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# Ethics in Large Law Firms: The Principle of Pragmatism

KIMBERLY KIRKLAND\*

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"The final arbiter of the quality of your work is not the client, the judge, or any external truth, it's the partner you're working for."<sup>1</sup>

## I. INTRODUCTION

The environments in which we practice law shape our understandings of what it means to be ethical and professional.<sup>2</sup> Our practice environments, most significantly our workplaces, influence the roles we assume vis-à-vis our clients and the assumptions, values and beliefs that frame our ethical decision-making—in other words, they shape our ethical consciousness.<sup>3</sup> As a result, one

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\* Professor of Law, Franklin Pierce Law Center. I am indebted to many people who have assisted me in the course of this project. First I am grateful for my long-time teacher, mentor, and friend, Robert Jackall at Williams College. I could not have undertaken this project without his generous guidance, advice, and honest feedback. I am also grateful for comments on earlier drafts from Jerry Kang, Thomas D. Morgan, and Bryant Garth. I also want to thank my friends and colleagues Christopher Johnson and Sophie Sparrow for their comments, feedback, and unfailing support and my research assistants Julee Flood, Suzanne Ketteridge and Sarah Montgomery for their valuable assistance. Finally, I want to thank the lawyers who agreed to participate in this project. They have been generous with their time, open and thoughtful about their experiences, and committed to helping me "get it right." It has been my privilege to know and work with them. All of the opinions and mistakes expressed here are mine alone.

1. A former summer associate speaking about the experience of working in a large law firm. My empirical research involved one-on-one interviews with twenty-two lawyers practicing in ten large firms. Unless otherwise indicated, all quotes from lawyers in this article are from the interviews for this study. Lawyers' names have been changed to protect their identity. See *infra* Part IV for a full description of my methodology.

2. See Robert L. Nelson & David M. Trubek, *Arenas of Professionalism: The Professional Ideologies of Lawyers in Context*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES* 177, 179 (Robert L. Nelson et al. eds., 1992); Tanina Rostain, *Waking Up from Uneasy Dreams: Professional Context, Discretionary Judgment, and the Practice of Justice*, 51 STAN. L. REV. 955, 956–57, 969 (1999); David B. Wilkins, *Everyday Practice is the Troubling Case: Confronting Context in Legal Ethics*, in *EVERYDAY PRACTICES AND TROUBLE CASES* 68, 71 (Austin Sarat et al. eds., 1998).

3. See Rostain, *supra* note 2, at 969–70 (positing that professional environments quickly eclipse the role of law school in shaping lawyers' beliefs and

lawyer can regard as unethical conduct that another lawyer, practicing in another setting, may see as uncontroversially appropriate. Although many scholars have noted the significance of the link between lawyers' workplaces and their ethical consciousness, empirical research exploring that relationship is relatively scarce.<sup>4</sup> In this article, I report my preliminary findings from my ongoing empirical investigation of that link.

Using large law firms as my sample, I investigate how bureaucratic legal workplaces "transform lawyers' ethical sights."<sup>5</sup> I start with the assumption that we must learn how lawyers "actually experience their work"<sup>6</sup> to understand how it influences their ethi-

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values).

4. See, e.g., Robert L. Nelson & David M. Trubek, *Introduction: New Problems and New Paradigms in Studies of the Legal Profession, in LAWYERS' IDEALS/LAWYERS' PRACTICES* 1, 3 (Robert L. Nelson et al. eds., 1992) (noting the lack of research into "[h]ow lawyers in various organizational and institutional locations throughout the profession see the contexts in which they operate, define the interests they pursue, and perceive the obligations they must honor."); Rostain, *supra* note 3, at 963, 969–70 (arguing that "[s]ociolegal investigations are . . . necessary to develop a much richer account of the role of professional environment in shaping lawyers' commitments and beliefs."); Mark A. Sargent, *Lawyers in the Moral Maze*, Villanova University School of Law, School of Law Working Paper Series, Paper 13, 2004, pp. 101–02 and 114–15, (suggesting we must understand the social contexts in which the lawyers involved in recent corporate scandals worked in order to understand whether regulations designed to change lawyer conduct will succeed). Robert Nelson's study of lawyers working in four corporate law firms in Chicago reported in *Partners with Power* discussed in text accompanying notes 97–116 and the *Ethics: Beyond the Rules* study sponsored by the Litigation Section of the American Bar Association and the American Bar Foundation, discussed in text accompanying notes 124 through 128, are two notable exceptions. ROBERT L. NELSON, *PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM*, 5–6 (1988) (exploring the influence of corporate clients on the values of the lawyers who represent them) [hereinafter *PARTNERS WITH POWER*]. Lawrence J. Fox, Nancy McCready Higgins & Donald B. Hilliker, *Report: Ethics: Beyond the Rules*, 67 FORDHAM L. REV., at 691–895 (1998) (investigating what I refer to here as the "working ethics" of large-firm lawyers) [hereinafter *Ethics: Beyond the Rules*].

5. Rostain, *supra* note 2, at 957.

6. ROBERT JACKALL, *MORAL MAZES: THE WORLD OF CORPORATE MANAGERS* 5 (1988) (describing his approach to the study of the moral ethos of corporate managers) [hereinafter *JACKALL*]. In *Moral Mazes*, Jackall gives a rich and nuanced account of the experience of managers working in large corpor-

cal consciousness. This is, therefore, an interpretive account of how large-firm lawyers view their work.

Through in-depth interviews with lawyers working in some of the country's largest law firms,<sup>7</sup> I identify the "set of rules, premiums, and sanctions that [large-firm lawyers] create and re-create"<sup>8</sup> to guide them as they endeavor to survive and advance in their firms. I argue that when large-firm lawyers make decisions in which ethical concerns are implicated, they are likely to make those decisions according to the logic of their firms.<sup>9</sup> If I am correct, this has profound consequences for the profession.

Understanding how bureaucratic legal workplaces shape lawyers' ethical consciousness is especially important now, as increasing numbers of American lawyers work in bureaucratic settings including large law firms, "business corporations, government agencies, mass-market legal service chains, and rationalized court systems."<sup>10</sup> Among these, I chose to study large law firms because they are quintessential bureaucratic legal workplaces. As they have grown over the last three decades, large firms have become increasingly bureaucratic in structure,<sup>11</sup> mirroring their corporate

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rate bureaucracies, and the influence of that experience on their moral consciousness. An early report of Jackall's study was first published in the *Harvard Business Review*. Robert Jackall, *Moral Mazes: Bureaucracy and Managerial Work*, HARV. BUS. REV., Sept.–Oct. 1983, at 118.

7. See *infra* Part IV for a description of the lawyers I interviewed.

8. JACKALL, *supra* note 6, at 112.

9. JACKALL, *supra* note 6, at 112. I use the phrase "logic of their firms" to refer to what Jackall labeled "institutional logic," which he defined as:

the [c]omplicated, experientially constructed, and, therefore contingent, set of rules, premiums, and sanctions that men and women in a particular context create and re-create in such a way that their behavior and accompanying perspectives are to some extent regularized and predictable . . . . [A]lthough individuals are participants in shaping the logic of institutions, they often experience that logic as an objective set of norms. And, of course, [managers'] own fates depend on how well they accomplish defined goals in accordance with the organizational logic of their situation.

JACKALL, *supra* note 6, at 112.

10. Mark C. Suchman, *Working Without a Net: The Sociology of Legal Ethics in Corporate Litigation*, 67 FORDHAM L. REV. 837, 857 (1998).

11. See Suchman, *supra* note 10, at 857–58 (noting that lawyers working

clients. Unlike corporations and many government agencies that are organized by non-lawyers for other purposes, however, large law firm bureaucracies are organized by lawyers for the sole purpose of providing legal services.

Sociologists have long theorized that bureaucracies shape the thinking of the individuals who work within them in distinctive ways.<sup>12</sup> Empirical studies have tested and refined this theory.<sup>13</sup> One of the most widely respected of these studies, Robert Jackall's *Moral Mazes, The World of Corporate Managers*,<sup>14</sup> has served as a model for my study of lawyers working in large law firms.<sup>15</sup> Jack-

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in large law firms are "experiencing a significant bureaucratization of their professional workplaces" and "experiencing an unprecedented degree of both commodification and supervisory control."); *see also* PARTNERS WITHOUT POWER, *supra* note 4 (describing the transformation in both size and complexity of the large law firm).

12. *See, e.g.*, C. WRIGHT MILLS, *WHITE COLLAR: THE AMERICAN MIDDLE CLASS* (Oxford Univ. Press, 1951); WILLIAM A. WHYTE, *THE ORGANIZATION MAN* (Simon and Schuster, 1956).

13. *See, e.g.*, JACKALL, *supra* note 6, at 11 and see sources cited therein at 235–38 summarizing theoretical and empirical works on bureaucracy.

14. Jackall's *Moral Mazes, The World of Corporate Managers* has achieved wide acceptance. It is well regarded in sociological circles and is used in the curriculum of many business schools. *See, e.g.*, Syllabi in business school courses: Fuqua School of Business at Duke University, Management 422 Term 2, 2004, Power and Politics, <http://faculty.fuqua.duke.edu/lerrick/management/422/files/PP%20syllabus202004.pdf>; Wharton School of Business, LGST 210 Corporate Responsibility and Ethics Honors Version, <http://download.wharton.upenn.edu/download/pub/lgst/syllabi/spring2004/lgst210.301.pdf>; MIT, Fall 2001, Professor R. Gibbons, [http://www.people.hbs.edu/r gibbons/945\\_Syl\\_9+14.pdf](http://www.people.hbs.edu/r gibbons/945_Syl_9+14.pdf)-supplemental result, and Syllabi in sociology courses: Sociology of Complex Organizations, Sociology 412, Fall 2001 Minnesota State University, Professor Olday <http://www.mnstate.edu/scj/olday/Soc 412/Syllabus.Htm-30k> and Sociology V3100, Introduction to Social Theory, Professor Polletta <http://www.sociology.columbia.edu/undergraduate/academics/courses/v3100.pdf>. It has been cited by legal scholars numerous times as evidence of what is happening in large corporate bureaucracies. *E.g.*, Donald C. Langevoort, *The Organizational Psychology of Hyper-Competition: Corporate Irresponsibility and the Lessons of Enron*, 70 GEO. WASH. L. REV. 968 (2002); Lawrence E. Mitchell and Theresa A. Gabaldon, *If I Only Had a Heart: Or, How Can We Identify a Corporate Morality*, 76 TUL. L. REV. 1645 (2002).

15. Numerous legal scholars have suggested that research, akin to Jackall's research with large corporations, be done in law firms. *See, e.g.*, Robert

all concludes that work in American corporate bureaucracies shapes corporate managers' habits of mind in characteristic ways and that those habits of mind, in turn, shape managers' moral consciousness.<sup>16</sup>

Similarly, based on the first phase of my research, I conclude that work in large law firm bureaucracies shapes lawyers' habits of mind in distinct ways. Large-firm lawyers work in a world where the relevant norms change frequently. Implicit in the opening quote, "The final arbiter of the quality of your work is not the client, the judge, or any external truth, it's the partner you're working for,"<sup>17</sup> is the interviewee's understanding that lawyers working in large firms must respond to varying sets of norms in the course of their work. What constitutes high quality work varies depending on the lawyer's supervisor. The proper writing style for one partner may be spare and legalistic while another prefers more literary prose. One partner may prefer to maintain friendly and accommodating relations with opposing counsel, while another adopts reserved and suspicious stances. One partner may want responsive documents produced upon request unless strong arguments exist for withholding them, while another may want documents withheld on any arguably non-frivolous ground unless the other side moves to compel their disclosure.

The degree of variation in the norms at play in large law firm bureaucracies makes the experience of work in large firms fundamentally different from that in small firms and plays a crucial role

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Gordon, *Lawyers, Scholars and the "Middle Ground,"* 91 MICH. L. REV. 2075, 2088, n.41 (1993); Robert Granfield and Thomas Koenig, "*It's Hard to be a Human Being and a Lawyer": Young Attorneys and the Confrontation with Ethical Ambiguity in Legal Practice,*" 105 W. VA. L. REV. 495 (2003); Donald C. Langevoort, *Ego, Human Behavior, and Law*, 81 VA. L. REV. 853 (1995); Sargent, *supra* note 4, at 112.

16. JACKALL, *supra* note 6, at 119 and 191–204. I use the term "habit of mind" here in the sense that Jackall uses the term in *Moral Mazes*, JACKALL, *supra* note 6, at 119. The term refers to the patterns of thinking that individuals develop in response to their experiences in, and the incentives created by, the social structures in which they work.

17. A former summer associate was speaking about the experience of work in a large law firm. See *infra* Part IV for a full description of my methodology.

in shaping large-firm lawyers' unique habit of mind. Although lawyers working in small firms often begin their careers working for other lawyers, and, therefore, must also respond to varying norms, they typically begin working autonomously (without supervision) earlier in their careers than do large-firm lawyers. As a result, small firm lawyers begin selecting their own norms relatively early in their careers.<sup>18</sup> In contrast, many large-firm lawyers work for other lawyers, and thus must respond to the varying norms of their supervisors, for much of their careers. Further, as large firms have grown larger and more culturally and geographically diverse and as lawyers move from one firm to another, the norms espoused by the powerful lawyers within these firms have become more varied.

In addition to pleasing the various lawyers who provide them with work, large-firm lawyers (in contrast to small-firm lawyers) must also meet the expectations of a growing group of lawyer-managers in their firms' management hierarchies. The norms espoused by the lawyer-managers who run large firms tend to change with some frequency. For example, firm management may espouse as a norm the ideal that litigators should see themselves as rainmakers. After hiring a consultant, however, firm management may change the prevailing norms to reflect a new strategic plan that envisions litigators as service providers to other practice groups in the firm.

Because norms vary among the powerful partners within a firm and over time, lawyers working in today's large law firms employ a characteristic "choice of norm" rule to guide them.<sup>19</sup> Like a choice of law rule that says the law of the state where an auto accident occurs is the source of governing law in a tort claim arising out of the accident, large-firm lawyers' choice of norm rule

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18. Certainly, small firm lawyers may look to others for guidance about what norms to adopt, but I am suggesting they have an opportunity early in their careers to make choices about the content of the norms they adopt. For a report of a wonderful preliminary empirical study of small and solo firm practitioners, see Leslie C. Levin, *The Ethical World of Solo and Small Firm Practitioners*, 41 HOUS. L. REV. 309 (2004).

19. See *infra* Part VI for a definition of choice of norm rule.

identifies the source of norms a lawyer should follow in a particular situation if he wants to act in accord with the logic of his firm.

Large-firm lawyers' choice of norm rule reflects the varying norms at play in large firms: the appropriate norms to apply in a given situation are those of the people the lawyer is working for and with at the time.<sup>20</sup> Because this choice of norm rule makes the partner or coterie a lawyer is working for at the time the source of norms, the lawyer asks, "What norms would the partner or coterie I am working with follow in this situation?"

The choice of norm rule large-firm lawyers employ is a critical component of the distinctive, "social, cognitive, and evaluative frameworks"<sup>21</sup> large-firm lawyers develop to negotiate their careers in large firms. As a consequence, across large firms, lawyers approach their work in characteristic ways. Further, I argue here that large-firm lawyers are likely to approach the moral and ethical dimensions of their work in these same, characteristic ways—employing the same social, cognitive and evaluative frameworks, including the choice of norm rule, they follow in other aspects of their work. I am not suggesting that large-firm lawyers' ethical norms are identical across firms or even within firms. Rather, I argue that the choice of norm rule that shapes large-firm lawyers' approach to moral and ethical issues is likely to be the same across firms.

Because the choice of norm rule in use in large-firm bureaucracies makes the norms lawyers follow highly mutable, large-firm lawyers place great importance on their own ability to discern the norms appropriate to the situation. As a result, their habit of mind<sup>22</sup> is to focus on which norms to follow when, rather than on the content of the norms themselves. In other words, the large-firm lawyers' habit of mind is to discern the norm "appropriate" to the

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20. Law schools arguably prepare law students to adopt the choice of norm rules I identify here. Most of us who teach have heard law students talk about tailoring exam answers to what particular professors want. In *Making Elite Lawyers*, Robert Granfield notes that law school pedagogy forces students to "reconceptualize their consciousness in ways that are compatible with the professional culture." ROBERT GRANFIELD, *MAKING ELITE LAWYERS VISIONS OF LAW AT HARVARD AND BEYOND* (Routledge, Chapman and Hall, Inc. 1992).

21. JACKALL, *supra* note 6, at 11.

22. *Supra* note 6, at 119.

situation, not to judge the merits of any given norm. If large-firm lawyers carry this habit of mind into their approach to ethical and moral issues, it will shape their ethical consciousness in very distinct ways: A habit of mind that focuses on identifying what norms others would follow rather than on the content of the norms themselves will "convert principles into guidelines, ethics into etiquette, [and] values into tastes."<sup>23</sup> Indeed, in a world where what norms one follows depends on what norms one's superiors would follow, principles can only be guidelines, ethics can only be etiquette, and values can only be tastes.

If other choice of norm rules prevailed in large firms, the proper source of norms with respect to ethical and moral issues might be the applicable code of professional responsibility or a lawyer's own sense of morality and propriety. A lawyer working in a world where the choice of norm rule directs him to consult fixed or internal sources of norms is likely to understand ethics and morals as rooted in principles or values. In contrast, the choice of norm rule and associated habit of mind I found at work in large law firms encourages a consciousness that understands ethics, morals, principles and values as mutable—i.e. as guidelines, etiquette and tastes.

The choice of norm rule I identify at work in large law firms is similar to the evaluative rules that Jackall found managers employ in large corporate bureaucracies. I argue that the choice of norm rule large-firm lawyers follow is a function of the peculiar bureaucratic structure of large law firms described below. If I am correct, the increasing bureaucratization of lawyers' workplaces has significant implications for debates about ethics and professionalism.<sup>24</sup>

I introduce my argument here as two equations: first, bureaucracy generates a characteristic choice of norm rule; second,

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23. JACKALL, *supra* note 6, at 204.

24. I suspect the habits of mind lawyers develop in large government and nonprofit bureaucracies will be somewhat different than those of lawyers working in large law firms. A full understanding of the role of bureaucracy in shaping nonprofit and government lawyers' ethical consciousness will require empirical study of the peculiar form of bureaucracy developed in those organizations.

this choice of norm rule encourages a morality characterized by organizational pragmatism rather than principled decision-making. I begin this way in an attempt to distill the relationship between large-firm bureaucracies and ethics. However, in my quest for clarity, I have greatly oversimplified the workings of large law firms as social institutions. In describing my empirical findings in Sections IV through VII below, I hope to more accurately reflect the complex, fluid, and richly nuanced workings of the human institutions that are large law firm bureaucracies.

I begin in Section II with a description of Robert Jackall's study of managers in large corporations and the role of bureaucracy in shaping managers' moral consciousness. In Section III, I review the recent legal scholarship on large law firms. Section IV outlines my methodology. In Section V, I describe the characteristic social structures of large law firms. Section VI describes the conflicts, tensions, incentives, and motivations created as the marketplace exerts pressure on these bureaucracies. Against the backdrop of the structure of large-firm bureaucracies, and the conflicts and tensions created as these bureaucracies compete in the marketplace, I examine in Section VII the experience of individual lawyers working in these firms. Through the voices of the large-firm lawyers I interviewed, I describe the organizational logic that guides them as they navigate their way through the complex social terrain of their bureaucracies. Finally, in Section VIII, comparing my observations with those of other scholars, I link, in very particular ways, the organizational logic at work in large firms with the ethical consciousness of the lawyers working in them.

## II. THE ROLE OF BUREAUCRACY IN SHAPING CORPORATE MANAGERS' ETHICAL CONSCIOUSNESS

In *Moral Mazes, The World of Corporate Managers*, Robert Jackall explores how bureaucracy shapes corporate managers' moral consciousness.<sup>25</sup> He finds that the rules corporate managers develop and follow in their quest "for survival and success are at the heart of what might be called the bureaucratic ethic, a moral code that guides managers through all the dilemmas and vicissi-

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25. JACKALL, *supra* note 6, at 205.

tudes that confront them in the big organization.”<sup>26</sup> Jackall reports on managers in three companies: a chemical company and its parent conglomerate, a large textile company, and a large public relations firm.<sup>27</sup> Jackall conducted more than 140 interviews of managers working in these corporations.<sup>28</sup> Through these interviews he identifies:

[t]he actual evaluative rules that managers fashion and follow in their work world, the rules that govern their stances toward and interaction with their superiors, subordinates, and peers; their friends allies and rivals; their business customers and competitors; regulators and legislators; the media; and the specific publics they address and the public at large.<sup>29</sup>

The “evaluative rules” Jackall describes are among the “experientially constructed . . . set of rules, premiums, and sanctions”<sup>30</sup> managers create and recreate to guide them through their work lives. He notes that, while managers play a role in “shaping [these rules, premiums, and sanctions], they often experience [them] as an objective set of norms.”<sup>31</sup>

Among the complex set of “evaluative rules” Jackall identifies are what I have labeled “choice of norm” rules. Jackall examines “the particular conceptions of right and wrong, of proper and improper, that underpin those rules”<sup>32</sup> and asks “how the social and bureaucratic context of [managers’] work—the warp across which the threads of their careers are stretched—shape their occupational moralities.”<sup>33</sup> He concludes that bureaucratic work encourages a

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26. *Id.* at 4.

27. *Id.* at 15.

28. *Id.* at 205.

29. *Id.* at 4.

30. *Id.* at 112 (referring to these rules, premiums and sanctions collectively as the “institutional logic” of large corporate bureaucracies).

31. *Id.* at 112.

32. *Id.* at 4.

33. *Id.* at 4.

distinct set of evaluative rules.<sup>34</sup> These rules and the habits of mind managers develop as they try to understand and follow them shape corporate managers' moral consciousness in characteristic ways.<sup>35</sup> By examining the evaluative rules managers follow and the habits of mind they develop, Jackall provides a rich and highly nuanced account of the role of bureaucracy in shaping corporate managers' moral consciousness.

