Moral Convergence: The Rules of Professional Responsibility Should Apply to Lawyers in Business Ethics

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Abstract

This article argues that the rules of professional responsibility should extend to lawyers advising on corporate ethical questions. It establishes how lawyers became ethical advisors to business organizations and then suggests that the ethical foundations of law and business have converged in a manner that brings their conceptions of "right versus wrong" increasingly into alignment. It finds evidence for this in two parallel developments. The first is a series of scandals that have rocked the corporate world and are likely symptoms of a larger phenomenon; the second is a series of key doctrines that have permeated professional education in law and promoted profit maximization as a shorthand for justice. Between these two parallel stories lie shared ethical concepts that embody the convergence in values to which this article attends. Whereas this convergence might make decision making easier, it diminishes ethical rigor within organizations. With that in mind, the following pages advance two related claims. A descriptive one argues that the resulting moral convergence is a condition in which managers and lawyers effectively rely on one another's conceptions of "right" rather than applying separate moral standards to ethical problems, thereby diminishing the rigor of ethical judgment in the business context. And a prescriptive claim argues that the rules of professional responsibility could help resolve this by extending their reach to cover lawyers advising on ethical questions in business organizations.

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INTRODUCTION

Professional legal ethics can serve as a valuable complement to business ethics in protecting against the temptations of profitable yet harmful corporate behavior. But this is only true when legal and business ethics remain distinct; as I will describe, such a distinction has become increasingly tenuous. Among organizations still practicing a shareholder primacy approach to corporate responsibility, business and law are increasingly engaged in a relationship of moral convergence. Here, the frameworks underpinning judgment in each may have converged over time, removing much of the complementarity in their partnership for decision-making purposes. Another way to conceptualize this is by recalling Ronald Dworkin's underlying point in *Law's Empire*: that law is all-encompassing in its moral authority, even when we attempt to reflect upon its limitations and idiosyncrasies.[1] This Article embraces that idea and asks what becomes of law when it harmonizes its unstated ethical priors with those of a neighboring discipline—in this case, business.

1.

> There is inevitably a moral dimension to an action at law, and so a standing risk of a distinct form of public injustice. A judge must decide not just who shall have what, but who has behaved well, who has met the responsibilities of citizenship . . . If this judgment is unfair, then the community has inflicted a moral injury on one of its members. . . .

RONALD DWORKIN, LAW'S EMPIRE 1 (1986).

The rules of legal ethics instruct attorneys to act directly or indirectly for the public interest.[2] But what exactly *is* the "public interest" and who gets to decide? Among lawyers trained in the United States, there have been two competing visions of this term—each with its own assumptions for how "moral character and fitness"[3] might be understood. On the one hand, many within the legal profession still view morality in *social* terms; it exists among and between people and matters most when human beings interact.[4] For these attorneys, justice means *fairness* and *equity* between individuals and groups. On the other hand, others view ethics in *egoistic* terms—through an individualist framework that views justice as something achieved by pursuit of self-interest.[5]

Both social and individualist forms of justice can be—and are—supported by the common moral framework of Utilitarianism. This framework is consequentialist, saying that the "right" decision can be determined based on expected outcomes. Most legal scholars use Utilitarianism in its social sense, often invoking the phrase "social utility."[6] This phrase describes the expected aggregate benefit or pleasure to a circumscribed community. And yet, two problems with this understanding have become apparent. First, in theory, aggregate social utility alone does not demand distributional equality or fairness. It means the economic pie available to society should be as large as possible, but does not say how that pie should be sliced. Second, perhaps because of the above ambiguity, many have applied "social utility" in a way that actually supports egoism or self-interested utility maximization. How can this be?

According to Zach Liscow, this has occurred through a longtime emphasis on efficiency.[7] In Law and Economics, two alternative definitions of efficiency are salient. The first, Pareto Optimality, means that no individual can be made better off by a market transaction without hurting another person.[8] Everyone has what they can pay most for. The second definition, Kaldor-Hicks Efficiency, says that even where a new transaction might benefit one party but hurt another, it is still

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2. MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 6 (2016) [hereinafter MODEL RULES].

3. "Good moral character and fitness is vaguely defined as the ability to perform one's professional work in an open, honest and forthright manner. Most jurisdictions have statutes establishing what constitutes good moral character and fitness." Timothy Dinan, *Bar Application Character and Fitness Background Check – Part 1*, NAT'L JURIST (March 22, 2018, 9:47 AM), https://www.nationaljurist.com/national-jurist-magazine/bar-application-character-and-fitness-background-check-part-1 [https://perma.cc/97QJ-R4JX].

4. This refers to scholars in the Law and Society and Law and Economics movements, respectively. For more on the relationship between these see, for example, Lauren B. Edelman, *Rivers of Law and Contested Terrain: A Law and Society Approach to Economic Rationality*, 38 LAW & SOC'Y REV. 181, 182–183 (2004).

5. *Id.*

6. *See, e.g.*, George P. Fletcher, *Fairness and Utility In Tort Theory*, 85 HARV. L. REV. 537, 537 (1972); Izhak Englard, *The Basis of Tort Liability: Moral Responsibility and Social Utility in Tort Law*, 10 TEL AVIV U. STUD. L. 89, 89 (1990).

7. *See generally* Zachary Liscow, *Is Efficiency Biased?*, 85 U. CHI. L. REV. 1649 (2018).

8. "A resource allocation is Pareto *optimal* if any movement from that allocation would make at least one person worse off." JEFFREY L. HARRISON, LAW AND ECONOMICS IN A NUTSHELL 35–36 (6th ed. 2016).

efficient if the beneficiary is willing—in principle—to compensate the victims.[9] As Liscow points out, Kaldor-Hicks has come to dominate Law and Economics.[10] And yet, because it eliminates Pareto Optimality's requirement of "no harm done" and introduces only the possibility of compensation, Kaldor-Hicks has actually taken the general adherence to "social utility" and moved it toward individual utility—or egoism. In effect, this has allowed Law and Economics to over-promise itself as a "science" of legal decision-making and a stand-in for deliberative justice. Or, as Mark Glick and Gabriel Lozada have said, "[t]he main problem with L&E [Law and Economics] textbooks is that they attempt to give economic efficiency, in any form, a status it should not have. Economic efficiency is not about justice, but the law presumably is."[11]

And therein lies the issue. The conflation of utilitarian cost-benefit analysis with egoism is a documented phenomenon in scholarship and both legal and business practices. It is a conflation that must be acknowledged and unpacked in any meaningful analysis of the interface of legal and business ethics. But to the extent that this Article embraces that conflation, it does so "ethnographically"—by seeing this area through the hearts and minds of those currently writing about and practicing it. Throughout this piece, I use "Law and Economics" interchangeably with "Economic Analysis of Law" (EAL), even while there remains disagreement on the mutual solubility of these terms. Some sources refer to them synonymously.[12] Others consider EAL distinct from Law and Economics for its unidirectional application of economic methodology to legal objects of study.[13] Guido Calabresi has written of the need to use lessons about law, cultivated from other disciplines such as anthropology, to better inform background assumptions and methods from economics, thus prompting him to advocate for "Law and Economics" as a bidirectional pathway distinct from the unidirectional.[14] One key implication of this distinction between Law and Economics and EAL pertains to the legacy of Jeremy Bentham's utilitarianism. Some have said that Bentham's thoughts about unfettered cost-benefit analysis are more purely reflected in EAL, whereas Law and Economics is, or should be, more cognizant of the humanistic

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9. Paretian concepts of efficiency, if applied to all public policy decisions, could lead to very limited government action. After all, everyone would have to agree with the policy. Another version of efficiency, Kaldor-Hicks or wealth maximization, responds to this problem. For something to be Kaldor-Hicks efficient, those individuals made better off by the policy or change would have to be made sufficiently better off that they *could* compensate those who are made worse off. The key here is that the compensation is 'potential,' not actual.

Id. at 39–40.

10. *Id*.

11. Mark Glick & Gabriel A. Lozada, *The Erroneous Foundations of Law and Economics*, INST. FOR NEW ECON. THINKING WORKING PAPER SERIES NO. 149 1, 90–91 (2021), https://doi.org/10.36687/inetwp149 [https://perma.cc/L6YP-BN7K].

12. *See* Paul H. Rubin, *Law and Economics*, THE LIBR. OF ECON. AND LIBERTY, https://www.econlib.org/library/Enc/LawandEconomics.html [https://perma.cc/ZR64-B8X4] (last visited Nov. 8, 2021).

13. Lewis Kornhauser, *The Economic Analysis of Law*, STAN. ENCYCLOPEDIA OF PHIL. (2017) ("Economic analysis of law deploys the tools of micro-economic theory to study legal rules and institutions.").

14. GUIDO CALABRESI, THE FUTURE OF LAW AND ECONOMICS 4 (2016).

idiosyncrasies that might complicate ethical judgement yet help refine economic theories and methods.[15]

Over the past forty years, Law and Economics' dual visions of "justice as efficiency" and "efficiency as self-interested action with hypothetical compensation" have grown. The latter has enjoyed the financial support of major corporate and high net worth benefactors, which in turn has led to the formation of research centers and think tanks supporting its perspective inside and outside American universities, and has brought the appointment of key writers to the federal judiciary.[16] Moreover, through the "organizational entrepreneurship" of these centers, Law and Economics successfully entered the mainstream of U.S. legal education and professional development—aspiring attorneys today cannot pass through the normal three-year J.D. degree program without significant exposure to its key precepts in the curriculum.[17] Advanced specialty courses in the topic are also on the rise among law school offerings. In a world of increasing multiculturalism and globalism, where accounting for experience grows more complex, the simplicity of Law and Economics has great appeal in the adjudication and settlement of disputes. But where does this leave the moral standing of lawyers today?

As described below, global businesses have come to rely heavily on legal counsel in determinations of "right versus wrong."[18] Whereas the growth of ethics in the standard business school curriculum since the scandals of the early 2000s is an encouraging development, lawyers are often the ones who are placed prominently in the position of advising companies on doing the "right" thing.[19] As I will explain, the rise of Law and Economics within the legal academy and its subsequent influence on legal professionals has made it more likely than in prior eras that businesses which turn to lawyers as a source of independent moral judgment may hear echoes of their own cost-benefit approach to ethics. In other words, business and law are increasingly in a relationship of moral

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15. *See* Keith Hylton, *Law and Economics Versus Economic Analysis of Law*, 48 EUR. J.L. & ECON. 77, 85 (2019) (stating that EAL is the more direct descendent of Benthamic utilitarianism); *see also* CALABRESI, *supra* note 14, at 1–2 (making the very same point).

16. *See* STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (2008); Paul Baumgardner, "*Something He and His People Naturally Would Be Drawn to": The Reagan Administration and the Law-and-Economics Movement*, 49 PRESIDENTIAL STUD. Q. 959 (2019).

17. For example, Torts is a required first-year course in U.S. law schools. The following are just some of the casebooks that include sections on economic analysis in tort cases: RICHARD A. EPSTEIN & CATHERINE M. SHARKEY, CASES AND MATERIALS ON TORTS 1186, 1319 (2020); WARD FARNSWORTH & MARK F. GRADY, TORTS: CASES AND QUESTIONS 96, 130 (2019); JOHN FABIAN WITT & KAREN TANI, TORTS: CASES, PRINCIPLES, AND INSTITUTIONS 158–85 (5th ed. 2020); AARON D. TWERSKI, JAMES A. HENDERSON JR. & W. BRADLEY WENDEL, TORTS CASES AND MATERIALS 166, 514 (2021); ARTHUR BEST & DAVID W. BARNES, BASIC TORT LAW CASES, STATUTES, AND PROBLEMS 99 (2007).

18. *See generally* BENJAMIN HEINEMAN, THE INSIDE COUNSEL REVOLUTION: RESOLVING THE PARTNER-GUARDIAN TENSION (2016).

19. *Id.*

convergence.[20] This is a descriptive claim about changes that have taken place in law beyond the purview of the average business scholar or manager. Given that, this article also argues that lawyerly conduct when advising companies on ethical matters should be governed by the Model Rules of Professional Conduct.

The article supports these claims by first laying a conceptual groundwork for scholars across business, law, and the social sciences to contextualize the arguments made here. It begins with a brief discussion of the role of lawyers in organizational ethics and culture, then describes recent developments in the legal profession as they relate to business organizations. In the next section, the article examines three specific cases of ethical misconduct among global businesses, and the role played by lawyers in those instances. The article then turns to describing how legal thought has evolved through the influence of the Law and Economics movement of the latter 20th century focusing on four key ideas that have come to shape doctrine. The piece then addresses key objections provoked by my primary claim that business and law have undergone moral convergence, and that this may play a role in the corporate scandals over the last several decades. Finally, before concluding, the article offers a solution to the dilemma raised: extending application of the rules of professional responsibility to lawyers advising on ethical questions in business organizations.

I. BACKGROUND

The background context for this discussion can be found in business ethics, law and organizations, law and markets, and sociolegal studies. Because my claims bring together these diverse topics, some definitions are in order.

