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Risky Business

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MILTON C. REGAN, JR.*

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* Professor of Law, Georgetown University Law Center. © 2006, Milton C. Regan, Jr. My thanks to Don Langevoort for comments on an earlier draft of this Essay.

INTRODUCTION

Economic consultant Peter Bernstein asks, “What is it that distinguishes the thousands of years of history from what we think of as modern times?”¹ His answer is “the mastery of risk.”² Bernstein argues:

The ability to define what may happen in the future and to choose among alternatives lies at the heart of contemporary societies. Risk management guides us over a vast range of decision-making, from allocating wealth to safeguarding public health, from waging war to planning a family, from paying insurance premiums to wearing a seatbelt, from planting corn to marketing cornflakes.³

However saturated modern society may be with risk calculations, law practice has come rather late to the table. What Anthony Davis calls the “cottage industry model” of practice created resistance to the adoption of business techniques such as risk management for many years, even as economic realities transformed law firms into major economic enterprises.⁴ Animated by the cottage industry vision, lawyers have sought jealously to guard their individual independence, notwithstanding the increasingly collective and interdependent nature of their practices.⁵

The increasing embrace of risk management by law firms that Professor Alfieri describes⁶ thus may seem to be the long overdue entry of law practice into the modern world. Indeed, as I will suggest, there are valuable benefits that flow from this development. Professor Alfieri is right to insist, however, that we examine more closely the assumptions and sensibilities that are associated with this conception of ethics.⁷ As he suggests, there are some features of risk management that may be in tension with a robust notion of lawyers’ ethical responsibilities. This is because rules designed to avoid acting unethically may

1. PETER L. BERNSTEIN, *AGAINST THE GODS: THE REMARKABLE STORY OF RISK* 1 (1996).

2. *Id.*

3. *Id.* at 2.

4. ANTHONY E. DAVIS, *RISK MANAGEMENT: SURVIVAL TOOLS FOR LAW FIRMS* 5 (1995). A cottage industry model conceptualizes a law firm as an umbrella encompassing a cluster of decentralized practices controlled by relatively autonomous lawyers and practice groups. *Id.*

5. *Id.*; see Milton C. Regan, Jr., *Law Firms, Competition Penalties, and the Values of Professionalism*, 13 *GEO. J. LEGAL ETHICS* 1, 61 (1999) (“[C]ategorical resistance to competition penalties implicitly reflects an individualistic model of law practice that is at odds with the fact that most modern legal services are provided through team production.”).

6. Anthony V. Alfieri, *The Fall of Legal Ethics and the Rise of Risk Management*, 94 *GEO. L.J.* 1909 (2006).

7. For insightful exploration of the implications for lawyers of the adoption of a risk management perspective in the corporate world, see Robert Eli Rosen, *Risk Management and Corporate Governance: The Case of Enron*, 35 *CONN. L. REV.* 1157 (2003); Robert Eli Rosen, “We’re All Consultants Now”: *How Change in Client Organization Strategies Influences Change in the Organization of Corporate Legal Services*, 44 *ARIZ. L. REV.* 637 (2002).

not necessarily inspire a motivation to act ethically.⁸

Appreciating this tension should lead us to consider the insights that we can gain from research on the psychological dynamics of behavior within organizations. In particular, we should attend to the considerable body of work that attempts to apply the findings of this research to the operation of corporate legal compliance programs. In many ways, these programs are the model for law firms' current efforts to establish an ethical infrastructure of policies, procedures, and rules designed to promote ethical conduct.⁹ An analysis of corporate programs suggests that companies struggle with a similar tension when devising and operating programs intended to ensure employees' compliance with the law. In particular, they must take into account the complex relationship between program characteristics on the one hand and employee perceptions, motivations, and sensibilities on the other.¹⁰ Law firms instituting risk management programs may profit from the lessons that corporations have learned from efforts to ensure legal compliance within large organizations.

In the material that follows, I will first situate the risk management paradigm within the evolution in bar ethics regulation, from reliance on aspirations to an emphasis on enforceable rules. I will then discuss the consistency of risk management with research in moral psychology suggesting the powerful influence of situational factors on conduct. I devote most of the remainder of this Essay to a description of the different effects of instrumental and normative approaches on ethical and legal compliance. This includes a discussion of the differences between deterrence-based and integrity-based programs. I conclude with some suggestions about the implications of research on and experience with corporate compliance programs for law firms.

I can highlight in this Essay only a bare handful of issues that the work I describe raises and merely speculate on the possible salience of these issues for law firms. In addition, I offer only a few suggestions on how the distinctiveness of law practice may affect the value of what we can learn from corporate compliance efforts. My hope, however, is to encourage greater attention to the lessons that corporate experience may offer for our attempts to promote ethical behavior of lawyers in an age in which law practice has become big business.

I. ASPIRATIONS, RULES, AND CHARACTER

A. INITIAL ASPIRATIONS

For most of the twentieth century, the ethical provisions that governed

8. See Alfieri, *supra* note 6, at 1910 (“[W]idespread adoption of risk management mechanisms . . . actually diminishes the appreciation of moral choices facing lawyers in practice . . .”).

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

10. See *infra* Part IV.

lawyers included a substantial component that expressed non-enforceable aspirations for lawyers' conduct. The American Bar Association (ABA) Canons of Professional Ethics, promulgated in 1908, spoke in expansive terms. For instance, Canon 15 provided that the lawyer, in pressing his client's cause, "must obey his own conscience and not that of his client."¹¹ Canon 16 stated that a lawyer should restrain his clients from "doing those things which the lawyer himself ought not to do."¹² Similarly, Canon 32 provided that a lawyer's duty in the last analysis includes impressing upon his client "exact compliance with the strictest principles of moral law."¹³

The 1969 Model Code of Professional Responsibility, which replaced the 1908 Canons of Professional Ethics, contained Canons, Ethical Considerations, and Disciplinary Rules.¹⁴ Only the latter, however, could serve as the basis for enforcement action by the state bar association. The Canons, the Code said, "are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession."¹⁵ The Ethical Considerations, the Code continued, "are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations."¹⁶

B. THE ADVENT OF RULES

Criticism of the Model Code of Professional Responsibility as unwieldy and disjointed, combined with the growing diversification and fragmentation of the bar, led to its replacement by the ABA in 1983 with the Model Rules of Professional Conduct.¹⁷ Today, the vast majority of states have ethical provisions based on the Model Rules.¹⁸ These rules abandon any focus on aspirations, eliminating the Canons and Ethical Considerations in favor of enforceable rules. Much like statutes, the rules announce minimum standards of conduct below which lawyers may not fall on pain of punishment. That punishment may

11. CANONS OF PROFESSIONAL ETHICS Canon 15 (1908), *reprinted in* REGULATION OF LAWYERS: STATUTES AND STANDARDS 222–23 (Stephen Gillers & Roy D. Simon eds., 2006) [hereinafter REGULATION OF LAWYERS].

12. CANONS OF PROFESSIONAL ETHICS Canon 16 (1908), *reprinted in* REGULATION OF LAWYERS, *supra* note 11, at 33.

13. CANONS OF PROFESSIONAL ETHICS Canon 32 (1908), *reprinted in* REGULATION OF LAWYERS, *supra* note 11, at 33.

14. *See* REGULATION OF LAWYERS, *supra* note 11, at 537.

15. MODEL CODE OF PROF'L RESPONSIBILITY Preliminary Statement (1983), *reprinted in* REGULATION OF LAWYERS, *supra* note 11, at 540–41.

16. *Id.*

17. *See* Theodore Schneyer, *Professionalism as Politics: The Making of a Modern Legal Ethics Code*, in LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 95 (Robert L. Nelson et al. eds., 1992) (providing an interesting account of the political maneuvering among different segments of the bar with respect to various provisions of the code).

18. *See* REGULATION OF LAWYERS, *supra* note 11, at 3.

include either disciplinary action or the use of rule violations as evidence in lawsuits brought against the lawyer.