Jackall begins *Moral Mazes, The World of Corporate Managers* with a description of the unique characteristics of American corporate bureaucracies.<sup>36</sup> He describes them as "hybrids,"<sup>37</sup> part Max Weber's "pure form" bureaucracy and part "patrimonial bureaucracy."<sup>38</sup> Bureaucracy in its pure form as envisioned by Weber is:

characterized by a kind of legalistic objectivity, by close attention to details and to orders, by adherence to standardized procedures, by thorough written documentation of daily business in well-maintained files, by impartial and fair treatment under law, by a consequent impersonality, and by a separation of offices from persons.<sup>39</sup>

Although American corporate bureaucracy has incorporated many of the "structural features of [the] pure form [of] bureaucracy," Jackall finds it also has "many of the features of personal loyalty, favoritism, informality and nonlegality that marked crucial aspects of the American historical experience."<sup>40</sup> Thus, power in American corporate bureaucracies is personal and, as a result, managers' personal relationships with their superiors are of pre-eminent importance.<sup>41</sup>

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34. *Id.* at 5–6.

35. *Id.* at 204.

36. *Id.* at 11–12.

37. *Id.* at 11.

38. *Id.* at 11.

39. *Id.* at 11.

40. *Id.* at 11.

41. *Id.* at 35–40.

Once they reach a certain level in the corporate hierarchy, Jackall found that managers do not believe their further advancement will depend on their performance.<sup>42</sup> Instead, "managers see success depending principally on meeting social criteria established by the authority and political alignments—that is, by the fealty and alliance structure—and by the ethos and style of the corporation."<sup>43</sup> In order to understand those social criteria and make decisions, managers develop the habit of mind of "looking up and looking around."<sup>44</sup> They look up to those above them on the corporate ladder and around to those in their various social networks to understand the rules-in-use that guide behavior and decision-making among their superiors and peers.<sup>45</sup> They look up and around to ascertain what "public face"<sup>46</sup> to present.<sup>47</sup> Thus, managers must "master[] the social rules that prescribe which mask [public face] to wear on which occasion."<sup>48</sup> The public face appropriate in one situation (e.g., in a meeting with one's boss and

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42. *Id.* at 45.

43. *Id.* at 45. Jackall introduces his study with a question:

What if men and women in the big corporation no longer see success as necessarily connected to hard work? What becomes of the social morality of the corporation—the everyday rules in use that people play by—when there is thought to be no fixed or, one might say, objective standard of excellence to explain how and why winners are separated from also-rans, how and why some people succeed and others fail? What rules do people fashion to interact with one another when they feel that, instead of ability, talent, and dedicated service to an organization, politics, adroit talk, luck, connections and self-promotion are the real sorters of people into sheep and goats?

*Id.* at 3. My research indicates the lack of fixed standards and the role of "politics adroit talk, luck, connections and self-promotion" in sorting the winners and losers in the quest for advancement has resonance for many large-firm lawyers working their way up the partnership ladder.

44. *Id.* at 77.

45. *Id.* at 37–40, 59–62.

46. "External appearances, modes of self presentation, interactional behavior, and projection of general attitude together constitute [a manager's] public face." *Id.* at 46.

47. *Id.* at 37–40, 59–62.

48. *Id.* at 46.

his/her allies) may not be appropriate in another (e.g., a meeting with managers outside this coterie).

The skill of looking up and around is challenged by the contingent nature of power in large corporations.<sup>49</sup> Frequent reorganizations and shake-ups mean that power is constantly being redistributed in corporate bureaucracies.<sup>50</sup> New CEOs are anointed and they reorganize to show the financial markets they are aggressively making changes.<sup>51</sup> New divisions are bought, existing divisions are reorganized and numerous managers are fired.<sup>52</sup> One's boss is assigned a new position. As power changes hands, or as those at the top find it expedient to change the norms in use, managers must recognize when and how the norms, including norms of public face, have changed.<sup>53</sup>

Successful managers understand the choice of norm rules—they know whose norms are appropriate to the situation.<sup>54</sup> They are also adept at noting a change in the prevailing norms.<sup>55</sup> Accordingly, successful managers develop certain characteristic habits of mind: They look up and around, they are flexible and able to adapt their styles as needed, and they pay close attention to perceptions.<sup>56</sup> They understand how they need to be perceived and are able to accurately assess how others see them.<sup>57</sup>

Those who make their way to the highest rungs of the corporate ladder shape the norms that filter down through their organizations.<sup>58</sup> For instance, Jackall reports that when “reorganizations in the chemical company brought new circles of managers to power . . . [t]he notion of ‘lean, hungry, and aggressive management’ became the watchword and the bonhomie of the old regime became

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49. *Id.* at 59–61.

50. *Id.* at 24–25, 33, 67, 73, 134–35.

51. *Id.* at 25.

52. *See, e.g., id.* at 25–33.

53. *Id.* at 21–23 and 59–61.

54. *Id.* at 59–61.

55. *Id.*

56. *Id.* at 59, 75–100.

57. *Id.* at 59, 64, 203–04. Jackall concludes that this necessitates a particular form of narcissism. *Id.* at 61.

58. *Id.* at 36.

dangerous.”<sup>59</sup> Thus, the style norms in the corporation change to reflect the styles and philosophies of those in power.<sup>60</sup> Some of the norms that come from the top may have moral or ethical dimensions.<sup>61</sup> For instance, a new CEO may “espouse policies of product responsibility, tying organizational rewards to sustained vigilance over the uses and possible uses to which a product might be put. Such programs thus try to link individual success, reduction of corporate liability, and consumer safety.”<sup>62</sup> But the norms that come from the top of the corporate hierarchy are subject to the choice of norm rules managers follow.<sup>63</sup> Jackall’s work suggests that it is these evaluative rules—the rules I have labeled “choice of norm rules,” not the norms themselves, that play the crucial role in shaping managers’ moral consciousness.<sup>64</sup> The choice of norm rule reflects the lack of fixed norms.<sup>65</sup> It places a premium on the ability to read the prevailing norms and apply the norms appropriate to the situation.<sup>66</sup> Thus, in corporate bureaucracies “morality does not emerge from some set of internally held convictions or principles”<sup>67</sup> or even from the norms being generated and disseminated from the top.<sup>68</sup> The appropriate norms to apply in a given situation, whether they are style norms or moral norms, are those of “some person, some coterie, some social network, some clique that matters”<sup>69</sup> to the manager at that time, in that particular situation.

Jackall describes the fate of a manager in one of the corporations he studied who failed to understand or to follow the choice of

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59. *Id.* at 61.

60. *Id.* at 58–61.

61. *Id.* at 198–201.

62. *Id.* at 199. Perhaps these policies are the genesis of the proliferation of warning labels on products that warn against seemingly farfetched potential uses. *Id.* at 199.

63. *Id.* at 192.

64. *Id.* at 191–204.

65. *Id.* at 191–94.

66. *Id.* at 192–94.

67. *Id.* at 101.

68. *Id.* at 192–94.

69. *Id.* at 101.

norm rules and the reactions of other managers to his plight.<sup>70</sup> Brady, an accountant, discovered various financial and accounting irregularities in his company, including bribes paid to foreign officials, doctored invoices, and manipulation of the company's pension fund.<sup>71</sup> He attempted to report his discoveries up the ladder and to the company's general counsel over a period of months.<sup>72</sup> When Brady refused to ignore the problems after being asked to do so by a colleague sent to "cool things down," he was fired.<sup>73</sup> Brady saw his predicament as a moral one.<sup>74</sup> He told Jackall:

So what I'm saying is that at bottom, I was in jeopardy of violating my professional code. And I feel you have to stick up for that . . . . I am frightened of losing respect, my self-respect in particular. And since that was tied with my respect for my profession, the two things were joined together.<sup>75</sup>

Other managers Jackall interviewed saw Brady's situation as "devoid of moral and ethical content."<sup>76</sup> In their view:

[H]e violated the fundamental rules of bureaucratic life . . . . (1) You never go around your boss. (2) You tell your boss what he wants to hear, even when your boss claims that he wants dissenting views. (3) If your boss wants something dropped, you drop it. (4) You are sensitive to your boss's wishes so that you anticipate what he wants; you don't force him, in other words, to act as boss. (5) Your job is not to report something your boss does not want reported but rather to cover it up.<sup>77</sup>

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70. *Id.* at 105–11.

71. *Id.* at 105–07.

72. *Id.* at 106–08.

73. *Id.* at 108–09.

74. *Id.* at 109.

75. *Id.* at 109.

76. *Id.* at 109.

77. *Id.* at 109–10.

Brady refused to follow what I have labeled the choice of norm rule of the corporation, which required him to look up and around to understand what his boss would deem proper conduct and to follow his boss's norms. Instead, he looked to his professional code as the source of norms. Jackall says:

Brady refused to recognize, in the view of the managers I interviewed, that 'truth' is socially defined, not absolute, and that therefore compromise, about anything and everything, is not moral defeat, as Brady seems to feel, but an inevitable fact of organizational life. They see this as the key reason why Brady's bosses did him in. And they too would do him in without any qualms.<sup>78</sup>

Jackall concludes that the ethos managers in large corporations:

turn principles into guidelines, ethics into etiquette, values into tastes, personal responsibility into an adroitness at public relations and notions of truth into credibility. Corporate managers who become imbued with this ethos pragmatically take their world as they find it and try to make that world work according to its own institutional logic.<sup>79</sup>

Since an increasing numbers of lawyers work in bureaucratic settings, we must understand whether the growing number of legal bureaucracies shape lawyers' moral consciousnesses in similar ways. Because lawyers and the work they do differ from corporate managers and their work in important ways, we cannot assume large law firm bureaucracies have the same effects. Most notably, lawyers are required to comply with a code of ethics.<sup>80</sup> Further,

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78. *Id.* at 111.

79. *Id.* at 204.

80. Many scholars have noted the weak enforcement of professional codes. See, e.g., Mona L. Hymel, *Symposium Introduction: The Future Structure and Regulation of Law Practice: Controlling Behavior: the Sources and Uses of Protocols in Governing Law Practice*, 44 ARIZ. L. REV. 873, 878-82, 890

even large corporate law firms—the legal bureaucracies that have the most in common with, and work for, large corporations—differ from corporate bureaucracies in other significant ways. The CEO of a corporation serves at the will of the board of directors and shareholders. In contrast, although large law firms are now usually managed by one or a small group of powerful partners, those managers serve at the pleasure of those they manage—the other equity partners in the firm. In my study, I set out to learn how the peculiar form of today’s large law firm bureaucracies shape the moral consciousness of the lawyers who work in them.

### III. THE STUDY OF LARGE LAW FIRMS

I do not begin my study of today’s large corporate law firms on a blank slate. As they have grown larger and more bureaucratic, these firms have become a particular focus of study.<sup>81</sup> Legal scholars have addressed a number of important theoretical and empirical questions that have deepened our understanding of these workplaces. As yet, however, no one has systematically investigated how the bureaucratic structure of these firms shapes lawyers’ ethical consciousness.

Much of the recent scholarship on large law firms is theoretical and views large firms through the lens of law and economics analysis.<sup>82</sup> In their seminal study of large firms, *Why the Big Get Bigger: The Promotion-to-Partner Tournament and the Growth of Large Law Firms*, Marc Galanter and Thomas Palay used law and

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(2002) and sources cited therein. When lawyers’ professional codes are enforced, scholars and the popular legal press have documented that solo practitioners and small firms “are disciplined at a far greater rate than other lawyers.” *Id.* See also Leslie C. Levin, *The Ethical World of Small and Solo Law Firm Practitioners*, 48 Hous. L. Rev. 309, 312 (2004).

81. In contrast to small firms, large firms have been the focus of more than their share of scholarly attention. See Leslie C. Levin, Symposium: *Preliminary Reflections on the Professional Development of Solo and Small Firm Practitioners*, 70 FORD. L. REV. 847, 848 (2001) and sources cited therein.

82. See, e.g., Marc S. Galanter & Thomas M. Palay, *Why the Big Firms get Bigger: The Promotion-to-Partner Tournament and the Growth of Large Firms*, 76 VA. L. REV. 747 (1990); David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581 (1998).

economic theory to explain the growth and structure of large law firms.<sup>83</sup> Galanter and Palay argue that the exponential growth of large law firms over the last century was driven by their structure, which the authors describe as a “promotion-to-partner tournament.”<sup>84</sup> According to Galanter and Palay, large-firm partners use associates to maximize partners’ surplus human capital—their ability to generate more legal work from their relationships with lucrative clients than they can do themselves.<sup>85</sup> To maintain the value of their human capital, partners must ensure that associates produce a high volume of quality work.<sup>86</sup>

Galanter and Palay posit that firms use a promotion-to-partner tournament as a monitoring mechanism to encourage associates to work hard and provide high quality legal services to their clients.<sup>87</sup> Partners lose money if they have to spend significant time closely supervising associates’ work beyond an initial period.<sup>88</sup> By deferring some of the associates’ income until partnership and challenging them to compete for a limited number of partnership seats, large firms create incentives for associates to produce a large volume of quality work with little supervision.<sup>89</sup> Galanter and Palay argue that the promotion-to-partner tournament necessitates that large firms grow exponentially, because as the number of partners grows, the firm must increase the number of associates to replace those who are promoted to provide the new partners with associates to do their work.<sup>90</sup>

David Wilkins and G. Mitu Gulati reconceived Galanter and Palay’s tournament theory to account for a number of anecdotal and preliminary empirical findings that appeared inconsistent with classic tournament theory.<sup>91</sup> In the course of their studies on the

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83. See Galanter & Palay, *supra* note 82.

84. *Id.* at 766.

85. *Id.* at 770–73.

86. *Id.* at 773–76.

87. *Id.* at 780–83; Wilkins & Gulati, *supra* note 82, at 1584.

88. Galanter & Palay, *supra* note 82, at 779–82.

89. *Id.* at 780–83.

90. *Id.* at 783–89.

91. Wilkins & Gulati, *supra* note 82. I say “appeared inconsistent” here because in *A Little Jousting about the Tournament*, Galanter and Palay argue that some of these findings were new and that others were not inconsistent.

role of race in large law firms,<sup>92</sup> Wilkins and Gulati find that not all associates participate in the tournament, and that the selection of partners is not based on past performance as a “rank order” tournament would suggest, but on forward-looking criteria.<sup>93</sup> They also find that the partnership tournament is not played on a level playing field; associates are tracked and seeded<sup>94</sup> from the outset for the coveted training assignments that ensure a group of associates are trained for partner-like work.<sup>95</sup> Also, the partners who declare the winners and losers of the promotion are not neutral, i.e., they have a stake in who wins.<sup>96</sup> Further, Wilkins and Gulati argue that Galanter and Palay’s theory does not recognize the pivotal role human and relational capital play in determining who wins and who loses the tournament.<sup>97</sup>

A number of other scholars following in this vein employ law and economics theory to analyze other aspects of large law firms, including the role of race in large firms.<sup>98</sup> As Wilkins and Gulati note, “[t]here are, however, limitations on the usefulness and reliability of these [law and economic based] accounts. For the most

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Marc Galanter & Thomas Palay, *A Little Jousting About the Tournament*, 84 VA. L. REV. 1683 (1998).

92. Wilkins & Gulati, *supra* note 82, at 1586.

93. *Id.* at 1586–87, 1606, 1620–24.

94. Firms track associates as they move through the multi-round tournaments from junior to senior associates competing for choice training assignments and the “associates” who do well in early rounds are favored and protected in later rounds. *Id.* at 1643–58. Associates are seeded (selected at the outset for choice training assignments) on the basis of pedigree (“signaling”), i.e., law school, class rank, law review membership and judicial clerkship. *Id.* at 1651–58.

95. *Id.* at 1641–44.

96. *Id.* at 1615–19.

97. *Id.* at 1657–60, 1669–70. Human capital refers to a lawyer’s ability to generate more work than she can do herself as a result of her native intelligence, her legal education and skills, her professional reputation and her relationships with clients. Galanter & Palay, *supra* note 83, at 768.

98. See, e.g., Wilkins & Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms, An Institutional Analysis*, 84 CAL. L. REV. 493, 515 (1996) (combining rational choice theory with a recognition of the role played by “professional ideology, social capital and inequality”).

part, this work is theoretical, rather than empirical, often relying on anecdotal evidence from the legal press.<sup>99</sup>

In contrast, Robert Nelson in *Partners with Power*, employed the empirical tools of sociology to investigate the structure of large law firms.<sup>100</sup> More than fifteen years since its publication, *Partners with Power* still represents the most thorough and systematic empirical study of large law firms to date. From 1979-1981, Nelson studied four large Chicago law firms; two that were traditional in their structure and two that were bureaucratic.<sup>101</sup> In labeling firms as traditional or bureaucratic, Nelson looks at three criteria: (1) policy making and strategic planning, (2) administration and monitoring of data, and (3) the organization and stability of work groups.<sup>102</sup> Policy making in traditional firms is "ad hoc and reactive"<sup>103</sup> while in bureaucratic firms a "specialized policy making group . . . actively engages in strategic planning."<sup>104</sup> Traditional firms do not have full-time managers and do not engage in systematic "monitoring of internal performance measures or financial information,"<sup>105</sup> while bureaucratic firms do. And finally, in contrast to traditional firms, bureaucratic firms have "well-defined work groups" with leaders who report up a management ladder.<sup>106</sup>

Nelson asked why the bureaucratic firms had adopted bureaucratic structures and how they differed from the traditional firms.<sup>107</sup> He concluded that the bureaucratization of large firms "as a means of improving service to clients and increasing partnership profits appears to be in the economic self-interest of the client-responsible elite."<sup>108</sup> He found that the bureaucratic firms, like

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99. *Id.* at 543 (placing their work in this theoretical/anecdotal tradition while acknowledging the limits of this form of argument and describing the preliminary empirical research they used to supplement the publicly available information).

100. See PARTNERS WITH POWER, *supra* note 4.

101. *Supra* note 4 at 92.

102. See PARTNERS WITH POWER, *supra* note 4, at 92.

103. *Id.* at 91.

104. *Id.* at 91.

105. *Id.* at 91.

106. *Id.* at 91.

107. *Id.* at 17, 25-29.

108. *Id.* at 225.

the traditional firms, were dominated by a small group of partners who had relationships with the firm's most important clients.<sup>109</sup> Thus the firms' adoption of a bureaucratic structure had not changed the essential nature of power in those firms.<sup>110</sup> Further, Nelson found that

although work and careers have changed significantly as firms grow and become differentiated, the model of professionalism continues to be the independent practitioner . . . Individual lawyers choose their roles (the field they work in, the partners they work for, the hours they work) and are ultimately responsible for their personal success or failure in the organization.<sup>111</sup>

Nelson went on to posit a theory of social change to explain how these firms reconciled their bureaucratic structure with traditional notions of professionalism.<sup>112</sup> He argued that professional "values relating to organizational policies arise inside the firm and reflect the managerial ideology of the elite in power."<sup>113</sup> While bureaucratic structures clashed with much of the traditional rhetoric of professionalism, those firms that successfully adopted bureaucratic structures reinvented professional ideology to rationalize the structures they imposed.<sup>114</sup> An example illustrates his point. The notion that a lawyer was free to choose the field(s) he worked in and to move from field to field as he desired was central to traditional notions of professionalism.<sup>115</sup> In one of the bureaucratic

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109. *Id.* at 224–28, 288–89.

110. *Id.* at 224–28, 288–89.

111. *Id.* at 278. This notion of professionalism is akin to historic notions about the role of merit in determining who succeeds in large corporations. JACKALL, *supra*, note 6, at 3 and 7–16. My findings suggest that, like managers in corporate America, many lawyers working in large-firm bureaucracies no longer believe that responsibility for their success or failure within their firms is ultimately within their control.

112. JACKALL, *supra* note 6, at 23–24.

113. *Id.* at 220.

114. *Id.* at 205–07 (summarizing Nelson's findings in PARTNERS WITH POWER).

115. *Id.*

Chicago firms Nelson studied, incoming associates were required to join a specific department at the outset rather than explore a variety of practice areas.<sup>116</sup> The ideology of the firm espoused by its dominant partners was that professionalism connotes a high degree of competence and competence requires specialization.<sup>117</sup> Lawyers cannot produce the high quality professional work their clients demand unless they specialize.<sup>118</sup> Accordingly, Nelson concluded that “[p]rofessionalism did not determine the organizational practice, but was constructed within each firm according to its particular history and the interests of its most powerful partners.”<sup>119</sup>

Building on Nelson’s earlier work in *Lawyers’ Ideals/Lawyers’ Practices*, Nelson and David Trubek suggested an interpretive framework for the study of the areas of the legal profession “that integrates studies of structural and organizational changes with studies of the reactions and perceptions of the actors involved in the changing systems.”<sup>120</sup> They argued that:

[P]rofessional ideals [are] formed partly within the workplace and partly as designed consciously or unconsciously, by lawyers for the promotion of their economic, power and status goals. Thus “ideals” carry within themselves heavy traces of what we have called “structure.” But they also can be seen as a set of dispositions that have a logic partially independent of the structures that produce them. They may, therefore, become the object of competition among individual or collective actors who seek to appropriate (or perhaps accommodate) elements of a professional tradition in order to advance a particular mode of professional organization or pursue other objectives.<sup>121</sup>

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116. *Id.*

117. *Id.*

118. *Id.*

119. Nelson & Trubek, *supra* note 2, at 207 (summarizing Nelson’s findings in PARTNERS WITH POWER).

120. *Id.* at 22.

121. *Id.* at 23.

