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Recommended Citation

Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 Md. L. Rev. 255 (1990)

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MARYLAND LAW REVIEW

VOLUME 49

1990

NUMBER 2

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Articles

CORPORATE LAW PRACTICE AS A PUBLIC CALLING

ROBERT W. GORDON*

INTRODUCTION

Law is a service profession; but it is also a public profession. Lawyers are supposed to serve their clients faithfully and zealously; but they also are supposed to work, both on and off the job of representing clients, as counselors, citizens, reformers, community activists, and public servants, to maintain the integrity of the framework of laws, institutions, and procedures that constrain their clients' practices and their own—and not just to maintain that framework, but to help transform it so that it more nearly will approach the conditions of justice and civic community. The lawyer is to function, in Talcott Parsons' words, "as a kind of buffer between the illegitimate desires of his client and the social interest."¹ He represents the client before the legal system; but he also represents the legal system to the client.

This is an inspiring ideal for a profession and, so long as its expression stays on this plane of comfortable vagueness, not a controversial one. At the bar association dinner, those lawyers who

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1. T. PARSONS, *A Sociologist Looks at the Legal Profession*, in *ESSAYS IN SOCIOLOGICAL THEORY* 384 (rev. ed. 1954).

have not fallen asleep during the speech can be seen nodding their heads and applauding afterwards. You can find the message summarized on the "President's Page" of any current bar journal, and at length in the American Bar Association's (ABA) 1986 Stanley Commission Report on rekindling lawyer professionalism.²

Yet if after the rhetoric you ask what the ideal demands in practice, the standard answers may seem a bit anticlimactic. Lawyers, we are told, should avoid vulgar advertising, volunteer some pro bono time, and support the bar's efforts to strengthen lawyer discipline, curb litigation abuse, promote legal-services programs for the poor, and improve public relations with its outside critics.³ Nothing wrong with this, to be sure, but as a program it seems rather a come-down from the much richer and more ambitious conceptions of their public obligations that lawyers have historically entertained and occasionally, though infrequently, acted upon. Even in its modest forms, the program has to struggle hard for survival in the current conditions of practice.

Law firms acknowledge the ideal—and its appeal to newcomers to practice—when they tempt new recruits with opportunities for pro bono work. Corporate attorneys acknowledge the ideal when they describe their function, as they often do, as that of affirmatively promoting compliance with the purposes of regulation, as well as minimizing exposure to liability.⁴ In the debates within the bar a few years ago over the Kutak Commission's recommendations to strengthen the disciplinary code⁵ (an effort that ended up weakening it), it was striking that even those lawyers resisting any obliga-

2. ABA COMMISSION ON PROFESSIONALISM, . . . IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 17-19 (1986).

3. These were, point for point, the recommendations of the Stanley Commission. *Id.* at 21-23. On the ritual, cosmetic quality of such reform proposals, see Rhode, *The Rhetoric of Professional Reform*, 45 MD. L. REV. 274, 282-83 (1986).

4. See, e.g., R. JONES, PRACTICE PREVENTIVE CORPORATE LAW 72-73 (1985).

5. MODEL RULES OF PROFESSIONAL CONDUCT (Discussion Draft 1980).

The Commission was chaired by Robert J. Kutak. For an interesting discussion of the Commission's proposed Rule 1.13(c), authorizing a corporate lawyer to reveal client confidences in the event of client wrongdoing, see Higginbotham, "See No Evil, Hear No Evil, Speak No Evil"—*Developing a Policy for Disclosure by Counsel to Public Corporations*, 7 J. CORP. L. 285, 287, 298-309 (1982). See also Burke, *The Duty of Confidentiality and Disclosing Corporate Misconduct*, 36 BUS. LAW. 239 (1981); Wolfram, *Client Perjury: The Kutak Commission and the Association of Trial Lawyers on Lawyers, Lying, Clients, and the Adversary System*, 1980 AM. B. FOUND. RES. J. 964.

The version of Rule 1.13(c) eventually adopted by the American Bar Association (ABA) in 1983 removed the disclosure provision, instead stating that the lawyer "may resign in accordance with rule 1.16." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(c) (1983).

tion—or even discretion—to disclose clients' ongoing crimes or frauds paid some homage to this ideal of a public professional function.⁶ Their main argument against allowing lawyers to breach confidences was that it would impair their effectiveness as compliance counselors since lawyers who could not be relied on not to disclose their confidences to the authorities would be taken out of the company's information loops and would never find out about illegal conduct until it was too late to stop it.⁷

But under pressure, the ideal sometimes has a way of vanishing like the smile on the Cheshire cat. The firm's new recruits soon discover that pro bono is the realm of summer and junior associates and the stray maverick partner; it usually does not count toward billable hours; it does not make rain; and it is not the route to partnership.⁸ Corporate counselors whose compliance guidance is likely to run into resistance from their clients tend either not to offer it or rapidly convert the advice into neutral risk-analysis and themselves into adversary advocates.⁹

By contrast, for a more robust version of the traditional ideal of the lawyer's public functions, let us go back to a well-known speech that Supreme Court Justice Harlan Fiske Stone gave to the University of Michigan in 1934.¹⁰ Stone complained that corporate lawyers had become "the obsequious servant[s] of business, . . . tainted . . . with the morals and manners of the market place in its most anti-social manifestations."¹¹ The lawyer had come to believe he was a technician simply carrying out his clients' schemes, forgetting his more important social function as an originator of policy whose role is to counsel his clients.¹² Stone gave as an example the role of lawyers in providing technical assistance to managers of companies or corporate reorganizations to engage in self-dealing at the expense of shareholders or beneficiaries, designed to exculpate trustees under indentures or heads of reorganization committees from liability.¹³ He commented that the "loss and suffering inflicted on indi-

6. See, e.g., Higginbotham, *supra* note 5, at 306 (suggesting that by emphasizing compliance with the law, counsel, without disclosing confidential information, can encourage the client to act lawfully).

7. See *id.* at 301-05.

8. See Gordon, *The Independence of Lawyers*, 68 B.U.L. REV. 1, 63 (1988).

9. See, e.g., Jones, *Losing Business Clients the Hard Way*, 73 A.B.A. J. 62, 62-63 (1987).

10. Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1 (1934) (address delivered at the dedication of the Law Quadrangle, University of Michigan, on June 15, 1934).

11. *Id.* at 7.

12. *Id.* at 5-7.

13. *Id.* at 9.

viduals, the harm done to a social order founded upon business and dependent upon its integrity, are incalculable."¹⁴ Lawyers are partly responsible for these disasters, for "such departures from the fiduciary principle do not usually occur without the active assistance of some member of our profession."¹⁵ The cure must be for lawyers to lift their eyes from day-to-day deals, to understand the social effects of their practices taken as a whole, and then to discipline each other to act collectively to counsel corporate clients to observe, rather than subvert, their obligations as trustees.¹⁶

The ideal of law as a public profession thus conceived supposes that lawyers will develop some vision of the common good or public interest, and try to realize it in their practices, if necessary against the immediate wishes of their clients. First, I would like very briefly to defend this ideal against its main rival, the insistence that the lawyer has no business pursuing any vision of the good save that of his client as his client is inclined to perceive it before any legal advice is given or considered.¹⁷ This defense can be very brief because both I and others have elaborately made the arguments elsewhere; and nobody has made them better than David Luban of the University of Maryland.¹⁸ I then want to move on to discuss some of the practical opportunities that have been offered historically, and that might be available now, for putting the idea into practice.

I. DEFENDING THE IDEAL

The rival ideal of partisanship, or adversary advocacy, only works so long as one can take for granted certain background conditions of legal order: that every person or firm or interest-group pursues its interest within an overall framework of rules, institutions, and procedures which ensures that in the aggregate all this self-interested behavior will result in general social benefit, or at least in more good than harm.¹⁹ A free-market system assumes a frame-

14. *Id.*

15. *Id.*

16. *Id.*

17. See, e.g., Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1068-73 (1976).

18. See D. LUBAN, *LAWYERS AND JUSTICE* 50-103 (1988); Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1113-19 (1988) [hereinafter Simon, *Ethical Discretion*]; Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 42-60 [hereinafter Simon, *Ideology of Advocacy*]; see also Gordon, *supra* note 8, at 68-83.

19. See Gordon, *supra* note 8, at 17. Some people (understandably) will be uncomfortable with this utilitarian formulation, and would prefer that adversary advocacy be justified on the grounds that, irrespective of general *social* benefit or harm, it promotes

work of legal rules prohibiting force, fraud, and unfair methods of economic warfare. Most of the players must observe and enforce these rules against cheaters and opportunists so that the overall system can work to general benefit. A political system based primarily on pluralist bargaining assumes a framework of procedures ensuring that major interest groups (however defined) obtain at least some access, and not hugely disparate access, to political decision-makers. A criminal justice system based on due process needs a framework of rules assuring that police, prosecutors, and judges deal more or less humanely with suspects and accurately with evidence from arrest to trial to punishment. A system of civil litigation should be an instrument, not a set of tactical roadblocks, to vindicate claims given by the substantive law. All this seems obvious to the point of banality.

But now stir lawyers into the liberal model of fair and effective background rules. The main function of lawyers in these systems, supposedly, is to promote their effective operation. In the course of protecting their clients' rights and interests, lawyers can help to ensure that regulators, adversaries, or prosecutors respect the framework and follow the rules—that is the traditional function of the criminal defense lawyer. Yet as people professionally skilled in casuistry, finding loopholes in rules, exploiting ambiguity and uncertainty, and playing strategic games, lawyers also can completely sabotage the framework. Clients who can afford to pay for such skills can rapidly exhaust adversaries who cannot, and thus turn the legal system into a device for evading the very rules it is designed to enforce, or worse, into a medium for extortion and oppression of the weak by the strong. In such a Nietzschean world, abiding by the "rule of law" is only for wimps: the smart, powerful people opt out of law by means of lawyers, and thereby provoke others to do likewise. Even adversaries who can afford to resist such tactics will be forced either to waste resources protecting themselves from predation, or to implement their own predatory counterstrokes.

At some point, the framework may have deteriorated so far under adversarial battering that even the lawyers responsible may be tempted to call upon third-party regulators to play the Hobbes-

individual autonomy, the freedom to pursue and to put into effect individual life-plans. But of course that freedom as well must be qualified by the like freedom of others, limited as it threatens harm to others, and exercised within some framework of limiting rules and conventions. See Fried, *supra* note 17, at 1070-71, 1073-74; Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 616-19.

ian sovereign and restore order, as the trial bar occasionally has been inspired to urge judges to control civil discovery abuse.²⁰ But the attempt to re-impose order may just create another layer of expensive policing, another set of controls to be ingeniously evaded, a fresh arsenal of weapons with which to batter one's opponents,²¹ and thus drive the system further towards entropy. Plainly no such system can survive at all without some degree of self-policing, some observance of conventions of cooperation and restraint, and above all, some attention by the players to whether the operation of the system is serving or betraying its substantive goals.

