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## Someplace Between Philosophy and Economics: Legitimacy and Good Corporate Lawyering

### Cover Page Footnote

Thomas Aquinas Reynolds Professor of Law, Georgetown University Law Center. Thanks to Ben Zipursky and Heidi Li Feldman for helping me get started, to Mitt Regan for helpful comments on an earlier draft, and to the participants at the Fordham Symposium for a stimulating discussion.

# SOMEPLACE BETWEEN PHILOSOPHY AND ECONOMICS: LEGITIMACY AND GOOD CORPORATE LAWYERING

*Donald C. Langevoort\**

## INTRODUCTION

What attitude toward the law should a lawyer have when advising a client? That is one of the motivating questions for this Symposium, and, of course, a central one that connects jurisprudence and professional responsibility.

People's answers will likely be influenced, implicitly at least, by what law they are thinking of when the question is posed. We can imagine many expressions of law that radiate a warm glow and readily incline one toward Hart's "internal" point of view grounded comfortably in duty and justice. Holmesian lawyers look callous and miserly when their advice with respect to this kind of law is simply about the odds of avoiding sanction.

But in the legal universe, how representative is this sample? This essay deals with the demands of responsible lawyering when one's client is a corporate or other business entity.<sup>1</sup> I suspect that to most business clients, many of the laws they encounter are mundane and, worse, suspicious in their origins. We would be naïve to think that laws always do more good than harm, or even that they are intended to do so. Too often, law in economic and commercial settings is the product of special interest haggling, political grandstanding, or bureaucratic sloth. In its totality, the bulk of commercial and regulatory law probably is mediocre at best. If this is the law we imagine, identifying the right posture for responsible legal advice gets much harder. To pose the question bluntly, what is the right way to advise a business person whose company is facing burdensome new regulation that is the product of effective lobbying by a trade group representing its competitors? Or with regard to new investor protection rules responding to some recent scandal, if it seems that compliance will

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\* Thomas Aquinas Reynolds Professor of Law, Georgetown University Law Center. Thanks to Ben Zipursky and Heidi Li Feldman for helping me get started, to Mitt Regan for helpful comments on an earlier draft, and to the participants at the Fordham Symposium for a stimulating discussion.

1. This has become a large enough subject now to have a casebook for itself. *See generally* Milton C. Regan, Jr. & Jeffrey D. Bauman, *Legal Ethics and Corporate Practice* (2005).

cost those investors much more in diminished returns than they will ever realize in protection?<sup>2</sup>

I am by no means suggesting that ill-conceived or mediocre laws necessarily dominate the business landscape, just that they are frequent enough and, perhaps more importantly, that many businesspeople genuinely believe that they are quite frequent. Both jurisprudence and professional responsibility scholars ought to take this challenge fairly seriously—good advice, after all, depends on constructive engagement with the audience to which it is directed.

My aim in what follows is to articulate a role for the “good” corporate lawyer that is more capacious and appealing than that of the Holmesian legal risk calculator. But for the reasons just suggested, I find myself unable to accept that law has a strong normative claim merely because it is law, and, again, strongly suspect that most who inhabit the business world share that perspective. To be sure, I am saying nothing new here: The point I am making comes fairly close to what many others, including Stephen Pepper,<sup>3</sup> have argued. That posture, however, usually tends to set one off in an effort to distinguish among laws that have moral content and those that do not, such as *malum in se* versus *malum prohibitum* or criminal versus civil. As generalities, these distinctions do not work very well. And as a result, it is easy to backslide toward the entirely amoral perspective.

What I want to put on the table is a distinction that might have more traction, and which a good corporate lawyer could employ to engage her client in a constructive, appealing way. It involves substituting the sociologist’s favorite word, legitimacy, for morality, in considering what follows when we think about the professional responsibility of corporate lawyers in terms of the corporation’s pursuit of social legitimacy. In other words, suppose we think of the “inside view” of legal obligation not so much as a (normative) moral claim but as a (descriptive) societal expectation.

This distinction may seem flimsy, and may in the end prove to be no better than any of the prior efforts. Maybe it is simply a way of retelling the well-worn “lawyer as statesman” story. But I am intrigued by a number of different strands of contemporary legal and social science research wherein legitimacy is an increasingly useful concept, and how these strands might entwine in the corporate world. In corporate governance, for example, the “agency cost” perspective, which has come to dominate in legal scholarship, has a plausible sociology-based competitor in the idea of “resource dependency,” which assumes that the organizational imperative is

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2. See generally Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 Yale L.J. 1521 (2005). I do not go anywhere near as far as Romano in doubting Sarbanes-Oxley, but suspect that at least some of it is of questionable efficacy. See Donald Langevoort, *Internal Controls After Sarbanes-Oxley: Revisiting Corporate Law’s “Duty of Care as Responsibility for Systems,”* 31 J. Corp. L. 949 (2006).

3. Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in Jurisprudence and Ethics of Lawyering*, 104 Yale L.J. 1545 (1995).

to gain resources from a variety of public and private actors.<sup>4</sup> Gaining legitimacy in these interactions is key, which is why, for instance, directors might be chosen for their ability to negotiate the interactions rather than (as most corporate legal scholars assume) their ability to monitor. Recent sophisticated work in corporate social responsibility (CSR) picks up on this to demonstrate why CSR is likely a real behavioral phenomenon rather than the mere window dressing cynics make it out to be.<sup>5</sup> Legitimacy also plays an important role in the social psychology of law-abidingness,<sup>6</sup> and of organizational compliance with law.<sup>7</sup> The economics of reputation and, more speculatively, the economics of identity<sup>8</sup> touch on it as well.

Underlying this effort is a suggestion about how morality and legitimacy relate, although I certainly claim no deep expertise in social theory outside the corporate world. As discussed more fully below, characteristic of economic activity is the need for high-velocity cooperative behavior. This behavior is burdened not only by the possibility of selfish opportunism, a well-recognized problem in law and economics, but by any disagreement about matters that increases transaction costs. To facilitate cooperative behavior, norms must evolve in economic settings that are neither so weak as to discourage trust nor so strong as to diminish incentives.<sup>9</sup> These norms, which in turn define legitimacy, are unlikely to be well-grounded in any coherent ethical philosophy because they are the product of compromise and are driven by conflicting, shifting social pressures. They tend more toward baseline than aspiration. The embedded relativism is easily criticized as falling short of the most revered expressions of moral philosophy and social justice.<sup>10</sup>

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4. See Jeffrey Pfeffer & Gerald R. Salancik, *The External Control of Organizations* 258-62 (1978); Amy J. Hillman & Thomas Dalziel, *Boards of Directors and Firm Performance: Integrating Agency and Resource Dependence Perspectives*, 28 *Acad. Mgmt. Rev.* 383, 388 (2003).

5. See generally Cynthia A. Williams & John M. Conley, *An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct*, 38 *Cornell Int'l L.J.* 493 (2005).

6. See generally Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 *Ann. Rev. Psych.* 375 (2006). Useful collections of materials on this subject include *The Psychology of Rights and Duties: Empirical Contributions and Normative Commentaries* (Norman J. Finkel & Fathali M. Moghaddam eds., 2005) [hereinafter *The Psychology of Rights and Duties*], and *The Psychology of Legitimacy: Emerging Perspectives on Ideology, Justice, and Intergroup Relations* (John T. Jost & Brenda Major eds., 2001) [hereinafter *The Psychology of Legitimacy*].

7. See generally Lauren B. Edelman & Mark C. Suchman, *The Legal Environments of Organizations*, 23 *Ann. Rev. Soc.* 479 (1997).

8. See generally George A. Akerlof & Rachel E. Kranton, *Identity and the Economics of Organizations*, 19 *J. Econ. Persp.* 9 (2005).

9. This oversimplifies, of course. A functionalist view of norms naturally runs into problems of stickiness and path dependency; it is doubtful that norms are truly efficient at any given point in time.

10. Psychologists are particularly interested in why so many people accept the legitimacy of structures and institutions that operate to their immediate disadvantage, particularly uneven distributions of wealth. See James M. Olson & Carolyn L. Hafer, *Tolerance of Personal Deprivation*, in *The Psychology of Legitimacy*, *supra* note 6, at 157.

For this reason, lawyers and legal academics whose work is tied to the workings of markets and economic behavior—except when they act as social critics—shy away from a strongly moral conception of legal obligation. Market-driven activity rewards sensitivity to transaction costs, thus encouraging the natural inclination to negotiate. Of course, law can be seen as an effort to override these “morals of the marketplace.” But those inclined toward the workings of the marketplace are likely to be ethical relativists to whom even the law is market-produced (that is, something resembling public choice theory) and thus having no special moral significance. Either because of special interests or lawmaker incompetence, they think, the law will often be inferior to what the market would do on its own, or with less heavy-handed regulatory interference. This is why pursuing a strong “inside view” agenda in a world inhabited by corporate lawyers and their clients is an uphill battle.

