 (Samuel B. Chase, Jr. ed., 1968).

187. *See* RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 43 (1980) (quoting Joseph Stalin).

188. Small & Loewenstein, *supra* note 185, at 5.

189. *Id.* at 11.

190. *Id.*

Given that the *only* difference between the two conditions was whether the recipient family had already been selected, one might reasonably expect that both groups of participants would contribute similar amounts. To the contrary, more people contributed and contributed significantly more money when the recipient family had already been determined than when the family had not yet been determined.[191] As the authors of the studies suggest, a determined victim of misfortune may stimulate a more powerful, affective response, inducing altruism. By contrast, an undetermined or statistical victim may invoke more deliberative, calculative cognitive processes that are more characteristic of emotional detachment.[192]

Other studies demonstrate that we lack empathy for *groups* of victims (regardless of whether they've been identified) as compared to a *single* identified victim.[193] It may simply be easier for people to adopt the perspective of a single identified individual, who is a psychologically coherent unit, compared to the multiple perspectives of a group of individuals, which may strain the perceiver's processing capacity.[194] Recent follow-up research also suggests these types of effects may translate into greater tolerance for unethical behavior when victims are unidentified.[195]

What is the significance of these findings in explaining the legal profession's resistance to gatekeeping? If people are generally unsympathetic to a group of unidentified or unidentifiable victims,[196] then we should expect lawyers to be callous about the harm that may befall a client's public shareholders. After all, shareholders are the textbook examples of victims for whom we cannot generate empathy. With the exception of a small number of activist shareholders, shareholders are numerous, diverse, abstract (especially if they are institutional), and often unidentifiable at any particular moment in time by virtue of the anonymous securities trading markets. Accordingly, lawyers may be more tolerant of ethically questionable behavior that risks harm to these shareholders.

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191. *Id.* at 12 (statistically significant difference of $p = 0.05$).

192. Deborah A. Small, George Loewenstein & Paul Slovic, *Sympathy and Callousness: The Impact of Deliberative Thought on Donations to Identifiable and Statistical Victims*, 102 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 143, 143–45 (2007).

193. Tehila Kogut & Ilana Ritov, *The "Identified Victim" Effect: An Identified Group, or Just a Single Individual?*, 18 J. BEHAV. DECISION MAKING 157, 165 (2005) (noting that the results of their study to support the hypothesis that a "single identified victim evokes stronger feelings than an unidentified single victim, or a group of victims, regardless of their being identified or not"—the singularity effect).

194. *Id.* at 158, 159, 165.

195. Francesca Gino, Lisa L. Shu & Max H. Bazerman, *Nameless + Harmless = Blameless: When Seemingly Irrelevant Factors Influence Judgment of (Un)ethical Behavior* 8, 17–22 (Harvard Bus. Sch. NOM Working Paper, Paper No. 09-020, 2008), *available at* http://ssrn.com/abstract=1238661 (concluding that people tend to judge others' ethically questionable behavior less harshly when the victim of the wrongdoing is unidentified).

196. The distinction between "identifiable" and "actually identified" victims is not material to this Article's analysis, as—with few exceptions—shareholders are often both unidentified and unidentifiable from the lawyer's perspective at any particular moment in time.

Moreover, lawyers will not be eager about having to safeguard the interests of such an abstract class of victims, especially if doing so feels like betraying the senior corporate managers—the living, breathing humans whose preferences they have internalized. In addition, we should expect that lawyers will likewise feel indifferent to the interests of the abstract *corporation* to whom they, by law, owe their fiduciary duties.

Comment letters confirm that lawyers are generally indifferent to shareholders as a class, who are seen as a "diverse and, for the most part, unknown group of constituents."[197] Lawyers dismiss the suggestion that shareholder interests should be considered in defining the lawyer's duty to the corporate client. They argue that the creation of a "direct duty to broad classes of diverse shareholders, most of whom have widely varying interests and objectives . . . would undoubtedly create impermissible conflicts."[198] Others "seriously doubt that there is any 'best interest of shareholders' that can be discerned for a publicly held corporation," given that the "interests of shareholders are very diverse."[199] And still others think it nothing less than "ludicrous to believe that an attorney can 'represent' much less protect the interests of such a disparate group."[200]