The point is simply that lawyers' routine partisan activity on behalf of clients can—and in reality frequently does—do severe damage to the framework that alone makes their partisan role defensible.²² Unless lawyers are willing to examine the aggregate effects of their clients' practices and their own on the framework of rules, and then act to help revise or reform the practices so as to limit damage to the framework, they cannot rely on the framework to justify what they do.²³ Consider tort claims: the administrative costs of adversary procedure in the tort system now are almost double the payouts to tort victims;²⁴ it cost at least one hundred million dollars and probably much more to net eighty million dollars for the Agent Orange claimants.²⁵ Consider labor relations: since the late 1960s, company lawyers have helped managements break union organizing campaigns by such tactics as firing active organizers, stalling Labor Board action on complaints until the organizing drive is over, and then paying small fines, thus effectively nullifying the Wagner Act's purposes of promoting fair elections and good faith bargaining.²⁶ These systems are no longer effectively achieving any of their legitimate purposes. Routine practice is

20. See, e.g., Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787, 862-69.

21. One such weapon is the strategic use of sanctions. See Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1327-28 (1986).

22. See D. LUBAN, *supra* note 18, at 51.

23. See Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 595-605 (1985); Simon, *Ethical Discretion*, *supra* note 18, at 1143-44.

24. See J. KAKALIK & N. PACE, *COSTS AND COMPENSATION PAID IN TORT LITIGATION* 70 (1986).

25. See P. SCHUCK, *AGENT ORANGE ON TRIAL* 5 (1987).

26. See R. FREEMAN & J. MEDOFF, *WHAT DO UNIONS DO?* 230-40 (1984); Bernstein, *Union-Busting: From Benign Neglect to Malignant Growth*, 14 U.C. DAVIS L. REV. 1, 4-10 (1980); Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA*, 96 HARV. L. REV. 1769, 1774-86 (1983).

nullifying the purposes—even if one takes the most conservative possible view of those purposes.²⁷

Now the Legal Realists among you may object that the account of the legal system I just gave is a terribly naive, formalistic account. Law is not really a framework of rules; that is a myth. Law is a congeries of social practices, a struggle among multiple contending groups and interpreters to bend ambiguous and open-ended language, manipulable procedures, complex bureaucratic organizations, and decision-making processes granted wide discretion, to their own purposes. The rules at best supply common reference-points for the players of the game, departure-points for argument, maneuver, interpretation, and discretion. Applications of the rules in practice, however, *do* achieve a certain short-run stability in most fields of law, so that lawyers often can predict outcomes reliably for their clients. But such stability as there is in law results from temporary truces, medium-term stable agreements, social bargains struck among interest-groups and between them and judges and regulators, to crystallize applications around particular conventions. If one looks at law this way, as a Legal Realist or anthropologist or a practicing lawyer would, one might see lawyers in such systems as intermediaries who help to negotiate and carry out the terms of the social compromises that encode the practical meanings of legislation and regulation.²⁸

From this “post-Realist” standpoint, take another look at the union-busting example previously discussed. Management lawyers might claim they simply are responding to the basic *de facto* revision of the conventional ground rules of capital-labor conflict, which has been going on since the late 1960s. Even in traditionally organized sectors, employers no longer accept unions as a necessary evil, but treat them as obstructions to be moved away from, subcontracted around, or simply broken through aggressive resistance or decertification.²⁹ The National Labor Relations Board, as reconstituted by the Reagan Administration, has actively collaborated in this project of weakening trade-union power; and the Congress has tacitly acquiesced by resisting all invitations to strengthen the rules in

27. See Weiler, *supra* note 26, at 1787-1805, for a discussion of the “ineffectiveness of the current reparative remedies in containing the incidence of employer unfair labor practices.” *Id.* at 1790.

28. For an excellent account of such a post-Realist model, see Clune, *A Political Model of Implementation and Implications of the Model for Public Policy, Research, and the Changing Roles of Law and Lawyers*, 69 IOWA L. REV. 47 (1983).

29. See T. KOCHAN, H. KATZ & R. MCKERSIE, *THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS* 47-65 (1986).

labor's favor.³⁰

So the post-Realist management lawyers might contend that their legal tactics simply faithfully reflect a pattern of decline in trade-union power in the western capitalist democracies, most of which is traceable to causes such as the international competition that has corroded the profitability of traditionally organized sectors,³¹ the new mobility of capital and labor across borders,³² or the internal ossification of labor leadership,³³ which are quite independent of the legal regime. Lawyers are just carrying out the terms of this new social contract in which many of labor law's protections have become chiefly symbolic, little more than a tax on conduct. If this strikes one as a more realistic description of the legal process than the model of rules, it still assumes that there is a framework of

30. See R. FREEMAN & J. MEDOFF, *supra* note 26, at 202-04. Of course, Congress has not repealed the rules on unfair labor practices either, and this poses an interesting jurisprudential problem to members of the labor bar. May business managers and the federal executive collude to nullify, claiming changed conditions, the manifest purposes of statutory protections for labor organizing—even though Congress has not repealed the protections and probably could not muster the votes to repeal? If business managers and bureaucrats do engage in such collusion, may lawyers conscientiously assist them? During the Reagan Administration, even conservative panels of the Court of Appeals for the District of Columbia Circuit repeatedly ruled that an executive that was unable to bring about the weakening of social and environmental regulation through congressional action might not (or at least not consistently) achieve the same results de facto (through passive deregulation) by stalling or refusing enforcement of statutes, or by rule-making that effectively would defeat their manifest purposes. For many examples, see R. HORWITZ, *THE IRONY OF REGULATORY REFORM* 210-12 (1989).

Even the many lawyers who think that private lawyers have no obligation whatever to play any affirmative role in implementing the public policies expressed in law might hesitate to proclaim that lawyers legitimately may collude in their deliberate and systematic obstruction. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) (1983) ("lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent"); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(7) (1981) ("lawyer shall not . . . [c]ounsel or assist his client in conduct that lawyer knows to be illegal or fraudulent"); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-5 (1981) (lawyer should never encourage or aid client to commit crimes or "counsel his client on how to violate the law and avoid punishment therefor").

Astonishingly enough, the vast literature dealing with legal ethics rarely even addresses crucial practical problems like those raised by the practical nullification of legislative purposes through lawyers' actions. *But see* D. LUBAN, *supra* note 18, at 377-80 (discussing the enormous influence of lawyer-lobbyists); Frankel, *The Alabama Lawyer, 1954-1964: Has the Official Organ Atrophied?*, 64 COLUM. L. REV. 1243, 1254-55 (1964) (describing how Southern lawyers actively resisted court-ordered desegregation); Rhode, *supra* note 23, at 602 (criticizing the bar's tendency to absolve lawyers from blame for legislative malfunction); Simon, *Ethical Discretion*, *supra* note 18, at 1125 (stating that "[t]he lawyer cannot escape involvement in law-making").

31. See T. KOCHAN, H. KATZ & R. MCKERSIE, *supra* note 29, at 103-04.

32. *Id.* at 53-54.

33. *Id.* at 181.

purposes and conventionally-stabilized arrangements that lawyers are bound to respect. For even under this minimalist post-Realist view, the lawyer's partisan role only can be justified under this theory if he ensures that his practice does not undermine the framework as crystallized in political bargains.

Yet to make this model of the legal process truly realistic, one would have to recognize that private lawyers do more than encode the social bargains; they themselves contribute to producing the social meanings of law, the very definitions of purposes as well as their meanings in application, not only in their evidently public roles as lobbyists and members of policy groups and bar committees and appellate advocates and *amici*, but in the interpretive spin they give the law in the ordinary course of advising clients. In labor relations, for instance, the operation of the legal regime by lawyers (and labor-relations consultants) has not just responded to a social decline in trade-union power, it has helped to cause the decline.³⁴ If this strikes you as a more realistic description of the legal process than the model of rules, it is one that even more urgently demands that the practical lawmakers of the system have the capacity and willingness to act as what nineteenth-century lawyers called "statesmen" within their domains of practice, as public-policy analysts and reformers capable of critical examination and revision of the aggregate effects of their practices.

Another example is the enforcement record of the Occupational Safety and Health Administration (OSHA), which many agree has been something between disappointing and disastrous, even or perhaps especially in its most zealous phase during the Carter Administration.³⁵ The agency started out with a "voluntarist" policy that gave employers little incentive to do the things that produce the highest levels of safety: to invest in prevention, strengthen the authority of safety divisions, disclose risks to workers, and institutionalize worker involvement in enforcement.³⁶ Under President Carter and director Eula Bingham, OSHA shifted to a confrontational policy relying on inflexible engineering standards, command-and-control regulation, and intrusive enforcement through inspections and fines, which provoked an intense business resistance that the small

34. See Weiler, *supra* note 26, at 1770 (contending that "the legal structure must bear a major share of the blame"); see also Bernstein, *supra* note 26, at 408 (describing the role played by "labor relations consultants," who are frequently, though not always, lawyers).

35. See C. NOBLE, *LIBERALISM AT WORK: THE RISE AND FALL OF OSHA* 2-3 (1986).

36. *Id.* at 181-88.

inspection force and trivial fines were wholly inadequate to overmatch.³⁷ The policy, as Charles Noble has pointed out, thus generated intense political opposition without ever having produced more than modest gains in safety and health.³⁸ But as Noble's study also noted, the problems were not solely the government's fault.³⁹ The unions contributed by overrelying upon state enforcement, and not moving early to assert a strong role in workplace enforcement for themselves.⁴⁰ And most important for present purposes, industries took a basically antisocial position with their strategy of resistance. Vast resources that could have gone to safety prevention instead went to lawyers who sought to get exemptions from standards, subjected standards to judicial and Office of Management and Budget review, contested small citations, and lobbied to put the agency out of business.⁴¹ The inspectors' conviction that they were dealing with callous lawbreakers was reinforced, prompting them to forego flexible enforcement for literal-minded "going by the book."⁴²

How might the ideal Olympian lawyer-statesman, the Brandeis-Stone corporate counselor, have handled this situation? Such a lawyer might have perceived in the Occupational Safety and Health legislation a broad social consensus favoring the reduction of workplace risks, even at some, though not dire, cost to peripheral firms and employment in them⁴³—though very little consensus about the point on the curve at which these trade-offs were to be made. Such a lawyer would have opposed mandatory agency-imposed engineering standards as too rigid to take account of variations among workplaces and tending to stifle innovation. But she also would have seen that her clients would have no incentive to invest in safety unless regulators set clear standards, preferably in

37. *Id.* at 188-93.

38. *Id.* at 196-98. Recent toxics regulation policy, John Mendeloff argues, suffers from similar flaws: the Occupational Safety and Health Administration (OSHA) regulates too few toxics, but overregulates those few, provoking endless and expensive court challenges. See J. MENDELOFF, *THE DILEMMA OF TOXIC SUBSTANCE REGULATION* 203 (1988).

39. C. NOBLE, *supra* note 35, at 140-44.

40. *See id.*

41. See R. REICH, *TALES OF A NEW AMERICA* 219-21 (1987). "Talented people have been known to spend entire careers circumventing a single, arcane area of regulation for the benefit of a few corporations." *Id.* at 219.