Many of the scholarly works discussed above express concern about how the structural changes large law firms have undertaken, and the changes in the markets they serve, affect the ethics of large-firm lawyers.<sup>122</sup> The organized bar and the popular legal press have expressed similar concerns.<sup>123</sup> In response to some of these concerns, a number of prominent legal and social science scholars working in this area participated in *Ethics: Beyond the Rules*, a project sponsored by the Litigation Section of the American Bar Association and the American Bar Foundation, designed to study large-firm lawyers' ethics.<sup>124</sup> In 1998, the study's authors conducted extensive group and some one-on-one interviews with nineteen lawyers working in large firms in two cities.<sup>125</sup> In these interviews, the researchers asked large-firm litigators to talk about their understandings of their roles vis-à-vis their clients, what it means to act ethically, and their professional ideals.<sup>126</sup> In a series of essays published in the Fordham Law Review, the researchers paint a vivid picture of large-firm lawyers' ethics.<sup>127</sup> Although the *Ethics: Beyond the Rules* scholars posit some of the structural and market roots of large-firm lawyers' ethical stances, they do not systematically investigate the link between the structure of lawyers' practice environments and their ethics.<sup>128</sup>

In this article, I combine my findings about the logic of large law firms with both my preliminary findings about large-firm lawyers' ethics and with the *Ethics: Beyond the Rules* scholars' data and draw conclusions about the links between the structure of large firms and lawyers' ethical consciousness. I do not posit theories to explain why large firms are structured as they are or how large

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122. See, e.g., Fox, Higgins & Hilliker, *Ethics Beyond the Rules Historical Preface*, 67 FORDHAM L. REV. 699 (1998); Marc Galanter and Thomas Palay, *The Transformation of the Big Law Firm*, LAWYERS' IDEALS/LAWYERS' PRACTICES, 31–33 (Robert L. Nelson et al. eds., 1992).

123. See, e.g., Douglas N. Frenkel, et al., *Ethics Beyond the Rules: Bringing Legal Realism to the Study of Ethics and Professionalism*, 67 FORDHAM L. REV. 697, 701 (1998).

124. See *supra* note 4, at Historical Preface.

125. Frenkel, et al, *supra* note 123, at 701–02.

126. See *id.* at 691–895.

127. *Id.*

128. *Id.*

firms re-make professional ideologies to rationalize their structures. I take the structure of these firms as I find it and ask how that structure affects lawyers' ethical consciousness.

As Nelson and Trubek's proposed interpretive framework for the study of the profession suggests, we need to understand how the structure of lawyers' workplaces affect their perceptions and how lawyers' perceptions, in turn, affect the structures of their workplaces.<sup>129</sup> To do this effectively, we must undertake empirical studies capable of capturing this complex and dynamic process. As Robert Gordon noted in 1993:

[T]here is very little as yet written about law firms that gives a good feel for how market and organizational structures, career patterns, professional self-images, firm cultures, financial pressures, patronage networks and power hierarchies—running from clients to partners and partners to associates—condition how lawyers see their jobs, self-interest, loyalties, obligations, and practical moralities, and how these conceptions play out in their work.<sup>130</sup>

Unless we understand how careers in bureaucratic law firms shape the ethical approaches of the lawyers working in them, we cannot determine whether the changes in the structure of large firms and the markets they service are a cause for concern, and if they are, how to effectively address them.<sup>131</sup>

There are several reasons why the sort of interpretive socio-logical study Jackall undertook in large corporate bureaucracies

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129. See Nelson & Trubek, *supra* note 2 at 213–14.

130. Robert W. Gordon, *Lawyers, Scholars, and the "Middle Ground,"* 91 MICH. L. REV. 2075 n.41 (1993) (citing *Moral Mazes* as "a wonderful study of business corporations in this vein").

131. Scholars have proposed new mechanisms for policing ethics and establishing ethical cultures in large law firms. See, e.g., Elizabeth Chambliss & David B. Wilkins, *A New Framework for Law Firm Discipline*, 16 SOC. J. LEG. ETHICS 535; WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYER'S ETHICS* (Harvard University Press 1998). We need to understand how lawyers in large firms experience their work in order to predict whether these mechanisms will be effective.

has not been undertaken in large law firms. First, it is difficult to do. Empirical work of this sort requires access to large-firm lawyers across the country and the time for lengthy, one-on-one interviews. Second, an early attempt in this direction may well have discouraged further study. Erwin Smigel's *The Wall Street Lawyer, Professional Organization Man?*, published in 1964, was an empirical study of lawyers working in what were large Wall Street law firms in the mid-to-late 1950s.<sup>132</sup> Smigel asked whether work in those law firm bureaucracies "breeds conformity and stifles creativity."<sup>133</sup> He concluded that, although Wall Street lawyers were "expedient conformit[ists]" in their "nonprofessional styles of life" like dress and residence, they had adopted the norms of the profession which value creativity and independent judgment.<sup>134</sup>

While Smigel's work was widely accepted and cited outside legal scholarship,<sup>135</sup> legal academics roundly rejected his conclusion as suffering from flaws typical of functionalist analysis.<sup>136</sup> A number of scholars "criticized these early explanations by arguing that 'professionalism' was merely the label under which law firms pursued their economic self-interest."<sup>137</sup> Nelson argued that Smigel "presents an idealized and incomplete model of the social structure of the professional firm."<sup>138</sup> Smigel "mistakenly read this form of domination [collegial hierarchy] as a lack of domination."<sup>139</sup> Nelson notes that Smigel found fewer rules in the Wall Street firms he studied than he expected given their bureaucratic structure.<sup>140</sup> This, Nelson argued, led Smigel to conclude that

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132. ERWIN O. SMIGEL, *THE WALL STREET LAWYER, PROFESSIONAL ORGANIZATION MAN?* (The Free Press of Glencoe 1964).

133. *Id.* at 3.

134. *Id.* at 338.

135. See, e.g., PARTNERS WITHOUT POWER, *supra* note 4, at 6 (citing Ouchi and others).

136. Functionalist analysis argues that professional "institutional structures are driven by the functions they were designed to implement." Wilkins & Gulati, *supra* note 92, at 493 n.60. Smigel asserted that professional norms dictated the structure of large law firms. SMIGEL, *supra* note 133, at 338.

137. Wilkins & Gulati, *supra* note 92, at 514.

138. PARTNERS WITHOUT POWER, *supra* note 4, at 15.

139. *Id.* at 16.

140. *Id.* at 13–14.

large firms had no need for extensive rules because large-firm lawyers had “internalized common standards of practice”<sup>141</sup> (namely canons of ethics) and that there was “little need to define the division of labor or to articulate powers attached to different positions in the firm’s hierarchy.”<sup>142</sup> Nelson notes, “In Smigel’s conception everyone knows his or her place; there is little conflict, little need to justify the distribution of power and profits.”<sup>143</sup> Smigel concluded that the collegial organization of the large Wall Street firms he studied allowed them to maintain autonomy from their clients’ interest.<sup>144</sup>

Nelson’s empirical findings flatly controvert Smigel’s thesis.<sup>145</sup> Nelson concluded that as a result of his failure to understand the “system of collegial domination” embedded in large law firms’ structure, Smigel underestimated the importance of these hierarchical relationships in understanding large law firms.<sup>146</sup> Nelson noted that it is the partners who control the firm’s relationships with its most powerful clients who sit atop the firm hierarchy. Based on his research he predicted these partners:

can be expected to have internalized the client’s perspective on questions of social and legal policy. In such a collegial hierarchy the interests, indeed, probably the tastes, of clients will be enforced. The resilience of collegial authority in the law firm will have the opposite effect from that posited in the professions literature. Instead of producing an organization that is more autonomous from client interests, collegial authority ensures that even as the organization becomes more specialized internally and moves in the direction of bureaucratic organization, it will remain under the control of clients.<sup>147</sup>

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141. *Id.* at 14.

142. *Id.* at 14.

143. *Id.* at 14.

144. *Id.* at 14–15; SMIGEL, *supra* note 132, at 338.

145. PARTNERS WITH POWER, *supra* note 4, at 205–90.

146. *Id.* at 16.

147. *Id.* at 227–28.

My empirical research confirms many of the theories and assumptions of Galanter and Palay, and Wilkins and Gulati, about the way large law firms work and about the incentives of the lawyers who work in them.<sup>148</sup> Moreover, many of Galanter and Palay's predictions in 1990 about what large firms might look like in the future are borne out by my research.<sup>149</sup> Although large firms are exponentially larger and substantially more bureaucratic than they were when Nelson wrote *Partners with Power*, my research also confirms Nelson's thesis about the nature of power in large law firms.<sup>150</sup> My findings are consistent with Nelson's conclusion that the dominant partners in large firms play a crucial role in setting the norms and creating the ideology that rationalizes those norms.<sup>151</sup> My study also confirms Nelson's prediction that the benefits of bureaucratization would drive more and more firms to adopt bureaucratic structures.<sup>152</sup>

By adopting a methodology similar to Jackall's, which has proven useful in providing insight into corporate bureaucracies,<sup>153</sup>

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148. See, e.g., Galanter & Palay, *supra* note 82; Wilson & Gulati, *supra* note 82. For example, Galanter & Palay theorize that large firms will become increasingly hierarchical in order to facilitate monitoring of the quality of their work product as large firms grow. Galanter & Palay, *supra* note 3, at 807. My empirical research confirms that large-firm bureaucracies have become increasingly hierarchical. See text accompanying notes 177–92. Wilkins and Gulati posit that large firms measure candidates for limited partnership slots against some “absolute standard of [human and relational] capital that translates into potential for the future,” and that that standard is shaped in part by external factors such as the market for one legal specialty over another. Wilkins & Gulati, *supra* note 82, at 1654; 1660–61. My research suggests that the external market factors often trump all other factors in the partnership decision. See text accompanying notes 227–28.

149. See, e.g., Galanter & Palay, *supra* note 82, at 807 (describing “the ‘Later’ Big Firm”).

150. See PARTNERS WITH POWER, *supra* notes 113–19.

151. See *supra* notes 112–21, 145–47.

152. See PARTNERS WITH POWER, *supra* note 114, at 281–82.

153. See, e.g., Donald C. Langevoort, Symposium: *The Organizational Psychology of Hyper-competition: Corporate Irresponsibility and the Lessons of Enron*, 70 GEO. WASH. L. REV. 968, 970–71 (2002) (citing Jackall's study reported in *Moral Mazes: The World of Corporate Managers* as evidence of managers in large corporations approaches to the business and ethical issues they confront); Timothy F. Malloy, *Regulation, Compliance and the Firm*, 76 TEMP.

I will explore how the bureaucracies created by the “partners with power” in today’s large firms shape the habits of mind, including the ethical consciousness, of the lawyers who work in them.

Although I take a more sociological approach, my findings are not inconsistent with the law and economics scholarship described above. As Cass Sunstein has argued, “[I]ndividual rationality is a function of social norms. The costs and benefits of action, from the standpoint of individual agents, include the consequences of acting inconsistently with social norms.”<sup>154</sup> Thus, if one subscribes to rational choice theory, an understanding of large-firm lawyers’ choice of norm rules (Sunstein might call them “choice of norm” norms or procedural norms) is necessary for any understanding of the costs and benefits of action.

In addition, I hope that my research makes two new contributions to this body of work. First, I describe the rules large-firm lawyers develop to negotiate the bureaucratic structures developed by the firm’s dominant partners. Second, I posit that the rules, including the choice of norm rule, and the habits of mind lawyers develop working in large firms<sup>155</sup> are similar to those Jackall identifies in large corporate bureaucracies. Thus, I argue that the rules that guide large-firm lawyers and the habits of mind that follow from these rules are largely a function of large law firms’ collegial bureaucratic structure.<sup>156</sup> Finally, I argue that the rules and habits of mind that large-firm bureaucracies encourage shape large-firm lawyers’ ethical consciousness in distinct and important ways.

#### IV. METHODOLOGY

Beginning in the spring of 2003, I began interviewing lawyers working in large law firms. My empirical research is on-going. In

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L. REV. 451, 490 (2003); Michael P. Vandenberg, *Beyond Elegance: A Testable Typology of Social Norms in Corporate Environmental Compliance*, 22 STAN. ENVTL. L.J. 55, 91 (2003).

154. Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 909 (1996).

155. See *infra* note 233–40 and accompanying text.

156. As Nelson noted, the partners in large law firms with relationships with powerful clients dictate the management structure of large firms. NELSON, *supra* note 4, at 16, 112.

this article, I report on the first phase of interviews. This preliminary report of my findings is based on my one-on-one interviews with twenty-two lawyers practicing in ten large law firms. These firms ranged in size from approximately 160 lawyers to over 1,000 lawyers.<sup>157</sup> They were located in large cities on the east and west coasts, and in the south. All but five of the lawyers I interviewed were litigators. I conducted all but two of my initial, in-depth interviews in person, spending from an hour and a half to three hours with each lawyer. I conducted follow-up interviews with six of these lawyers, some in person and some by telephone, during which I asked them to interpret the material I was collecting. In total, I conducted thirty interviews.

The lawyers I interviewed included junior and senior associates, salaried non-partnership track lawyers, non-equity, and equity partners. A number of them had management responsibilities in their firms. They included a team leader, several practice group leaders, a department head for a large metropolitan office, a firm-wide department head, and a former managing partner. I also interviewed a third year law student who had been a summer associate at a large law firm during the summer of 2003. Sixteen of my interviewees were men and six were women. Two interviewees were Asian-American; one was African-American; all others were Caucasian-Americans.

The lawyers I interviewed were not chosen at random. Instead, I used personal connections to gain access to large-firm lawyers. I asked friends, colleagues, and former colleagues to suggest large-firm lawyers with whom I could speak. Some of these lawyers made initial calls to lawyers they knew and asked whether I could contact them. Others gave me the name of a lawyer and told me to use their names when I introduced myself and my project. Some of the lawyers I interviewed introduced me to still other lawyers. All of the lawyers I interviewed spoke with me on the condition that they and their firms remain anonymous. I have changed all names, and sometimes other identifying information,

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157. Five of the firms were among the fifty largest firms in the country, and all of the firms were among the largest 250 law firms in the country in 2003, according to the National Law Journal. *The NLJ 250*, NAT'L L.J., Nov. 24, 2003, at S10.

including in some instances gender information, to protect the identities of those lawyers and their respective firms. With one exception, I found the lawyers I interviewed to be eager to talk about their work and lives in large law firms. I took handwritten notes of my interviews and subsequently typed them myself or had them typed for me.

The sample of lawyers involved in my study is not intended to be statistically representative. However, the twenty-two lawyers I spoke with had diverse professional backgrounds. Some had spent their entire careers in the same firm; some had come to their firms as lateral associates or partners. They also had diverse practice concentrations. Notwithstanding these differences, their geographic diversity, and the range of seniority and managerial responsibilities represented, my in-depth interviews revealed remarkable consistency in these lawyers' experiences of work in large law firms.

Within large firms, I focused my initial research primarily on litigators.<sup>158</sup> I did so for two reasons. First, litigators' working ethics represent an exceptionally influential paradigm of legal ethics; non-litigators adopt litigators' adversarial norms even when their work does not involve adversary proceedings.<sup>159</sup> As David Luban noted, "Lawyers commonly act as though the standard conception [the duty of a lawyer in an adversary proceeding to zealously represent his client's position] characterizes their relationship with clients even when the representations do not involve the courtroom."<sup>160</sup> Thus, understanding how the logic of large law firm bureaucracies shapes litigators' working ethics may indicate how the increasing bureaucratization of legal workplaces shapes

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158. The next phase of my empirical research is focused on transactional lawyers.

159. See DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 57–58 (1988).

160. *Id.* at 57 (arguing that the standard conception of the lawyer's role as a partisan advocate who is not morally accountable for his actions only applies in the context of litigation and that the principles of partisanship and non-accountability should not apply when lawyers work outside of an adjudicatory proceeding) (citing Schwartz's formulation of the principles of professionalism, Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 672 (1978)).

the working ethics of non-litigators as well.<sup>161</sup> In addition, large-firm litigators are actively engaged in the ongoing discourse—the regular dialogue among plaintiffs' lawyers, defense lawyers, clients and the court—by which litigation ethics are defined and redefined.<sup>162</sup> Understanding the organizational influences on large-firm litigators is, therefore, essential to understanding the development of litigation ethics. Second, I focused on large-firm litigators because doing so allowed me to build upon data in the *Ethics: Beyond the Rules* study, which was focused on litigators.<sup>163</sup>

In conducting these interviews, I tried to understand how these large-firm lawyers viewed and experienced their work. I asked them about their interactions with colleagues within the firm, as well as with clients and adversaries. I asked who succeeds in their firms and why. I also asked them how they make decisions. In response, they told me stories, a number of which are recounted here.<sup>164</sup> The social, cognitive and evaluative rules large-firm lawyers develop and live by emerge from these stories. It is these rules that, I argue, are likely shaping lawyers' ethical consciousness.

## V. THE SOCIAL STRUCTURE OF LARGE LAW FIRMS

To understand how large-firm lawyers experience their worlds, one must first understand the social structure of large law firms. How is the firm's work organized? Who reports to whom?

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161. In my own research, I did not find differences in the ways litigators and non-litigators in large firms experience the worlds of their firms.

162. See Suchman, *supra* note 10, at 867 (noting that “[l]itigation ethics do not exist in the abstract, but rather are constantly being constructed from litigators' day-to-day routines. Standards of conduct come from neither individual attorneys nor from individual firms, but rather from the larger system of the profession as a whole”).

163. See *Ethics: Beyond the Rules*, Historical Preface, *supra* note 4 at 692.

164. Certainly, there is more to be learned about large law firms. This article is the first report of an ongoing research project that I hope will continue to provide rich data about the experience of work in large law firms. There is also much to be learned through comparative studies. For instance, it would be useful to compare lawyers' experience of work in large firms with a similar study of lawyers working in small, non-bureaucratic firms and to examine whether and how differences in their experience impact their working ethics.

What kinds of decisions need to be made, and who makes them? Although every firm is unique, and although large-firm lawyers believe that their firms differ substantially in terms of their culture, the structure of the bureaucracies that have developed in these firms is remarkably similar. As noted in Part III above, a number of other scholars have described the general structure of large law firms and referred to many of the specific features of large-firm structure in the course of their work.<sup>165</sup> In this section, I describe in some detail the common structural features of the firms I studied in 2003 and 2004. Because I posit that the structure of large firms influences lawyers' ethical consciousness, I endeavor to provide a more comprehensive description of the structure than is contained in much of the earlier scholarship. Most of what I describe here is generally consistent with that scholarship; however, many of the firms I studied have developed more elaborate management bureaucracies than those described in earlier studies.<sup>166</sup>

All large law firms are made up of partners and associates, and most employ a number of salaried lawyers who are not on the partnership track.<sup>167</sup> Of the ten firms I studied, seven have a two-tiered partnership, consisting of equity partners and non-equity partners.<sup>168</sup> Equity partners own the firm. Non-equity partners are not owners, but typically may vote on all issues that come before the partnership, with the exception of promotion to equity partner. The partners, associates and non-partnership track lawyers in these

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165. See text accompanying notes 81–128.

166. See, e.g., Galanter & Palay who describe less elaborate management structures. Marc S. Galanter & Thomas M. Palay, *Why the Big Firms get Bigger: The Promotion-to-Partner Tournament and the Growth of Large Firms*, 76 VA. L. REV. 747 (1990). However, both Galanter & Palay and Nelson predict that the management structures will become more elaborate. *Id.* at 807 (describing the “Later” Big Firm); PARTNERS WITH POWER, *supra* note 4, at 273–75.

167. Accord MARC GALANTER & THOMAS M. PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 64–66 (1991) (discussing changes in structure of large law firms and the growth of a class of permanent salaried employees who are not eligible to be promoted to partner).

168. I refer to partners here as either equity partners (meaning owners) or non-equity partners. The titles used to distinguish partnership status vary from firm to firm. In addition to “equity” and “non-equity” partners, firms refer to partners as “capital” and “non-capital” partners, and as “senior” and “junior” partners.

firms engage in two types of work. First, they provide legal services for the firm's clients, and second, to varying degrees, they contribute to managing the firm itself. In my research, I studied how large law firms structure both the legal work lawyers perform for clients, and the work of managing the business of the firm.

### *A. The Structure of Litigation Work in Large Law Firms*

Litigation work in large firms is organized hierarchically around cases, with the lawyer responsible for the relationship with the client at the top of the hierarchy. A client will hire a lawyer to handle a lawsuit. That lawyer may supervise work on the case himself or he may assign management of the case to a trusted colleague, a partner, or senior associate.<sup>169</sup> I refer to the lawyer who manages the case as the "case manager." The number of other lawyers assigned to the case will vary depending on the complexity and stakes involved. A complex, high stakes case may require four, five, or more lawyers, while a simple case may require only the case manager and one or two junior lawyers. The lawyer initially hired by the client, the case manager (if not the lawyer who brought the work in), and the lawyers working for them on a case make up the case hierarchy. These case hierarchies are independent in the sense that partners outside the case hierarchy do not question or otherwise monitor how a case manager and his team handle a case.

Within the case hierarchy, the case manager is primarily responsible for contact with the client, and he supervises the work of junior lawyers on the case. Typically, the case manager decides major strategy questions and appears at all significant court proceedings. The junior lawyers on the case research legal issues and write memos summarizing their findings; they draft briefs; they draft discovery requests; and they respond to the other party's discovery requests. They may also take and defend depositions and prepare experts. In this process, some case managers are very

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169. I generally use the terms "he" or "his" when I refer to a generic lawyer to allow for easier reading. Where I refer to the comments of one of my subjects, I use the appropriate personal pronouns, except in those instances where I changed gender information to protect an interviewees' identity.

"hands-on" and review and revise every document drafted by the lawyers who work for them. Other case managers are less directive, while still demanding that junior lawyers' work meet their expectations.

Litigation partners and senior associates who do not bring clients into the firm, must form alliances with one, or more, of the firm's powerful partners with important client relationships who can provide them with work. The lawyers with important client relationships who sit at the top of the case hierarchies are colloquially referred to as "rainmakers," "queen bees," "originators," and/or "finders." Often a lawyer who does not have clients of his own is assigned to manage a case for a client of another lawyer in the firm. If this case manager has strong client relationship and case management skills, he may be able to increase the amount of work coming from the client. For instance, the client may give him more of its litigation work. Lawyers with these skills are sometimes referred to as "binders" because they cement and expand relationships with existing clients. The best binders form such strong relationships with clients that if they leave their firms, some clients may move with them.