Now, as Professor Iman Anabtawi has argued, shareholders do in fact have diverse—and often conflicting—interests.[201] Accordingly, any reform seeking to redefine the lawyer's fiduciary duty to incorporate explicitly shareholder interests must deal with the unintended consequences of doing so.[202] But the bar's contention that the lawyer's fiduciary duty should not be so expanded is, quite simply, a red herring. After all, on the narrow issue of requiring lawyers to interdict the material, unrectified illegalities of managers, there is no conflict of interest.[203] In fact, for the issue at hand, the interests of the corporate client and its shareholders happen to be perfectly aligned.[204] As a result, a redefinition of the lawyer's fiduciary

197. Munger, Tolles & Olson Letter, *supra* note 178.

198. Letter from Varnum, Riddering, Schmidt & Howlett LLP to Jonathan G. Katz, Sec'y, Sec. & Exch. Comm'n (Dec. 18, 2002), http://www.sec.gov/rules/proposed/s74502/jblevan1.htm.

199. LACBA Letter, *supra* note 178.

200. Letter from Compass Bancshares, Inc. to Jonathan G. Katz, Sec'y, Sec. & Exch. Comm'n (Dec. 12, 2002), http://www.sec.gov/rules/proposed/s74502/jwpowell1.htm.

201. *See* Anabtawi, *supra* note 183, at 577 (2006) (noting inherent difficulties in discerning what shareholder interests are due to "deep rifts among the interests of modern shareholders").

202. *See id*. at 574–75 (noting that increasing shareholder power might result in certain shareholders pursuing their own private interests to the detriment of shareholders as a class).

203. *See* Kim, *supra* note 12, at 113–16.

204. To the extent that material illegalities perpetrated by managers are likely to be eventually revealed in the marketplace, the company and its shareholders have common interests in preventing or rectifying illegalities before greater damage to the company is done. Securities law scholars believe that actionable securities frauds are particularly susceptible to ultimate detection. *See, e.g.*, Jennifer H. Arlen & William J. Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence*, 1992 U. ILL. L. REV. 691, 701 (arguing that fraud-on-the-market securities frauds are likely to be revealed). Once revealed, the company's share prices will likely drop, which can't be good either for the company or the company's investors. To be sure, prior to the fraud's revelation, any particular investor might benefit in the short term when selling his shares to another investor at

duty is not necessary.

V. CONCLUSION

Why do lawyers resist gatekeeping? On the one hand, if you take the official rhetoric of the bar at face value, it is because lawyers are professionally obligated to do so. Resistance reflects virtue. On the other hand, if you adopt a cynical approach, it's just lawyers chasing their economic self-interest. Follow the money. Resistance reflects vice. Of course, the truth is always somewhere in between. It is economic self-interest, but not in the way we commonly think of it (for example, lawyers intentionally lying to the public or regulators in order to line their own pockets). Rather, it is economic self-interest warping cognition. It is vice, but not of a venal sort. It's rather banal.[205]

In addition to self-interest, unconscious efforts to reduce cognitive dissonance will lead to the internalization of the interests of those senior corporate managers serving as the clients' representatives. This mechanism overlaps somewhat with self-interest but not entirely. Finally, it's how we think of—or more accurately, fail to think of—the statistical victim that is the shareholder. These three cognitive processes—self-interested motivation, internalization of managers' views as a product of cognitive dissonance, and indifference to abstract shareholders—explain *why* lawyers resist gatekeeping duties. Consequently, when lawyers advance principled arguments about why gatekeeping is not their job, we should consider those arguments with a healthy dose of skepticism.