This evolution in emphasis reflects diminishing confidence that there is enough consensus about professional ideals to make hortatory proclamation an effective means of regulating conduct. Rather than rely on self-constraint animated by lawyers' internalization of common values, ethical provisions now purport to announce in advance what conduct is permitted and what is prohibited. Armed with this notice, lawyers can order their professional lives accordingly and stay out of trouble. As Tanina Rostain has put it, "[t]he transition from Code to Rules marked a fundamental shift in expectations for legal ethics. In essence, the organized bar relinquished the ambition of articulating a unified statement of professional ideas in favor of clearly stating the enforceable legal obligations of lawyers."¹⁹

This type of regulatory regime is designed to reduce reliance on individual discretion in promoting ethical conduct. Lawyers must still exercise discretion, of course, in determining when a rule applies, what it requires, and what, if any, exceptions to it are applicable. In contrast to the prior regime, however, professional ethical deliberation is supposed to consist mostly of following rules rather than open-ended reflection on competing values.²⁰

C. CHARACTER AND RULE COMPLIANCE

The Model Rules reflect ambivalence about the role of character in producing ethical conduct. On the one hand, more precisely drawn rules reduce the need to rely on individual character because, to act ethically, the lawyer need only engage in the relatively narrow exercise of rule interpretation. Furthermore, we might suspect that professional training will tend to lead lawyers to take a "technocratic" approach to interpretation, which is guided by the outcome that the lawyer seeks to achieve rather than a more expansive assessment of the values expressed by legal rules.²¹

On the other hand, the Rules are directed at individual lawyers and, for the most part, address those lawyers as individuals apart from whatever settings in which they practice. The implicit message is that ethical lapses ultimately are

19. Tanina Rostain, *Ethics Lost: Limitations of Current Approaches to Lawyer Regulation*, 71 S. CAL. L. REV. 1273, 1280 (1998).

20. The section on the Scope of the Rules cautions, "The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law." MODEL RULES OF PROF'L CONDUCT Scope, reprinted in REGULATION OF LAWYERS, *supra* note 11, at 12. The ABA offers no indication, however, of what these moral and ethical considerations might be, presumably leaving their identification to the conscience of individual lawyers rather than to any collective effort on the part of the profession.

21. See Heidi Li Feldman, *Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?*, 69 S. CAL. L. REV. 885, 886 (1996) ("In particular, I argue that [a technocratic] mode of lawyering discourages, and may even entirely thwart, a certain sentimental responsiveness integral to genuine ethical deliberation.")

attributable to individual weakness or mendacity—in other words, a problem with character. This focus on individual character is reflected in the ABA's 1986 report “. . . *In the Spirit of Public Service*”: *A Blueprint for the Rekindling of Lawyer Professionalism*. “The public views lawyers,” the report says, “at best, as being of uneven character and quality.”²² The Commission expressed its belief that “most lawyers . . . are conscientious, fair, and able. They serve their clients well and are a credit to the profession. Yet the practices of some lawyers cry out for correction.”²³

D. CHARACTER AND RISK MANAGEMENT

The increasing focus on risk management in law firms and legal departments that Professor Alfieri describes can be seen as consistent with the evolution from aspirations to rules. Risk management attempts to put in place a set of standard policies and procedures that minimize individual discretion and emphasize uniform responses to specific situations. The occurrence of a particular contingency—such as an inquiry about representation by a potential client—should trigger the same response in every case—such as conducting a conflicts check. Risk management provisions are rules designed to avoid violating other rules, such as state bar provisions, state and federal statutes, regulations, and the like. The idea is that rule compliance will ultimately beget rule compliance.

Risk management reflects less ambivalence than do the Model Rules, however, about the role of individual character. The focus of risk management is on the organizational context in which lawyers practice and how that shapes behavior. Its emphasis on compliance with provisions one step removed from rules of conduct de-emphasizes character and highlights circumstance. Referring a conflicts matter to a committee, for instance, reduces the need to rely on the ability of an individual lawyer to resist temptation. Similarly, requiring a second signature on an opinion letter from a lawyer not working on a matter makes the firm less dependent on the probity of the first lawyer. The objective is to manipulate circumstances in order to reduce the probability of failures of character.

On this view, the individual lawyer is a dependent variable in a complex chain of causal influences. Shifting the strength and weakness of certain of these influences should make her more likely to act in a particular way. This is a model in which behavior is less a product of individual will than of the stimuli to which a lawyer is subjected. Indeed, the exercise of discretion is subversive of uniformity, so subjectivity is discouraged.

In many respects, this is a salutary shift in focus. It is not surprising, for instance, that law firms have focused more on risk management as they have

22. AMERICAN BAR ASS'N, COMM'N ON PROFESSIONALISM, “. . . IN THE SPIRIT OF PUBLIC SERVICE”: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM, *reprinted in* DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 38 (4th ed. 2004).

23. *Id.*

become more bureaucratic business enterprises. Several studies underscore the crucial role of organizational environment in influencing the behavior of actors within bureaucratic settings.²⁴ Spurred both by the insights from these studies and the rewards available under certain regulatory regimes, numerous corporations have established legal compliance regimes in recent years. Indeed, providing advice on the creation and maintenance of such programs has become a major industry.

As law firms have become larger and more geographically dispersed, as well as more explicitly profit-oriented, it makes sense that they would learn from business organizations attempting to place ethical constraints on profit-seeking behavior. Given that firms now contain an increasing diversity of practice specialties, fill more of their partner ranks through lateral hiring, and often employ lawyers of differing national backgrounds and cultures, it is more difficult to assume a consensus on professional values among members of the firm. The result may be that the importance of attaining financial objectives is the default consensus. Firms therefore are more likely to emphasize rule compliance than professional discretion as the foundation for ethical conduct.

II. RISK MANAGEMENT AND MORAL PSYCHOLOGY

Risk management is also consistent with a growing body of research on ethical behavior outside of organizational contexts. This research has been described as “situationist.”²⁵ It challenges the notion that ethical behavior is primarily the work of good character, conceptualized as an integrated set of dispositions that operates across a wide variety of circumstances. Situationism instead suggests that behavior is highly context-dependent and often differs based on what seem to be trivial differences between one situation and another. Someone who is faithful to a spouse, for instance, may nonetheless embezzle money from an employer; someone who is willing to stop on the highway to help a stranger with a flat tire may not stop while on foot to help a stranger who appears to be ill. Myriad circumstantial factors make it hazardous to predict behavior in one setting based on behavior in another. On this view, rather than speak of character in a global sense, we should think of it in disaggregated terms, as dispositions to act in certain ways under certain circumstances.

This perspective implies that, rather than trying to develop characters that will determine behavior regardless of the situation, we should attend more to features of our environment that influence conduct. As philosopher John Doris

24. See, e.g., *CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS* 46 (David M. Messick & Ann E. Tenbrunsel eds., 1996) (suggesting “a perspective of ‘command responsibility’ and an emphasis on the various duties of individuals, including the duty not to overlook harm, and the duty to carry out positional responsibilities”); Harvey S. James, Jr., *Reinforcing Ethical Decision Making Through Organizational Structure*, 28 *J. BUS. ETHICS* 43 (2000) (examining how a firm’s organizational structure affects the ethical behavior of workers).

25. JOHN M. DORIS, *LACK OF CHARACTER: PERSONALITY AND MORAL BEHAVIOR* 1 (2002). Doris’s book contains an extensive discussion of much of this body of work.

states, situationism “reminds us that the world is a morally dangerous place.”²⁶ Confidence in character can put people at risk in morally dangerous situations because it can lead them to overestimate their ability to resist circumstantial pressures. Rather than simply attempting to strengthen resolve, we should instead, or in addition, try to avoid putting ourselves in situations that test it.

John Doris illustrates this point with the example of someone who is invited to dinner by a flirtatious colleague when his spouse is out of town. Rather than accept the invitation on the assumption that he has a virtuous enough character to resist temptation, a more realistic person might conclude that prudence suggests he decline the invitation in the first place.²⁷ The factors that determine our ethical success or failure thus “often emerge earlier in an activity than might be thought.”²⁸ This means that we may be less ethically responsible for failing to resist powerful pressures than for putting ourselves in situations where we will encounter them. “Only by being aware of the situational threats to responsibility can we act as responsible persons in as many situations as possible.”²⁹ By providing a better understanding of the determinants of behavior, situationism may foster “a process of self-manipulation that allows people to take a more active and responsible role” in their lives.³⁰

An emphasis on risk management reflects this focus. The establishment of certain policies and procedures is designed to create circumstances that minimize the probability of undesirable conduct and maximize the probability of good. A sound risk management program identifies what are most likely to be occasions of temptation and attempts to adopt measures that reduce their potency. As situationism recommends, it focuses on a point earlier in the causal chain than the ultimate ethically significant decision.

