Taking Cues: Inferring Legality from Others' Conduct

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Taking Cues: Inferring Legality from Others' Conduct

Cover Page Footnote
Stein Professor, Fordham University School of Law; Director, Louis Stein Center for Law and Ethics. My thanks to Ben Zipursky for his comments on an earlier draft and for organizing the Stein Center's Symposium The Internal Point of View in Law and Ethics for which this was written.

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INTRODUCTION

A lawyer told me this story about what he saw one day on his travels in northern Europe. A farmer was driving a tractor down the road. As the farmer reached a crossroad, the traffic light turned red. The farmer stopped the tractor. No one was waiting to cross the road and there were no other vehicles coming from any direction as far as the eye could see. The farmer could tell it was entirely safe to proceed and no one would have cared if he had done so. But the farmer waited until the light turned green. "And that," the lawyer concluded, "is the rule of law." "And that," H.L.A. Hart would likewise have concluded, "is the internal point of view." As Hart explained, people viewing the traffic light from an "internal point of view" treat it not "merely as a natural sign that people will behave in certain ways," but "as a signal for them to stop, and so a reason for stopping in conformity to rules which make stopping when the light is red a standard of behavior and an obligation." The farmer was apparently indifferent to how the traffic law would be enforced—or, more precisely, to the fact that there would be no financial, reputational, or other penalty if he broke the law. He obeyed the law not because he felt any moral obligation independent of the law to stop his tractor in the road, and not because the traffic law’s purpose of preventing accidents was thereby served. Rather, he felt a moral compulsion to abide by the law, regardless not only of enforcement implications, but also of the law’s utility in the particular context. He obeyed the law simply because it is the law.

* Stein Professor, Fordham University School of Law; Director, Louis Stein Center for Law and Ethics. My thanks to Ben Zipursky for his comments on an earlier draft and for organizing the Stein Center’s Symposium The Internal Point of View in Law and Ethics for which this was written.
2. Id. at 90.
3. Cf. Frederick Schauer, Deferring, 103 Mich. L. Rev. 1567, 1570 (2005) (reviewing Philip Soper, The Ethics of Deference: Learning from Law’s Morals (2002)) (distinguishing “disobeying the law” from “doing the wrong thing”). Of course, other stories might be told about the farmer—for example, that he was in no hurry to reach his destination—indeed, he was reluctant to do so and he was therefore happy for an excuse to pause in open country on his way to wherever he was going. But I am happy to accept the explanation given.
Contrast this with drivers on U.S. highways who habitually go several miles per hour over the speed limit. They would be surprised to be ticketed for going fifty-eight miles per hour on a highway zoned for fifty-five miles per hour, at least absent a sign that warned, “Speed limit strictly enforced.” Does that mean that these drivers are what Holmes would call “bad men”? Some might say that is so, citing this as an example of conscious law breaking, reflecting a common disposition to disregard at least those regulatory laws that have no independent moral underpinning, if one can do so without paying a price. Speeding is a puzzle for those of us who start with the premise that most people are motivated to abide by the law even when they would benefit from breaking it. It might be explained that drivers who slightly exceed the speed limit are complying with the law, not “in the books,” but “in action.” The law “in action” is a product of more than what the statute says and what a court would say its written words mean. The “law,” broadly speaking, is also, in part, a product of how it is enforced. So those with an “internal point of view” may have internalized a particular understanding of the regulatory law: Regulatory law “in action,” or regulatory duty, takes meaning from how the written law is implemented.

The law-in-action explanation does not mean that drivers understand the written law—the law “in the books”—to permit them to drive faster than the posted speed limit, but only that the “law” that they feel morally compelled to obey (if they are generally law-abiding) is something other than the written law. Drivers know that the written law does not mean “proceed at a reasonable speed” or “at a safe speed” or “within a few miles per hour of the posted speed limit.” The speed limit is a classic example of a bright-line rule as opposed to a general standard. Drivers know perfectly well that the written law forbids them from driving over the speed limit, and they would not expect judges to interpret the law otherwise.

5. Compare those who go substantially over the speed limit but slow down only when they fear, or are warned by their radar detectors, that a speed trap may be ahead.
6. Oliver Wendell Holmes, Jr., The Path of the Law, 10 Harv. L. Rev. 457, 459 (1897).
9. See Alschuler, supra note 4, at 368 (citing Roscoe Pound, Law in Books and Law in Action, 44 Am. L. Rev. 12, 15 (1910)).
11. Michael Steven Green, Legal Realism as Theory of Law, 46 Wm. & Mary L. Rev. 1915, 1922 (2005) (“While contending that the law was substantially indeterminate, legal realists acknowledged [that] the law can meaningfully instruct people to act in certain ways
TAKING CUES

first blush, the idea of the “law in action” would not seem to have much significance for how people understand the meaning of the written law. I want to question that intuition.

This essay looks at the interpretation of regulatory law by those who are subject to regulation. It begins by asking how law-abiding people who are subject to regulatory law come to understand the law’s meaning. It posits that people take their understandings, in part, from how others behave—in particular, from how others who are subject to the law conduct themselves and how regulators enforce the law. In contrast, the understandings of those who are governed by the law will rarely matter to courts interpreting the law. This raises a question of how lawyers counseling clients should address conduct that, although arguably within the reach of a regulatory provision, is commonly undertaken without sanction. This essay suggests that law-abiding clients are entitled to know and take account of how others behave, which is to say that even the “law-abiding participant” may take account of enforcement consequences.

I. LAW-ABIDING PARTICIPANTS’ UNDERSTANDINGS OF THE LAW: IT MATTERS WHAT OTHERS DO

I assume that most people, most of the time, want to obey the law as they understand it, regardless of whether they can get away with transgressing. The question then is how people understand the written rules and regulations to which they are subject. My argument, and this is purely descriptive, is that to a significant extent, people look around to see what others do as a guide to understanding what they can do—not in the sense of what they can “get away with,” but in the sense of what is allowed. It seems fair for them to do so. To be sure, ignorance of the law is generally no excuse. It would rarely be a legal defense to say, “I thought what I did was permissible because others were doing it before me.” But that does not mean that law-abiding people (that is, those who want to comply with the law) do not take their cues from others. Even when dealing with the written law, they engage in a common law exercise. Few people read statutes. They are more likely to infer what is permitted from what they see those around them do with impunity. That is true even of lawyers, who

rather than others to some extent, and for this reason can guide the behavior of those who seek to obey its commands. If I want to abide by a statute that says that the speed limit is 55 m.p.h., I know what to do (namely, drive 55 m.p.h. or less). By the same token, a judge who wants to adjudicate in accordance with the statute knows what to do (namely, sanction only those who drive faster than 55 m.p.h.).

12. The exception would be where the provision in question applies only where the individual “knew” that what she was doing was wrong. See, e.g., Liparota v. United States, 471 U.S. 419 (1985) (holding that a federal statute regarding food stamp fraud required a showing that the defendant knew his conduct was unauthorized by statute or regulations); Morissette v. United States, 342 U.S. 246 (1952) (finding that it was a defense to the criminal charge of knowingly converting federal property that the defendant did not know that what he was doing was a conversion).
learn the rules of courtroom conduct, to say nothing of legal ethics, by observing the conduct of other lawyers. At least when other lawyers’ conduct goes unchallenged, one assumes that they know what they are doing. Psychologically, this is understandable. Like the drivers on the highway, we do not want to be left behind. This means that the law may have a different meaning for the first people who are subject to it than for those who come later, and that the meaning of a law, from the perspective of those to whom it applies, may evolve over time. I offer the following three examples from personal experience.

