

***EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER***  
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**PROLOGUE**

On Friday afternoon, December 12, 1997, John Gellene entered the federal courthouse in Milwaukee in the company of Mark Rotert. Rotert was a lawyer from the Chicago law firm of Winston and Strawn. The forty-one-year-old Gellene had been in many courthouses before as a bankruptcy partner at the prestigious Wall Street law firm of Milbank Tweed Hadley & McCloy. Milbank traced its roots to the year after the Civil War ended. For more than a century it had provided legal services to the social and economic elite, most notably the Rockefeller family. Gellene was regarded as one of the best bankruptcy lawyers in the country, and had worked on some of the largest corporate reorganizations in the world. The previous year he had earned more than \$600,000. He had a residence on the upper East Side of Manhattan, where he lived with his wife and three young daughters.

Gellene had spent most of 1994 in this same courthouse in Milwaukee, guiding local mining tool manufacturer Bucyrus-Erie through a contentious reorganization in bankruptcy. Despite a bitter feud among creditors, Bucyrus had emerged in good shape. Indeed, its business outlook was so bright that it recently had been purchased by a large private investment partnership. The last time Gellene had been in the building was in April 1996 for a hearing to determine the fees that Milbank should receive for its work on the bankruptcy. A month later, U.S. Bankruptcy Judge Russell Eisenberg approved the firm's receipt of \$1.86 million as compensation for the services it provided to Bucyrus. Gellene thus could look back with pride on much of what had happened in this courthouse from February 1994 until May 1996.

Today, however, Gellene was not entering the building as an advocate. Instead, he was a criminal defendant. Rotert was not Gellene's co-counsel; he was his attorney. On the other side of the table were not creditors negotiating how to divide the assets of a financially troubled company. Rather, it was the United States government, acting through Assistant U.S. Attorneys Steven Biskupic and Joseph Wall. Today was the day that Gellene would be arraigned on charges of committing three federal crimes. Today he would enter his plea in the case.

The basis for Gellene's prosecution was something that had happened in this very courthouse. In 1993, Gellene had been asked by powerful Milbank partner Larry Lederman to provide his services to Bucyrus because of Gellene's experience in bankruptcy and financial restructuring. Lederman had advised Bucyrus off and on for

five years. He also had provided legal guidance for several years to investment banker Mikael Salovaara. Salovaara had furnished financial advice to Bucyrus over the same five-year period. He was a former Goldman, Sachs partner who had recently left the firm with a colleague to establish an investment fund known as South Street. In 1992, South Street had advanced several million dollars to Bucyrus in return for a lien on all the company's manufacturing equipment. As the company's major secured creditor, South Street would be first in line to be paid if Bucyrus filed for bankruptcy.

Gellene began working with Bucyrus shortly before the company announced in February 1993 that it would no longer be able to make interest payments on its debt. Bucyrus hoped that it could obtain agreement among its creditors on a reorganization plan under Chapter 11 of the federal Bankruptcy Code. For most of 1993, Gellene helped negotiate the terms of that plan. Ultimately, Bucyrus gained acceptance from all but one large creditor, Jackson National Life Insurance Company (JNL), who strongly opposed it. In February 1994, Gellene filed a Chapter 11 petition on behalf of Bucyrus that laid out the terms of the proposed reorganization plan. JNL immediately contested it. At the same time, Gellene applied to the court for official appointment as Bucyrus' counsel during the Chapter 11 proceedings.

As part of this application for appointment, Gellene was required under Bankruptcy Rule 2014 to list his and Milbank's connections with any party in interest in the bankruptcy. At the time, Milbank also was representing Mikael Salovaara on one matter and South Street on another. Gellene himself was the lead counsel in the South Street matter, although he had done very little work on the case. The work for Salovaara and South Street created a potential conflict of interest for the law firm. As counsel for Bucyrus in its bankruptcy, Milbank would represent a debtor that had a duty to treat fairly all parties with a claim on its assets. As counsel for Salovaara and South Street, Milbank might have an incentive to provide advice to Bucyrus that favored South Street over other creditors.