The rise of risk management, thus, is commendable insofar as it recognizes the importance to ethical conduct of situational influences in general and organizational influences in particular. Its implicit account of lawyers’ behavior represents a sophisticated advance over appeals that focus on individual character and values.

The insights of situationism do not mean, however, that character is irrelevant to producing ethical conduct. While we may be skeptical of accounts of character that are meant to hold true globally, the situationist acknowledges that narrower dispositions and attitudes can play a role in how people respond to different circumstances. We need not be full Skinnerians, subscribing to the notion that human conduct is simply the end result of stimulus and response.³¹ Humans must still confront the “burdens of moral agency,”³² exercise discre-

26. *Id.* at 146.

27. *Id.* at 147.

28. *Id.*

29. *Id.* at 153.

30. *Id.*

31. See, e.g., B.F. SKINNER, ABOUT BEHAVIORISM (1976).

32. Alfieri, *supra* note 6, at 1911.

tion, cultivate judgment, and be prepared to accept some responsibility for their actions. Situationism maintains that greater attention to the impact of circumstances suggests that responsibility may lie not simply at what seems the final moment of decision, but for conduct at an earlier point in the sequence of events.

As an example, consider John Gellene's assumption of responsibility for representing South Street in what was known as the Busse matter.³³ At the time, Gellene also was representing Bucyrus-Erie in preparing for its bankruptcy. Since South Street was the major secured creditor of Bucyrus, this dual representation created the potential for a conflict of interest. In addition, Gellene and Milbank's work for South Street was a "connection" that would have to be disclosed under bankruptcy rules when Gellene applied for appointment as Bucyrus' counsel when that company filed its bankruptcy petition.

It is appropriate to hold Gellene responsible for failing to disclose this connection to the court when it came time to do so. We also may be justified, however, in holding him responsible for accepting the representation of South Street in the first place. When Milbank partner Larry Lederman called Gellene to discuss the Busse matter, Lederman asked Gellene whether Milbank's corporate practice group should handle it or whether the bankruptcy group of which Gellene was a part should do so. Gellene responded that lawyers in the bankruptcy group should do the work under his supervision.³⁴ In other words, Gellene actively sought the assignment.

Whether the corporate or bankruptcy group did the work on the Busse case, Milbank would have a potential conflict of interest and a connection to South Street that ultimately would have to be disclosed to the bankruptcy court. Gellene's personal involvement in the matter, however, would create an especially acute potential for conflict, and disclosing his work on Busse to the bankruptcy court would be especially likely to lead to his disqualification.

There is a strong argument, therefore, that Gellene should have anticipated he might find making the required disclosure especially difficult when he eventually applied to represent Bucyrus in its bankruptcy. He should have taken this into account when he decided to tell Lederman that the bankruptcy group should handle the Busse matter. In light of this, he can be blamed not simply for failing to make the proper disclosure but also for knowingly placing himself in circumstances in which this was a likely outcome. To the extent that Gellene sought the South Street representation in the belief that robust character traits would enable him to resist temptation when the time came for disclosure, he was misguided and placed himself at significant ethical risk. In retrospect, simply suggesting that the corporate group handle the Busse matter would have been wiser. Therefore, situationism properly understood leaves room for the operation of character and the exercise of informed discretion.

33. MILTON C. REGAN, JR., *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* 322–23 (2004).

34. *Id.* at 323.

III. RISK MANAGEMENT AND ETHICAL MOTIVES

One reason that character still matters in a risk management regime is that any system of rules, no matter how comprehensive, still leaves occasions calling for discretion. Determining when a rule applies, what features of the situation are salient to its application, and how it should be reconciled with other arguably relevant rules requires judgment that itself is not reducible to following a set of rules. How one engages in this process will be shaped to some degree by the dispositions, attitudes, and motives one brings to the task.

A. THE INSTRUMENTAL APPROACH TO ETHICS

Professor Alfieri's caution about an emphasis on risk management highlights the point that conceptualizing ethics as a matter of avoiding liability can influence these dispositions, attitudes, and motives, and, therefore, how someone exercises her discretion. The possible emergence of an instrumental approach to legal rules is an especially important concern. Risk management conceives of ethical and legal provisions as a minefield of potential sources of liability. Policies and procedures adopted under its banner are aimed at reducing the probability that anyone will make a misstep that results in detonation. The person for whom ethics is synonymous only with risk management, therefore, may tend to approach the law as does Holmes's "bad man," who "cares only for the material consequences which such knowledge enables him to predict,"³⁵ and not any moral ends that the law is designed to serve. Such persons will try to avoid punishment but will have no sense that breaking the law is a moral offense.

For someone who adopts this perspective, law is an obstacle to the achievement of personal ends, which imposes a "cost" or "price" on efforts to attain them. Ruthlessly following this theory to its conclusion, legal compliance is a matter not of obeying commands with intrinsic normative value, but adding the prospect of liability to the scales when weighing the costs and benefits of different courses of action.

This instrumental approach to rule compliance is insufficient to ensure robustly ethical conduct because its motives for compliance are relatively shallow and contingent. If violating a rule on a given occasion seems to promise more benefits than costs, then Holmes's bad man may stray. Rules, whether narrowly or broadly phrased, will not impose meaningful constraints on lawyers who do not have underlying commitment to moral force of the law. They will be able to devise strategies that eliminate or circumvent legal obstacles that arise for clients.³⁶ In addition, of course, a system dependent solely on instrumental motives also can be extremely costly because of the need for extensive monitor-

35. Oliver Wendell Holmes, *The Path of the Law*, reprinted in COLLECTED LEGAL PAPERS 167, 171 (Harold J. Laski ed., 1920).

36. Rostain, *supra* note 19, at 1335.

ing.³⁷

A belief in the legitimacy and value of rules is a motive that appears to be more robust in ensuring compliance. If the rules are regarded as instantiations of ethical norms, then the desire to act ethically can move an individual to comply even in the absence of monitoring or the likelihood of sanctions for noncompliance. In such instances, the actor is moved by an internalized sense of obligation rather than a calculation of the costs and benefits of compliance.³⁸

Furthermore, a person animated by this motive is more likely to conceive of ethics not simply as rule compliance but as fidelity to broader principles and values. As business ethicist Lynn Sharpe Paine maintains, it is a mistake “to regard legal compliance as an adequate means for addressing the full range of ethical issues that arise every day.”³⁹ She continues, “[e]ven in the best cases, legal compliance is unlikely to unleash much moral imagination or commitment.”⁴⁰ As a result, “[t]hose managers who define ethics as legal compliance are implicitly endorsing a code of moral mediocrity for their organizations.”⁴¹ For these reasons, those familiar with ethics and legal compliance programs suggest that a set of rules will be most effective if the organization fosters a culture in which ethical behavior is valued for its own sake.

Sensitivity to the effects of a compliance program on motives and attitudes may seem to reintroduce the threat that character will be erased from the picture, by implying that character is ultimately just the product of environmental forces. The relationship between program features and personal disposition, however, is more complex than this. Rather than simply producing certain dispositions, programs with different features tend to *evoke* certain pre-existing orientations. This suggests that individuals possess a mixture of instrumental and normative motives and that either motive may predominate in a given situation.

The work of Ian Ayres and John Braithwaite on industry regulation is instructive on this point.⁴² Ayres and Braithwaite suggest that the corporate actors whom they have studied are “bundles of contradictory commitments to values about economic rationality, law abidingness, and business responsibility. Business executives have profit-maximizing and law-abiding selves. At differ-

37. See Robert Cialdini, *Social Influence and the Triple Tumor Structure of Organizational Dishonesty*, in CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS, *supra* note 24, at 44, 56–57.

38. See Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577 (2000); Timothy F. Malloy, *Regulation, Compliance, and the Firm*, 76 TEMP. L. REV. 451, 464–75 (2003). On the importance of this phenomenon for obedience of the law in general, see TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

39. Lynn Sharp Paine, *Managing for Organizational Integrity*, HARV. BUS. REV., Mar.–Apr. 1994, at 106, 109.

40. *Id.* at 111.

41. *Id.*

42. See IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1992).

ent moments, in different contexts, the different selves prevail.”⁴³ What are the implications of this for a regulatory strategy?