A. No Traveling Beyond This Point

I spent a lovely fall weekend in Old Saybrook, Connecticut, at a bar association retreat attended by lawyers and judges. During a break from the educational programs, I took a walk along the water with two friends with whom I had worked years earlier as a federal prosecutor. Our walk took us down a quiet, dead-end road, toward a lighthouse, in what we thought might be the direction of a home once belonging to Katharine Hepburn. Eventually, we came to a sign that said, “No Traveling Beyond This Point.” We debated what that meant. Was foot traffic “traveling”? Or did the sign refer only to vehicles? Were we “traveling” as opposed to “visiting” or “returning home” because we were outsiders and uninvited? Heading toward us, we saw four other lawyers who had ventured down the path and were returning. My friends and I, emboldened, continued our lovely walk, not ignoring the sign, but undeterred by it.

What might the other four lawyers have been thinking? These were four well-regarded lawyers, jealous of their reputations for probity. They would not deliberately have continued down the road if they believed that doing so was forbidden—for example, if the sign said, “No trespassing—no one permitted beyond this point without authorization.” They would have obeyed such a clear prohibition even if it were not accompanied by a warning, “Trespassers will be prosecuted,” and even if they knew that there was no enforcement consequence for trespassing. They would not have said, “Although we are not allowed to walk down the road, let’s do it anyway, because we will not get caught or, if we are caught, nothing bad will happen to us.” Indeed, they would have stopped and turned around even if they believed that the sign had no legal effect—that it was simply posted by residents who were jealous of their privacy and tranquility. They were law-abiding and respectful of others, both in and out of authority. But the “no traveling” sign was ambiguous. There was no one to ask for an explanation—no evidence of the intent of those who wrote and posted the sign beyond what could be surmised from its ambiguous words and context. This was a residential road, not a military installation. From the context, one might surmise that residents wanted exclusivity—they wanted entirely to be left alone. But one might equally surmise that residents wanted to avoid disturbance to the road or the noise of vehicular traffic. Our
colleagues could err on the side of respecting the residents’ peace or privacy
or, as they evidently did, indulge their impulse to keep going, believing that
doing so would cause no harm and was permitted, because they were just
walking, not “traveling.”

As we saw these lawyers returning, my two friends and I took note of the
ambiguous sign, but we were in a slightly different position in trying to
understand what it meant. We surmised that our four colleagues had
already concluded that “no traveling” did not proscribe walking. They had
acted on that understanding and no one had come out of his or her house
with a garden rake to chase them away. The fact that others whom we
respected had acted on the belief that the sign permitted pedestrian traffic,
and that they had walked down the road and back undisturbed, subtly
influenced our own understanding of the ambiguous injunction.

In hindsight, it is unclear what the “law” was to which we and others on
that road were subject. The “no traveling” sign was a command, but it was
not promulgated by a legislative body. On the other hand, the sign may
have given notice of an ordinance which had been promulgated by a
lawmaking body and which, if transgressed, would have enforcement
consequences, just as a speed-limit sign gives notice of a traffic ordinance.
The sign was written for strangers, and one reading the sign would not have
known what the ordinance (if any) said nor whether the sign was a fair
paraphrase. The sign was evidence of the law. The law was unknowable.
The sign was as close as one could get to knowing the law. As far as we
were concerned, the sign was the law.

To understand the “no traveling” law, we who followed, like our
predecessors, looked to the words of the sign, its context, and our
understandings of the norms in that context—namely, that ordinarily roads
are publicly accessible. But we, unlike our predecessors, also looked at
how others had behaved: Four lawyers ahead of us had walked down the
road unchallenged, and, as far as we knew, no others had approached the
sign and turned right around. That our colleagues were unchallenged did
not allow an inference about how enforcement authorities or residents, who
might have had an incentive to enforce the law informally, might have
regarded the sign or whatever underlying ordinance it expressed. No police
officers were around. Perhaps no one was home, or, if they were, they did
not notice that our colleagues had walked down their road, or if they did
notice, they could not be bothered to complain. But the fact that our
colleagues’ evident understanding went unchallenged allowed us to infer
that their understanding was correct, which would not have been so had
they been chased away by the police or residents.

B. No Riding Without a Bus Pass

My teenage children ride a private bus to high school. At the beginning
of the school year, they received a bus pass and were told in writing that
they were required to produce it to ride the bus. On the first few days of school, the bus driver checked the students’ passes, but within a week she stopped doing so, presumably because she recognized the children, or because checking bus passes was bothersome and slowed the trip. Within the next few weeks of school, my daughter Anna lost her bus pass. Because she did not seem to need it anymore, she took the path of least resistance, not bothering to go to the school’s administrative office to replace it. For weeks, that was no problem. But then evidently an edict came from higher-ups at the bus company. The following day, the driver asked the students to produce their bus passes before they boarded and, because Anna could not do so, refused to allow her to ride, despite the pleadings of Anna, her brother, who had boarded ahead of her, and some schoolmates. One of Anna’s classmates who took that bus found himself in the same boat that morning.

Members of my family had very different reactions when the story was told that night. My son Zack, although he had pled my daughter’s cause, was not particularly sympathetic. Zack’s argument was that Anna knew that the bus company’s rule required her to carry a pass and that she broke the rule, which the bus company was within its rights to enforce, however selectively. While acknowledging (though not precisely recalling) the written rule and that it remained in effect, Anna’s view was that she was entitled to assume that the bus company was no longer enforcing it, especially because the rule, which made sense early in the school year, stopped serving a purpose once the driver recognized the students. From her moral perspective, she was entitled to act on the basis of the law as enforced—the law “in action.” My wife, who is a lawyer, was the most infuriated. She took the view that the bus company, having failed to enforce the bus-pass rule for several months, had no right to turn our daughter away without first putting her on notice that the requirement to carry a bus pass had been reinstated. Her argument was that, although the requirement may have been unqualified in the bus company’s contract, the requirement itself had changed as a result of the course of dealing with the bus company. This was not an example of under-enforcement, but of a change in the law, which meant that Anna was required to have obtained a bus pass, but not necessarily to have it in her possession to ride.\textsuperscript{13}

\textsuperscript{13} After I completed a draft of this article and described it to my brother, a lawyer in Washington, D.C., he offered me another story. He was driving in Rock Creek Park, where the traffic rules are confusing, and came to a fork in the road. Going left would have led him to where he was going more quickly and easily. But a sign said that during particular times of day, which included when he was then driving, no cars were permitted to take that route. He was unsure what to do, even though the sign was unambiguous. When the three cars ahead of him went left, he followed. He and the driver ahead of him were pulled over. The police officer asked, “Did you not see the sign?” My brother answered, “Yes, but I was not sure, and I followed the other cars.” The police officer let him go. In the future, of course, his understanding will be different, regardless of what other drivers do.
C. No Traveling Around the Country Practicing Law

Several years ago, I served as Reporter to the ABA Commission on Multijurisdictional Practice, which was asked to look at the rules governing lawyers’ practice across state lines and to propose appropriate reform. At that time, lawyers were generally forbidden from practicing law outside the states in which they were licensed. The prohibition was established by state Unauthorized Practice of Law (UPL) provisions, which were typically misdemeanor laws. Most obviously, the laws prohibited a lawyer from “putting up a shingle” in a state in which she was not licensed. This often meant that even an experienced lawyer who moved to a new state had to take another bar examination. At least at the UPL laws’ inception, it was also understood that a lawyer outside his or her home state could not give legal advice to a client, conduct a transaction, or (unless admitted pro hac vice) conduct litigation in a court. A law license was not like a driver’s license.

