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Lawyers in the Moral Maze

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LAWYERS IN THE MORAL MAZE

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I. INTRODUCTION

THE Securities and Exchange Commission's Standards of Professional Conduct for Attorneys[1] represent an attempt to solve a problem. The problem is that ethical obligations, state law and self-interest apparently do not give lawyers sufficient incentives to report law violations by corporate managers "up the ladder" to appropriate decisionmakers within the corporate client, or to disclose illegality to regulators. That problem is considered serious, because it is believed to have resulted in lawyers' at least passive complicity in managerial wrongdoing. That complicity violated lawyers' fiduciary obligation to their corporate client and betrayed their public trust as gatekeepers, thereby contributing to the recent epidemic of corporate fraud and corporate governance failures. Let's assume, for the sake of argument, that the problem, as just defined, is real and serious. Let's assume further that the Standards will go some distance toward solving that problem (although how much distance is debatable).[2] It is difficult to predict the potential efficacy of a legal solution to such a problem, however, without understanding why the problem exists, how deeply rooted it is in the reality of corporate and professional life and how the problem fits structurally into its social context. Only with a fuller understanding of its social reality can we assess whether government intervention will succeed or produce perverse, distorted or insignificant results. It

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1. Final Rule: Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6295 (Feb. 6, 2003) (to be codified at 17 C.F.R. pt. 205), *available at* www.sec.gov/rules/final/33-8185.htm (hereinafter referred to as "the Standards").

2. The divergence of opinion about the usefulness of the Standards is reflected in the various contributions to this Symposium. For other opinions about the Standards, see generally Stephen M. Bainbridge, *The Tournament at the Intersection of Business and Legal Ethics*, 1 U. ST. THOMAS L.J. (forthcoming 2004); Stephen M. Bainbridge & Christina M. Johnson, *Managerialism, Legal Ethics and Sarbanes-Oxley Section 307*, MICH. ST. UNIV. D.C.L. L. REV. (forthcoming 2004); David J. Beck, *The Legal Profession at the Crossroads: Who Will Write the Future Rules Governing the Conduct of Lawyers Representing Public Corporations?*, 34 ST. MARY'S L.J. 873 (2003); John C. Coffee, Jr., *The Attorney As Gatekeeper: An Agenda for the SEC*, 103 COLUM. L. REV. 1293 (2003); Jill E. Fisch & Kenneth M. Rosen, *Is There a Role for Lawyers in Preventing Future Enrons?*, 48 VILL. L. REV. 1097 (2003); Thomas Lee Hazen, *Administrative Law Controls on Attorney Practice—A Look at the Securities and Exchange Commission's Lawyer Conduct Rules*, 55 ADMIN. L. REV. 323 (2003); Marc I. Steinberg, *Lawyer Liability After Sarbanes-Oxley—Has the Landscape Changed?*, 3 WYO. L. REV. 371 (2003).

is this Article's thesis that the problem of lawyer complicity, active or passive, in managerial wrongdoing may be rooted in a socially determined moral obtuseness shared by too many corporate managers and corporate lawyers. Their moral consciousness (or unconsciousness) may be so deeply embedded in the social contexts in which managers and lawyers operate that the Standards may have only a marginal effect. While legal intervention may be needed to counter the gravitational pull toward complicity that some lawyers' personal moral resources cannot resist, the social dynamics that created the pull are persistent, pervasive and adaptable. The Standards may come to be seen as just another set of rules whose neutralization, avoidance or manipulation is entirely consistent with the prevailing organizational morality.

That possibility may give some basis for pessimism about the success of the Standards. The moral maze in which some corporate lawyers and managers find themselves may be just too hard to escape. Before reaching any conclusions, however, let alone pessimistic ones, we need to understand more—first, about the varieties of lawyerly complicity in managerial wrongdoing, and second, about the social and moral universe from which such complicity emerges.

II. THE VARIETIES OF COMPLICITY

Recent scandals have shown that both in-house counsel in major corporations and outside attorneys in elite law firms have in fact contributed to wrongdoing by corporate managers, in some cases criminally. It is not possible to determine with empirical precision how systemic such behavior is, but there has been enough of it in the highest reaches of corporate America and elite law firms to suggest that the problem is not a small one. Lawyers' contributions to the series of corporate disasters that cascaded through the first years of this decade were significant. Most disturbing, perhaps, has been the variety of ways in which lawyers involved themselves in wrongdoing.

A complete survey of all those varieties is not possible here, but a summary of the basic types will provide a sense of the dimensions of the problem:

- Lawyers affirmatively and intentionally helped managers engage in self-dealing and misappropriation of corporate assets by deceiving boards about the nature of the transactions, particularly failing to advise the board fully about the managers' conflict of interest.[3]

3. The failures of senior in-house counsel at Tyco and Enron in this regard are well known. Regarding Tyco, see Mark A. Sargent, *Lawyers in the Perfect Storm*, 43 WASHBURN L.J. 1, 20 n.46 (2003). Regarding Enron, see Deborah L. Rhode & Paul D. Paton, *Lawyers, Ethics and Enron*, 8 STAN. J. L. BUS. & FIN. 9, 15-18 (2003). Vinson & Elkins, Enron's outside counsel, also has been charged with responsibility for this type of failure. *See* Sargent, *supra*, at 20-21 (detailing Vinson & Elkins's

- In representing corporations before regulatory agencies, lawyers deceived the agencies about the fraudulent or otherwise illegal nature of corporate activities and statements.[4]
- Lawyers materially participated in preparing false or misleading disclosures in documents filed with the SEC and disseminated to the public, or stood by passively.[5]
- Law firms provided legal opinions on transactions which the law firm had a significant financial interest in promoting.[6]

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shortcomings in their representation of Enron); *see also* Rhode & Paton, *supra*, at 19 (same). There is a question, however, as to whether the outside lawyers who advised Enron's board, including Vinson & Elkins, could have done anything to persuade the board that the self-dealing transactions they approved were problematic. The Enron board had a considerable amount of information about the conflicts of interest and failed to do anything about them. Professors Fisch and Rosen have concluded that "the lawyers could have had little impact on corporate policy, absent explicit disclosure of an overt fraud." Fisch & Rosen, *supra* note 2, at 1119. While it may be true that the Enron board may have been informed of the conflicts of interest and failed in their own duty of monitoring, it is by no means clear that their failure absolves Vinson & Elkins or Enron's in-house counsel of responsibility. Given their intimate knowledge of the full extent of the conflict, the immense profitability of the transactions for the insiders, the disproportionate allocation of risk to the corporation and the lack of arms-length negotiations, can the advice they gave the board be presumed to have been minimally competent? Furthermore, the apparent approval of the transactions by a prestigious law firm may have lulled an already acquiescent board into even greater passivity, especially when confronted with very complex transactions.