Working for the finders and binders are the "minders."<sup>170</sup> Minders may be senior associates learning how to manage cases and clients. A minder might also be a non-equity partner with good legal skills who has not yet demonstrated the ability to form strong enough relationships with clients to expand the business coming from the client. Until these lawyers can develop their own client relationships, they are entirely dependent on finders and binders at the firm for work, and thus, for their job security. In all of the firms I studied, minders' billable hours were tracked and compared and billable hour expectations were significant.

Some minders never develop into binders or finders. At some firms, these lawyers may be promoted to non-equity partner and

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170. There are several variations of this phrase in use. Some lawyers I interviewed used the terms finders, binders, and grinders. It is unclear where the terms finders, binders, minders and grinders originated; however, the terms were used by a number of the lawyers I interviewed, and they have been incorporated into socio-legal lexicon describing the status hierarchy in large law firms. See, e.g., NELSON, *supra* note 4, at 69-77.

maintain that status indefinitely. At others, they may be employed as “counsel” or “staff attorney” or in some other non-partner status position. At still other firms, lawyers who cannot find or bind work have a limited tenure and are forced out at the time of the non-equity partner or the equity partner election, if not before. Notwithstanding the differences in the prospects for minders among large firms, in every firm I studied, minders were viewed as easily replaceable.

While the structure of litigation work described here is not new, complex management bureaucracies have been superimposed on these case hierarchies relatively recently.<sup>171</sup> The intersection of the structure of legal work in large firms and the new business structures that have been imposed on them is profitability. Those partners at the top of the case hierarchies, who maintain relationships with the firms’ most lucrative clients, have power in the growing bureaucracies that manage large law firms today.<sup>172</sup> As one lawyer put it, profitability is the “coin of the realm” in today’s large law firm bureaucracies. Only the most profitable finders and binders will have what another of the lawyers I interviewed referred to as the “moral authority” to be elected to, and successfully maintain, leading roles in these new management bureaucracies.

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171. See Suchman, *supra* note 10, at 857 noting that:

Elite lawyers are also experiencing a significant bureaucratization of their professional workplaces. As documented, the size of the nation’s leading law firms has grown dramatically in recent decades. With very few exceptions, elite outside counsel . . . now work in ‘partnerships’ of literally hundreds of attorneys, often spread among offices in several states or even countries . . . As law firms grow and diversify, informal social structures and face-to-face contacts no longer suffice to bind these organizations together, and a new regime of formal hierarchy, record-keeping, and evaluation has begun to emerge.

*Id.*

172. *Accord PARTNERS WITH POWER*, *supra* note 4, at 224 (noting that “[b]ureaucratization in the law firm will always be subject to the prerogatives of the client responsible elite”).

### *B. The Structure of the Business Bureaucracy of the Large Law Firm*

In *Partners with Power*, Nelson identified the defining features of a bureaucratic law firm. First, bureaucratic firms have “a specialized policy-making group that actively engages in strategic planning.”<sup>173</sup> Second, these firms have “a developed administrative component consisting of a managing partner and a mechanism for collecting and analyzing data on the financial performance of individual lawyers and work groups.”<sup>174</sup> Third, bureaucratic firms have “well-defined work groups (usually taking the form of departments) with recognized heads who supervise the group and report to the central policy-making group.”<sup>175</sup>

All of the firms involved in my study meet Nelson’s criteria. First, all have a policy-making group made up of the managing partner(s),<sup>176</sup> often the department heads, or a subset of them, and several other powerful “client-responsible”<sup>177</sup> partners in the firm. These partners form one or more managing committees. The title of these committees varies from firm to firm.<sup>178</sup> As Nelson predicted,<sup>179</sup> a primary responsibility of the managing partner(s) and

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173. *Id.* at 91.

174. *Id.* 91–92.

175. *Id.* 91–92.

176. Firms have a variety of titles for the lawyer-manager at the apex of the firm’s management bureaucracy, most frequently “managing partner,” or “chairman.” Some firms have two managing partners. This often occurs when the firm is the product of a merger of two firms of relatively equal power. In firms where the “chairman” is the lawyer at the apex, there may be one or more “managing partners” working under the chairman. In these circumstances, the managing partner’s duties may be primarily administrative with decision-making authority residing in the chairman. I use the term “managing partner” here to refer to the partner at the apex of the management bureaucracy.

177. The term “client responsibility” was coined by Robert Nelson, in *Partners with Power* to “refer to the control of a client account by a particular lawyer.” PARTNERS WITH POWER, *supra* note 4, at 91.

178. These committees are referred to as the “management committee,” “executive committee,” “operations committee,” “governing committee,” and “policy committee,” to name a few.

179. PARTNERS WITH POWER, *supra* note 4, at 274 stating that:

The processes of growth and specialization introduce additional pressures for firms to develop bureaucratic managerial,

the managing committee(s) that assist him is strategic planning. Many firms hire consultants to aid managers in this process. Against the backdrop of the strategic plan, the managing partner and managing committee(s) make decisions about mergers and acquisitions, associate hiring, who makes non-equity partner and equity partner, whether to de-equitize a partner, conflicts of interest, and the criteria for compensation.

In most of the firms I studied, the partnership retains authority to vote to approve decisions about who makes partner, but this vote seems to be a formality in most large firms where many partners do not know one another, much less all the candidates for non-equity and equity partner. In some of the smaller large firms I studied, the equity partners maintain some greater degree of control over compensation decisions by electing a compensation committee to make compensation decisions or recommendations. However, senior management usually plays a significant role in designing the criteria for compensation. Although the equity partners typically sign off on mergers and acquisitions, senior management does the strategic planning to determine whether the firm should consider merger and does the due diligence required to evaluate a proposed merger. Senior management then goes to the equity partnership with a recommendation about merger and the partnership accepts or rejects their proposal.

In some firms, many of the most profitable partners sit on the committees that make the most significant decisions affecting the firm. Even if they are not on those committees, however, the managing partner(s) and the lawyer-managers working with them must have "buy-in" (meaning support) from those highly profitable partners to wield the influence necessary to obtain approval from the partnership for mergers, reformulations of the compensation criteria, and other significant changes.<sup>180</sup>

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administrative and work group structures. At the managerial level, it will become increasingly apparent that some group within the organization must plan strategically for firms to defend their client bases or take advantage of new opportunities. Hence, the role of leading partners will become more distinct from that of the rest of the organization.

180. Most of the firms I studied also appointed an "office managing partner," a lawyer-manager for each office of the firm. Office managing partners

Second, in keeping with Nelson's criteria, all of the firms I studied have established elaborate mechanisms for tracking the profitability of individual lawyers. Today, partners are evaluated principally on the profitability of the work they manage rather than the hours they bill. Firms keep data on the hours worked on a case, the fees billed to the client,<sup>181</sup> the fees actually collected (known in some firms as the "realization" rate),<sup>182</sup> the time required to collect fees,<sup>183</sup> and the overhead chargeable to the partner. Data on each partner are tracked and compared with other partners' numbers. A number of firms also track the profitability of practice groups.<sup>184</sup>

Finally, consistent with Nelson's criteria, in all of the firms I studied, lawyers are organized by specialty into well defined work groups most often referred to as practice groups. In many firms, these practice groups are coming to be viewed as individual "profit centers." All lawyers in the firm are members of one or more practice groups.<sup>185</sup> Some firms subdivide practice groups into narrower areas of specialization, often referred to as teams. Lawyers may be members of multiple teams. The practice groups are usually

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are typically responsible for administration of their office staff and facilities. In some firms, the office managing partners also have a role in strategic planning for their offices, and thus, are expected to have an understanding of the market for all of the practices within their offices, not just for their own specialties. Typically, the office managing partner reports to the managing partner and/or the management committee. Some firms also include regional office managing partners or representatives on the key management committee(s).

181. A partner may write off some of the time he and the lawyers working on a case spent on a task; thus, the fees billed may vary from the time spent.

182. It is not uncommon for clients to try to negotiate fees after time is billed.

183. Fees paid 120 days after billing are worth less to the firm than fees paid thirty or sixty days after billing. Consequently, many firms track a partner's "turn around time," meaning the time it takes a partner's clients to pay their bills.

184. In one firm lawyers reported that although firm management claims that it does not track the profitability of practice groups, the firm has this data and considers it when deciding how to divvy up points among equity partners and whether to elevate a lawyer to non-equity or equity partner status.

185. Although some of the firms studied tout systems that allow associates to try various practices before specializing, lawyers in those firms reported associates are under significant pressure to specialize early, certainly within the first several years of practice.

grouped into larger departments. A firm may have three departments: Litigation, Business, and Real Estate. The litigation department will consist of a number of practice groups organized by specialty and sometimes with reference to the industry served. A lawyer who specializes in securities litigation may be a member of the securities litigation team, within the business litigation practice group, which is a part of the litigation department. All ten of the firms I studied have offices in more than one city and the practice group organization described above transcends geography.

Each firm has developed multi-layered hierarchies of lawyer-managers under the managing partner and the management committee, who manage the departments and practice groups. The titles of the lawyers who manage practice groups vary from firm to firm: for example, "leader," "chair," or "head."<sup>186</sup> These practice group leaders typically report to their department heads, who report to the managing partner(s) and/or managing committees.<sup>187</sup>

Practice group leaders' management authority often impinges significantly on the autonomy of the lawyers working within the group. For instance, practice group leaders are typically gatekeepers for the work of the practice group. They must approve any new work a lawyer wants to bring into the group by criteria relating to the type of work and the fee arrangements proposed. Although at the time of my interviews, none of the firms I studied paid lawyers according to the profitability of their practice group, the profitability of practice groups is a crucial factor in the competition for resources among practice groups. For example, management is unlikely to recommend elevating non-equity partners to equity partner in practice groups that are not profitable. Similarly, management may not assign new associates to less profitable practice groups. Consequently, practice group leaders watch the profitability of their groups closely and have an incentive to refuse to allow

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186. I refer to these lawyers here as practice group leaders.

187. In some firms, when a critical mass of lawyers within a specialty is located in one office, a manager, who reports to the firm-wide practice group leader, is appointed for the practice group within that geographic office. For instance, the firm may appoint a partner in the securities litigation practice group to lead the Los Angeles office. The securities litigation practice group manager for the Los Angeles office then reports to the securities litigation practice group leader for the firm, who happens to be located in the New York office.

a lawyer in the group to take on work they believe will not be sufficiently profitable.

In addition, practice group leaders generally control the practice group's resources (human and non human) and decide how to distribute those resources within the group. The resources controlled by the practice group leaders vary somewhat from firm to firm. Generally, they control the budget for equipment and for conferences. In many firms, they also assign associates to work on cases or select the lawyer who will allocate work to associates. Thus, when a partner needs an associate to work on a case, he generally must ask the practice group leader or work allocator to assign an associate. If the partner approaches the associate himself about working on a case, he usually obtains the practice group leader's or work allocator's, formal or informal, acquiescence to the assignment. In addition, practice group leaders are sometimes in a position to select the lawyers within the group who will participate in "client pitches," and thus, who will have an opportunity to share the credit for obtaining a new client.<sup>188</sup>

Practice group leaders also play a role in the evaluation of lawyers within the group. In some firms, the practice group leader coordinates the regular evaluation of associates within the group. In most firms, associates and non-equity partners need the support of their practice group leaders to be promoted.

Practice group leaders serve as the group's official liaison with firm management. So, for instance, when a practice group seeks resources (e.g., when the group wants to hire new associates, paralegals, or staff, or have associates elevated to partner) it is typically the practice group leader who makes the group's case to senior management. In order to garner these resources, a practice group leader must ensure that their group is profitable and that the group is highly valued in the firm's strategic plan. Often, only those practice groups that are profitable, and/or have a primary

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188. "Credit" may be formal or informal. Some firms' compensation formulas give lawyers credit for participating in successful pitches. In other firms, although a lawyer may not receive compensation credit, participating in a pitch contributes to the perception that a lawyer is a business generator. The importance of these perceptions is discussed in Part VI.C.

place in the strategic plan, can expect their associates to make partner and their non-equity partners to become equity partners.

In addition, practice group leaders advocate for lawyers in their groups when management has to act to avoid conflicts of interest. While conflict checks are not new, as firms have grown, conflicts of interest have become more common and often pit partners or practice groups against one another. Each group wants to take on the new work to improve its profitability. When a conflict cannot be waived and the firm has to choose what work to pursue, decisions about which client to take and which to turn away are made at the highest levels of firm management. Senior management typically makes these decisions by reference to profitability and the strategic plan. Practice group leaders are often involved in making the case to firm management that the work their groups want to take on fits within the firm's strategic plan.

Unlike the managing partner, practice group leaders are not necessarily the most profitable lawyers in the group. In many firms, a number of practice group leaders are young equity partners, who are perceived as rising stars in terms of profitability, and as having the people skills that will enable them to manage partners, associates, and any factions within their practice groups.<sup>189</sup> The power actually exercised by practice group leaders varies greatly from practice group to practice group and from firm to firm.<sup>190</sup> Some practice group leaders are proactive managers and leaders. In other practice groups, the most powerful equity partners in the group are not appointed leader because they lack management skills. Even so, in some cases these partners refuse to allow anyone else to make decisions of any consequence. In these groups, the job of practice group leader is largely ministerial, i.e., keeping track of data and passing information up and down the ladder. The role that the practice group leader plays in a given

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189. In one firm I studied, the majority of the practice group leaders were what were known as "service partners," binders who work for the firm's powerful finders.

190. A number of firms I studied were discussing giving greater authority to practice group leaders at the time of my interviews. For instance, one firm was considering giving practice group leaders authority to decide some portion of the lawyers' compensation. See also Terry Carter, *New Roles for Group Leaders*, A.B.A. J., Feb. 2004, at 32.

group can have significant consequences for lawyers working within the group.<sup>191</sup>

Although a powerful practice group leader may limit the autonomy of many lawyers within the group, profitable partners may be able to purchase a degree of autonomy that others in the group cannot. For instance, while a firm may officially require all partners to prepare a business plan, a practice group leader may ignore the requirement for a very profitable partner, or a highly profitable partner may be able to charge a client a lower hourly rate than other partners would be permitted to charge for a new matter. Lawyers at the highest levels of management identify one of the central tensions in large firms today as whether management is able to control decisions in the areas outlined above, i.e., whether management can decline to follow the wishes of a significant partner and still maintain power.

The power of the managers of today's large law firm bureaucracies described above has created a whole new fealty ladder that lawyers within the firm must learn to climb. In addition to negotiating the hierarchies inherent in the structure of the legal work of the firm, lawyers in large firms now must also negotiate multiple layers of relatively complex management bureaucracies.<sup>192</sup>

### *C. Conflicts and Tensions, Incentives and Motivations*

The pressure of the profitability imperative on these large-firm bureaucracies creates the central conflicts, tensions, incentives, and motivations affecting large-firm lawyers. Changes in the market for corporate legal services have been widely discussed in the legal scholarship.<sup>193</sup> As large corporations are hiring in-house counsel,

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191. See *supra* text accompanying notes 44–47.

192. These new management bureaucracies are certainly more complex than those described by Smigel and even those described by Nelson in 1988. See *supra* notes 132–144, 102–106 and accompanying text. Galanter and Palay, however, predicted this change. See *supra* note 149. To date, no commentators have interviewed large-firm lawyers regarding the impact of these more elaborate management bureaucracies and the organizational logic they bring with them.

193. Several authors have discussed the growth in the number of in-house lawyers as being responsible for increasing competition among large law firms

more of a corporation's routine legal work is done in-house.<sup>194</sup> Large corporations view the outside legal services they purchase as a commodity.<sup>195</sup> They typically enter the legal marketplace looking for services on a project by project, case by case basis<sup>196</sup> or they may hire one firm to do all of a particular type of legal

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for clients. *See, e.g.*, NELSON, *supra* note 4, at 8 noting that:

The transformation in the legal needs of the corporation transformed the market for large-firm services. The emergence of new functions for the corporate law firm was also associated with the decline of its traditional practice base. Routine corporate matters were taken over by inside counsel . . . the firm's relationships with corporate clients underwent a discernable change. Continuous broad-ranging relationships between firms and corporate clients were increasingly displaced by a series of ad hoc, case-by-case, field-by-field relationships between a corporation and many law firms.

Suchman, *supra* note 10, at 856–57 (explaining that “many corporate clients have responded to rising legal costs by augmenting their in-house counsel’s offices, making these companies into unprecedentedly informed consumers of professional services”).

194. GALANTER & PALAY, *supra* note 167, at 46–50. The authors describe the growth in size of in-house counsel departments and as the size of these departments has grown so has the amount of work being brought in house and state that:

A series of surveys by Altman & Weil found that, from 1976 to 1982, the percentage of firms reporting in-house counsel do three-quarters of the corporations legal work increased from 56.0 percent to 66.5 percent . . . . While law departments formerly confined themselves to processing routine corporate legal matters and left major transactions and litigation work to outside counsel, they are now undertaking more work that once would have gone to outside lawyers. Some in-house counsel now conduct some or all of their own litigation . . . . The relation of corporate law departments to outside counsel has shifted from comprehensive and enduring retainer relationships toward less exclusive and more task-specific ad hoc arrangements . . . . In their relationship with outside law firms, today’s enlarged corporate legal departments impose budgetary restraints, exert more control over cases, demand periodic reports, and engage in comparison shopping among firms.

195. *Id.* at 46–50.

196. *Id.*

work.<sup>197</sup> For example, a corporation might hire one, or a few firms, to handle its entire products liability defense. Corporations shop for firms to do this work, and a number of firms may compete for the business. Many firms have opened offices in multiple cities in an attempt to make themselves attractive to large corporations with a need for legal services in many regions of the country.<sup>198</sup> As a result, firms no longer “own” the work they do because there is always a competitor waiting in the wings trying to steal the client away.

Further, firms’ relationships with their clients are often built on personal relationships with in-house lawyers who face uncertainty themselves. A former managing partner of a large national firm explained:

It is very hard to “own” business today. In-house counsel who is your friend loses his job. Now you need to scramble for work. There were many e-mails within the firm where a lawyer was asking if anyone knew of job for Joe X [who just lost his in-house position]. If you can find Joe an in-house position, you can secure work [for yourself and the firm]—if not, you’re out of luck.

Even if a partner’s relationship with a client is secure, he faces contingencies within his firm. For instance, firm management may decide to increase the firm’s billing rates beyond what a partner’s clients are willing to pay. This partner must either find new clients or resign and take his existing clients to a firm that charges lower rates.

As corporate clients have become less loyal to the firms they hire, lawyers have become less loyal to the firms that employ them.<sup>199</sup> When large firms had long-term, stable relationships with

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197. The phenomenon of firms competing for business has been documented by other scholars, and in the popular legal press. See, e.g., Suchman, *supra* note 10, at 856–57 (describing increase in competitive pressure among firms). These competitions are sometimes fought out in what are called “beauty contests” or “client pitches.”

198. GALANTER & PALAY, *supra* note 167, at 46–50.

199. *Id.* at 54–55 (documenting the increase in lateral movement of law-

their clients, a retiring senior partner could “hand down” or “bequeath” a client to a more junior partner.<sup>200</sup> The ability to pass a client down the generations encouraged strong loyalties among lawyers in a firm. Because most large firms do not own work today, junior lawyers cannot count on inheriting work from their elders; they must think differently about their careers. As a former managing partner explained, “Today, a lawyer needs to build skills. Yesterday, a lawyer needed to build a practice. A lawyer today is more of a hired gun, less the owner of a small business.”

While these changes were occurring, the popular legal press was born,<sup>201</sup> and the *American Lawyer* began reporting firms’ “profits per partner.”<sup>202</sup> As a result, lawyers in large firms can, and do, compare what they earn to what they think lawyers in compa-

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yers and groups of lawyers from one firm to another beginning in the 1970’s).

200. See ERWIN O. SMIGEL, THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN? 234–35 (The Free Press of Glencoe 1969) (identifying the lawyers who “inherit” the firms largest clients as the lawyers who controlled the Wall Street firms he studied).

201. Galanter & Palay, *supra* note 82, at 68–76 (documenting the chronological development of the legal press). The authors’ reference Erwin Smigel’s work in *The Wall Street Lawyer*, reporting that in the 1950’s firms kept information about partnership agreements, finances, client lists and salaries confidential. *Id.* The authors credit the Supreme Court decision in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), with giving birth to the legal press because lawyers could talk to reporters about their practices without being accused of advertising. *Id.* Reporting about lawyers and the practice of law increased in both *The New York Times* and *The Wall Street Journal*. For example, by the late 1970s, several national law publications, including *The American Lawyer* and *The National Law Journal*, began reporting on the internal workings of the profession including firm’s hiring policies, marketing strategies, clients, fee structures and compensation. *Id.*

202. *The American Lawyer* began publishing “profits per partner” among the nation’s top law firms in 1984. *A Guide To Our Methodology*, AM. LAW., Aug. 2003, at 85. All of the lawyers I spoke to about these statistics were highly skeptical about their accuracy. *The American Lawyer* claims it gathers the data it uses to determine profits per partner from both official and unofficial sources. *Id.* The “official” sources are members of large-firm management committees who are willing to provide information. *Id.* According to *The American Lawyer*, for the firms that refuse to provide information, the reporters obtain information from “unofficial” sources—members of these firms who provided the information anonymously. *Id.*

able firms are earning and may change firms if they think they can make more money or have access to more resources.<sup>203</sup>

To attract profitable laterals to their firms, management strives to keep the firm's profits per partner number high. To do this, managers must keep the number of equity partners small. This creates another of the primary tensions in large firms. Most equity partners in large firms rely on non-equity partners or senior associates to manage their cases for them. To keep those lawyers motivated, equity partners need to be able to hold out a realistic possibility that these lawyers will be elected equity partners. However, as the pressure grows to keep the equity partnership small, the odds of making equity partner in the large law firms I studied, and in large firms across the country, have become far worse.<sup>204</sup>

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203. See Suchman, *supra* note 10, at 856–57.