Gellene didn't disclose these Milbank ties to Salovaara when he submitted the affidavits that accompanied his application. Judge Eisenberg appointed him in March 1994 to represent Bucyrus in the bankruptcy. The judge eventually approved the Bucyrus reorganization plan in December 1994, capping almost two years of intense negotiation and litigation among the parties.

Two years later, JNL discovered Gellene's concealment of Milbank's connections with Salovaara and South Street. By then, JNL controlled Bucyrus. Milbank was forced to return the entire \$1.86 million it had been awarded for representing Bucyrus in the Chapter 11 case. Bucyrus also sued it for malpractice, a claim that the firm settled for an amount reported to be between \$27 and \$50 million.

Finally, in December 1996 federal prosecutors in Milwaukee obtained a grand jury indictment of Gellene. He was charged on two felony counts of making false declarations in the affidavits he had submitted to Judge Eisenberg. He also was charged on one felony count for using a false affidavit under oath to claim that Milbank was eligible to receive payment for its work on the bankruptcy. Each of the first two counts carried a penalty of up to five years in prison and a \$250,000 fine. The third count was punishable by up to five years in prison and a \$10,000 fine. Any prison sentence over a year would deprive Gellene of his right to vote, his ability to be a teacher, his eligibility to hold public office, and the opportunity to practice law. He was the first lawyer ever charged under federal criminal law for violating Bankruptcy Rule 2014.

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WHY DID JOHN Gellene do it? Why did he risk all he had – his wealth, influence, success, livelihood, and his very freedom, not to mention the security of his wife and children? He had worked brutal hours for years, traveling the country and the world, in pursuit of a partnership granted only to a privileged few at Milbank. Why would he place that in jeopardy by failing to make a simple disclosure?

The answers to these questions are fascinating because they shed light on the tragic fall of a Wall Street lawyer. Gellene's story, however, has broader significance. It offers a window onto the dramatic forces that have irrevocably transformed elite law firm practice over the past quarter century. No one who hopes to fathom the ethical landscape that lawyers such as Gellene must navigate can ignore this sea change in what it means to practice in a large law firm. Furthermore, Gellene's experience illustrates the ways in which specialities such as bankruptcy can generate distinct practice cultures with their own norms and understandings of ethical obligations. Appreciating how lawyers identify, frame, and resolve ethical questions thus requires sensitivity to both the types of organizations in which they work and the particular fields in which they practice.

By analyzing John Gellene's story against the backdrop of these forces, this book is a response to the increasing call for work in legal ethics that takes account of the particular contexts in which lawyers practice. In addition, it reflects the view that case studies can be an especially valuable way to deepen our understanding of the complex interaction between context and individual character. As one observer has put it, the narrative focus of case studies can "allow us to visit the psychological and moral realms of legal actors both before and after they make decisions or take actions."

A focus on practice setting illuminates the vast differences in the experiences of lawyers. While it's common to speak of "the" legal profession as if it were a unified

body of similar practitioners, the reality is that lawyers work in a variety of practice organizations and are involved in a broad range of activity. The incentives, opportunities, and pressures that confront a lawyer in a large law firm are different from those that lawyers face in a corporate legal department, a government agency, or a small boutique firm. Similarly, lawyers practicing securities law, litigating personal injury cases, providing tax opinions, and bringing criminal prosecutions take account of considerations in their daily work that can be strikingly different. How lawyers respond to the particular forces that shape their practice gives specific content to broad professional ideals and ethical aspirations. For these reasons, it may be more accurate in some respects to speak of “legal professions” rather than “the legal profession.”