4. *See, e.g.*, Indep. Exam'r Report, SEC v. Spiegel, Inc., No. 03C-1685, 2003 U.S. Dist. LEXIS 17933 (N.D. Ill. Sept. 11, 2003), *at* http://www.sec.gov/Archives/edgar/data/276641/000094787103002136/0000947871-03-002136.txt [hereinafter Crimmins Report] (describing behavior of Kirkland & Ellis in its representation of Spiegel, Inc. before SEC). Kirkland & Ellis filed late notices with the SEC on behalf of Spiegel, stating that the company was not filing its periodic reports because it was "'not currently in compliance with its loan covenants and is currently working with its bank group to amend and replace its existing credit facilities,' and thus 'not in a position to issue financial statements . . . ,'" even though Kirkland & Ellis knew that "the real reason why Spiegel was not filing its periodic reports was that it did not want to disclose KPMG's going concern qualification and other material bad facts and circumstances threatening Spiegel's survival." *Id.* at 83-84.

5. With respect to Vinson & Elkins's active participation with Enron managers in the preparation of misleading disclosures, see Sargent, *supra* note 3, at 20 n.50 (citing William F. Powers, Jr., Report of Investigation by the Special Investigative Committee of the Board of Directors of Enron Corp. (Feb. 1, 2002) at 178-203 (on file with author)). Regarding the allegedly active complicity of the general counsel of HBO & Co. in fraudulent financial disclosures, see Sargent, *supra* note 3, at 21 n.50, and Crimmins Report, *supra* note 4, at 82 (criticizing passivity of law firm White & Case concerning material non-disclosures by Spiegel managers).

6. *See* Paul Braverman, *The Bleeding Edge*, AM. LAW., June 2003, at 94, 97 (detailing practice of providing tax opinions on very aggressive corporate tax shelters when opining law firm was actively involved with investment bankers in developing and promoting such transactions). Among the firms involved in this practice were McKee Nelson, Ernst & Young, King & Spalding and Akin, Gump, Strauss, Hauer & Feld. *See id.*; *see also* Mike France, *The Rise of the Wall Street Tax Machine*, BUS. WK., Mar. 31, 2003, at 84, 85-87. For more detailed analysis of this phenomenon, see STAFF OF SENATE COMM. ON FIN., 107TH CONG., REPORT OF INVESTIGATION OF ENRON CORPORATION AND RELATED ENTITIES REGARDING FEDERAL TAX AND COMPENSATION

- In-house counsel encouraged managers or employees to destroy information related to an investigation, or at least did not discourage them.[7]
- Lawyers failed to report "up the ladder" within the corporation when confronted with material violations of law by managers.[8]
- Lawyers failed to conduct adequate special investigations of alleged managerial wrongdoing when specifically retained to do so, sometimes because of their own conflicts of interest.[9]

Those are perhaps the principal types of illegal or immoral behavior that lawyers have facilitated or participated in, actively or passively, intentionally or negligently, enthusiastically or reluctantly. But why did they do it? There is no shortage of explanations.

III. Some Explanations

The explanations range from the grandiose to the technical. For example:

- Lawyers' wrongdoing simply reflected a general cultural moral decline.
- Lawyers got tired of watching their clients make all the money through opportunistic behavior in the financial gold rush of the 90s, and decided to join in the fun.
- Professional values succumbed to business values in large law firms, so lawyers became increasingly willing to do anything for money.
- The demise of client loyalty and the increasing fragility of client relationships required law firms and lawyers to be more "flexible" about problematic transactions to preserve the client relationship.

Issues, and Policy Recommendations (Comm. Print 2003), *available at* http://www.access.gpo.gov/congress/joint/jcs-3-03/vol1/.

7. *See* Roger C. Cramton, *Enron and the Corporate Lawyer: A Primer on Legal and Ethical Issues*, 58 Bus. Law. 143, 158-63 (discussing role of Arthur Andersen's in-house counsel and outside attorneys—Davis Polk & Wardwell—in destroying documents relating to their representation of Enron).

8. This may have been the primary failure by Enron's general counsel. *See* Miriam Rozen, *An Unenviable Position*, Tex. Law., Feb. 4, 2002, at 1 (discussing role of Enron's general counsel).

9. For a critical discussion of the serious conflicts of interest that compromised a special investigation of Global Crossing conducted by Simpson Thacher & Bartlett, see Report of the Special Committee on Accounting Matters to the Board of Directors of Global Crossing Ltd., Global Crossing's Response to Olofson's Allegation 37-47 (Feb. 18, 2003) (on file with author). For additional sources discussing the Simpson Thacher investigation, see Sargent, *supra* note 3, at 28 n.77. For a critical discussion of Vinson & Elkins's well-known conflicts of interest in its perfunctory investigation of whistle-blower allegations regarding massive insider self-dealing at Enron, see Cramton, *supra* note 7, at 162-67.

- A premium on generating a constant flow of deals and processing them rapidly led to inattention to detail, including potential conflicts, over-reliance on inexperienced lawyers and a preoccupation with ensuring repeat business.
- The demise of aiding and abetting liability for lawyers,[10] the impact of the Private Securities Litigation Reform Act of 1995 on class actions[11] and chronic SEC understaffing[12] contributed to a "Wild West" atmosphere in which the fear of liability was minimized.
- The growth and geographic spread of large law firms impeded internal monitoring, and led to excessive diffusion of responsibility undermining individual accountability, and resulted in proliferating and insufficiently monitored conflicts of interest.
- Work assigned to outside law firms has become heavily compartmentalized, so that lawyers working on particular transactions and pieces of transactions may not have the global view or the authority that would allow them to detect or deal with wrongdoing.