One set pertains to morality and ethics. In lay use, these terms are often synonymous, but in philosophy they have distinct meanings. *Morality,* in lay use, means intuitions about right and wrong. The term *moral convergence,* in this article, describes an emergent co-dependence between two or more communities such that "independent" moral judgment between them becomes a logical impossibility. *Ethics* is a structure of rules that can lead to answers about right and wrong, whereas morality describes a system of thought or a mentality that can underlie those rules. In application, the terms are often used synonymously. But as denoted in its title, this article uses them to mean slightly different things. *Ethical* still refers to the systematic application of moral judgment in the professional or bureaucratic context. Legal ethics is a significant set of constraints placed upon attorney conduct, which is most notably used to limit their pursuit of

20. Here, I am not suggesting that *convergence* by itself is a negative development. What makes it negative is its coincidence with a presumed moral independence afforded legal expertise. If it were agreed that the goal of professional legal counseling was to only advise on questions of what the law "says," and if that was all that lawyers did, then there might be nothing wrong with business and law sharing a singular ethical framework and applying this to decision-making.

market self-interest when using their professional position.[21] *Business ethics* then refers to systems of thought and practice for arriving at the "right" course of action among business organizations. This article is concerned with legal ethics as well as the reliance of business leaders on lawyers in the realm of business ethics. As I describe here, that reliance has been historically grounded in a perceived moral independence generated by the hitherto distinct ethical frameworks assumed to be in play in Western law. In other words, business managers have assumed lawyers to exercise independent and ethical judgment—one not premised solely on profit—in advising their organizations. But, as I suggest, the distinctiveness of the predominant framework present in law is now reasonably in question given the influence of Law and Economics.

In the past thirty years, business ethics as a management sub-discipline has grown and responded to numerous, widescale corporate scandals and shockwaves. The main Western frameworks for business ethics include Utilitarianism, Kantianism, Virtue Ethics, and Care Ethics.[22] As devised by Bentham and John Stuart Mill, Utilitarianism emphasizes "utility," which is often synonymized with happiness or pleasure rather than simple use value. Whereas Mill wrote that pleasure could be experienced in qualitatively different ways, Bentham believed that it could be evenly compared across subjects and therefore was a quantitative measurement.[23] Bentham's view lent itself well to the rise of liberal economics, where most goods could be monetized, traded, and later securitized. Once the pleasure derived from activities could be monetized, it could be easily compared and weighed against the displeasure the activities would bring about for other people or against the displeasure non-activity would conjure in the decision-maker. Under this framework, the morally "right" choice is the one that elicits the greatest aggregate pleasure for the relevant circumscribed system: the individual, the family, the community, the nation, or the world.[24]

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21. Riaz Tejani, *A Working-Class Profession: Opportunism and Diversity in U.S. Law*, 42 DIALECTICAL ANTHROPOLOGY 131, 135–36 (2018).

22. *See* JOHN R. BOATRIGHT & JEFFREY SMITH, ETHICS AND THE CONDUCT OF BUSINESS 48–55 (8th ed. 2017); *see also* Rita Manning, *Caring as an Ethical Perspective*, *in* BUSINESS IN ETHICAL FOCUS 56–62 (Fritz Allhoff, Alexander Sager & Anand Vaidya eds., 2d ed. 2017).

23. DAVID MEELER, *Utilitarianism*, *in* BUSINESS IN ETHICAL FOCUS 35–42 (Fritz Allhoff, Alexander Sager & Anand Vaidya eds., 2017).

24. Richard Posner has explained that Law and Economics' use of utilitarianism is, by necessity, one that equates "happiness" with wealth maximization. *See* RICHARD POSNER, THE ECONOMICS OF JUSTICE, 48–49 (1983). Kantianism opposes this instrumentalist view of moral judgment. Whereas both Bentham and Mill's approach to "right versus wrong" choices were outcome oriented (or consequentialist), Kant argued that such choices must focus upon the inputs to decision making—especially the incorporation of a decisional principle, rule, or duty that, if applied, would govern the hypothetical actions of all of humanity. *See* Heather Salazar, *Kantian Business Ethics, in* BUSINESS IN ETHICAL FOCUS 43–48 (Fritz Allhoff, Alexander Sager & Anand Vaidya eds., 2d ed. 2017). In practice, this would mean that it might be right to steal from a neighbor if and only if the circumstances causing you to do so—medical necessity for example—would be dire enough that *everyone* should be forgiven for behaving similarly under the circumstances. In this sense, it matters not whether stealing *in this exact instance* would produce pleasure, but whether all people stealing in all such instances would produce a livable world. It may be useful to note, foreshadowing the discussion below, that Western legal

Corporate social responsibility now holds that business organizations owe some duty to civil society at large in exchange for the rights and privileges society furnishes these organizations in their pursuit of profit. This, of course, has been controversial. Debate was sparked by Milton Friedman's now seminal article, "The Social Responsibility Of Business Is To Increase Its Profits,"[25] where he argued that the pursuit of profit *was* the only true social responsibility of business, but that piece was a *response* to decades of developing public sentiment that businesses should "do the right thing"[26] beyond their stated profit mission. Whereas it influenced much in corporate life between the 1970s and 1980s, the now widely accepted idea of *stakeholder value* raised by R. Edward Freeman[27] suggested companies may not owe duties toward the public at large but are beholden to a wide array of primary and secondary "stakeholders"—actors who participate in the company's profit-generating activities. Companies, Freeman said, owe duties to these stakeholders if they wish to survive past the short term and hold their moral communities—for example profit-seeking suppliers and ecologically-minded customers—in balance.[28]

Two points about corporate social responsibility are significant today. On one hand, it is considered to be a truism that most business organizations, management professionals, and business scholars publicly agree that some measure of social responsibility is expected of a for-profit enterprise.[29] On the other hand,

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systems—especially English common law where cases create precedent, and judges are, in effect, legislating—quietly operated under this framework for much of the past two hundred years. After all, legislation means selecting the governing rule that, when generalized, produces the desired social conditions. Prior to the European enlightenment, it is arguable, Western legal systems operated substantially under an Aristotelian framework of virtue ethics. Virtue ethics hold that the "right" decision is that which elevates the individual's character by pursuing "the golden mean"—the greatest balance between emotional extremes in pursuit of the "good life." *See* Richard Glatz, *Aristotelian Virtue Ethics and The Recommendations of Morality*, *in* BUSINESS IN ETHICAL FOCUS 49–55 (Fritz Allhoff, Alexander Sager & Anand Vaidya eds., 2d ed. 2017). Whereas Aristotle lived in the 4th Century B.C., the influence of his syllogistic reasoning—where we combine a major premise (e.g., a rule) with a minor premise (e.g., a fact)—became the very basis for all legal reasoning in the two thousand years since. Logic aside, the purpose of legal reasoning, to arrive at the "right" decision, was also, for much of Western legal history, Aristotelian in nature: how to reach decisions that would reward or incentivize the "good life" or virtue. Alongside these canonical frameworks lies Care Ethics. Developed initially by the feminist writer Carol Gilligan in response to the seemingly patriarchal canon of marquee Western moral philosophers, Care Ethics suggested that doing the "right thing" meant choosing the course of action that most promoted strong interpersonal relationships. *See* Manning, *supra* note 22, at 56–62. This was premised on the belief that existing ethical frameworks—Utilitarian, Kantian, and Aristotelian—all pursued a form of moral detachment from the objects of our decision-making. Under Care Ethics, Gilligan emphasized, the priority was not abstract individual "justice" but rather a pragmatic application of "care" through decisions that affect people as they reside in interdependent relationships.

25. Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES MAG. (Sept. 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html [https://perma.cc/3GD5-XME7].

26. WARREN BENNIS & BURT NANUS, LEADERS: THE STRATEGIES FOR TAKING CHARGE 21 (1985).

27. R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH (1984).

28. *Id.*

29. David Gelles & David Yaffe-Bellany, *Shareholder Value is No Longer Everything, Top C.E.O.s Say*, N.Y. TIMES (Aug. 19, 2019), https://www.nytimes.com/2019/08/19/business/business-roundtable-ceos-corporations.html [https://perma.cc/77P6-A4WC].

Friedman's 1970 admonition has never quite left us, and many still—often behind closed doors—resist defining "the right thing" on a macro-social scale.[30] This is particularly true among the many organizations like Enron and British Petroleum who have found themselves in ethical hot water.[31]

Corporate social responsibility intersects with studies of law and organizations. Building on Max Weber's work, Phillip Selznick laid the groundwork for modern studies of law and organizations, arguing that bureaucratic organizations tended to develop internal structures of "law" as they moved toward higher states of rationalization.[32] This, in turn, contributed to a more general trend of "institutional isomorphism" across organizations documented by Paul DiMaggio and Walter W. Powell.[33] Institutional isomorphism described the way in which business organizations came to resemble one another as new practices rendered one more competitive and others followed suit. Cal Morrill described the ways in which this trend has led more and more executives to develop dispute settlement patterns within organizations they lead.[34] Building on that work, Lauren Edelman studied the re-interpretation and creative application of civil rights law by employees in U.S. corporations. [35] There, she said, corporate advisers, including compliance officers and human resources (HR) specialists, were given the task of establishing equal opportunity policies based on the relatively new civil rights laws developed in the 1960s.[36] This development meant that "law" was in large measure elaborated upon by—and within—corporate organizations rather than by traditional institutions of legal authority. This "legal endogeneity," as Edelman termed it,

> [P]osits that organizations respond to ambiguous law by creating a variety of policies and programs designed to symbolize attention to law . . . legal endogeneity theory challenges the standard view of law as exogenously created or determined outside the boundaries of organizations. In the standard exogenous view, a law is a downward force that is primarily coercive and determinative . . . . Legal endogeneity theory, by contrast, sees law, at least in part, as an upward

30. John M. Mason, *Maximizing Shareholder Value Comes First - and the GE Example*, SEEKING ALPHA (Oct. 10, 2019), https://seekingalpha.com/article/4295958-maximizing-shareholder-value-comes-first-and-ge-example [https://perma.cc/ZSR2-39T3].

31. *See* Robert Bryce, *Enron's Ken Lay and BP's Tony Hayward Were Paid to Be Reckless*, THE DAILY BEAST (June 24, 2010), https://www.thedailybeast.com/enrons-ken-lay-and-bps-tony-hayward-were-paid-to-be-reckless?ref=scroll [https://perma.cc/235R-AVHL].

32. MAX WEBER, FROM MAX WEBER: ESSAYS IN SOCIOLOGY 214–217 (H.H. Gerth & C. Wright Mills eds., 1946). *See generally* PHILLIP SELZNICK, LAW, SOCIETY, AND INDUSTRIAL JUSTICE (1969).

33. Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147, 150 (1983) (discussing the concept of institutional isomorphism).

34. CALVIN MORRILL, THE EXECUTIVE WAY: CONFLICT MANAGEMENT IN CORPORATIONS 16–20 (1995).

35. *See* LAUREN B. EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS (2016).

36. For example, Title VII of the 1964 Civil Rights Act, the Age Discrimination in Employment Act of 1967, and the Equal Employment Opportunity Act of 1972; *see* EDELMAN, *supra* note 35, at 5–6.

> force. Legislatures, administrative agencies, and courts tend to incorporate and condone ideas about law and compliance that become common and widely accepted within organizations.[37]

Legal endogeneity describes some of the ways in which corporate organizations became the incubators of a new modern deregulatory approach—one that would lead to more widespread privatization of public services and utilities in the 1990s and 2000s.

Starting in the 1980s, lawyers began to take greater responsibility in corporate organizations. The emergence of this trend owes itself to changes in the structure of the legal profession itself. On one side of the coin has been the rise of the in-house corporate counsel. Documenting this, Ben Heineman explains that the in-house counsel role did not become what it is today until late in the 20th century.[38] This was a result of increasingly costly outside legal services due to more complex global transactions and changing perceptions among lawyers about "success" within the profession.[39] As Heineman writes,

> More deals and more disputes required more attention of more business leaders, who began to discover that 'making' expertise inside the organization, rather than 'buying' legal services outside, could increase speed, quality, and productivity . . . [and] as inside lawyers began to assert their power, the position of General Counsel, which had once seemed a backwater for lawyers who failed to make partner at major law firms, began, in the 1980s and 1990s, to attract many more premier lawyers from outside the company.[40]

As in-house legal departments grew, law schools and senior attorneys began advising a new crop of graduating law students that the job of the inside counsel was one of the most desirable a lawyer could have: it afforded high compensation sufficient to justify the costs of becoming an attorney; it brought added benefits such as stock options associated previously only with rank and file workers or leadership positions of a non-legal nature; and it demanded the work hours of a nine-to-five job rather than the grueling "billable hours" expected of big law firm associates.[41]

On the other side of this professional coin has been growing interest in "JD Advantage" employment.[42] A term largely resulting from the law school rankings system, "JD Advantage" refers to those types of jobs which do not *require* a law degree but for which having one becomes advantageous—either during the recruitment process or in executing the job functions. This includes fields such as

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37. EDELMAN, *supra* note 35, at 12.

38. *Id.*

39. HEINEMAN, *supra* note 18, at 7.

40. *Id.* at 10–11.