The large Wall Street firm that is the practice setting for this book is interesting for several reasons. First, it was the rise of such firms in the late nineteenth century that provoked the first sustained efforts to distinguish lawyers as members of a profession with its own unique ethical standards. Anxiety that lawyers were becoming indistinguishable from other commercial occupations led to the formation of the American Bar Association, the creation of a formal canon of ethics for lawyers, and the requirements that persons attend law school and pass a bar examination in order to practice law.

Second, the Wall Street firm was able to influence these reform efforts so as to establish the claim that it represented the pinnacle of professional skill and independence. Reinforced by certain features of the market for corporate legal services, this view prevailed until the last quarter of the twentieth century. Since then, dramatic changes have increased competition among Wall Street firms for both clients and lawyers. On a practical level, these changes have had ripple effects for virtually all lawyers in private practice. On a cultural level, the impact has been at least as profound. Just as the rise of large firms a little over a century ago prompted alarms about lawyers’ professional status, so the recent changes that have roiled these firms have rekindled this anxiety. For better or worse, in other words, the large Wall Street firm has served as something of a bellwether of the state of the legal profession for over a hundred years.

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Understanding the case of John Gellene thus requires placing him into the context of the Wall Street law firm at a particularly unsettling historical moment. It’s common to describe that moment as the decline of law practice from a profession to a business. Framed in this way, the ethical implications are straightforward. Individual lawyers and the firms in which they work are motivated more by greed than they were a generation ago. As a result, they are more willing to forsake their ethical obligations than the lawyers who came before them.

The two prevailing explanations for Gellene's behavior reflect this view. The first is that Gellene was a moral rogue, an aberrant partner with a weakness for cutting corners when it suited his purposes. The second is that Gellene was the fall guy, someone pressured to conceal a conflict of interest so that Milbank could reap a reward of almost \$2 million in fees. From this perspective, Gellene was done in by a corrupt organization. The first explanation blames Gellene's fall on flawed character; the second depicts him as the victim of circumstances that he couldn't resist.

Understanding the ethical challenges that large firm lawyers face, however, requires a richer account of how character and circumstance interact in daily practice. We need to move beyond the claim that unethical behavior is attributable mainly to a decline in the personal morality of lawyers or in the integrity of law firms – and that this results from the change in law practice from a profession to a business.

It's true that large law firms now must devote more explicit attention to financial viability than they did a generation ago. Firms unquestionably are subject to greater competition for clients and lawyers than ever before. In recent years they have adopted business principles that their corporate clients embraced far earlier. Law firm leaders speak more openly about profitability and revenues than their predecessors ever did.

Understanding the significance of these changes, however, requires more than broad theories of professional decline. First, we need more detailed accounts of the impact of heightened competition. How precisely do large law firms differ from those a generation ago? What policies and procedures have firms adopted in response to market forces? How does escalating competition shape the career paths of lawyers in large firms? What distinctive opportunities, pressures, and temptations do lawyers face in large firms? What kinds of personal traits are adaptive in this environment?

Focusing on these questions directs attention to three features that are common to practice in modern large law firms. First, a shift to merit-based compensation and away from job security means that partners as well as associates are competitors in a tournament within the firm. Prior scholarship has developed and refined the notion that working life within the large firm is organized as a tournament. That research, however, has focused on competition among associates for partnership. This book suggests that the tournament doesn't end when an associate makes partner. Partners continue to compete for compensation, status, and job stability on an ongoing basis, with their ability to generate revenues serving as the primary scorecard.

The ability to produce revenues in today's large law firm depends primarily on entrepreneurial effort. The firm itself is far less able than before to furnish a permanent

base of clients that provide a steady stream of work. The lawyer therefore must seek out his or her own clients. The common way to describe this system in the large firm is that you “eat what you kill.” There are two main ways to be an entrepreneur who can compete successfully in a tournament organized around this principle. The first, and preferable, way is to be a “rainmaker”: someone who develops contacts with clients that lead to regular business. The second is to cultivate a good relationship with a rainmaker, thereby gaining access to the work that his or her clients generate.