All of the foregoing explanations for the involvement of lawyers with their clients' wrongdoing—or their failures to restrain that wrongdoing—have some force. A multiplicity of explanations also makes sense because of the circumstances and nature of the offenses, and lawyers' contributions to them varied so much. Different explanations apply with different force in the various contexts; seeking a monocausal explanation would seem to be futile.

IV. THE MORAL ORIGINS OF COMPLICITY

In describing the behavior of the lawyers and law firms in these cases, however, there does seem to be something that links them all: an apparent indifference to the morality of their actions. Most of the lawyers involved presumably possessed some form of personal moral code, whether based on religious or secular premises, as well as a professional-role morality that should have been as stringent in its proper sphere as any personal morality. At a minimum, those personal and professional moral codes would have insisted upon truth-telling, personal integrity, concern about the consequences of one's actions for others, recognition of the limitations on one's obligation to a client and an understanding that the "legal" is not

10. *See* Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994) (denying imposition of aiding and abetting liability).

11. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995).

12. For an argument that the SEC has not been able to meet its regulatory responsibilities with respect to public corporations, see STAFF OF SENATE COMM. ON GOV'T. AFF., 107TH CONG., FINANCIAL OVERSIGHT OF ENRON: THE SEC AND PRIVATE SECTOR WATCHDOGS 29-68 (Comm. Print 2002).

coextensive with the "moral." Those moral priorities, however, often seemed to disappear into a smog of expediency, rationalization, willful blindness and slavish obedience to the wishes of self-interested managers who purported to speak for the corporate client. Of course, we cannot read the hearts of those lawyers, our knowledge of the facts is incomplete and hindsight judgment of others can be self-indulgent, but the facts speak for themselves: many lawyers in these cases, whether actively or passively, helped corporate managers act illegally, immorally or both.

It is sloppy and cheaply judgmental to talk about epidemics of greed or stupidity—although there were apparently plenty of both in these cases. It is also naive to talk about a fall from a golden age of corporate and lawyerly probity—although the opportunities for massive fraud and malfeasance seem to be getting greater. Ultimately, narratives of cultural decline and a decadent *zeitgeist* are historically imprecise and sociologically crude, and of little explanatory use. There needs to be a more concrete explanation for why some lawyers' sense of personal and professional moral boundaries seemed to be so insignificant in the way they worked with the corporate managers who did so much harm.

Perhaps something more useful can be found by looking at the social situations in which these lawyers lived and acted. What was it about their rootedness in specific social contexts that influenced the way they thought about what is permissible and what is not, and which seems to have caused them to sideline or bracket the sense of limits they brought with them to the workplace from their personal, religious or professional moral formations?

A. *The Moral World of Corporate Managers*

Extraordinary insights into this question can be found in Robert Jackall's *Moral Mazes: The World of Corporate Managers.*[13] This book is an in-depth sociological analysis based on extensive fieldwork among corporate managers in several corporations in the chemical and textile industries in the early 1980s. Jackall's goal was to examine how bureaucracy shapes moral consciousness.[14] His premise was that the moral consciousness of corporate managers has to be understood not in terms of abstract philosophical, religious or professional moral systems, but "sociologically, that is, as empirical, objective realities to be investigated."[15] That is precisely what Jackall attempts to do in *Moral Mazes*, identifying the actual moral "rules-in-use"[16] that governed the way his corporate managers behaved in their social setting. This highly concrete, empirical approach enabled Jackall to avoid the aridity and abstractness of most discussions of business

13. ROBERT M. JACKALL, MORAL MAZES: THE WORLD OF CORPORATE MANAGERS (1988).

14. *See id.* at 3 (stating purpose of author's study).

15. *Id.* at 4.

16. *Id.*

or professional ethics, and to explain why managers "bracket, while at work, the moralities that they might hold outside the workplace or that they might adhere to privately and to follow instead the prevailing morality of their particular organizational situation."[17] Jackall argues, in essence, that managers tend to adhere to an *occupational morality* determined by the social structure of their workplace. If one wants to understand why managers choose to act one way and not the other, including acting immorally and illegally, one needs to understand that occupational morality. To understand that occupational morality, however, one must understand the social context in which it emerges. In the large business corporation, he argues, the social context is bureaucratic.

Bureaucratic work, Jackall argues, shapes people's consciousness in decisive ways. Much of the way it does so is familiar, particularly in its rational/hierarchical characteristics:

> It regularizes people's experiences of time and indeed routinizes their lives by engaging them on a daily basis in rational, socially approved, purposive action; it brings them into daily proximity with and subordination to authority, creating in the process upward-looking stances that have decisive social and psychological consequences; it places a premium on a functionally rational, pragmatic habit of mind that seeks specific goals . . . .[18]

Other ways are perhaps less familiar. We tend not to think of "impersonal" bureaucracies as crucibles of intense personal competition, in which people are subjected to "subtle measures of prestige and an elaborate status hierarchy that, in addition to fostering an intense competition for status, also makes the rules, procedures, social contexts, and protocol of an organization paramount psychological and behavioral guides."[19] It is in the context of this deeply personal competition for status in a hierarchical system of power and domination that people learn to be guided by the rules that will promote their success. A foundational rule is the imperative to bracket conventional morality within managerial circles, "where such verities are widely recognized to be inapplicable except as public relations stances."[20] Once those "verities" are bracketed, the organization's rules-in-use determine the decisions that individual managers make.

It is not possible to do justice here to Jackall's thick description of the world of his corporate managers, or to the intricacies of its moral system, but some of its key characteristics can be summarized. That world is characterized by:

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17. *Id.* at 6.
18. *Id.* at 5.
19. *Id.* at 5-6.
20. *Id.* at 6.