41. E. ALLAN FARNSWORTH, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE UNITED STATES 32 (2010).

42. *See generally* William D. Henderson, *The Market for Recent Law Graduates*, *in* BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA 184 (Samuel Estreicher & Joy Radice eds., 2016).

corporate compliance and human resources, for example. During the 2000s, law schools began complaining that the main rankings body, *U.S. News and World Report*, was only collecting employment data pertaining to law graduates who became *practicing* attorneys—that is to say, those who became active members of their state Bar.[43] This omitted the fraction of students who instead went straight into the business world in the types of positions listed above.[44] Combined, the "inside counsel revolution"[45] and the rise of "JD Advantage" legal employment made corporate life a much larger feature of the professional experience of new attorneys.

Since roughly the mid-2000s, these developments in the profession have led to growing attention to the role of "lawyers as leaders" in the business world.[46] Once viewed as merely a transaction cost, attorneys are increasingly seen as playing an active role in steering (or failing to steer) companies toward doing the right thing—toward playing a key role connecting organizational conduct and societal benefits in what business school dean Thomas Horan has called the "Arc of Purposeful Leadership."[47] Constance Bagley viewed "legal astuteness," the capacity to use good legal judgment in organizational leadership, as its own significant variable in the success of commercial firms.[48] In arguing for the importance of reflection on lawyers as leaders, Deborah Rhode wrote that the qualities which allow attorneys to achieve leadership roles are not the qualities that make for an ethical corporate leader. These include the characteristics of egoism and ambition for money and power.[49] These qualities, Rhode writes, are the same qualities that encourage a "win at all costs" approach when attorneys advise corporate executives in decision making. And yet, they are in many ways encouraged at the level of law school education itself. There, classroom dynamics such as forced curve grading and professorial cold-calling encourage a cutthroat and performative machismo that writers like Elizabeth Mertz argue lies at the heart of a lawyerly ideology—one that severs moral reflection from the jobs of legal

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43. *See id.* at 191–92; *see also* Brian Dalton & Elie Mystal, *ATL vs. Law Dean vs. Common Sense: What Weight Should be Given to Solo Practice and to "JD Advantage" Jobs in Law School Rankings?*, ABOVE THE L. (June 17, 2014), https://abovethelaw.com/2014/06/atl-vs-law-dean-vs-common-sense/?rf=1 [https://perma.cc/MP7N-L437].

44. Initially labeled "JD Preferred" employment, U.S. News then changed the category to "JD Advantage" and law school deans applauded the move as it permitted them to report higher overall employment percentages and show their schools to be a strong "value proposition" despite the ballooning costs of law school attendance over those years. *See, e.g.*, Dalton & Mystal, *supra* note 43.

45. HEINEMAN, *supra* note 18.

46. DEBORAH RHODE, LAWYERS AS LEADERS (2016); PAULA MONOPOLI & SUSAN MCCARTY, LAW AND LEADERSHIP: INTEGRATING LEADERSHIP STUDIES INTO THE LAW SCHOOL CURRICULUM (2016). *See generally* Ben W. Heineman, *Law and Leadership*, 56 J. LEGAL EDUC. 596 (2006).

47. Thomas A. Horan, *The Arc of Purposeful Leadership*, LEADER TO LEADER 47–52 (Apr. 17, 2020), https://doi.org/10.1002/ltl.20509 [https://perma.cc/3W77-GLLC].

48. Constance Bagley, *Winning Legally: The Value of Legal Astuteness*, 33 ACAD. MGMT. REV. 378, 378 (2008).

49. RHODE, *supra* note 46, at 5.

analysis and oral advocacy.[50] These various studies are part of a growing body of work reflecting on the development of leadership skills among lawyers.

This Article builds on those by homing in on the *pathways* between professional education and organizational ethics. Its argument responds to Jeffrey Nesteruk's call for a theory of the ethical ramifications of corporate law.[51] Subsequent responses looked at the substance of the lawyer-client relationship for evidence about the ethical role of business lawyers. Using "identity theory," Sally and Hugh Gunz argued that in-house attorneys in business organizations wear multiple hats as professionals and employees leading them to select among available identities to make ethical trade-offs, unlike their peers in professional firm practice who are fixed in their sense of self.[52] Examples include aspirations to executive roles, and incentives that give counsel a financial stake in their organization's profit. This is in direct distinction from an earlier study in which South African researchers found legal ethics (e.g. professional ethics governing lawyerly conduct) consistently trumped business ethics (e.g. moral frameworks applied in business organizations) in hypothetical conflicts where attorneys were forced to choose between the two.[53] Barbara Mescher found weakened ethical independence among Australian lawyers arising solely from their own conflicting commercial interests.[54] Both comparative observations about the legal profession are relevant as they come from other common law systems and well-developed Western economies. This Article, by contrast, examines not the relationship between lawyers and clients but the ethical assumptions behind one dominant movement within legal professional training.

Finally, the role of law in markets further frames this discussion. How, given the robustness of Western legal orders reaching farther into the Global South, as well as preoccupation with the rule of law and transparency, could business and banking practices have become so risky as to jeopardize the very foundations of capitalism itself (demonstrated most recently in the 2008-2010 global financial crisis)? Exciting scholarship out of U.S. law schools began to track this evolution and found at its origins new, ingenious conceptions and uses of law.[55] Annelise Riles wrote that it was business lawyers (among others) who had devised and

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50. *See generally* ELIZABETH MERTZ, THE LANGUAGE OF LAW SCHOOL: LEARNING TO THINK LIKE A LAWYER (2007).

51. *See generally* Jeffrey Nesteruk, *The Ethical Significance of Corporate Law*, 10 J. BUS. ETHICS 723 (1991).

52. *See generally* Sally Gunz & Hugh Gunz, *Ethical Decision Making and the Employed Lawyer,* 81 J. BUS. ETHICS 927 (1991).

53. *See* Nicola Higgs-Kleyn & Dimitri Kapelianis, *The Role of Professional Codes in Regulating Ethical Conduct*, 19 J. BUS. ETHICS 363, 372 (1999).

54. Barbara Robin Mescher, *The Business of Commercial Legal Advice and the Ethical Implications for Lawyers and Their Clients*, 81 J. BUS. ETHICS 913, 914 (2008) (arguing that the magnitude of business law cases in professional practice exerts a gravitational pull on the ethics of lawyers across firms. Mescher notes, "[c]ommercial law provides the greatest source of income for many of these law firms").

55. *See id.*

helped enforce a new regime of "collateral" that secured corporate transactions across vast expanses of space and time and gave rise to a new environment in which global capitalism could flourish and flow.[56]

Prior to all of this, the global capitalist system required initial steps to convert tangible and intangible goods and services into "capital." If land and labor could be mixed with capital to result in yet more capital, how was this alchemical process catalyzed? The answer, writes Katharina Pistor, is in "coding," or labeling the raw materials such as land and human labor—both items that are not naturally fungible—as objects of exchange.[57] Land could be securitized and used as "collateral" in the way Riles describes only once this was done.[58] Labor could then be traded for compensation in the ways that would make equal opportunity within organizations so significant in the way Edelman illuminates.[59] Law, says Pistor, provided the code underpinning contemporary capitalism.[60] All of this tells us that law sits at the foundation of the modern market and encourages us to ask whether law can be autonomous from market culture itself.

One of the key lessons from sociolegal studies is that law is never independent of society but rather sits on a normative continuum with morality.[61] Morality, explained above, consists of the questions and answers communities pose themselves about right and wrong pertaining to specific behavior and action, as well as questions of how people see their place in the world at large.[62]Ethics, meanwhile, describes the frameworks that emerge out of moral reflection. These are both first-order norms. If so, then law is a second order norm system. For a rule or standard to become law, it must originate with public morality, become an accepted norm within a community or society, and then become inscribed orally or through writing with a certain authoritative formality. This second order quality is what Paul Bohannon famously labeled "double institutionalization"[63]—the capacity for legal institutions to often echo social ones.

In the process of becoming law, behavioral norms circulate between the collective morality of a society and the legal order. As one evolves, it may pull the other along with it. Sociolegal scholars have, for this reason, focused heavily on law's

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56. ANNELISE RILES, COLLATERAL KNOWLEDGE: LEGAL REASONING IN THE GLOBAL FINANCIAL MARKETS (2011).

57. KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY 3–6 (2019).

58. RILES, *supra* note 56.

59. EDELMAN, *supra* note 35.

60. PISTOR, *supra* note 57.

61. *See generally* RIAZ TEJANI, LAW AND SOCIETY TODAY (2019).

62. DIDIER FASSIN, INTRODUCTION: TOWARD A CRITICAL MORAL ANTHROPOLOGY TO A COMPANION TO MORAL ANTHROPOLOGY 1–18 (Didier Fassin ed., 2015); MICHAEL LAMBEK, THE ETHICAL CONDITION: ESSAYS ON ACTION, PERSON, AND VALUE (2015).

63. Paul Bohannon, *The Differing Realms Of The Law*, 67 AM. ANTHROPOLOGIST 33, 33 (1965).

interaction with social change.[64] Taken together, they tell us that changes in legal theory may influence the morality of the wider legal culture. In other words, if law is morality institutionalized, and morality can be nudged using law, then they sit along a continuum that we might consider more broadly as "legal culture". If law and morals sit along a continuum and both belong to legal culture, then what "counts" in the study and training of new lawyers is more than just learning what the law "says." It also, quite substantially, includes what the law means to achieve or policy.[65] In this way, the three-year law school learning process that most lawyers go through in the United States can become highly influential on attorney behavior in the post-graduate employment context, because what it takes to become a lawyer is not simply learning the rules; it is, as Mertz masterfully demonstrated, learning how to "think like a lawyer" in general.[66] "Think like," in this widely circulating phrase, is doing a lot of work; it includes both rational analysis of law and real-world facts, as well as moral reflection and sorting of right from wrong.

In short, new generations of American lawyers can and do enter the working world with understandings of law and morality influenced (at least) or structured by (at most) the understandings of law and morality taught in U.S. law schools. As outlined below, to the extent that Law and Economics has grown to become an influence on law schools, it has also grown to become a major influence on legal behavior in organizations. The next two sections delve more deeply into that behavior, as well as into recent developments in law school intellectual life and training that may be related to it.

II. ORGANIZATIONAL ETHICS AND BUSINESS LAW

In considering the extension of professional responsibility to new fact patterns in business law, it may be useful to start at the end and work backwards. Taking a case method approach, this section looks at three recent corporate scandals and the apparent role of corporate attorneys in their unfolding. This offers a multi-perspectival view of the part attorneys can play before and after corporate scandals.[67]

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64. Take, for instance, a norm that says, "killing another human being without justification will be a crime punishable by death." We might call this initially a cultural norm originating in the community's ideas of right versus wrong. Unjustified killing is "wrong," whereas retributive killing of someone who has violated the norm is "right." This, in turn, reflects public morality; the penalty of death may be said to restore a moral balance that was tipped when the original crime took place. Applied to an actual murder case enough times with acceptance and collective memory, whether in the most "simple" tribal setting or the most "complex" urban context, this rule becomes re-institutionalized as having the higher authority and coercive abilities of "law."

65. The definition of "law" is a perennial topic for debate among legal scholars, but this statement is based on the idea that law professors at Tier-1 law schools tend to discuss public policy in their classrooms and the development in legal writing over recent decades to include "rule explanation" segments in brief and memo writing. In other words, the *purpose* of rules remains a fixture in and around application of "law."

66. MERTZ, *supra* note 50.

67. Importantly, because evidence about attorney-client relations is privileged, this section, and this paper generally, do not attempt to show how executive decision-making is directly influenced by general counsel or outside litigation attorneys. Rather, it assumes that executives hire these professionals in good faith with some

A. BOEING

On October 29, 2018, Lion Air Flight 610 plunged into the Java Sea off the coast of Indonesia, killing all 189 passengers and crewmembers. On March 10, 2019, Ethiopian Airlines Flight 302 crashed into the Ethiopian countryside, killing all 157 passengers and crewmembers. Both disasters involved the new Boeing 737 Max airliner, a redesigned version of the 737 that was intended to be lighter, allow greater capacity, and consume less fuel than its predecessors.[68] The plane was also equipped with a software system designed to correct its pitch if computers detected a stall—a loss of lift caused by speed or angle changes. This system, known as a Maneuvering Characteristics Augmentation System (MCAS), was quietly installed in the aircraft without notice to many airline pilots and without instructions on how to override it should it erroneously take over the plane's movements. Flight data recorders and ground radar showed both Flight 610 and Flight 302 plummeting quickly in their final moments and suggested that both sets of pilots were struggling to understand how to manage the MCAS in real time before their planes and passengers hit the ground or water.[69] How could a respected aircraft manufacturer have created a product intended as an improvement to consumer air travel that turned out to be this dangerous?

The answer draws together two key themes that, unfortunately, run through organizational ethics. The first is self-regulation. In 2005, the United States Federal Aviation Administration (FAA)—following substantial lobbying efforts from the aerospace industry itself—created a new regime of self-authorization that allowed manufacturers to, in effect, become their own safety regulators.[70] This regime was notably similar to others contemporaneously established in sectors such as energy. For instance, in the case of the BP Deepwater Horizon oil rig explosion and spill, the United States Department of the Interior, through its Minerals Management Service (now known as the Bureau of Ocean Energy Management, Regulation and Enforcement), had allowed self-reporting of environmental protection and safety measures among oil drilling firms.[71] In the case of the FAA practice, efforts by one U.S. senator to reform the practice were directly met with intensive lobbying by Boeing and other companies.[72] In both the BP and Boeing cases, the justification for self-regulation had been a familiar one: efficiency demands that regulation be

intention to submit to their expert judgment and raises the likelihood that the role played by corporate attorneys has both legal and ethical ramifications.