However, this is not cause for abject despair. What I am suggesting is that corporate lawyers and their clients are likely inclined towards pragmatism, not opportunism. The baseline might not be as appealing as we might want, but it is far better than nothing. My substitution of legitimacy for morality is just a pragmatic move designed to describe a form of professional responsibility that does not devolve into simple legal risk calculation. Instead, it involves the good lawyer in the second step of helping the corporate client assess the legitimacy of its behavior, which, as we shall see, is no small task.

#### I. “INSIDE-OUT” IN THE CORPORATION

Though I am not particularly well-read in the contemporary “inside view” debate, I assume that inside view proponents have as their baseline the existence of an inherent moral obligation to obey the law, so that resting behavior on the probability of detection/magnitude of sanction calculation is wrong. There is also a second claim commonly made (though not necessarily so): The moral content of at least some laws makes literal or technical compliance insufficient; instead, attention must be paid to the law’s spirit or purpose.<sup>11</sup>

My assigned task is to relate this to the situation where the client is a corporation. In terms of the underlying corporate theory, there are really two separate questions. The easier question, for me, is whether the corporation has the *right* or *freedom* to act as anything other than a wealth-generator for its stakeholders (which to most corporations means its shareholders). This is certainly one of the great debates in corporate theory, with Milton Friedman as the canonical citation that it does not,<sup>12</sup> and Frank

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11. See W. Bradley Wendel, *Professionalism as Interpretation*, 99 Nw. U. L. Rev. 1167, 1168 (2005).

12. See Milton Friedman, *Capitalism and Freedom* 133-34 (1962).

Easterbrook and Dan Fischel as evangelists for the view that the profit-maximizing constraint extends even to compliance with the law.<sup>13</sup>

Today, however, this debate has largely run out of steam.<sup>14</sup> To those who believe that natural persons have moral obligations of any sort, it is difficult to accept that these obligations could be deflected by the consensual act of investment in a legal entity and delegation to professional managers.<sup>15</sup> The more sophisticated view—that organizations take on characteristics separate and distinct from its stakeholders—lends itself naturally to a moral theory of distinct corporate rights and responsibilities.<sup>16</sup> So does the view that I prefer: that the corporation is a creature of the state whose nature and purposes are simply defined by law, from which a norm of law-abidingness follows easily. Those who still aggressively insist on shareholder wealth maximization as the only permissible goal of the corporation are either hard-core libertarians who refuse to accept that the firm is anything more than a consent-based private association of investors or, far more likely, instrumentalists, who claim that any permission to deviate from the goal of wealth maximization leads naturally to sloth and slack rather than exemplary behavior by those handling other people's money. The vast majority of instrumentalists do not quarrel with the view that the obligation to comply with the law overrides the pursuit of profits. They simply do not want us to consider this part of "corporate law."<sup>17</sup>

So far as corporate law itself is concerned, the law's primacy over strict profit-maximization is well recognized.<sup>18</sup> The business judgment rule prevails in a way that gives officers and directors permission to pursue moral or social goals so long as some possible (usually reputational) argument might be made that the corporation would benefit in the long run, which certainly protects law-abidingness. Many state laws go further, expressly authorizing "other regarding" activity by the corporation. And at least one well-known case indicates that the business judgment rule does not protect deliberate decisions not to obey the law.<sup>19</sup>

Thus, there is very little today to support the view that the corporation is *required* simply to be calculative in how it approaches the law. The separate question then is whether it is obliged to be law-abiding in anything

13. See Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 Mich. L. Rev. 1155, 1168 (1982). For additional citations and a critique, see Cynthia A. Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 N.C. L. Rev. 1265 (1998).

14. For a recent criticism of this view using conventional economic analysis, see Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. Rev. 733 (2005).

15. Or if one takes a more managerialist view, it is hard to explain why managers gain freedom from moral claims on their behavior simply because they have raised capital externally.

16. Meir Dan-Cohen, *Rights, Persons and Organizations: A Legal Theory for Bureaucratic Society* 78 (1986).

17. See, e.g., Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 Geo. L.J. 439 (2001).

18. See Elhauge, *supra* note 14, at 756-62.

19. See *Miller v. AT&T Co.*, 507 F.2d 759, 762 (3d Cir. 1974).

more than calculative terms. In light of what was just said, “corporateness” should simply make no difference. The one authority that has thoroughly considered the specific question of acting “within the law” in recent years is the American Law Institute’s *Principles of Corporate Governance*, which says clearly that the corporation “is obliged, to the same extent as a natural person, to act within the boundaries set by law” regardless of whether or not such conduct enhances shareholder wealth.<sup>20</sup>

If so, then “corporateness” is unimportant to the main questions that motivate this Symposium, so that I could well end my contribution here. Whatever the lawyer is expected to do with respect to a human client, she should be expected to do with respect to a corporate client. But I will not end here, because there is something more pragmatic to say about corporate lawyering. The nature of ethical deliberation within an organization is in many ways different from the ethical deliberation of a natural person. To the extent that a lawyer’s professional responsibility is something more than shrewd risk calculation (which I believe, but have nothing novel to offer as justification<sup>21</sup>), it follows that the good lawyer should take those differences into account in order to act responsibly. Fortunately, given my interests and expertise, this allows me to turn to the social sciences for insight as to what those differences might be.