- Intense competition for status and power, with people constantly pitted against each other;[21]
- A disconnection between hard work and success, based on the reality that hard work alone cannot produce success because ability to play the corporate "game" is also crucial;[22]
- A disconnection between appearance and reality, derived from the realization that the important decisions are made in back rooms; that the public reasons for decisions are often not the real reasons;[23] and that a willingness to sustain that disconnection is crucial to personal advancement;
- An almost feudal system of personal loyalty and fealty between supervisors and inferiors, in which personal fates are interconnected,[24] and group loyalties are of paramount

21. As Jackall describes the situation: "Since rewards are always scarce, bureaucracies necessarily pit people against each other and inevitably thwart the ambitions of some." *Id.* at 35. Jackall sees the competitive dynamic, however, as not only a competition for resources but also as a type of psychological competition: "Even more important on a day-to-day basis is the ongoing competition between talented and aggressive people to see whose will prevails, who can get things done their way." *Id.* The two types of competition, Jackall notes, are complementary: ability to impose one's will creates a credibility that facilitates competition for resources. *See id.* (describing relationship between two types of competition).

22. "[M]anagers see success depending principally on meeting social criteria established by the authority and political alignments—that is, by the fealty and alliance structure—and by the ethos and style of the corporation." *Id.* at 45.

23. *See id.* at 88 (explaining why discrepancies exist with respect to reasons given for making decisions). This is so, Jackall argues, even though one of the hallmarks of a bureaucracy is the written record:

> [E]ven where one can follow a paper trail, most written documents in the corporate world constitute simply official versions of reality that often bear little resemblance to the tangled, ambiguous, and verbally negotiated transactions that they purportedly represent. As a result, whatever meaningful tracking does take place occurs within managers' cognitive maps of their world, which, of course, are constantly changing and subject to retrospective interpretation and reinterpretation.

Id. Jackall also found that within his corporate bureaucracies, rational decision-making processes were not always followed, and that impulsiveness and irrationality were not infrequent, but that such behavior was "always justified in rational and reasonable terms. It is so commonplace in the corporate world that many managers expect whatever ordered processes they do erect to be subverted or overturned by executive fiat masquerading, of course, as an established bureaucratic procedure or considered judgment." *Id.* at 77.

24. *See id.* at 17 ("Managers do not see or experience authority in any abstract way; instead authority is embodied in their personal relationships with their immediate bosses and in their perception of similar links between other managers up and down the hierarchy."). Jackall describes the management style he observed as shaping a "patrimonial authority arrangement that is crucial to defining both the immediate experiences and the long-run career chances of individual managers. In this world, a subordinate owes fealty principally to his immediate boss." *Id.* at 19. In describing expensive and apparently irrational gestures of fealty to the CEO, Jackall explains that "[i]t is far more important to please the king today than to worry about the future economic state of one's fief, since, if one does not please

importance;[25]

- An enormous premium on "flexibility" and willingness to adapt to expediency rapidly;[26]
- An optimistic belief that problems of questionable legality or morality can be "outrun" before the consequences come to roost and, hence, need not be confronted;[27] and
- A pervasive sense of social uncertainty, in which one is constantly aware of being evaluated, but in a system that is capricious and in which all status arrangements are contingent and fluid.[28]

In such a world, a distinctive set of moral rules-in-use emerges; one adapted to the social intricacies of the organization. Those rules can be characterized as follows:

- The prevailing ethos is remarkable for its lack of fixedness. Decisions are governed by an "essential, pervasive and thoroughgoing pragmatism,"[29] in which alertness to expediency is of paramount importance.
- Questions of "right" or "wrong" should not be confronted as such; an insistence on the moral dimensions of an issue is regarded as, at best, embarrassing and, at worst, fatally disloyal.[30]

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the king, there may not be a fief to worry about or indeed vassals to do the worrying." *Id.* at 22.

25. *See id.* at 25 (discussing sharing of credit for success within hierarchical subgroups in corporations). The importance of group loyalty is underscored by Jackall's comparison of managerial circles in sociological terms to gangs. *See id.* at 39 (discussing social contexts that breed alliances).

26. *See id.* at 128-33 (discussing importance of flexibility and adaptability to expedience in order to maintain solidarity with managerial colleagues).

27. *See id.* at 96-100 (describing attitude exemplified by game of "milking the plant" to generate short-term profits that make plant managers look good, and long-term losses that are not realized until after managers leave, which can be blamed on their successors).

28. Jackall describes how managers have an acute sense of organizational contingency. "Because of the interlocking ties between people, they know that a shake-up at or near the top of a hierarchy can trigger a widespread upheaval, bringing in its wake startling reversals of fortune, good and bad, throughout the structure." *Id.* at 33. Compounding the sense of uncertainty created by the "constant potential for social reversal," is an awareness of always being on probation, which, Jackall argues "produces a profound anxiety in managers, perhaps the key experience of managerial work." *Id.* at 33, 40.

29. *Id.* at 105 ("[A] principal managerial virtue and, in fact, managers' most striking actual characteristic is an essential, pervasive, and thoroughgoing pragmatism.").

30. *See id.* at 101-05 for a discussion of how "White," a specialized manager hired by a textile company to deal with the problem of damage to employees' hearing resulting from long-term exposure to the company's machinery, failed in his efforts to focus managers' attention to the problem, precisely because of his insistence on framing the problem as a moral one.

> [T]hough the company publicly pointed with pride to its employment of someone with training in audiology, the fact is that White's moral squint

- A willingness to keep silent about problems that may prove embarrassing to superiors or the organization is highly prized.[31]

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on the issue, manifested by his obvious moral commitment to the problem and his insistence on the company's obligation to workers, made other managers uncomfortable.

Id. at 104. Jackall shows that this discomfort reveals something fundamental about his managers' moral consciousness:

> [W]hy should his moral stance make other managers uncomfortable? Managers are, after all, men and women with exactly the same kind of moral sensibilities that White possesses although they may express them in different arenas of their lives. Here the political vagaries typical of corporations provide the clue to the riddle. Without clear authoritative sanctions, moral viewpoints threaten others within an organization by making claims on them that might impede their ability to read the drift of social situations. As a result, independent morally evaluative judgments get subordinated to the social intricacies of the bureaucratic workplace. Notions of morality that one might hold and indeed practice outside the workplace—say, some variant of Judeo-Christian ethics—become irrelevant, as do less specifically religious points of principle, unless they mesh with organizational ideologies. Under certain conditions, such notions may even become dangerous. For the most part, then, they remain unarticulated lest one risk damaging crucial relationships with significant individuals or groups. Managers know that in the organization right and wrong get decided by those with enough clout to make their views stick.