68. Gwyn Topham, *Boeing's 737 Max Wooed Airlines With Its Cost-Saving Fuel Economy*, THE GUARDIAN (Mar. 12, 2019), https://www.theguardian.com/business/2019/mar/12/boeings-737-max-wooed-airlines-cost-saving-fuel-economy [https://perma.cc/CB4Y-DWWN].

69. *Id.*

70. 14 C.F.R. § 183.41–813.67 (2005).

71. Thomas Frank, *The Gulf Spill and The Revolving Door*, WALL ST. J. (May 12, 2010), https://www.wsj.com/articles/SB10001424052748704250104575238562718885050 [https://perma.cc/K2MG-PC3E].

72. Terence McKenna, *Internal Boeing Messages Detail How Pressure to Cut Costs Eroded Company's Renowned Safety Culture*, CBC NEWS (Jan. 19, 2020), https://www.cbc.ca/news/business/boeing-fifth-estate-costs-safety-1.5426571 [https://perma.cc/6TQY-RJ39].

entrusted to those most familiar with the risk-generating commercial activities. Who more possesses this familiarity than the industries themselves?

A second theme is the emphasis on short-term profit seeking. In the case of Boeing's 737 MAX, employees were aware of the considerable risks being created by a deteriorated safety culture. In 2018, for example, before the first crash, one employee wrote another that they would not trust the aircraft to carry their own family.[73] Company safety culture was subordinated to share price—especially in the run-up to the release of the anticipated 737 MAX. Internal messages and emails paint a picture of a profit-focused management culture at the world's largest aircraft manufacturer, where pressure for short-term shareholder returns seems to have overwhelmed safety concerns.[74]

When describing organizational safety culture in this way, it is important to note the emphasis was on "short term" profit. As many companies have learned, cutting corners with product safety often catches up with the organization in the long run. In this case, Boeing lost $18.6 billion by March 2020—its first losses since 1997—because of the choices made.[75] But where were the lawyers in those choices?

Boeing's general counsel through the 737 MAX affair was J. Michael Luttig, a former judge on the United States Fourth Circuit Court of Appeals. By the time of his retirement, he owned $3 million in Boeing stock in addition to receiving a $7 million income from the company. While it can raise several issues in professional ethics, attorney ownership of stock in one of their clients is not in itself considered a conflict of interest under the Rules of Professional Conduct.[76] Corporate counsels are in the unique professional position of being both employees of and legal counselors to their organizations. This has long raised what some call the "partner-guardian" tension.[77] On the one hand, the general counsel has a duty to advise their company with a realistic and protective view of legal risk and

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73. Natalie Kitroeff, *Boeing Employees Mocked F.A.A. and 'Clowns' Who Designed 737 Max*, N.Y. TIMES (Jan. 29, 2020), https://www.nytimes.com/2020/01/09/business/boeing-737-messages.html [https://perma.cc/G9QE-B72Z].

74. McKenna, *supra* note 72.

75. David Koenig, *Boeing Posts First Annual Loss Since 1997*, AP (Jan. 29, 2020), https://apnews.com/article/ks-state-wire-us-news-business-il-state-wire-wa-state-wire-8ea6d7147585b3799380bb7d14f5c504 [https://perma.cc/49LY-4QZV].

76. Donald Langevoort. *When Lawyers and Law Firms Invest in Their Corporate Clients' Stock*, 80 WASH. U. L.Q. 569, 570–571 (2002) ("No [ABA Ethics] opinion has declared equity-based compensation objectionable per se, or even strongly sought to discourage this practice.");

> A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless: (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client; (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

MODEL RULES R. 1.8(a).

77. HEINEMAN, *supra* note 18.

responsibilities. On the other hand, they are compensated—for instance through stock options and other revenue incentives—in a way that may make them the beneficiary of potential profit-generating shortcuts in compliance or evasion of liability.

In the aftermath of the two major crashes, Boeing CEO Dennis Muilenburg moved Luttig from his role of General Counsel into a crisis-management role as counselor and senior advisor. In that position, Luttig coordinated a team of "high powered"[78] defense attorneys from the top law firms in the world. In this role as top legal defender, he was considered to have performed well.[79] But in terms of advising Muilenburg of his ethical responsibilities as CEO during these disasters, Luttig may have fallen short by promoting what some called, "a lawyer-driven admit-no-wrong playbook."[80] In the intervening months between the first and third crashes, the company, on the advice of its legal team, chose not to identify known problems with the MCAS system, denied responsibility, and opted not to recall the highly dangerous product it had created.[81]

B. VALEANT

On August 5, 2015, stock in Valeant Pharmaceuticals (Valeant) sold for $262.52 per share. Over the two years prior, the value had more than doubled. A year later, in 2016, it was decimated to less than $30.[82] By Milton Friedman's standards,[83] Valeant's CEO Michael Pearson had far exceeded his "social responsibility" before colossally failing it. How?

Valeant had existed in Southern California since the 1950s with mixed success and took on Pearson in 2008 after his work as an outside consultant. In 2010, Pearson orchestrated a merger with Biovail Corporation in Canada and relocated company headquarters there, which brought Valeant's tax obligation to as low as five percent.[84] Meanwhile, it pursued a campaign of acquiring other pharmaceutical companies and either stripping them of their research and development budgets or hiking the prices of lifesaving drugs they already produced. Price hikes

78. Steve Miletich, *Boeing Turns to High-Powered Defense Attorneys in 737 MAX Investigation*, THE SEATTLE TIMES (June 6, 2019), https://www.seattletimes.com/business/boeing-aerospace/boeing-turns-to-high-powered-defense-attorneys-in-737-max-investigation/ [https://perma.cc/BE9Y-U4HH].

79. *See* Press Release, Boeing Communications, J. Michael Luttig to Retire from Boeing at Year End (Dec. 26, 2019).

80. Steve Miletich & Dominic Gates, *Top Boeing Attorney Who Oversaw 737 MAX Legal Fallout to Retire*, THE SEATTLE TIMES (Dec. 26, 2019), https://www.seattletimes.com/business/boeing-aerospace/top-boeing-attorney-who-oversaw-737-max-legal-fallout-to-retire/ [https://perma.cc/B44U-DVUH].

81. Press Release, Department of Justice, Boeing Charged with 737 Max Fraud Conspiracy and Agrees to Pay over $2.5 Billion (Jan. 7, 2021).

82. Emma Court, *Valeant Gets a New Name to Shed its Scandals, but Will it Work?*, MARKETWATCH (July 17, 2018), https://www.marketwatch.com/story/valeant-will-get-a-new-name-again-hoping-to-shed-its-scandals-2018-05-08 [https://perma.cc/4R7R-NFZ9].

83. Friedman, *supra* note 25.

84. Maureen Farrell, *Valeant-Salix Deals Shows Why Inverted Companies Will Keep Winning*, WALL ST. J. (Feb. 23, 2015), https://www.wsj.com/articles/BL-MBB-33568 [https://perma.cc/L9ZD-MYDW].

were becoming more common in the biotech sector, which attracted criticism from the public and U.S. lawmakers, leading Pearson to deny that its move was part of a concerted strategy.[85] But as analysts documented, most of the company's U.S. profits were a result of price increases.[86] Prior to its collapse in value, Valeant attempted a hostile takeover of Allergan plc, the maker of Botox. While the effort was nearly successful, it ultimately failed because Valeant's aggressive approach, which included reputational attacks, was viewed as unseemly and in bad faith.[87] Moreover, the company's plan in acquiring a respected industry giant that had generated considerable value from research was to, "slash Allergan's research-and-development costs by 90 percent, saving billions of dollars and creating immense short-term profits."[88]

Finally, in addition to aggression and unstatesmanlike conduct, Valeant was accused of fraud using the small "specialty" pharmacy Philidor Rx Services (Philidor). Using its own employees to pose as Philidor's, Valeant had the pharmacy push its drugs on consumers and ultimately began treating Philidor's sales as its own for accounting purposes.[89] This occurred just as Pearson's strategy of leveraging—in other words using corporate revenues to acquire more companies rather than reinvesting in research—was catching up with the company and its valuation was coming under scrutiny. Whereas the prevailing logic had been an almost cult-like following of CEO Pearson, a handful of critical short sellers forced the investing market to demand transparency and accountability leading to the final collapse of Valeant shares with investors losing billions of dollars in the crash.[90] Again, where were the lawyers?

Valeant's Robert Chai-Onn joined the company in 2004 as General Counsel and Executive Vice President. In 2014, Chai-Onn was reported to have earned roughly $5 million *more* than CEO Michael Pearson.[91] More importantly, in mid-2015, Chai-Onn's name appeared on one of the key pieces of evidence linking

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85. *See* Gina Chon, *Rising Drug Prices Put Big Pharma's Lobbying to the Test*, N.Y. TIMES (Sept. 1, 2016), https://www.nytimes.com/2016/09/02/business/dealbook/rising-drug-prices-put-big-pharmas-lobbying-to-the-test.html [https://perma.cc/AYH7-R684]; Mike Egan, *Valeant Denies Enron-Like Fraud*, CNN (Oct. 26, 2015), https://money.cnn.com/2015/10/26/investing/valeant-responds-fraud-enron/index.html [https://perma.cc/7KLY-YBN8].

86. Bethany McLean, *The Valeant Meltdown and Wall Street's Major Drug Problem*, VANITY FAIR (June 5, 2016), https://www.vanityfair.com/news/2016/06/the-valeant-meltdown-and-wall-streets-major-drug-problem [https://perma.cc/W3FY-H8QV].

87. REUTERS, *Allergan Rejects Valeant Pharma's 'Cut and Slash' Takeover*, CNBC (May 12, 2014), https://www.cnbc.com/2014/05/12/allergan-rejects-valeant-pharmas-takeover-bid.html [https://perma.cc/6Y5E-Q2KU].

88. *Id*.

89. Matt Turner & Linette Lopez, *Leaked Documents Shed Light on the Defunct Pharmacy That Brought Valeant to its Knees*, BUS. INSIDER (Nov. 8, 2016), https://www.yahoo.com/news/leaked-documents-shed-light-defunct-111600991.html [https://perma.cc/KAY8-6CG3].

90. Stephen Gandel & REUTERS, *What Caused Valeant's Epic 90% Plunge*, FORTUNE (Mar. 20, 2016, 1:52 PM), https://fortune.com/2016/03/20/valeant-timeline-scandal/ [https://perma.cc/J75H-BGFB].

91. Kathryn Vasel, Jose Pagliery, Matt Egan & Jesse Solomon, *15 Execs Who Make More Than Their CEOs*, CNN MONEY (Dec. 18, 2014, 9:12 AM), https://money.cnn.com/gallery/news/companies/2014/12/18/executives-make-more-than-ceos/index.html [https://perma.cc/9K4J-XDMD].

Valeant to its shell pharmacy Philidor.[92] Chai-Onn—as general counsel— signed and sent a demand letter to R&O Pharmacy in Camarillo, CA insisting on payment of nearly $70 million to Valeant for unpaid invoices. But, said R&O, it had never once received any such invoice, and had never done business with Valeant. It attempted to follow up with Valeant for evidence of the debt, but Valeant failed to reply. In a lawsuit filed by R&O, its attorneys, said, "one of two things must be true: 1.) Valeant and R&O are victims of a massive fraud perpetrated by third parties; or 2.) Valeant is conspiring with other persons or entities to perpetuate a massive fraud against R&O and others."[93] Investigative journalists would later discover that R&O did in fact do business with Philidor and "[t]hat an important financial relationship exists between Philidor and Valeant's KGA unit is inarguable."[94] Indeed, most of Philidor's business by that time was pushing Valeant drugs on consumers, offering copay waiver coupons as an incentive, and then billing insurance at the higher and higher retail drug prices the company was setting.

According to State Bar records in California, Chai-Onn had no disciplinary actions against him as of August 2021.[95] Similarly, despite filing numerous insider trading reports with the Securities and Exchange Commission during his tenure, he appeared to have no illegal trades related to Valeant.[96] But, legality aside, were his actions as corporate counsel on behalf of Valeant—facilitating its Philidor fraud scheme—ethical? Before answering this, one final case deserves consideration.

C. WELLS FARGO

The Boeing and Valeant cases offer circumstantial evidence of questionable advising by corporate counsel and the problem of incentive structures in likely causing this. Wells Fargo, on the other hand, offers an example of direct involvement by an in-house legal team and subsequent assignment of blame by an internal investigation. In the early 2010s, as the dust settled from the banking crash of 2008, it looked as though Wells Fargo was one of the few large consumer banking firms that had escaped relatively untarnished. While there was a general distrust for banking institutions that had traded on speculative mortgage derivatives and then foreclosed on and evicted vulnerable families, Wells Fargo preserved much of its folksy, Main Street-friendly image captured in the symbol of its ubiquitous stagecoach.[97] But, behind the scenes, starting as early as 2002 and reaching an

92. Complaint for Declaratory Judgment, R&O Pharm., L.L.C. v. Valeant Pharm. N. Am. L.L.C., No. 2:15-CV-07846, 2015 WL 9286563 (C.D. Cal. Oct. 6, 2015).