42. See E. BARDACH & R. KAGAN, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS* 117-19 (1982).

43. See Rose-Ackerman, *Progressive Law and Economics—And the New Administrative Law*, 98 *YALE L.J.* 341, 358-59 (1988).

terms of safety-and-health outcomes such as maximum exposure levels, rather than specific engineering methods, and set penalties strong enough to induce compliance.⁴⁴ She might, as Susan Rose-Ackerman has proposed, suggest that workers be able to bargain away standards in return for other benefits; but might settle for a combination of bargainable with minimum nonbargainable standards.⁴⁵ With such standards in place, her job of negotiating particular compliance levels for her client would become much easier because she would have a clear threat to present to reluctant managers. She also would have seen that any safety regime crucially relies on the cooperation of the affected workers, that these workers have considerable expertise as well as the capacity to cooperate, and that they should thus be consulted and involved in plant governance involving safety.

In my fantasy, the counselor remains a partisan for her client within the terms of the structure that she has helped to establish. She will fight in rule-making proceedings for feasibility standards that tend to privilege economic costs in trading off safety benefits against their costs, and for methods that tend to value costs liberally and benefits conservatively—though not for standards and methods that eliminate the key purpose of providing clear, strong incentives to safety investment. Unless she is a visionary social-democrat as Brandeis himself was, she is not likely to recommend to her clients internal safety regimes that go beyond a consultative role for workers⁴⁶ to the point where workers might threaten managerial prerogatives over the control of work. Such a governance system would have to be fought for by others—by the union, if there is one, or by liberal legislators, administrators, public-interest groups, or grass-roots movements, if there are any. But at least, in the fantasy, she would have participated in setting up a framework that had some hope of satisfying the social demand for improvements in worker safety at acceptable costs to her client; rather than encouraging her client to invest in mindless resistance to regulation that accomplishes little except to raise the social cost of already inadequate enforcement.

I have just painted a portrait of the Progressive lawyer-statesman. She combines technical insight into joint-maximizing struc-

44. *See id.* at 359.

45. *Id.* at 358-59.

46. *See* T. KOCHAN, H. KATZ & R. MCKERSIE, *supra* note 29, at 147-77. Quality of working life processes are based on the mutual advantages of increased employee-management cooperation. *Id.* at 148.

tural solutions to social conflicts with social judgment, that is, a lively sense of social responsibility for her own and her clients' practices, while still vigorously pursuing her clients' interests.⁴⁷ But what everyone wants to know is, what could possibly make it real? How would my fantasy lawyer find the inspiration to come up with this or any similar structural solution to this regulatory problem; why would she press it against the immediate interests of clients; and how would she press it—in what institutional settings and to whom? Indeed with only a few exceptions such as Brandeis himself, the Progressive visionaries rarely have given much attention to how the vocation of Progressive lawyering might be institutionalized in private practice.⁴⁸ Professor Bruce Ackerman's recent restatement of the Progressive ideal, for instance, imagines a new breed of "activist" lawyers, schooled in a new "discourse" of law compounded of liberal law-and-economics, Rawlsian philosophy,⁴⁹ and computer modelling of regulatory policies, equipped not simply to argue particular cases and transactions but to critique and re-evaluate whole regulatory structures.⁵⁰ In short, an entire bar staffed with Bruce Ackermans.⁵¹ But Ackerman has almost nothing to say about the settings—the firms, the corporate bureaucracies, the transaction-types, the pressures from clients and partners—in which these lawyers have to work.⁵²

47. For illuminating sketches of the character of the Progressive lawyer-statesman ideal, see B. ACKERMAN, RECONSTRUCTING AMERICAN LAW 6-12 (1984); Luban, *The Noble Oblige Tradition in the Practice of Law*, 41 VAND. L. REV. 717, 727-29 (1988) (presenting a skeptical view of the ideal); Simon, *Babbitt v. Brandeis: The Decline of the Professional Ideal*, 37 STAN. L. REV. 565 (1985).

48. Brandeis outlined his ideas in a 1905 speech entitled *The Opportunity in the Law*, delivered to the Harvard Ethical Society. See Luban, *supra* note 47, at 717, 720-27. Brandeis later characterized the proper role of a lawyer as being a "lawyer for the situation." *Id.* at 721.

49. See J. RAWLS, A THEORY OF JUSTICE (1971). Rawls calls the main idea of his theory "justice as fairness." *Id.* at 11. "All social values—liberty and opportunity, income and wealth, and the bases of self-respect—are to be distributed equally, unless an unequal distribution of any, or all, of these values is to everyone's advantage." *Id.* at 62.

50. See B. ACKERMAN, *supra* note 47, at 28-38.

51. See *id.* at 67-70.

52. I found one exception relating to administrative law practice:

Increasingly, it will seem plausible for lawyers to try to persuade agencies that they have misunderstood the structure of the activities they regulate. When bureaucrats persist in ignoring the relevant market failures, moreover, lawyers for affected interests can be expected to appeal for corrective action. Now that they can describe the structural facts, they will have every incentive to articulate legal principles that reveal the agency to be abusing its discretion, and demand a hearing for their increasingly refined complaints about the substance of administrative policy.

II. THE IDEAL IN PRACTICE—HISTORICAL EXPERIENCE

On these points some history offers a little help. Stone himself, who had been a law school dean, imagined that the emerging vanguard of law professors, instructed in legal and social science, with "data patiently assembled and organized so as to show with the powerful impact of revealed truth the extent to which devotion to private interests has obscured our vision of the public welfare,"⁵³ could train the new cadres of public and private lawyers to understand the social effects of legal regulation and thus to assume the proper public functions of the bar as trustees for a business society.⁵⁴ Professors could teach future lawyers how to design and maintain general-social-welfare-maximizing frameworks of legal policy;⁵⁵ and the new lawyers in turn could teach their business clients.⁵⁶ As one of the Columbia curricular reformers of the 1920s baldly stated, the lawyer is the "real social engineer The way to make business a profession is to turn its ultimate direction over to lawyers."⁵⁷ Two responses to Stone's speech perhaps sum up the case against this—in retrospect amazingly innocent—vision. One was from Harold Laski, the English Socialist: "Having been made a dependency of the business empire," Laski said, the legal profession had "to adapt its habits to the standard of its protector."⁵⁸ The other was from the arch-conservative Wall Street lawyer William D. Guthrie, who claimed that the bar *was* discharging its public responsibilities by fighting the New Deal, protecting "ancient principles" from "national socialism . . . the leveling of classes, the destruction of property, and the overthrow of our federal system."⁵⁹

The first generation of Progressive law reformers, who, unlike their successors, began their careers as business lawyers, created new institutions outside private practice for themselves to staff.⁶⁰

Id. at 76.

That will be plausible, all right, so long as discourse about "structures" favors lightening up on their clients. But what if, as in my fantasy, the rational-technocratic-Rawlsian solution is to increase the burden on clients? Or, to switch from social to economic regulation, what if the client wants to protect its cozy regulated niche against the Ackermanian ideal of deregulation?

53. Stone, *supra* note 10, at 8.

54. *Id.* at 14.

55. *Id.*

56. *Id.* at 13.

57. Hanna, *A Modern Approach to Legal Education*, 6 AM. L. SCH. REV. 745, 750 (1930).

58. A. MASON, HARLAN FISKE STONE 382 (1956) (quoting Laski, *The Decline of the Professions*, HARPER'S, Nov. 1935, at 679).

59. Guthrie, *Law School Reviews and Lawyers*, 4 FORDHAM L. REV. 3, 4 (1935).

60. See Gordon, "The Ideal and the Actual in the Law: Fantasies and Practices of New York

These were public-interest issue groups like the Public Franchise Leagues or National Consumers League, for which they acted as general counsel in lobbying, litigation, and legislative drafting.⁶¹ Other institutions included: (1) administrative commissions to run worker's compensation programs or regulate utility rates;⁶² (2) investigative commissions to probe municipal or industrial corruption;⁶³ (3) public-interest interveners, whose role was to argue on behalf of the unorganized public in agency proceedings;⁶⁴ (4) private or public mediation or arbitration boards like the board created by Brandeis under the garment industry protocol and Frankfurter's War Labor Policies Board;⁶⁵ (5) social-science research enterprises and think-tanks;⁶⁶ (6) journals like the *Survey Graphic* and *The New Republic* to publicize their views;⁶⁷ and, finally, (7) the occasional law school course in regulated industries.⁶⁸ The activity of the progressive law reformers was tied into mass based political movements like Teddy Roosevelt's and LaFollette's Progressive parties,⁶⁹ who could translate ideas into power.

Felix Frankfurter, without doubt the century's most prolific progenitor of lawyers as public-policy mavens, assumed that the culture of Wall Street practice was hopelessly parochial and reactionary, and quickly left the practice.⁷⁰ He occasionally steered his protégés to firms like his friend Emory Buckner's firm Root-Clark to gain experience.⁷¹ He urged his protégés to climb the first rungs of a career ladder that sometimes led private lawyers to public service, in order to gain experience. More often, however, he advised younger lawyers with a public-interest agenda to avoid the corporate bar al-

City Lawyers, 1870-1910, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* 64-65 (G. Gawalt ed. 1984). For a list of many of these lawyers, see *id.* at 67 n.6.

61. See P. IRONS, *THE NEW DEAL LAWYERS* 10 (1982); M. PARRISH, *FELIX FRANKFURTER AND HIS TIMES* 72 (1982).

62. See White, *Felix Frankfurter, the Old Boy Network, and the New Deal: The Placement of Elite Lawyers in Public Service in the 1930's*, 39 *ARK. L. REV.* 631, 657-66 (1986).

63. *Id.*

64. See J. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 121-24 (1976).

65. See M. PARRISH, *supra* note 61, at 107-11.

66. See J. SCHWARZ, *LIBERAL: ADOLF A. BERLE AND THE VISION OF AN AMERICAN ERA* 351-63 (1987).

67. See M. PARRISH, *supra* note 61, at 66-68, 230.

68. See P. IRONS, *supra* note 61, at 7-8.

69. See M. PARRISH, *supra* note 61, at 54.

70. See J. AUERBACH, *supra* note 64, at 26; White, *supra* note 62, at 636.

71. J. AUERBACH, *supra* note 64, at 139-50, 167-72, 213-14; M. MAYER, *EMORY BUCKNER* 127-73 (1968).

together.⁷² He created his own network of placement slots that he and his disciples actually could string together into a career.⁷³ Most often, his protégés started with a clerkship with Holmes or Brandeis, followed by a stint at the United States Attorney's office in the Southern District of New York.⁷⁴ For example, he placed David Lillienthal first with Richberg's and Ickes' labor law practice in Chicago,⁷⁵ then moved him to the Wisconsin Public Utilities Commission, and finally brought him into the New Deal.⁷⁶ He placed Nathan Margold with the Garland Fund Study that launched the National Association for the Advancement of Colored People's (NAACP) campaign against segregation.⁷⁷ He staffed most of the principal legal jobs of the New Deal, sometimes himself drafting the legislation that created a new agency,⁷⁸ and then placed his people on the new commission or on its staff.⁷⁹ Finally, he helped his people get law school professorships.⁸⁰

The new public-interest lawyers of the late 1960s and early 1970s generally kept clear of corporate practice, though some of them started out in big-firm jobs. As David Luban pointed out, however, the new breed of lawyer took a much harder line than their Progressive predecessors. Their corporate and public-interest practice commitments were mutually exclusive; "you were either on the bus or off the bus."⁸¹ The public-interest lawyers invented their own institutional mechanisms like foundation financed law firms⁸² or Nader's Raiders⁸³ or the Children's Defense Fund,⁸⁴ sometimes helping to mobilize and joining with broad-based interest groups like labor or the emerging environmental movement.⁸⁵ They carved out an institutionalized—and even sometimes publicly funded—role for themselves in policy-making as regular participants in agency

72. See White, *supra* note 62, at 659.

73. See M. PARRISH, *supra* note 61, at 220-37.

74. See J. AUERBACH, *supra* note 64, at 141; White, *supra* note 62, at 654-60.

75. See J. AUERBACH, *supra* note 64, at 142.

76. See M. PARRISH, *supra* note 61, at 226.

77. J. AUERBACH, *supra* note 64, at 213-14.

78. *Id.* at 234-36. With the help of some noted legal scholars, Frankfurter shaped "a pretty amateurish piece of drafting" into the Securities Act of 1933. *Id.* at 234.