Id. at 105.

31. *See id.* at 31 (regarding secrecy as a pervasive corporate phenomenon). Jackall also describes the case of "Tucker," a "lower middle-level manager" who discovered certain technical problems in fibers manufactured by his company that meant almost certain liability disaster. *See id.* at 128-33 (exemplifying importance of managerial "alertness to expediency" and "prudent silence" in gaining trust and acceptance of corporate colleagues). There, the manager dutifully reported up the ladder as quietly as possible:

> What follows is a cautionary tale about the virtues of steadfast silence amidst the perils of corporate life. One may gauge the reactions of top executives to Tucker's report from subsequent events. All thirty copies of the report were confiscated. Tucker was asked to surrender all of his working notes. Tucker's desk was entered and his own copy of his report taken. The carpet was never introduced; the tires were never introduced; the press conference was never held. One executive, three levels above Tucker, was quietly fired; two research and development scientists, who apparently had been "fudging data" under pressure from the line, were also sanctioned, one fired, the other demoted. And Tucker never heard about the matter again. He says:
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>> Now clearly the report got to someone because they stopped the introduction of the product. This was not a light decision because four years of work and a lot of hope had gone into it. There was real panic in the division about it. But our evidence was irrefutable. Yet no one ever told me thank you; no one ever said that I was a good employee.
>
> The last remarks are not made in a complaining way. Rather, Tucker understands that this lack of acknowledgment, this silence on the part of authorities, was, first, an implicit warning.
>
>> Now the key thing is that if I had pursued this issue I would have been fired, no doubt about it. Since I didn't pursue it, I didn't get any credit but I also didn't get fired. I was the messenger that came

- Fealty to superiors within the organization trumps other moral obligations.[32]
- Individual responsibility for problems or mistakes should be avoided; responsibility should be diffused as much as possible; dangerous decisions should be avoided.[33]
- Legal and regulatory requirements should be regarded cynically, and compliance should be conducted in a manner that

> to the king and told him that his son had been tortured to death and his ears cut off. One of the norms here is to keep quiet once you have done your job in reporting what you see . . . . If you pursue something like this, no one will like you. It's that simple.

Tucker has risen steadily since that episode. He understands now that the silence of his superiors also established the criterion for an implicit probation:

> I think that I've got to where I am today because of this. [His boss's boss] knows that I saved the company a lot of money and a lot of asses to boot. And he and others know that I am someone who can be trusted. I can keep my mouth shut . . . . And that's the biggest thing that I have going for me—that people feel that I can be trusted. I can't overemphasize that enough.

Id. at 130.

32. *See id.* at 109 (discussing how manager—deeply troubled by blatantly illegal manipulation of pension fund by his supervisors for their own benefit—was summarily fired because he "could not just go along with things even if he did not agree"). His termination was regarded as entirely appropriate by other managers:

> His basic failing was . . . that he violated the fundamental rules of bureaucratic life. These are usually stated briefly as a series of admonitions. (1) You never go around your boss. (2) You tell your boss what he wants to hear, even when your boss claims that he wants dissenting views. (3) If your boss wants something dropped, you drop it. (4) You are sensitive to your boss's wishes so that you anticipate what he wants; you don't force him, in other words, to act as boss. (5) Your job is not to report something that your boss does not want reported, but rather to cover it up. You do what your job requires, and you keep your mouth shut.

Id. at 109-10.

33. *See id.* at 85-90 (describing various aspects of corporate scapegoating). The tendency toward diffusion of responsibility within corporate bureaucracies is very strong because of the intense competition among managers and the enormous contingency and fragility of status. *See id.* (discussing use of blame, scapegoating and diffusion of responsibility by big corporations when things go wrong). This leads, however, to the designation of "patsies" to be blamed for failure, regardless of the actual level of culpability:

> The most feared situation is to end up inadvertently in the wrong place at the wrong time and get blamed [for a failure or mistake]. Yet this is exactly what happens in a structure that systematically diffuses responsibility. It is because managers fear blame-time that they diffuse responsibility; however, such diffusion means that someone, somewhere is going to become a scapegoat when things go wrong.

Id. at 86. The impact of this behavior on managers' sense of accountability was described graphically by one of Jackall's managers in the following terms:

> The good manager is always aware and always wary. He knows that he has to be able to point the finger at somebody when things go wrong. There's no accountability in the corporation. People don't want to hear about that shit. What you hope is that no one is after your ass . . . .

Id. at 89.

serves the interest of the individual manager in the competitive game.[34]

- Truth-telling is essentially optional, because "'truth' is socially defined, not absolute, [so] . . . that . . . compromise, about anything and everything, is not moral defeat . . . , but simply an inevitable fact of organizational life."[35]

It should be no surprise that Jackall identified several instances in which these rules-in-use prevented his corporate managers from coping honestly with instances of even blatant illegality, such as financial fraud perpetrated by the CEO.[36] In that case, loyalties to superiors and other group members, extreme sensitivity to short-term expediency, willingness to bury problems with silence and, most of all, preoccupation with status in the organization, led not just to sidelining of moral concerns but to complicity in substantial wrongdoing.[37] Jackall's description of managers' willingness to engage in self-dealing[38] and manipulation of financial data, and to co-opt in-house lawyers into facilitating and hiding the fraud,[39] or

34. *See id.* at 147-48, 155-61 (summarizing managers' attitudes toward regulation and regulators, and of managers' need to overcome their challenges, as well as analyzing ideological mind sets that impede managers' capacity to deal with regulatory requirements in chemical and textile industries).

35. *Id.* at 111.

36. *See id.* at 108 (identifying instances of rules-in-use preventing honesty within corporate regime).

37. As Jackall explains, this sort of thing did not bother his managers at all:

> [A]s managers see it, playing sleight of hand with the monetary value of inventories, post- or predating memoranda or invoices, tucking or squirreling large sums of money away to pull them out of one's hat at an opportune moment are all part and parcel of managing in a large corporation where interpretations of performance, not necessarily performance itself, decide one's fate. Furthermore, the whole point of the corporation is precisely to put other people's money, rather than one's own resources, at risk.