Over time, lawyers began crossing state lines to assist clients. Although regulators rarely interceded, the possible application of the UPL laws was sometimes raised in private litigation. For example, in the mid-1960s, the New York courts in Spivak v. Sachs considered whether William Spivak, a California lawyer, had violated New York’s UPL prohibition when he came to the state at the request of Mary Sachs, a social acquaintance, to assist her in a matrimonial litigation. Before first coming in late 1959, Spivak advised Sachs “that he would not be able to appear in any action and that the services he could perform would be limited to advice and consultation with the attorneys appearing for her.” Afterwards, Sachs claimed that she did not have to pay Spivak’s fee because he had violated the state’s UPL law. The state’s intermediate appellate court disagreed, emphasizing the evolving nature of law practice. But one judge dissented,

14. Some states allowed experienced lawyers to seek admission on motion without taking a new bar examination.
16. Id. at 667.
17. Id. at 667-68. The court stated,
   We have no doubt that the services performed were legal services. The only question is whether plaintiff is barred from recovery because he is not admitted to practice in this jurisdiction. . . .

   In all of the reported cases interpreting the statute which have come to our attention, the question has either been one of holding out to be an attorney, or whether a continuous course of conduct carried on in this state constituted legal practice. The statutory purpose is the protection of the public against representation by persons who are exempt from the regulatory provisions which govern those admitted to practice. Consonantly, it has been held that a single act not influenced by the element of misrepresentation of status, even though the act is one usually restricted to lawyers, is not a violation of the section.

   The literal interpretation which attributes to a single act, not attended by misleading the client, the same consequences as a continuing course of conduct, is virtually self-defeating. With business activities crossing state lines and with
maintaining that giving legal advice as to the law, regardless of which body of law, is the practice of law, and noting that the lawyer's provision of advice in New York was not merely incidental to his California practice.\textsuperscript{18} The New York Court of Appeals agreed with the dissent that the lawyer had engaged in unauthorized law practice.\textsuperscript{19} Quoting a New Jersey decision, however, it acknowledged that, given "the numerous multi-State transactions and relationships of modern times, we cannot penalize every instance in which an attorney from another State comes into our State for conferences or negotiations relating to a New York client and a transaction somehow tied to New York."\textsuperscript{20} The court left it to another day to decide when such work would be permissible.\textsuperscript{21}

The ABA Commission conceded that there were legitimate regulatory reasons to limit what lawyers may do outside the states where they are licensed.\textsuperscript{22} But the wisdom of a broad restriction on transient practice outside one's own state was questionable\textsuperscript{23} given how clients' needs and law practice had continued to change.\textsuperscript{24} At the time the ABA issued its

\textit{Id.} (citations omitted).

\textsuperscript{18} \textit{Id.} at 668-70 (Eager, J., dissenting).


\textsuperscript{20} \textit{Id.} at 168.

\textsuperscript{21} \textit{Id.}

\textsuperscript{22} ABA Comm'n on Multijurisdictional Practice, Client Representation in the 21st Century 7 (2002) [hereinafter MJP Report] ("In general, a lawyer may not represent clients before a state tribunal or otherwise practice law within a particular state unless the lawyer is licensed by the state or is otherwise authorized to do so. Jurisdictional restrictions promote a variety of state regulatory interests.").

\textsuperscript{23} \textit{Id.} at 1. Jurisdictional restrictions on law practice were not historically a matter of concern, because most clients' legal matters were confined to a single state and a lawyer's familiarity with that state's law was a qualification of particular importance. However, the wisdom of the application of UPL laws to licensed lawyers has been questioned repeatedly since the 1960s in light of the changing nature of clients' legal needs and the changing nature of law practice. \textit{Id.}

\textsuperscript{24} \textit{Id.} at 1, 9. The Commission's report observed, although client needs and legal practices have evolved, lawyer regulation has not yet responded effectively to that evolution. As the work of lawyers has become more varied, specialized and national in scope, it has become increasingly uncertain when a lawyer's work (other than as a trial lawyer in court) implicates the UPL law of a jurisdiction in which the lawyer is not licensed. Lawyers recognize that the geographic scope of a lawyer's practice must be adequate to enable the lawyer to serve the legal needs of clients in a national and global economy. They have expressed concern that if UPL restrictions are applied literally to United States lawyers who perform any legal work outside the jurisdictions in which they are admitted to practice, the laws will impede lawyers' ability to meet their clients' multi-state and interstate legal needs efficiently and effectively.

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report, the prevalence of national legal practice was well known and commonly accepted. 25 Although lawyers did not set up offices in states where they were not licensed, they freely traveled nationally and internationally to advise out-of-state clients in areas of law in which they had expertise. 26 In marketing their services through firm brochures and, later, through websites, lawyers emphasized their ability to provide assistance nationally. Professional publications identified law firms with

Testimony before the Commission was unanimous in recognizing that lawyers commonly engage in cross-border legal practice. Further, there was general consensus that such practice is on the increase and that this trend is not only inevitable, but also necessary. The explosion of technology and the increasing complexity of legal practice have resulted in the need for lawyers to cross state borders to afford clients competent representation.

Id. 25. See, e.g., Susan Hackett, Beauty is in the Eye of the Beholder, 1997 Litig. 8, 14 (noting that this was “an era when companies multiply through strategic alliances and in which legal practice is increasingly national and international in scope”); Marc S. Mayerson, Managing Complex Insurance Coverage Disputes, 32 Tort & Ins. L.J. 53, 67 (1996) (finding that insurance coverage instructions are available “from many of the law firms with national practices in this specialized area”); Harvey D. Myerson, Building a New Tradition, A.B.A. J. Apr. 1, 1986, at 38, 40 (“The national scope of the [large law] firms permits improved representation of clients who do business on a national basis and of local and regional clients who have concerns that reach beyond the geographic confines of a given city or state. The improved organizational practices permit a large group of lawyers to operate with the cost-effectiveness that the cost-conscious clients of today rightfully expect.”); Lawrence Savell, Looking for a New Place to Practice? The 10 Best Cities for Lawyers, A.B.A. J., Mar. 1992, at 58, 60 (“Although Kansas City firms have developed an extensive national practice (furthered by a geographically central location) as well as an international practice, the bar is still relatively small.”).