93. *Id.*

94. Roddy Boyd, *The King's Gambit: Valeant's Big Secret*, FOUND. FOR FIN. JOURNALISM (Oct. 19, 2015), https://ffj-online.org/2015/10/19/hidden-in-plain-sight-valeants-big-crazy-sort-of-secret-story/ [https://perma.cc/YR92-NVMF].

95. State Bar of California, *Attorney Profile, Robert Roswell Chai-Onn #192329,* http://members.calbar.ca.gov/fal/Licensee/Detail/192329 [https://perma.cc/589P-ASSZ] (last visited Aug. 14, 2021).

96. SEC. AND EXCH. COMM'N, INSIDER TRADING REPORT (2020), https://sec.report/CIK/0001502213/Insider-Trades [https://perma.cc.3WJC-LBKW].

97. Dan Kraus, *Dirty Money: The Wagon Wheel, Season 2 Episode* (Jigsaw Productions 2020).

apogee by 2011, Wells Fargo employees engaged in a systematic practice of aggressive "cross-selling"—pushing new banking products on unwary customers.[98]

Wells Fargo's scheme began with an internal campaign to incentivize local banking employees to open as many new accounts per day as possible. This campaign meant that if a customer approached a banker in need of a checking account, that banker was instructed to "cross-sell" savings, brokerage, credit card, and other accounts in order to reach stiff numerical quotas for new accounts opened weekly. This placed a heavy psychological burden on employees, many of whom were just grateful to have a banking job after the Great Recession.[99] But the stresses this placed on individuals, and the organizational culture it created, were extraordinary. "I was in the 1991 Gulf War," wrote one employee in an internal memo, who followed this statement by saying, "I had less stress in the 1991 Gulf War than working for Wells Fargo."[100] This level of pressure forced retail bankers to push multiple products on customers so that some individuals had numerous accounts—checking, savings, credit card, mortgage, investment, etc.—they did not need or want, and then received penalty fees on ones that remained unused for years.[101] In many cases, employees opened fraudulent accounts in the names of people who never requested or signed for them.[102] By 2016, it was estimated that Wells Fargo had opened up to 500,000 unauthorized credit cards and more than 1.5 million checking accounts.[103] When customers complained, internal practice was to discipline individual employees but keep the pressure on to open more accounts.[104] These accounts, it was later revealed, were used to demonstrate to Wells Fargo shareholders that business was booming.[105] Over the ten years from 1996 to 2006, Wells Fargo stock shares increased in value from about $13 to about $36 per share. From 2011 to 2015, just four years, they had risen from $24 to $58 per share.

For several years Wells Fargo executives deflected blame toward individual branch employees and managers for this widespread fraud. In many cases, following customer complaints, individuals were fired despite a documented

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98. *Id.*

99. *Id.*

100. Michael Hiltzik, *That Wells Fargo Accounts Scandal Was Even Worse Than You Can Imagine*, L.A. TIMES (Jan. 27, 2020), https://www.latimes.com/business/story/2020-01-27/wells-fargo-scandal [https://perma.cc/42T9-WC3W].

101. Jack Kelly, *Wells Fargo Forced To Pay $3 Billion For The Bank's Fake Account Scandal*, FORBES (Feb. 24, 2020), https://www.forbes.com/sites/jackkelly/2020/02/24/wells-fargo-forced-to-pay-3-billion-for-the-banks-fake-account-scandal/?sh=3ff3f55142d2 [https://perma.cc/9JB9-URTS].

102. Hiltzik, *supra* note 100.

103. *Rules Amendments Effective in December*; *Wells Fargo Under Fire for Sales Practices,* 35 AM. BANKR. INST. J. 8, 9 (2016).

104. *Dirty Money: The Wagon Wheel, supra* note 97.

105. Bethany McLean, *How Wells Fargo's Cutthroat Corporate Culture Allegedly Drove Bankers to Fraud,* VANITY FAIR (May 31, 2014), https://www.vanityfair.com/news/2017/05/wells-fargo-corporate-culture-fraud [https://perma.cc/V247-M44A].

campaign known as "Going for Gr-Eight"—in which the goal of eight total accounts per customer, was a stated expectation.[106] As investigations grew in the wake of the fraud, the question became how much executives knew about the corporate culture that had developed. To begin with, the CEO John Stumpf, who presided over the company's worst years, was well aware of the culture he had inherited from his predecessor, Richard "Dick" Kovacevich. "When asked why Wells Fargo had a cross-selling goal of eight, he'd say, 'The answer is: it rhymed with "great!"'".[107] By 2020, the United States Office of the Comptroller of the Currency placed personal liability on eight of the bank's top executives. This included CEO John Stumpf and Carrie Tolstedt, the Head of Community Banking (the division most directly implicated in the fraud); but it notably also included the company's general counsel, James Strother.[108] This was noteworthy in that attorneys have not often been named directly as perpetrators in corporate fraud cases.

In 2017, the Independent Directors of the Board of Wells Fargo & Company released an internal "Sales Practices Investigation Report" assessing the root causes of the scandal. In a section specifically addressing failures of the bank's *legal* department, it concluded that two divisions of the company's in-house counsel team had "significant involvement with sales integrity issues" well before the public scandal.[109] In a stunning passage, the report states that,

> The Law Department's *focus was principally on quantifiable monetary costs* — damages, fines, penalties, restitution. Confident those costs would be relatively modest, the Law Department did not appreciate that sales integrity issues reflected a systemic breakdown in Wells Fargo's culture and values and an ongoing failure to correct the widespread breaches of trust in the misuse of customers' personal data and financial information.[110]

Here, the cost-benefit orientation applied by Wells Fargo's in-house attorneys is familiar. It substantially resembles the utilitarian framework described at the beginning of this article—one that has featured prominently in thinking about business ethics since Bentham and Mill. In other words, a decision is ethical under that framework and under Wells Fargo's sales philosophy if the prospective aggregate benefit outweighs the sum of individual harms created by its execution. In this case, the strengthening of the community banking division justified individual risks created. Access to more consumer banking on Main Street made it acceptable to force discrete consumers to pay more in hidden account fees. However, lawyers are supposed to be independent advisors to heads of industry,

106. *Id.*
107. *Id.*
108. *Id.*
109. INDEPENDENT DIRECTORS OF THE BOARD OF WELLS FARGO & COMPANY, SALES PRACTICES INVESTIGATION REPORT, 75 (2017).
110. *Id.* at 78 (emphasis added).

not adherents of the moral logics that govern for-profit commercial institutions. As Heineman writes, corporate counsel are not mere partners of the firm, they are "partner-guardians"—roles that may be in tension but are nonetheless *both* indispensable.[111]

Despite the popularity of stakeholder corporate social responsibility, Boeing, Valeant, and Wells Fargo all demonstrated a tacit commitment to Friedman's shareholder primacy doctrine saying that the pursuit of share price is paramount —subject to "law and ethical custom."[112] But what, if anything, has happened to "law and ethical custom"—what many refer to as Friedman's "guardrails"? Why do many commentators leave these out when speaking critically of Friedman's influence on corporate conduct? The answer is that, at a high level of generality, we must acknowledge that one of the greatest architects of these guardrails, the federal regulatory state, has *itself* been severely weakened in its role over the past forty-some years. Whether it is called Reaganism, neoliberalism, or anti-statism,[113] the move to minimize federal regulation over numerous aspects of corporate life has—on its face—removed much of the form and substance of "law and ethical custom" as a meaningful curb on corporate shareholder value maximization.

Apart from public law, there is the more immediate issue raised by this article: a convergence between the ethics of corporate profit-seeking and the ethics of the legal profession, furthered in part by the rise of Law and Economics. What happens when legal advising, displayed by the cases above for instance, mirrors the consequentialist ethics Friedman enduringly promoted? This could mean corporate lawyers come to act increasingly as agents of the organization rather than as guardians or advisors of it. Although contrary to basic tenets in legal ethics,[114] it would be a logical extension of a long-running misapplication of agency theory —whereby managers were nearly reduced to being agents of corporate shareholders—as described by Frank Dobbin and Jiwook Jung following the financial crisis of 2008.[115]

In each of the three cases above, the ethical framework of utilitarianism—albeit an egoistic version of it conflating social and individual utility—appeared to govern the legal counsel's influence on organizational decision making. To see that framework so clearly at the heart of in-house lawyering in major U.S. firms is

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111. HEINEMAN, *supra* note 18.

112. Friedman, *supra* note 25.

113. All three of these terms have been used to describe the deregulatory movement of the 1990s and 2000s by writers like David Harvey and Aiwa Ong. *See,* e.g., DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM (2007); AIWA ONG, NEOLIBERALISM AS EXCEPTION: MUTATIONS IN CITIZENSHIP AND SOVEREIGNTY (2006).

114. MODEL RULES, pmbl., scope (stating that the lawyer has a duty to hold in balance duties to the client, the profession, and the public all at once.)

115. Frank Dobbin & Jiwook Jung, *The Misapplication of Mr. Michael Jensen: How Agency Theory Brought Down the Economy and Why it Might Again*, *in* 30B RESEARCH IN THE SOCIOLOGY OF ORGANIZATIONS, MARKETS ON TRIAL: THE ECONOMIC SOCIOLOGY OF THE U.S. FINANCIAL CRISIS 29, 59 (Michael Lounsbury & Paul Hirsch eds., 2010).

surprising given the longstanding expectation for professional independence among lawyers. That is until we examine recent changes in U.S. legal theory and professional training.

III. CHANGES IN LEGAL THOUGHT AND PROFESSION

The legal profession in the United States has undergone consistent change throughout its history. This section traces that history in brief and suggests that the overall trajectory has been one of increasing convergence between the underlying ethics of the legal and business professions.

The very inception of the American bar in the colonial period was one of disjuncture and difference from its parent legal system: English common law.[116] Lawyers in the early United States would either travel by boat to London to study and gain admission at the Inns of Court or they would apprentice and "read law" in an existing law practice in the New World. Once the Revolutionary War broke out, it became impossible to travel to England, and the United States legal education system began to develop as its own, freestanding institution.[117] The earliest law schools began turning out young attorneys who then favored fellow alumni in hiring and professional partnerships, and the system of prestige networks that remain with us today began to be forged. These early law schools continue to be the most elite, and the most influential in the world of multinational business organizations today.[118]

The U.S. legal academy kept a pure, formalist vision of law until about the 1930s. In the interwar period, which included the Great Depression and New Deal, scholars of American law began to see the urbanization and cultural pluralism of the cities as a reason to consider law in its social context. The Legal Realists, as they became known, argued that understandings of "law in action" were equally if not more important than "law in books" alone.[119] These scholars began taking into account research from psychology, anthropology, sociology, and economics as they considered the role law should play in the 20th century.[120] Initially, the most important movement to spring out of Legal Realism was Critical Legal Studies. CLS, as it has been called, believed that law could be a force in maintaining social inequalities, and that it could therefore also be used to ameliorate them. This movement coincided with and took inspiration from the Civil Rights Era in the 1960s, and it found success in American law schools

116. LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAWS (1973).

117. *See Id.*; *see also* FARNSWORTH, *supra* note 41 at 12.

118. For example, Harvard, Columbia, and NYU remain the most highly represented and respected in international business law. *See, e.g.*, *Best Business Law Programs*, U.S. NEWS AND WORLD REPORT (2021).

119. Roscoe Pound, *Law in Books and Law in Action*, in AMERICAN LEGAL REALISM, 39–45, 44 (William W. Fisher, Morton Horwitz, & Thomas A. Reed eds., 1993).

120. Riaz Tejani, *Efficiency Unbound: Processual Deterrence For A New Legal Realism.* 6 U.C. IRVINE L. REV. 207, 233–36, 2016.

through the 1970s.[121] Attorneys trained in this period went on to work in the judiciary, legislature, and regulatory arm of the executive branch, bringing about a new era of government oversight and social protection from private, commercial activity.[122] As one would expect, business leaders did not embrace these developments.[123]

In the 1980s, therefore, business leaders began to organize and contribute financial support to a movement of conservative and libertarian legal experts that had developed below the radar over the previous decades. The relative marginality of these experts in the 1960s and 70s may have been due to prevailing interests in social and distributive justice among academics, and due to the earlier investments in progressive academic research by what Steven Teles has called the "liberal legal network" that emerged out of the New Deal and saw a rebirth in the 1960s thanks in part to the Ford Foundation.[124] Business leaders noted a school of thought sitting at the margins of American law schools known as Law and Economics. They viewed this as a potentially powerful tool in a prospective effort to confront and limit the regulatory wave inspired by the New Deal, CLS, and the Civil Rights Era.[125]

The key intellectual developments of the Law and Economics movement had already been proposed by the time the conservative legal movement embraced it. In the 1960s and 1970s, economists at the University of Chicago began to argue that economics sat at the foundation of what law was capable of doing. Their work, now referred to as "first wave" Law and Economics, immanently opposed the rise of socialism and communism in the East and argued that human freedom was key to a healthy political economy.[126] Friendrich Von Hayek[127] and Friedman[128] were two of the biggest names in this movement that paired democracy and capitalism, but it was Ronald Coase[129] who brought freedom of contract and other legal precepts into what the Chicago School was saying about political economy. In the ensuing decades, legal scholars[130] began to closely embrace

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121. TELES, *supra* note 16, at 2–3.