As a starting point, consider the ethical decision making of the individual. There is rich psychological literature on this question, which I could not hope to capture fully. The older Kohlberg-style research claims that people vary in their stages of moral development—with good ethical reasoning dominating the decisions of those with more fully developed moral awareness and sensitivity. More recent research has stressed the automaticity of moral reactions,<sup>22</sup> which is only partially (and often unsuccessfully) adjusted by conscious deliberation. This suggests that some situations—particularly where empathy is triggered—will produce fairly strong inclinations to “do good,” while others will prompt egocentric construals and forms of self-deception that make self-serving behavior more

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20. *Principles of Corporate Governance* § 2.01 cmt. G (1994). As Cynthia Williams has pointed out, there are certain aspects of corporate law (e.g., formulations of the duty of care and indemnification rules) that are inconsistent with a strong corporate obligation to obey the law. See generally Williams, *supra* note 13. These can be explained in two separate ways that do not lead to the conclusion that the *Principles*’ main statement is disingenuous. First (and to me more plausibly), these other rules reflect views about protecting directors from personal liability that go beyond the specific context of illegality. Second, they may subtly reflect a Holmesian view in which both corporations and individuals have *some* freedom to act in a calculative way. All the text says is that the corporation’s obligations are the same as the natural person’s, not that the natural person’s obligation to obey the law is necessarily absolute.

21. See Richard W. Painter, *The Moral Interdependence of Corporate Lawyers and Their Clients*, 67 S. Cal. L. Rev. 507, 525 (1994).

22. See Jonathan D. Cohen, *The Vulcanization of the Human Brain: A Neural Perspective on Interactions Between Cognition and Emotion*, 19 J. Econ. Persp. 3, 10-13 (2005); Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 Psychol. Rev. 814, 818 (2001).

likely even among those who seem able, at the conscious level, to engage in sophisticated ethical reasoning.<sup>23</sup> Even at the individual level then, it may well be a challenge for the lawyer to express an “inside” view of legal obligation that makes the client more likely to act appropriately.

Whatever the challenge at the individual level, the problem compounds many times over when we are dealing with organizational decision making. The importance of the effort also compounds because of the one key difference between individual and corporate clients: In the latter setting, there are no natural persons with unqualified authority to act *as* the client.<sup>24</sup> Many of the behavioral differences are well understood and frequently noted by business and legal scholars. For example, diffusion of responsibility in an organization reduces the likelihood that any given person or small group will be inclined to assume it. In this sense, structure and process (i.e., corporate governance) become inextricably bound up in corporate ethics in a way that we would not see with individuals. In fact, many post-Sarbanes-Oxley reforms in corporate governance go explicitly to questions of ethics. There is the requirement of a code of conduct for senior financial officers, and new internal controls requirements that force both lawyers and auditors to investigate the firm’s ethical climate along with legal compliance.

My interests recently have focused on the cognitive dimension to this problem, about which much can be said. To summarize an argument I have made elsewhere, organizations develop strong or weak belief systems—sense-making devices that privilege certain inferences, construals, and explanations over others.<sup>25</sup> Often these are grouped under the heading of “corporate culture” as coordination mechanisms. Imagine two people who have to cooperate to get work done. Constant negotiation over what is happening, what to think about it, and how to proceed slows down the pace of work. To get work done, assumptions have to be made. And the taken-for-granted beliefs that permit the most work to get done are those that simplify, reduce anxiety and the potential for conflict, and motivate. My prediction is that perceptions that deflect hard ethical dilemmas (that is, rationalizations) are more adaptive than those that generate moral angst.

Now imagine what happens when tens of thousands of people must interact, rather than just two. The need for taken-for-granted beliefs to “grease” the endless interactions required for efficient coordinated effort

23. See Don A. Moore & George Lowenstein, *Self-Interest, Automaticity, and the Psychology of Conflict of Interest*, 17 Soc. Just. Res. 189, 195-96 (2004); Ann E. Tenbrunsel & David M. Messick, *Ethical Fading: The Role of Self-Deception in Unethical Behavior*, 17 Soc. Just. Res. 223 (2004).