Previous research has suggested that law firms represent an organizational labor market. Associates with large amounts of “human capital” but few client contacts match up with partners whose clients spawn more work than those partners individually can handle. I argue that the same process occurs among partners as well: non-rainmakers with more legal skills than clients compete for relationships with rainmakers who have the clients that can use those skills.

A second feature of large firm practice today is that market forces and greater specialization by lawyers make the particular field in which a lawyer practices an increasingly important source of guidance. Law firms today grow more by acquiring individual lawyers, practice groups, or entire firms than by promoting associates to partner. This means that they tend to house more and more divergent personalities and areas of practice under one roof. This can make it difficult to establish and sustain an overall organizational culture. At the same time, legal work continues to require more refined specialization. As a result, lawyers are likely to draw many of their norms and much of their practice culture from colleagues working in the same specialty, rather than from the firm as a whole. The organizational setting in which lawyers practice thus is not monolithic, but multicultural. The firm establishes the general parameters of competition for reward and punishment. Lawyers’ practice specialities, however, may shape how they approach that competition -- the obstacles that they perceive, the strategies that they adopt, and the tradeoffs that they make.

Finally, lawyers in large firms now work more and more with temporary teams of lawyers and other professionals on discrete projects for intensive periods of time. Teams of persons with varied skills, sometimes from different organizations, are assembled for specific projects, then disassembled and reconstituted for others. Furthermore, competition for clients makes “winning” serve as the central mission for many of these projects. Such teams also can serve as a source of norms for practicing lawyers. The intense interdependence of the experience, combined with close identification with the client, helps create a distinct cognitive and moral universe that can shape how lawyers identify and respond to ethical questions.

This book places the emergence of law firms with these features in historical

context, by describing the evolution of Wall Street firms from the late nineteenth century to the dawn of the twenty-first. The experience of Milbank Tweed serves to illustrate this history. I draw on secondary sources, interviews, and internal Milbank Tweed memoranda to tell the story of how the firm evolved from a bastion of the social elite to an aggressive entrepreneurial enterprise. John Gellene began at Milbank just as the old order was crumbling, and was named a partner as the new order was being put in place. His journey from associate to partner thus occurred in a period of economic, political, and cultural transformation at the firm.

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APPRECIATING COMMON FEATURES of large firm practice provides a valuable framework for gaining a deeper understanding of the impact of recent changes in the legal profession. We can gain even more insight, however, by applying that framework to examine the experience of individual lawyers in particular instances. Case studies offer the chance to explore how character and circumstance interact in subtle ways, producing distinctive individual stories that nonetheless resonate beyond their specific characters. This leads us to the story of John Gellene.

Telling this story requires delving into the details of the Bucyrus bankruptcy in order to get a ground-level view of the circumstances in which Gellene was practicing. What did he understand his assignment to involve? How was that affected by his interaction with others? Whom did he consider his adversaries? What obstacles did he see to achieving a successful result? What alternatives and choices did he perceive himself as having? What pressures did he feel? In other words, how did Gellene see his world? How did the characteristics that he shared with lawyers in other large firms combine with his unique experience to produce a singular perspective that shaped his behavior?

In recounting these details, I draw on transcripts of the Bucyrus bankruptcy case, the record of Gellene's criminal trial and sentencing hearing, documents relevant to the bankruptcy and criminal proceedings, documents prepared in connection with the financial transactions that were the subject of dispute in the bankruptcy, and interviews with participants in and observers of these events, as well as with bankruptcy specialists. These sources help stitch together a narrative that conveys a sense of what it was like for John Gellene to be representing Bucyrus in its bankruptcy in 1993 and 1994. The story includes a discussion of how the pursuit of higher profits led large New York firms into corporate bankruptcy practice in the early 1980s, and the ways in which this has created tension with bankruptcy conflict of interest rules.