122. *Id.*

123. *See id.* at 59.

124. *See id.* at 24–25, 30.

125. *See id.* at 182, 216.

126. References to the mid-century lawyer-economists as "first wave" Law and Economics are found in secondary literature. *See e.g.*, Megan Richardson, *The Second Wave in Context*, *in* THE SECOND WAVE OF LAW AND ECONOMICS, (Megan Richardson and Gillian Hadfield eds., 1999), and in contemporary ethnographic interview data collected by the author for a forthcoming book project (Informants 4, 5, 6, 9 & 10; transcripts on file with the author). Notwithstanding the salience of this ethnographic usage, some have argued the true "first great Law and Economics" dates back to the late 19th Century. *See generally* Herbert Hovenkamp, *The First Great Law and Economics Movement*, 42 STAN. L. REV. 993 (1990).

127. FRIEDERICH VON HAYEK, LAW, LEGISLATION AND LIBERTY, VOLUME 1: RULES AND ORDER (1973).

128. *See generally* MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962).

129. *See generally* R.H. Coase, *The Problem Of Social Cost*, 3 J.L. & ECON. 1 (1960).

130. *See generally* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (1973); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961).

Chicago economics, and the innovations in legal theory and interpretation they would produce remain highly influential today. Law and Economics in that period saw an explosion in productivity fueled greatly by four theories that revolutionized the field: the Coase Theorem, Efficient Breach, Optimal Deterrence theory, and the Hand Calculus.

A. THE COASE THEOREM

The first of these major innovations was from Coase's 1960 paper "The Problem of Social Cost." His theorem said that, in the absence of transaction costs, a society could arrive at the most efficient distribution of goods through market transactions among itself.[131] This idea assumed that people are rational value maximizers and that they would go after the goods they valued most inasmuch as they could afford to do so. A collectible vintage automobile, for example, would wind up in the hands of the collector who valued it the most, and the seller would obtain the greatest compensation for its purchase when collectors could openly bid at their highest amounts. The Coase Theorem, as it is now called, always begins with the preface, "in the absence of transaction costs." This phrase is significant; it brackets away most of what social life entails including reputational, familial, cultural, religious, and linguistic limitations on people's ability to communicate—let alone trade—freely with one another. But it also means that law, often one of the biggest transaction costs in business—should do its best to step aside. The regulatory state should recede to a minimum, and judges should adjudicate disputes based on a determination of who values the object in dispute—a property, a right to pollute, an injury—the most. Most significantly, the theorem also suggests that judicial outcomes may actually be "irrelevant" in market terms, because the parties may simply bargain for the rights involved after the fact of litigation.[132]

The Coase Theorem may be the first and most prominent innovation in economics that made its way into law. Today, casebooks—from which first year students are taught—in contracts, property, and tort law all feature some mention of this idea.[133] For new initiates it can be surprising; what is an economic theory doing in a law textbook? What is the purpose of advocating for justice when doing so is deemed "irrelevant" as seen from the market?

B. EFFICIENT BREACH

In the field of contracts specifically, another innovation inspired by Law and Economics research has been *efficient breach*. Historically in contract law, when the elements of a valid contract were all present and a party to the agreement

131. Coase, *supra* note 120.

132. Steven G. Medema *Debating Law's Irrelevance: Legal Scholarship and the Coase Theorem in the 1960s*, 2 TEX. A&M L. REV. 159, 212 (2014).

133. *See, e.g.*, casebooks cited *supra* note 17.

violated a material term of that agreement, they were considered to be in "breach" of contract. In many cases, the factual question of whether such a term has been violated is not difficult; rather, the case turns on the validity of the contract, the specific term, or the damages that resulted. Also, historically salient was the idea that breaches of contract might be forgiven for several contextual reasons that made performance of the agreement practically problematic. "Impossibility," "frustration of purpose," and "*force majeure*" are all variations on this theme.[134] These legal theories held over from the earlier days of commercial contracts when it was understood that the only acceptable reasons not to perform on a binding promise toward someone were related to the difficulties created in doing so; these same difficulties could arise in many more situations, so the willingness to forgive a duty made sense in its universal applicability.[135]

Beginning in the 1970s, scholars looking at contract disputes began entertaining a different reason for excusing violations of agreed terms.[136] This was inspired in large part by the growing dominance of the *commercial* contract—an agreement designed for explicit monetary gain to at least one party—in the legal landscape. What if there had been no obstacle to the performance of a contractual duty, but the end goal of commercial gain was no longer viable? Sure, courts could uphold the contractual duty for deontological reasons only: under a Kantian framework, duties that are assumed in good faith should be carried out because the world would not be livable if anyone could just evade them at random. One should uphold their promises because they have incurred a duty to do so. But, under a utilitarian framework defining "right" in terms of wealth creation, the loss of prospective monetary reward should be fatal to the enforcement of the agreement. It is not enough that one party might *view* it this way; courts are not in the business of making life easier for one party alone. But if that party could argue that the enforcement of the contract would be inefficient for the community at large, then it would make little sense for a court to enforce an undertaken duty just in the name of Kantian morality. The theory of "efficient breach" said a party to a contract could evade its enforcement by arguing that such enforcement would destroy rather than create aggregate wealth in a community.[137] But again, there is a marked slippage between social and individual utility: under Kaldor-Hicks "efficiency", some individuals can be made better off by a distributional improvement but the beneficiary of an efficient breach may have no obligation to share new gains resulting from a release from obligation.

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134. *See* Charles G. Brown, *The Doctrine of Impossibility of Performance and the Foreseeability Test*, 6 LOY. U. CHI. L.J. 575, 575–76 (1975).

135. *See generally id.*

136. *See* Richard A. Posner & Andrew M. Rosenfeld, *Impossibility And Related Doctrines In Contract Law: An Economic Analysis*, 6 J. LEG. STUD. 83 (1977).

137. *Id.*

This soon fell under criticism from moral theorists of contract who viewed keeping promises as "right" in itself.[138] The isolation of efficient breach to contract law is of little consolation on this subject.[139] Indeed, "breach" is by definition a concept that already implies a contract of some form. But the proportion of civil cases arising out of contract—particularly in the business world—is enormous. For example, a 2005 Bureau of Justice Statistics found that thirty-three percent of all civil trials in state courts involved contract disputes.[140] Therefore, it changes little to say efficient breach is isolated to contract law because the implications of this concept for corporate life and business ethics remain widespread. To briefly summarize, economic analysis of contract presumes that "doing the right thing" can be defined in terms of monetary outcomes. Next, duties undertaken by agreement among organizations can be wiped away when it is socially "cheaper" to do so. But, under Kaldor-Hicks efficiency, there may not be obligations to spread gains from this type of breach of contractual duty. Ultimately then what becomes of the moral character and integrity—the creditworthiness—of commercial institutions? Whether or not they engage in efficient breach, business organizations in general can lose credibility from this, and require incentives based on the specter of litigation[141] to perform as expected.

C. OPTIMAL DETERRENCE

A third innovation from Law and Economics was *optimal deterrence* theory. This theory applied most in the realm of tort liability. It said that decisional outcomes in cases of civil harm—for example, products liability, in which a commercial product injured the end user—should be reached in a manner that is most efficient for the society at large.[142] The underlying idea was that in deciding liability, courts were not simply rendering private justice, they were also creating public policy. If a company could be found strictly liable for, say, a glass jar of peanuts breaking upon opening and cutting the plaintiff's hand[143], then not just *this* company but *all* companies, would have to ensure the safety of their product containers until the moment their products arrived in the consumer's hand, Historically, courts were aware of this policy effect but decided cases based upon classic Kantian and Aristotelian ideas about right versus wrong. With the proliferation of Law and Economics, the emphasis on Kaldor-Hicks raised the belief that

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138. *See generally* CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981).

139. The concept is a distinct institution that does not exist explicitly across other areas of the common law, although tort theories of breach that consider cost-benefit analysis are analogous.

140. Lynn Langton and Thomas H. Cohen, *Civil Bench and Jury Trials in State Courts, 2005*, U.S. DEP'T JUST. (Oct. 2008), https://bjs.ojp.gov/content/pub/pdf/cbjtsc05.pdf [https://perma.cc/S4FV-ZNZY].

141. This might take the form of deterrence from the "specter of process" or the "specter of liability." *See* Riaz Tejani, *Efficiency Unbound: Processual Deterrence for a New Legal Realism*, 6 U.C. IRVINE L. REV. 207, 208 (2016).

142. *See generally* Guido Calabresi, *Optimal Deterrence and Accidents*, 84 YALE L.J. 656 (1974).

143. *See generally* Welge v. Planters, Lifesavers Co., 17 F.3d 209 (7th Cir. 1994).

these decisions could also be used to ensure the most "efficient" use of social resources.[144] Richard Posner initially said that wealth maximization was a form of utilitarianism, but as Daniel Ostas writes, he later eschewed utilitarianism as a kind of master narrative of Law and Economics.[145] Yet, as Liscow and others write, even while wealth maximization and utility may have fallen out of fashion, the underlying foundation of "efficiency" in Law and Economics has not.[146] A rule that was overly inclusive—that is to say granting damages to plaintiffs who perhaps had been imprudent in their uses of the product—would be wasteful as there could be no benefit to "charging" a corporation for misconduct that was outside its own hands. Optimal deterrence theory said judges should determine liability in just such a way that it discouraged unsafe behavior only so far as doing so would not become wasteful of aggregate resources. Recognizing that case outcomes may affect social behavior, the theory held that this behavior should be made safer only as much as doing so was efficient. Under optimal deterrence theory, decisions should minimize the cost of accidents *and* the costs of avoiding them.[147]

Once again, the ethics of such decision-making leave much to discuss. People, that decision-making said, should not act with the *utmost* care to one another because life is precious and harming another outside of self-defense is a breach of universal human duties or virtues. Rather, people should act with only the level of care whose costs do not outweigh its benefits where costs and benefits could be theoretically social but practically individualized.

D. THE HAND FORMULA

Following this reasoning, the final, and perhaps most ubiquitous legal theory endemic to Law and Economics is known as the Hand Calculus from the seminal case *U.S. v. Carroll Towing*.[148] There, U.S. Second Circuit Judge Learned Hand had to decide whether a barge loaded with flour for the U.S. war effort and moored in New York Harbor should have been more diligently surveilled by its owners prior to breaking loose and crashing into neighboring boats and docks.

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144. POSNER, *supra* note 130.

145. Daniel T. Ostas, *Postmodern Economic Analysis of Law, Extending the Pragmatic Visions of Richard A. Posner*, 36 AM. BUS. L.J. 193, 196 (1998).

146. Liscow, *supra* note 7.

147. JULES COLEMAN, SCOTT HERSHOVITZ & GABRIEL MENDLOW, THEORIES OF THE COMMON LAW OF TORTS, STAN. ENCYC. PHIL. (Edward N. Zalta ed., 2015), https://plato.stanford.edu/entries/tort-theories/ [https://perma.cc/JV6V-NPBW]

> [The] principal claim is that tort should be understood as aiming to minimize the sum of the costs of accidents and the costs of avoiding them. Since shifting costs is itself costly, economic analysis begins with the following question: when is it worth incurring costs in order to shift costs? The obvious answer is that it makes sense to incur costs in order to reduce costs only when doing so is itself cost justified: that is, when the cost incurred are less than the costs avoided. This leads to the well known economic view that the goal of tort law is to minimize the sum of the costs of accidents and the costs of avoiding them—so-called, optimal deterrence.

148. United States v. Carroll Towing Co., 159 F.2d 169 (2d. Cir. 1947).

The main question in the case was whether the company in charge of the vessel employed sufficient staff to watch the barge throughout the day and night.[149] This question could be generalized to a more essential question about *all* of negligence liability: How do we determine when an actor has behaved below the requisite standard of "reasonable care"? The answer, said Judge Hand, could be distilled into a simple calculus.

> Since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her; the owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B less than PL.[150]

As later summarized by Posner, the Hand Calculus was a formulaic way of expressing Benthamic Utilitarian ethics.[151] In negligence, it meant that the "right" decision was one in which doing any more to mitigate risks taken would outweigh the economic advantages of taking that risk in the first place.

These key tenets of Law and Economics have found their way into numerous cases over the decades since this intellectual movement took root.[152] They would also find further support through the establishment and creation of several new think tanks and university research centers sponsored largely by private benefactors—some of whom had been defendants in tort and contract cases and were unhappy about the far-reaching effect of these case outcomes on their corporate activities.[153] With this infusion of financial support also came a powerful wave of faculty and staff recruitment—an effective tidal wave of institution-building within the academic wing of the legal profession that was directly intended to counterbalance what had been perceived as the increasing drift of American lawyers toward public interest goals and away from commercial enterprise.[154] As Law and Economics took root in the academy for these reasons, it would exert considerable impact on the formation of new lawyers. It augured the emphasis on quantitative rankings as a determination of law school quality and choice.[155] It helped to emphasize the "human capital" approach to legal education and

149. *Id.* at 174.