204. See NELSON, *supra* note 4, at 3 (describing the changes in large-firm practice and how firms "have raised the threshold for full partnership by lengthening the number of years required before admission to partnership, inserting intermediate levels of partnership, and conferring partnership status on only a small percentage of any entering cohort"); Marie Beaudette, *Associates Leave Firms in Dromes, Becoming Partner Is No Longer a Priority—And If It Is, It Is a Difficult Goal*, NAT'L L.J., Oct. 6, 2003, at C4 (reporting the results of a NALP Foundation study showing large numbers of associates leaving firms before making partner). One of the reasons for the exodus is the remote chances of becoming partner. *Id.* "In large part, associates believe making partner is out of their grasp, either because the standards are unfairly applied or because firms don't want to slice up their profits further, the study found." *Id.* See also, Nathan Koppel, *The Cahill Way*, AM. LAW., July 2003 at 92 (describing the promotion practices of the second most profitable firm in *The American Law 100*'s most profitable firm ranking, Cahill, Gordon & Reindel. "Every year Cahill generally hires 30–40 new associates, and it makes, on average, fewer than two new partners. In the last 14 years . . . the firm has made 26 new partners."); Martha Neil, *Brave, New World of Partnership*, A.B.A. J., Jan. 2004, at 30–33 (reporting that firms now use a two-tier partnership track extending the time it takes to make equity partner and that among associates that can put in the hours necessary to be considered for partnership status, "[o]nly a small fraction of associates are eventually offered partnership." The article also quotes an attorney in a large Manhattan firm describing the path to partnership as "[i]t's not enough to be just a really good lawyer in competing for partnership . . . [y]ou have to be a really good lawyer, in the right practice area, in the right time in the economy. There are so many variables that are just beyond anyone's control.").

The lowered odds of making equity partner create a competition among practice groups, and sometimes between non-equity partners within practice groups, for a limited number of equity partnership seats. Profitability and management's strategic plan are key determinants in this competition. For instance, the strategic plan may call for the firm to position itself as specializing in providing legal services for the financial services industry. Management will devote resources, marketing expenditures, new hires, and equity partnership seats to those practice groups that service that industry. Because the products liability practice group does not serve the financial services industry, lawyers in that group are unlikely to be promoted to equity partner.

In addition, even the most successful partners in large firms face contingencies and uncertainty they did not face thirty years ago. In all of the firms I studied, there was talk of de-equitizing partners who had not been profitable for a number of years in order to keep the firm's profits per partner number up.<sup>205</sup> An equity partner explained, "All firms have dead wood,<sup>206</sup> some are more successful at cleaning [it] out than others . . . . The firm has to have a carrot and a stick to keep people in line." An equity partner in another firm agreed, "[The firm needs to] cut out the dogs. Get rid of the partner whose practice has died. Every two to three years [the firm needs to] look closely and make the hard decisions—look at production versus salary. Nip the thing in the bud and de-equitize the couch potatoes." Many of the lawyers I interviewed reported that their firms had already de-equitized partners, and others suggested that de-equitizing was imminent.

## VI. THE WORLD OF LARGE-FIRM LITIGATORS

Large-firm lawyers develop stated and unstated rules—what sociologists would call “rules-in-use”—to negotiate the uncertainties, conflicts, and tensions created by the bureaucracies in which

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205. A lawyer who was a high level manager in his firm noted that most firms' partnership agreements do not provide for “de-equitizing,” but he had never heard of anyone challenging the practice.

206. Equity partners who are not profitable are referred to as “dead wood” in many firms.

they work. These rules-in-use guide their decisions about whom to work for, how to behave, how to deal with clients and adversaries, and what legal and professional judgments to make. Among these rules-in-use is what I refer to as a choice of norm rule. The rules-in-use at work in large law firms, including the choice of norm rule, shape the way large-firm lawyers think, what sociologists call their "habits of mind."<sup>207</sup> The rules-in-use and habits of mind at work in large firms are evident in lawyers' stories about their experiences in their firms.

When asked who succeeds and advances in large law firm bureaucracies and why,<sup>208</sup> lawyers talked about understanding what is expected of them and meeting those expectations. For lawyers who do not generate their own business, this means understanding what the lawyers above them in the case hierarchy expect.<sup>209</sup> These lawyers must know how the lawyers who supervise them expect work to be done and expect them to behave in any given situation. With the exception of those lawyers who are so profitable as to be able to purchase substantial autonomy, large-firm lawyers must also understand their lawyer-managers' expectations. Understanding what those above you want is crucial for promotion to non-equity and to equity partner. Understanding what firm management and peers expect is also a key ingredient for success in the battle for resources among equity partners and practice groups.

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207. See, e.g., JACKALL, *supra* note 6 (describing the habits of mind of corporate managers).

208. I did not begin my study asking large-firm lawyers which associates succeeded in their firms and why, but I quickly discovered that this was what large-firm lawyers were interested in talking about. I came to understand that a discussion of who succeeds and why provided a window into the rules-in-use and habits of mind of large-firm lawyers.

209. It is relatively rare for associates and junior partners in large firms to generate their own business because the firm is looking for work among Fortune 500 companies and other wealthy clients who can pay them fees which ranged from \$190 to \$725 per hour at the time of my research. See Renee Deger, *Silicon Valley Sees Rates on the Rise*, NAT'L L.J., Dec. 15, 2003, at col. 1 (reporting on recent hourly rate increases). However, an associate or junior partner who does generate business will occupy the role of the finder.

When they speak about expectations, large-firm lawyers are talking about “norms.”<sup>210</sup> Some of the norms lawyers must understand and follow are shared by lawyers across the firm; others are not. When individual partners or groups of lawyers within the firm do not espouse or follow the same norms, large-firm lawyers employ a choice of norm rule. Across all of the large firms I studied, the choice of norm rule lawyers applied was the same: understand and follow the expectations/norms that the lawyer or lawyers who matter at the moment would want you to follow in the situation. When I asked large-firm lawyers to describe what is expected of them and how they meet those expectations, first and foremost, they spoke about “being available” to the lawyers with and for whom they work.

#### *A. The Importance of “Being Available”*

In negotiating the case hierarchy, lawyers who work for other lawyers must understand that their supervisors are their primary “clients.” Supervising lawyers expect “service” from associates in the same way clients expect service from their lawyers. In fact, one lawyer referred to the lawyers she works for in her firm as “internal clients.” All of the lawyers I interviewed spoke about the necessity of being available to other lawyers and to their clients.

For lawyers who do not generate their own business, “being available” means not turning down assignments. As a result, lawyers in the country’s largest firms work long hours when their groups have abundant work. When asked how associates succeed, an equity partner said, “You have to be available. You can’t say no.” A successful fifth year associate noted:

I have never turned work down. Actually, I turned down work once after a huge arbitration where I billed 1,000 hours in three months. I needed a vacation or I was going to have a nervous breakdown. I

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210. See Sunstein, *supra* note 154, at 914 (defining “norms” as “social attitudes of approval and disapproval, specifying what ought to be done and what ought not to be done”).

told the partner I would do the work when I got back.

A senior associate explains that expectations about being available often remain unstated:

Some associates don't understand or don't care what is expected. I leave my Blackberry<sup>211</sup> on vibrate at night. One time I was working with [a partner in another department] on a matter. At two a.m., I'm asleep in bed and my Blackberry goes off. It was this partner e-mailing me from the office. I got up and e-mailed a response. This went on for several nights. James [the equity partner who is this associate's mentor] never asks explicitly for this, but I know he wants it too. He doesn't say he expects it, but he wants me to return his e-mails over the weekend. He tells me that he likes that I have never turned him down when he asks for something.

Even an astute summer associate quickly becomes aware that expectations about availability are often unstated, and if stated, that the stated expectations may, in fact, conflict with actual expectations.

The rhetoric coming from the firm to summer associates was that quality of life was very important. We were told that if associates worked too many hours, the firm would lock the door to their offices and tell them that they could not come in.<sup>212</sup> But when you looked at who was successful it was the people who were working long hours.

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211. "Blackberry" is the brand name of a hand held wireless device that allows the user to send and receive e-mail from outside the office.

212. This summer associate noted, "Young lawyers coming into the firm were typically of two types. First, there were those dead set on making partner from the outset. Second, there were those who were looking for interesting work but also wanted a private life. The summer associate recruiting committee's message was geared to the second group of people."

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No partner at [the firm] would ever say “you need to work this weekend,” but the people who were succeeding were working weekends. Whenever partners mentioned associates favorably, they mentioned those who were working incredibly long hours. The people who were making it, the associates a partner would mention at a meeting—“Jeff did a great job on this”—were the highest billers among the associates. The “go to” associates never said no to an assignment. These were the people who were first in, in the morning, and last out at night.

Superiors also expect the lawyers who work for them to be responsive to clients’ needs “24/7.” Many of the lawyers I interviewed routinely gave their clients their home and cell phone numbers and carried a wireless hand held device for sending and receiving e-mails.<sup>213</sup> It is not only associates who work long hours

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213. Not all associates working in large firms are willing to meet the expectation that they always be available. During their tenure as associates at large firms, young lawyers are identified as what one lawyer characterized as “contenders” and “non-contenders.” Some of the non-contenders are self-selected while others are not. As David Wilkins and G. Mitu Gulati have observed, during the first several years of an associate’s tenure at a firm, large firms identify those associates who lack the required dedication or skills to advance and fire them or assign them low prestige, repetitive work. *See Wilkins & Gulati, supra* note 82. Among those associates who survive the weeding out process, many will decide they do not want to vie for partnership. Many are not willing to sacrifice their personal lives to work the hours required to put them in contention for partnership. These self-selected and unannounced non-contenders may stay for a number of years to earn large salaries, but will leave the firm before they are considered for partnership. As a fifth-year associate notes, they “do not announce their intention to leave because it would be political suicide to do so.”

The contenders I spoke with have similar views of the non-contenders. A contender says, “One of the things that separate the contenders from the non-contenders is their work ethic. Many of the non-contenders are not trying.” She observes that she and her fellow contenders are “in-bred workaholics. [Contenders] would be working this hard no matter what they were doing for a liv-

in large law firms. One partner explained, “[T]he hours don’t get any better for partners; partners have even more pressure than associates do.”

The hours do not get better for partners because other lawyers also expect partners to be available to them. Many litigators, including some partners, spend a portion of their time managing litigation for clients of partners in other practice areas. For example, a corporate partner may ask a litigation partner to handle a lawsuit for a corporate client. Because these litigators do not have the primary relationship with the client, and the corporate partner is providing the litigator with work, the litigator needs to meet the expectations of the corporate partner, as well as the client, to maintain this “feeder” relationship. An equity partner related a conversation she had with one of her partners who was “fed up” with meeting his partners’ expectations:

We walked out of the building one night, he told me  
he was going to stop working for this [group of

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ing.” Another contender agrees:

When I was in college and law school, I thought everyone wanted to make it to the top, to be successful. I now realize there are people who just want to get to the middle; they are content to fly under the radar screen. They do mid-level work and try not to attract attention. They don’t want to make the extra effort. You can tell who these people are early on. You look to see who will take on a new project; who will take on the really messy project; who will write the article for the bar journal. One associate says yes, the other says she’s too busy. Both have the same amount of work on their plate. You can tell who really wants it and who is just comfortable.

While they see themselves embodying a work ethic the non-contenders do not share, the contenders are conscious of the choices they are making. Inevitably, they come to question their choice to stay in light of the low odds of making partner at many firms. A fifth year contender at a large firm observes:

I’ve missed a lot by choosing this large-firm life. All my college friends are married and have children. All my friends from law school [all of whom work at large firms] are single and have no kids. Working till 9:00 p.m. every night is no fun. When I occasionally leave at 5:00 or 6:00 p.m., I am amazed at the numbers of people on the street. I think, “Do you leave this early every day?”

lawyers in the firm] and go back to more generalized work in his area. He said he was [fifty-five] and couldn't keep doing what he was doing. He said the partners [in the practice group he serviced] were jerks to him, often called him on Friday night at five and said "oh sorry, I forgot we need an opinion by Monday morning." He had no autonomy and no home life. He realized that moving to more generalized work would mean a demotion in status and probably pay, [but] he wanted to make the move. He [said] he could not do this for another ten years.

This partner was an equity partner with very specialized expertise, and he did almost all of his work for partners in other practice areas.

In contrast, a profitable equity partner who generates substantial business has far greater latitude to pick and choose when and to whom within the firm he sacrifices his time. An equity partner, Will, described his response to Jeff, an equity partner whose book of business had evaporated in the last couple of years:

If he called me two years ago and said I need you in LA next week, I would have been in LA the following week. Today if he calls and asks me to go to LA next week, I look at my calendar. If I am not interested in going for my own reasons and I see my daughter has a soccer tournament next week, I will tell him "I am really sorry but my daughter has a tournament." Two years ago, I would have missed my daughter's tournament.

Because Jeff was no longer particularly relevant to Will, the choice of norm rule requiring Will to meet the expectations of those who "matter" did not require Will to go out of his way to meet Jeff's expectations.

Equity partners must also be available to their partners to garner firm resources when they need or want them. One equity partner describes this as building a "goodwill bank" with his partners. He drew on this goodwill bank when he wanted one of the lawyers who worked for him selected for equity partner, or if his practice

declined and he needed his partners to give him time to rebuild it before they significantly reduced his compensation or de-equitized him. Asked how he builds goodwill, this partner said “it is really about not saying no.”

Increasingly, as the firm’s bureaucracy grows, lawyers in large firms must also be available to the lawyer-managers to do the “business” work of the firm. Lawyers must be willing to do increasing amounts of non-billable work ranging from work on firm committees, or participating in client pitches, to helping prepare firm marketing materials. Even partners are expected to devote time to the non-billable work of the firm, and unless they are so profitable that they have significant autonomy, they must meet those expectations. Not all lawyers recognize the import of these expectations. As a team leader explained:

As a manager my “bullshit meter” is always way up. The people I manage are litigators; they are advocates. But some are all talk. People can smell these folks a mile away. These are the people who say, “Pick me, pick me” and never follow through. These are people who are assigned to do a client pitch; they volunteer to take on an action item in preparation for the pitch and never do it. These people die and they don’t understand why, they think they are stars, well liked. I say, “Don’t give me happy talk, do something.”

Some partners are sufficiently profitable to purchase a degree of autonomy within the firm, and as a result, may not have to meet all of management’s expectations. For example, two profitable partners reported that they had not prepared the individual partner business plans their respective firms’ management required of all partners. Neither partner was chastised for not preparing a business plan.<sup>214</sup> While their practice group leaders apparently elected not to push this issue with these partners, both lawyers reported

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214. One of these partners reported that he had been the most profitable lawyer in his firm the previous year.

that less profitable partners in their groups were not excused from this obligation.

The expectations about what kinds of work a lawyer needs to be available to perform differ from firm to firm, from practice group to practice group, and often from partner to partner. Because expectations about what kind of work a lawyer should spend his time on vary, choice of norm rules come into play. An equity partner noted, “A junior lawyer may think the partner wants him to bill 2,500 hours a year, [but] knowing what is expected also means understanding that in reality that partner would like to see that lawyer bill 2,200 hours and spend 300 hours chairing an ABA committee.” A lawyer must recognize and understand these varying expectations and meet them.

Lawyers in large firms trade being available for a steady stream of work for support in their quest for advancement and for support in the inevitable competition for firm resources. Partners who have relationships with powerful clients see a lawyer’s willingness to be available as a sign of loyalty, and they reward that loyalty with more work. In addition, says one equity partner, “[p]artners . . . try to take care of people who have been loyal to them by helping them get elevated to partner. They look for people who have been loyal to them and . . . who won’t compete with them.”

In contrast, a lawyer who is not seen as sufficiently available may lose a source of work and damage his chances of advancement. An equity partner described the negative reaction of a partner she was working for when he thought she was misleading him about being available:<sup>215</sup>

If you are not responsive to [the partners you service] you are at risk. If you are not there, partners and clients find someone else, and you are out. [I’ll give you an example.] I disabled the function on my Blackberry that says “This message is courtesy of Comcast” at the bottom of every e-mail you send [indicating that the e-mail was sent from a “Black-

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215. This equity partner spends a portion of her time doing specialized litigation for clients of lawyers in other practice groups in her firm.

berry," thus not from the lawyer in her office.] One of the partners I was working for e-mailed me while I was at a meeting outside the office. I got the message on my Blackberry and responded. He sent back an e-mail asking "Are you in the office?" I told him no. When I got back to the office and saw this partner, he implied that I was being deceptive by turning off the Comcast message.

She explained that she disabled the Comcast message because "clients want to think you are always available to them. If they know you are replying from out of the office, but you are not out [working] on something for them, they don't like it." The partner seemed reassured, but this lawyer saw her partner's reaction as evidence that she must create the perception that she is always available if she does not want her partner to "find someone else."

Having a strong relationship with the finders and binders a lawyer works for is also essential to surviving the occasional, inevitable mistake. All of the lawyers I spoke with agreed that every lawyer makes mistakes. Substantive mistakes range from missing a deadline, to producing documents that could have been withheld, to forgetting to shepardize cases. Whether a mistake is fatal to a lawyer's career depends, in part, on the strength of his relationship with the lawyer supervising him.

When a junior lawyer makes a mistake, the lawyers I interviewed agreed that the supervising partner rarely blames the mistake on the junior lawyer when communicating with the client. More often, the partner takes responsibility for the mistake. For example, one lawyer says:

I've never heard of a partner hanging an associate out to dry. Mistakes stay within the group working on the case. You don't tell other partners about them, you don't tell the client if you don't have to, that a mistake has been made. If you can, you smooth it over. The client doesn't want to know that the associate has enough reign to make these kinds of mistakes.

And when an associate has a strong relationship with the supervising partner, mistakes may matter less. As a fifth year associate notes:

I've made two mistakes. First, I filed an affidavit without understanding what was involved in the case. I made a mistake in another case. I [sent] opposing counsel privileged documents in the discovery process . . . I disclosed a document to opposing counsel that had attorney handwriting on it so it could have been claimed as privileged. These are the kind of mistakes that make you physically ill.

This associate felt certain these mistakes would not be used against her because she had very strong relationships with the supervising partners involved.<sup>216</sup>

Associates must also show their loyalty by not revealing partners' mistakes. An equity partner explains, "I don't want someone who is backstabbing me. I had an associate who worked for me . . . who would then go work for another partner and tell him what I screwed up. Why do I need that?" If a junior lawyer has been sufficiently loyal to partners in the firm to develop strong relationships with them, those partners may also be willing to use their influence to advocate for his promotion to partner.

### *B. The Criteria for Partnership—the Invisible and Moving Bar*

When large-firm lawyers speak about their work, the quest for partnership—who makes it and who does not and why—is a central concern. Associates are preoccupied with their own chances for making partner and measure their chances against their peers' chances. Partners are concerned about whether their protégés will make partner. The habits of mind lawyers develop in response to the partnership tournament—the intense focus on managing per-

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216. See, e.g., Wilkins & Gulati, *supra* note 82, at 1613–15 (arguing that if firms were structured as classic rank order tournaments one would expect competition between associates or sabotage, but noting that large firms "do not appear to be characterized by high levels of employee sabotage").

ceptions and the premium on the ability to adapt—play an important role in shaping their ethical consciousness.

States one attorney, “[t]o make partner you must have a champion for your file. If your mentor does not say anything negative, but does not give you momentum, you are dead.” For an equity partner to be willing to champion a lawyer’s file, that lawyer must have demonstrated his loyalty to the partner by being available and by “knowing what is wanted and giving it.” A partner who decides to champion his loyalist’s file will expend goodwill in the effort. For example, one equity partner I interviewed reported that he had just received a call from David, another equity partner, asking him to support the election of Susan to equity partner. The partner I spoke with believed David was calling every equity partner in a firm of more than 700 lawyers, asking them to support Susan. As large firms grow larger, the influence of each equity partner is diluted, meaning there are fewer partners who are profitable enough to demand that their loyalists be made equity partner.

Most large firms have established committees to evaluate candidates for promotion to non-equity and equity partner. These committees make recommendations to firm management and/or directly to the partnership. Members of these committees come from different practice areas and often from different regions of the country. As a result, the candidate may know few or none of the members of the committee who will evaluate him for partnership. The criteria these committees use to evaluate candidates are often vague or largely unstated and are constantly changing. As a lawyer who has been working at a firm for fifteen years and has not made partner says, “The thinking at [the firm] has become that just being a good lawyer and doing a good job for seven to nine years is not enough. What is enough is a matter of speculation.” Even a recently elected equity partner claims, “Having just been elevated to equity partner, I have no idea what the criteria are.”<sup>217</sup>

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217. This is consistent with Wilkins and Gulati’s findings. Wilkins & Gulati, *supra* note 82, at 1667–69. Wilkins and Gulati posit that firms use secrecy to keep senior associates motivated and working hard, stating:

Recall that these lawyers are primarily motivated to work hard with little supervision by the desire to make partner. Having

All of the lawyers I spoke with agreed that being a good lawyer is not enough to make equity partner in today's large firms, and in a number of firms, it is also not enough to make non-equity partner.<sup>218</sup> Large firms view good lawyers as expendable. As one equity partner put it, "You can't swing a dead cat in New York without hitting a good lawyer." By the time a lawyer is being considered for partner, "being a good lawyer is off the table," meaning the "good lawyer" criterion has been met, and other criteria will be the deciding factors. Now that fewer and fewer partners have the power to demand that their candidates be promoted to equity partner, the enthusiastic support of one or more equity partners is frequently not enough. When pressed to identify the other criteria that determine who makes partner, lawyers repeatedly spoke about the necessity of managing appearances and perceptions.