79. *Id.* at 237.

80. *Id.* at 153, 157.

81. Luban, *supra* note 47, at 731.

82. See generally Rabin, *Lawyers for Social Change, Perspectives on Public-Interest Law*, 28 STAN. L. REV. 207 (1976).

83. See B. WEISBROD, J. HANDLER & N. KOMESAR, PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS 414-15 (1978) [hereinafter B. WEISBROD].

84. *Id.* at 319.

85. *Id.* at 151-52.

rule-making and licensing proceedings,⁸⁶ financed impact litigation through government-funded legal services and attorney fee awards,⁸⁷ and staffed a whole new set of policy courses and clinical programs in the law schools.⁸⁸ A few have used private practice to subsidize public-interest work.⁸⁹ Many have retreated into law firms as loyalists in exile, waiting for the restoration of the Democratic Empire. But few think of business practice as a place from which to pursue a social reform agenda. One does that, if at all, as a lawyer without clients, a free-lance public-policy activist; as a lawyer for diffuse and unorganized publics; as a lawyer for the state; or as a lawyer representing causes or social movements or interest groups with a countervailing agenda to that of business.

Yet many of the first generation of Progressive reformers, as I already mentioned, were business lawyers in private practice even as they were building the new institutions and articulating the ideal of the public-minded counselor to business.⁹⁰ How was that possible? Well, it was possible when clients adopted, or could be influenced to support, the reform agenda for reasons of their own; when the clients did not care about the cause one way or another; when the clients were in no position to assert strong views because they had lost legitimacy; or finally in situations of total disequilibrium, like the chaos resulting from the Great Depression, when old stable systems had broken down, the policy options were fluid, nobody knew what to do next, and every path seemed open to social invention.

The possibility of influencing the client to adopt the reform agenda is the easiest case: much of the Progressive reform agenda was the same agenda as that of vanguard business leaders. Core-industry firms in Northern states that regulated child labor supported nationwide regulation to eliminate the competitive advantages of Southern plants.⁹¹ Business firms facing drastic outside threats to their autonomy were often happy to support initiatives for the construction of legal structures that would moderate the

86. See Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1760-61 (1975); Vogel, *The Public-Interest Movement and the American Reform Movement*, 95 POL. SCI. Q. 607, 615-16, 619-22 (1980-1981).

87. See B. WEISBROD, *supra* note 83, at 45-47, 268-70.

88. See R. STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980s*, at 214-16 (1983).

89. See Rabin, *supra* note 82, at 232.

90. See *supra* note 60 and accompanying text.

91. S. WOOD, *CONSTITUTIONAL POLITICS IN THE PROGRESSIVE ERA: CHILD LABOR AND THE LAW* 9 (1968).

threat.⁹² Utilities facing municipal takeover acquiesced in rate-making commissions.⁹³ Insurance companies facing the prospect of strict federal regulation opted for state regulators they hoped to find more tractable.⁹⁴ Industries facing massive labor disruption, and discovering that injunction warfare simply increased labor militance, might press for mediation boards such as that jointly proposed by the ABA and the American Federation of Labor in the 1920s, or government arbitration, or joint-labor-management councils, or corporatist accords such as those of the National Recovery Act.⁹⁵ Worker's compensation, a joint project of corporate lawyers and conservative labor leaders, was ultimately palatable to business clients because it provided a structure that took the issue out of industrial warfare, forestalled more radical measures such as keeping claims in the tort system without employer defenses, reliably limited the cost of compensation, and made them look constructive and reasonable in a period when they were under fierce rhetorical attack from Progressive politicians and the Hearst press.⁹⁶ Today, associations of corporate counsel similarly press for alternative dispute mechanisms to litigation; and bar groups who primarily represent corporate defendants press for moving disputes out of the tort system into no-fault administrative plans.⁹⁷

On the Progressive urban reform agenda, business leaders and reform groups often agreed: they wanted to end machine corruption, and bring "efficient" methods to urban administration.⁹⁸ They were hostile to immigrant politics and hoped, where possible, to replace democratic decision-making and patronage appointments with elite administration staffed with people like themselves.⁹⁹ To underscore the positive side of their elitism, they truly believed that

92. *Id.* at 2.

93. See G. KOLKO, *THE TRIUMPH OF CONSERVATISM* 63-64 (1977); J. WEINSTEIN, *THE CORPORATE IDEAL IN THE LIBERAL STATE: 1900-1918*, at 25-26 (1968).

94. See M. KELLER, *THE LIFE INSURANCE ENTERPRISE 1885-1910*, at 240-42 (1963).

95. See Hawley, *The Discovery and Study of a "Corporate Liberalism"*, 52 *BUS. HIST. REV.* 309 (1978); see also L. GERBER, *THE LIMITS OF LIBERALISM 197-223* (1983); E. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY 19-130* (1966) (detailed analysis of the National Recovery Act experience); C. TOMLINS, *THE STATE AND THE UNIONS 107-08* (1985).

96. See generally Friedman & Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 *COLUM. L. REV.* 50 (1967).

97. See, e.g., Ranii, *ABA Report Suggests Changes in Tort System*, *Nat'l L.J.*, Dec. 24, 1984, at 6, col. 1; *Tort Liability System Found in Good Shape in ABA Report*, *N.Y.L.J.*, Dec. 12, 1984, at 1, col. 3.

98. See S. SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920*, at 50-55 (1982).

99. See *id.* at 52-55.

the major social problems of their time, including the unhappy social side effects of industrial capitalism, were their responsibility to solve.¹⁰⁰

As a practical matter, these political alliances shaped the careers of private lawyers: the young practitioner starting out did well to join some reform cause as a way of meeting business clients, impressing senior lawyers, and attracting public attention. If one worked part-time at the Skid Row settlement houses, as the young Adolf Berle did, one could mix with many socially prominent and influential people.¹⁰¹ General ideological support from clientele also could license lawyers to take on reform projects far afield from direct service to clients. For example, the internationalist orientation of the Wall Street banking community eventually drew many lawyers into the foreign policy establishment.¹⁰² Once there, they were recruited *en masse* for ventures like the Marshall Plan.¹⁰³ Another, even better example is international human rights. Wall Street lawyers have always supported international rule-of-law institutions for business reasons because they help to protect their clients' overseas investments from contract-welshing or expropriation. But this general orientation has led them into activism on behalf of international human rights as well.¹⁰⁴

Still, needless to say, sharing a reform agenda with your clients can get very uncomfortable: narrow limits are set to what are considered "reasonable" or "responsible" proposals; and then as now, many lawyers have had to choose between their clients and their cause, with predictable but not uniform results. Some very notable people ultimately chose the cause.¹⁰⁵ That problem is avoided if one's cause is something one's clients are not likely to care about, so

100. See J. WEINSTEIN, *supra* note 93, at 30.

101. See J. SCHWARZ, *supra* note 66, at 37-40.

102. One lawyer who was noted for somewhat infamous internationalist leanings was John Foster Dulles, the long-time senior partner of Sullivan & Cromwell and Secretary of State under President Eisenhower. See generally T. HOOPES, *THE DEVIL AND JOHN FOSTER DULLES* (1973); N. LISAGOR & F. LIPSUIS, *A LAW UNTO ITSELF: THE UNTOLD STORY OF THE LAW FIRM SULLIVAN & CROMWELL* (1988).

103. To staff some of its key positions, the Marshall Plan administration pulled six prominent New York attorneys out of practice. See M. HOGAN, *THE MARSHALL PLAN: AMERICA, BRITAIN, AND THE RECONSTRUCTION OF WESTERN EUROPE, 1947-52*, at 138-39 (1987).

104. For illustrative examples of the Association of the Bar of the City of New York's (ABCNY) interest in this area, see generally Mullerstein, McKay & Schlam, *Criminal Justice and Human Rights in Northern Ireland: A Report to the Association of the Bar of the City of New York*, 43 REC. A.B. CITY N.Y. 110 (1988); Committee on International Human Rights, *United Nations Human Rights Covenants*, 36 REC. A.B. CITY N.Y. 217 (1981).

105. See *infra* notes 106-109 and accompanying text.

long as it is not positively disreputable, and especially if it can be cast in legalist ideology. Corporate lawyers have on occasion—far too few occasions, but maybe one should be grateful there were any—been known to promote causes that some of their business clients would have considered positively Communistic: The Boston lawyer Moorfield Storey became President of the NAACP,¹⁰⁶ Henry Stimson and Harlan Stone organized the New York City Bar protest against expulsion of the Socialists from the New York Assembly,¹⁰⁷ Grenville Clark defended the free speech rights of radicals¹⁰⁸ and labor organizers;¹⁰⁹ the Chicago Bar Association supported due process for accused and investigated “subversives” in the 1950s (though many bar groups did not).¹¹⁰ The Association of the Bar of the City of New York (ABCNY) has perhaps the most remarkable record held by a bar group dominated by a corporate-practice elite for surprising departures from conventional professional policy proposals. The ABCNY opposed continuation of the Vietnam War and invasion of Cambodia and supported civil rights legislation, legal rights of the mentally ill, and divorce reform.¹¹¹ And now, of course, many business lawyers give their time to pro bono legalist causes—death penalty appeals, international human rights, and the like.

In its most important and ambitious hope, the Progressive project, however, has been disappointing. That was the hope that lawyers could be independent enough of their clients to take the creative initiative as legal and policy reformers—the role Progressives saw as having been performed by private lawyers at the founding and in the early republic—even against their clients’ immediate interests, as long as they reasonably could believe that they were improving the general social environment for their clients as well as others.¹¹² Clearly that does not happen often; even lawyers who think that more regulation of their clients, or an interpretation of

106. See J. AUERBACH, *supra* note 64, at 65.

107. See A. MASON, *supra* note 58, at 801.

108. See G. DUNNE, GRENVILLE CLARK: PUBLIC CITIZEN 97-109, 194-209 (1986) (describing Clark’s intervention in free-speech cases on behalf of the ABA Bill of Rights Committee).