Id. at 110.

38. A manager, "Brady," disturbed by clear evidence of manipulation of the pension fund, found that:

> Key people in the corporation . . . were using about $18 million from the employee pension fund as a profit slush fund. Essentially, there was too much money in the pension fund. Explicit rules govern such a contingency but these were being ignored. The money was not declared as an asset but concealed and moved in and out of the corporation's earning statements each year so that the corporation always came in exactly on target. In fact, each October key officials could predict earnings per share for the year to the penny even though one-third of all earnings were in foreign currency. This uncanny accuracy assured top executives, of course, of completely reliable bonus payments. These were tied to hitting profit targets and gave top managers in the company up to 100 percent of their annual salary in deferred income in stock on top of whatever benefits they had accrued in the pension plan.

Id. at 107.

39. When Brady brought this situation to the attention of the chief lawyer in the firm, he "'did not want to touch the issue with a barge pole.'" *Id.*

to exclude them from knowledge of the facts,[40] is eerily prophetic of the widespread financial fraud at the highest levels of major corporations that surfaced so dramatically in recent years.

While Jackall's conclusions about corporate America are, almost by definition, limited by his ethnological methodology to a particular set of companies in two specific (and highly troubled) industries during one time period, the scale and breadth of the recent corporate scandals suggests that the dynamic he describes, or something like it, was widespread in corporate America in the years since *Moral Mazes* was published in 1988. The highly particularized, socially conditioned moral world he analyzes so minutely may indeed be a large part of our world.

B. *Are Lawyers in the Moral Maze?*

Even if Jackall's description of the moral rules-in-use of corporate managers is broadly applicable to today's Enrons, WorldComs and HealthSouths, what does that have to do with *lawyers*? While corporate managers may have been caught in a moral maze created by the patterns of power and uncertainty in bureaucratic organizations, can it be said that their lawyers were caught in a similar maze, causing them to join their clients in sidelining the moral considerations they knew to exist and professed to respect? A full answer to that question would demand a study of lawyers' lives as intensive as Jackall's journey into his managers' lives, but some conclusions can be ventured, first about in-house counsel, and then about outside attorneys.

In-house counsel are in precisely the same maze as their managerial colleagues. They are vulnerable to adopting the same occupational morality as the managers with whom they work, because they are subject to the same social exigencies, power struggles, personal uncertainties and demands of expediency that characterize the corporate bureaucratic organization.[41] Theoretically, in-house counsel's role—to protect clients from themselves—and in-house counsel's own sense of themselves as independent professionals should make them less vulnerable. They should, after all, be expected to function as a check against any tendency to view law compliance cynically, and truth contingently.[42] It can be assumed that many in-house counsel do in fact play that role. In fact, their closeness to their managerial clients can produce a trust in their judgment that allows

40. *See id.* at 122-23 (citing examples of two in-house lawyers who were kept in dark about two instances of substantial illegal behavior by corporate managers—bribery and improper disposal of pesticides).

41. *See id.* at 108 (describing case of responsibility-dodging chief lawyer).

42. In an excellent study based on intensive fieldwork in a corporate legal department, Michael J. Kelly shows that corporate managers can internalize this role understanding. *See* MICHAEL J. KELLY, LIVES OF LAWYERS: JOURNEYS IN THE ORGANIZATIONS OF PRACTICE 107 (1994). In Kelly's study, a manager describes his relationship with in-house counsel in these terms: "A lawyer should seek to restrain you. It is my lawyer's professional duty to argue with me." *Id.*

them to question and challenge their clients' decisions very effectively.[43] That closeness, however, is double-edged. Counsel's constant exposure to the moral rules-in-use that govern day-to-day life in the corporation may produce in some an ethical numbing that erodes their ability to function in that vital quasi-adversarial manner.

As a result, corporate counsel may develop tendencies that reflect, rather than challenge the organizational morality, including: (1) a tendency to avoid characterizing questionable activities as involving "legality" or "illegality," let alone "right" or "wrong," so that they may be defined as mere practical "problems" to be "managed" as quietly as possible; (2) a tendency to provide ambiguous, tentative advice that enables managers to continue operating on the margins of legality;[44] (3) a tendency to acquiesce in silencing whistle-blowers, including other lawyers and, most important;[45] (4) a tendency by senior counsel to identify too closely with the personal interests and fates of the CEO or other senior managers.[46] Ironically, lawyers' self-conception as advocates for the client, as neutral, non-judgmental facilitators of transactions, or as professionals trained to make "arguments" on either side of an issue, can allow a high degree of rationalization of their complicity in conduct that is ultimately not in their corporate client's interest, certainly not in the public interest and often immoral if not illegal. Lawyers in large corporations, thus, may adapt to the bureaucratic organization by developing the same moral consciousness as their managerial colleagues, and become trapped in the moral maze out of which they should be guiding their clients. While many avoid that trap, some do not.

In contrast to in-house counsel, outside attorneys do not occupy the same moral universe as the managers of their corporate clients, because they are socialized in different organizational settings. Jackall's analysis of the moral rules-in-use of corporate managers thus might not seem terribly relevant to explaining the behavior of outside attorneys. Closer consideration, however, suggests that the analysis is in fact quite relevant, at least as a way of defining a threat to lawyers' integrity.

43. *See id.* at 85-115 (describing how that trust relationship was developed in company that author studied). "There is less distrust, because the lawyers and client *are* literally on the same team." *Id.* at 90 (emphasis in original). Kelly's in-house lawyers "have a connection of trust with the client [i.e., the company] that enables the client to accept what he or she may not want to hear, without misunderstanding or hard feelings." *Id.* at 91.

44. *See, e.g.*, Cramton, *supra* note 7, at 158-62 (describing advice provided by Arthur Andersen's in-house counsel regarding document destruction).

45. *See* JACKALL, *supra* note 13, at 108. In-house lawyers may learn to acquiesce because they may be at best ignored or at worst terminated if they attempt to draw attention to illegal or otherwise questionable behavior by managers. *See id.* (discussing case of corporate counsel facing pressure due to discovery of financial fraud); *see also* Sargent, *supra* note 3, at 38 n.109 (describing fate of would-be whistle-blowing in-house lawyers at Enron).