26. MJP Report, supra note 22, at 10-11. The report stated, Lawyers who provide legal advice or assistance in transactions also commonly provide services in states in which they are not licensed. Like litigators, transactional lawyers who are representing clients in the state in which they are licensed travel outside the state in order to conduct negotiations, gather information, provide advice, or perform other tasks relating to the representation. Lawyers also travel outside their home states in order to provide assistance to clients who are in special need of their expertise. For example, lawyers who concentrate their practice in federal law—such as securities, antitrust, labor, or intellectual property law—are often retained by clients outside their home states because of the clients’ regard for their particular expertise. The same is true of foreign lawyers whose expertise in foreign law is sought, as well as of other lawyers, such as bond lawyers or mergers-and-acquisition lawyers, who practice in specialized areas. For some lawyers, multijurisdictional practice grows out of an ongoing relationship with a client. Sometimes, the work is for a client who resides in the lawyer’s home state but who has business dealings outside the state. Other times, the work is for a client who has moved out of state. A lawyer who drafts a will for a client in one state may be asked by that client to draft a codicil to the will after the client has moved to another state. For in-house lawyers in particular, ongoing work for a corporate employer commonly involves travel to the different states where the corporation has offices or business interests.

Id.
national practices and reported on significant transactions in which out-of-state law firms served corporate clients. Disciplinary proceedings based on the UPL laws in such situations were virtually unheard of, and so lawyers faced little risk, as long as they did not “open a permanent office in a state where they are not licensed” or appear in court without obtaining pro hac vice admission.

What could the ABA Commission say about this phenomenon and why the laws should be reformed? The Commission might have started with the proposition, put forth by at least one commentator, that “[a]ttorneys engage in the unauthorized practice of law on a daily basis.” The Commission could have explained that lawyers were “bad men” who violated this law openly and wantonly every day, knowing that they could get away with it because of the indifference of regulatory authorities, and that it was therefore necessary to change the law to conform it to lawyers’ conduct so that ours would no longer be a profession of scofflaws. That explanation did not seem terribly attractive, however, because our professional norms (of which the ABA is a principal exponent) identify being “law-abiding,” like integrity and trustworthiness, as an important professional and personal value or trait for lawyers. Since the early days of the republic, individuals

27. See, e.g., Jeff Blumenthal, Ballard Winning Suitor in Courtship of Pollard, Legal Intelligencer (Phila.), Aug. 28, 1998, at 1 (referring to a lawyer who “estimated he focuses more than 75 percent of his national practice with clients as far off as California and Texas on representing shopping center landlords”); Kevin Livingston, In Brief, Recorder (S.F.), Aug. 20, 1998, at 6 (referring to a law firm’s “national environmental practice”); John E. Morris, Snapping Down the Big Bet, Conn. Law Trib., July 13, 1998 (referring to a Cleveland law firm that had “taken its real estate practice national”); Ritchenya Shepherd, Rust Belt Firm Goes High-Tech, Nat’l L.J., Dec. 28, 1998, at A18 (reporting on a Pittsburgh firm that had “transformed itself from a local firm, dependent on Rust Belt businesses, to a regional player with a number of national niche practices”).

28. For example, the American Lawyer’s monthly column titled “Big Deal” has chronicled corporate acquisitions, mergers, and other major transactions, and identified the lawyers and clients involved. In many cases, one or more of the parties are represented by out-of-state lawyers. For example, in an acquisition reported in February 2004 involving two companies in the health-care field, the Alabama acquiring company was represented by lawyers whose offices were located in Atlanta, Cleveland, Chicago, and Wilmington, while the Texas target company was represented by lawyers whose offices were located in New York and Pittsburgh. See Big Deals, Am. Law., Feb. 2004, at 42.

29. MJP Report, supra note 22, at 11.


31. An analogy might be the change in the laws governing fee-splitting among lawyers. Initially, the practice was categorically forbidden. Recognizing that “referral fees” were nevertheless common, the ABA amended the rule to permit the practice with procedural safeguards. See Roy Simon, Simon’s New York Code of Professional Responsibility Annotated 326 (2005) (“The bar decided it did not want a rule that was so flagrantly and frequently violated . . .”).

32. Model Rules of Prof’l Conduct pmbl. para. 5 (2005) (“A lawyer’s conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer’s business and personal affairs.”); id. para 6 (“[A] lawyer should further the public’s
who gave evidence of insufficient fidelity to the law could be denied the right to engage in our profession.\textsuperscript{33}

The better explanation, it seemed, was that, although the wording of most state UPL laws had remained the same since they were adopted and courts generally had not narrowed their reach, the meaning of the laws had nevertheless changed to permit more extensive interstate law practice. What was the evidence of the change? It was the understandings of lawyers who regularly practiced across state lines as reflected in their conduct, together with the absence of enforcement. Lawyers did not believe they were violating the UPL law by performing occasional work in other states.\textsuperscript{34} Disciplinary agencies tacitly permitted prevailing practices.\textsuperscript{35} But if the laws no longer prohibited interstate practice as sweepingly as before, there remained a need for law reform, because some lawyers were too law-abiding. Even though the UPL laws served no purpose as applied to certain practices, and most lawyers understood that the law no longer reached those practices, some lawyers, in an excess of caution, might refrain from interstate practices to the detriment of their clients. Besides that, members of the public who were unaware of what the laws really meant might form the misconception that lawyers were acting lawlessly.\textsuperscript{36}

understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.”).

\textsuperscript{33} See, e.g., Smith v. State, 9 Tenn. 228 (1829) (striking an attorney from the rolls for killing an adversary in a duel).

\textsuperscript{34} This was true at least until 1998, when the California Supreme Court issued its opinion in Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court, 949 P.2d 1 (Cal. 1998), which held that New York lawyers were barred from recovering legal fees for work performed in California in connection with an impending California arbitration, because they had done so in violation of the state’s UPL law. Even this decision did not result in the imposition of discipline on out-of-state attorneys. It did, however, call lawyers’ attention to the risk that their common practices might be deemed improper and sanctionable. The Birbrower decision was the impetus for the ABA’s appointment of its commission to study the regulation of multijurisdictional law practice and to propose reforms to permit these practices to continue in appropriate circumstances without fear of discipline.

\textsuperscript{35} See, e.g., Ryan J. Talamante, We Can’t All Be Lawyers . . . Or Can We? Regulating the Unauthorized Practice of Law in Arizona, 34 Ariz. L. Rev. 873, 888-89 (1992) (“Currently, however, the State Bar plays a passive role in regulating the unauthorized practice of law. The State Bar does receive complaints pertaining to unlicensed practice, but because the law is now unsettled, the State Bar does not actively investigate such matters.”); Daniel A. Vigil, Regulating In-House Counsel: A Catholicon or a Nostrum?, 77 Marq. L. Rev. 307, 314 (1994) (“Arizona may tacitly allow unlicensed in-house counsel to practice without fear of sanction.”).