24. See generally William H. Simon, *Whom (or What) Does the Organization’s Lawyer Represent?: An Anatomy of Intraclient Conflict*, 91 Cal. L. Rev. 57 (2003).

25. See Donald C. Langevoort, *Opening the Black Box of “Corporate Culture” in Law and Economics*, 162 J. Inst. & Theo. Econ. 1 (2006); see also, e.g., Donald C. Langevoort, *Resetting the Corporate Thermostat: Lessons from the Recent Financial Scandals About Self-Deception, Deceiving Others and the Design of Internal Controls*, 93 Geo. L.J. 285 (2004) [hereinafter Langevoort, *Lessons*].

expands mightily, especially if the firm is under competitive pressure. Put simply, “stories” about why what is happening is acceptable are functional on average, even though they may not be entirely realistic and may cause those inside the organization to ignore important risks. As I have argued elsewhere, at the very least the good corporate lawyer must maintain a cognitive distance from these organizational pressures even to be a good Holmesian legal risk calculator, much less to play a more ambitious professional role.<sup>26</sup>

## II. BRINGING LEGITIMACY INTO THE CONVERSATION

To sociologists, belief systems “legitimate” perceptions, inferences, and behaviors; this is just another way of saying that they provide normative cover for the privileged beliefs. My point above is that corporate cultures will legitimate certain perceptions because they operate to grease interactive productivity, rather than introduce grit into the organizational machinery. This, it seems to me, says much about organizational responses to legal and ethical demands.

There is ample evidence, even at the individual level, that people’s judgments about whether to comply with the law are heavily affected by their perceptions of the law’s legitimacy as applied in a particular instance.<sup>27</sup> But legitimacy is a largely social construct—hence we would often expect fairly common patterns of legal compliance, with some legal claims having substantial legitimacy and others (e.g., speeding, certain copyright violations) resisted based on doubts about their legitimacy.

At the organizational level, corporate cultures have the capacity to influence perceptions of the law’s legitimacy, especially when there is some ambiguity in what the law demands. On this point, we come very close to the subject of this Symposium, because it connects closely to the “inside view” discussion. As I suggested earlier, corporate cultures will sometimes offer agents an account that rationalizes marginal or “aggressive” compliance, or even noncompliance. This poses one of the most interesting dilemmas in professional responsibility: the appropriate interaction with clients (or clients’ agents) who have formed a strongly critical or dismissive view of the law’s demands, and to whom marginal compliance is thus ethically permissible.

Before turning to this question in more detail, I should note an important point about corporate cultures. As organizational sociologists point out, cultures vary in strength, and for the most part, it is unusual for a culture to

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26. Donald C. Langevoort, *The Epistemology of Corporate-Securities Lawyering: Beliefs, Biases and Organizational Behavior*, 63 *Brook. L. Rev.* 629 (1997). For a very thoughtful application to the work of inside counsel, see Sung Hui Kim, *The Banality of Fraud: Re-situating the Inside Counsel as Gatekeeper*, 74 *Fordham L. Rev.* 983 (2005).

27. Tom Tyler’s work has emphasized this, in particular noting the fairness (procedural and otherwise) of the law’s demands. See, e.g., Tyler, *supra* note 6; Tom Tyler, *A Deference-based Perspective on Duty: Empowering Government to Define Duties to Oneself and to Others*, in *The Psychology of Rights and Duties*, *supra* note 6, at 137.

emerge that overrides the more general cultural values that most agents bring to work with them. Most corporate cultures, in other words, are fairly weak and only fill in firm-specific gaps with respect to those broader values.<sup>28</sup> This is quite good news, because it operates to make firm-wide misbehavior more difficult. All other things being equal, agents resist acting contrary to their values and will do so only if strongly motivated, and firms pay a substantial cost in morale and good will if the motivation is too heavy handed.

That said, rationalized resistance is common enough.<sup>29</sup> This can be the product of a strong corporate culture (most likely when a strong culture is essentially a survival instinct), or just a gap-filler when more general cultural norms are not in play (e.g., when the law is fairly technical in its operation). Legal researchers who pay attention to organizational behavior have found many examples of this. David Spence's work in environmental compliance shows that a dominating reason for noncompliance is the corporate actors' belief that the laws are poorly crafted, unduly burdensome, and arbitrarily enforced.<sup>30</sup> This triggers a cascade of plausible excuses (utilitarian and otherwise) for cutting corners in the face of imperfect enforcement of those laws. With respect to the corporate financial reporting scandals, which had many different contributing causes, one likely contributor was a rejection in key segments of the business community during the 1990s of the legitimacy of technical accounting rules in producing valuable disclosure. Playing games with "Generally Accepted Accounting Principals" was at worst trivial and could often be rationalized as actually doing more good for the company than harm, especially in the early stages of the slide down the slippery slope toward corruption.<sup>31</sup>