150. *Id.* at 173.

151. Richard Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32–35 (1972).

152. *See* Keith Kendall, *The Use of Economic Analysis in Court Judgments: A Comparison between the United States, Australia and New Zealand*, 28 UCLA PAC. BASIN L.J. 107 (2011).

153. McCarthy v. Olin Corp., 119 F.3d 148 (2d Cir. 1997). The Olin Foundation funded Law and Economics centers at University of Chicago, Yale, Harvard, Stanford, UPenn, Berkeley, and USC. *See* TELES, *supra* note, 16 at 182–207.

154. TELES, *supra* note 16.

155. BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS, 78 (2012).

justified increasingly burdensome student debt levels.[156] It may even have inspired the deregulation of the law school accreditation process and the advent of for-profit law schools.[157] And it fostered a vision of legal ethics shaped by a conception of legal services as themselves a form of commercial activity riding tandem toward increased wealth with the explosion in financial capitalism during the same period.[158]

IV. MORAL CONVERGENCE

Starting from the corporate scandals of the past several decades and working backwards, we see that the ethical judgment in large commercial firms has often placed profit over limiting harm to passengers, shareholders, and small depositors. Examples of this conduct abound, and the above cases of Boeing, Valeant, and Wells Fargo are but some of the many high-profile illustrations. In each of those cases, corporate counsel was in a position to advise executives on the proper course of action. In each case, in-house counsel also stood to benefit handsomely from the wrongful conduct employed by the corporation or its subsidiary.

At this stage, it is useful to revisit the nuances inherent in the ethical position of utilitarianism by asking the following question: Were newsworthy product cases a faithful application of utilitarianism or a violation of it? In the historic Ford Pinto case, for example, Ford had been informed that the placement of internal fuel tanks in its famous compact vehicle was unsafe and would lead to vehicular explosions upon impact.[159] Ford lawyers calculated the likelihood and frequency of such incidents, the cost of bodily injury and death that would result and weighed these factors against the cost of recalling the dangerous vehicles. Ford determined that settlement payouts would be less costly than eliminating the risks it had created, so the company chose the former course of action. Later, when court proceedings assessing the punitive damage award for one plaintiff uncovered this internal, *ex ante*, deliberate choice, the court saw this as evidence of bad corporate judgement.[160]

Perhaps Ford's conduct, much like Valeant, Boeing, and Wells Fargo above, was egoist *rather* than utilitarian—as self-interested rather than socially useful. And yet, the question it raises for the corporate context is: what do we mean by "self" and "society"? As has been said in a variety of forms and contexts, "corporations are people."[161] The French sociologist Emile Durkheim viewed

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156. *See* Riaz Tejani, *A Working-Class Profession: Opportunism and Diversity in U.S. Law*, 42 DIALECTICAL ANTHROPOLOGY 131 (2018).

157. *See generally* RIAZ TEJANI, LAW MART: JUSTICE, ACCESS, AND FOR-PROFIT LAW SCHOOLS (2017).

158. PISTOR, *supra* note 57; RILES, *supra* note 56.

159. Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 360–61 (Cal. Ct. App. 1981).

160. *Id.* at 813. ("Ford's argument that there can be no liability for punitive damages because there was no evidence of corporate ratification of malicious misconduct is . . . without merit.").

161. One of the more famous cases of this was Senator Mitt Romney's assertion during the 2011 presidential campaign. *E.g.*, Phillip Rucker, *Mitt Romney Says 'Corporations Are People'*, WASH. POST (Aug. 11,

corporations at the dawn of the twenty-first century as some of the best exemplars of "organic solidarity"—from an archaic type of weak social relation based on necessity to a stronger modern one based on complementary choice and mutual gain.[162] And as Gerald Gaus wrote, the corporation exhibits several qualities that are closer to socialism than pure market capitalism.[163] By this, he meant that the organizational solidarity around employee retention and promotion, as well as employer-subsidized group healthcare, were ironically more collectivist that most of what we see in Western society at large. This echoes Hayek, who felt the system of reward in capitalist firms was more other-oriented: "Reward for merit is reward for obeying the wishes of others in what we do, not compensation for the benefits we have conferred upon them by doing what we thought best."[164] Indeed, in the French language today one of the words for "company" remains *société*—a reflection of the collectivist roots and organic solidarity reflected in business organizations. The point is that ethical decisions taken for the betterment of the corporation—as most are—do not uncomplicatedly fall into the category of egoism, because the firm is often seen and behaves as a micro-society. And so perhaps the slippage from a utilitarianism *social* in nature to one *egoistic* or individualist in nature, in this context results from the ambiguities inherent in the term *society* itself. Indeed, even outside this context, as described at the outset of this article, lawyer-economist focus on Pareto-optimal distribution, emphasizes the *social* benefit of *individual* pursuits of self-interest.[165]

The importation of this idea into legal analysis and institutions, however, is the primary subject of this article. In historical perspective, this importation is a relatively new phenomenon; American lawyers have always been trained in the precepts of English common law.[166] Historically, the ethical frameworks underpinning common law were of diverse Western origins; in some cases, the breach of a duty was controlling irrespective of the severity of outcome or the chain of causation that ensued.[167] In other instances, virtue mattered most as in cases

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2011), https://www.washingtonpost.com/politics/mitt-romney-says-corporations-are-people/2011/08/11/gIQABwZ38I_story.html [https://perma.cc/9FGF-KCV4]; Kent Greenfield, *If Corporations Are People, They Should Act Like It*, THE ATLANTIC, (Feb. 1, 2015), https://www.theatlantic.com/politics/archive/2015/02/if-corporations-are-people-they-should-act-like-it/385034/ [https://perma.cc/LW68-Q6KG].

162. EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY, 143, 143 (Steven Lukes ed., W.D. Halls trans., Free Press 2014) (1984).

163. Gerald Gaus, *The Idea and Ideal of Capitalism, in* BUSINESS IN ETHICAL FOCUS 651, 663–64 (Fritz Allhoff, Alexander Sager & Anand Vaidya eds., 2d ed. 2017).

164. F.A. HAYEK, THE CONSTITUTION OF LIBERTY 100 (1960).

165. Writers like Ayn Rand separated individualism from any kind of social or collective benefit on the basis of a presumed closer relationship between reality and perception at the individual level, and of a presumed distortion of reality when mediated by perceptions at the social level. *See* AYN RAND, THE VIRTUE OF SELFISHNESS (1964). Popular embrace of Rand's "objectivism" remains another possible strand of influence on contemporary lawyering in corporate organizations, however the diffuse uptake of lawyer-economist ideas in law school teaching and learning is a more proximate one.

166. *See, e.g.*, FARNSWORTH, *supra* note 41.

167. *See generally* DAVID G. OWEN, THE PHILOSOPHICAL FOUNDATIONS OF TORT LAW (1997).

where courts consider "moral turpitude" to be a cause for heightened punishment.[168] Utilitarianism, meanwhile, though it was an ethical system founded in 18th century England, took some time to find its way deeply into common law jurisprudence. Attorneys were slow to argue, and judges slow to accept *en masse* that the "ends justify the means" when it comes to assessing the right thing to do.

But the rise of Law and Economics represents, despite assertions of continuity[169], a shift in this history away from duty and virtue-based ethics and toward a utilitarian perspective that found assessing right versus wrong could be simpler than before. Reducing good judgment down to that which helps to generate the most aggregate wealth, Law and Economics argued that "justice" was a microeconomic rather than social or philosophical problem. The legal theories cited above, the Coase Theorem, efficient breach, optimal deterrence, and the Hand Formula, are all taught in the very first year (often first semester) of law school, when most professional socialization occurs. They are embedded in the ubiquitous case books professors use for contracts, torts, property, and even civil procedure. Most new attorneys are exposed to, if not immersed, in them.

Meanwhile, the choice of some large corporations to make decisions that favor profit over other forms of social responsibility even in the face of stakeholder theory is nothing new.[170] But the general agreement from academic law—represented by one of its most vocal subfields today, Law and Economics—that ethical choices can be assessed based often on Utilitarian cost/benefit thinking, is unprecedented. It has led to the situation that forms the title and argument of this paper: that business and law are today in a relation of heightened moral convergence.

To recap, this convergence has been characterized by several parallel trends. First, the growth of lawyers in business organizational leadership, spelled out in Section I above, has meant that professional legal training has played a larger role in the culture of corporate organizations. Second, the ongoing rise of Law and Economics has made its consequentialist account of justice an extremely important—if not the most important—school of thought in legal education. And third, the ongoing adherence to shareholder primacy as a paradigm in business management—as seen in the three case studies of Section II—has amplified ethical misconduct under the aegis of efficiency. In short, as this article asserts, while companies rely more and more on attorneys to help them discern the right thing to do, attorneys are trained more and more to discern right and wrong by a logic that has driven many businesses since the 1970s.

To this argument, several objections are foreseeable. The first is that the examples of ethical breach—both those given above and those not—are exceptions that prove a different rule. But, if they are exceptional as lapses, it is only in that

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168. *Id.* at 1–2.

169. *See* Riaz Tejani, *The Life of Transplants: Why Law and Economics Has Succeeded Where Legal Anthropology Has Not,* ALA. L. REV. (forthcoming 2023).

170. Friedman, *supra* note 25.

they were themselves *detected*. Indeed, the pervasive number of cases like these and a likely number of unreported ones suggests the underlying logic to them is probably far more common than we know.

A second objection might be that the problem lies not in too many legal counselors advising on business ethics but rather in too few; that companies should subject themselves to *more* advising from lawyers, not less, and that the problem is executives listening insufficiently to the advising they receive. This would be true if law supplied robust, alternative ethical considerations. Yet zero times ten is still zero. Although "zero" alternative ethical frameworks might be an exaggeration for the entire profession, this is not the case for the self-selecting group comprising corporate counsel and business lawyers more generally. On these groups, the influence of cost-benefit thinking is likely strongest.[171]

A third objection may be that Law and Economics touches primarily the legal academy—legal theory and legal education—rather than professional practice. But this proposition is weakened by a cursory look at the federal judiciary and regulatory agencies. Several of the most prominent Law and Economics theorists, Richard Posner, Frank Easterbrook, and Guido Calabresi, have sat as judges on Federal Courts of Appeal, and the Federalist Society—the most prominent conservative lawyer association in the United States—has successfully recommended appointments for decades from a list that includes numerous libertarian lawyers.[172]

And finally, a fourth objection is that lawyers should never have been granted moral deference in the first instance. With lawyer jokes abundant in the popular culture, the moral equanimity of attorneys has long been a question; companies that turned to them for ethical advice were thus confusing, perhaps fatally, law and ethics. But the advent of a licensed, professional bar with a monopoly on legal services is historically *new*. In both the Roman Empire and early Colonial America, lawyers could be "laypersons," albeit respected and learned members of the community.[173] In many cases they were those deemed to be highest in

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171. Many law schools have paired "business law" with Law and Economics in curricular programs, research centers, and faculty interest groups. For example, Stanford Law School offers an "Area of Interest" concentration in Law, Economics, and Business, though not in business alone. *See* Stanford Law School, https://law.stanford.edu/areas_of_interest/law-economics-business/ [https://perma.cc/3AZ2-BKVZ] (last visited Sep. 5, 2021). The University of Texas - Austin is home to a Center for Law, Business, and Economics. *See* The University of Texas at Austin, https://law.utexas.edu/clbe/ [https://perma.cc/KKP5-AZYN] (last visited Sep. 5, 2021). And Harvard is home to a John M. Olin Center for Law, Economics, and Business *See* Harvard Law School, http://www.law.harvard.edu/programs/olin_center/ [https://perma.cc/LJ3H-9USU] (last visited Sep. 5, 2021).

172. *See* TELES, *supra* note 16, at 157–159.

173. *See e.g.*, Anton-Hermann Chroust, *Legal Profession in Ancient Imperial Rome*, 30 NOTRE DAME L. REV. 521, 535 (1955):

> In the beginning of Roman Law the jurisconsult or lawyer, who was either a pontiff or a layman, had merely informed the parties as to the exact wording of the solemn forms of action (*legis actiones*) or formulae they were to use in order to achieve the desired legal result.

virtue. Today, in the world of international commercial arbitration, where bar licensure is neither a possibility nor a reputational variable, this emphasis on virtue remains strikingly prominent.[174] This suggests that, in historical and comparative perspective, absent a strict licensure regime, moral character is one of the key independent variables for faith in legal expertise. Where licensing is required, it is still nominally an important factor.

V. SOLUTION

In this section I will argue that the Preamble of the Model Rules should be amended to add language condemning professional advising that leads to significant and foreseeable ethical breaches, and Rule 2.1 should be revised to make ethical reflection a necessary aspect of client counseling. The previous sections have suggested that there is a convergence between business and law at the level of ethical framing. While this does not mean to suggest *every* business lawyer is guided by the principles underpinning Utilitarianism, Law and Economics, Kaldor-Hicks efficiency, or egoism, it does assert that a predominant ethical tendency transmitted through contemporary legal education is one of cost-benefit thinking. Comparing this with the traditional shareholder primacy view of corporate social responsibility, what we see is an unprecedented level of similarity, if not direct overlap. This article has raised this form of moral convergence as a red flag because, although business ethics are not their primary focus, business lawyers are increasingly relied upon to give their stamp of approval to actions managers and executives might otherwise fear as "wrong."[175] Here, questions of "wrongfulness" in the *ethical* sense become superseded by answers about "wrongfulness" in the *legal* sense. As this piece has documented, several of the largest corporate ethical breaches of the past twenty years are illustrations of this dilemma.

