



## ESSAY

**The Return of the Lawyer-Statesman?**

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**Abstract.** Ben W. Heineman, Jr., a former general counsel of General Electric, has written a book (*The Inside Counsel Revolution*) proposing an ambitious role for legal advisors to corporations, which he calls “resolving the partner-guardian tension.” Corporate lawyers, Heineman argues, must be effective agents in helping their clients attain their performance goals. But they must also ensure that the company acts with “integrity,” meaning compliance with the spirit as well as the letter of the laws of the jurisdictions in which the company does business, fostering constructive relations with stakeholders as well as maximizing share prices, and forming collaborations with other companies to promote public policies that mitigate the harmful externalities of corporate conduct. This Essay points out that this program looks like a revival of the “managerialist” agenda of progressive corporate statesmen of the 1920s and 1930s and of relatively progressive business associations of the 1950s and 1960s, like the Committee for Economic Development. In recent decades, the managerialist ideal of corporate statesmanship has been abandoned in favor of the view that the only social responsibility of businesses is to maximize their profits and that the only responsibility of their lawyers is to help them overcome regulatory and tax restraints that stand in their way. This Essay argues that this dominant vision of corporations as amoral profit-seekers and of their lawyers as their amoral facilitators has proved dangerously misguided, and it welcomes the revival of the lawyer-statesman ideals of Heineman and his collaborators as a corrective. It also raises some questions about the feasibility of the ideal.

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## Introduction

In the spring of 2015, David Wilkins, professor at Harvard Law School, and Ben Heineman, Jr., former general counsel at General Electric (GE) and now a lecturer at Harvard, organized a conference of corporate in-house lawyers and law firm partners.<sup>1</sup> The conference took as its theme a manifesto—whose principal authors were Wilkins; Heineman; and William Lee, a former managing partner at WilmerHale—proposing a role for in-house counsel based on a capacious concept of the client company’s enlightened self-interest and obligations of citizenship.<sup>2</sup> Heineman has since expanded on this set of ideas in a book: *The Inside Counsel Revolution: Resolving the Partner-Guardian Tension*.<sup>3</sup> This book is partly an account of his tenure at GE, partly a manual for corporate in-house counsel, and mostly an elaboration of the theme of the Harvard Manifesto that it is the company lawyer’s job to balance the client company’s interest in “performance”—long-term financial prosperity—and “integrity.”<sup>4</sup> “Integrity” turns out to be shorthand for a collection of traits and actions: responsible mitigation of risks of harmful effects of the client’s business; honest dealing and avoidance of corruption; and support for public policies that regulate harmful externalities and supply public goods—such as infrastructure, education, and health.<sup>5</sup> This project seems of a piece with parallel—gradual and fragile—movements, which one can see in the policies of some nation-states and in the World Bank and International Monetary Fund, away from the hardline neoliberal (or market fundamentalist) doctrine that unfettered business enterprise under minimal state supervision is the only feasible route to global well-being.<sup>6</sup>

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1. See *Professionalism Project*, HARV. L. SCH. CTR. ON LEGAL PROF., <https://clp.law.harvard.edu/clp-research/legal-practice/professionalism-project> (last visited June 6, 2017); see also Gabe Friedman, *In Cambridge, Lawyers Debate Future of Their Profession*, BLOOMBERG: BIG L. BUS. (Apr. 10, 2015), <https://bol.bna.com/in-cambridge-lawyers-debate-future-of-their-profession>.
  2. See generally BEN W. HEINEMAN, JR. ET AL., *LAWYERS AS PROFESSIONALS AND AS CITIZENS: KEY ROLES AND RESPONSIBILITIES IN THE 21ST CENTURY* (2014), [https://clp.law.harvard.edu/assets/Professionalism-Project-Essay\\_11.20.14.pdf](https://clp.law.harvard.edu/assets/Professionalism-Project-Essay_11.20.14.pdf).
  3. BEN W. HEINEMAN, JR., *THE INSIDE COUNSEL REVOLUTION: RESOLVING THE PARTNER-GUARDIAN TENSION* (2016).
  4. See generally *id.*
  5. See *infra* text accompanying note 9.
  6. For a discussion of the core doctrines of neoliberalism, see, for example, David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS., no. 4, 2014, at 1, 1-3. For a discussion of the gradual retreat from market fundamentalism, see, for example, COLIN CROUCH, *MAKING CAPITALISM FIT FOR SOCIETY* 8-19 (2013), among many other works noting this trend.

The Harvard Manifesto and Heineman's book go well beyond the kind of high-minded corporate rhetoric generally deployed for ceremonial occasions. There is a lot of high-minded rhetoric in both, but it is accompanied by many concrete and specific examples and proposals. I want to focus on the pieces of both works that deal with lawyers, law firms, and their corporate clients as citizens with public responsibilities. For me, the most interesting aspect of this initiative is that it returns to some earlier notions of the responsibilities of legal professionals as citizens while also trying to update those traditions to take account of present opportunities and obstacles.

I devote most of this Essay to Heineman's book because it contains the more extensive version of his views. But let me first quote from the more compressed and succinct Harvard Manifesto to give the flavor of the general argument. The authors begin with the assertion that "the ultimate goal of corporations—especially global companies—should be the fusion of high performance with high integrity, with the general counsel and inside lawyers playing key roles in achieving both."<sup>7</sup> "High performance" is simply conventional profit-seeking for the benefit of "shareholders and other stakeholders upon whom the company's health depends."<sup>8</sup> "High integrity" is a considerably more complicated and multiform concept, which includes

robust adherence to the letter and spirit of formal rules, both legal and financial; voluntary adoption of binding global ethical standards that go beyond existing rules, including balanced proposals on future public policy; and employee commitment to core values of honesty, candor, fairness, trustworthiness, and reliability. It involves understanding, and mitigating, other types of risk—beyond direct economic risk—that can cause a company catastrophic harm: legal, ethical, reputational, communications, public policy, and country-geopolitical.<sup>9</sup>

Achieving these goals casts special obligations on the corporation's lawyers, who have not been discharging them well in recent years:

For lawyers, these integrity issues go far beyond the strictures of mandatory legal professionalism.

. . . Ultimately, high performance with high integrity creates fundamental trust among shareholders, creditors, employees, recruits, customers, suppliers, regulators, communities, the media, and the general public. This trust is essential to sustaining the corporate power and freedom that drives the economy—trust which in the past 10 years has dramatically eroded due to stark corporate scandals and unthinkable business failures.<sup>10</sup>

The corporation's outside lawyers share this elevated mission:

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7. HEINEMAN ET AL., *supra* note 2, at 22.

8. *Id.*

9. *Id.*

10. *Id.*

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But it is not just the individual attorneys employed by law firms who must rededicate themselves to their duties as lawyer-citizens. As with the corporations that comprise the bulk of large law firms' clients, law firms can and should redouble their efforts in the area of "law firm citizenship," with the goal of advancing pertinent social goods. This might include public policy efforts in areas that directly affect law firms' business and professional interests (e.g., tax reform or legislation aimed at litigation and professional conduct), as well as public policy efforts in areas that affect the business interests of a given law firm's core client base—*so long as in each case the firm is careful to advocate for policies that further the broad public interest and not just the firm's or its client's parochial ones.*<sup>11</sup>

In addition to such "public policy efforts," the authors recommend that law firms

adopt a focused philanthropy model, concentrating resources and time on a specific group of organizations, with an eye toward long-term relationship and capacity building. This includes financial support, pro bono legal representation, volunteer service, and in-kind donations. A firm could commit to a financial contribution over time to each selected organization, but also promise and commit the time and energy of lawyers and staff to the organization. This long-term commitment of money and manpower not only benefits the selected organizations but also allows the firm to act as an institutional citizen in a different and meaningful way.

Firms also can and should embrace a role in addressing broader societal issues, for example education, scientific research and development, or cybersecurity and privacy. Firms must recognize and reward those engaged in these efforts both in compensation and with other recognition.<sup>12</sup>

Now, this ambitious program may not, in the end, result in much of substance. But it does seem to represent an important rhetorical shift away from conceptions of the business firm and of the obligations of the lawyers serving the firm that came to prevail around 1980.

In these conceptions it is inappropriate for business firms to serve any interest but that of maximizing profits for shareholders and inappropriate for their lawyers to do anything but help them do so.<sup>13</sup> It is, in any case, impractical, as such a firm would become a takeover target or have to replace its managers.<sup>14</sup> It is equally improper under these conceptions for lawyers to question client managers' chosen ends. That is also impractical. In-house lawyers will be bypassed or replaced for giving unwelcome advice, and outside law firms will fear losing business—or a star partner who recruited that client—to another firm. Similarly, in some conceptions of ethical lawyering, it

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11. *Id.* at 47 (emphasis added).

12. *Id.*

13. See *infra* Part III.

14. For the classic version of this argument, see Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 112-13 (1965).

is not only permissible but also necessary for a lawyer to adopt as her client's "interests" whatever the corporate agent who is consulting the lawyer presents as what the actual client immediately wants.<sup>15</sup> At its worst, as I spell out in more detail below, this doctrine not only rationalizes passive acceptance of some pretty dodgy business practices but also actively promotes them.

The Harvard Manifesto and Heineman's book assume that lawyers can and should have some influence in helping determine business clients' enlightened long-term interests and goals, which necessarily presupposes that business firms will have some leeway to act on that advice. In this respect, are the manifestos more realistic than the doctrine that business firms must follow the commands of the market or go under, and lawyers the commands of the client? Yes, in a way. But they are also potentially more radical, even utopian, in a good way. They represent a throwback to the "managerialist" conception of the business firm that emerged in the early twentieth century and dominated both business- and legal-professional ideology in the postwar period of 1945 to about 1975.<sup>16</sup>

### I. "Managerialist" Views of Corporate Citizenship

This managerialist ideology has its origins early in the twentieth century, when some prominent lawyers and business managers developed a complementary vision of their roles as leaders in business organizations. Managers would seek, and encourage their lawyers to give advice that would help them seek, to realize public values in the course of profit-seeking—or to put this another way, to be responsible corporate citizens, aware of potential conflicts their operations might provoke and harmful effects that might ensue, and to constructively collaborate to mitigate those conflicts and effects.