So what does the good corporate lawyer do in the face of this? Put another way, what is the "inside view" when the law's legitimacy is doubted, as it so frequently is in the business community? Being largely unread in the contemporary jurisprudence literature, I will simply assume that critics have repeatedly made the point that laws vary substantially in how well they are crafted, what motivates them, and what balance of costs and benefits they have for society. Putting aside the too-easy case of evil or corrupt laws, there probably are numerous statutes and administrative regulations that generate more costs than benefits, either because they were ineptly drafted in the first place, were overly influenced by special interests, or have since become obsolete. Although the dominant view in jurisprudence is that literal compliance even with poorly crafted laws is

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28. See generally Edelman & Suchman, *supra* note 7.

29. This is often the product of the slippery slope. See, e.g., John M. Darley, *The Cognitive and Social Psychology of Contagious Organizational Corruption*, 70 *Brook. L. Rev.* 1177 (2005).

30. See generally David B. Spence, *The Shadow of the Rational Polluter: Rethinking the Role of Rational Actor Models in Environmental Law*, 89 *Cal. L. Rev.* 917 (2001).

31. See generally Donald C. Langevoort, *Technological Evolution and the Devolution of Corporate Financial Reporting*, 46 *Wm. & Mary L. Rev.* 1 (2004).

obligatory, it is not at all clear to me that there is a compelling professional responsibility to search for its spirit or purpose in an effort to go any further. And the dominant view notwithstanding, many people would find a posture of strategic noncompliance morally acceptable on utilitarian grounds so long as the poor quality of the law is clear enough. I do not want to argue the point because I am sure that jurisprudence and professional responsibility scholars have debated it quite thoroughly as a general matter. I simply want to emphasize the professional dilemma it creates. To take an immediately pressing illustration, consider the many prophylactic requirements of the Sarbanes-Oxley Act, which are widely seen as a knee-jerk political reaction disproportionate to the severity of the underlying problems, costing shareholders (the primary intended beneficiaries) far more than any benefits it might generate. Numerous academics agree: Roberta Romano calls it “quack” corporate governance,<sup>32</sup> and even more moderate commentators have expressed doubts about whether any sensible cost-benefit calculation guided the legislative process or the rule making that followed.<sup>33</sup> Over the last two years, corporate lawyers have had to assist their clients through the compliance process. What should be the touchstone, especially if such criticism is apt?

Of course, this concern is not specific to business law. But as noted earlier, I think that the business community is particularly sensitive to it, and business involvement in lawmaking through lobbying and other forms of influence is hardly conducive to a romanticized view of law’s moral force. Disenchantment is more likely. If we turn specifically to corporate law, moreover, there is a strong academic view, and some statutes and doctrine in support, that the law of business associations is private law—the contractualization of nearly everything, so that all is negotiable, nothing fixed. As many critics of the trend have noted, such instability drains nearly all moral force out of the law, making it hard to discern an inside view. While this essay is no place to try to explain why this trend occurred, or how far the law has come to the purely contractual model, “thou shall not loot” may be the only practically immutable rule in corporation law. As today’s executive compensation packages demonstrate, even that rule may be challenged at the margins. That leaves the good corporate lawyer without much of an inside view to work with on matters that are purely “corporate.” Process and negotiation so often trump substantive fairness even in the one doctrinal subject area that used to be solidly fiduciary, the duties of loyalty and good faith.

## II. LAWYERS AND LEGITIMACY

I have made a jumble of claims about corporations and their lawyers, which come down to the idea that the world in which they operate is so

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32. See generally Romano, *supra* note 2.

33. See, e.g., Robert Charles Clark, *Corporate Governance Changes in the Wake of the Sarbanes-Oxley Act: A Morality Tale for Policymakers Too*, 22 Ga. St. L. Rev. 251 (2005).

dominated by the necessity of compromise that a strongly moral view of legal obligation is off-putting. That the law itself, at least that regulating business behavior, is so often the product of compromise and flawed processes simply underscores that perception, leading to strongly held doubts that merely because something is the law, it has particular virtue. These doubts, rather than anything about the nature of the corporation, tempt corporate lawyers to adopt a Holmesian posture.