To begin to resolve this problem, the ethical training of lawyers must be returned to a central place in legal education. Law students should be taught from the earliest stages that their decisions and advising about "what is legal" are not divorced from implications about "what is ethical." This runs contrary to the way standard issue-spotting is used in both classroom and exam contexts.[176] It need not displace the issue-spotting faculties that law students are trained to develop; it need only complement it. But law schools are slow-changing and may not embrace new recommendations and institutional incentives to make ethics "feel"

See also, Mary Sarah Bilder, *The Lost Lawyers: Early American Legal Literates and Transatlantic Legal Culture*, 11 YALE J. L. & HUMAN. 47, 50 n. 16 (1999) ("One approach insists that, even if there were 'attorneys,' they do not really count because the seventeenth-century laymen 'attorneys' were qualitatively different from the real attorneys of the eighteenth-century who had 'legal education.'").

174. YVES DEZELAY & BRYANT GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER (1996).

175. *See* HEINEMAN, *supra* note 18, at 11.

176. MORRILL, *supra* note 34, at 146.

more significant to legal education. If not, how do we incentivize law schools and professional responsibility scholars and teachers to emphasize the ethical *in* the legal? Moreover, do we hold practitioners more accountable for offering legal advice that, while sound with respect to the law, leads to ethical breaches that cause harm to employees, customers, the environment, or the general public?

The surest way to achieve this accountability is to modify the existing regime of professional responsibility so that it applies to legal advising in which corporate, business, or commercial ethical questions are implicated. As currently adopted in most states, the Model Rules of Professional Conduct do not apply in this way. In a few places, the current rules come close. Section 5 of the Preamble states, "A lawyer should use the law's procedures only for legitimate purpose. . . ."[177] Legitimate purposes, in this use, could by itself be read as "ethically praiseworthy" or something to this effect. But the wider context of its use in this section suggests otherwise; the ensuing language describes duties to preserve the integrity of legal process and institutions. "Legitimate purposes" here likely means purposes that do not abuse the system. This language is therefore ineffective on its face for discouraging the kinds of legal advising that led to, for example, the Wells Fargo scandal.

Similarly, Section 6 of the Preamble says, "[A] lawyer should cultivate knowledge of the law beyond its use for clients, [. . .], a lawyer should further the public's understanding of and confidence in the rule of law and the justice system. . . . A lawyer should be mindful of deficiencies in the administration of justice. . . ."[178] The potential for these statements to guide lawyerly ethical conduct is seemingly high. They imply that knowledge of the law is part of a larger body of values, not simply in the *service* of one client. They suggest public confidence in law is paramount and should not be compromised, and they say that one should not take advantage of weaknesses in legal protections or institutions meant to benefit the public. All of these are things that pertain to the kinds of conduct seen in Boeing, Valeant, and Wells Fargo in the past decade, and that is a good thing. But the prescription offered in Section 6 is systematically weak: "Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system. . ."[179] This entreaty to donate time lies behind much of our *pro bono* channel for legal services, which is better than nothing. However, duties to avoid large-scale corporate wrongdoing cannot be discharged by individual lawyers donating time to promote "access to justice." Systemwide problems call for systemwide solutions.

Section 9 further states, "[w]ithin the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment

177. MODEL RULES pmbl., Section 5.
178. MODEL RULES pmbl., Section 6.
179. MODEL RULES pmbl., Section 6.

guided by the basic principles underlying the Rules."[180] Here, the concession to the complexity of context in legal advising is most healthy, and encouraging. But again, the section goes on to specify that the duty to use moral judgment is mainly for the benefit of *clients* and other *participants* in the legal system.[181] Although this language remains preambular, it has, as in all code interpretation contexts, significant weight. If Section 9 were not limited to clients in this way, it could better protect the public at large by asking attorneys to think twice before risking harm to the community or society.

Next, in Section 16 we learn that "[t]he rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law."[182] Herein lies perhaps the most promising language in the Preamble as far as accountability for business ethical advising on the part of lawyers is concerned. But it could go further. As written, Section 16 simply states that there are other principles to take into account beyond "the legal." This leaves open to considerable interpretation what those principles might be, and how much they can be permitted to conflict with determinations of legality. This section ought to specify that viable Western frameworks for deciding "right from wrong" include virtue (e.g. Aristotelian), duty (e.g. Kantian), and care (e.g. quasi-feminist) ethical traditions.[183] Beyond those, non-Western frameworks such as Confucianism could be enumerated to emphasize the importance of a moral framework when approaching ethical advising.

Finally, moving from the Preamble to Rule 2.1 of the Model Rules, we find an express admonition that lawyers presently acting as advisors, "may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."[184] As Comment 2 on Rule 2.1 specifies, however, "a lawyer is not a moral advisor as such."[185] This specification seems to reflect an outdated view of lawyers as purely legal advisors, and it does not internalize the developments, described in Section II above, positioning lawyers as integral business leaders. Ethics and morality are implicated in all legal advising, especially in situations where large organizational conduct is capable of generating rapid, widespread costs and benefits. And again, the normative thrust of this instruction to consider ethics is weakened by the discretion conceded in the word "may."

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180. MODEL RULES pmbl., Section 9.
181. MODEL RULES pmbl., Section 9.
182. MODEL RULES pmbl., Section 16.
183. *See supra* note 24.
184. MODEL RULES R. 2.1.
185. MODEL RULES R. 2.1, cmt. 2.

> Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and *may* decisively influence how the law will be applied. (emphasis added).

In the world of business ethics, there is no greater condemnation of ethical conduct than a court ruling with substantial damages awarded to a plaintiff, or class of plaintiffs. For students and scholars in the fields of management and organizational leadership, legal judgments serve as a kind of shorthand for ethical reasoning—even when in theory they should be kept separate. This returns us back to the premise suggested earlier in this article that businesspeople depend on jurists increasingly to advise what is "right." Taking this tendency into account, and combining that with my observations of the above sections of the rules of Professional Conduct, I suggest that the Preamble of the Model Rules be amended to include language that condemns legal advising which leads to significant and reasonably foreseeable ethical breaches, and that Rule 2.1 be amended to make ethical consideration a necessary component of legal advising.

Such a principle may be analogous to the jurisprudence around "foreseeability" in tort law. There, many ask, should it matter whether only proximate resulting harm was foreseeable, or should we extend liability for more harms that follow further down a chain of causation. As currently practiced by courts, the more hazardous the activity, the broader the scope of liability admitted.[186]

In cases of corporate ethical breaches resulting from otherwise sound "legal" advice, the same should be true. A corporate counsel to a Fortune 500 company may be able to reasonably say this or that decision will be legal under the current law—and therefore not liable for malpractice—but she should not be unaccountable for doing so when the likelihood of mass harm to the public or environment was reasonably foreseeable. Language to this effect should be added to Section 16 of the Preamble and to Rule 2.1.

Notwithstanding philosophical debates about the contiguity between morality and ethics, and assuming that both describe deep considerations of custom about "right versus wrong," then it would seem Rule 2.1 is perhaps the *most* opportune site for inserting the principle that lawyers *ought* to consider salient ethical frameworks in advising large organizations capable of rendering substantial harm through the pursuit of a self-oriented utilitarianism. The rule should thus read:

> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer *shall* refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

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186. *See, e.g.*, Fleming James, *Scope of Duty in Negligence Cases*, 47 NW.U. L. REV. 778, 781 (1953).

> This will be because the offending conduct foreseeably involved unreasonably great risk of harm to the interests of someone other than the actor. This view would limit the scope of the duty accordingly: the obligation to refrain from that particular conduct is owed only to those who are foreseeably endangered by the conduct and only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous. Duty, in other words, is measured by the scope of the risk which negligent conduct foreseeably entails.

In adopting this revision, the drafters of the Model Rules may open themselves to criticism that they have failed to specify *whose* morals or contextual factors should count in ethical reflection. But, through the Comment process they can specify that they are not endorsing *one* moral, social, or religious system over others—simply asking professionals to reflect on some extra-legal bases for "right versus wrong," particularly in situations where law is not vocal or decisive. Indeed, this is merely asking attorneys to reflect purposefully on something they are likely already doing tacitly or subconsciously. Some readers may feel these changes ask too much, that attorneys already have broad fiduciary duties to their client and to the Court, and that adding new duties to protect the general public is overly burdensome. Some guidance from the rules of academic research ethics might be comparatively instructive. Although foreign to most legal academics and practitioners, the research of most scientific, biomedical, and social scientific disciplines is governed by the Common Rule codified at 45 C.F.R. 46.[187] This rule is a formalization of decades worth of ethical review and debate about the practices of research on human subjects in the wake of violations such as the Tuskegee Syphillis study, the Milgram Experiment, and the Stanford Prison Experiment.[188] Today, all human subjects research leading to generalizable results must be vetted by institutional review boards (IRBs) at most colleges and universities. Public grant funding is not permitted unless this step is first completed.[189]

Among the many principles IRB committees are trained to use in assessing risks and benefits of human subjects research, one stands out as supportive of the argument of this article: *beneficence*. According to training materials all researchers must review prior to submitting an IRB protocol, all human subjects researchers must observe the principle of beneficence.[190] So what is it?

> Beneficence – Persons are treated in an ethical manner not only by respecting their decisions and protecting them from harm, but also by making efforts to secure their well-being. Such treatment falls under the principle of beneficence. The term "beneficence" is often understood to cover acts of kindness or charity that go beyond strict obligation. In this document, beneficence is understood in a stronger sense, as an obligation. Two general rules have been formulated as complementary expressions of beneficent actions in this sense: (1) do not harm and (2) maximize possible benefits and minimize possible harms.[191]

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187. 45 CFR § 690.101-124.

188. Ronet Bachman & Russell K. Schutt, *Research Ethics and Philosophies*, *in* THE PRACTICE OF RESEARCH IN CRIMINOLOGY AND CRIMINAL JUSTICE, 52–81 (2001).

189. *See e.g.*, *Human Subjects*, NAT'L SCI. FOUND., https://www.nsf.gov/bfa/dias/policy/human.jsp [https://perma.cc/FPF5-LVZT] ((last visited Sep. 30, 2021).

190. *See* DEP'T OF HEALTH AND HUMAN SERV.'S, OFFICE OF HUMAN RESEARCH PROT.'S, *Consideration of the Principle of Justice,* 45 CFR part 46 (2021).

191. NAT'L COMM'N FOR THE PROT. OF HUM. SUBJECTS OF BIOMEDICAL AND BEHAV. RSCH., THE BELMONT REPORT: ETHICAL PRINCIPLES AND GUIDELINES FOR THE PROTECTION OF HUMAN SUBJECTS OF RESEARCH (1979).

If this sounds much like the Hippocratic oath of the medical physician, that is by design. The National Commission charged with studying the problem of ethical violations in research determined that this entreaty to "do no harm" was a necessary and non-negotiable element to making modern scientific research trustworthy, honorable, and even valid.[192] Henceforth, scientists had duties to not only cause minimal harm in their studies, but to actively seek out ways to benefit their participants and the general public through their work. Furthermore, while there appears to be an irony in the second "general rule" articulated above—namely, that the principle of beneficence calls for a cost-benefit analysis— one must keep in mind that the problem addressed in this article has not been the "social utility" school of utilitarianism, but rather the particular version of individualistic or egoistic utilitarianism encouraged by Law and Economics' emphasis on Kaldor-Hicks efficiency as a stand-in for up-front ethical reflections about harm and distributive justice.

Why beneficence should apply in the case of scientific research but not in professional legal practice is puzzling. While it may be true that lawyers are primarily advocates rather than public servants, scientists are in no greater sense natural servants of civil society. And yet, the standard to which we hold them is dictated not by their "natural" role but rather the possibility and scope of harms they may potentially create—even when great social benefits might be anticipated. In this case, with the rise of multinational corporations and potential for massive corporate wrongdoing, a similar expectation of beneficence is reasonable to impose upon lawyers. The additional language broadening the scope of application in the Model Rules is one efficient way to promote this expectation.

CONCLUSION

This article has argued that business executives and lawyers are increasingly in a state of moral convergence. In business, the persistent "Friedmanian" view of corporate social responsibility places profit over other objectives, and in law most Law and Economics has deemphasized duty, virtue, and care ethics to generally favor a framework that supports individualized profit seeking. There may be room to debate whether corporate organizations are "individuals", but the point is that, by design, they typically manage their affairs "as though" separate from contextual social structures.

Given this, the ABA should include a more explicit statement on the professional responsibilities that obtain in large business organizations, where "sound legal advice" can sometimes support gross ethical failures. Encouraging more independent ethical judgment in this way can only help to protect the law from becoming adjunct to business and allowing it to remain its own "empire."[193]

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192. *Id.*

193. DWORKIN, *supra* note 1.