\textsuperscript{36} MJP Report, supra note 22, at 10-12. The report stated, Lawyers have general understandings about how jurisdictional restrictions apply to their work in states where they are not licensed. These understandings are shaped less by the wording of the UPL provisions or by decisional law, which is sparse, than by conventional wisdom or by what the U.S. Supreme Court has called “the lore of the profession.” On one hand, lawyers understand that they may not open a permanent office in a state where they are not licensed and also that they may not
In a certain sense, the UPL story in the ABA’s telling is not terribly different from the first two stories. Lawyers and law firms had a sense that they were subject to the UPL law but were uncertain about what the rule required. They were generally law-abiding and wanted to comply with the law governing their professional conduct. Where did they get their understanding of what the law required? Almost certainly, they did not replicate the process by which a court interprets the law or by which a lawyer giving an opinion interprets the law. As they worked in states other than their own, they were at best dimly aware of the wording of those states’ UPL laws, their legislative histories, and what the state courts said about them. Lawyers and law firms, the most legally sophisticated regulated individuals and entities, took their cue from others. Junior lawyers looked at what senior lawyers did. Senior lawyers looked at what other lawyers in their firms and other firms had previously done, perhaps assuming that someone earlier down the line had closely analyzed the question. Perhaps the law firm’s “ethics” lawyer—if it had one—read some cases. But for most lawyers, the lore of the profession was more important than the case law.

appear in the court of a state where they are not licensed without judicial authorization. On the other hand, lawyers recognize that they may give advice in their own states concerning the law of other jurisdictions, that they may represent out-of-state clients in connection with transactions and litigation that take place where the lawyer is licensed, and that they may travel to other jurisdictions in connection with legal work on behalf of clients who reside in and have matters in the state where the lawyer is licensed.

Lawyers’ general understandings are, to some extent, reinforced by the sporadic enforcement of state UPL laws. Regulatory actions are rarely brought against lawyers who assist clients on a temporary basis in connection with multi-state or interstate matters. This might fairly suggest that there is a profession-wide understanding that the UPL laws, however broadly they may be written and however they may be interpreted in theory, will be interpreted by courts and enforcement agencies to accommodate reasonable and conventional professional practices. Further, one might assume that, because of the sporadic nature of proceedings to enforce jurisdictional restrictions, lawyers may comfortably rely on their professional understandings and that, therefore, there is no need to reform existing laws, however inconsistent or non-specific they may be. These assumptions would be mistaken, however.

Irrespective of the low risk of enforcement, lawyers and law firms take jurisdictional restrictions seriously. Further, even if lawyers felt free to ignore UPL laws in areas where there is a professional consensus that the laws are outmoded and there appears to be a tacit understanding that they will not be enforced, it is undesirable to retain the laws as written, rather than amending them to accord with contemporary understandings and practices that serve clients well. Keeping antiquated laws on the books breeds public disrespect for the law, and this is especially so where the laws relate to the conduct of lawyers, for whom there is a professional imperative to uphold the law.

Id.

37. See generally Elizabeth Chambliss & David B. Wilkins, The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms, 44 Ariz. L. Rev. 559 (2002).
II. JUDICIAL INTERPRETATION: THE RELEVANCE OF LAW-ABIDING PARTICIPANTS' CONDUCT

One might consider whether courts interpreting regulatory provisions should give weight to how generally law-abiding people act. Suppose that a succession of generally lawful people form a belief about the meaning of the law and hold so strong a conviction that they act in reliance on it, when they might ordinarily steer far clear of what they perceive to be the limits of the law. Suppose, further, that their conduct goes unchallenged by the authorities charged with enforcing the law, so that their belief is reinforced. Should courts hesitate to employ their esoteric tools of legal interpretation to read the law in a manner that restricts this conduct? To the extent one views the law as a contract between the government and the governed, then the course of dealing between them might give meaning to the law or even, in effect, rewrite the law. But courts approach statutory and contract interpretation very differently. There is only a limited extent in practice, or even in theory, to which courts' interpretive principles would allow for consideration of peoples' conduct or of their sincere beliefs expressed through their conduct.

Let me begin by noting that the emphasis here is on what the regulated do, not what the regulators do. I am not looking at how much weight courts should give to regulators' consistent nonenforcement of the law in a particular context. Depending on its interpretive philosophy, a court might give varying weight to how an agency interprets the law it is charged with enforcing. But the best evidence of an agency's interpretation would be what the agency actually says, not what a court might infer from an agency's enforcement practices. Judicial inferences are less reliable because under-enforcement may have many explanations. An agency may make a judgment not to enforce a law that it believes to be applicable based on a judgment about how best to allocate limited resources. Alternatively, the agency may have a policy of tempering an overly broad (but, in its view, applicable) law by enforcing it only where its purpose is most clearly

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38. Note that my focus is on statutes that continue to serve a purpose at the core and are therefore enforced generally, but not regarding particular conduct that arguably falls within their reach. The question is not whether the law has lapsed, but how it should be interpreted. Therefore, I am not addressing the concept of "desuetude," which involves a claim that a statute may no longer be given effect because, for a substantial period of time, it has not been enforced at all and has been forgotten. See generally Note, Judicial Abrogation of the Obsolete Statute: A Comparative Study, 64 Harv. L. Rev. 1181 (1951). Nor am I focusing on "archaic" statutes, that is, those laws whose original premise is wholly outdated. See Holmes, supra note 6, at 469 ("It is still more revolting if the grounds upon which [the law] was laid down have vanished long since, and the rule simply persists from blind imitation of the past."); see, e.g., Delta Traffic Serv., Inc. v. Transstop, Inc., 902 F.2d 101 (1st Cir. 1990).

In the case of lawyers' multijurisdictional practice, for example, it seems unlikely that regulators, such as state prosecutors and disciplinary agencies, reached affirmative conclusions about how the UPL law applied to an out-of-state lawyer who did not establish an office or advertise in the state. If regulators thought about the question at all, they probably decided that the law was unclear and that they should husband scarce resources for cases where there were clear violations that threatened the harms against which the UPL law protects.

One might be tempted to quickly dismiss the idea that courts engaged in the interpretation of regulatory provisions should give any weight to the conduct of individuals or entities subject to enforcement of the law. To begin with, people may not generally be law-abiding, and if we are, people engaging in conduct that falls within the law's gray areas may not be. In any case, the conformity of people's conduct may say more about social psychology ("monkey see, monkey do") or physiology (for example, that we are hardwired to imitate others) than about legal understandings.

Further, insofar as people are aware of the law, their conduct in the law's gray area may be ambiguous. In a particular instance, they may not be acting in good faith. That many engage in the same legally questionable conduct may reflect consciously parallel or even deliberately concerted decisions strategically to test or flout the law. Consider the December 2005 strike by New York City transit workers after being warned that they would be violating state law against strikes by public employees. I would assume that most transit workers are generally law-abiding. But in this case, they certainly did not believe that they were acting in a legally permissible way.

Even if actors are proceeding in good faith, they may not be expressing a belief about the law on the books as opposed to the law in action. Contrast the "no traveling" sign with the "bus pass" rule. The lawyers who proceeded past the sign had a belief that they were not transgressing the

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40. Selective enforcement is generally a legitimate enforcement strategy, especially in the case of regulatory law. Further, a legislature may intentionally draft an overly inclusive law with the expectation that regulatory authorities will not seek to enforce the law at the margins. In that event, courts may lack authority to prune the law through interpretation.


42. Cf. Sandra Blakeslee, Cells That Read Minds, N.Y. Times, Jan. 10, 2006, at F1 (describing how mirror neurons in the brain respond to other people's actions by autonomically simulating the action).

43. For example, the decision of large law firms to use advanced waivers might fit into this category as an example of testing the law.