109. *Id.* at 105.

110. See Halliday, *The Idiom of Legalism in Bar Politics: Lawyers, McCarthyism and the Civil Rights Era*, 1982 AM. B. FOUND. RES. J. 913.

111. See M. POWELL, FROM PATRICIAN TO PROFESSIONAL ELITE 95-99, 215-19 (1988) (with regard to the Vietnam War, it was generally the young lawyers who strongly opposed the war).

112. See, e.g., W. WILSON, *The Lawyer and the Community*, in 21 THE PAPERS OF WOODROW WILSON 66-67, 69-70 (A. Link ed. 1976); Stone, *supra* note 10, at 2-3.

rules disfavoring their clients, might be a good thing in the abstract, even something they might push for if they were judges or public officers, generally do not work towards such reforms outside representation contexts. They often do not push for them in bar association sections, public-policy groups, professional-education seminars, law review articles, or testimony before Congress, and they do not allow their associates to do so either. There are exceptions, of course—the tax bar, for example, often has pushed for reforms of the tax code against the interests of many of its corporate clients;¹¹³ and various ABCNY committees have promoted some positions plainly adverse to the interests of clients of some leading ABCNY lawyers, such as support for strengthening environmental,¹¹⁴ antitrust,¹¹⁵ and trade regulation.¹¹⁶ I would guess, though, that the exceptions are rare, that most lawyers' policy groups seek only to minimize both clients' and lawyers' exposure to regulation and liability.¹¹⁷

In case the reader thinks that I only give credit for aid to left-liberal causes, I will mention that industry lawyers gave very little support to the economic-deregulation initiatives of recent years, though the purpose of those reforms, to open up regulated industries to more competition, was exactly the sort of centrist-techno-

113. For example, in the past few years, the New York State Bar Association (NYSBA) Tax Section has opposed a taxpayer bill of rights because of its cost to the Internal Revenue Service, called for increased funding for the Internal Revenue Service, supported reform that increased insurance industry taxation, and supported, with qualification, a Treasury Department tax reform and simplification proposal and a proposal, since enacted, that taxed corporations on the distribution of appreciated property. See NEW YORK STATE BAR ASSOCIATION TAX SECTION, REPORT ON THE OMNIBUS TAXPAYERS' BILL OF RIGHTS, reprinted in 40 TAX NOTES 97 (1988) (opposition to taxpayer's bill of rights); *New York State Bar Association Report Examines H.R. 3838 'General Utilities' Repeal Provisions*, 31 TAX NOTES 459 (1986); *New York State Bar's Tax Section Supports Direction of Treasury Simplification Proposal 'In General'*, 26 TAX NOTES 1203 (1985); *NYSBA Comments on Tax Bill Provisions Affecting the Insurance Industry*, 32 TAX NOTES 416 (1986); *NYSBA Tax Section Calls for Increased IRS Budget*, 27 TAX NOTES 1334 (1985). Clear cut examples of public spirited action are difficult to isolate because in many cases, there is no obviously "correct" solution and client interest is split. Nonetheless, the positions of the NYSBA are widely regarded as principled. See Sheppard, *General Utilities Repeal: Of Ostriches and Motherhood*, 30 TAX NOTES 491, 492 (1986) ("The rule among the NYSBA executives is that client concerns are to be left at the door in the interest of formulating positions consistent with the public good.").

114. Two ABCNY committees split on these issues; the leadership allowed both positions to be recommended to the legislature. M. POWELL, *supra* note 111, at 119.

115. *Id.* at 123-27.

116. *Id.* at 117-38.

117. See generally A. MELONE, LAWYERS, PUBLIC POLICY AND INTEREST GROUP POLITICS (1977) (most bar association lobbying tracks the policy preferences of major business clients).

cratic-framework type of reform that Progressive lawyers usually celebrate.¹¹⁸ (The early Progressives, of course, *promoted* regulation of these industries, but under a different legal-economic prevailing wisdom).¹¹⁹

Some of the main historical exceptions I can think of, occasions when lawyers have sailed off on public ideological crusades of their own without considering the possible damage to clients, are not very encouraging. John Foster Dulles gathered his clients together to lobby against the Public Utility Holding Company Act and then advised them to ignore the Act as unconstitutional;¹²⁰ the American Liberty League lawyers counselled civil disobedience to Labor Board orders;¹²¹ and the ABA pressed for the Walter-Logan bill that would by judicializing the entire federal administrative process have made it as cumbersome and expensive for clients to get decisions out of the process as for the government.¹²²

This dispiriting (though as Harold Laski pointed out probably inevitable)¹²³ *de facto* unwillingness to risk client favor, however, does not mean that business lawyers lack any opportunities for constructive influence. The opportunities are everywhere. But they are found most often in the interstices of practice, rather than bold public reform initiatives, and in occasions for marginal influence on internal bureaucratic politics.

III. THE IDEAL IN CURRENT PRACTICE SETTINGS

Let us return to the routine kind of corporate counseling, the task of helping corporate clients deal with government regulation. Corporate lawyers do not always agree on what professionalism demands in the performance of this task, and tend to disagree more violently the more specific the discussion becomes; but there is a strong respectable view that the norms and practices of adversary

118. See, e.g., Gordon, *supra* note 8, at 63-65.

119. Indeed, the response of some industries to the gathering policy consensus of the late 1970s and early 1980s in favor of deregulation provides a textbook example of how unreflective carrying out of a business client's immediate interests can subvert that client's interest in the long run. See generally M. DERTHICK & P. QUIRK, *THE POLITICS OF DEREGULATION* 174-206 (1985) (discussion of telecommunications industry).

120. See N. LISAGOR & F. LIPSIGUS, *supra* note 102, at 114-18.

121. See P. IRONS, *supra* note 61, at 243-48.

122. See C. Harrington, *The Political Economy of Administrative Law Practice* (June 1, 1983) (unpublished manuscript) (copy on file with *Maryland Law Review*). On this last example, to be fair, I have to add that although the ABA supported the bill, the ABCNY opposed it, and helped produce the compromise resulting in the Administrative Procedure Act.

123. See Laski, *supra* note 58, at 677.

advocacy do not give adequate or appropriate content to the lawyer's role in this context, at least not until the company has been caught in a violation and definitively has rejected any response save that of minimizing its liability. Until then, the respectable view holds, the professionally responsible lawyer will direct her advice not just to the defensive aim of minimizing exposure, but to the affirmative one of promoting compliance with the regulation's purposes.¹²⁴ And of course, corporate lawyers devote a lot of time institutionalizing this view, by setting up mechanisms to promote and monitor compliance. For example, if a client risks suit for condoning sexual harassment, it is completely routine for general counsel to initiate a corporate policy—directives from the chief executive officer (CEO)—and a grievance procedure.

Regulation of corporate activity normally registers—among other, haphazardly miscellaneous interests and purposes—social judgments about how to promote competition and fair dealing in markets—like antitrust, labor laws, and laws against deceptive practices and bribery or discrimination in hiring—or how to prevent and pay for the social costs of corporate activity including damage to the environment or to worker health and safety, discrimination, sexual harassment, and economic dislocation. At least in the short run, these obviously are all purposes that may appear as obstacles to the corporate pursuit of profits.

Sometimes the lawyer's two aims of minimizing her client's exposure and promoting compliance with regulatory goals may be in harmony but obviously they need not be. From management's point of view, substantial compliance may be the surest preventive of liability, but may cost much more than creative avoidance. In any actual corporate organization, there will be considerable discrepancies between the moral and policy norms given expression in regulation (what one writer usefully has called the "myth-system") and the company's routine practices (its "operational code").¹²⁵ Again from management's point of view, the company's lawyers (whether in-house or outside is irrelevant) have the job of managing these discrepancies so that they do not become so glaring or visible as to cause serious interference with or financial drains upon the client's operations.

124. For authoritative expressions of this view, see MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1980); American Bar Association and the Association of American Law Schools, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159 (1958).

125. W. REISMAN, *FOLDED LIES: BRIBERY, CRUSADES AND REFORMS* 15-36 (1979).

Trying to condition the company into compliance is one way of closing the gap; but so are other strategies such as adopting the most restrictive conceivable interpretations of what the law demands, constructing devices that will formally satisfy the regulation while defeating its substance, designing the cosmetic appearance of compliance (*e.g.*, the publication of paper directives that everyone will ignore because nothing turns on disobeying them), concealing violations when they do occur, playing the audit lottery, stonewalling or counterattacking enforcers, or simply paying fines or settling cases as they come up as a continuing cost of doing business. To reduce these options to a crude typology, lawyers can choose among actual compliance, cosmetic compliance, nullification-by-resistance or the "Holmesian bad man's" strategy of violate-and-pay,¹²⁶ or any combination of these.

The ideal of the law as a public profession generally recommends promoting actual compliance so far as it is practically feasible for the lawyer to do so. This does not demand dumb, literal obedience to every rule but creative forms of compliance that, although aiming to minimize cost and disruption to the company, effectively still realize the regulations' basic purposes. It undoubtedly asks too much of any counselor that she should refuse to compromise the goal of substantial compliance until it runs up against implacable resistance at the company's highest decision-making levels—one can take only so many causes to the CEO or Board, or threaten to resign only so many times—but it does not seem unreasonable to ask that she spend her political capital shrewdly to get as much compliance as she can.

But why on earth *would* she choose this course rather than alternatives that usually will occasion less conflict with and more rewards from the organization for which she works? Skeptics about the practicality of the professional ideal find it easy to list reasons why it will not fly in real work settings.¹²⁷ Corporations notoriously draw sharp organizational boundaries between themselves and outsiders, reinforced by blood-bonds of loyalty that produce tremendous stress and dissonance in employees trying to play the double-agent's game of serving both the social norms of their professions and company policies.¹²⁸ The ideology of the business world depreciates many regulatory goals as populist folly or special-interest selfishness en-

126. See O.W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 173 (1920).

127. See Weiss, *Social Regulation of Business Activity: Reforming the Corporate Governance System to Resolve an Institutional Impasse*, 28 UCLA L. REV. 343, 364 (1981).

128. See *id.* at 365.

forced by unreasonable and ignorant bureaucrats.¹²⁹ The expression of moral concerns in moral terms is often treated both as hypocritical and inappropriate.¹³⁰ The punishments dealt to conscientious whistleblowers can be savage—isolation, demotion, and social death if they stay with the company, scapegoating for the problem and unemployability if they are fired or resign—while executives who remain “loyal” suffer no stigma and may even get their old jobs back when they get out of jail.¹³¹

The basic problem, the skeptic will argue, with constituting lawyers as the group that are to initiate and supervise compliance efforts in resistance to pressures generated by cultures of profitability, loyalty, and antiregulatory ideologies, is that they are subject to most of the same constraints as other corporate agents. In-house lawyers, who are most familiar with the details of the business, are part of the management team and their personal fortunes may well rise and fall with their colleagues'. Outside lawyers, besides wishing to avoid gratuitous offense to an important source of fees, especially under recent conditions of ferocious competition for corporate business, may know too little about the client's operations to detect developing problems and devise creative ways of correcting them.