Perceptions have become increasingly important in large firms because, as large firms grow, lawyers within these firms have less direct, personal knowledge about other lawyers in their firms. Partners often know relatively little about many of their partners and they do not know many of the associates and laterals coming into their firms. As Wilkins and Gulati note, even when an associate works for a partner, the partner often has little time to closely monitor the associate's work.<sup>219</sup> Wilkins and Gulati further state: "[i]n situations in which quality judgments depend on a complex evaluation of an employee's technical competence, thoroughness, and judgment (in addition to results), a firm would have to retrace

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no more than a minimal amount of information about how they rank against their competitors and what weights are going to be given to different aspects of their performance[], these lawyers have strong incentives to work hard at everything possible. From the firm's perspective . . . the black box approach—not the open door policy suggested by standard tournament theory—maximizes the incentive effects of the tournament for these lawyers.

*Id.*

218. *Accord PARTNERS WITH POWER, supra* note 4, at 28 (contrasting this phenomenon with an era when good lawyers could expect to make equity partner in a large law firm).

219. Wilkins & Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms, An Institutional Analysis*, 84 CAL. L. REV. 493, 518 (1996).

a good deal of the employee's actual decision-making process before it could reach an accurate assessment about performance.”<sup>220</sup>

Wilkins and Gulati argue that because close monitoring of associates' work is prohibitively expensive, large firms have little information on which to base determinations about which associates will receive coveted training assignments.<sup>221</sup> As a consequence, they argue firms tend to rely on readily observable signals (for instance law school status, class rank, prestigious clerkships, etc.) to make these decisions.<sup>222</sup> When decisions are being made without more accurate information, Wilkins and Gulati argue that stereotypes and bias are more likely to impact decision-making.<sup>223</sup> My research indicates that the lack of information in large law firms leads to another important phenomenon: Large-firm lawyers rely on perceptions to make judgments about one another. As a consequence, large-firm lawyers must understand how they need to be perceived in order to compete successfully for promotion.

### 1. Managing Perceptions

From their first days at the firm, associates learn to “look up and look around.”<sup>224</sup> A fifth year associate assigned to the committee in charge of summer associates explained:

I give the summer associates advice when they come in. I tell them “figure out who the superstars are, look at how they behave and copy them.” I give them names of people who are superstars. I say, “Dress like them, watch their behavior at firm functions and with clients, copy them.”

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220. *Id.*

221. *Id.* at 568–69.

222. *Id.*

223. *Id.*

224. JACKALL, *supra* note 6, at 75–100. “Looking up and looking around” is a phrase coined by Jackall to refer to the habit of mind of managers in large corporate bureaucracies who look up to their superiors and look around their social networks to determine what decisions to make. *Id.*

Moreover, lawyers must understand that they may need to vary their public faces<sup>225</sup> depending on the situation. For example, a former summer associate described Jim, a "superstar" among associates at his firm:

It became clear that the good associates developed a partner face, when they talked to the partners they were different than when they talked to other people. [For instance, when Jim] sat down and talked to [associates] it was like sitting in a high school locker room. However, when he talked to a partner he was a completely different person and the switch was totally natural; he didn't seem to have to think about it, he just moved into it naturally. The associates loved this guy, he was succeeding but he was one of them. The partners also loved this guy, it seemed like he was always at the firm, always available . . . I was in [Jim's] office at one point when a partner called him asking him to work on another project and he said to [the partner] "I'm really busy, can you tell me more about this project" and he would thereby create the impression that he was busy but that he would take on this project to work with this partner because he really liked working with him. I don't think that [Jim] was all that busy when he said this, however, this was totally natural to him, it wasn't as if he was scheming.

A fifth year associate contrasts the public face her firm expects her to adopt with adversaries, the public face clients expect her to adopt, and the perceptions she needs to create when dealing with her superiors in the firm. She explains:

To make partner in litigation you need to be seen as really aggressive. Your partners need to know that

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225. I use the term "public face" to mean the "conscious projection of a constructed persona" as Robert Jackall defined it in commenting on an earlier draft of this paper. *See supra* note 6.

you are not going to be pushed around or bullied out there . . . . The client wants to know that you won't be pushed around; that you will do what you need to, to defend them. You have to create the impression that you are looking out for the client in every way. Internally, [inside the firm] you need to be a yes person.

Not only must these lawyers be able to create contradictory perceptions—being aggressive and a “yes person”—at times they must also project a public face that belies their reality. For example, an associate tells the following story:

The partner said you run this case, Claire; “I will be hands off” but then he would call and say “how can you have done X?” He knew nothing about the case but was calling the shots from the sidelines, from the bleachers really. He was going to try the case, but he knew nothing about it. I went to [my mentor] and asked him what I could do to get this partner involved. He gave me some useful advice. But basically I had to run with the ball and give the impression that I could do that, that I could run the case. The other partners in the department knew he wasn't giving me any help. If I had let on that I was panicking, it would have ruined my reputation with all of the other partners.

Perceptions are created early and can be hard to change. A lawyer who has been passed over for partner several times notes:

One thing has become apparent. It is difficult to come up for partner after seven to ten years at a firm. If you've been there straight through, whatever mistakes you've made [and your early insecurities] are rattling around back there. If you come in [to the firm] as a fifth year, you can start over; create a perception of yourself as a superstar.

In addition to appearing confident, to be promoted, a lawyer in a large-firm must be perceived as “somebody who looks like they’d be able to develop clients.” At the seven-to-nine year mark—when firms are deciding whether to promote associates to non-equity partner—most lawyers will not have generated significant business from the Fortune 500 companies that large law firms service today. Consequently, firms make decisions about promotion to non-equity partner based on perceptions about who will be able to generate that kind of business in the future.<sup>226</sup> In some firms, the decision about promotion to equity partner is still largely based on perceptions about the ability to generate or bind substantial business. In other firms, in order to be promoted to equity partner, lawyers must have a track record of either substantial business generation or significant expansion of business and be perceived as able to generate or bind more business.<sup>227</sup>

Perhaps most importantly, to be promoted, a lawyer must be perceived as understanding the need to create the right perceptions.

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226. This is consistent with Wilkins and Gulati’s findings. See Wilkins & Gulati, *supra* note 82, at 1657–60 (observing “that [f]irms make partnership decisions not as a reward for past associate performance, but as a prediction of which partner candidates will contribute the most in the future.” Promotion decisions are based on potential future performance because “[p]artners play a fundamentally different role in law firms than associates, even senior associates. [P]artners have obligations to bring in new business and maintain existing business that associates do not.”).

227. It is also important for a candidate for partnership to create the perception that he has other opportunities if he is not made partner. For instance, one lawyer I interviewed related a story about a colleague in his firm who was being considered for equity partner. She was a binder for a very important client of the firm. However, she and the partner who originated that business were the same age, and consequently, her strong relationship with the client did not increase the chances that the client would remain with the firm after the finder who originated the business retired because she would be retiring at the same time. The partner evaluation committee recommended this lawyer for equity partner, but the management committee rejected the recommendation, a first to this lawyer’s knowledge. Because this candidate had two children in college, there was speculation in the firm that the management committee felt certain they could refuse to elevate this lawyer to equity partner, and she would not leave the firm. When I described this situation to an equity partner at another firm, he confirmed that “the first question that is asked is will [the lawyer] leave if we don’t make him a partner.”

Lawyers who do not understand what perceptions they need to create, or even recognize that they need to worry about how they are perceived, are not acting in accordance with their firm's organizational logic—the socially constructed rules, premiums, and sanctions that lawyers create to guide their behavior.

A litigation department head gives examples of lawyers who, in his view, are able to create the necessary perceptions to be elected equity partner and those who are not. He describes a meeting where four non-equity partners met with him and the managing partner of the firm to discuss a difficult issue:

I can look down the table and tell you who will make it and who won't. You know it when you see it, the type of person who will be "accretive." The first lawyer is the smartest person in the room. She will only make equity partner if she has a very strong political rabbi.<sup>228</sup> She will never be able to instill confidence in a client. A client will never look at her and think "she will take care of me." She will always need a translator who can communicate her advice to clients. The next guy is not quite as smart and has the same problem. The third guy at the table is another [dissent reader] but he has pretensions of worldliness. When he talks, he leans into the conference table. It's as if someone told him that "players lean in" when they speak. Who knows, maybe this guy will make it. Sometimes if you wear the shoes long enough they fit. The last guy at the table is the complete natural. He is self possessed, entirely articulate, only speaks when he has something to say, not to hear himself talk. When he talks, no one interrupts him and he adds something new. I'd bet dollars to donuts this guy will be an equity partner within a few years.

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228. "Rabbi" is the term the lawyer used. It was not a term widely used among my interviewees.

Thus, creating the right perceptions for promotion requires understanding what public face a partner is expected to adopt in a given situation. A lawyer must be skilled in reading situations and understanding the public face called for at a given time and place in order to successfully navigate the road to advancement in a large-firm. Although the non-equity partner with “pretensions of worldliness” is not able to wear the public face comfortably at this point, in the department head’s view, he has a greater chance of making equity partner than the first two lawyers because he, at least, understands the need to create a public face appropriate to the situation. The “natural” not only understands this, he is able to do it seamlessly.<sup>229</sup>

The department head sees these same four lawyers’ approaches to an issue about a discrepancy in pay—their understanding or lack of understanding of the etiquette required in the situation—as indicative of their suitability for promotion. One department head told me:

When I met with them individually before this meeting, [the first three lawyers at the table] whined about the disparity in pay. The “natural” says to me, “I’m upset and you can write down that I am upset, but tell the guys at the top, I’ll take a \$50,000 pay cut if they will give me first chair in a trial for a Fortune 50 client. I can make a career out of that.” This guy sees the macro.

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[He] is not a management problem—I don’t have to manage this guy. The dissent readers are the problem. I have to manage them . . . You have to bring the world to these guys. They don’t understand it themselves.”

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229. Lawyers I interviewed had a variety of names for the “natural” including the “superstar” and the “complete athlete.” The lawyers this subject referred to as “dissent readers,” lawyers who are bright but lack the ability to discern and meet expectations about the perceptions they need to create, were also referred to as the “guy who wore black socks to gym class.”

For the department head, the question for promotion purposes was not whether any of these four lawyers was ready to try a case for a Fortune 50 client, but which of them knew it was appropriate in response to a pay discrepancy issue to project a public face of confidence and eagerness. In this way, large-firm litigators routinely equate appearances with substance. Their habit of mind is to attend to, and make crucial judgments on, the basis of perceptions.

This department head, and other lawyers I interviewed who are skilled at reading expectations, expressed significant frustration with lawyers who do not recognize the need to create the right perceptions and/or are not able to read expectations about what public face is appropriate in a given situation. Their failure to understand the logic of their firms makes them unqualified for promotion. These lawyers are at best naïve, and at worst, “management problems” because they will not understand why they are not advancing and are likely to become dissatisfied with their stagnated careers. But even those lawyers who can read expectations and manage their public faces accordingly face uncertainty because what is expected always changes.

## 2. Paradigm Shifts and the Premium on the Ability to Change

Expectations often change as new lawyers take over positions of power within management or when the lawyers in power decide to change the strategic plan. Changes in the strategic plan may prompt changes in the rhetoric used in the firm. For instance, one lawyer noted that management at his firm stressed “total quality client service.” This was the “buzz phrase” in his firm. In a later interview with another lawyer in the same firm, it became apparent that, after hiring a consulting firm, firm management had decided to focus on branding certain practice groups, and that “branding” was the new buzz phrase. Many firms employ consultants to assist them in formulating their strategic plans.<sup>230</sup> These consultants sell

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230. A cottage industry of consultants specializing in advising large law firms has developed over the last several decades. See C. Marcus Harris, *Use of Consultants by Lawyers*, in GARY A. MUNNEKE, *LAW PRACTICE MANAGEMENT: MATERIALS AND CASES*, 144–51 (1991) (documenting the growth of consultants providing advice to law firms on topics ranging from internal partnership relations, to compensation, to advertising and marketing); see also About Altman &

advice about marketing and management strategies that they claim will make firms successful. A former managing partner explains:

Consultants claim to have information no one else has and this is what they sell. The firms are looking for the “Promised Land” and the consultants tell them they’ve been to the top of the mountain and seen what no one else has seen. The firms could do all of this themselves, there is no magic to it.

Armed with a consultant’s advice, management has “credibility” when it makes a decision to promote one practice group over another, or to reward one activity more generously than another in the firm’s compensation formula. A couple of years later, consultants will inevitably come back with new information and advice, changing the strategic plan and associated expectations. In other words, as the strategic plan changes, management’s norms often change.

Shifts in the strategic plan can have enormous consequences for lawyers trying to advance in large firms. A non-equity partner in his thirteenth year at his firm describes the “paradigm shifts” that have complicated his quest for equity partnership at his firm. He explains:

During my first four years at the firm, there were two categories of lawyers at the firm; the people who brought in the work and the people who did the work. There was a paradigm shift [somewhere between] my five to ten year mark. Then the idea du jour was “everyone needs to bring in business.” Everything was about marketing. “Everyone needs

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Weil, *at* <http://www.altmanweil.com/about.cfm> (last visited Jan. 11, 2005) (documenting the formation of the firm in 1970, services offered, and its current status as the only consulting firm “specializing in legal organizations” listed in the *Consultant’s News* top 100 management consulting firms); Hildebrandt International, Legal Consulting Services, *at* [http://www.hildebrandt.com/ConsultingServices.aspx?BD\\_ID=4858](http://www.hildebrandt.com/ConsultingServices.aspx?BD_ID=4858) (last visited Jan. 11, 2005) (describing firm’s 25 year history and services offered to law firms to improve internal structure, efficiency and profitability).

to become a rainmaker." If you didn't, you were looked on negatively or forced out. I focused on rainmaking. I'm a good schmoozer. I brought in \$400K as a [young] associate one year. This was more than some of the litigation partners were bringing in. [Firm management] would ask me to be on panels for seminars for associates about rainmaking. I was [held up as an example,] well regarded.

In the last two to three years the idea du jour has been "driving work." Litigators are supposed to expand the business coming from existing clients (usually clients of other departments). Now we are being told "don't waste time rainmaking; litigators can't generate business." Now you need to be the "go to guy" for a corporate guy who needs a litigator. [Now I'm in a difficult position]. I haven't worked on establishing relationships within the firm and I don't want to be working for [a corporate partner]. I like autonomy. Every time the paradigm shifts it sends me into a tailspin.

This lawyer attributed this latest paradigm shift to a change in firm management and a subsequent change in the strategic plan. The firm had recently merged with a smaller litigation boutique. The leading lawyer in the boutique firm had a large and very profitable client base and was made head of litigation as part of the merger agreement. When he became department head, the expectations for litigators in the firm changed.

[The new head of litigation] says marketing is "bullshit." He sat me down and said, "What are you doing?" He told me that in all his years of practice he has never marketed. He made himself the "go to guy" for all the corporate people. He says "litigators can't generate business; they must be driving business." He told me he has buy in from senior people in the firm on this, so a litigator can qualify for equity partner by expanding business and compensation will also reflect the value of this activity.

Assuming a lawyer is able to keep up with his firm's paradigm shifts, to be promoted, he also needs to be lucky.

### 3. Luck—the Trump Card

To be promoted in large law firms today, a lawyer must be in the right place at the right time. The relative status of the lawyer's practice group at the time he is being considered for non-equity and equity partner will be a deciding factor in promotion decisions. As a seventh year associate at a large national firm puts it, to make partner, "[Y]ou need to be a good lawyer, you need to know what [partners] want from you and give it to them, and you need to be in a hot practice group." A practice group is "hot" when it is busy, profitable, and has a place in the firm's strategic plan.

The same associate noted that the hot practice group can change rapidly. He identified Mergers and Acquisitions, Corporate Finance and Venture Capital as three practice groups that had been hot, but had suffered recent reversals of fortune because of changes in the financial markets that would make it difficult, if not impossible, for associates in those groups to make partner at the time of our interview.<sup>231</sup> Changes in the firm's strategic plan may also affect which practice group is hot in a firm at any given time. As a litigation department head explains:<sup>232</sup>

[We] have a high level insurance coverage litigation practice. The firm doesn't want to be known as an insurance coverage firm, however, that work tends to be countercyclical. So it is good work to have. Some of the partners in the insurance coverage practice can be some of the higher paid people in the firm. But the firm is not going to work at grow-

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231. Wilkins and Gulati note the pivotal role of external market forces in their reconception of the promotion to partner tournament and argue that associates bear the risk of market fluctuations in the tournament. Wilkins & Gulati, *supra* note 82, at 1660–61.

232. My research indicates that the firm's strategic plan also plays a pivotal role in who wins and loses the tournament. Again, it is the associates who bear the risk that changes in the strategic plan may change the criteria for success in the tournament.

ing that practice group; we won't be doing a lot of new hiring there; we won't be making a lot of new capital partners in that area.

Consequently, an associate or non-equity partner who chose a specialty in his first several years at a firm can only hope that seven-to-nine years later, when he is being considered for non-equity partner and when he is considered for equity partner thereafter, his practice group is busy, profitable, and has a prominent place in the firm's strategic plan.

### *C. Success in the Competition for Resources*

Lawyers who are promoted to partner must continue to accurately read and meet colleagues' and firm management's expectations and manage perceptions. For example, most firms recognize subjective criteria relating to partners contributions to the firm in their compensation decisions. This subjective criterion is referred to by different names in each firm, for example, "good citizenship credit" or "glue" (as in holding the firm together.) Willingness to spend time on associate training, participate in client pitches, respond to requests for information from potential clients, prepare marketing materials, serve on firm committees, and work to generate new business are all viewed, to varying degrees, as contributions to the health of the firm. Thus, some portion of an equity partner's compensation will turn on the compensation committee's perceptions about the partner's contribution to the day-to-day administration of the firm.

Further, an equity partner may want to grow his practice by hiring more paralegals or associates for his practice group. He may want some of his most valuable senior associates promoted to partner, or he may want the firm to market his practice. To accomplish any of these, he must understand what perceptions he needs to create to win management's support in the competition for these resources and wage his battles accordingly. It is also crucial that he understand the proper etiquette for waging these battles.

Ann, an equity partner and practice group leader with a successful and growing practice, describes the competition for resources between her and another practice group leader. Together, Ann and Rob built the litigation department in their office into a

substantial practice. Ann explained that both of their practices have strengths and weaknesses. Ann's practice is rate sensitive (meaning the clients do not pay top hourly rates) but gives the firm exposure to the heads of Fortune 500 companies. Rob's clients pay premium rates, but Ann says his Achilles heel is that his practice lacks "cachet" and does not give the firm exposure to high profile, potential clients. Ann states:

[Rob] and I are in a battle right now about whose practice gets preeminence and resources. The firm is now at the stage where we are trying to get the profits per partner number up. So the equity partner pie needs to stay small to attract talent, [meaning] premium practices from other firms. [This means the firm will only make a few new capital partners]. [We are competing for resources,] but we [present ourselves] as arm-in-arm, a team. We would never say anything outright to each other, or others, but the battle is going on. I'm in one corner with my troops and Rob is in the other with his troops. Neither of us would say what I just said to you to anyone at the firm, but both of us are trying to sell our practices internally.

Another lawyer talks about the etiquette required in the competition for resources in his firm. "The whole system is self-interest driven, but no one talks about it this way. Everyone talks about it as an altruistic system or talks about it in a communal sense. But so much of what partners are doing is being done to promote their own value."

In addition to employing the proper etiquette in the competition for resources, lawyers must create the right perceptions about their contributions and abilities. An equity partner explains:

You have to keep track of your client pitches to make sure that everyone knows that you've done them . . . . Some of this will be done subtly and some not so subtly. People are trying to make sure they stay noticed. There will be five people on a pitch. When they get back to the office only one

person may talk about having gone on the pitch. But that person talks . . . so people associate him with going out and generating and finding new business. The person who is talking may not be the person who did the most work on the pitch, or had the client connection, . . . but it's all about the perception. Eventually, the perceptions may get clarified, however, the partner who talked a lot about involvement in the pitch has already created a perception that [he's] generating a lot of business.

E-mail is a vehicle for creating perceptions in many firms. One lawyer says:

These broadcast e-mails are essentially advertisements. A partner, or even an associate, will send out a broadcast e-mail saying, "I'm going to be making a pitch to client X. If anyone has any contacts at client X, please contact me immediately." [Or an] e-mail will go out saying "we have a client doing X, if you have expertise in this area, please contact me." [Or] "I was just appointed to X firm committee, and in doing my work for the committee, it would be helpful if you have any information on X, if you would forward it to me." These [e-mails] are really just a way to stay noticed, to make people think you have a big book of business or clout with management.

In many firms, an equity partner must also create the perception that he has the support of the lawyers working under him. For example, David relayed the following story about his competition with Bill for resources. Tension about compensation of non-equity partners developed when both David and Bill hired lateral non-equity partners at a higher rate of compensation than the home grown non-equity partners received. David and Bill structured their respective lateral hires' compensation in different ways. The homegrown non-equity partners were angry about both compensation packages. David explained:

This became a huge battleground for us. We were vying for the role of the good guy who is looking out for you. It was like politics—campaigning for the troops' allegiance. [Both of us were saying to the non-equity partners,] "I'm looking out for you, this is good for you." To be credible in the institution you need a groundswell of support from the non-capital partners behind you. We were both going from office to office campaigning one-on-one with the non-capital partners.

Equity partners create these perceptions to encourage the loyalty of good non-equity partners and associates who seek to form alliances with partners they believe have the influence needed to help them achieve partner status. One equity partner stated:

There is a lot of, I don't want to say deception, but illusion in this process. Partners try to convince younger lawyers they have clout. Some do it to make themselves look more powerful; for instance, "because of me, you were put on this committee." It is also important to have more people working in your practice area, this makes your practice group look busy and important . . . . These illusions are used to corral resources. Partners are trying to make themselves look important . . . .