B. BALANCING INSTRUMENTAL AND NORMATIVE APPROACHES

Ayres and Braithwaite observe that, on the one hand, regulation that relies solely on moral suasion will be ineffective when actors are motivated by economic rationality, such as concern for the bottom line. In such instances, regulated actors will exploit the regulator’s assumption that corporate officials are motivated simply by the desire to act responsibly. On the other hand, a strategy based mainly on the imposition of penalties will undermine the good will of regulated actors who do have a desire to act ethically. “When actors see themselves as pursuing a higher calling,” Ayres and Braithwaite write, “to treat them as driven by what they see as baser motivation insults them [and] demotivates them.”⁴⁴ They argue that “[a] crucial danger of a punitive posture that projects negative expectations of the regulated actor is that it inhibits self-regulation.”⁴⁵ The result can be the creation of an attitude of resistance and only grudging literal compliance with rules.

The work of Ayres and Braithwaite underscores that regulation may subtly influence a regulated actor’s understanding of herself and her motivations. The image of multiple selves that come to the fore under certain conditions is consistent with situationism. At the same time, these selves seem to be expressions of underlying, albeit contextual, character, in that they can influence the outcomes that result from using different compliance strategies. Regulators therefore must treat the particular selves that are activated under certain circumstances as independent variables.

Ayres and Braithwaite suggest that a system that effectively promotes ethically responsible conduct must have the capability of activating both economic rationality and the desire to act ethically. “[W]ithout the spectre of sanctions in the background . . . social responsibility concerns would not occupy the foreground of our deliberation. In contrast, when punishment is thrust into the foreground, it is difficult to also sustain public-regarding modes of deliberation in the foreground.”⁴⁶ They further note that “the less salient and powerful the control technique used to secure compliance, the more likely internalization will result.”⁴⁷ By contrast, the more visible the sanctions, the more likely the party is to attribute her compliance to external compulsion.⁴⁸ As a result, Ayres and Braithwaite believe that the optimal regulatory approach is for a regulator to proceed at the outset on the assumption that the regulated actor desires to behave ethically. She must be prepared to impose punishment, however, if the

43. *Id.* at 19.

44. *Id.* at 24–25.

45. *Id.*

46. *Id.* at 47.

47. *Id.* at 49.

48. *See id.*

regulated party acts inconsistently with that assumption.⁴⁹

What insights from Ayres and Braithwaite can we draw for the relationship between legal ethics and risk management? First, law firms today have come to resemble more explicitly the business corporations that these two scholars have studied. Intense competition in the market for legal services has made it imperative for law firms to adopt more sophisticated business practices in order to remain financially viable. It therefore seems reasonable to conceptualize lawyers as consisting partially of a profit-maximizing self that is operative in certain situations.

If we view lawyers as regulated business actors, then we can identify at least two types of entities who serve as regulators. One is law firms who seek to establish and enforce risk management procedures with which lawyers are directed to comply. The other includes “external” entities such as bar associations; government agencies like the Securities and Exchange Commission (SEC), Internal Revenue Service (IRS), and the Department of Justice (DOJ); and private plaintiffs, all of whom may seek to hold lawyers responsible for ethical violations under bar rules, statute, or common law doctrine.

Second, it should be clear that the hortatory approach exemplified by the 1908 Canons and other aspirational standards cannot serve as the sole source of ethical regulation. Whether that approach was ever effective,⁵⁰ modern law practice has become a far too explicitly commercial enterprise for it to be so now. Too much risk exists that reliance on moral suasion will be exploited by lawyers for whom profit maximization has become an unavoidable consideration.

However, a third point that follows from Ayres and Braithwaite is the inadvisability of relying solely on the prospect of punishment to promote ethical behavior. Such a strategy is likely to undermine internalization of the norm of ethical behavior as valuable for its own sake. A regime that relies solely on sanctions and deterrence may reinforce the idea of the lawyer as the “bad man,” whose compliance is based simply on the contingent calculations of economic rationality.

This would be an especially unfortunate outcome because it might lead lawyers to convey this instrumental conception of law to clients as well, thereby further eroding belief in the intrinsic normative character of legal rules. As Tanina Rostain has noted, “Lawyers signal their own attitude toward the legal framework and the posture they believe a client should adopt—respectful, disdainful, alienated, or other—through the ways they talk about law as much as

49. See *id.* at 19–53 (discussing the concept of the “Benign Big Gun”—speaking softly and carrying a big stick).

50. For a suggestion that informal norms may have played a role in regulating lawyer behavior in the absence of rules, see W. Bradley Wendel, *Regulation of Lawyers Without the Code, the Rules, or the Restatement: Or, What Do Honor and Shame Have to Do With Civil Discovery Practice?*, 71 *FORDHAM L. REV.* 1567, 1568 (2003).

in the specifics they impart.”⁵¹ A purely instrumental approach to law could thus erode a valuable form of social capital.

These observations suggest a fundamental challenge of modern legal ethics: to motivate lawyers to strive to realize broad professional aspirations, while simultaneously minimizing violation of ethical and legal rules. Can we encourage aspirations while simultaneously securing compliance? What situations create the danger that accomplishing one will compromise our ability to accomplish the other?

IV. CORPORATE LEGAL COMPLIANCE PROGRAMS

Research on behavior within organizations, especially as applied to corporate legal compliance programs, has begun to yield some tentative insights that may help answer these questions. This research suggests complex connections among program characteristics, group dynamics, individual perceptions and motives, and employee behavior. We will need not only to take account of these interactions, but also to consider how the distinctiveness of law firms and the legal profession may add another layer of complexity. The discussion below offers a brief summary of some of the major themes that have emerged in the research so far. It admittedly only scratches the surface on this topic and represents but a rudimentary effort to begin this conversation. My hope, however, is that it will inspire more in-depth examination.

A. INSTRUMENTAL/DETERRENCE-BASED COMPLIANCE PROGRAMS

One fairly robust finding is that aggressive compliance monitoring can have an unfavorable effect on the motivation of agents to comply with rules. When employees regard supervision as unreasonably pervasive and intrusive, they can develop an adversarial attitude toward the company, its supervisors, and the rules themselves. They may come to attribute their own compliance as motivated by coercion, rather than by their own desire to act properly. In their eyes, people act ethically because the system forces them to, not because they are motivated to do so.⁵²

When this perception emerges, the result ultimately may be lower rates of compliance than would exist in the absence of close monitoring and visible penalties. This can occur for two reasons. First, employees' interpretation of their compliance as motivated by external influence may "crowd out" any tendency to attribute compliance to their own intrinsic desire to act in accordance with the law. This can drain the compliance program of any inherent moral value, so that it is conceptualized as simply a set of rules that attach prices to certain types of behavior. It also may undermine employees' perception of themselves as honest and ethical people who would abide by the law

51. Rostain, *supra* note 19, at 1336.

52. See Cialdini, *supra* note 37; Edward L. Deci & Richard M. Ryan, *The Support of Autonomy and the Control of Behavior*, 53 J. PERS. & SOC. PSYCHOL. 1024, 1026 (1987).

even in the absence of monitoring. As a result, employees may violate the rules when the probability of detection and/or the penalty is low.⁵³

A second reason for low compliance in a program that relies mainly on penalties to control behavior is the implicit signal it sends about what employees can expect from their colleagues. Such a program can convey the message that people cannot be trusted because wrongdoing is relatively common.⁵⁴ Employees are less likely to comply with rules when this is the case. Compliance under such circumstances tends to make people feel like “chumps” who naively disadvantage themselves compared to others. A penalty-oriented compliance program thus may destroy conditions for the emergence of social norms that can channel behavior in desirable directions.⁵⁵

Thus, for instance, expanding the focus to legal compliance by the general public, taxpayers exposed to information suggesting that there is widespread tax evasion may be less willing to pay their fair share of taxes.⁵⁶ Paying one’s full share in this situation is akin to cooperating in a Prisoner’s Dilemma when the taxpayer knows that other parties are likely to defect. By contrast, publicity about strict enforcement against specific individuals may not have the same effect. It avoids suggesting that cheating is widespread, and can signal that the government takes defection seriously and is willing to bear the expense of penalizing defectors. Enforcement also reduces the number of tax evaders whom an individual is likely to encounter. The result can be to reinforce the sense that most people pay their fair share, which means that doing so is unlikely to put the taxpayer at a disadvantage compared to others.