Louis Brandeis was one of the principal theorists—and most effective practitioners—of this role. His famous 1905 speech titled "The Opportunity in the Law" is now remembered chiefly as a summons to public interest lawyering, a call to leading lawyers to act for "the people" as well as for corporate clients.<sup>17</sup> It also urges upon lawyers a public interest-seeking role, independent of their functions as representatives of any client interests, as

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15. See generally William H. Simon, *Whom (or What) Does the Organization's Lawyer Represent?: An Anatomy of Intraclient Conduct*, 91 CALIF. L. REV. 57 (2003) (noting, and criticizing, the tendency of corporate law doctrine to identify as the "client" whichever corporate officer is consulting the lawyer).

16. See *infra* Part I.

17. Louis D. Brandeis, *The Opportunity in the Law*, Address Before the Harvard Ethical Society (May 4, 1905) [hereinafter Brandeis, *Opportunity in the Law*], in LOUIS D. BRANDEIS, *BUSINESS—A PROFESSION* 313, 321 (1914) [hereinafter BRANDEIS, *BUSINESS—A PROFESSION*].

policy statesmen and drafters of and advocates for sound legislation.<sup>18</sup> But its main purpose is to urge lawyers, in their capacity as advisors to businesses, to counsel managers to adopt business strategies that will increase the material welfare and practical capacity for democratic citizenship of their major constituencies—workers, local communities, and governments.<sup>19</sup> As is well known, Brandeis practiced what he preached when he could. For example, he advised the shoe manufacturer William McElwain to help cure the evil of irregular employment while also making his plant more efficient by evening out production over the year. And he advised the Filene brothers, department store magnates, to quiet labor unrest by giving their workforce a larger participatory stake in managing the business.<sup>20</sup>

Brandeis was well aware that because lawyers act for clients, they can only perform this role if their clients desire and authorize it. So his other great cause was to make business management a “profession.”<sup>21</sup> A professional, Brandeis said, rejects the notion that the amount of money made is a fair measure of success. A business must, of course, be profitable or go under.

But while loss spells failure, large profits do not connote success. . . . [I]n business, excellence of performance manifests itself . . . in the improvement of products; in more perfect organization, eliminating friction as well as waste; in bettering the condition of the workingmen, developing their faculties and promoting their happiness; and in the establishment of right relations with customers and with the community.<sup>22</sup>

The implication was that if managers practiced business as a profession, more clients like McElwain and the Filenes would show up to demand socially responsible legal advice.

The cause of professionalizing business was not, of course, confined to Brandeis. It was taken up by the newly founded Harvard Business School. Owen D. Young—one of Heineman’s predecessors as general counsel of GE and the company’s then-chairman of the board<sup>23</sup>—gave the Dedication Address for the new school in 1927.<sup>24</sup> Young argued that as business organizations

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18. *Id.* at 319.

19. *Id.* at 319-21.

20. See MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 63-65, 237-40 (2009).

21. Brandeis, Opportunity in the Law, *supra* note 17, at 313-14.

22. Louis D. Brandeis, Business—A Profession, Address at Brown University Commencement Day (June 19, 1912), in BRANDEIS, BUSINESS—A PROFESSION, *supra* note 17, at 1, 4.

23. Owen D. Young, GEN. ELECTRIC, <https://www.ge.com/about-us/leadership/profiles/owen-d-young> (last visited June 6, 2017).

24. Owen D. Young, Dedication Address (June 4, 1927), in 5 HARV. BUS. REV. 385 (1927); see also JOSEPHINE YOUNG CASE & EVERETT NEEDHAM CASE, OWEN D. YOUNG AND AMERICAN ENTERPRISE: A BIOGRAPHY 372-76 (1982).

expanded and their products and operations grew more technical and specialized, corporations were no longer subject to local social sanctions, becoming laws unto themselves.<sup>25</sup> In response, legislatures staffed with “amateurs” passed laws that expressed public outrage at corporate excesses but were clumsily and ineffectively drafted.<sup>26</sup> To avoid ill-judged regulation, business managers needed to seek remedial measures that would help solve the problems—or “externalities,” as we now call them—their organizations had helped create. The most important of these problems was the condition of labor. Workingmen were squeezed to extract the last dollar of profit; their family lives were destroyed by excessive hours of labor; their entire communities’ welfare was disrupted when plants closed. As Young argued, “[n]o man with an inadequate wage is free. He is unable to meet his obligations to his family, to society, and to himself.”<sup>27</sup> Also, he cannot be a full human being so long as he is thought of as a hired man. Young hoped for a day when labor would hire capital, businesses would become democratic rather than autocratic, and labor and management would cooperate to yield the highest joint profit and divide it fairly.<sup>28</sup> Notably, this statement was made by the chairman of one of the largest corporations in the world<sup>29</sup> in the conservative 1920s.

Young’s words were certainly not empty rhetoric. He came by his ethic from experience. He was GE’s in-house counsel when the company faced a wave of post-World War I strikes.<sup>30</sup> The company asked him to devise a strategy to deal with them.<sup>31</sup> Like Brandeis before him, Young “argued that capitalists must provide alternate avenues of worker/management cooperation if they wished to avoid strikes and radical agitations.”<sup>32</sup> This advice led to one of the first company unions. It was followed, when Young became chairman of the board, by company-sponsored life insurance, mortgage benefits, pension programs, and a general policy of employment security and wage stability.<sup>33</sup>

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25. Young, *supra* note 24, at 389.

26. *Id.* at 390.

27. *Id.* at 391.

28. *See id.* at 392.

29. GE was the eleventh-largest company in the United States (as measured by value of assets) in 1917 and the fifteenth-largest in 1930. ALFRED D. CHANDLER, JR., *SCALE AND SCOPE: THE DYNAMICS OF INDUSTRIAL CAPITALISM* app. A.1 at 642, app. A.2 at 649 (1990).

30. *See* Kim McQuaid, *Young, Swope and General Electric’s ‘New Capitalism’: A Study in Corporate Liberalism, 1920-33*, 36 *AM. J. ECON. & SOC.* 323, 324-25 (1977).

31. *See id.* at 325.

32. *Id.* at 327.

33. *See id.*; *see also* CASE & CASE, *supra* note 24, at 252-61. Young was also a founder of the Radio Corporation of America and, like Brandeis, active in national policymaking. *See* CASE & CASE, *supra* note 24, at 182-91. He was the author of the Young Plan to reduce  
*footnote continued on next page*



Adolf Berle, a leading progressive lawyer and (with Gardiner Means) theorist of corporate management, specifically identified GE under Young and Gerard Swope as the ideal kind of client for Brandeisian legal counseling.<sup>34</sup> Berle hoped that this conception of business lawyering might “in time redeem the bulk of the corporation bar from the profitable but usually undistinguished bondage in which most of it lives.”<sup>35</sup>

In the 1920s and 1930s, only a minority of liberal capitalists adopted the Brandeis-Young model of business-statesmen guided by lawyer-statesmen. But that model acquired new life in the “managerialist” era following World War II. Somewhat ironically, given Brandeis’s own strong preference for small, competitive business firms over large ones, the principal spokesmen for the view that corporate managers should guide their companies to act in the public interest were mostly executives of large oligopolistic firms loosely associated in a consortium called the Committee for Economic Development (CED). The CED was organized in 1942 as a group of moderate businessmen interested in influencing the planning of the postwar economy.<sup>36</sup> After the war, the group consistently represented the centrist wing of American business, relatively friendly—compared to business organs like the National Association of Manufacturers and the Chamber of Commerce—to government regulation and social spending and relatively accommodating to labor unions.<sup>37</sup> The CED’s influence and membership declined in the “stagflation” era of 1973 to 1980, when the Business Roundtable supplanted it as the leading spokesman for big business.<sup>38</sup>

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German reparations debts and came close to being the Democratic presidential nominee in 1932. *Id.* at 434-54, 553-72, 625-32. Young supported government intervention to revive the economy in the 1930s but, like many other businessmen, eventually turned against the New Deal. *See id.* at 548-52; McQuaid, *supra* note 30, at 332.

34. *See* A.A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1372 (1932). Berle was echoing E. Merrick Dodd, Jr.’s praise for Swope and Young. *See* E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1154-55 (1932).

35. Adolf A. Berle, Book Review, 76 HARV. L. REV. 430, 433 (1962) (reviewing BERYL HAROLD LEVY, *CORPORATION LAWYER: SAINT OR SINNER?; THE NEW ROLE OF THE LAWYER IN MODERN SOCIETY* (1961)).

36. G. WILLIAM DOMHOFF, *THE MYTH OF LIBERAL ASCENDANCY: CORPORATE DOMINANCE FROM THE GREAT DEPRESSION TO THE GREAT RECESSION* 30 (2013).

37. *See id.* at 55-83.

38. *See* MARK S. MIZRUCHI, *THE FRACTURING OF THE AMERICAN CORPORATE ELITE* 171, 178 (2013); *see also infra* note 52 and accompanying text. For a discussion of the origins, rise, and decline of the CED, *see* DOMHOFF, *supra* note 36, at 30-240. The CED eventually abandoned the shrinking center and joined the Roundtable on the right in the years leading up to Ronald Reagan’s election to the presidency in 1980. *Id.* at 227-40.

Leading theorists of managerialism, like Berle and the economist Robin Marris,<sup>39</sup> argued that a combination of imperfect competition and diffused shareholders allowed managers the leeway to act in the role of “trustee[s]” responsible for mediating among and satisfying a variety of stakeholder claimants: workers, customers, suppliers, shareholders, creditors, communities where a company did business, and “the public.”<sup>40</sup> Capably advised by lawyer-counselors, the autonomous professional management hierarchy would harmonize interests and develop wealth-enhancing technologies and business strategies. Enhanced productivity would raise living standards for everyone and avoid class conflict (what the historian Charles Maier memorably called the “politics of productivity”<sup>41</sup>). Companies would cultivate largely cooperative relationships with regulatory agencies while keeping overregulation at bay. Such managers also accepted, if grudgingly, their unions, though confining the union role to negotiations over wages, benefits, and working conditions while retaining managerial prerogative to determine business strategy.<sup>42</sup> In this period, public concern with the dangers of concentrated corporate power—which had been the dominant issue of national politics in the United States from the 1880s through the 1930s—largely disappeared from the political agenda.<sup>43</sup>

Members of the CED supported tax hikes to reduce deficits and pay the costs of wars and infrastructure spending, full employment as a proper goal of fiscal and monetary policy, environmental protections, education spending and reform, and even the war on poverty.<sup>44</sup> They also perceived that there were some public goods that needed government action because firms that

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39. See ADOLF A. BERLE, JR., *THE 20TH CENTURY CAPITALIST REVOLUTION* 164-77 (1954); ROBIN MARRIS, *THE ECONOMIC THEORY OF ‘MANAGERIAL’ CAPITALISM* 46-66 (1964).