This suggests that an entirely amoral conception of professional responsibility will emerge, creating the dreaded race to the bottom where the lawyer is just a cynical legal risk calculator. While this is a real danger, I want to turn to the flip side of the notion of legitimacy in the hopes of checking the cynicism. As noted earlier, social legitimacy and prevalent norms fall short when measured against coherent expressions of ethics. But they are better than simple self-interest, because they reflect society's baseline demands from those participating in society and the economy. They are widely recognized within the business community. The idea that I want to put forth is that corporate lawyers are responsible for helping their clients understand and appreciate the relationship between legality and legitimacy, and that this is both a challenging and professionally rewarding task.

A reasonable fear at the outset is that legitimacy is little more than the most over-used word in sociology, too fuzzy and manipulable, or that the pursuit of legitimacy is little more than public relations. That impression management techniques can provide cover for illegitimate behavior is certainly true, especially in the face of ambiguity. My prediction, however, is that truly illegitimate behavior is actually difficult to sustain, and that on average, a decision to persist in such behavior has negative returns for the firm. An interesting body of sociological work suggests that businesses for the most part act as if this is so, and have reasonably good "legitimacy instincts." Robert Kagan and his colleagues term this "social license"—the recognition that if conduct inexcusably falls short of societal demands, the firm will lose access to important resources and be disadvantaged.<sup>34</sup> This is so regardless of whether the conduct is law-abiding or not; something can be lawful but still illegitimate. But to the extent that the law tracks

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34. See, e.g., Neil Gunningham et al., *Social License and Environmental Protection: Why Businesses Go Beyond Compliance*, 29 *Law & Soc. Inquiry* 307 (2004); Robert A. Kagan et al., *Explaining Corporate Environmental Performance: How Does Regulation Matter?*, 37 *Law & Soc'y Rev.* 51, 69 (2003) (discussing a mill manager's claim "that the sanctions it feared most for breaching regulations were not legal but informal sanctions imposed by the public and the media, and hence it was motivated less by avoiding regulatory violations per se as anything that could give you a bad name" (internal quotation marks omitted)); see also Williams & Conley, *supra* note 5; Jason Scott Johnston, *Signaling Social Responsibility: On the Law and Economics of Market Incentives for Corporate Environmental Performance* (U. Pa. Inst. for L. & Econ. Research, Paper No. 05-16, May 2005), available at <http://srn.com/abstract=725103>. Business people's inclination to obey the law when the law's demands are properly framed is an important message of Ayres's and Braithwaite's well-known work on regulation. See generally Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992).

legitimacy, law-abidingness is a way of staying within social bounds. Moreover, this is not disconnected from legal risk itself—prosecutor, judge, and jury decisions are plausibly related to judgments about legitimacy, so that legal consequences can follow that would not if the behavior were illegal but not illegitimate. By way of example, concealment and deception are often tolerated in economic behavior. But if the concealment or deception is connected to seemingly offensive behavior, what was tolerable and commonly accepted receives a lightning bolt of liability—just ask Arthur Andersen or Bernie Ebbers. As noted earlier, more sophisticated understanding of CSR also builds on this idea, so that firms in a wide variety of settings (environmental compliance, consumer safety, etc.) seek to maintain their social license through a combination of impression management and real behaviors, with the latter having more sustainability.

So what is the lawyer's role here? If Kagan is correct that firms generally perceive the need to respect their social license, we have to inquire into why, sometimes, they lose sight of it.<sup>35</sup> There are two possibilities, each of which pulls in the lawyer. One is an agency cost problem: that the self-interest of some agents justifies causing the firm to take a social license (and legal liability) risk. The negative consequences may be stronger for the firm than for the individuals. The other, which I find more interesting, relates back to what was discussed earlier. The internal work of the firm requires cognitive simplification—belief systems—to achieve coordination. A natural incentive is to grease these interactions by deflecting moral doubts and anxieties that might otherwise burden them. Under certain circumstances, the internal culture may cast doubt on the legitimacy of legal demands in order to maintain internal coherence and productivity.<sup>36</sup>

Although this kind of rationalization will not necessarily be inaccurate, it is easy to see how it can also be myopic or self-serving, mindlessly justifying behavior that from an external perspective would cross the line. Sarbanes-Oxley is a good example. There are doubtlessly many aspects of the legislation that deserve skepticism, and many businesspeople who honestly believe that it is bad law. If unchecked, however, this attitude can lead to rationalizations that justify cutting corners and other forms of “cosmetic compliance,”<sup>37</sup> which can easily devolve into noncompliance. I suspect that the lawyer who pushes for a higher level of compliance because “it's the law” will not be persuasive unless she can (in true Holmesian

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35. See Kimberly D. Elsbach, *The Architecture of Legitimacy: Constructing Accounts of Organizational Controversies*, in *The Psychology of Legitimacy*, *supra* note 6, at 391.