It is also crucial for a practice group to create the right perceptions in order to win the competition among practice groups for resources. For instance, it is important that practice groups appear busy. An equity partner explains:

The Practice Group leader has an interest in getting everyone in the group working. Data is [tracked] on the average hours worked in each group every month. If an associate does not get his or her time in, it makes it look like the group is not working hard because the average goes down. This may be misinformation if the group is really working hard

and it puts the group in a bad position. Associates often don't understand this.

A former managing partner agrees, “[N]ot being busy is death in a law firm. And it is a perception that is hard to change.” This premium on perceptions is a central feature of the organizational logic of large firms.

## VII. DECISION-MAKING IN LARGE LAW FIRMS

Lawyers make decisions against the backdrop of the organizational logic of their firms. They make both legal and ethical judgments. Many of these judgments fall within “gray areas” where there are no hard and fast rules to guide decision-making. For example, lawyers make judgments about whether to employ a targeted or a “kitchen sink” approach to litigation. A “kitchen sink” approach is one in which they would pursue every advantage, including making every non-frivolous argument or objection available to them. Lawyers also make decisions about how aggressive to be with opposing counsel.

Lawyers at the top of the case hierarchy often delegate decision-making to the lawyers working under them. Because finders and binders are under pressure to expand existing work, bring in new work, and be available to their clients and colleagues, there are tremendous pressures on their time. In addition clients pressure firms to keep fees low. Consequently, the incentives for finders and binders to delegate work to “cheaper” lawyers are substantial. When they delegate work, finders and binders look for lawyers who can manage some of their cases, meaning lawyers who will take work off their desks and make decisions without needing constant handholding.<sup>233</sup> An equity partner expressed his frustra-

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233. Senior lawyers’ motivation for delegating work in large law firms appears to be quite different from senior corporate managers’ motives when they delegate work. See JACKALL, *supra* note 6, at 78, 80 (reporting that in corporate bureaucracies decision-making was pushed down the ladder so that those on top could deny involvement if the decision did not “pan out”). The lawyers I interviewed agreed that when a junior lawyer makes a decision that turns out to have been wrong in hindsight, the client will hold the senior lawyer, the lawyer with the client relationship, responsible for the decision. Thus, delegating and dis-

tion with lawyers who are unable to do this: "You can see it when an associate doesn't have it. They ask questions constantly, they don't want to make decisions, they don't move the ball forward; they have no clear sense of how to move the ball forward."

Although the lawyers at the top of the case hierarchy want the lawyers to whom they delegate work to make decisions, a lawyer working for another lawyer does not have autonomy when making decisions. An equity partner described how her decision-making changes when she is not the top lawyer in the case hierarchy. She describes her work as falling into three categories: "mine, ours, and service work." The work she describes as "mine" is work she does for clients she brought into the firm. The work she describes as "ours" is work she does as the "binder" for Jeff, her powerful mentor's large clients. "Service" work is work she does for lawyers in other areas of the firm. She explains:

I make all of the decisions on the cases that are "mine." I sometimes handle the "ours" cases on my own . . . I have worked with [Jeff] for so long that I know how he will answer most questions and so I don't ask much. When I don't know the partner or the client as well, I am more careful about making decisions and will ask what the partner wants to do.

Lawyers working for other lawyers must know how their supervisor would handle a situation and must handle it the same way because supervisors are not looking for lawyers who will make any decision; they are looking for the lawyers who will make the right decisions.<sup>234</sup> They must make the right decisions without asking

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couraging questions appears to be a result of 1) a desire not to do the least desirable work, 2) the tremendous pressure on the finders' and binders' time, and 3) pressure from clients to delegate work to the most cost effective lawyers in the firm.

234. In some cases the supervising lawyer is the finder who originated the business and the binder is working to make the right decisions. At other times, the supervising lawyer is a binder who grew the litigation business coming from a client. In these circumstances, relevant binders may look for minders to manage cases for them and those minders must make what the binder believes are the right decisions. Thus, both minders, and in some circumstances, binders

too many questions and without making mistakes that will make the supervising lawyer look bad to the client or to the firm.<sup>235</sup> As a successful equity partner observes:

The minders are the folks who are being squeezed. For litigators the most difficult position is being in the middle between the senior partner and the associate. The associate just does what he or she is told. The minder is supposed to take part of the load off the senior person. This means making some calls. [They] need to try to figure out what the senior partner would do and hope [they] were right.

What constitutes the right decision or the appropriate judgment on a question will vary depending for whom the lawyer is working. A minder must discern how the particular partner he is working for would want something done. Astute junior lawyers learn that they need to understand and conform to individual partner's judgments on everything from style to legal strategy. One junior lawyer stated:

The summer associates were assigned work with a primary and secondary lawyer. The primary lawyer was a partner; the secondary lawyer was a more

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must work to meet their supervisors' expectations.

235. Wilkins and Gulati's work with tournament theory predicts this phenomenon. *See* Wilkins & Gulati, *supra* note 98, at 538–39. They state:

First, partners will have a preference for associates who need little or no training. Monitoring the work of other lawyers is both difficult and expensive. Partners want to staff their projects with associates who will be able to do the work with relatively little supervision. Finding lawyers who can perform work competently and quickly is the preeminent selection criterion.

*Id.* Wilkins and Gulati report anecdotal evidence that suggests "black lawyers may develop risk-averse strategies performing their work," such as "ask[ing] more clarifying questions when receiving assignments" and speaking less at meetings with clients. *Id.* at 576–77. My research confirms that lawyers who develop these kinds of risk-averse strategies are less likely to create the perceptions they need to create to advance within the firm.

senior associate. The better associates would tell you this partner wants X, Y, and Z. For instance, there was a standard interoffice memo form, but you always had to check with the associate to make sure that this partner wasn't looking for something different. Or the associate might tell you that although the partner said he wanted something back from the summer associate in two weeks, he really wants an answer in two days.

Lawyers must also conform to clients' preferences regarding the work they do. This junior lawyer further stated:

Each [in-house lawyer at the company] has a different style. You have to know what each one wants. One may want all memos in bullet point form and a plain English version of the issues. Another wants a traditional legal research memo with extensive citations. I give them each what they want. Some associates refuse to adapt to the client's style. They say "this is who I am and I'm not changing."<sup>236</sup>

Making the right decisions includes conforming to the partner's expectations (norms) about everything from a lawyer's stance in interactions with adversaries to the legal arguments and strategies he pursues. For example, a third year law student who worked as a summer associate at a large firm notes, "I watched associates take more aggressive stances with opponents [on certain cases] because they knew that's what the partner on the case would do." Another lawyer reported moving for summary judgment on more issues than he would have otherwise so that he would not appear weak to his supervisor.

When asked whether it is important that an associate be able to adapt to clients' preferences, an equity partner acknowledged it is important. However, he said he also wants an associate to exer-

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236. This associate noted that the associates who refused to adapt left the firm. He was not sure whether they left of their own accord or if they were asked to leave.

cise “independent judgment.” When asked how he knows whether an associate is exercising independent judgment, he said, “I ask them what they think we should do. I’ll ask, ‘How do you think we should respond to this complaint? Should we file a motion to dismiss? What arguments would you make?’” Earlier in the interview, this partner discussed associates who did not make partner in his firm. He identified poor substantive or professional judgment as determining factors in the decision not to make these associates partners. When asked to describe an associate who did not make partner, he said:

It is the kind of person who chooses a less persuasive argument than they might have on a legal issue; that would be an example of poor substantive judgment. An example of poor professional judgment is doing something other than what the partner asked for. [I can think of an associate whom we did not elect partner because he had poor professional judgment.] The partner had said something needed to be done by a certain deadline. The associate did something different by the deadline and never discussed the change in strategy with the partner.

Thus, when a lawyer’s judgment varies from the supervising partner’s judgment, he must obtain the supervisor’s approval to exercise his judgment. When a junior lawyer prepares a draft for a supervisor’s review or is expected to ask questions, many supervisors want him to come back with his own, better ideas. An equity partner said:

I look for an associate who “comes to play;” an associate who will take a proprietary interest in the case. A weak associate will give me a draft of a brief that is “half assed” and merely regurgitates my ideas. I want someone who will come back with his own, better arguments. I don’t want an associate who is high maintenance.

However, when the supervisor wants a minder to make a call without asking questions, it is essential for the minder to be able to read

the partner's expectations accurately and "do what [the partner] would have done" without making mistakes.<sup>237</sup>

This means minders spend much of their time making judgments about what a partner would want in a given situation, as opposed to exercising their own judgment. As a result, many large-firm associates are insecure about their skills. An equity partner observed:

I can spot a large-firm associate in seconds at a dinner party because they feel like frauds—you can see it. They are apologetic—they tell me what firm they work for before they tell me what they do. With a small firm lawyer, they are interested in their work and talk about the work; they do they'll tell you—I have this employment case . . . .

Although the sought after minders (those who know what judgments they are expected to make and make them) may not develop confidence in their own judgment, at the promotion stage, it is imperative that they appear confident.

### VIII. THE MORAL ETHOS OF LARGE-FIRM LITIGATORS

Across firms, successful large-firm lawyers follow a distinctive choice of norm rule. As they climb case hierarchies and negotiate their firms' management bureaucracies, they develop related habits of mind.<sup>238</sup> They look to the lawyers they are working for and with, and those who matter to them at the time, as the source of norms. As large firms have grown and become more bureaucratic under the leadership of their elite partners, the norms espoused by partners within those firms have become more varied.

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237. For some associates, particularly some junior associates at the very bottom of the case hierarchy, the need to give the lawyers above them what they want without making mistakes causes them to resort to cautious decision-making. "The task of the first through third year associates was impossible. You can't make any mistakes. Associates said to me 'don't be noticeable; if you have a choice between not being noticed and doing something outstanding which may potentially bomb, don't take the risk.'"

238. *See supra* note 23.

Firms hire lateral partners who bring new norms to the firm. Large-firm lawyers must not only meet the expectations of the lawyers who supervise their work; they must also meet the expectations of the network of lawyer managers who “manage” them. When firms merge or acquire new practice groups, power shifts and norms change. Frequently, norms also change when the lawyers managing the firm adopt a new strategic plan.

As a result, large-firm litigators are accustomed to “looking up and around”<sup>239</sup> whenever they make decisions, and they become highly attuned to the personalities and preferences of the lawyers for whom they work. When they survey the social landscapes of their firms, they see terrain shaped by individual personalities, styles and preferences. Expectations or norms about what hours they work, what kinds of work they do, how they do their work, what decisions to make, what public face to wear and etiquette to follow in a given situation vary depending on who a lawyer is working for and who has power at the time.

In this environment, it is not the norms espoused by the firms’ elite partners that will shape large-firm lawyers ethical consciousness. It is the choice of norm rule that requires they identify and meet the expectations of those who matter that will shape their consciousness. The choice of norm rule large-firm lawyers follow in their work life tends to make notions of right and wrong, proper and improper, mutable in the lawyers’ eyes.

In addition, large-firm lawyers are accustomed to being judged and judging others by the perceptions they create. This intense attention to perceptions leads large-firm lawyers to collapse the distinction between appearances and substance. In important respects, appearance becomes substance in large firms. Some large-firm lawyers are more attuned than others to the preferences of their supervisors and colleagues and to the perceptions they are expected to create. This ability to understand and follow the rules of the fluid organizational game is of preeminent importance in large firms. It is the lawyers who have most thoroughly adopted this habit of mind and are able to act on the logic of their firms who succeed in today’s large firms. They are the superstars.

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239. JACKALL, *supra* note 6, at 77.

### A. Ethics as a Function of the Large-Firm Litigator's Habits of Mind

My research is designed to identify the organizational logic of large firms, the habits of mind and evaluative rules (e.g., the choice of norm rule) that guide large-firm lawyers in their work. In contrast, the *Ethics: Beyond the Rules* project<sup>240</sup> was designed to investigate “the prevalence and likely causes of, and possible remedies for, ethically inappropriate or problematic behavior in large-firm litigation practice, especially in the area of discovery.”<sup>241</sup> The project’s scholars were particularly interested in “areas of problematic conduct ‘beyond the rules’ as well as in plain violations of ethical and practice rules.”<sup>242</sup> Based on their empirical study of large-firm litigators in two large cities, each of the socio-legal scholars involved in the project published an essay interpreting the data gathered from his or her own perspective and area of expertise.<sup>243</sup>

Several themes emerged in these essays that suggest that the organizational logic that guides large-firm lawyers in their quest for success and advancement within their firms, described in Part V, *supra*, also influences their ethical consciousness. When asked to define ethical and unethical behavior, the *Ethics: Beyond the Rules* informants<sup>244</sup> had difficulty doing so because what they considered ethical was highly dependent on situational factors.<sup>245</sup> When the researchers pushed their informants to define ethical

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240. See *supra* text accompanying note 4.

241. Robert W. Gordon, *The Ethical Worlds of Large-firm Litigators: Preliminary Observations*, 67 FORDHAM L. REV. 709, 709 (1998).

242. *Id.* at 709–10.

243. *Id.*

244. In *Ethics: Beyond the Rules*, Mark Suchman referred to the lawyers interviewed as “informants.” See Suchman, *supra* note 10, at 843. Where it is otherwise not clear, I refer to them as the “informants” to distinguish them from the lawyers I interviewed.

245. Douglas N. Frenkel et al., *Bringing Legal Realism to the Study of Ethics and Professionalism*, 67 FORDHAM L. REV. 697, 705–06 (1998) (noting that “[a]ll of the papers, using slightly different labels, note the discussants’ avoidance or suspicion of any moral calculus in their daily choices. Decision-making was described as ‘situational’ or pragmatic, thinking ‘realistic’ and instrumental, standards as external, and ethical limits defined solely by rules”).

norms rather than rely on situational factors, the informants did two interesting things. First, they tended to define right and wrong in terms of what others might think and, second, they elevated civility to an ethical norm.<sup>246</sup> Finally, these litigators' professional ideal was "a game well-played"<sup>247</sup> meaning a game played by the established conventions.

### 1. Ethical Decision-Making Characterized by Situational Judgment and Reference to Other People's Morals

Mark Suchman observed, "[A]lmost always, the first assertion about the content of '*Ethics: Beyond the Rules*' was 'it depends'—often followed by a very tentative and unsatisfying list of conditions upon which it depended."<sup>248</sup> All of the other scholars involved in the *Ethics: Beyond the Rules* project made similar observations.<sup>249</sup> Robert Nelson described the phenomenon this way:

The biggest problem with getting the lawyers to talk about the gray areas in their own professional decision-making was the salience of situational factors to evaluating "proper practice." The answer to almost every question was that it "depends." Aggressiveness generally is inappropriate, unless the war was initiated by the other side. Hardball usually is inappropriate unless there is a specter of mischievous plaintiffs' lawyers waiting to use the information from discovery for other suits. The hallmark of good lawyering is managing the relationship with [the] clients so that no ethical lines need to be drawn in the sand.<sup>250</sup>

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246. Suchman, *supra* note 10, at 847–48.

247. *Id.* at 870–71.

248. *Id.* at 847.

249. Frenkel, *supra* note 245, at 705–06.

250. Robert L. Nelson, *The Discovery Process as a Circle of Blame: Professional and Socio-Economic Factors that Contribute to Unreasonable, Inefficient, and Amoral Behavior in Corporate Litigation*, 67 FORD. L. REV. 773 (1998). See also Gordon, *supra* note 241, at 714–15; Suchman, *supra* note 10,

Thus, a large-firm litigator's definition of ethical conduct varies depending on the conduct of his adversary. The situational factors the informants considered also included the client's instructions, or in the absence of instructions, the relative strength of the client's position, the client's interests and desires,<sup>251</sup> and the consequences of a chosen course of conduct, including the likelihood of being caught or damaging one's reputation.<sup>252</sup> Nelson labeled the apparent command that the informants consult situational factors, the "imperative of situational judgment."<sup>253</sup>

The "imperative of situational judgment"<sup>254</sup> is an extension of the organizational logic large-firm lawyers develop in response to the social structure of their firms. The choice of norm rule at work in large firms makes right and wrong fluid concepts for the large-firm litigator. Fixed standards are anathema in a world where "the final arbiter of the quality of your work is not the client, the judge, or any external truth, it's the partner you're working for."<sup>255</sup>

When pushed to move beyond situational factors to define a normative standard of right and wrong, several of the *Ethics: Beyond the Rules* scholars observed that large-firm litigators defined right and wrong in terms of what other audiences might think. One noted:

Among large-firm litigators, associates [in contrast to partners] readily acknowledged the moral dimensions of their work, but often collapsed these into pragmatic concerns. Thus, for example, they frequently discussed morality in terms of how an action would appear in a newspaper or to a judge or jury. These imaginary external audiences seemed to provide a "reality check," or, in the words of one associate, an "objective moral standard."<sup>256</sup>

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at 847.

251. Gordon, *supra* note 241, at 714.

252. Suchman, *supra* note 10, at 847.

253. Nelson, *supra* note 250, at 780.

254. *Id.*

255. See *supra* note 1.

256. Suchman, *supra* note 10, at 844–45.

Robert Gordon, another scholar involved in the project, made a similar observation:

According to our study, lawyers pondering a course of action will ask themselves, or each other, how a description of it would sound in front of a spectator, how it would sound to a judge, (often-mentioned) how it would look “in the newspaper,” “in the right hand column of *The Wall Street Journal*,” or to their “mother.” . . . Moral judgment, in other words, is something that others possess and may bring to bear; the lawyer’s task is to anticipate that judgment. He does not consult some internalized set of ethical or professional norms, such as what would be fair, honest, and just, in this situation, or what is the most consistent with the kind of person or lawyer I would like to be. Rather, one asks, what would others think?<sup>257</sup>

Again, the *Ethics: Beyond the Rules* informants’ working ethics are entirely consistent with the habits of mind of looking up and looking around and equating appearance with substance that I observed in large-firm litigators. Perceptions are the “substance” on which many important decisions are made in large firms. As a result, day in and day out, large-firm litigators ask themselves: what would others think is the right perception to create in this situation. What constitutes the right perception depends on who you are working for or who your audience will be. It is not surprising, therefore, that when the *Ethics: Beyond the Rules* informants tried to identify ethical norms, they approached the task not by consulting internal standards or codified rules of conduct, but by reference to the expectations of relevant audiences, e.g., supervisors, clients, judges, and the media.<sup>258</sup> For large-firm litigators,

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257. Gordon, *supra* note 237, at 732.

258. See Suchman, *supra* note 10, at 844–45; Gordon *supra* note 237, at 732.

acting ethically was appearing ethical to a relevant hypothetical audience.<sup>259</sup>

## 2. The Lawyer's Role: Lawyer-as-Agent

The organizational logic of large firms is also a powerful influence on large-firm litigators' conception of the adversarial norm and of their roles within that norm vis-à-vis their clients. The large-firm litigators' habit of mind of looking up and looking around is superimposed on the norms created by the adversarial system, and, consequently, it shapes their understanding of those norms. The reshaped norms, in turn, serve to rationalize the social structure of large law firms.

The *Ethics: Beyond the Rules* scholars made a number of interesting observations about the norms of the adversarial system and the related norms in the area of client relationships, as understood by their informants. Nelson observed that "most litigators defined their moral obligations almost strictly in terms of the role they played in the adversarial process. That is, they had a duty of zealous representation to their client but not a duty to step outside that role to attempt to achieve a more moral resolution of conflict."<sup>260</sup> However, as Gordon explained, the relationship of the adversarial norm to other competing norms has changed in recent years. Gordon stated:

At one time (in theory, anyway; what happened in actual practice is obscure,) lawyers generally understood that this norm was constrained by, and had to be balanced against, other norms, namely those general duties owed by lawyers as "officers of the court" to the framework of substantive and procedural rules that structure the adversary system. But over the course of this century, especially in recent years, those generally countervailing norms have been both weakened and reduced to rules. Instead of being confronted with two general obligations in

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259. *See id.*

260. Nelson, *supra* note 250, at 779.

permanent tension, which must constantly be balanced against one another, lawyers face only one dominant master norm: a client's interest is to be zealously advanced, qualified only by particular positive rules.<sup>261</sup>

Thus, lawyers have elevated the duty to zealously represent their clients over other competing obligations, and the procedural and ethical rules that constrain lawyers' conduct are just another set of rules to be gamed, interpreted, and argued in the effort to advance the client's interests.<sup>262</sup> Suchman concluded that the *Ethics: Beyond the Rules* informants viewed the duty of zealous advocacy as "an affirmative moral obligation, even when it came into conflict with other ethical rules."<sup>263</sup> For instance, many informants saw conferring with their witnesses during a rest break in a deposition as an affirmative moral obligation, even if the court rules in the jurisdiction prohibited such conversations.<sup>264</sup> In the context of deposition defense, the affirmative moral obligation that the lawyers zealously defend his client meant that "walking the line [pushing the limits of the rules] was the preferred position for the morally responsible attorney."<sup>265</sup>

At the same time that zealous representation of the client has become an affirmative moral obligation for the *Ethics: Beyond the Rules* litigators, their view of their roles and relationships with their clients has changed. Although the notion of lawyer-as-counselor has long been a professional ideal,<sup>266</sup> when pushed to define norms in the area of client relations, Suchman noted that the

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261. Gordon, *supra* note 241, at 728.

262. *Id.* at 737.

263. Suchman, *supra* note 10, at 854 (emphasis added).

264. *Id.* at 851.

265. *Id.* at 854 (emphasis added).