40. COMM. FOR ECON. DEV., *SOCIAL RESPONSIBILITIES OF BUSINESS CORPORATIONS: A STATEMENT BY THE RESEARCH AND POLICY COMMITTEE* 22-23 (1971).

41. Charles S. Maier, *The Politics of Productivity: Foundations of American International Economic Policy After World War II*, 31 INT’L ORG. 607, 613 (1977).

42. For a concise account of managerialist ideology, see William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1491-98 (1989). For the best of several accounts of the CED, see DOMHOFF, *supra* note 36, at 34-185. For other examples, see generally ROBERT M. COLLINS, *THE BUSINESS RESPONSE TO KEYNES, 1929-1964* (1981); and KARL SCHRIFTGIESSER, *BUSINESS AND PUBLIC POLICY: THE ROLE OF THE COMMITTEE FOR ECONOMIC DEVELOPMENT, 1942-1967* (1967).

43. See generally RICHARD HOFSTADTER, *What Happened to the Antitrust Movement?*, in *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 188, 212-37 (1965) (positing that concern with corporate power abated in postwar America because business was seen as a mostly benign purveyor of economic abundance and because routine antitrust enforcement was trusted to keep it in check).

44. See DOMHOFF, *supra* note 36, at 125-46.

tried to provide them on their own would be at a competitive disadvantage.<sup>45</sup> Thus, there was a need for concerted action by business through associations like the CED to lobby for public goods, including government provision of public sector jobs to alleviate unemployment.

GE did not entirely subscribe to this benevolent cooperative vision in the postwar period. Some of its senior executives were sent to jail for pricefixing in the 1950s.<sup>46</sup> The company continued the Young-Swope traditions of treating its employees, shareholders, and consumers as “constituencies” whose interests had to be coordinated and satisfied and of paying its workers high wages.<sup>47</sup> But after a bitter strike of electrical workers in 1946, during which the strikers had locked managers out of their own plants, the company’s labor relations became more adversarial.<sup>48</sup> Although GE treated the United Electrical Workers’ union as a fact of life, it also treated the union as a threat to be dealt with by red-baiting its more leftist leaders, aggressive adversarial bargaining, and strike-busting tactics.<sup>49</sup> These tactics earned the label of “Boulwarism” after GE’s notoriously hardline Vice President for Labor and Community Relations, Lemuel Boulware.<sup>50</sup> GE also became an early adopter of a far-right antigovernment ideology, as broadcast by its television spokesman in the 1950s and 1960s, the actor Ronald Reagan.<sup>51</sup>

## II. The Eclipse of Managerialism

The managerialist era ended in the late 1960s and early 1970s with the end of the long postwar economic boom, stagflation, the oil embargo, and the rise of foreign competition.<sup>52</sup> A new association, the Business Roundtable, was

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45. See, e.g., COMM. FOR ECON. DEV., *supra* note 40, at 57-58 (giving the examples of civil rights laws, automobile safety regulation, and antipollution controls and incentives). The CED supported the creation of the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA). See DOMHOFF, *supra* note 36, at 180-82.

46. Gilbert Geis, *The Heavy Electrical Equipment Antitrust Cases of 1961*, in WHITE-COLLAR CRIMINAL: THE OFFENDER IN BUSINESS AND THE PROFESSIONS 103, 103-06 (Gilbert Geis ed., 1968).

47. RONALD W. SCHATZ, *THE ELECTRICAL WORKERS: A HISTORY OF LABOR AT GENERAL ELECTRIC AND WESTINGHOUSE, 1923-60*, at 169-70 (1983).

48. See KIM PHILLIPS-FEIN, *INVISIBLE HANDS: THE MAKING OF THE CONSERVATIVE MOVEMENT FROM THE NEW DEAL TO REAGAN* 93-97 (2009).

49. See SCHATZ, *supra* note 47, at 170-86; see also PHILLIPS-FEIN, *supra* note 48, at 97-110.

50. See SCHATZ, *supra* note 47, at 170; see also PHILLIPS-FEIN, *supra* note 48, at 100.

51. See PHILLIPS-FEIN, *supra* note 48, at 111-14.

52. See Ernie Englander & Allen Kaufman, *The End of Managerial Ideology: From Corporate Social Responsibility to Corporate Social Indifference*, 5 ENTERPRISE & SOC’Y 404, 417-18 (2004) (specifying causes of the breakdown of managerialism).

formed in 1972.<sup>53</sup> This was a transitional organization, initially still managerialist in its orientation: as late as 1990, its statement on corporate responsibility still proposed that managers should be responsive to, mediate among, and balance competing claims of multiple corporate stakeholders and interests.<sup>54</sup> These interests included supporting OSHA, civil rights laws, wage and hour laws, and pension reform (ERISA); recognizing the desires of employers “to have loyal and motivated employees”; and paying attention to the long-term performance of the corporation.<sup>55</sup>

But by the late 1990s, the only function of this residue of managerialist ideology was to explain why entrenched managers were entitled to resist takeovers. Incidentally, Irving Shapiro—a lawyer who had spent a quarter of his career in the Justice Department before becoming in-house counsel and then CEO of DuPont—led the Roundtable.<sup>56</sup> (A CEO of GE, Fred Borch, was one of the Roundtable’s principal founders;<sup>57</sup> another, Jeffrey R. Immelt, sits on the Roundtable’s executive committee today.<sup>58</sup>) The view of Shapiro and the Business Roundtable was that egalitarian social policy, regulation, and deficit spending had transferred wealth from private to public hands and impeded the ability to invest in new plants and technologies and that government policies promoting full employment and collective bargaining led to dangerous levels of inflation.<sup>59</sup> So firm was their belief that all inflation was caused by labor’s push for higher wages that they even opposed giving food stamps to striking workers.<sup>60</sup> The Roundtable’s main public program became cutting taxes, social spending, and labor costs by reducing regulation and social welfare spending, lowering worker expectations, and slashing payrolls.<sup>61</sup> Thus, professional management was still connected to a policy program and social vision, though by this time a very conservative one. The older moderate-corporatist alliances promoted by the CED were fractured and dissolved.<sup>62</sup>

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53. *History of Business Roundtable*, BUS. ROUNDTABLE, <http://businessroundtable.org/about/history> (last visited June 6, 2017).

54. Bus. Roundtable, *Corporate Governance and American Competitiveness: March, 1990*, 46 BUS. LAW. 241, 244-45 (1990).

55. *Id.*

56. Claudia H. Deutsch, *Irving S. Shapiro, 85, Lawyer and Ex-Chairman of DuPont*, N.Y. TIMES (Sept. 15, 2001), <https://nyti.ms/2ptS1fq>.

57. See PHILLIPS-FEIN, *supra* note 48, at 192.

58. *Jeffrey R. Immelt*, BUS. ROUNDTABLE, <http://businessroundtable.org/about/members/jeffrey-r-immelt> (last visited June 6, 2017).

59. See PHILLIPS-FEIN, *supra* note 48, at 194-95.

60. *Id.*

61. See *id.* at 206-12.

62. See MIZRUCHI, *supra* note 38, at 171-79.

Meanwhile, once the takeover threat subsided, so did social responsibility as a reason for allowing managers to resist it. Managers now accepted the new doctrine—whose Johns the Baptist had been Milton Friedman; Henry Manne; and the Chicago School economists Eugene Fama, Michael Jensen, and William Meckling—that the business firm was only a “nexus of contracts,” that managers’ only principals were shareholders, and that a business has no responsibility except to make profits for its shareholders.<sup>63</sup> The Business Roundtable officially adopted the “managers as agents of shareholders only” view in its 1997 Statement on Corporate Governance.<sup>64</sup> As management was now compensated largely with stock options that supposedly aligned its interests with those of shareholders, this came to mean, in effect, that managers had no responsibility except to make as much money for *themselves* as possible.<sup>65</sup> As Rakesh Khurana<sup>66</sup> has put it, the new gospel of management self-enrichment “helped create the conditions and standards of behavior through which the market-based mechanism of stock options was turned into an instrument for defrauding investors, jeopardizing the livelihoods of employees, and undermining public trust in managers and corporations.”<sup>67</sup> Now the only obligation of managers, working solely for their own benefit, was to produce quarterly profits—or at least the illusion of quarterly profits—until the bubbles burst and the music stopped.

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63. For two of the core papers that expound this thesis, see Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288, 289 (1980); and Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 310-11, 357 (1976). For an excellent summary and acute critique of the “nexus of contracts” view of the corporation, see William W. Bratton, Jr., *The “Nexus of Contracts” Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 409-11 (1989).

64. Bus. Roundtable, Statement on Corporate Governance 1-4 (1997).

65. See RAKESH KHURANA, FROM HIGHER AIMS TO HIRED HANDS: THE SOCIAL TRANSFORMATION OF AMERICAN BUSINESS SCHOOLS AND THE UNFULFILLED PROMISE OF MANAGEMENT AS A PROFESSION 317-26 (2007). Khurana notes that, consistent with this new emphasis on the manager as a self-seeking profit-maximizer, business schools came to be ranked by the incomes and networking opportunities of their graduates. *Id.* at 335-42.

66. Khurana’s brilliant history of business education and ideology describes how the tie between managers and other corporate stakeholders was broken. The Trojan horse in his account was the Ford Foundation’s plan to upgrade the intellectual quality of elite business schools and provide rigorous training for the profession of business in the 1950s and 1960s. The plan was to bring academic disciplines into the business schools and use them to produce skilled technocratic managers. *See id.* at 239-82. Very quickly, economics and quantitative methods came to dominate the curriculum. *Id.* at 273-78. The content was Max Weber’s nightmare, a purely instrumental rationality divorced from any normative goals or purposes. *See id.* at 379-80.

67. *Id.* at 375.