Understanding how Gellene's experience was both similar to and different from other lawyers helps us construct an account of what happened that is more complex than

the claim that Gellene was an ethical rogue, or that Milbank was fundamentally corrupt. I use this account to explore the influences and motivations that could have prompted Gellene to act as he did, and the rationalizations that he may have used to justify his behavior. This analysis draws on interdisciplinary insights from behavioral and moral psychology, organizational theory, and business ethics to examine the psychological dynamics of how large firm lawyers may approach ethical issues. It suggests that these lawyers may be particularly susceptible to “moral drift”: the inability to reflect critically on the conventional “scripts” that tend to guide everyday behavior. I then discuss measures we can take that may help reduce the vulnerability of such lawyers to the ethical dangers of moral drift.

My approach to legal ethics thus moves back and forth between a focus on the structural features of large law firm practice, and on how those features intersect with the personal history of individual lawyers. Awareness of structure helps identify potential influences on behavior and possible targets of reform. At the same time, close analysis of behavior can deepen and modify our understanding of the situations that large firm lawyers confront. Ideally, this process will yield a richer ethical portrait of elite law firm practice than either focus alone. Furthermore, it will move us beyond the debate over whether law practice is still a profession or has become a business.

John Gellene’s behavior was not as lurid as many of the actors involved in the legal and business scandals of recent years. He didn’t loot a company of its assets, or manipulate financial statements to mislead investors. There’s no evidence that he withheld information from the bankruptcy court so that he could favor South Street over other creditors. Indeed, Bucyrus’ general counsel had high praise for the quality of Gellene’s work on behalf of the company. The absence of obvious explanations such as fraud or greed makes Gellene’s story an especially good vehicle for analyzing the subtle but powerful forces that shape behavior in today’s large law firms. The failure to disclose a conflict of interest in bankruptcy court in Milwaukee may seem light years away from the high-profile combat of Wall Street law practice. This book argues, however, that they are linked in intricate and fundamental ways.

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MAGISTRATE AARON GOLDSTEIN presided over John Gellene’s arraignment on that cold December day in Milwaukee. He first advised Gellene of his rights: the right to remain silent; the right to a lawyer; and the right to ask that the court appoint a lawyer for him if he were unable to pay for one. Gellene responded that he understood these rights. Assistant U.S. Attorney Biskupic then proceeded to describe the three counts contained in the indictment: two counts of making a false material statement in connection with a bankruptcy case, and one count of using a document while under

oath despite knowing that it was materially false. Gellene's attorney Mark Rotert entered a plea on Gellene's behalf of not guilty on all counts.

The final matter at the proceeding was the ability of Gellene to travel while awaiting trial. Before the arraignment, Gellene had been interviewed by the court's Pretrial Services Officer. The Officer had recommended to the court that the defendant be released on his own signature on the condition that he surrender his passport and report to the Officer as directed. Biskupic indicated that he had no problem with the recommendation. Goldstein ruled that Gellene could travel within New York and New Jersey, to Illinois to visit his counsel, and to the Eastern District of Wisconsin where the trial was to be held. If he wished to travel anywhere else, Gellene would have to notify the Pretrial Services Office in advance.

Goldstein admonished Gellene that if he failed to make any court appearances, he would have his bond revoked and would be charged with the crime of bail jumping. The magistrate also told him that he could be charged with a violation of the Witness Protection Act if he threatened or harmed anyone who was a witness, victim, or informant. If he violated any local, state, or federal law while out on bail his penalties automatically would be increased.

These warnings seemed more appropriate for a member of organized crime than a bankruptcy lawyer who had spent most of his time helping companies restructure their debt obligations. John Gellene, however, was now within the domain of the criminal law, accused of committing an offense against society. In February 1997, he would be the defendant in a trial that could result in imprisonment, a fine of hundreds of thousands of dollars, and the loss of his ability to practice law. As he left the building, he could not have helped but ask himself a question: How had he fallen so far so fast?