Even more important, and of greatest relevance to my project here, is that professional ideals, as currently articulated and institutionalized in corporate law practice, are not robust enough to endow lawyers with sufficient resources to help them to overcome these constraints. The ideals are so elastic as constantly to defeat their own purposes. The counselor's ethic may recommend an active role in promoting and monitoring compliance, but the ethic is a sickly one that at the first sign of resistance is apt to dissolve into the adversary's goal of minimizing exposure through any plausibly legal means available, including, of course, high technical virtuosity in casuistic interpretation and procedural manipulation. The disciplinary codes give almost no support to the compliance counselor's role.

Even the ABA's Model Rules of Professional Conduct were drafted (largely upon the insistence of the trial bar) to give primacy to the advocate's role and to reduce dissonance between pursuit of law-embodied norms and the client's immediate interests in favor of

129. *See id.* at 365-66.

130. *See id.* at 366.

131. On the anti-regulatory ideologies and savage self-protectiveness of corporate cultures, see generally R. JACKALL, *MORAL MAZES: THE WORLD OF CORPORATE MANAGERS* (1988); W. REISMAN, *supra* note 125; Weiss, *supra* note 127, at 360-77.

acquiescence to the client.¹³² Under these rules, for example, lawyers are not to counsel or assist clients to engage in criminal or fraudulent conduct,¹³³ but have no positive duty to urge compliance or to go beyond "purely technical" advice¹³⁴ if that is all the client wants;¹³⁵ and have virtually no formal leverage over clients who persist in illegal conduct, since they may disclose misconduct to outsiders only in extreme situations,¹³⁶ 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.¹³⁷ The lawyer who cannot count upon factual uncertainty, legal ambiguity, and vaguely worded client assurances that it will clean up its act, to relieve her of any pressure to invoke these (in any case nonobligatory) sanctions is sadly deficient in the casuistical and rationalizing defense-mechanisms of her profession.¹³⁸

The skeptic's final point is that corporate willingness to comply with regulatory norms really depends upon outside political and economic conditions over which the company's lawyers have little or no control.¹³⁹ The degree of a corporation's "social responsibility," or concern for other social goals besides short-term profit maximizing, is a function of the structure of its market and its position in that market.¹⁴⁰ The other main inducement to compliance is the threat of heavy sanctions, predictably enforced,¹⁴¹ which in turn is a function of political support for regulation and the power of countervailing constituencies, especially labor unions. In recent years,

132. See MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1983).

133. See *id.* Rule 1.2.

134. See *id.* Rule 2.1 comment (applicable to both experienced and inexperienced clients).

135. See *id.* Rule 1.2.

136. See *id.* Rule 1.6 (disclosure permitted in situations of death or serious bodily harm).

137. *Id.* Rule 1.13.

138. Some legal doctrines actually turn the lawyer's monitoring function from a sword into a shield by allowing corporate managers facing liability for "intentional" or "bad faith" conduct to plead reliance on advice of counsel as a defense. See Kraakman, *The Economic Functions of Corporate Liability*, in CORPORATE GOVERNANCE AND DIRECTOR'S LIABILITIES: LEGAL, ECONOMIC AND SOCIOLOGICAL ANALYSES ON CORPORATE RESPONSIBILITY 178, 203 (K. Hopt & G. Teubner eds. 1984) [hereinafter CORPORATE GOVERNANCE AND DIRECTOR'S LIABILITIES].

139. See, e.g., C. NOBLE, *supra* note 35, at 181-96 (discussing shifting approaches to OSHA enforcement as Republican and Democratic administrations came into office).

140. See Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1, 25-26 (1979); Mashaw, *The Economic Context of Corporate Social Responsibility*, in CORPORATE GOVERNANCE AND DIRECTOR'S LIABILITIES, *supra* note 138, at 55; McKie, *Changing Views*, in SOCIAL RESPONSIBILITY AND THE BUSINESS PREDICAMENT 31-32 (J.W. McKie ed. 1974).

141. See C. NOBLE, *supra* note 35, at 197.

most United States companies have experienced severe pressure from international competition to cut costs.¹⁴² The amazing new volatility of the market for corporate control has increased the interfirm mobility of corporate managers, severed their traditional ties to local communities, and brought to power a breed of portfolio managers oblivious to audiences save the securities markets, whose priorities pressure middle managers to cut legal corners to make profit targets.¹⁴³ At the same time, at the federal level, and in many states as well, the climate of regulatory enforcement in such fields as environmental, telecommunications, safety-and-health, employment discrimination, and labor regulation has been relatively permissive.¹⁴⁴ Labor unions have reached their post-war nadir in membership and influence.¹⁴⁵

The main response to the skeptic—whose claims have undeniable force—has to be that there actually are enormous variations in the responsiveness of American corporations to the social norms reflected in regulation;¹⁴⁶ and the variations do not seem to be tied tightly to external variables such as market structure and regulatory climate.¹⁴⁷ Conditions of imperfect competition (oligopoly position), for example, may help create the opportunities for socially responsible conduct, but cannot explain the degree to which a company takes advantage of such opportunities. Even for companies determined to behave as perfect economic persons, amoral calculators, the most basic terms of the calculus—both “profit-maximizing” and “costs” of liability or regulatory sanctions—are

142. See, e.g., Kaplan, *One Cost System Isn't Enough*, HARV. BUS. REV., Jan.-Feb. 1988, at 61; Scott, *Competitiveness: 23 Leaders Speak Out*, HARV. BUS. REV., July-Aug. 1987, at 106.

143. See, e.g., *Worldwide Executive Mobility, 1988*, HARV. BUS. REV., July-Aug. 1988, at 118-23 (64% of top managers say it is likely or very likely they will change companies again within the next 10 years). See generally Coffee, *Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response*, 63 VA. L. REV. 1099 (1977).

144. See, e.g., R. HOROWITZ, *supra* note 30 (discussing deregulation of the telecommunications industry); C. NOBLE, *supra* note 35, at 193-96 (describing the Reagan administration's approach to OSHA regulation). See generally S. TOLCHIN & M. TOLCHIN, *DISMANTLING AMERICA: THE RUSH TO DEREGULATE* (1983).

145. See R. FREEMAN & J. MEDOFF, *supra* note 26, at 4, 18; T. KOCHAN, H. KATZ & R. MCKERSIE, *supra* note 29, at 3-9.

146. See S. LYNDENBERG, A. MARLIN, S. STRUB & THE COUNCIL ON ECONOMIC PRIORITIES, *RATING AMERICA'S CORPORATE CONSCIENCE, A PROVOCATIVE GUIDE TO THE COMPANIES BEHIND THE PRODUCTS YOU BUY EVERY DAY* (1986) (surveying the social policies of 130 large United States corporations).

147. See, e.g., Kagan & Scholz, *The "Criminology of the Corporation" and Regulatory Enforcement Strategies*, in *ENFORCING REGULATION* 65 (K. Hawkins & J. Thomas eds. 1984); Lane, *Why Businessmen Violate the Law*, in *WHITE COLLAR CRIME* 102 (G. Geis & R. Meier eds. 1977).

too amorphous to dictate uniform responses.¹⁴⁸ This is demonstrated effectively by the often disastrous miscalculations of morally indifferent managers, resulting in huge liabilities for harms that much less costly recall or correction in mid-production could have averted.¹⁴⁹

Thus for explanations of variation in law-abiding corporate conduct, a growing body of work is inclined to look to variations in corporate strategies, structures, and "cultures."¹⁵⁰ Some of this work necessarily seeks to examine what will strengthen the advice-giving and monitoring capabilities of—among other potential monitors such as competitors, independent directors, shareholders, "private attorneys general," et cetera—the corporation's lawyers.¹⁵¹

The recent work of Robert Rosen on the sociology of in-house counsel's work is particularly suggestive in its grouping of corporate legal departments into two general types, one of which takes a very narrow view.¹⁵²

Legal departments adopting the narrow view sharply distinguish legal from business advice and confine the lawyer's role to the strictly legal; their advice is reactive, given only when asked for, accepting as the "client" whatever manager at whatever level consults it, and accepting the "problem" and the corporation's "interest" as defined by that manager; their advice is in the form of neutral risk-analysis; and they do not ask what happens when the "client" leaves their office—unless required to perform monitoring or auditing functions, in which case they will confine themselves to asking for-

148. See Kagan & Scholz, *supra* note 147, at 71-72.

149. See *id.* at 72 (providing two examples of costly risk miscalculations by corporate managers that were reported within only two days of each other in a major newspaper).

150. See, e.g., R. JACKALL, *supra* note 131, at 17-40; C. STONE, *WHERE THE LAW ENDS* (1975); Coffee, *supra* note 143, at 1127-47; Coffee, "No Soul to Damn, No Body to Kick": *An Unscandalized Inquiry Into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1981); Coleman, *Responsibility in Corporate Action: A Sociologist's View*, in *CORPORATE GOVERNANCE AND DIRECTOR'S LIABILITIES*, *supra* note 138, at 69; Kagan & Scholz, *supra* note 147; Kraakman, *The Economic Functions of Corporate Liability*, in *CORPORATE GOVERNANCE AND DIRECTOR'S LIABILITIES*, *supra* note 138, at 178; Stone, *Public Interest Representation: Economic and Social Policy Inside the Enterprise*, in *CORPORATE GOVERNANCE AND DIRECTOR'S LIABILITIES*, *supra* note 138, at 122; R. Rosen, *Lawyers in Corporate Decision-Making* (Nov. 1984) (unpublished Ph.D. dissertation) (available at University of California at Berkeley or in the University of Miami, School of Law Library).

151. See C. STONE, *supra* note 150, at 163-64 (advocating legal audits by corporate counsel); R. Rosen, *supra* note 150 (an effective corporate counselor must study his client's organizational structure, utilize the corporation's policies, political coalitions and culture, and become an influential member of the client's decision-making team in addition to supplying technical information about the law).

152. See R. Rosen, *supra* note 150.

mal questions and receiving formal responses.¹⁵³ Under attack by regulators or civil adversaries, they will view their function as simply minimizing liability in every case. The A.H. Robins Company that has had to devote most of its resources to compensating victims of its catastrophic decisions to market and then conceal mounting evidence of the dangers of the Dalkon Shield, probably exemplifies an extreme version of this narrow model and its perils.¹⁵⁴ At Robins, the medical and legal departments were, apparently by design, kept insulated from one another so that lawyers defending the mounting flow of tort suits had no access to doctor's reports on dangers of the shield; while the medical department in turn was deprived of new medical information generated in the suits.¹⁵⁵ The lawyers also seem to have destroyed or permitted the destruction of key documents,¹⁵⁶ and engaged in ferociously adversary litigation tactics, cross-examining plaintiffs on details of their sexual practices to deter suits, hiding important documents from discovery in mountains of trivial ones, and coaching top executives to forget virtually all details of management decisions relating to the Shield.¹⁵⁷

Legal departments adopting the broader view see their role as that of building compliance goals and prevention-and-monitoring mechanisms which will become part of the company's own strategies and routine operations, so that compliance becomes not a grudging response to the lawyer-policeman muttering vague threats of state terror, but company policy, implemented through its regular divisions.¹⁵⁸ A good example comes from Allied Chemical's restructuring after it was caught dumping Kepone into the Chesapeake Bay.¹⁵⁹ The restructuring included creating a Toxic Risk Assessment Committee and a new executive position reporting to top management, rerouting information on toxics so it would reach these new monitors, and tying one-third of the compensation of plant managers to their safety records.¹⁶⁰

This broad role is obviously a much more demanding role than

153. See generally *id.*

154. See generally M. MINTZ, *AT ANY COST: CORPORATE GREED, WOMEN, AND THE DALKON SHIELD* (1985).

155. *Id.* at 204-06, 211-12.