36. This is, of course, not the only problem corporate lawyers face. They also face problems of information diffusion, which raise hard questions about lawyers' responsibility to “dig” for the truth when encountering cause for suspicion. See generally William H. Simon, *Wrongs of Ignorance and Ambiguity: Lawyer Responsibility for Collective Misconduct*, 22 *Yale J. on Reg.* 1 (2005).

37. See Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 *Wash. U. L.Q.* 487 (2003).

fashion) also threaten a significant risk of detection and enforcement, and that posture fails when the risk diminishes, as it probably has already.

The legitimacy-oriented posture that I envision has two dimensions. First, it pushes back on organizational inferences and rationalizations that are essentially self-serving. Left to its own, an internal culture is likely to doubt the legitimacy of too much law. In essence, the lawyer needs to advocate so far as is plausible for the law's legitimacy, not out of any sense that the law is necessarily right but because it is so easy inside the culture to devalue it. Second, the good lawyer has to be sensitive to and engage the client's agents on those aspects of the law or regulation that reflect societal expectations of appropriate behavior—that is, legitimacy. To give a concrete example, the most hated portion of Sarbanes-Oxley in the business community is the requirement of audited internal controls.<sup>38</sup> Much of the increased costs comes from hard-to-justify intrusiveness on mundane matters such as personnel protocols and double-check mechanisms far removed from likely risks of malfeasance.<sup>39</sup> I would not expect a lawyer to push too hard here, even though that might be the regulatory expectation. But there are specific places where a failure of internal controls—for example, on managerial self-dealing—would be regarded as a sin of omission inconsistent with emerging societal expectations about senior executive accountability. The good lawyer has to fight here, because this goes to the legitimacy (not just compliance) of the systems of checks and balances in a public corporation, against managers primed to resist.

This brings me to a point I have made before.<sup>40</sup> Lawyers have to maintain a posture of cognitive independence from the internal belief systems of the corporation in order to do their jobs well. Being too close creates the risk that powerful organizational perceptions and inferences will spread and compromise the quality of the legal advice, regardless of how the goal of professional responsibility is articulated. Skilled corporate lawyers should not simply take this as a trite invitation toward an attitude of professional superiority but learn carefully how and why these belief systems can be so powerful. Only then will professional engagement be successful.

#### CONCLUSION

In the end, I confess, I am a Holmesian who believes that law and morality are only loosely coupled. More importantly, the business world to which I pay most of my professional attention is one in which the language of legitimacy has a much stronger pull on behavior than the language of morality. That makes me doubt that a project to promote a strong “inside

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38. See William J. Carney, *The Costs of Being Public After Sarbanes-Oxley: The Irony of “Going Private,”* 55 *Emory L.J.* 141 (2006).

39. See Langevoort, *supra* note 2, at 959-60.

40. See *supra* note 26 and accompanying text.

view” of the law’s demands generally would find much of a willing audience.

But I am also unwilling to give up on some way of engaging clients beyond the language of risk. Both lawyers<sup>41</sup> and legal academics signal much by the way we think and talk about responsibility: Being relentlessly descriptive can become a self-fulfilling prophecy to the extent that what is repeatedly identified as common or predictable is then gradually accepted as normative as well.<sup>42</sup> The “devolution” of the legal profession—in corporate practice, particularly<sup>43</sup>—may be the product of economic circumstances beyond our control, but it certainly does not help when the dominant social science methodology persistently treats lawyers and their clients as either economic opportunists or risk actuaries.

To be sure, a legitimacy-based vision of the lawyer’s role is not very different from long-standing calls for lawyers to think about risks to their clients in terms broader than simple legal sanction. The payoff is not in the conception but in understanding precisely how and why agents of the corporation think about the law’s demands—including the possibility that they mischaracterize or trivialize the legitimacy of the law in ways that are unwise. Countering those perceptions and inferences is hard, and takes sophistication, which makes the task deserving of professional respect. It requires study of why managers are tempted to violate the law, which has long been of interest to professional responsibility scholars. But perhaps less expectedly, it also requires study of why managers so frequently adhere to or exceed what the law demands, because that is where we will find the language, the beliefs, and the social influences from which advice in the business setting can be framed constructively, with an eye to legitimacy as well as legality. Perhaps as we learn more about the psychology, sociology, and economics of legitimacy and social license, good lawyers will get some help.

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41. See Tanina Rostain, *Ethics Lost: Limitations of Current Approaches to Lawyer Regulation*, 71 S. Cal. L. Rev. 1273, 1336 (1998).

42. See, e.g., Moore & Lowenstein, *supra* note 23, at 195-96.

43. See Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 Md. L. Rev. 869 (1990).