### III. Managers as Amoral Profit-Seekers and Lawyers as Amoral Servants of Clients

After a long debate on what constituencies corporate managers should serve and what social goals they should pursue, by the 1980s a consensus seemed to form that managers should serve only their shareholders and should have no social goals except making money.<sup>68</sup> This orthodox view of the corporation as the amoral profit-seeking servant of its stockholders is, I believe, disturbing enough on its own terms. But it becomes positively frightening when coupled with the orthodox view of the lawyer as the equally amoral zealous servant of his client, bound to navigate around or minimize or eliminate any legal obstacles standing in the way of the client's business objectives.<sup>69</sup>

Milton Friedman, ahead of his time as the most famous and influential advocate of corporate self-seeking and critic of "corporate social responsibility," was aware that self-seeking was subject to limitations. The "only . . . social responsibility of business," he argued, is to "increase its profits."<sup>70</sup> But he immediately recognized the need for constraints on profit-seeking: "That responsibility is to conduct the business in accordance with [the owners']

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68. For the classic contributions beginning the debate, see A.A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931); Berle, *supra* note 34, at 1367, 1372; Dodd, *supra* note 34, at 1145-46; and E. Merrick Dodd, Jr., *Is Effective Enforcement of the Fiduciary Duties of Corporate Managers Practicable?*, 2 U. CHI. L. REV. 194, 194-95 (1935). For an able and acute summary of the ups and downs of the subsequent debates as the desirability of corporate social responsibility and service to multiple stakeholders rose and fell in the academic and business literature, see C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 U. KAN. L. REV. 77 (2002). For the most rigorous and effective statement of what I am calling the "consensus view," see David L. Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1, 5-8 (1979).

69. For some classic expositions (though they are accompanied by critiques) of the standard conception of the lawyer as zealous advocate for her client, see Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 615-19; and William H. Simon, Commentary, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 39-61. This conception is codified (with qualifications) in the American Bar Association's Canons of Professional Ethics: "The lawyer owes entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability, to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied." MODEL CODE OF PROF'L RESPONSIBILITY Canon 15 (AM. BAR ASS'N 1980). It is also codified in the Model Rules of Professional Conduct preamble: "These principles [underlying the Rules] include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law . . ." MODEL RULES OF PROF'L CONDUCT pmb. ¶ 9 (AM. BAR ASS'N 2016).

70. Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, at 124 (quoting MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (1962)).

desires, which generally will be to make as much money as possible *while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom.*<sup>71</sup> Profit-seeking is a praiseworthy end “*so long as [the business] stays within the rules of the game*, which is to say, engages in open and free competition without deception or fraud.”<sup>72</sup> Friedman suggested that if corporate managers follow their own views of desirable social policy and spend their owners’ money on favored social causes—the example he gave was decisions to protect the environment more than the law requires—then they are taxing the owners without democratic process.<sup>73</sup> The legal “rules of the game,” by contrast, are legitimate because they are made by elected officials through democratic processes.<sup>74</sup> Businessmen, Friedman argued, should stay out of public policy formation:

If businessmen do have a social responsibility other than making maximum profits for stockholders, how are they to know what it is? Can self-selected private individuals decide what the social interest is? Can they decide how great a burden they are justified in placing on themselves or their stockholders to serve that social interest? Is it tolerable that these public functions of taxation, expenditure, and control be exercised by the people who happen at the moment to be in charge of particular enterprises, chosen for those posts by strictly private groups? If businessmen are civil servants rather than the employees of their stockholders then in a democracy they will, sooner or later, be chosen by the public techniques of election and appointment.<sup>75</sup>

Friedman’s sounds like a killer argument against the managerialist program of pursuing social goals other than those of making money for shareholders.<sup>76</sup> (Of course, managers who adopt such a program may claim that pursuing such goals will aid the long-run profitability of the enterprise.) But the argument’s apparent simplicity is rather deceptive. Friedman divides the world into two spheres, one of private self-seeking in the market, the other of democratically legitimated controls on such self-seeking, which we call law. He pictures the corporation as a passive law-taker, maximizing profits within the hard constraints supplied by law. There are business decisions and political decisions. Managers are to make business decisions and leave politics to the politicians.

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71. *Id.* at 33 (emphasis added).

72. *Id.* at 124 (emphasis added) (quoting FRIEDMAN, *supra* note 70, at 133).

73. *See id.* at 33.

74. As a committed libertarian, of course, Friedman objected to many of the laws passed by democratic majorities. But he did not doubt that businesses had to follow them.

75. FRIEDMAN, *supra* note 70, at 133-34.

76. Friedman’s basic argument is endorsed, though with some recognition of problems with it, by what is probably the most careful and sophisticated treatment of corporate social responsibility in the legal literature. *See* Engel, *supra* note 68, at 29-30, 30 n.87.

But that does not sound like anything in the real world. Corporations are anything but passive or neutral with respect to compliance with legal limits on their conduct. There is an entire profession—ours—whose work is devoted to making apparently hard constraints soft and malleable. Lawyers are skilled at the law evasion game—exploiting interpretive ambiguities in statutes, regulations, or case law; stalling underfunded and understaffed enforcement regimes by exhausting their resources; hiding doubtful dealings under the cloak of confidentiality; inventing ingenious shelters to conceal the sources of taxable gains or move them to low-tax jurisdictions; or writing elaborate opinion letters that seem to reassure regulators and third parties that corporate dealings are sound.<sup>77</sup> In short, lawyers often treat the law, the supposed rules of the game, as stuff to be gamed and manipulated in their clients' interest. Sometimes they even claim that engaging in this gaming of the rules is protecting the “rule of law.”<sup>78</sup> This hyperformal interpretation of that concept suggests that if the state wants to bring sovereign force to bear on a private party, it has to do so in language that is textually unambiguous and unmistakably clear.<sup>79</sup> Because almost no statutory or regulatory language can ever fully satisfy that requirement,<sup>80</sup> in effect the formal ideal of the “rule of law” is being used to subvert the actual rule of law. The actual rule of law includes the constraints of the legal framework as they would be interpreted in good faith by a judge or other official or even just a citizen who respects the outcome of democratic process—that is, understood by reference to the manifest purposes or goals that the law is seeking to attain.

Yet if, as Friedman asserts, managers usurp the province of legal authorities when they do more than the law requires, it must also be true that *contravening* the law, or doing *less* than it requires, must also violate the public rules of society made by democratic processes. Who are the managers to arrogate to themselves the legitimacy to decide that tax or environmental or occupational safety or product liability laws cut too far into their profits and therefore may rightly be evaded? These are all distributional decisions that individual companies and their managers would seem to have no right to make.

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77. If things turn out badly, of course, counsel can say that they relied on facts supplied by clients and clients that they relied on advice of counsel.

78. See Doreen McBarnet & Christopher Whelan, *The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control*, 54 MOD. L. REV. 848, 857 (1991).

79. See *id.* at 849, 857-59.

80. It would require a separate treatise to substantiate this assertion. Anyone who doubts that an aggressive interpreter can manufacture ambiguity out of virtually any text might consider how difficult it has been for advocates of textual formalism in statutory interpretation to find that what they construe as “plain meanings” are equally plain to other interpreters. See, e.g., William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 621-23 (1990).



One way some lawyers—including notable scholars of corporate governance—have tried to finesse this problem is by reinterpreting what “law” means so as to minimize its significance as a constraint on profit-seeking. They restate law as simply a price on conduct<sup>81</sup>—the view of Oliver Wendell Holmes’s classic “bad man” whose only interest in law is in whether its sanctions, discounted by the probability of detection and enforcement, are likely to impose more costs than the benefits of violation.<sup>82</sup> If the managers will make more money by violating the law, taking the risk of fines and jail terms, they not only may but must do so. This solves the problem how to reconcile subversion of legal rules with maximum profits for the shareholders but at a rather high cost. It deprives law, supposedly the legitimate voice of the people, of any normative content. It is also a recipe for anarchy. No government can ever be strong enough to enforce its laws against powerful interests, well fortified with lawyers, determined to nullify those laws.

There is still another problem with Friedman’s formula (lawmakers make the laws; businessmen maximize profits while complying with the laws). What business clients often want from their lawyers, if the lawyers cannot succeed in minimizing or nullifying legal obstacles to their plans, are *changes* in the overall rules of the game that will generally benefit, or loopholes or exemptions that will specifically benefit, their bottom lines.<sup>83</sup> If government is the only legitimate judge of how and how much to regulate in the event of market failures, or to provide public goods like a livable planet, how can a corporation acting under Friedman’s rules properly spend its resources to influence those decisions? The dilemma should be even more painful for industries that are engaged in pure rent-seeking—of privileges, monopoly rights, government contracts, exemptions from taxes or weakening of

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81. Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1168 n.36 (1982) (“Managers have no general obligation to avoid violating regulatory laws, when violations are profitable to the firm . . . We put to one side laws concerning violence or other acts thought to be *malum in se*.” (citations omitted)). Under Easterbrook and Fischel’s view,

managers do not have an ethical duty to obey economic regulatory laws just because the laws exist. They must determine the importance of these laws. The penalties Congress names for disobedience are a measure of how much it wants firms to sacrifice in order to adhere to the rules; the idea of optimal sanctions is based on the supposition that managers not only may but also should violate the rules when it is profitable to do so.

*Id.* at 1177 n.57.

82. For an excellent exposition and critique of law-as-price, see W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167, 1176 (2005).

83. Managers may also lobby for rules (such as those regulating executive compensation) that make it easier for them to engage in self-dealing, but such rule changes are presumably unappealing to both Friedmanites and corporate social responsibility types.

regulations affecting those industries in particular, immunity from or limits on tort liability, below-market leases of public lands, and the like.

The response might be: this is all just the activity of citizens engaging in the ordinary process of pluralist interest group bargaining. The managers are just making their contributions to the democratic decisionmaking process.

So they are, but if you are a committed Friedmanite, the managers have no business spending the corporation's money trying to produce a distributive outcome, even if the one they want may also increase the company's profits. They are still operating outside their legitimate sphere. It makes no sense to argue that the managers may lobby to relax environmental regulations but may not donate a million dollars to Americans for Prosperity or the Club for Growth to lobby on their behalf. If they may operate in the public sphere, guided by their judgments about where their enlightened self-interest lies, surely they should be able to lobby to strengthen the EPA or give to the Sierra Club or the Natural Resources Defense Council.