1. Lawyers and Compliance Programs

There are at least a couple of features of law practice that we may need to take into account when considering the significance of these tendencies. First, lawyers traditionally have seen themselves as autonomous professionals who

53. On the “crowding-out” phenomenon, see generally BRUNO S. FREY, NOT JUST FOR THE MONEY: AN ECONOMIC THEORY OF PERSONAL MOTIVATION 7–39 (1997); Bruno S. Frey & Felix Oberholzer-Gee, *The Cost of Price Incentives: An Empirical Analysis of Motivation Crowding-Out*, 87 AM. ECON. REV. 746 (1997).

54. See Ann E. Tenbrunsel & David M. Messick, *Sanctioning Systems, Decision Frames, and Cooperation*, 44 ADMIN. SCI. Q. 684, 688 (1999).

55. On the potential for destruction of social norms by legal rules, see generally Richard H. Pildes, *The Destruction of Social Capital Through Law*, 144 U. PA. L. REV. 2055 (1996). The literature on the operation of social norms and their interaction with law is of course legion, with various different theories on the nature of the interaction. For a sampling, see ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991); ERIC POSNER, LAW AND SOCIAL NORMS (2000); *Symposium: Law, Economics, and Norms*, 144 U. PA. L. REV. 1643 (1996); *Symposium: The Legal Construction of Norms*, 86 VA. L. REV. 1577 (2000); *Symposium: Norms and Corporate Law*, 149 U. PA. L. REV. 1607 (2001). For an effort to “develop principles of theory acceptance—a metatheory—for theories of social norms as they relate to law,” see W. Bradley Wendel, *Mixed Signals: Rational-Choice Theories of Social Norms and the Pragmatics of Explanation*, 77 IND. L.J. 1, 39–56 (2002).

56. See generally Leandra Lederman, *The Interplay Between Norms and Enforcement in Tax Compliance*, 64 OHIO ST. L.J. 1453, 1469 (2003) (discussing several studies focusing on the influence of other taxpayers’ attitudes toward the tax system upon the individual taxpayer’s ultimate compliance).

should be subject to minimal external influence.⁵⁷ The reality has not always matched the image, but this remains a strong component of professional identity. Lawyers therefore may be especially sensitive to what they perceive as intrusive monitoring—perhaps quicker to construe supervision as excessive and to be more resistant to it. This may make them especially susceptible to the “crowding out” phenomenon, and thus more likely than others to approach rule compliance instrumentally.

Lawyers’ professional training may make adoption of this attitude especially problematic. Lawyers are adept at creative interpretation of rules and at fashioning plausible arguments in support of their interpretations. This may enable them more than other people to convince themselves that they are not violating a given rule, thus reducing any psychological dissonance that they might feel by engaging in certain behavior in the absence of this rationalization.⁵⁸ The result is that a lawyer may not have to work as hard as a non-lawyer to justify acting in a way that a more detached observer would characterize as a rule violation.

A second feature of law practice relevant to compliance is that a lawyer who bristles at what she perceives as intrusive monitoring may be in more of a position than a non-lawyer to respond by leaving her employer. A law firm’s assets consist mainly of relationships with clients, but individual lawyers in many cases are able to leave the firm and take those assets with them. The lateral market for lawyers thus may make it even more difficult for law firms than other employers to implement a compliance program that relies on penalties to influence behavior. When exit is an easy option, there may be less incentive to abide by rules that one regards as intrusive. Combined with what may be lawyers’ tendency to find offensive a measure of supervision that non-lawyers might not, the bargaining leverage provided by the lateral market may lead law firms to adopt relatively mild measures that fail to detect much misconduct and result in only minor penalties when they do.

Research suggests that when this occurs, there will be less compliance than if the firm adopted no system of sanctions at all.⁵⁹ This counterintuitive outcome reflects the role that compliance program characteristics play in framing employees’ perceptions of situations in which they must make decisions. Frames influence “not only the perception of what type of behavior is proper but also expectations of what others will do, what norms are applicable, and what kinds of attributions about others are justified.”⁶⁰ They are activated by a variety of

57. See Davis, *supra* note 4, at 3 (“The hallmark of lawyers before the advance of the large firm was their sense of independent professionalism. Whether they worked alone or in firms, they prized their independence.”); Regan, *supra* note 5, at 34–36 (“This aspiration to independence is expressed in the statement that the lawyer is an ‘officer of the legal system,’ who bears some responsibility for ensuring the integrity of the legal process.”).

58. The classic statement of cognitive dissonance theory is LEON FESTINGER, *THEORY OF COGNITIVE DISSONANCE* (1957).

59. See *infra* note 62 and accompanying text.

60. Tenbrunsel & Messick, *supra* note 54, at 687.

subtle cues, some of which may seem trivial to an outside observer.

2. Economic Frames and Compliance

One frame that persons use is a “business” or “economic” frame. This focuses on maximizing utility by avoiding penalties and obtaining rewards.⁶¹ A person employing this frame essentially uses a cost-benefit analysis to choose a course of behavior. By contrast, an “ethical” frame emphasizes moral considerations that can have categorical force, reducing the likelihood of weighing costs against benefits.⁶² Which frame is activated thus can determine not only what behavior is chosen but why. A person who frames a decision as economic in nature may decide to comply with a rule because on balance it is rewarding to do so, while a person who regards the situation as calling for an ethical decision may choose compliance because doing so is an expression of the right thing to do.

One of the cues that signal which frame is appropriate is the existence of a compliance program that relies significantly on surveillance and sanctions to induce appropriate behavior. Such a program tends to elicit a business frame when there is no information that permits a person to form expectations about others’ behavior.⁶³ The latter type of information is powerful for the reasons described above: people are more likely to cooperate—or restrain themselves in accordance with rules—when they believe that others will as well. When they do not have enough information to make this prediction, the presence of surveillance and sanctions can serve as a proxy for it. Research indicates that a system with these features can signal that people generally cannot be trusted and require the threat of penalties in order to act correctly. The expectation that others are unlikely to cooperate in turn leads an individual to focus on her own self-interest, and to frame the situation with an eye toward what choices will further it.

Framing explains why a program with weak sanctions can produce less compliance than one with no sanctions at all. Ordinarily we would assume that adding costs to the noncompliance alternative would increase, rather than reduce, compliant behavior. A surveillance and sanction system, however, prompts a focus on the business aspects of a decision. This in turn elicits cost-benefit calculation of the desirability of cooperation or compliance. When costs of defection or noncompliance are relatively low, this calculation will indicate that defection/noncompliance is the appropriate behavior. In terms of the Prisoner’s Dilemma, there is no dominant strategy in the business frame. Whether to cooperate or defect is contingent on the costs and rewards of doing so in a particular instance.

61. *See id.* at 688; David M. Messick, *Alternative Logics for Decision Making in Social Settings*, 38 J. ECON. BEHAV. & ORG. 11, 26 (1999).

62. *See* Tenbrunsel & Messick, *supra* note 54, at 688; Messick, *supra* note 61, at 14.

63. *See* Tenbrunsel & Messick, *supra* note 54, at 693.

3. Ethical Frames and Compliance

By contrast, the dominant strategy for a person using an ethical frame is to cooperate/comply because that behavior is regarded as valuable in its own right. This orientation eschews cost-benefit analysis, and therefore is not sensitive to the strength or weakness of sanctions.⁶⁴ Thus, we see the explanation for the apparent paradox. The absence of a surveillance and sanctions program may elicit an ethical deliberative frame, which is likely to result in compliance. The presence of such a program may evoke a business frame, in which weak sanctions lead to a significant amount of noncompliance.