45. On the other hand, my colleague Jennifer Gordon tells me that the transit workers (as distinguished from their leadership who called the strike) believed that they were acting in a morally correct fashion by obeying the "higher law" of union solidarity, a violation of which would have carried more severe "enforcement consequences" than striking.
written command. My daughter, who failed to carry a bus pass, believed that she was transgressing the written rule, but thought that her act was morally correct for a different reason; namely, that she was permitted to rely on the bus driver’s consistent failure to enforce a rule that had ceased to serve any purpose.

Suppose that courts can get past these practical difficulties. To what extent and for what purpose should a court consider what people subject to the law actually do and implicitly understand about the law? If the court’s focus is on the intent of the enacting legislature in the most literal sense, one might suppose that post-enactment conduct, and in particular, how the public interprets the law or acts under it, says very little about what the enacting legislature had in mind. But courts rarely view the idea of “legislative intent” so literally. Other interpretative approaches may allow some room for considering how people commonly behave.

Consider the textualist judge, who focuses (at least initially) on the words of the law as the expression of the law’s meaning. Courts conventionally look at “common understanding and practices” to decide whether the words of a statute are subject to multiple interpretations when the claim is that a statute is unconstitutionally vague or, in criminal cases, that the rule of lenity should apply. A court may give weight to how regulated individuals and entities understand the words of the law in determining not only whether the words are clear, but what they mean. Most often, however, a court will pick up a dictionary to ascertain the ordinary understanding of an undefined statutory term. Courts might be reluctant to give weight to the public’s arbitrary understanding of the law.

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49. United States v. Petrillo, 332 U.S. 1, 7-8 (1947); see, e.g., United States v. Hussein, 351 F.3d 9 (1st Cir. 2003); Sabetti v. Dipaolo, 16 F.3d 16 (1st Cir. 1994); Guardian Title Co. v. Bell, 805 P.2d 33 (Kan. 1991).
50. See, e.g., Granny’s Rocker, Inc. v. Ill. Liquor Control Comm’n, No. 5-92-0861, 1994 Ill. App. Lexis 779 (App. Ct. May 16, 1994); Carroll v. State, 911 S.W.2d 210, 220 (Tex. App. 1995) (“In the absence of special definitions, statutory language can be measured by common understanding and practices or construed in the sense generally understood.”). If the term is defined in the statute, the statutory definition will prevail over common understanding or usage. See, e.g., Fox v. Standard Oil Co., 294 U.S. 87, 95 (1935).
From a textualist perspective, people's behavior may be relevant at least when those who are subject to the law actually consider how the law applies to them. For example, the "no traveling" sign was posted for people who were subject to it—people walking down the road who came to the sign—without the mediating influence of lawyers and judges. The words may have a certain meaning for ordinary people who read them in context, which may differ from the meaning ascribed to them by the residents who posted the sign. If the focus is on the words, the understanding of pedestrians who encounter the sign and actually consider its meaning may be as important as the understanding of the judge who reads the words outside the context in which they apply or the understanding of the authors, who, if their words do not convey their intended meaning, can post a clearer sign. What of the fact that pedestrians are likely to read the sign through the prism of their self-interested desire to continue down the road? However consciously they want to be law-abiding, subconsciously their understanding of the law will be biased. The authors of the sign surely would have known that, however, and could have corrected for distortion by writing with greater clarity.

Likewise, if a judge is trying to ascertain the meaning of a statute, one might argue that the genuine understanding of those who are subject to the law ought to carry more weight than the judge's own impression or the avowed understandings of legislators, as reflected in the legislative history. It is fair to presume that when legislators write laws, they employ words as they would be understood by those who are subject to the laws (and therefore self-interested), rather than invoking special, potentially inaccessible meanings. If legislatures do not do so, from a textualist perspective, arguably they should. Why should courts, through interpretation, effectively expand the written regulatory laws beyond the evident import of their words?

52. For example, in In re Sewell, 32 B.R. 116 (Bankr. N.D. Ala. 1983), rev'd, 79 B.R. 36 (N.D. Ala. 1984), the question was whether a mobile home lacking a motor was a "motor vehicle" for the purpose of a licensing statute requiring a filing to perfect a security interest. The bankruptcy judge put weight on the conduct of those governed by the law. Id. at 124 ("The Court is aided in determining what 'meaning' was placed on the statute in question by members of the public to whom it was addressed by the fact that each of the creditors gave evidence of having filed a financing statement on the mobile home in which it claimed a purchase money security interest."). Of course, people's compliance with a regulation is ambiguous: While they may have believed that the regulation applied, they may also have been acting in an abundance of caution.

53. Their failure to do so may have been deliberate. They may have realized, for example, that, for political or other reasons, they could not expressly bar pedestrians, but hoped to deter those who might misinterpret the sign or be discouraged by its ambiguous wording.

Or consider the judge who takes a "purposive" approach, interpreting the uncertain law in light of the purpose of the law itself. It may be relevant that people act a certain way, evidently without causing any harm, and therefore, without incurring regulators' concern. Consider all three stories: No harm was done by pedestrians on the country road, by children without a bus pass whom the bus driver recognized as entitled to ride, or by lawyers traveling interstate to serve clients' legal needs. One might infer that, in these contexts, applying the relevant rule or law would not serve its original purpose.

Finally, consider the judge who takes a "dynamic" approach, recognizing, as William Eskridge has suggested, that the meaning of a statute may change over time in light of the changed social context, including changes in other law, public values, and the social context in which the law is applied. That is, in fact, the best description of the approach taken by both the intermediate appellate court judges and the high court judges in Spivak. The judges gave some attention to the UPL law's wording (for example, what it means to "practice law") and, at least implicitly, to the law's purpose of protecting clients in the state from out-of-state lawyers who lacked proficiency in the state's law. But the judges also recognized that the law's reach had changed as law practice had changed. Implicitly, the disagreement among the judges was over how much law practice had changed and how much weight to give to the changes.

From a "dynamic" perspective, it was irrelevant in Spivak whether lawyers were relying on their understanding of the law on the books or in action, given the extent to which law practice in New York and elsewhere had developed in reliance on the understanding that it was legally permissible for lawyers to practice nationally. Lawyers traveled around the country to provide assistance in areas of federal law in which they had developed special expertise or to serve corporate clients with whom they or their law firms had developed a sustained relationship. Individual lawyers,

55. See Gonzalez, supra note 46, at 611-13 (describing Hart and Albert Sack's legal process approach).
56. See William N. Eskridge, Jr., Dynamic Statutory Interpretation, 135 U. Pa. L. Rev. 1479 (1987). Of these, Eskridge suggests courts should give greatest weight to changes in public values when an old statute does not specifically address the question before the court. Somewhat differently, Judge Guido Calabresi has argued that, like common law courts, courts interpreting old statutes should have leeway to prune those that no longer enjoy majoritarian support. See Guido Calabresi, A Common Law for the Age of Statutes (1982).
57. This was a context in which a dynamic approach was almost uniquely justified. Courts traditionally establish standards governing admission to practice law in the state and standards of conduct for those admitted. UPL laws implicitly recognize that it is the courts who "authorize" individuals to practice law in the state. State courts presumably may, by rule making, authorize out-of-state lawyers to practice law in the state, subject to whatever conditions the state courts deem appropriate. That being so, courts interpreting UPL laws owe less fidelity than might ordinarily be warranted to either the statutory language or the legislature's intent. Cf. Bruce A. Green, Doe v. Grievance Committee: On the Interpretation of Ethical Rules, 55 Brook. L. Rev. 485, 486-87 (1989).
law firms, and in-house corporate law offices had structured their practices and professional relationships around the ability to do so. The judges in Spivak might have given weight to what lawyers were actually doing out of respect for the same reliance interests that underlie the principle of stare decisis. At the same time, it was probably uncommon for lawyers to travel out of their states to assist individuals on matrimonial matters in particular.\textsuperscript{58} By shutting the door on the California matrimonial lawyer's travels, but leaving the door open to other interstate practices, the state's high court reserved judgment on the extent to which the law might be read to conform to existing and evolving practices.