46. *See* Sargent, *supra* note 3, at 38 n.108 (noting similarities with general counsel of both Tyco and Enron).

It is relevant, first of all, because of the possibility that lawyers will assimilate their clients' worldview. Donald Langevoort has demonstrated how cognitive psychology explains this phenomenon and, in particular, how it can lead to attorney complicity in client fraud.[47] Lawyers may develop perceptual schema based on first impressions of a client's probity that create a presumption of trustworthiness that is hard to overcome.[48] Adoption of the client's worldview provides a heuristic that allows an outsider to map and interpret novel and uncertain social arrangements. Assent or apparent assent to clients' values, goals and modus operandi appeals to lawyers' instinct to share in a group modality that rewards cooperative behavior. Langevoort thus identifies cognitive mechanisms that lead attorneys to the client's worldview; Jackall enriches our understanding by telling us something disquieting about what that worldview might be and how it encourages both active and passive involvement in managerial illegality and immorality of the type just described. Once lawyers start to think like their clients, they may start to act like their clients. In this view, lawyer complicity is not a simple matter of personal greed or supine acquiescence to client greed; it is a defect of cognition and, as such, perhaps more dangerous.[49]

Jackall's analysis is also relevant, however, because large law firms, like Jackall's chemical companies, are bureaucratic organizations. They are social structures that may develop moral rules-in-use not dissimilar from those operating in those corporations, and that may lead to the kind of bracketing of moral restraints characteristic of the corporate moral consciousness. I cannot, of course, state categorically that they are the same, without the type of rich information Jackall used in reaching his conclusions. Conclusions derived from detailed fieldwork in specific types of organizations should certainly not be generalized glibly to other types of

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47. *See* Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry Into Lawyers' Responsibility for Clients' Fraud*, 46 VAND. L. REV. 75, 95-110 (1993) (discussing lawyer complicity in clients' fraudulent conduct).

48. *See id.* at 102-03 (noting that cognitive limitations may also prevent lawyers from perceiving and acting upon information inconsistent with their presumption of client's probity, because such recognition would be threatening to lawyers' self-conception). Langevoort states: "When people voluntarily commit themselves to a certain position, attitude or belief, the subsequent discovery of information that indicates harmful consequences flowing from that commitment directly threatens their self-concept as good, worthwhile individuals. Thus, cognition processes will work to suppress such information if at all possible." *Id.*

49. Indeed, as Professor David Luban has pointed out, most of the lawyers involved in some of the worst cases of complicity probably do not believe they did anything wrong.

> One of the investigators for the Powers Report recalls that when Enron's lawyers were explaining the details of the elaborate "special purpose entity" deals that siphoned millions of dollars into Andrew Fastow's pockets, they weren't ashamed or embarrassed. They were proud of their handiwork, and eager to explain how they did it.

David Luban, Ninth Circuit Conference, *Making Sense of Moral Meltdowns*, at 2 (June 24, 2003) (copy on file with author).

organizations. While large law firms are social bureaucracies in Jackall's terms, they are not the same societies as large business corporations. It is also dangerous to generalize about an entire sector of the legal profession.

Comparison of the moral consciousness of lawyers to that of managers, furthermore, must take into account the different types of moral formation provided by lawyers' professional education and training and the sense of public trust implicit in their professional self-conception. Indeed, many lawyers attach tremendous value to their self-conception as counselors *against* fraud and self-dealing. It is their *raison d'etre* or stock-in-trade. Violation of that self-conception through even passive complicity in wrongdoing may produce intolerable role-strain in such lawyers. The collegial, participatory manner of governance in at least some partnership structures also may be a bulwark against the shell games with truth endemic to more hierarchical organizations. Lawyers in large law firms thus may be more resistant to the pressure that emerges within corporate bureaucracies to develop a stunted moral consciousness.

But are they immune? I believe we need to look closely at whether the strong correlation in many large firms between status and client generation, the moral hazards created by an "eat what you kill" method of partner compensation,[50] the consequent fluidity and instability of personal status, the use of internal competition as an organizing principle in what Marc Galanter and Thomas Palay famously called the "tournament of lawyers,"[51] the system of personal patronage, fealty and loyalty among individ-

50. The dependence of partners on unstable client relationships may produce an ethical numbing for obvious reasons: "Compensation based on business generation means that partners are more vulnerable to shifting market conditions . . . . A partner subject to the 'eat what you kill' system may be anxious about where her next meal is coming from." Milton C. Regan, Jr., *Corporate Norms and Contemporary Law Practice*, 70 GEO. WASH. L. REV. 931, 937 (2002). As Professor Bainbridge has pointed out in assessing (critically) the potential influence of the Standards:

> Because an individual partner is even more likely than a firm to be dependent on billings to a single major client, the eat what you kill phenomenon makes it highly unlikely that such a partner will risk antagonizing key clients absent the proverbial smoking gun (and maybe not even then).

Bainbridge, *supra* note 2, at 18.

51. MARC GALANTER & J. THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 77-120 (1991). Galanter and Palay describe the promotion-to-partner tournament as a mechanism for recovering the human-specific cost of investment in associates by binding them to the firm through offering them the prize of partnership for winning the competitive tournament, and preventing them from shirking by posing the threat of losing the tournament. *See generally id.* The adequacy of the economic tournament model for explaining the organization of law firms has been questioned. *See* David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581, 1586-87 (1998). Wilkins and Gulati conceded, however, that the "tournament" concept was a useful metaphor, particularly with respect to senior associates in their last few years before partnership. *See id.* at 1633 (acknowledging usefulness of metaphor); *accord* Bainbridge, *supra* note 2, at 12-15 (discussing metaphor). The winners of

uals within the firm and the tendency to regard "truth" as socially defined and contingent, which dynamics are common to all bureaucracies, tend to produce the kind of moral rules-in-use that can lead to complicity with client wrongdoing. In particular, the need to please clients in order to keep them—in a highly competitive market for legal services—suggests that the positive forces supporting lawyer independence too often will not be strong enough to counter the drift toward complicity. The sociological theory may need to be worked out, but the record of complicity described above suggests that in too many cases the social dynamic of the law firm has produced precisely that result not in outlier firms, but at the heart of the elite corporate bar.