This logic suggests that the likelihood of compliance is enhanced by either a program without sanctions or a program with a heavy dose of them. The basis for the behavior is different in each instance, however. In Prisoner's Dilemma terms, "[w]hen no sanctions are present, individuals cooperate because it is the ethical action to take. When strong sanctions are present, individuals cooperate because it is the more profitable business strategy."⁶⁵ Thus, "while there are no ethical reasons for defecting, there very well may be business reasons for cooperating."⁶⁶

These conclusions suggest that firms may achieve compliance in different ways, based on what we might call either intrinsic or extrinsic motivation to comply. Different audiences may vary in their receptiveness to each kind of appeal. Focusing again on the tax context, for instance, we see that adherence to a norm of compliance appears to be related to the opportunities available to evade taxes.⁶⁷ Taxpayers with primarily wage and investment income have fewer opportunities than taxpayers who are self-employed. The former historically have had significantly higher rates of compliance than the latter.⁶⁸

For wage and investment taxpayers, a compliance strategy that emphasizes the widespread practice of fulfilling tax obligations is likely to reinforce the belief that paying one's fair share of taxes is an intrinsically ethical obligation. In addition, stressing that the government does aggressively pursue the minority of citizens who cheat on their taxes fosters the expectation that most people will abide by the law and those who attempt to free ride will be caught and punished. Enforcement can help ensure a critical mass of compliant tax payers, thereby increasing the robustness of the compliance norm by minimizing exposure to persons who engage in tax evasion.⁶⁹

64. *Id.* at 699 ("[W]hen an ethical frame is evoked, cooperation should be the dominant choice, independent of the presence or absence of a sanctioning system and the expected cost of the sanctions.").

65. *Id.* at 700.

66. *Id.* at 702.

67. See Lederman, *supra* note 56, at 1508 ("A survey of Minnesota taxpayers found that normative beliefs about tax compliance are related to opportunity to evade.").

68. *Id.* at 1500.

69. *Id.* at 1500–03. For a suggestion of how deterrence and a norm of compliance can be intertwined in the tax context, see John T. Scholz & Neil Pinney, *Duty, Fear, and Tax Compliance: The Heuristic*

These measures can strengthen a norm of compliance for a group who is already inclined to embrace that norm, in part because they have few opportunities to cheat in any event. Taxpayers whose opportunities are so constrained that they have little choice but to pay their required share thus can interpret their behavior as motivated by the desire to act legally. The perception that others will be punished for cheating reduces the likelihood that their interpretation will be undermined by fear that paying the required tax is actually a foolish choice that will disadvantage them compared to others.

By contrast, “the tendency towards a group norm of evasion among the self-employed,” combined with the belief that others are likely to engage in evasion, may require more aggressive sanctions that reduce opportunities for noncompliance.⁷⁰ If successful, this approach may limit opportunities enough that a norm of compliance may emerge. This norm would be reinforced both by the constraints on tax evasion and by the perception that the number of other self-employed taxpayers who cheat is low.⁷¹

The possible value of a program that combines norm-based and sanction-based features finds support in studies that indicate that increased audit rates and higher sanctions do not necessarily lower tax compliance by “crowding out” intrinsic motivation to comply.⁷² This suggests that a compliance program may be able to trigger the use of an ethical frame for one segment of the target audience while eliciting a business frame for another segment. One consideration in determining which approach to use for which group may be the opportunities that various groups have to evade the rules.

4. Compliance Programs as Insurance

A final consideration in assessing corporate compliance programs is that organizations may effectively treat them as insurance, investing only in the amount of compliance necessary to shift liability or the costs of misconduct from the firm to its employees.⁷³ Under the Organizational Sentencing Guidelines, for instance, as well as the policies of certain government agencies, a company whose employees have acted illegally may gain certain benefits if it has in place an effective legal compliance program: A prosecutor may decline to bring charges against the company as an entity, the organization may introduce the existence of such a program as part of its defense, and an effective program may reduce the penalties that are ultimately imposed on the company.⁷⁴

Basis of Citizenship Behavior, 39 AM. J. POL. SCI. 490, 508–09 (1995) (finding that a taxpayer’s sense of duty affects his analysis of the risk of cheating and suggesting that increased enforcement might fail to increase compliance if it leads to a decreased sense of duty and thus a lower perception of risk).

70. Lederman, *supra* note 56, at 1508.

71. *Id.* at 1508–10.

72. *See generally id.*

73. *See generally* William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343 (1999).

74. For an overview of these practices, see Kimberly D. Krawiec, *Organizational Misconduct: Beyond the Principal-Agent Model*, 32 FLA. ST. U. L. REV. 571, 584 (2005). *See also* William S. Laufer,

An organization that treats its compliance program as an insurance policy will find it rational to incur expenses for such a program only up to the point at which it will be deemed sufficiently effective to gain lenient treatment for the organization.⁷⁵ Given the difficulty of determining whether a compliance program is effective, companies may enhance the likelihood of receiving these benefits simply by establishing programs with certain formal features.⁷⁶ This creates a moral hazard that the company will be indifferent to the risks created by its agents once such a program is in place, since only those agents, and not the firm, will suffer any loss resulting from the risky behavior. In consequence, “[t]he purchase of compliance sufficient to shift the risk of liability and loss, in certain firms, has the effect of decreasing levels of care.”⁷⁷ A company that conceives of ethics as a matter of risk management therefore may work from within a business frame, taking a narrow self-interested approach that undermotivates its employees to behave ethically.

To date, law firms have not sought to rely on risk management programs to argue for lenient treatment. They may face fewer occasions to do so, since, for various reasons, their lawyers are rarely the targets of criminal investigations. In New York and New Jersey—the only states that authorize disciplinary actions against law firms as entities—however, firms are able to defend against such actions by establishing that they had in place reasonable programs designed to ensure ethical behavior by their lawyers.⁷⁸ Furthermore, the possibility of enforcement actions by government agencies against firms may increase with the enactment of SEC rules governing lawyers and more aggressive IRS pursuit of tax shelters. Firms faced with such actions, as well as those that are defendants in private civil litigation, may draw an analogy to the corporate

Integrity, Diligence, and the Limits of Good Corporate Citizenship, 34 AM. BUS. L.J. 157, 163–66 (1996).

75. See generally Laufer, *supra* note 73.

76. On the difficulty of evaluating the effectiveness of these programs, see Krawiec, *supra* note 74, at 580 (“[C]ourts and agencies are unlikely to possess the ability to differentiate effective internal compliance structures from cosmetic ones—that is, those structures designed to create the illusion of compliance for purposes of avoiding legal liability, rather than for the purpose of deterring misconduct.”); Donald C. Langevoort, *The Behavioral Economics of Corporate Compliance With Law*, 2002 COLUM. BUS. L. REV. 71, 112–14 (arguing that after an illegality is discovered, there is a bias toward determining that monitoring was insufficient and that an effective inquiry into the compliance program “would require extensive and subjective expert research into the culture and operations of the firm”); Laufer, *supra* note 73, at 1417–18 (questioning the capacity of courts to evaluate the effectiveness and authenticity of compliance programs and noting corporations’ awareness of this deficiency). In determining which formal features to adopt, companies may look to sources such as the Committee of Sponsoring Organizations of the Treadway Commission, which publishes guidelines for programs focused on matters such as Enterprise Risk Management and Internal Controls. See <http://www.coso.org> (last visited Mar. 10, 2006).

77. Laufer, *supra* note 73, at 1415.

78. See N.J. RULES OF PROF’L CONDUCT R. 5.1(a) (2006) (law firms must make “reasonable efforts to ensure that member lawyers conform to the Rules of Professional Conduct”); N.Y. CODE OF PROF’L RESPONSIBILITY DR 1-104(a) (2006) (law firms must “make reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules”).

sector in arguing that they should receive benefits from having in place an effective ethical compliance program. If this becomes the primary rationale for adoption of such a program, it raises the specter of moral hazard that I have described above.

B. INTEGRITY-BASED COMPLIANCE PROGRAMS

Concern about some of the problems with compliance programs that emphasize surveillance and sanctions has led some observers to call for an “integrity-based” approach to ethics. This approach attempts to reduce reliance on rules and rule-following as the basis for ethical conduct. As one proponent argues:

[T]he goal of [many compliance] programs is to prevent, detect, and punish legal violations. But organizational ethics means more than avoiding illegal practice; and providing employers with a rule book will do little to address the problems underlying unlawful conduct. To foster a climate that encourages exemplary behavior, corporations need a comprehensive approach that goes beyond the often punitive legal compliance stance.⁷⁹

1. Fostering Values

The premise of an integrity-based approach is the importance of “self-governance in accordance with a set of guiding principles”⁸⁰—both for the organization as a whole and for individuals within it. Management furthers such a process by accepting the responsibility “to define and give life to an organization’s guiding values, to create an environment that supports ethically sound behavior, and to instill a sense of shared accountability among employees.”⁸¹

Steps essential to this task include widely communicating the importance of values that employees take seriously and can accept; demonstrating top management’s commitment to the values and its willingness to make decisions in accordance with them; integrating values into the everyday decision-making process regarding matters such as strategic plans, the pursuit of business opportunities, the allocation of resources, the measurement of performance, and promotion and compensation; ensuring the generation of information that enables employees to incorporate values in decision-making; establishing reporting relationships that provide alternate perspectives necessary for objective decisions; and equipping managers with the skills and knowledge necessary to make ethically sound decisions.⁸²

An integrity-based approach thus attempts to substitute persuasion for monitoring as the most salient mechanism for inducing ethical behavior. It is premised on the belief that intrinsic motivation is a powerful influence on

79. Paine, *supra* note 39, at 106.

80. *See id.* at 111 (differentiating the compliance regimes from the integrity-based approach that holds organizations to a higher standard).