Given these tendencies, one might ask: why should we rely on lawyers at all when all the evidence shows that they would make *lousy* public gatekeepers? Shouldn't Congress, courts, and the SEC just throw up their hands in resignation, realizing the futility of trying to convert lawyers into gatekeepers? But we live in a world of neither perfect solutions nor ideal gatekeepers, so the relevant issue is not so much whether lawyers make good gatekeepers in some absolute sense but always as compared to what? Here is not the place to provide a complete answer to that question, which would require an institutional comparison of the efficacy of other existing gatekeepers, including accountants, investment bankers, and boards of directors.[206] Suffice it to say that, for purposes of this Article, it seems odd

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a fraudulently inflated price. However, no investor benefits if fraud becomes rampant enough to drive both honest issuers and investors from the capital markets. Moreover, recent research casts doubt on claims that investors may suffer no or negligible net harm from fraud over the long term. *See* Alicia Davis Evans, *Are Investors' Gains and Losses from Securities Fraud Equal over Time? Some Preliminary Evidence* 5–6 (Michigan Law Empirical Legal Studies Working Paper, Paper No. 09-002, 2010), *available at* http://ssrn.com/abstract=1121198.

205. In prior work, I have distinguished between the "venality hypothesis" and the "banality hypothesis." *See* Kim, *supra* note 41, at 988–97.

206. In prior work, I identified four criteria by which gatekeepers may be comparatively assessed. They are (1) the willingness to interdict, (2) the willingness to monitor, (3) the capacity to monitor, and (4) the capacity to interdict. Kim, *supra* note 16, at 421–22 (discussing the "Four Quadrants of Gatekeeping").

to exempt those professionals who are presumably most adept at identifying law violations.[207]

Lawyers perceive it to be in their self-interest to resist gatekeeping because they are myopic. In the long run, gatekeeping actually serves the legal profession's self-interest because "lawyers are valuable to their clients to the extent, but only to the extent, that they can be trusted by constituents and third parties not to game the system in a way that damages the entity, the integrity of the capital markets, and the legal framework."[208] As noted by Robert Gordon, "If it turns out not only that [lawyers] are gaming the system to suppress and distort facts that make corporations look bad, and hype and inflate facts that make them look good, they lose the power to legitimate/validate corporate conduct."[209]

One need only look at the historical lesson provided by the accounting profession to see how a profession can be catastrophically short-sighted. As Professor John Coffee has argued, by persistently resisting clearly defined gatekeeping obligations and by "tolerating a disciplinary system that amounted to little more than a charade, the [accounting] profession ensured that eventually such a system of private self-regulation would become politically unacceptable."[210] In the wake of the extraordinary audit failures that culminated in the corporate fiascoes of Enron and WorldCom, Sarbanes-Oxley ended the self-regulation of accountants by creating a public regulatory body—the Public Company Accounting Oversight Board—to regulate auditing.[211] Securities lawyers should be reminded of the possibility of a similar fate.

In spite of the dour diagnosis that I have presented in this Article, there is cause for guarded optimism. There is decent evidence that individual lawyers—at least on *some* level—hunger to be more ethical and want to

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207. It seems especially odd to exempt lawyers from gatekeeping if the persistence and prevalence of white collar crime is explained more by the prohibitive costs of detection rather than inadequate sanctions. Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857, 888 (1984); *see also* Michael L. Seigel, *Corporate America Fights Back: The Battle over Waiver of the Attorney-Client Privilege*, 49 B.C. L. REV. 1, 13 (2008) (noting the complexity of white collar crime and the inherent difficulties in prosecuting them). Using the terminology that I developed in prior work, lawyers may have a superior "capacity to monitor" than other professionals, given lawyers' relative expertise (by virtue of their education and training) in identifying law violations (at least for those violations that are not pure accounting frauds). For an analysis comparing the expertise of inside and outside counsel, see Kim, *supra* note 16, at 455–57. Also, as noted by Deborah Rhode, among the various gatekeepers, lawyers are most qualified "to advise on what would satisfy the purpose and spirit, as well as letter, of the law." Rhode, *supra* note 47, at 1331. For an analysis of how legal issues were important and arguably central even in the Enron (accounting) fraud, see Regan, *supra* note 12, at 1140–43.