Of course, Friedman and others with views more liberal than his are right to worry about what will happen if corporations step outside their sphere of "profit-seeking within the rules" and start to game the rules or engage in politics to change the rules. Throughout our history people have worried that business corporations, with their ability to aggregate capital and hire expensive lawyers and lobbyists, will corrupt and overwhelm democratic institutions. In the early republic, legislatures tried to impose safeguards against corporate entities by limiting their powers and capitalization.<sup>84</sup> By the mid-nineteenth century, legislatures sought to prevent corporate capture by limiting what states could do to benefit corporations (such as investing public money in them or exempting them from taxes or liabilities).<sup>85</sup> In the late nineteenth century, the main instrument of control was supposed to be antitrust laws.<sup>86</sup> Closer to our times, state and federal governments have tried to contain corporate influence in politics by forbidding them to spend money on elections or ballot initiatives.<sup>87</sup> Most of these controls are now gone. Our constitutional law has

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84. See JAMES WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780-1970*, at 39-45 (1970).

85. See, e.g., WILLIAM G. ROY, *SOCIALIZING CAPITAL: THE RISE OF THE LARGE INDUSTRIAL CORPORATION IN AMERICA* 72-75 (1997).

86. See generally James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 OHIO ST. L.J. 257 (1989) (noting that vigorous antitrust enforcement was believed to be the crucial precondition to keeping free markets competitive).

87. See *McConnell v. FEC*, 540 U.S. 93, 115-32 (2003), *overruled in part by Citizens United v. FEC*, 558 U.S. 310 (2010); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 767-68 (1978).

demolished most of these restrictions on corporations as political actors, recognizing them as full participants in the public sphere.<sup>88</sup>

And on most issues that matter to them, business firms are the eight-hundred-pound gorillas, much stronger than the parties most likely to try to enforce the legal constraints: underfunded and understaffed government agencies, private plaintiffs, nongovernmental organizations (NGOs), or public interest lawyers. And a corporate entity determined to get its own way can often count on its lawyers to overwhelm such adversaries with expensive legal procedures or to disarm them in advance by means of nondisclosure agreements; mandatory arbitration clauses excluding class actions; or the purchase of expensive, biased expertise claiming that no harm has been done or that, if it has, the company did not cause it.<sup>89</sup> Corporate efforts to undermine legal constraints often elude scrutiny altogether because they are conducted under the radar, in anterooms of legislative committees or regulation writers, or during phone calls between well-connected business executives and agency heads.<sup>90</sup> These are serious obstacles to enforcement even in countries with well-functioning and well-resourced regulatory states. In many countries where multinationals do business, where public agencies are weak and enforcement budgets low, and where officials are easily bribed to look the other way, the amoral corporation can operate without any effective constraints at all except the resistance of local power blocs.<sup>91</sup>

So in the real world, the strictures of Friedman and his supporters—that corporate managers should stick to their knitting and keep their noses out of the public sphere and its unavoidably controversial distributive politics—are not observed. There is abundant evidence (some of it cited above) of corporate managers as active participants in the public sphere. We usually suppose that people acting as citizens have some obligation to serve the interests of the public as well as their own. Are corporations different? Should managers be driven in their political aims, as in their business aims, by the sole goal of maximizing profits for their shareholders?<sup>92</sup>

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88. See, e.g., *Citizens United*, 558 U.S. at 341-43; *Bellotti*, 435 U.S. at 775-86.

89. See generally NAOMI ORESKES & ERIK M. CONWAY, *MERCHANTS OF DOUBT: HOW A HANDFUL OF SCIENTISTS OBSCURED THE TRUTH ON ISSUES FROM TOBACCO SMOKE TO GLOBAL WARMING* 240-44, 248 (2010) (recounting how companies commissioned research from scientists casting doubt on corporate causation of harms).

90. For a textbook example, see Haley Sweetland Edwards, *He Who Makes the Rules*, WASH. MONTHLY (Mar./Apr. 2013), <http://washingtonmonthly.com/magazine/marchapril-2013/he-who-makes-the-rules>, which discusses attempts to weaken Dodd-Frank regulations of banking practices.

91. See SUSAN ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM* 9-35 (1999).

92. As far as I am aware, very little has been written on the ethics of corporations as citizens or of lawyers as agents of corporate citizens.

If so, we have to accept as a normative ideal the model of the self-seeking profit-driven corporation, powering ahead with its lawyers on the lookout for inconvenient legal or moral constraints on its conduct, prepared to blow past them or zap them out of existence. Predatory companies with aggressive legal staffs can inflict a lot of damage on others' persons and property—stealing lawfully owed wages, skimming off undisclosed fees from customers, seizing foreclosed property to which they do not have title, pouring cyanide-laced tailings into neighbors' drinking water, bribing officials to obtain advantages denied to more honest competitors, and obtaining monopoly rights to necessities like water or pharmaceuticals—without having to pay for it or be subject to effective controls.<sup>93</sup> The central legal rules are the framework rules that constitute the market itself. There is no market without the rules; there is only anarchy. If your company pollutes my air and water, that is not just an unfortunate side effect of productive activity; it is a violation of my fundamental property rights, a trespass and invasion. You should stop doing it or at the very least pay me for your right to pollute (or, for devotees of the Coase Theorem, give me the opportunity to pay you to stop<sup>94</sup>).

These examples, of course, are not dystopian fantasies of hypothetical dangers. They describe the everyday activities of many companies, some bearing famous names.<sup>95</sup> The amoral corporation guided by the amoral zealous advocate is potentially a monster, a powerful engine of destruction, a licensed sociopath. Somehow we have talked ourselves into the position that this is an acceptable normative view of the purposes of the corporation and an acceptable view of the role and ethics of a lawyer.

Yet even extreme libertarians cannot endorse the nullification of basic rights-protecting law. The only people who could would be Randian admirers of the arch-selfish entrepreneur as the heroic agent of creative change<sup>96</sup>—or, less dramatically, those convinced that the wealth created for such companies and their shareholders, even if it ends up in a very few hands, justifies all the damage done to produce it. This ideology sometimes amounts to little more than vulgar libertarian Babbity—"business good, government bad."

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93. For an excellent recent book cataloguing such practices, see THOMAS O. MCGARITY, *FREEDOM TO HARM: THE LASTING LEGACY OF THE LAISSEZ FAIRE REVIVAL* (2013).

94. See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 1-15 (1960) (theorizing that absent transaction costs, it makes no difference whether the polluter has to pay for the right to pollute or the pollutee has to pay the polluter because the parties can bargain to an efficient solution).

95. For a work featuring a comprehensive and scholarly compendium of damage inflicted by prominent companies and facilitated by sustained political assaults on regulatory controls, see MCGARITY, *supra* note 93.

96. See AYN RAND, *ATLAS SHRUGGED* (1957); AYN RAND, *THE FOUNTAINHEAD* (1943).

#### IV. Corporate Counseling in Practice

Now, I hasten to say there is no reason to think that all or even most corporate managers engage in amoral, reckless, and socially destructive self-seeking or that their lawyers believe it is their sworn duty as zealous advocates to help them do so. Such sociological literature as there is on the role of corporate counsel suggests that actual practice varies quite a lot. Some lawyers feel comfortable in the role of gatekeeper or “cop,” actively pressing their clients to avoid stepping over legal limits.<sup>97</sup> Others assume the role of entrepreneur or “adversarialist,” a partner with the business managers in trying to aggressively game legal constraints.<sup>98</sup> Doreen McBarnet’s rather chilling studies of corporate lawyers show that the very *raison d’être* of certain segments of the corporate bar, their source of “value” for the client, lies in their ability to game regulatory and taxing regimes—to find ways over, under, around, and through new forms of regulation designed to curb risky behavior and tax evasion.<sup>99</sup> “Don’t worry too much about Dodd-Frank (or any other regulation),” one can picture them telling their clients—“we’ll find ways to get around it, and in the meantime our lobbyists will be working to weaken the rules.” Certainly many law firms advertise themselves to prospective clients as “creative,” “forward-leaning,” and “entrepreneurial” with respect to legal risks.<sup>100</sup>

It is likely—and of course I am guessing here, as no comprehensive study of corporate lawyers’ ethics has ever been undertaken or likely ever will be, given difficulties of access and the rules of confidentiality and privilege—that most in-house lawyers are neither aggressive gatekeeper-cops nor aggressive entrepreneurs but simply cautious advisors on legal risk. In-house lawyers, as Sung Hui Kim has pointed out, are subject to enormous pressures to simply facilitate—and not be seen to obstruct—the wishes of client managers: as employees within a hierarchy, as peers connected by ties of loyalty and solidarity to work teams, and as professionals with ethical duties to zealously

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97. See Sung Hui Kim, *The Ethics of In-House Practice*, in *LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT* 197, 198-99 (Leslie C. Levin & Lynn Mather eds., 2012); Robert L. Nelson & Laura Beth Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 *LAW & SOC’Y REV.* 457, 463-64 (2000); Tanina Rostain, *General Counsel in the Age of Compliance: Preliminary Findings and New Research Questions*, 21 *GEO. J. LEGAL ETHICS* 465, 470-74 (2008).

98. See Christine E. Parker et al., *The Two Faces of Lawyers: Professional Ethics and Business Compliance with Regulation*, 22 *GEO. J. LEGAL ETHICS* 201, 224-28, 238-41 (2009).

99. See Doreen McBarnet, *Financial Engineering or Legal Engineering?: Legal Work, Legal Integrity and the Banking Crisis*, in *THE FUTURE OF FINANCIAL REGULATION* 67, 68-69 (Iain G. MacNeil & Justin O’Brien eds., 2010).

100. For examples, see Christopher J. Whelan, *Some Realism About Professionalism: Core Values, Legality, and Corporate Law Practice*, 54 *BUFF. L. REV.* 1067, 1126-32 (2007).

pursue client interests.<sup>101</sup> In-house lawyers are like financial risk managers—somewhat marginalized within the business, having to cultivate trust relations with operational managers to be seen as members of the team, always ready to suggest alternative means of achieving a manager’s objective if some legal obstacle appears rather than simply saying “no.” “No” has to be used sparingly, reserved for actions that risk serious criminal liability<sup>102</sup> and rationed even then, lest the lawyer be perceived as an obstructive troublemaker and never consulted. The safest course for lawyers is to take a relatively passive role: to assume that whichever manager consults them is their “client” (even if that manager seems to be proposing action that might disserve the actual client, the corporate entity<sup>103</sup>), to present the manager with options and estimates of legal risk likely to attach to each, and to let the manager decide (while adding a covering memo to the file noting that they have advised on legal risk).<sup>104</sup> In

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101. Sung Hui Kim, *The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper*, 74 *FORDHAM L. REV.* 983, 1041-52 (2005).