81. *Id.*

82. *See id.* at 112 (presenting “The Hallmarks of an Effective Integration Strategy”).

behavior. In order to elicit this motivation, the organization seeks to signal to employees that it trusts them to do the right thing. Making surveillance and sanctions a less prominent and intrusive presence in daily work life is intended to send this signal. The theory is that if employees see management and fellow employees behaving consistently with the values that the organization has articulated, they are likely to follow suit. An integrity-based approach thus is willing to accept a less aggressive compliance enforcement strategy as the price for creating conditions in which intrinsic motivation and social norms can operate to produce ethical behavior.

2. Discretion and Ethical Judgment

Theoretically, granting agents more discretion can help them cultivate the capacity to deliberate autonomously on ethical issues. Individuals subject to specific prescriptions for behavior that allow little room for discretion may not come to grips with their moral agency nor acknowledge responsibility for their actions.⁸³ In William Simon's terms, being closely tethered to rules inclines them to engage in "categorical" rather than "contextual" reasoning.⁸⁴ Rather than consider and balance a wide range of considerations in light of their contribution to underlying values, such agents confine themselves to determining whether the literal terms of narrow rules apply to the situation at hand.

There is enough support for the position that lawyers should confine themselves to categorical reasoning that Simon calls it the "Dominant View."⁸⁵ There also, however, is a robust tradition that criticizes the dominant view as unduly narrow. In this tradition, a lawyer is sensitive not simply to the letter of the law but to its underlying spirit and purposes as well.⁸⁶ As Robert Gordon expresses this view with respect to corporate representation, the lawyer

may not act in furtherance of his client's interest in ways that ultimately frustrate, sabotage, or nullify the public purposes of the laws—or that injure the interests of clients, which are hypothetically constructed, as all public corporations should be, as good citizens who internalize legal norms and wish to act in furtherance of the public values they express.⁸⁷

83. See Lawrence E. Mitchell, *Cooperation and Constraint in the Modern Corporation: An Inquiry into the Causes of Corporate Immorality*, 73 TEX. L. REV. 477, 478–80 (1995) (noting that the constraining power of the state and institutionalized corporate relationships result in "an abrogation of moral autonomy and a corresponding denial of moral responsibility").

84. WILLIAM SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 74 (1998) (asserting that a lawyer's mechanical adherence to rules "categorical" norms as opposed to "contextual" norms).

85. See *id.* at 7 (describing the "Dominant View" as one in which counsel zealously represents any client interest).

86. See, e.g., *id.* at 8 (describing the "Public Interest View"); see also DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* xvii (1988) (asserting that a lawyer's role is to make laws "more just" and clients "more public spirited"); DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 2 (2000) (arguing for an increased adherence to public interest in the legal profession).

87. Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1207 (2003).

There is not enough space here to discuss in detail the debate over the appropriate scope of the lawyer's role. Suffice it to say that those who believe that lawyers should engage in contextual rather than simply categorical reasoning will find integrity-based programs promising not only because they may produce rule compliance, but because they also may afford opportunities for persons to develop the capacity for expansive ethical deliberation.

In sum, discretion is not only inevitable in any compliance system but may be necessary for development of the ability to further its ultimate concerns. In some cases, adherence to the strict terms of a rule may best further ethical values; in others, the exercise of some discretion will be the best way to do so. John Gellene was misguided, for instance, to the extent that he concluded that literal compliance was not necessary with Bankruptcy Rule 2014's requirement that he disclose Milbank Tweed's representation of South Street.⁸⁸ As I have suggested, he may have reasoned that there was no serious danger that his representation of Bucyrus would be compromised by Milbank's tie to South Street, and that any conflict was a "technical" rather than a "substantive" one.⁸⁹ Rule 2014 is explicitly intended, however, to foreclose the exercise of discretion by attorneys.⁹⁰ Such discretion too easily can result in self-serving rationalizations for nondisclosure that pose a danger to the integrity of bankruptcy proceedings.⁹¹

By contrast, consider the formation of the Chewco special purpose entity by Enron in late 1997.⁹² Chewco was created to participate as a partner with Enron in an energy venture.⁹³ While Enron officers and employees invested in Chewco, that entity did not have to be included in Enron's financial statements if outside investors contributed three percent of its equity.⁹⁴ Enron informed its attorneys that it was considering permitting the company's Chief Financial Officer (CFO), Andrew Fastow, to invest in Chewco.⁹⁵ The attorneys advised Enron officials that Fastow was considered an "executive officer" of Enron under SEC regulations, and that his participation therefore would have to be disclosed in the company's public filings.⁹⁶

After some delay, Enron substituted William Kopper for Fastow.⁹⁷ Kopper was a vice-president in the business unit that Fastow headed and a direct

88. See REGAN, *supra* note 33, at 322–24 (stating that various external influences pushed Gellene away from the required disclosure).

89. *Id.* at 333–34.

90. See *id.* at 333–38 (describing noncompliance with Rule 2014 as a "calculated gamble").

91. See *id.* at 334 (noting that Gellene rationalized his nondisclosure despite knowing the "letter of the rule" required it).

92. See generally Milton C. Regan, Jr., *Teaching Enron*, 74 *FORDHAM L. REV.* 1139, 1238–43 (2005) (providing the details of Enron's dealings with Chewco).

93. See *id.* at 1238.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 1239.

subordinate of the CFO. Enron's understanding at that time was that Kopper was not an "executive officer" of Enron and that his participation therefore need not be disclosed in company's securities filings.⁹⁸ Even if this were true, there is a strong argument that failing to disclose the involvement of Kopper, given his dependence on Fastow's goodwill, was inconsistent with the purpose of the SEC regulation. That provision is intended to alert investors to top management's involvement in arrangements that could pose a conflict of interest. An attorney engaging in contextual rather than categorical deliberation therefore could conclude that the literal terms of the regulation were not dispositive, and that Enron should disclose Kopper's participation. As the Gellene and Chewco examples illustrate, robust ethical judgment calls for a kind of "meta-discretion" to determine when it is appropriate to exercise discretion. An integrity-based approach tries to create opportunities for agents to develop this capacity.

3. Potential Pitfalls

Despite its potential benefits, relying on an organizational integrity strategy may also involve certain risks. First, articulating a set of values may be intended as simply an inexpensive public relations substitute for a concerted ethics program. As Donald Langevoort has observed, "Because these programs have become so commonplace, few firms can afford to depart from the norm, whatever their level of internal commitment to it."⁹⁹ As a result, it may be difficult to differentiate effective from ineffective—or, worse, insincere—integrity-based programs.

A second potential difficulty is related to the first. It is crucial for employees to believe that management takes seriously the values that it proclaims. It may be difficult, however, for them to determine if this is so. One factor that can signal sincerity is the willingness of senior management to model the kind of conduct they are trying to persuade employees to engage in. As Langevoort suggests, however, this may not be enough if employees are subject to performance incentives in which ethical behavior is likely to put one at a disadvantage.¹⁰⁰ This can occur, for instance, if the organization uses a "highly competitive tournament and quota system for salespeople in which pecuniary rewards are heavily skewed to the top performers and laggards are dealt with harshly."¹⁰¹

In this instance, it is clear that "the incentives skew against the values message."¹⁰² The result may be that employees either regard the company's commitment to ethical values as unrealistic or as insincere window-dressing that is subordinate to bottom-line objectives.¹⁰³ In neither case will employees

98. *Id.*

99. Langevoort, *supra* note 76, at 106.

100. *Id.* at 107–10.