208. Kim, *supra* note 12, at 135 n.372 (paraphrasing Robert Gordon).

209. E-mail from Robert Gordon to author (July 17, 2009, 1:04 PST) (on file with author).

210. JOHN C. COFFEE, GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 170 (2006).

211. *Id*. at 142–43. Of course, it remains to be seen whether this body will be an aggressive regulator of auditing. *Id.* at 377.

assume a greater role in counseling clients to observe the law.[212] But lawyers are reluctant to risk "offending a client by the advice" they give or the public positions they support,[213] especially if doing so simply results in clients going elsewhere to find lawyers with more malleable consciences. Also, given the state of background norms of corporate representation, characterized by the prevailing "ethic of uncritical loyalty to the client,"[214] lawyers will hesitate to go against the grain and be the audacious norms entrepreneur.[215]

Since individual lawyers suffer from massive collective action problems that prevent them from going against these norms,[216] bar associations can play a vital role by doing two things. First, they can affirmatively define law-respecting norms by inculcating a prima facie duty to urge compliance with the law[217] and stop promulgating rules and rhetoric that signal to lawyers that it is "*illegitimate* to adopt an attitude of discretionary judgment toward their clients' . . . ends."[218] Second, instead

212. In Nelson's aforementioned survey of Chicago lawyers, "[m]ore than three-quarters of the sample (76 percent) responded that it was appropriate to act as the conscience of a client when the opportunity presented itself—a consensus that did not vary by age, firm, or field of practice." Also, 16.22% of lawyers reported having refused an assignment because it conflicted with personal values, of which 50% of those responses reported having refused an assignment to avoid violating professional conduct rules (e.g., ongoing client criminal conduct, conflicts of interests, harassment of third parties). Only 8.1% of the lawyers who had never refused work said that "personal values should not dictate what a lawyer does." *See* NELSON, *supra* note 145, at 255–56. In another survey of 1,216 in-house counsel, 78% of respondents felt that the general counsel or other inside attorneys should report misconduct to appropriate corporate officials; 71% felt that the law should be clearly defined and that reporting illegal behavior should be mandatory, regardless of the attorney-client privilege, to ensure the well-being of the corporate client; 35% felt that disclosure of confidential communications (to report misconduct to the SEC) should be mandatory while 46% felt that it should be permissive. *See* Chad R. Brown, *In-House Counsel Responsibilities in the Post-Enron Environment*, 21 No. 5 ACCA DOCKET 92, 97–98 (2003). In another empirical study on in-house counsel of Fortune 1000 companies, 17% of in-house counsel identified their primary concern as policing the conduct of their business clients. *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, 460, 463, 468 (2000).

213. Gordon, *supra* note 113, at 287.

214. *Id.* at 292.

215. Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 909 (1996) (defining "norm entrepreneurs" as "people interested in changing social norms").

216. *Id*. at 948 (noting that individuals "cannot bring about the change on their own, because in his individual capacity, each person has limited power to alter meanings, norms, or roles" and noting the government's role in solving collective action problems).

217. *See* Gordon, *supra* note 113, at 279 (observing that lawyers "have no positive duty to urge compliance or to go beyond 'purely technical' advice if that is all the client wants"). A prima facie duty to urge compliance with the law can derive from a prima facie duty to obey the law. *See* 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 (1996).

218. Gordon, *supra* note 44, at 57. As noted by Gordon, lawyers "have virtually no formal leverage over clients who persist in illegal conduct, since they may disclose misconduct to outsiders only in extreme situations, and may not even resign unless the company's highest authority resolves to proceed with a 'clear' violation of law likely to result in 'substantial injury' to the organization."

of resisting gatekeeping, they can embrace it and acknowledge the necessity of prosecuting securities lawyers who assist corporate frauds. Since the bar isn't doing it,[219] it should candidly acknowledge that someone else should. Bar leaders would also do well to examine the lessons learned from the plight of the accounting profession to re-evaluate the legal profession's own self-interest.

See Gordon, *supra* note 113, at 279.

219. State bar disciplinary systems lack both funding and expertise to go after securities lawyers. *See, e.g.*, RICHARD L. ABEL, AMERICAN LAWYERS 143–50 (1989); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 641 (1985); Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 21–22 (1991); David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 801, 822–30 (1992); Harvey L. Pitt, Remarks Before the Annual Meeting of the American Bar Association's Business Law Section (Aug. 12, 2002) (transcript available at http://www.sec.gov/news/speech/spch579.htm) (expressing SEC's frustration about the "generally low level of effective responses we receive from state bar committees when we refer possible disciplinary proceedings to them"); Cramton et al., *supra* note 32, at 795–97.