Relying on how regulated people act within the law raises some policy concerns. One is that if people know courts will take others' conduct into account, they may have an incentive to over-rely on inferences about others' beliefs as an alternative to forming independent beliefs. Another is that people may then have an incentive to act strategically, hoping that if they and others get away with conduct that initially crosses the line drawn by the law, they will eventually reshape the law. Courts might not want to encourage people to knowingly violate the law en masse, get away with it, and then, if later called to account, attempt to benefit from their collective lawlessness by arguing that the law has now changed.

Even putting these concerns aside, it is unlikely that a court should give as much weight to how people act within the context of the law as people themselves give. Under any interpretive theory, what others do and evidently believe would not be as important to the courts as it might be to those who are subject to the law. Even more so, an aggressive regulator who is looking for a legal tool with which to challenge conduct that he considers problematic will undervalue the fact that the behavior has become common, and, indeed, view that as evidence of a prior regulatory failure and as cause for intervention. Thus, there will be a disjunction between how people who consider themselves law-abiding view their own conduct and how regulators view it. This may explain, at least in part, why regulators are sometimes accused of overreaching when they make creative use of the law to challenge questionable industry practices that seem to have become entrenched.\textsuperscript{59}

\textsuperscript{58} In general, it was probably less common for lawyers (other than those admitted pro hac vice) to work outside their states on matters governed principally by state law (other than Delaware corporate law or relatively uniform state commercial law).

III. COUNSELING ABOUT UNSETTLED LAW

Suppose that you are a New York lawyer in 1959. Your client, Spivak, says that he is a California lawyer who seeks your advice about the meaning and application of New York’s UPL law. Specifically, he wants to know whether he may come to New York to advise a woman, Sachs, in a matrimonial action. He explains that the woman already has a matrimonial lawyer, but she is a social acquaintance who will be assisted by having the advice of a second lawyer whom she knows and trusts. If Spivak were a “bad man,” he might want to know whether his representation is illegal and, if so, the likelihood he will have to pay a price, and what that price might be—for example, whether regulators bring UPL actions against out-of-state lawyers. But Spivak makes clear that he is law-abiding. In that case, what is the “law” with which he is seeking to abide and what does he need to know about it? 

One possibility is for the lawyer giving advice to act as seer: The lawyer would view the “law” as a prediction of what a court would say the law is. As the Spivak case illustrates, different judges might answer differently, depending on what principles of interpretation they employ and how they employ them. That being so, the lawyer’s prediction is fallible. The lawyer may predict that a court would find Spivak’s proposed representation of Sachs to be permissible, as the intermediate appellate court later did. But that would not be the end of the discussion. In deciding whether to rely on the lawyer’s opinion about the law, Spivak would want to know the possible consequences if the lawyer is wrong—as well as the possible consequences even if the lawyer is right. Surely, Spivak would have to be told about the enforcement risks if the lawyer’s prediction is wrong—namely, how likely it is that Spivak’s conduct might be challenged by the client in a fee dispute or by enforcement authorities. Even if the lawyer were confident that Spivak would be vindicated if he chose to defend himself, Spivak might not want to risk the expense and anxiety of having to do so. Further, given the advisor’s uncertainty, Spivak would want to weigh the extent of the risk that a court would find the conduct improper and impose sanctions. But even if Spivak were indifferent to the price he might personally have to pay, he might want to know the possible

60. One possibility that the lawyer in Spivak did not pursue, and that my hypothetical lawyer also is putting to the side, is seeking admission pro hac vice to serve as cocounsel.

61. See Model Code of Prof’l Responsibility EC 7-3 (1981); Holmes, supra note 6, at 458 (“[A] legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court . . . ”).

62. The Arthur Andersen criminal prosecution illustrates why, as a practical matter, regulated businesses and professionals might think that regardless of whether a court might approve their conduct, it is important to act cautiously. If a regulator brings a proceeding, a party has a powerful incentive to concede wrongdoing regardless of the predicted outcome of a judicial proceeding, not only because the outcome is never certain, but also because merely undergoing the proceeding may be ruinous.
consequences given his own understanding of what it means to be law-abiding. In particular, if his moral commitment were not only to obey the law, but to avoid coming close to the lines or to avoid the “gray areas,” Spivak would want to know the likelihood that the lawyer’s prediction was wrong.

Alternatively, the lawyer as “seer” might predict not what a court would say, but what a regulator would say, at least in contexts where, as a practical matter, regulators have the last word. This, one might say, is a prediction about the meaning of the law in action. For some regulated clients, there would be no meaningful ability to seek a judicial resolution if a regulator alleges that they transgressed an ambiguous law. The cost of defending itself and the punishment if the client is unsuccessful mean, as a practical matter, that the client will have to settle with the SEC, the state attorney general, or whichever other regulator initiates proceedings.

Another possibility is for the lawyer to act not as seer, but as judge. The lawyer would express her own best professional judgment about the reach of the uncertain law, adopting whatever interpretive principle she considers most apt and applying that approach as she sees most fit. A lawyer might read a law more broadly than a court would, either to promote its imperfectly expressed intent or to give effect to words that outstrip the legislature’s intentions. Or she might read the law less broadly, either

63. Likewise, the client’s moral commitment might include acting according to the “spirit” or “purpose” of the law even when the law does not extend to his proposed conduct, in which event the client would want not only to know what the law requires, but also to have an understanding about its origin and function.

64. Although the focus here is on what it means to counsel the law-abiding client about the law, none of this is to suggest that the lawyer’s advice would or should exclude a discussion about moral considerations independent of the legality of the client’s proposed conduct. The latter is the subject of Deborah Rhode’s contribution to this symposium. See generally Rhode, supra note 41. However, the distinction between counseling a client about the law and possible legal consequences, on one hand, and about moral considerations, on the other, is often not so clear. For example, Professor Rhode points to examples, such as the failure of Salomon Brothers’ general counsel to advise the company to correct a trader’s submission of false auction bids, and “the moral meltdowns on display in cases like Enron and its predecessors during the savings and loan crisis of the 1990s,” to suggest that “the ultimate justification for an ethical dimension to legal counseling is that there is no alternative.” Id. at 1324-25. But it might be argued that these are examples of legal meltdowns, not purely moral meltdowns, and that it would have been sufficient to avoid them if the lawyers (assuming they had sufficient factual knowledge) had provided appropriate advice about the law and its significance, and the clients had accepted it.

65. W. Bradley Wendel describes the role as more of an “amalgam” of a judge and the client: “Lawyers are not judges, who are institutionally charged with the task of remaining impartial, but they are also not clients, who may be permitted to approach the law from a partisan and self-interested perspective.” W. Bradley Wendel, Professionalism as Interpretation, 99 Nw. U. L. Rev., 1167, 1177 (2005).