102. Lawyers who treat actions that might result in criminal liability as lines not to be crossed are clearly treating law as a set of norms, not as simply a price on conduct to be discounted by the probability of detection and enforcement. *See supra* note 82 and accompanying text. From a purely “bad man’s” view of costs and benefits, however, their clients need not usually fear much adverse state action. *See generally* BRANDON L. GARRETT, *TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS* 3-18 (2014) (observing that despite the vast expansion in recent decades of the criminal code of corporate offenses, neither companies nor their managers are often prosecuted and that when they are, they are usually allowed to defer prosecution on the condition that they take remedial action).

103. For a discussion of the tendency of both lawyers and corporate law doctrine to conflate manager and entity, see William H. Simon, *Duties to Organizational Clients*, 29 *GEO. J. LEGAL ETHICS* 489, 490-91 (2016); and Simon, *supra* note 15, at 62-65.

104. For wonderful interviews of in-house counsel for British corporations, see CRISTINA GODINHO ET AL., *LAWYERS’ ETHICS IN THE CORPORATE WORLD: IN-HOUSE LAWYERS, LEGAL RISK AND THE TOURNAMENT OF INFLUENCE* (forthcoming Dec. 2017) (on file with author). As one interviewee explains,

what you mustn’t do is say no to anyone, that’s a big, big mistake. . . . But very rarely do you get a question, the question is more like what will happen if? The lawyer is probably guessing with huge experience and knowledge, and the guess might be in the right ballpark but it’s still a guess. Much, much better to give options to a management team and to indicate the degree of risk with each one, and then let the management team form its own view about it, try and get the dialogue going. If you can form that kind of relationship then you will grow the legal service.

*Id.* (manuscript at 113) (alteration in original) (italics omitted). There is also risk management through information control: do not write anything down, do not leave a paper trail, and make sure any reports are covered by privilege. Other excerpts from the interviews include:

If there’s a criminal matter [the business proposes] you’d hope they’d agree and if they didn’t agree leave. It’s often not as stark as that. What it is has been in my experience is that you’re in a culture within a firm where you’re constantly having to swim against the tide and being pressured. Senior management and the business people know amongst their group of lawyers who is nice and easy and compliant and who isn’t. . . . They’re very smart at getting their business interests put first, so they will try and pick off compliant people and have them

*footnote continued on next page*

this role, the lawyer is simply a neutral risk assessor, an advocate neither for legal compliance nor for legal avoidance or evasion.

The Harvard Manifesto and Heineman's book represent a sharp challenge to conventional views of the corporate lawyer as an active gamer of legal constraints on corporate profit-seeking or a neutral assessor of legal risk whose advice may passively enable violations of law. From here, this Essay focuses on Heineman's book because it lays out the most comprehensive and detailed vision of an in-house counsel as a lawyer-statesman who promotes public values and the rule of law as well as the self-interest of his client company.

In a pessimistic 2009 assessment of the current status of the historical ideal of the lawyer-statesman or lawyer-citizen, I wrote that "[t]he citizen lawyer may one day stage a comeback, and I hope she does; but present conditions are not favorable."<sup>105</sup> Heineman does want to bring it back—he explicitly pitches his work as a revival of the lawyer-statesman ideal—and believes it can be realized in the role of in-house counsel.<sup>106</sup> This ideal is that of a genuinely independent advisor who occupies a dual role: he not only guides clients through the maze of law and regulation to help realize the company's profit goals but also affirmatively promotes the company's compliance with law and fosters cooperation with other companies to engage in collective action for the public good.<sup>107</sup> He describes the task as balancing "high performance with high integrity" to resolve the "partner-guardian tension."<sup>108</sup>

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dedicated, . . . [to] get this bank within the bank culture. They'd choose their lawyers that facilitate their business.

So what happens . . . if you don't accommodate the business needs and you question things and you highlight risk and you're objective and exercise judgement[?] . . . [Y]ou're just not picked by those people and you end up not doing what some people might call the best work in the bank or the most high profile[;] you can get side-lined.

*Id.* (manuscript at 121) (first, third, fourth, fifth, and seventh alterations in original).

It's not the job of the lawyer to [make the decisions], beyond keeping us out of jail and making sure we don't go bust from a legally generated risk. The rest of the job as a lawyer is to make sure that the business has a calibration of the risk and takes an informed decision; we're advisors, not deciders, and that's the frame. . . . [I]f you can't get across those three basis [sic] then you haven't done your job properly.

*Id.* (manuscript at 124) (first alteration in original); *see also id.* ("I would [raise resigning] if it was something that I felt was criminal activity; I'd have to." (alteration in original)). The authors found that while "lawyers and businesses like to project a belief in legality or working within the law, in reality this often meant something different": the "elision of legality with criminal law was common." *Id.* One interview respondent demonstrated "how quietly [that] qualification can be introduced": "Well[,] no breaking the law. I think the foundation of any sustainable company has to be honest numbers and compliance with the law. So that's no breaking the criminal law." *Id.*

105. Robert W. Gordon, *The Citizen Lawyer—A Brief Informal History of a Myth with Some Basis in Reality*, 50 WM. & MARY L. REV. 1169, 1206 (2009).

106. *See* HEINEMAN, *supra* note 3, at 31-42.

107. *See, e.g., id.* at 317-18.

108. *Id.* at 55 (emphasis omitted).

Heineman's book is a somewhat ungainly object—part autobiography, part operations manual for in-house counsel, part didactic tract with cautionary tales of lawyers and companies gone over to the dark side. It is often repetitive, with tendencies to overuse corporate buzzwords and slogans. “Integrity,” for example, is a term that stands in for too many different things—honest and fair business dealings, respect for the normative goals of law, concern for various corporate constituencies, regard for the social consequences of corporate policies and actions, and leadership in proposing collective action to mitigate bad effects. But the book's central message is forceful and clear—and sufficiently specific to absolve it of being just another public relations advertisement for corporate altruism and virtue.

The book also gains credibility from the impressive credentials and experience of its author. Heineman is a sort of superstar among lawyers. After a Supreme Court clerkship, he worked as a public interest lawyer for the Center for Law and Social Policy and served as a government lawyer in the Carter Administration, rising to the rank of Assistant Secretary for Planning and Evaluation in the Department of Health, Education, and Welfare.<sup>109</sup> He was the managing partner of Sidley Austin's Washington office when Jack Welch, the newly anointed CEO of GE, asked him to become GE's general counsel.<sup>110</sup> He remained at GE from 1987 to 2005 under Welch and his successor, Jeffrey Immelt, supervising an in-house legal staff that grew to over 1200 lawyers operating in over one hundred countries.<sup>111</sup> He was one of the first in-house counsel to build his office into something like a major law firm that conducted most of the client company's legal work, contracting out specialty work to outside law firms as needed.<sup>112</sup>

Heineman articulates a vision of the general counsel's role that is in many ways at odds with 1980s-era managers' and lawyers' ethics. He emphatically rejects the Jensen-Meckling thesis that the sole task of management is to maximize shareholder value, as measured by short-term share price, and resurrects the managerialist view that the corporation has responsibilities to its many constituencies—including employees, customers, creditors, suppliers, and communities.<sup>113</sup> He also rejects both the “bad man's” view of law as simply a price on conduct and the view of law as texts to be construed formally and

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109. See Resume of Benjamin W. Heineman, Jr. 1-2 (n.d.), <http://docplayer.net/1296731-Resume-benjamin-w-heineman-jr-home-harvard-i-employment.html>; see also Ben W. Heineman, Jr.: Short Form Bio (n.d.), [http://ccl.yale.edu/sites/default/files/files/Biography\\_Heineman\\_Benjamin\\_W.pdf](http://ccl.yale.edu/sites/default/files/files/Biography_Heineman_Benjamin_W.pdf).

110. See HEINEMAN, *supra* note 3, at 8, 15; see also Resume of Benjamin W. Heineman, Jr., *supra* note 109, at 1.

111. See HEINEMAN, *supra* note 3, at 8, 40.

112. See *id.* at 8-10, 15, 40.

113. *Id.* at 282-85.



technically rather than in the light of their “real purpose[s]” and likely social consequences.<sup>114</sup> He urges company lawyers to respect the law as embodying norms, or “binding judgments made by a society’s duly authorized legal and political processes,” and argues that “[g]lobal corporations must give deference to the law of the nation in which they choose to operate, even if there is some discretion in determining what is the law of that society.”<sup>115</sup> A general counsel must say “no” to clearly illegal conduct. But the lawyer-statesman must ask what is right as well as what is legal. And more than that, he must ask what the long-term global economic, policy, and cultural tendencies are that may affect the corporation’s future and to develop strategies to anticipate them. Heineman calls for—and his career exemplifies—a powerful and proactive general counsel, not a team of lawyers waiting passively to be consulted by business managers.

Heineman gives many examples of corporate scandals facilitated, he believes, by lawyers taking a passive role, turning a blind eye to violations: the well-known Enron scandal;<sup>116</sup> the Siemens massive global bribery cases;<sup>117</sup> the General Motors ignition switch failure;<sup>118</sup> Apple’s problems with subcontractors in its supply chain abusing its manufacturing labor force;<sup>119</sup> JPMorgan Chase’s multiple scandals (London Whale, LIBOR ratefixing, and money laundering);<sup>120</sup> the Walmart Mexico bribery scandal, which Walmart’s local general counsel arranged to cover up;<sup>121</sup> and Volkswagen’s rigging its emissions detectors to fool regulators.<sup>122</sup> In each of these cases, he suggests, there was a serious failure of controls from the general counsel’s office,<sup>123</sup> and in some, such as Walmart’s, there was active complicity by the general counsel’s office.<sup>124</sup>

Heineman is particularly interested in “citizenship and the primacy of public policy.”<sup>125</sup> He does not like the term “corporate social responsibility” because it has come to mean largely decorative voluntary philanthropy, such as

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114. *Id.* at 35, 140-41.

115. *Id.* at 34 (emphasis omitted).