156. *Id.* at 210-27.

157. *Id.* at 194-97.

158. See generally R. Rosen, *supra* note 150.

159. See Coffee, *supra* note 143, at 1270-71; Coffee, *supra* note 150, at 451, 456.

160. See *supra* note 159. For a particularly interesting set of case studies of Federal Trade Commission (FTC) consent orders employing managerial restructuring remedies, see Solomon & Nowak, *Managerial Restructuring: Prospects for a New Regulatory Tool*, 56 NOTRE DAME L. REV. 120 (1980).

the other. To perform it the lawyers need a place in the organizational hierarchy that is both high (reporting directly to the CEO, and well-connected personally to the CEO and Board) and out-of-channels (able to investigate and intervene at any level, in any division). They need discretion to define the "client" and its "problems" and "interests" more broadly than particular divisions or levels may wish.¹⁶¹ Above all they need (1) sufficient knowledge of the business operations of the company so that they can work with middle managers to devise means of institutionalizing preventive compliance with regulatory norms that seem to realize gains to those managers,¹⁶² or at least are relatively nondisruptive; (2) sufficient trust so that troubles will be called to their attention before it is too late to dislodge the policies or investment decisions that caused them; (3) sufficient prestige to make the threat of going up the chain of command credible enough to influence changes at middle levels without actually trying to use it; and (4) sufficient authority to summon independent forces, such as outside lawyers or consultants or "audit committees" to recommend or monitor changes.¹⁶³

The disciplinary codes, as earlier mentioned,¹⁶⁴ contribute very little to the project of trying to institutionalize this "broad" view of the corporate counselor's function, and even somewhat undermine it. Whether much support could have been lent to the counseling function by reforms in the disciplinary rules anyway has been the subject of great contention. The major proposed reform was to increase the lawyer's discretion or obligation to disclose ongoing harmful conduct. The opponents of disclosure, with support from more objective observers,¹⁶⁵ argued that if compelled disclosure had any effect at all it likely was to prevent the lawyers' access to internal corporate affairs—indeed possibly to keep knowledge of potentially shady or risky operations concealed from *any* responsible corporate officer. The argument surely was overstated. Of course,

161. See Coleman, *supra* note 150, at 79-80 (the determination of a corporation's "interests" is problematic because as a joint enterprise, there is no single individual within the corporation who can expound its interests).

162. For example, to reduce repair costs associated with compliance with an FTC consent order's warranty service requirements, a mobile home manufacturer instituted sweeping changes in quality control procedures, construction materials, and manufacturing techniques. It subsequently reported that "the cost of the changes was less than the benefit received in the form of savings in repair costs and increased good will" Solomon & Nowak, *supra* note 160, at 139.

163. See, e.g., C. STONE, *supra* note 150, at 163-64 (advocating legal audits).

164. See *supra* note 124.

165. See, e.g., C. STONE, *supra* note 150, at 42-43; Coffee, *supra* note 143, at 1146.

bad clients will not knowingly reveal dubious conduct to lawyers if the lawyers must disclose it. But some clients, realizing that the only way they can get legal help will require disclosure, will clean up their act, and even bad clients may disclose inadvertently.¹⁶⁶ In any event, the politics of disciplinary rule-change in the ABA closed off even this narrow avenue to reform.

If the threat of disclosure is not always a particularly useful resource for corporate lawyers trying to institutionalize the counseling function, what is? To bargain with managers for compliance, lawyers need both plausible threats of damage to the corporation and plausible promises of benefits. Benefits are more important because it is often difficult to induce managers to invest in simply avoiding losses, especially losses that are inevitably speculative because the risk of harms to others and the risk of regulatory detection and enforcement are always debatable.¹⁶⁷

The corporate lawyers could best promote this function by using professional associations, such as the American Corporate Counsel Association, practitioners' seminars, and widely read journals like the *Business Lawyer*, to instruct one another in success stories of compliance strategies and models of compliance structures.¹⁶⁸ Counsel for the more law-abiding and socially responsible companies also should articulate informal standards of good practice so that lawyers fighting for marginal changes in their own work settings can point to highly respectable examples of appropriate practice. It would also help, at least slightly, if there were continuing emphasis from the major bar associations on lawyers' social responsibilities, even if only in the usual form of highminded rhetoric on the president's page.

Clearly, however, lawyers need sticks as well as carrots. Recall the OSHA example discussed earlier.¹⁶⁹ The ideal regulatory regime, from the compliance lawyer's point of view, is one that has

166. See D. LUBAN, *supra* note 18, at 206-34; Rhode, *supra* note 23, at 612-17; Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 397-99 (1989) (empirical studies inspire skepticism about whether rules of confidentiality do much to promote client frankness, and thus about whether loosening such rules would much inhibit it).

167. See, e.g., *supra* note 149 and accompanying text.

168. In many fields, of course, this already is done. Seminars to instruct managers or other lawyers how to design a corporate sexual harassment policy and grievance procedure provide one example. The threat consists of potential vicarious liability for harassment if the firm lacks such a policy; the benefit is the improvement in employee morale which results from an harassment-free work atmosphere. See, e.g., *Law Firms Address Issue of Sexual Harassment*, The L.A. Daily Journal, July 18, 1988, at S2, col. 1 (some Los Angeles firms offering "awareness" seminars).

169. See *supra* notes 35-42 and accompanying text.

potentially severe sanctions for violations, but is willing to be flexible in negotiating compliance systems or consent decrees which can be tailored to fit particular companies' situations and which will prevent and remedy violations. This gives counsel something draconian to bargain with, as well as the promise of extracting a "sweet deal" for his company; a conversion from "unreasonable" to "reasonable" regulation.¹⁷⁰ Regulation is the "businessman's best friend" so long as it can be viewed as a more or less objective constraint, something that the firm must incorporate into its strategies because it is *inevitable*: no manager can then be blamed for having made a "losing" investment in compliance.¹⁷¹ When doubts arise about the seriousness of regulatory intentions or adequacy of enforcement, there are enormous temptations to move toward "bad-man's" strategies, cosmetic compliance, or outright nullification.¹⁷²

The regulatory enforcement climate, especially at the level of small interstitial decisions that are practically critical but concealed from political view, is something that corporate lawyers can help to influence as members of powerful policy forming elites; as participants in rule-making and regulatory-negotiation proceedings; and as drafters of consent decrees restructuring delinquent businesses. Indeed the most efficient regulatory regime for some contexts may be one that creates "gatekeeper" obligations, *i.e.*, one that directly conscripts the lawyers as regulatory agents by legally requiring that they monitor certain company transactions, investigate underlying facts, certify conditions, and disclose violations of law; and imposes liability on the gatekeepers as well as their clients for negligence or nondisclosure.¹⁷³

In reality, unfortunately, lawyers often deploy their influence in

170. For an extended argument that regulatory "unreasonableness"—the inability to distinguish between unwitting technical violators and genuine "bad apples," or between major substantive and trivial formal violations—is a contributing cause of noncompliance, see E. BARDACH & R. KAGAN, *supra* note 42, at 58-92 (in the context of OSHA enforcement). *But see* C. NOBLE, *supra* note 35, at 195-96 ("cooperative" enforcement policies of Reagan Administration vitiated purposes of act).

171. *See, e.g.*, R. JACKALL, *supra* note 131, at 159-60.

172. For example, the weakness of National Labor Relations Board enforcement has led to increasingly aggressive union-busting tactics in the knowledge that penalties, if any, will be light and imposed far too late to help an organizing campaign. *See* Weiler, *supra* note 26, at 1769-1803.

173. An example of such a regime is the Securities and Exchange Commission's (SEC) Rule 2(e), 17 C.F.R. § 201.2(e) (1989) (empowering the SEC to prohibit lawyers who have violated federal securities laws from practicing before the SEC). *See* Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857, 890 (1984) (stating that gatekeeper liability has received widest play in response to securities violations and similar transactional delicts).

ways that actually are antithetical to their professional interests, that is, in reflexively and mindlessly antiregulatory lobbying. To some degree, this is inevitable given the immersion of lawyers in the cultures and ideologies of their clientele. Organizations of industry counsel likely will not press vigorously for strengthening of outside regulatory regimes—as opposed to strengthening of inside preventive and monitoring systems, which they can be expected to support.¹⁷⁴ Such groups certainly would resist even more fiercely regulation imposing disclosure requirements or gatekeeper liabilities on lawyers themselves: they always have done so in the past.

There are, however, other kinds of institutions—the bar association committee or task force or law-reform group, governmental or foundation commissions and advisory bodies, non-profit public-policy centers—in which the same lawyers can serve. In such settings, the members to some extent may escape both the parochialism of their usual associates and the narrow advocacy roles and be freed to articulate more disinterested views of ethics and policy. If the group includes lawyers from diverse business sectors, they will have cross-cutting interests anyway: insurance-industry lawyers will urge preventive regimes on counsel for potential mass-tort defendants, house counsel will press mechanisms for reducing litigation costs on law-firm litigators, outside-firm lawyers can suggest mechanisms for damage control after corporate violations have been discovered that will bring them in as outside monitors and reduce the dangers of cover-ups and suppression of evidence, and lawyers for capital-intensive industries can take a more detached view of labor and employment laws, and so forth.

Even if such groups' ties effectively disable them from initiating proposals for strong and effective outside regulation, experience suggests that they can play an important part in deciding how to respond to outside initiatives—whether to try to cripple the initiative, or make it palatable to major business interests while preserving its basic purposes—and thus to mediate between regulatory and business constituencies.

Similarly, one realistically cannot expect—though it would be nice if one could—that lawyers representing a corporate raider will counsel against a particular take-over on the grounds, for example, that the plan will cost more in lost jobs and community devastation

174. See, e.g., Note, *Redefining the Attorney's Role in Abusive Tax Shelters*, 37 STAN. L. REV. 889, 893-96 (1985) (proposed Treasury Department regulations imposing severe sanctions for attorneys violating policies governing tax shelter opinions were softened substantially under the influence of the ABA).

than it will reap in shareholder wealth. One cannot even expect that lawyers representing a corporate target will counsel an entrenched management that investing in elaborate tactical defenses or leveraged buyouts is against the best interests of the entity because it will deprive its shareholders of a good deal or mire its operations in debt. But one might expect, and even sometimes witness, lawyers who have experienced many take-overs giving some relatively disinterested advice to policy-makers on how to regulate them. Such advice will of course be easier if the lawyer represents both raiders and targets in one-shot deals rather than continuing relations, and always will be in demand whatever the governing rules are.