66. See generally id. at 1197 (arguing that a lawyer must give advice based on “[i]nternal legal reasons,” that is, “those grounds (texts, principles that are fairly deemed to underlie and justify legal rules, interpretive practices, hermeneutic methods, and so on) that are properly regarded in a professional community as appropriate reasons to offer in justification of a result”).
because the law's purpose would not be served or because the law's language failed to go as far as the legislature intended. If she concluded that the UPL law permitted Spivak to represent Sachs, it would be all the more important for Spivak to be told the risks of relying on the lawyer's judgment. Because the lawyer would not purport to make a prediction about how a court would rule, the risk would be even greater in this case that, notwithstanding the lawyer's good faith belief that the law was inapplicable, a court would see it differently.

A different approach might be taken at least when the client seeks an opinion that will have legal effect. In some cases, a client will want to be able later to assert an advice-of-counsel defense—for example, an argument that the client is not subject to liability for "knowingly" violating a law of which knowledge is an element or an argument that the client should not be subject to punitive damages for willful wrongdoing. The client will want to be able to say later that it acted in good faith reliance on counsel's legal advice, obtained after fully disclosing to counsel all the relevant facts. If that is the client's aim, the lawyer might interpret the law in accordance with how courts expect lawyers to do so when courts recognize an advice-of-counsel defense—assuming the relevant doctrine resolves the issue. At the very least, the law may set bounds on how aggressively the lawyer can interpret the law.

But there is yet another possibility, that is, for the lawyer to act purely as counselor. Perhaps when the law is uncertain, the client wants to form his own judgment about what the law means, because his moral commitment is to conform to the law as he understands it, not as a lawyer understands it or as a lawyer predicts a court would understand it. What does it mean for a person to adopt the "internal point of view" once one gets beyond a law's "central core of undisputed meaning"? The client might want to understand the law's moral underpinnings and purpose in order to conform to the "spirit" of the law, regardless of the ambiguity of its letter. But what if self-restraint would not serve the evident purpose of a purely regulatory provision, such as the UPL law? Even assuming the lawyer predicted that a court would apply the law anyway, or even assuming that the lawyer personally interprets the law to apply, it is unclear that a law-abiding client must adopt those viewpoints. The ethics rules specifically authorize a lawyer to "discuss the legal consequences of any proposed course of conduct with a client and [to] counsel or assist a client to make a good faith effort to determine the . . . scope, meaning or application of the law." Presumably, this means "good faith" from the client's perspective, not the

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68. Hart, supra note 1, at 12.
A client might want to form his own judgment about the law. Surely Spivak, a lawyer, might do so. If so, the law-abiding client might choose to interpret the law as law-abiding people ordinarily do, rather than as courts and lawyers might. In that event, considerations about how others act with regard to the law would become important, not for purposes of calculating whether to violate the law and risk paying a price, but for purposes of forming a good faith understanding of the law’s meaning.

Finally, add one more element—namely, that the meaning of the law is not only indeterminate, but evolving. Suppose that several years have passed since New York’s high court held in Spivak that a California lawyer could not come to New York to advise a New York client about matrimonial issues. Now, a different California lawyer wants to know whether he can come to New York to negotiate a real estate deal for a New York corporation which he has previously represented in California. The corporation will also have New York counsel to advise about local law. The Spivak court previously adopted a “dynamic” approach to interpreting the UPL law and explicitly declined to decide how the law applied to other aspects of interstate law practice, which it acknowledged to be evolving. To what extent, in advising about the law, may the lawyer take account of that evolution in counseling the law-abiding client?

The law-abiding client would not want to violate the law today in order to contribute to social changes that lead to different understandings of the law at a later date. But if the law is unsettled, the law-abiding client might want to consider, among other things, that the likely meaning of the law today may be different from its likely meaning tomorrow. If the client’s moral commitment is to comply with a court’s predicted interpretation, the question becomes at what point in time?

The client might want to comply with the law as it would be interpreted (1) at the time he would act, (2) a short time later when the propriety of his particular conduct would be decided by a court (assuming it ever was), or (3) a long time later when the judiciary definitively resolved the issue through interpretation or rule making. More likely, the client’s moral compulsion to comply with the law for its own sake does not imply a moral

70. Cf. id. R. 3.1 (forbidding a lawyer from making a frivolous argument, but recognizing that a lawyer may make a “good faith argument for an extension, modification or reversal of existing law”).

71. The corporate client is unlikely to complain, and regulators are unlikely to question the conduct on their own initiative. As it has turned out, the question remains unresolved as of late 2006. Several years ago, the New York State Bar Association proposed to the presiding justices of the four departments of the Appellate Division that they adopt proposed amendments to the disciplinary rules to address interstate law practice. After the presiding justices failed to act for more than two years, and it became plain that they would not do so, the bar association withdrew the proposal, with the expectation of reintroducing it some years later as part of a set of proposed, comprehensive amendments to the state’s disciplinary rules.
compulsion when the law is uncertain to comply with a lawyer's understanding of the law's meaning or with the lawyer's (or the client's own) prediction of a present or future court's understanding. Nor should it. The court in Spivak issued a limited, rather than sweeping, ruling, in part because courts favor case-by-case adjudication, but perhaps also because the court wanted law practice to evolve freely. If that is so, then acting in the gray areas of an uncertain law as social practices evolve is not lawless by any measure, but is consistent with the courts' understanding of how the meaning of the law develops over time.

CONCLUSION

There has always been a skeptical strain in the legal academic and professional literature about how lawyers counsel clients, especially commercial and tax clients, when the law is unclear. The assumption has been that many lawyers assist clients in exploiting "loopholes" in the law by putting forth implausible, excessively formalistic interpretations of the law and assisting clients in structuring their affairs in reliance on such interpretations. These clients' decisions on how to act under the law turn on enforcement risks, not on an internal moral obligation to conform to the law.

The focus here, in contrast, has been on well-intentioned clients—those with an internal point of view. The point is that, in determining the meaning of the "law" with which they feel morally compelled to comply, law-abiding clients may draw inferences from what others do. This is especially so when social practices and the law itself appear to be evolving, but it may be so whenever the law's meaning is uncertain. Consequently, lawyers will advise law-abiding clients when others act without enforcement consequences in the gray area of the law. In such cases, the difference between "bad" and law-abiding clients, and the lawyers who counsel them, may not be readily apparent, at least from the perspective of one who looks at their behavior from an external point of view.

72. See Robert W. Gordon, A New Role for Lawyers?: The Corporate Counselor After Enron, 35 Conn. L. Rev. 1185 (2003); Bruce A. Green, Thoughts About Corporate Lawyers After Reading The Cigarette Papers: Has the "Wise Counselor" Given Way to the "Hired Gun"?, 51 DePaul L. Rev. 407 (2001); Pepper, supra note 7, at 1547; William H. Simon, After Confidentiality: Rethinking the Professional Responsibilities of the Business Lawyer, 75 Fordham L. Rev. 1453, 1457 (2006); Wendel, supra note 65, at 1174 (arguing that "lawyers [should] approach the law with the intent to recover the meaning of the law, rather than simply to manipulate formal features of legal texts").
Notes & Observations