116. *See id.* at 101-02.

117. *See id.* at 99-101.

118. *See id.* at 96-99.

119. *See id.* at 206-07.

120. *See id.* at 102-06.

121. *See id.* at 166-68.

122. *See id.* at 108.

123. *See* sources cited *supra* notes 116-22.

124. HEINEMAN, *supra* note 3, at 166-67.

125. *See id.* at 317-57 (formatting altered).

charitable contributions to the local symphony or United Way.<sup>126</sup> The corporation needs to be a republican citizen and a participant in public policy formation, not just a rent-seeking special interest.<sup>127</sup> It must actively “help secure public goods, which are vital to societal well-being but which cannot be realized through the market.”<sup>128</sup> Partly Heineman means that the company’s own policies should be directed at reducing harmful externalities; he mentions reducing air and water pollution and hazardous waste and instituting wellness, labor safety, sick leave, and parental leave programs for the company’s own and its suppliers’ employees.<sup>129</sup>

The primary idea Heineman advocates is that the general counsel take the initiative to organize consortia of companies to influence governments in order to “seek a collective public policy solution on these ‘indirect’ issues that addresses an important ‘non-market’ problem . . . and that is also enforceable (which voluntary action or industry agreements are not).”<sup>130</sup> He expresses a broad commitment to supporting policies that sustain and improve the environment in which the company lives and breathes—improved education, scientific research, infrastructure updates, policies affecting climate change, antipoverty and public health programs, and security and antiterrorism measures, among others.<sup>131</sup> Heineman thinks that the general business associations like the Business Roundtable and Chamber of Commerce tend to advance “lowest common denominator’ positions that are heavily slanted toward business or are a vague collection of business bromides or both.”<sup>132</sup> He believes that the solution is to recruit other companies and other organizations into “coalition[s] of the willing” to pressure for such policies.<sup>133</sup> He cites as examples initiatives he took at GE: pressing for an executive agreement with other countries that would strengthen the Foreign Corrupt Practices Act, which was finally achieved in 1997;<sup>134</sup> the U.S. Climate Action Partnership of major companies to develop a cap-and-trade regime that would limit use of greenhouse gases;<sup>135</sup> and an asbestos trust fund that would take asbestos injury

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126. *See id.* at 318.

127. *Id.* at 317-18.

128. *Id.* at 317.

129. *Id.* at 325-26.

130. *Id.* at 345-46.

131. *Id.* at 345.

132. *Id.* at 346.

133. *Id.*

134. *Id.* at 327-29 (noting that, after ratification, the agreement became effective in 1999).

135. *Id.* at 346-47.

cases out of the courts and put them into an administrative compensation system.<sup>136</sup> These last two unfortunately failed.<sup>137</sup>

## V. Some Questions About Heineman's Project

These all seem like fairly progressive initiatives—much like those that corporate members of the CED supported in its heyday<sup>138</sup>—and I, for one, very much welcome the call to major multinational companies to support them. But there is no guarantee that corporations mobilized around public policy causes will not choose (what people like me would consider) very bad ones: we would rather such companies focus narrowly on making money than seek to influence broad policy formation. Yet it seems unlikely that businesses that push for progressive causes will inspire antiprogressive forces to mobilize if they otherwise would not. The Koch brothers, Chamber of Commerce, Business Roundtable, and National Federation of Independent Business, among many others, are mobilized already. Business firms do not need much provocation to lobby for policies that benefit their bottom lines—like lower taxes, less regulation, or fewer labor protections.

A big question Heineman's project raises is why a company's legal department is the appropriate agent to enact these ambitious programs. What is it about lawyers that renders them competent to give policy advice, as well as strictly legal advice, and to lead the way in organizing other companies to join in collective public policy formation? In particular, given Heineman's repeated emphasis on the corporate client's need for ethical as well as legal advice and on "doing the right thing" as well as the profitable and law-compliant thing, why are lawyers peculiarly qualified and well situated to serve as the corporation's moral guide?

Construing the lawyer as policy advisor and policy entrepreneur is easier to do. Lawyers presumably gain some knowledge of policy from their training and experience. Legal education infused with insights from the legal realist and law and economics movements is partly an education in policy.<sup>139</sup> Heineman's

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136. *Id.* at 347.

137. *Id.*

138. As it happens, Heineman's father, Ben W. Heineman, Sr., was a lawyer, speechwriter for Adlai Stevenson, advisor to President Lyndon B. Johnson, president of the Chicago and North Western Railway, and one of the charter members of the CED. See DOMHOFF, *supra* note 36, at 135, 175; Denise Grady, *Ben Heineman, Multifaceted Businessman, Dies at 98*, N.Y. TIMES (Aug. 9, 2012), <https://nyti.ms/MEd4YJ>.

139. "Legal realism" was a movement of legal intellectuals writing in the 1920s and 1930s whose work had a profound effect on legal reasoning. Among the movement's tenets were that formal legal arguments conceal what are really issues of public policy and that judges and lawyers should identify and use policy analysis to resolve them. Robert W. Gordon, "Legal Realism," in A COMPANION TO AMERICAN THOUGHT 392, 392-93  
*footnote continued on next page*

view that law (or some law, anyway) expresses norms that have binding authority because of their adoption through democratic processes and that lawyers must interpret law in light of its manifest purposes presupposes that lawyers are likely to have some insight into those purposes. Heineman tells us that he made a practice of hiring lawyers with government, and thus policy, experience.<sup>140</sup>

But what about lawyers' moral authority? The theory is not well developed in Heineman's book, but the basic idea is that company lawyers with experience outside the company—perhaps especially with experience in government—as litigators or transactional lawyers accustomed to having to see things from others' points of view may be exceptionally qualified to detect adverse reactions and reputational harm. Their job is to ask: What if this practice were exposed in tomorrow's *New York Times* or on the front page of the *Wall Street Journal*? The lawyer may not perhaps himself be blessed with a superior moral disposition or instincts but is something of an expert in anticipating moral reactions in others—how, for instance, a jury (to take an example from the Ford Pinto case<sup>141</sup>) might respond to evidence that company engineers were willing to subject drivers to the risk of an exploding gas tank to save a few dollars per car. The lawyer is something like Adam Smith's "impartial spectator," the "man within the breast," who regulates his own conduct by imagining the reactions of others.<sup>142</sup> Executives who have spent most of their lives in a corporate culture tend to develop a tribal mentality, an "us versus the outside world" view in which loyalty is not just a primary virtue but the only virtue, and to close ranks against the enemy—plaintiffs, NGO critics, and bureaucrats.<sup>143</sup> Perhaps lawyers—or some lawyers, anyway—bring to the corporation a more cosmopolitan and less parochial viewpoint, more aware of the institutional and cultural infrastructures in which the company must operate, because their social and political experiences are often much more diverse and extensive than the managers'.

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(Richard Wightman Fox & James T. Kloppenberg eds., 1995). "Law and economics" (or "economic analysis of law") is a generic name for several schools of legal intellectuals writing since 1960. Like the realists, law and economics scholars believe that legal arguments are, at bottom, disputes over policy and that economic analysis provides useful methods for identifying efficient resolutions to those disputes. *See generally* Richard A. Posner, *Values and Consequences: An Introduction to Economic Analysis of Law*, Coase Lecture (Jan. 6, 1998), in *CHICAGO LECTURES IN LAW AND ECONOMICS* 189 (Eric A. Posner ed., 2000).

140. *See* HEINEMAN, *supra* note 3, at 340.

141. *See* *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 358-61 (Ct. App. 1981).

142. ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 161-65, 208-20 (Arlington House 1969) (1759).

143. For an analysis of tribalism, see ROBERT JACKALL, *MORAL MAZES: THE WORLD OF CORPORATE MANAGERS* 49-55 (1988).

To be sure, there are many reasons to doubt whether inside counsel can actually play this role—as employee, faithful agent and advocate, and team player—with all the pressures to conform and cognitive biases that come along with it.<sup>144</sup> A prominent securities law scholar recently observed that if a corporation were serious about actually complying with some law or regulation—environmental, safety, antidiscrimination, workplace harassment, anti-foreign corruption, antifraud, or anything else—it might do well to locate responsibility for compliance in some other set of specialists besides lawyers, given lawyers’ almost reflexive instincts to try to interpret constraints out of existence or behave like “attack dog[s]” against interests perceived as hostile.<sup>145</sup> And there are reasons to be skeptical about how far Heineman’s experience at GE can be generalized to other companies. His situation was pretty special, after all. Jack Welch personally recruited Heineman for the job. Welch and Immelt gave him solid backing for the expansive, proactive role his general counsel’s office performed within the company. He had unhampered access to the board of directors and its independent committees. He had hierarchical control over all the lawyers, inside and outside, serving the company.<sup>146</sup> There was less risk than in many companies (for instance, Enron) that a manager who wanted to bend the rules could find a compliant lawyer somewhere in the corporate bureaucracy. Heineman’s stature was such that if he felt he had cause to withdraw as the company’s counsel, or risked being fired, I suspect that his separation was more likely to hurt the company than to hurt him.<sup>147</sup>

Also, Heineman’s book is less than fully candid about some of the legal and ethical problems that beset his own company<sup>148</sup>—which is too bad, because the omissions tend to undercut his central message about compliance with law and ethics. Young and Brandeis, recall, gave primacy to employees’ welfare and voice in management,<sup>149</sup> but Heineman has almost nothing to say about labor policy, except one brief passage explaining how complicated it is to devise workable global standards for the treatment of labor in global supply chains<sup>150</sup> and another about the importance of transitional arrangements for laid-off

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144. See Kim, *supra* note 101, at 997, 1001-34.

145. See Donald C. Langevoort, *Getting (Too) Comfortable: In-House Lawyers, Enterprise Risk, and the Financial Crisis*, 2012 WIS. L. REV. 495, 500-02.

146. See HEINEMAN, *supra* note 3, at 8-10.

147. *Cf. id.* at 88-89.

148. For a well-written muckraking exposé of these problems, see THOMAS F. O’BOYLE, *AT ANY COST: JACK WELCH, GENERAL ELECTRIC, AND THE PURSUIT OF PROFIT* (1998). If the book’s reporting is correct, GE senior managers dismissed whistleblowers on several occasions and thus violated Heineman’s strictures that company employees should be free to report problems up the ladder. See *id.* at 246-58.