In the currently emerging conditions of corporate practice, outside-firm lawyers may be able to contribute more to the provision of relatively disinterested ethical and policy advice, without feeling that they are betraying their clients or risking loss of business. This is because companies now less often retain the same firm to represent all their interests than they did fifteen years ago, and more often spread legal business, discrete deals or lawsuits, among several firms.¹⁷⁵ A law firm thus has less to lose if one of its lawyers risks offending a client by the advice she gives or public positions she supports.

Organized bar groups, besides providing fora of their own for professional policy-making, can support such efforts in several ways. Specifically, it would be useful if the ABA and big city bar associations were to adopt policies that would concretely support their commitments to public service by the bar, and serve as sources of countervailing influence to the economic pressures of private practice that severely discourage engagement in nonbillable ventures of any kind. For example, they might issue ethical opinions regarding merely "positional" conflicts to the effect that law firms and general counsel's office may do nothing to inhibit partners or associates from writing articles or otherwise being active in policy-formation causes simply on the ground that their clients might object.¹⁷⁶ They also could helpfully recommend, if, as is probable, there is too much opposition to require firms to count time spent in public-interest activity toward billable-hours quotas and give it full credit in part-

175. See Chayes & Chayes, *Corporate Counsel and the Elite Law Firm*, 37 STAN. L. REV. 277, 294 n.50 (1985) (only 10% of the larger companies surveyed spent more than half of their total outside fees with one firm).

176. For an interesting ABA conference panel discussion of this issue, see Friedman, *Limitations on the Corporate Lawyer's and Law Firm's Freedom to Serve the Public Interest*, 33 BUS. LAW. 1495, 1495-1506 (1978).

nership decisions. They can, as some bar associations are already doing, pass rules or recommend that firms contribute some set minimum proportion of time or income to public-interest or public-policy organizations.¹⁷⁷

CONCLUSION

Now I am well aware that many people who share my implicit political agenda will think I have chosen a weird way to promote it. So I ought to make clear right away that I do not for a minute think that private corporate practice is by any means the most promising place from which to work to build a more decent, equal, solidary society. As I have said, experience has worn away most of the hopes of Progressives like Stone that business lawyers actively could initiate social reforms involving basic restructuring of their clients' operating environments in ways that seem to cut into corporate profits or autonomy. That vision was never very realistic about the economics of practice, or the obvious psychological fact that if you spend your whole professional life among business people, you are likely to come to think as they do about most things anyway, and will not rock the boat even if you do not. But the same experience has suggested that the reactive role of lawyers, and the advice they give clients facing challenges from outside, may critically influence the shape of the resultant social compromises. So some shrewd bureaucratic politics, interstitial influence on corporate decisions and political strategies, pressed from the inside at the right historical moment, can make a real difference.

Sometimes, of course, there is no real opportunity for influence—as when the client is committed by company policy to continuing violations of law—and then the lawyer really should get out; no self-respecting professional should remain in that situation. More often if there is little chance of influence, it is because the work one is doing for the client is so narrow and specialized there is no hope of ever determining what its social meaning is. After a few years of work without apparent social meaning, a reflective professional might at least start to wonder how much she needs this job. But when influence at the margins, or institutional tinkering, is possible,

177. See, e.g., W. Bradford, Community Services Department Report of Activities, 1985-1989 (June 1989) (unpublished report of Hogan & Hartson's pro bono work) (copy on file with *Maryland Law Review*). A partner directs a department devoted to the Washington-based firm's pro bono work for four years, and one or two associates rotate through for four month periods. As a result the firm exceeds the ABA's 50 hour per year pro bono time recommendations for each of its attorneys. *Id.* at vii.

it matters quite a lot whether the company tries to pre-empt an outside threat through bitter resistance, cosmetic compliance, or genuine restructuring of operations. That is the arena in which, classically, lawyers have served or failed to serve their public functions.

Some will ask if I have bought into the Progressive illusion that there always is some optimizing solution to social conflict. Is not the kind of solution that business lawyers are likely to press their client to adopt in its long-term interest one that accommodates conflict by co-opting it? Has not it repeatedly helped a cause offsetting business interests if the companies and their lawyers were so mindlessly intransigent, so Neanderthal and inept in their resistance, that their position was completely discredited?

One does not have to be a Leninist to wonder if supple, creative, accommodating lawyers with soothing compromises might be the worst possible recipe for constructive social change. And sometimes they may be. There is simply no way to predict what the outcome will be: the compromise may pacify the opposition, or it may give it a beachhead to expand its cause; history is full of examples of structural compromises that did both—think of section 7(a) of the National Industrial Recovery Act,¹⁷⁸ intended by many business supporters to pacify the labor movement by including it in the corporatist recovery partnership through symbolic recognition of its right to organize and bargain collectively.¹⁷⁹ With that right in hand, though at the time it largely was a paper right, almost completely unenforceable in any practical way, unions recruited 900,000 new workers in 2 years.¹⁸⁰

Lawyers also could further serve their public functions in areas that do not conflict directly with client interests and thus give much more scope for an active role in promoting social change rather than just a reactive one. I will not attempt to develop this thought in this Article: what it would involve, besides sacrificing some income to devote some more corporate-lawyers' time to nonpaying public interest causes, if need be by setting up lower-paid "public-interest career" tracks within firms, is to imitate the Progressive reformers

178. Pub. L. No. 73-67, 48 Stat. 195 (1933); see P. IRONS, *supra* note 61, at 23, 203 (Roosevelt had no intention of protecting labor's rights through § 7(a), instead, Congress inserted it into the National Industrial Recovery Act as a concession to labor leaders who had sought to stimulate employment by establishing a 30 hour work week which Roosevelt opposed).

179. D. BRAND, *CORPORATISM AND THE RULE OF LAW* 302-03 (1988).

180. *Id.* at 303.

by going beyond representing individual clients in one-shot transactions to lend the firms' resources to institutions or movements pursuing long-term structural-change strategies. The law firm of Skadden, Arps, Slate, Meagher & Flom is doing this indirectly by financing internships with public-interest organizations;¹⁸¹ a San Francisco firm is doing it by forging an alliance with child-welfare groups like the Children's Defense Fund, institutionalizing the alliance so that the firm and the Fund can count on working together for the long term. Firm members also sit on corporate and foundation boards that could work together, if they wanted to, to do such things as raise capital and put together legal structures for tenant-owned low-income housing.

Law schools also could do a lot towards reconstructing law as a public profession by reconceiving their function not simply as that of teaching skills, but as training lawyers in socially responsible practice. This too, unfortunately, is a line of thought I will not develop in this Article. Schools already do this, or try to, in areas like family and poverty law; in fields in which clients depend on our judgment, and especially when the practice is subsidized, lawyers start to care a lot about the social effects of their work. But it needs to be done in business law training too: we have too few equivalents of medical clinical research, where researchers and trainees observe standard practices in the field, study their effects, critique the procedures, and publish the results.

Basically, the cultivation of reflective judgment about law practice demands both some empirical understanding of the effects of that practice and the ability to assess how well current practices are serving the social norms of the legal system. In this arena, law schools have a curiously mixed record. Law teachers, compared to the profession as a whole, have used their freedom from the constraints of practice to take up at least mildly critical and reformist stances toward the legal system and its operations. In many courses, it is common for teachers to point to failures of the current system and to recommend reforms in doctrine, institutions, or practices. Occasionally they have even conducted empirical studies of lawyers' practices and their effects.¹⁸² It is not uncommon for a law profes-

181. See Anderson, *ABA Honors Skadden, Arps: Lawyers to Work for Appalachian, Inner-city Programs*, 75 A.B.A. J. 118 (1989).

182. See generally K. MANN, *DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* (1985); Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974); Macaulay, *Lawyers and Consumer Protection Laws*, 14 LAW & SOC'Y REV. 116 (1979).

sor to argue to a corporations class that most of the ingenious anti-take-over devices, poison pills, shark repellents, and the like, which have been invented in recent years by the mergers-and-acquisitions defense bar, are pernicious in their economic consequences, since they prevent or raise the costs of take-overs that would increase shareholder and social welfare; or, alternatively, that not all take-overs are welfare-increasing but that current rules and practices fail adequately to discriminate between those that are and those that are not. A torts teacher is likely to point to the huge administrative costs of the current tort litigation system, and to recommend alternative institutions or settlement modes, like no-fault or alternative dispute resolution (ADR), that save money for both plaintiffs and defendants. A labor law teacher may criticize the deficiencies of an enforcement system that rewards blatantly illegal employer tactics in unionizing drives because sanctions are so weak and so long delayed that they can be disregarded.

Yet my impression is that law teachers in their reformist mode mostly see themselves as addressing policy-makers, judges, other legal academics, and perhaps also those students who may some day assume such roles, rather than students as prospective practitioners.¹⁸³ Since we say so little about what may be possible within the real constraints of practice, our students tend to think that nothing is. The upshot is that we do little to prepare our students to perceive what opportunities there may be to engage in the socially responsible professional's function of promoting reflective judgment and institutional reform from within the practice roles themselves. This is true even when, as in the examples just given, it is apparent that the behavior of lawyers is a contributing cause of the social problem. I have no illusions that judgments about the social effects of legal practices will be uncontroversial. But social effects need to be assessed and made the subject of open political debate, not ignored completely as they so often are now. And the intraprofessional debate over effects has to spread beyond lawyers trained in economics, who are tending rather to monopolize it, to people interested in other values besides efficiency, like distributional fairness, democratic procedures, and the vitality of community life.

The ideal of law as a public profession has suffered badly from cynicism. Many of my students who have chosen corporate practice

183. For a rare exception, see Cooper, *The Avoidance Dynamic: A Tale of Tax Planning, Tax Ethics, and Tax Reform*, 80 COLUM. L. REV. 1553, 1553-96 (1980) (article framed as a dispute between a senior partner and an associate over whether tax advice the association is proposing to give a client constitutes proper avoidance or improper evasion).

somewhat against the grain of their reformist commitments say to each other, as long as we have sold out, we might as well go all the way and play the game to the hilt; and this turns into an excuse for not doing anything once there, an excuse all too easily reinforced by the ethic of uncritical loyalty to the client. But the ideal also has suffered from extravagant ambitions, demanding more sacrifices than other-than-heroically-committed lawyers are willing to make, or even patently suicidal public defiance of one's clients. The ideal has to be scaled down to an everyday practical one. If it is scaled down to the simple commitment to try to assess the impact of what one is doing, to cooperate with others to exploit whatever opportunities and resources may be present in one's job situation to promote the best substantive goals of the system, it can work. Charles Hamilton Houston, the great civil rights lawyer who used the deanship of Howard Law School to turn it into a training ground for cadres of black activist lawyers, expressed grimly, but accurately, the ideal of law as a public profession when he told his students, "A lawyer's either a social engineer or he's a parasite on society."¹⁸⁴

184. G. McNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* 84 (1983).