266. See, e.g., SOL M. LINOWITZ WITH MARTIN MAYER, THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY 228 (1994) (arguing that lawyers need to return to their traditional role as advisors to their clients); Bruce A. Green, *Thoughts about Corporate Lawyers After Reading the Cigarette Papers: Has the "Wise Counselor" Given Way to the "Hired Gun"?*, 51 DEPAUL L. REV. 407, 407 (2001) (describing the traditional view of the lawyer as a counselor guided by principles of fairness and equity).

large-firm litigators fell into two camps: those who saw themselves as agents of the client and those who saw themselves as fiduciaries.<sup>267</sup> The litigators in the lawyer-as-agent camp saw themselves in “a passive position as an agent of the client’s will—and pass[ed] moral responsibility along to the client-as-principal.”<sup>268</sup> The litigators who saw themselves as fiduciaries “asserted that they would make at least a cursory effort at moral suasion if they felt that their client was in the wrong.”<sup>269</sup> Suchman notes that the lawyer-as-agent view was the dominant of the two among the large-firm litigators involved in the study.<sup>270</sup> The informants felt they had an affirmative moral obligation to zealously represent their clients, and the majority of them saw themselves as agents of their clients, not counselors. In other words, a majority of the *Ethics: Beyond the Rules* litigators believed they had an affirmative obligation to zealously represent their client’s will, without any obligation to attempt to constrain that will.

This comes as no great surprise. In *Partners with Power*, Nelson argues that large law firms are controlled by those partners in the firm with the most lucrative clients.<sup>271</sup> The dominant partners’ ability to retain power within the firm depends on their continued relationships with their clients.<sup>272</sup> As a consequence, their incentives are not to act as autonomous counselors who serve as a check on their clients’ desires, but as agents of their clients.<sup>273</sup> My empirical research suggests that the very structure of today’s large-law firm bureaucracies mirrors this economic reality.

Large-firm litigators view zealous advocacy as an affirmative moral obligation and see themselves as agents of their clients because their habit of mind is to look up and look around. The lawyer-as-agent norm and the norm that elevates the pursuit of the client’s interests to an affirmative moral obligation are consistent

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267. Suchman, *supra* note 10, at 849.

268. *Id.*

269. *Id.* (noting that informants stated their best course of action would be to attempt to persuade their clients pragmatically, for example, by making reference to what other audiences may think).

270. *Id.* at 867.

271. PARTNERS WITH POWER, *supra* note 4, at 224–28, 288–89.

272. *Id.* at 276–89.

273. *Id.*

with lawyers' daily experiences within their firms. Junior lawyers are agents for the lawyers who supervise them. Within their firms, most large-firm lawyers are not autonomous counselors who consult internal or fixed standards (i.e., personal moral beliefs or widely held professional norms) and advise their superiors about the appropriate course of action. Large-firm litigators approach their relationships with, and obligations to, their clients the same way. They must understand their client's will and they have an affirmative moral obligation to zealously advance that will. Because there are few fixed standards of right and wrong within the firm, there are few obligations that might compete with the client's goals.<sup>274</sup>

And while these habits of mind shape lawyers' norms, these norms, in turn, serve to rationalize the social structure of large firms. As one of the lawyers I interviewed observes:

[Yes], a downstream lawyer may vary style depending on who he's working for: When working for a take no prisoners' partner, err on the side of being more aggressive. For instance, you are filing a summary judgment motion. You can move on eight issues; three you think are worthless, but you insert all eight because you don't want to be perceived as weak. But [I don't see this as a problem;] even lawyers at the top of the food chain have to do this. If they have a really aggressive client they adjust.

Thus, the adversarial norm that promotes zealous representation of the client above all competing obligations and the lawyer-as-agent norm, rationalize the entire food chain in the large-firm and the "upward looking stances"<sup>275</sup> it creates. If the obligation to zealously represent a client is the overriding obligation and the

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274. Mark Suchman notes that many of the in-house lawyers interviewed in the *Ethics: Beyond the Rules* project shared the view that outside lawyers were agents, not fiduciaries. Suchman, *supra* note 10, at 849–50. No doubt, this also contributes to large-firm lawyers' increasing tendency to see themselves as agents, rather than fiduciaries.

275. JACKALL, *supra* note 6, at 5–6 (using the term "upward looking stances" to describe the habits of mind of corporate managers).

litigator is an agent of that client, not a counselor, then it is appropriate that junior lawyers not define right and wrong for themselves, but instead look up the food chain and ask, “[w]hat would the lawyer I’m working for think is right here?” And the lawyer at the top of the food chain will ask what the client wants rather than consulting any internalized or fixed standards. In this way, the adversarial norm and the lawyer-as-agent norm articulated by the *Ethics: Beyond the Rules* litigators justify the social structure of the large law firm.<sup>276</sup>

### 3. Ethics Defined as Civility—Appearances Equated with Content

Like their upward looking stances, the large-firm lawyers’ habit of mind that equates appearances with substance also influences lawyers’ ethical consciousness. In my own fieldwork, I found that lawyers equated civility (i.e., following what they defined as the appropriate etiquette) with ethics. For instance, when I asked a mid-level associate whether the lawyers she opposed were ethical, she told me that she usually faced “the highest caliber lawyers” on the other side of her cases—lawyers who are “extremely ethical in their behavior.” By way of example, she relayed a story about an arbitration in which she had been involved where the arbitrator had commended the lawyers involved on their professionalism. I asked her how she knew the lawyers on the other side had produced all the responsive documents in discovery. She explained:

[T]here was not a problem with scheduling depositions, there was nothing said in the briefs that was stretching the facts or the law, I could tell from the way they were behaving in the deposition that they weren’t being obstructionists. You can tell because at the end of the day somebody who has integrity knows that it’s not personal, they shake hands; these

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276. Robert Nelson notes that the imperative of situational judgment rationalizes the independence of the case hierarchies within large law firms. Nelson, *supra* note 250, at 781. Because ethical judgments are governed by situational factors, it would be inappropriate for one partner to question another partner’s handling of his cases. *Id.*

are professional lawyers. I call . . . the other side and sa[y] "These are my witnesses, will you tell me yours?" And the other side . . . give[s] me their witnesses. These lawyers are advocating strongly but it is done in a professional manner. You don't have a full on battle if it is not needed.

This lawyer equates her opponents' good manners and willingness to play by the customary rules with ethical behavior.

The *Ethics: Beyond the Rules* scholars observed the same tendency for their informants to equate ethics with civility.<sup>277</sup> When they pushed large-firm litigators to move beyond situational factors and define the normative standards that guide their ethical judgments, the norms many of them identified were standards of civility rather than standards of ultimate justice.<sup>278</sup> Mark Suchman characterized his observations as follows:

[L]arge-firm litigators' . . . comments centered predominantly on intra-professional<sup>279</sup> obligations. Informants generally couched these discussions in the language of ethical pragmatism; however, by the second weekend, many attorneys began to introduce some (modest) normative considerations as well. Significantly, though, even when the conversations carried moralistic overtones, the groups showed little interest in (or concern about) morality with a capital "M." Rather, large-firm litigators tended to frame the moral challenges of intra-professional relations as questions of "civility"—a normative standard, to be sure, but one suggesting that the primary consequence of violation would be pragmatic inconvenience and tit-for-tat retribution, not systemic corruption and depravity.<sup>280</sup>

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277. Suchman, *supra* note 10, at 846–47.

278. *Id.*

279. *Id.* (using the term "intra-professional" to refer to other lawyers, particularly opposing counsel, but including colleagues within their firms).

280. *Id.* at 847.

Suchman also reported that the informants “repeatedly identified incivility as a central characteristic”<sup>281</sup> of those actors within the system, and their firms, who they identified as most responsible for unethical conduct. When asked to identify proposals to elevate their firm’s professional practice, the informants’ comments frequently were directed at increasing civility.<sup>282</sup> Suchman noted that “judging from the response that the issue elicited, one could justifiably conclude that incivility would rank at or near the top of our large-firm informants’ complaints about the current state of litigation practice.”<sup>283</sup>

Similarly, the *Ethics: Beyond the Rules* litigators did not view evasive discovery responses as unethical unless the means used to evade responding violated the large-firm litigators’ rules of etiquette. Suchman explained:

At the most basic level, one striking feature of our attorneys’ comments was the extent to which they analyzed ethical dilemmas as issues of intra-professional miscommunication. Repeatedly, discovery was framed as a semiotic ritual—an exchange of “significant gestures,” in Mead’s terminology—between two members of a single “discourse community.” The measure of ethical conduct seemed to be “did the attorney send an honest signal,” not “did the attorney produce the relevant material.”<sup>284</sup>

When they frame ethics as questions of civility or sending honest signals, the informants are separating appearances and con-

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281. *Id.* at 848 (identifying “incivility as a central characteristic of the profession’s purported villains (small firms, [and within large firms] lateral hires, mid-level partners, etc”)).

282. *Id.*

283. *Id.*

284. *Id.* at 866, 870–71 (noting that most of the *Ethics: Beyond the Rules* informants believed it was ethical to reframe a discovery request to narrow its scope and only supply documents responsive to the reframed request as long as the response indicates that the request has been narrowed, and thus, “‘tees up’ the issue for a motion to compel”).

tent, and, as within their firms, in the litigation context it is appearances that matter most. It is not the substance of the response, i.e., whether it is accurate and complete, that makes it ethical, but whether the response is communicated in the customary manner. For example, if the lawyer has decided to evade responding, does the response send the customary signal that the lawyer is being evasive? Large-firm litigators are concerned with discerning and playing by the customary rules of the adversary game and they look for opponents to do the same.

In the same vein, Suchman observed:

[T]he guiding ideal of legal professionalism [for the informants in *Ethics: Beyond the Rules*] resides in the image of a ritualized adversary contest—a stylized confrontation in which lawyers serve as zealous champions for good and bad causes alike, without ever becoming so close to the principles that they lose sight of the nobility of a game well-played.<sup>285</sup>

The stated professional ideal of the litigator informants differed markedly from those of the in-house counsel, plaintiffs' counsel, and judge informants the *Ethics: Beyond the Rules* scholars interviewed. The in-house counsel informants' professional ideal was efficiency, "provid[ing] a cost-effective vehicle for his or her client's specific interests, and [thereby] . . . facilitat[ing] the efficient functioning of the economy as a whole."<sup>286</sup> For the plaintiffs' lawyer informants, "neither the honor of the game nor the efficiency of the economy lie at the heart of the legal ideal. Rather, the morality of the justice system rests squarely on its ability to provide justice."<sup>287</sup> The scholars make clear that plaintiffs' lawyer informants were as pragmatic in their approach to ethical decision-making as were the large-firm lawyers, but they justified their tactics differently; they rationalized their use of harassing or uncivil tactics—their means—as necessary to achieve the "just"

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285. *Id.* at 870–71.

286. *Id.* at 871.

287. *Id.*

ends they claimed to advocate.<sup>288</sup> Finally, the professional ideal of the judicial informants was finding truth.<sup>289</sup> “[T]heir raison d’être clearly resides in their ability to facilitate the revelation of fact and the debunking of fiction.”<sup>290</sup>

What distinguishes the “game well-played” ideology from the “justice,” “truth,” and “efficient dispute resolution” ideologies is that each of the latter incorporates a generally understood external standard by which the morality of the justice system can be measured. So, for example, the plaintiff’s lawyer posits certain ends as moral, such as “gender equality,” and he acts in accordance with his professed professional ideal when he zealously represents a client in a gender discrimination claim seeking those ends. The plaintiffs’ lawyers’ statement of their professional ideals, like those of judges and in-house counsel makes reference to a widely held value that the adversarial system purports to serve and that arguably makes it moral.

In contrast, the large-firm litigator’s professional ideal—a game well-played—does not incorporate any external standard that measures the morality of the system according to the values advanced through the real world consequences or outcomes of litigation.<sup>291</sup> Instead, it incorporates a standard for evaluating the lawyer’s performance. The standard it incorporates, “well-played,” is defined by the large-firm litigators themselves, not by reference to any external, widely understood values. In order to play the game well and nobly, a lawyer must understand and play by the rules-in-use, for example, by employing appropriate situational judgment and sending the customary signals when his or her responses are evasive.

Large-firm litigators equate ethics with etiquette and locate their ideal in the manner in which the game is played because the organizational logic of large-firm bureaucracies shapes their ethical consciousness. In a world where others decide the goals, where

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288. *Id.* at 872.

289. *Id.*

290. *Id.*

291. Christopher Johnson discussed the idea expressed here and in the preceding paragraph with me at length and commented on it in an earlier draft. I am indebted to him for his insights.

right and wrong depend on whom one is working for at the time, and understanding the rules of etiquette and what perceptions one is expected to create is paramount, large-firm lawyers become accustomed to placing independent value on the ability to discern and follow the logic of the fluid organization game. The value for them is not in the ends of the game but in their ability to understand and play by its rules. Similarly, they locate ethics in the way in which they conduct the conversation rather than in its content. The large-firm litigator's professional ideal is divorced from the moral ends the adversarial system purports to serve; instead it centers on the skills that make these lawyers successful within their own firms.

If, as I have argued, the organizational logic of large-firm bureaucracies plays a role in shaping large-firm lawyers' views of ethics, one would expect associates, who presumably have not thoroughly adopted the logic of their firms, to view questions of ethics somewhat differently than successful partners who are more thoroughly entrenched in that logic. The *Ethics: Beyond the Rules* scholars found evidence of such variations in perceptions; associates saw ethical issues where partners did not.<sup>292</sup> Associates "readily acknowledged the moral dimensions of their work, but often collapsed these into pragmatic concerns," while partners "tended to deny the moral dimensions of their work entirely, and to reduce most issues to either ethical rules or pragmatic strategies."<sup>293</sup> When asked about what changes they might make in their firms to address ethically problematic conduct in litigation, "partners offered only the most minor adaptations," while "the center of [associate] opinion clearly favored more significant changes in the incentive structures of firms and in relationships with clients."<sup>294</sup> When the *Ethics: Beyond the Rules* scholars read the partners' responses to this question to the associates, the associates' reactions were telling. One stated:

I'm struck by the difference in perceptions. We seem to identify more occasions that we thought

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292. See, e.g., Nelson, *supra* note 250, at 793–94.

293. *Id.* at 844–45.

294. *Id.* at 793.

ethical issues were arising in terms of behavior and specific issues [that firms might address.] What I'm hearing from their responses is that there really is nothing wrong. [Another associate said] it strikes me that either we are wrong or they don't see that [pressures toward incivility or abuse] exist . . . or they see it and they don't care. Or they don't recognize it as a problem.<sup>295</sup>

I argue the latter—that the partners “don’t recognize it as a problem.” Partners have adopted the habits of mind of the large-firm lawyer; associates are works in progress. Partners live by the organizational logic of their firms and that logic has changed their understandings of what it means to be ethical. Partners do not see moral questions where associates do because partners do not measure their conduct against internal or fixed principles; their habit of mind is to glean expectations, to read situations, to collapse the distinction between appearance and substance, and to equate etiquette with ethics. The structures and incentives of large firms encourage this; therefore, the partners do not see a problem to be fixed.

Several associates interviewed in the *Ethics: Beyond the Rules* study identified mid-level partners as the primary source of “the pressure for borderline ethical behavior or hardball” in their firms.<sup>296</sup> This also suggests that the organizational logic of large-firm bureaucracies shapes large-firm lawyers’ understandings of ethics and lawyers’ roles. Unlike senior partners, who began their careers before the thorough-going bureaucratization of large firms, mid-level partners have “grown up” in large-firm bureaucracies. They are also the lawyers who are being “squeezed,” who need to “try to figure out what the senior partner would do and hope they were right.” Thus, they are the large-firm lawyers who are most likely to be thoroughly entrenched in the organizational logic of

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295. *Id.*

296. Gordon, *supra* note 241, at 718 (noting that this assertion was disputed especially by the partners interviewed in the study); Suchman, *supra* note 10, at 872 (observing that large-firm lawyers identified lateral hires and mid-level partners as the “devils within,”—the individuals within their firms who were to blame for professional failings).

their firms. For this reason, their conduct may be the best indicator of the effect of bureaucratization on lawyers' working ethics.

## IX. CONCLUSION

The complicity of large-firm lawyers in recent, highly publicized corporate scandals has spurred a new chorus of concerns about large-firm lawyers' ethics. Mark Sargeant observes "there does seem to be something that links [the lawyers involved in these scandals]: an apparent indifference to the morality of their actions."<sup>297</sup> How did the large-firm bureaucracies where these lawyers worked shape their ethical consciousness? Sargeant argues:

Most of the lawyers involved presumably possessed some form of personal moral code, whether based on religious or secular premises, as well as a professional-role morality that should have been as stringent in its proper sphere as any personal morality. At a minimum, those personal and professional moral codes would have insisted upon truth-telling, personal integrity, concern about the consequences of one's actions for others, recognition of the limitations on one's obligation to a client and an understanding that the "legal" is not coextensive with the "moral." Those moral priorities, however, seemed to disappear into a smog of expediency, rationalization, willful blindness and slavish obedience to the wishes of self-interested managers who purported to speak for the corporate client.<sup>298</sup>

To draw certain conclusions about the role of large-firm bureaucracy in shaping these lawyers ethical consciousness, we need to study lawyers who have engaged in illegal or immoral acts on behalf of their clients or who refused to do so when asked.<sup>299</sup>

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297. Mark A. Sargeant, *Lawyers in the Moral Maze*, 49 VILL. L. REV. 867 nn.3–9 (2004) (describing in house and large-firm lawyer involvement in various corporate scandals).

298. *Id.* at 871–72.

299. The next phase of my empirical research will focus on precisely these

What we know now is this: the lawyers working in large law firm bureaucracies employ a characteristic choice of norm rule to guide them through the maze of norms through which they must navigate every day. This choice of norm rule makes notions of right and wrong and proper and improper entirely mutable. As a result, the large-firm lawyer's habit of mind is to attempt to identify the norm appropriate to the context, rather than to judge its merits. Moreover, this habit of mind is likely to make a thorough-going organizational pragmatism the large-firm lawyer's guiding moral principle.

The use of situational judgment, equating ethics with etiquette, and the elevation of the skills required for success within the organization to a professional ideal, are not problems unique to large law firm bureaucracies. The organizational logic at work in large firms is similar to that of America's large corporate bureaucracies. In *Moral Mazes: The World of Corporate Managers*, Jackall describes the habits of mind managers develop in large corporate bureaucracies:

Bureaucratic work shapes peoples consciousness in decisive ways. Among other things, it regularizes peoples' experiences of time and indeed routinizes their lives by engaging them on a daily basis in rational, socially approved, purposive action; it brings them into daily proximity with subordination to authority, creating in the process upward looking stances that have decisive social and psychological consequences; it places a premium on functionally rational, pragmatic habit of mind that seeks specific goals; and it creates subtle measures of prestige and an elaborate status hierarchy that, in addition to fostering an intense competition for status, also makes the rules, procedures, social contexts, and protocol of an organization paramount psychological and behavioral guides.<sup>300</sup>

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questions.

300. JACKALL, *supra* note 6, at 5–6.

Jackall concludes that in large corporations “morality becomes indistinguishable from the quest for one’s own survival and advantage.”<sup>301</sup> This is precisely what appears to be happening in large law firms. The large-firm litigator’s professional ideal has “become indistinguishable from the quest for [his] own survival and advantage.”<sup>302</sup> This suggests that the organizational logic at work in large law firms is, in significant respects, a function of their bureaucratic structures. It suggests bureaucratic work shapes lawyers’ ethical consciousness in distinctive ways. This has implications for all lawyers working in bureaucratic settings.

John Feerick, former Dean of the Fordham University School of Law, recently defined integrity in the practice of law as “[s]taying with your principles . . . holding on to who you are and being yourself at all times as best you can . . . not giving up your principles in order to promote yourself.”<sup>303</sup> According to the logic of the large law firm, however, acting with integrity, as John Feerick defines it, may be professional suicide. Traditional notions of integrity and professionalism assume that professionalism is not merely a function of what makes a lawyer successful in his particular work environment. Much of the scholarship that offers prescriptions to “fix” lawyers’ ethics assumes lawyers will check their conduct against an internal moral compass and thus have a sense when things are ethically “amiss.”<sup>304</sup> Consulting an internal moral

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301. *Id.* at 204.

302. *Id.*

303. Mary C. Daly, *Teaching Integrity in the Professional Responsibility Curriculum: A Modest Proposal for Change*, 72 FORDHAM L. REV. 261, 261 (2003) (quoting telephone message from John D. Feerick, Professor of Law and former Dean of Fordham University School of Law (Feb. 3, 2003) (on file with Mary Daly)).

304. See, e.g., WILLIAM SIMON, THE PRACTICE OF JUSTICE, A THEORY OF LAWYER’S ETHICS (1998). Simon advocates that “[l]awyers [sh]ould take those actions that, considering the relevant circumstances of the particular case, seem likely to promote justice.” *Id.* at 138. Simon proposes that lawyers use their judgment to weigh their obligations as advocates and as officers to the court and decide questions of justice. *Id.* at 138–39. My research suggests that the large-firm lawyer’s habit of mind is to view norms as mutable. As a result, large-firm lawyers are not in the habit of forming their own judgments about what constitutes justice. See also, e.g., Elizabeth Chambliss & David B. Wilkins, A New Framework for Law Firm Discipline, 16 GEO. J. LEGAL ETHICS 355 (2003) (ad-

compass is foreign to the large-firm lawyers' habit of mind. As a result, the increasing bureaucratization of legal workplaces poses significant challenges for the viability of traditional notions of professionalism and prescriptions for lawyers' ethical shortcomings, or for any view of ethics and professionalism that requires a lawyer to consult some internal or fixed moral calculus, separate from the criteria for success in his workplace.

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vocating a rule requiring law firms to designate an in-house compliance specialist to address ethical issues) *and* Elizabeth Chambliss & David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel and Other Compliance Specialists in Large Law Firms*, 44 ARIZ. L. REV. 559 (2002) (describing the authors' preliminary empirical study of large law firm compliance specialists). As Chambliss and Wilkins note, one of the most serious challenges to the efficacy of in-house compliance specialists in large firms, is large-firm lawyers' failure to recognize ethical issues when they are confronted with them. *Id.* at 587. Certainly my research suggests that lawyers who follow the large-firm choice of norm rule are unlikely to identify ethical issues when they arise because they tend to view norms as mutable. The large-firm lawyers' habit of mind is to ask what norm a superior or relevant peer group would apply in the situation, not to ask if the norms are right or wrong or to check those norms against an internal moral compass.