V. A WAY OUT OF THE MAZE?

What, then, is likely to be the fate of the Standards? Do they offer a way out of the maze? Are they likely to be an intervention that short-circuits the patterns of complicity by creating a legal obligation preventing lawyers from doing the kinds of things their socially determined rules-in-use would incline them to do? Before answering that question, however, it must be emphasized that the Standards are actually quite modest as an attempt to solve the problem of lawyer complicity in client wrongdoing. They do not really attempt to address the case of lawyers who actively and intentionally participate in, and benefit from, client wrongdoing either as primary violators or aiders and abettors. Lawyers who are willing to do that sort of thing are not likely to worry much about violating the up-the-ladder reporting requirement or even a noisy withdrawal requirement. Furthermore, because the Standards, as of this writing, do not include a noisy withdrawal/reporting-out requirement, they do not address the problem of what lawyers should do when senior managers are complicit with, or indifferent to, the wrongs they have detected. The Standards simply address the problem of passive complicity, of remaining silent when confronted with evidence of managerial law violations, when reporting up the ladder to senior managers or the board conceivably could have made a difference.

That problem, however, is important. One of the core rules-in-use described above is the imperative to remain silent in those circumstances. To the extent that the Standards counter that imperative, they will be very useful and should be welcomed. What needs to be considered, however, is whether the same social conditions that have resulted in lawyers' silence about some serious law violations will also promote rationalization, evasion and willful blindness with respect to the Standards' requirements. That

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such tournaments, furthermore, may be characterized by an "ethical plasticity," allowing wide scope for construing self-serving behavior as reasonable, "so that moral anxiety is buffered." Donald C. Langevoort, *The Organizational Psychology of Hyper-Competition: Corporate Irresponsibility and the Lessons of Enron,* 70 GEO. WASH. L. REV. 968, 970 (2002).

risk is substantial, particularly if the criteria that trigger the reporting requirement provide, as seems likely, wide discretion for prospective determination by the attorney that reporting is not required,[52] or retrospective determination by a court that it was not required. Furthermore, if the SEC, as Michael Perino has argued, is neither interested in, nor capable of, enforcing the requirement vigorously,[53] the prevailing rules-in-use will allow it to slide into irrelevance as legal arguments for rationalizing non-reporting, routinized, in-firm bureaucratic mechanisms for processing the reporting decision become fixed, and firms learn to avoid the kind of situations in which the reporting decision might have to be confronted.[54] The mere existence of the rules may have a deterrent effect on many cautious and conscientious lawyers, but if the kinds of firms that actively or passively contributed to the egregious behavior of corporate clients such as Enron, WorldCom and so many others are dominated by a moral consciousness that encourages endless rationalization and willful blindness, then the deterrent effect is likely to be minimal.[55] A full understanding of the social dynamics that generated the need for the Standards in the first place may lead to the conclusion that reliance on the ability of those caught in a moral maze to choose to recognize and act upon wrongdoing may be overly optimistic.[56]

52. *See generally* Roger C. Cramton, Susan P. Koniak & George M. Cohen, *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILL. L. REV. 725 (2004).

53. *See generally* Michael A. Perino, *How Vigorously Will the SEC Enforce Attorney Up-the-Ladder Reporting Rules? An Analysis of Institutional Constraints, Norms and Biases*, 49 VILL. L. REV. 851 (2004).

54. In addition, if lawyers were to take the reporting-up requirement seriously, clients may be less willing to share information with their lawyers if they feel that their lawyers will blow the whistle on them within the corporate hierarchy. For discussion of this possibility, see Fisch & Rosen, *supra* note 2, at 1128. The net effect may be removal of lawyers from situations in which they conceivably could have a positive influence on corporate decision-making. *See* Bainbridge, *supra* note 2, at 15-16 (describing attorney rationales for "turning a blind eye" under Sarbanes-Oxley regulations).

55. For a similarly pessimistic assessment of the potential influence of the Standards, also based on assessment of the organizational dynamics of the large law firm, see Bainbridge, *supra* note 2, at 15-19 ("[D]espite the attorney's overarching legal obligations to report misconduct, the attitudes ingrained by the promotion-to-partner tournament will incline them to intentionally or subconsciously overlook evidence of management misconduct.").

56. I leave it to others to discuss whether the Standards' reporting-up requirement (or any future noisy withdrawal reporting-out requirement) is inconsistent with the lawyer's primary obligation to the client. In other words, to what extent is there a tension between one lawyer's responsibilities as gatekeeper and responsibilities as a counselor in business transactions? For an analysis of that tension and criticism of the Standards from practitioners' perspectives, see Stanley Keller & Peter Moser, *Sarbanes-Oxley 307: Trusted Counselors or Informers*, 49 VILL. L. REV. 833 (2004). As has been emphasized elsewhere, the reporting-up requirement actually *supports* the lawyer's obligation to the real client (the corporation) as distinct from the managers who hired him or her. *See* Cramton, *supra* note 7, at 154-56 (arguing that reporting-up requirement emphasizes lawyer's obligation to organizational client). While that is true, the federalization of the reporting-up requirement, with

The social imperatives militate against development of a consciousness in which such self-policing is possible. Defects in cognition, alertness to expediency and, most of all, the bracketing of moral concern are all too characteristic of the bureaucratic organizations in which lawyers operate and which they represent. Perhaps only a more stringent liability regime under the securities laws, including revived aiding and abetting liability and a broader scope for primary liability,[57] will make a real difference in leading lawyers out of the maze.

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the at least theoretical risk of SEC enforcement, alters the tone of the lawyer-client relationship and may impede the development of trust. The question, then, is whether the benefits to be derived from the Standards outweigh the resulting cost: a tendency to exclude well-intentioned lawyers from the kinds of deliberations where they could exercise a restraining influence.

57. For a useful discussion of how such expanded liability may arise from the litigation against the law firms involved in the Enron debacle, see Daniel A. Ninivaggi et al., *Post-Enron 10b-5 Secondary Actor Liability: A New Standard for Attorneys*, 91 ILL. B.J. 350 (July 2003).