149. See *supra* notes 17-28 and accompanying text.

150. See HEINEMAN, *supra* note 3, at 201-07.

workers.<sup>151</sup> His company under Jack Welch treated employees pretty well but was famous for laying off the bottom 10% every year, ultimately eliminating over 100,000 American jobs, a practice that earned Welch the nickname “Neutron Jack.”<sup>152</sup>

Heineman points with pride to GE’s environmental record, but the company was notorious for stalling for years on orders to clean up nearly two million pounds of polychlorinated biphenyls that its plants had dumped into the Hudson River.<sup>153</sup> The dumping was, however, legal at the time and occurred before Heineman’s tenure, and to its credit, the company did eventually dredge the river to do the cleanup.<sup>154</sup>

In 2009, GE paid \$50 million to settle an SEC lawsuit for securities fraud.<sup>155</sup> GE had engaged in exactly the sort of accounting gimmick that eventually brought down Enron. To book profits early, it had moved debt off its books by disguising loans as sales of locomotives.<sup>156</sup> To be sure, in a company of GE’s size, \$50 million is little more than a rounding error. But it would have been useful to learn how such accounting gimmickry could have happened under the eagle eye of the general counsel’s office.

Still more disturbing is Heineman’s silence on GE’s tax-minimization strategies. GE’s tax department is famous for creative tax dodging, to the point of reducing its U.S. tax liabilities to zero.<sup>157</sup> The strategies are all arguably legal, but they are not what one would expect from a company that supposedly looks to the spirit as well as the letter of the law and wants a reputation as a good corporate citizen. The company is also very active in lobbying for special provisions and exemptions,<sup>158</sup> which seems like simple rent-seeking, not collective action for the common good (which might take the form of lowering tax rates but eliminating loopholes, or abolishing corporate tax while increasing individual rates).

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151. *Id.* at 211-12.

152. O’BOYLE, *supra* note 148, at 71; Opinion, ‘Neutron Jack’ Exits, N.Y. TIMES (Sept. 9, 2001), <https://nyti.ms/2q3tnDY>.

153. See JOHN CRONIN & ROBERT F. KENNEDY, JR., THE RIVERKEEPERS: TWO ACTIVISTS FIGHT TO RECLAIM OUR ENVIRONMENT AS A BASIC HUMAN RIGHT 58-63 (1997).

154. See Jesse McKinley, *G.E. Spent Years Cleaning Up the Hudson. Was It Enough?*, N.Y. TIMES (Sept. 8, 2016), <https://nyti.ms/2pjupOc>.

155. See Floyd Norris, *Inside G.E., a Little Bit of Enron*, N.Y. TIMES (Aug. 6, 2009), <https://nyti.ms/2nPbjye>.

156. *See id.*

157. For an explanation of GE’s tax strategies, see, for example, David Kocieniewski, *G.E.’s Strategies Let It Avoid Taxes Altogether*, N.Y. TIMES (Mar. 24, 2011), <https://nyti.ms/2jWSzZg>. See also *General Electric: Where Taxes Are a Source of Profits*, N.Y. TIMES (Mar. 24, 2011), <http://www.nytimes.com/interactive/2011/03/25/business/general-electric-where-taxes-are-a-source-of-profits.html>.

158. Kocieniewski, *supra* note 157.

As its general counsel, Heineman was the keeper of his company's secrets and bound by law as well as loyalty and prudence not to reveal its dirty linen in public. Still, *The Inside Counsel Revolution* would have been a much more informative book if he had been able and willing to describe the pressures brought to bear on the lawyers in his office and the battles he lost as well as those he won. What every reader surely wants to know is: How can a general counsel who wants to be a lawyer-statesman pursuing a capacious concept of corporate citizenship operate successfully in a company as fanatically dedicated to meeting profit targets and elevating its stock price as GE was under Welch?

### Conclusion

Despite these reservations, I do not think this enterprise can be readily dismissed as just the glossy-brochure expression of airy ethical aspiration from those who do not have to put it into practice—judges, law professors, and retired lawyers. Heineman's is a report from the field, and even if there is much that it omits or overlooks, it is full of concrete examples of public-minded activism and pragmatic proposals for institutionalizing the locus of such action in the general counsel's office. After several waves of corporate scandals that company lawyers clearly did nothing to stop, and often cheerfully abetted,<sup>159</sup> it is refreshing to hear a forthright rejection of commonly held views about both corporate and legal ethics and the articulation of a task for the general counsel's office of active leadership in improving the legal, social, and physical environment in which the company does business.

That is why the Harvard Manifesto and the Heineman book that elaborates its thesis are interesting and potentially important. The moment seems propitious for a revival of the model of professional leadership articulated by Brandeis and Young; business leaders should take account of the environment in which the corporation operates and evaluate the effects of its operations on that environment and their likely consequences for the future health of the enterprise. Business leaders need especially to evaluate potentially adverse consequences such as sullen or rebellious workforces, dissatisfied customers, and residents living downstream from polluters. They need to anticipate

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159. To take one example among many, it has been disheartening to find out that, almost a decade after the Enron scandal, Lehman Brothers executives were still creating special purpose vehicles to move debt off the books and disguise it as earnings—the exact same devices that helped bring Enron down—and that Lehman's lawyers (its London solicitors, in this case) were signing off on these transactions just as Enron's had done. For more information on Lehman's collapse, see Report of Anton R. Valukas, Examiner at 732-42, *In re Lehman Bros. Holdings, Inc.*, No. 08-13555 (JMP) (Bankr. S.D.N.Y. Mar. 11, 2010), <https://web.stanford.edu/~jbulow/Lehmandocs/VOLUME%203.pdf>, which describes the so-called "Repo 105" transactions by which Lehman disguised its earnings.

political reactions likely to result in regulation and then, instead of blocking or evading such regulation, try to devise social welfare-maximizing solutions that result in gains to all interested parties. The Brandeis-Young view was that inattention to horrid social effects invites social anger and extremely crude regulation.<sup>160</sup> It seemed to them that a socially conscious and responsible leadership working through alliances such as the National Civic Federation and the CED can come up with superior and more flexible legal and nonlegal regimes.<sup>161</sup> Lawyers, they believed, were central to this process because their social and political experiences were often much more extensive than the managers'; they had often served in important government posts as elected or appointed officials and were familiar with the ways of the nation's capital.

Brandeis and Young were motivated in part by a stern sense of social duty of a kind one does not see much of in the business and financial worlds today, where if one wants to indulge such a sense of duty, the only way to do so is retire and become a philanthropist. They were also moved by the specter of labor discontent and class conflict, which, if unmediated, might lead to socialism or fascism. As Brandeis put it, "[t]here will come a revolt of the people against the capitalists, unless the aspirations of the people are given some adequate legal expression; and to this end coöperation of the abler lawyers is essential."<sup>162</sup>

Now that there seems to be no abuse that labor cannot be made to fatalistically take in stride, that threat seems less urgent.<sup>163</sup> But I doubt whether income and wealth inequality can grow much wider without provoking severe distributional dissent, only so much of which can be channeled into ethnic nationalism. And what happens after the bursting of another financial bubble—the return of mass unemployment, the continued escalation of healthcare costs far beyond what any other society has to pay, the exhaustion of energy sources, and the destruction of the planet?

Lawyers, as Alexis de Tocqueville pointed out, historically staffed the country's policy elites and its political leadership class, in and out of office, in private practice and on leave from it.<sup>164</sup> More and more lawyers have come to share this leadership with other occupations, which is fine, but they have also abdicated leadership. At every stage of professional development, lawyers have

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

161. *See supra* Part I.

162. Brandeis, *Opportunity in the Law*, *supra* note 17, at 323.

163. For a discussion of the declining influence of the labor movement, see, for example, NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR*, at ix-xxiv, 285-89 (rev. & expanded ed. 2013).

164. *See* 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 348-58 (Francis Bowen ed., Henry Reeve trans., New York, Century Co. 1898) (1835).



passed on responsibility for thinking about the social effects of their work on others. Law professors, themselves refugees from practice or those who have avoided it altogether, have been producing proposals for the reform of legal doctrines and institutions, which judges and policymakers could act on. But they have been slow to address the role of practicing lawyers in implementing—or undermining—such reforms, averting their eyes from what their own graduates will be doing in practice and leaving effective training, both technical and ethical, to law firms.

Law firm partners have used the ethics of client service and adversary advocacy to pass all responsibility for the determination of the ultimate ends of their work onto clients and their in-house counsel. Many in-house counsel, in turn, have carefully separated their domain of strictly legal matters from business decisions or have framed their job simply as that of maximizing the short-term interests of the client entities, as defined by the managers from whom they take instructions, regardless of likely impacts on the clients' long-term interests or those of the communities, environments, or places where they do business, or employees.<sup>165</sup> Everyone is, or at least pretends to be, just an agent—managers of shareholders, inside counsel of management, outside counsel of inside counsel, and associates of partners. The notion that all of these agents might have some discretion, some leeway, to consider and serve some interests beyond short-term profitability for their principals and for themselves seems both impractical and improper—impractical because of increased competition among business firms in product markets and among law firms for clients and rainmaking partners.

It is inevitable that business lawyers are largely creatures of their clienteles, both because their ethics mandate that they be so<sup>166</sup> and because they tend to identify to some extent with their clients' outlooks, ideologies, and priorities.<sup>167</sup> Nonetheless, because of their connection with public institutions and values of the legal system, lawyers may have some influence over the ways their business clients voluntarily comply with, resist, defy, or try to nullify tax and regulatory regimes and how they seek through judicial, legislative, or agency action to change those regimes. Brandeis and Young in their day, and Wilkins, Heineman, and Lee in ours, conceived of lawyers as active shapers of the client's agenda. A reasonable question follows: What latitude do present-day business organizations—given the "financialization" of business management and its obsession with meeting quarterly profit goals—have to pursue such agendas? Even under pressures of competition and financial

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165. See sources cited *supra* notes 98-104.

166. See *supra* note 69.

167. See ROBERT L. NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM 236-43 (1988).

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markets, it seems that managements have considerable leeway in setting business strategies—like wage rates; health, sick leave, and maternity/paternity leave benefits; the conditions of labor in supply chains; environmental policies; and political causes. The Harvard Manifesto and Heineman’s book are, for all their limitations, signs pointing in the right direction.