101. *Id.* at 107.

102. *Id.*

103. *See id.* at 107–10. Some firms may in fact benefit from a culture of risk-taking that sometimes flirts with the edge of legality and will not want to constrain agents unduly from engaging in such

be motivated to take ethical pronouncements seriously. Langevoort therefore concludes that “[h]ighly competitive industries, especially those with ‘tournament’-oriented compensation structures, will have a hard time implementing an integrity system.”¹⁰⁴

Finally, we have to consider whether the easing of surveillance and penalties that accompany an integrity-based approach is likely to result in a weak sanctioning system that produces less compliance than a system with either strong sanctions or none. Even if there is a sufficiently visible set of sanctions to elicit a business frame for deliberation, the sanctions may be so low that the cost-benefit calculation only rarely leads to the conclusion that ethical behavior is profitable. Organizational leaders who find an integrity approach attractive therefore will have to determine how to structure their compliance program so that it does not result in this worst of all possible worlds.

4. Integrity-Based Programs and Law Firms

On the one hand, an integrity-based approach seems appealing to law firms in light of the traditional ideals of lawyer independence and autonomy, as well as the profession’s emphasis on the importance of good judgment. Furthermore, it is consistent with the aspiration that lawyers will orient themselves in terms of greater ethical values rather than simply aiming to comply with rules and avoid liability.

Law firms also may have an advantage in being able to draw upon a set of ethical values distinctive to the legal profession, as opposed to more diffuse values drawn from ordinary morality. These have the potential to provide a common vocabulary for both the articulation of values and efforts to infuse legal practice with an appreciation of them. Given the greater specialization of the bar, the salience of these values in daily practice may require translation of them by practice groups and specialized bar groups into an even more refined vocabulary, which provides instruction on the distinctive dilemmas that lawyers in a particular field of practice tend to face.

On the other hand, one can’t help but think that we’ve been down this road before. The 1908 Canons, as well as the Canons and Ethical Considerations of the 1969 Code, sought to express broad principles that were supposed to guide lawyers in their exercise of discretion.¹⁰⁵ The Code, of course, sought to balance these with enforceable rules. The Code was replaced by the Model Rules in 1983, however, because of the conclusion in many quarters that the Canons and Ethical Considerations were vacuous and ineffective.¹⁰⁶ Critics argued that relying on broad principles with minimal sanctions failed to moti-

behavior. *See, e.g.,* Kimberly D. Krawiec, *Accounting for Greed: Unraveling the “Rogue Trader” Mystery*, 79 OR. L. REV. 301 (2001). Securities trading firms may be an example of companies that benefit from such an entrepreneurial culture. *See generally id.*

104. Langevoort, *supra* note 76, at 111 n.86.

105. *See* text accompanying notes 11–14.

106. *See* text accompanying note 17.

vate ethical behavior, and that a strategy that focused exclusively on enforceable rules was necessary in order to provide the proper incentives.¹⁰⁷

Furthermore, the specific values that have been posited as distinctive to the legal profession are in some tension, and there has never been a robust consensus about how lawyers should accommodate them. The Preamble to the Model Rules acknowledges this. It declares that a lawyer is “a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.”¹⁰⁸ These roles, the Preamble suggests, “are usually harmonious,” but “[i]n the nature of law practice . . . conflicting responsibilities are encountered.”¹⁰⁹ The most significant tension, of course, is between the idea that a lawyer is simply a neutral advocate and that she has some duties to the larger legal system beyond the interests of the client. The bitter conflict on this issue suggests that there may be limits to firms’ abilities to invoke ideals of the legal profession in the pursuit of an integrity-based program.

Finally, has the movement among law firms toward “eat what you kill” compensation and a perpetual tournament of partners created conditions inimical to the success of an approach based on integrity? Major partners might be able to model the behavior they hope to encourage by, for example, forgoing some of the compensation to which they are entitled or refusing on principle to deliver certain kinds of opinion letters. They also might encourage pro bono work by crediting the hours spent on it toward the calculation of billable hours. How much difference will such measures make, however, if compensation is based primarily on revenue generation and the firm is willing to increase profits per partner by expelling partners who do not meet a given revenue target? At a minimum, the research that I have described suggests that firms who desire to adopt an integrity approach must think carefully about the complex relationships among the firm’s policies and procedures on the one hand and attorneys’ incentives and perceptions on the other.

CONCLUSION

Professor Alfieri has rendered valuable service by emphasizing the need to scrutinize the implicit cognitive and moral universe that risk management both reflects and shapes. This Essay is a modest response to the call to begin this task in earnest. I have suggested that we need to draw upon research on the psychological dynamics of organizational life, to examine the application of this research to corporate compliance efforts, and to develop an understanding of the ways in which the nature of law firms as distinctive business enterprises should inform our assessment of the relevance of this body of work.

One point worth keeping in mind as we engage in this work is that corpora-

107. See text accompanying notes 17–20.

108. MODEL RULES OF PROF’L CONDUCT pmbl., *reprinted in* REGULATION OF LAWYERS, *supra* note 11, at 9.

109. *Id.* at 11.

tions and law firms may be converging on the same point from diametrically opposite directions. The prevailing approach to regulating corporate behavior for over a century has been reliance on deterrence through the manipulation of incentives.¹¹⁰ By contrast, the dominant approach to regulating lawyer behavior over roughly the same period has been reliance on appeals to internalized values.¹¹¹ Recent work on corporate regulation emphasizes the inadequacy of relying solely on deterrence and the importance of an internalized value of compliance.¹¹² Recent work on lawyer regulation has underscored the limits of relying on faith in lawyers' values and the importance of sanctions in shaping incentives.¹¹³

Human motivation and behavior are complicated enough that neither proponents of shaping incentives through rules nor proponents of fostering the internalization of norms through appeals to values are likely to have the last word. Ideally, a regulatory regime will build on the strengths of each, although doing so successfully can be a delicate task.¹¹⁴ As a relatively recent entrant into the realm of sanctions and incentives, however, lawyer regulation might be prudent in not overreacting to the limitations of a compliance approach. We need more time to evaluate its potential in this arena, and to assess how it might best work in tandem with an appeal to values.

In particular, for good reasons, risk management is here to stay. Law firms are only now beginning to move away from the "cottage industry" model of practice and to recognize the impact of organizational structure, policies, and procedures on the behavior of lawyers within the firm. At least in the short term, law firms' belated attention to these factors likely will take the form of adopting measures to ensure legal compliance and avoid legal risks. Finally, we need to consider how to take account of the emerging work on situationist moral psychology that suggests that character is less global, and circumstances are more influential, than we conventionally believe.¹¹⁵ This research requires that we assess more critically the reliance in many quarters on virtue ethics as the foundation for promoting desirable conduct by lawyers.¹¹⁶ Doing so may shed

110. For a discussion of the role of corporate liability in shaping incentives for legal compliance, see Deborah A. DeMott, *Organizational Incentives to Care About the Law*, 60 *LAW & CONTEMP. PROBS.* 39 (1997).

111. See text accompanying notes 11–14 (discussing aspirations as basis for regulating lawyer's conduct).

112. See text accompanying notes 52–56.

113. See text accompanying notes 33–39.

114. For one effort to analyze the respective contributions of these and other approaches, see Linda Klebe Trevino et al., *Managing Ethics and Legal Compliance: What Works and What Hurts*, 41 *CAL. MGMT. REV.* 131 (1999). The authors concluded that both integrity-based and compliance-based approaches were significantly associated with positive behavioral outcomes in the six companies they studied and that the two were not mutually exclusive. See *id.* at 138–39. An integrity-based focus, however, had a stronger relationship to such outcomes than a compliance focus. See *id.* at 138.

115. See *supra* Part II.A.

116. See, e.g., ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 11–162 (1993).

light on how a compliance approach can be used most effectively.

It is too soon to say how law firm ethics programs might take account of these considerations. It is not too soon, however, to stress that it is important not simply that lawyers avoid ethical lapses but that they practice in ways that give meaning to professional aspirations such as promoting justice, preserving the integrity of the legal system, and fostering respect for the rule of law. The task ahead is to ensure that lawyers remain bilingual: fluent in the language of risk, while appreciating that another language is necessary to express more expansive conceptions of legal ethics for which risk has no vocabulary.