

# INSIDE LAWYERS: FRIENDS OR GATEKEEPERS?

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## INTRODUCTION

In February 2014, after an unprecedented eleven-year delay, General Motors Company (GM) announced a recall of 2.6 million vehicles due to a defective ignition switch.<sup>1</sup> The ignition switch, which fell below GM's own torque specifications, caused engines in certain Chevrolet Cobalt and Saturn Ion cars to stall even at highway speeds and disabled airbags while the cars were still in motion.<sup>2</sup> By October 9, 2015, the number of deaths attributable to the faulty ignition switch had climbed to 124 and the number of injuries to 275.<sup>3</sup> These tragic events prompt us to ask, once again, the question first posed by Judge Stanley Sporkin in the aftermath of the savings and loan debacles of the late 1980s: Where were the lawyers?<sup>4</sup>

Sadly, in GM's case, the lawyers were right there.<sup>5</sup> Though primary blame should perhaps rest with GM's engineers, who apparently did not understand how their vehicles were built,<sup>6</sup> GM's inside lawyers,<sup>7</sup> who

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1. Sue Reisinger, *The GM Lawyers Were Here*, *LAW.COM* (July 1, 2014), <http://www.law.com/sites/articles/2014/07/01/the-gm-lawyers-were-here/> [https://perma.cc/YVF2-QMWK].

2. ANTON VALUKAS, REPORT TO BOARD OF DIRECTORS OF GENERAL MOTORS COMPANY REGARDING IGNITION SWITCH RECALLS 1 (2014).

3. DETAILED OVERALL PROGRAM STATISTICS, GM IGNITION COMPENSATION CLAIMS RESOLUTION FACILITY (Oct. 9, 2015), [http://www.gmignitioncompensation.com/docs/Program%20Statistics%20\(2015-10-09\).pdf](http://www.gmignitioncompensation.com/docs/Program%20Statistics%20(2015-10-09).pdf) [https://perma.cc/7M54-W233].

4. See *Lincoln Sav. & Loan Ass'n v. Wall*, 743 F. Supp. 901, 920 (D.D.C. 1990) (“Where were these professionals . . . when these clearly improper transactions were being consummated?”).

5. Reisinger, *supra* note 1 (“The ignition switch debacle inevitably cast the legal team in a harsh light and led to the oft-repeated phrase: Where were the lawyers? Well, they were right here.”).

6. VALUKAS, *supra* note 2, at 2 (“A critical factor in GM personnel's initial delay in fixing the switch was their failure to understand, quite simply, how the car was built.”).

7. This Article uses “inside lawyers” and “inside counsel” interchangeably to refer to corporate in-house counsel.

handled engineering, safety, and products liability issues, must be faulted for having obscured the deadly defect. The report of the internal investigation conducted by Anton Valukas and commissioned by the GM board<sup>8</sup> (“the Valukas Report”) provides important details. As early as 2005, the GM lawyers knew about the Cobalt’s tendency to stall while in motion, as contemporaneously reported by a barrage of negative press—including from *The New York Times* and the Cleveland paper *The Plain Dealer*.<sup>9</sup> As early as 2007, a Wisconsin State Patrol report that explicitly (and correctly) linked the defective ignition switch to an airbag failure in a fatal Cobalt collision entered the legal department’s files.<sup>10</sup> And, as early as 2010, the lawyers understood that the Cobalt had a history of unaddressed airbag nondeployments in known fatalities and were warned by outside counsel that GM’s inaction could be interpreted as “egregious conduct” and subject GM to punitive damages.<sup>11</sup>

Yet it was not until December 2013 that a GM lawyer finally notified GM’s general counsel that there was even an issue involving a potential recall,<sup>12</sup> in spite of a written policy—in effect since 2003—that inside attorneys should bring serious, unaddressed problems, including significant safety issues, to the attention of the general counsel.<sup>13</sup> What’s more, these lawyers were not low-level attorneys squirreled away in some rogue foreign branch office. They were highly experienced and trusted lawyers located at GM’s headquarters, some of them in charge of committees tasked with making high-level settlement and product recall decisions.<sup>14</sup> After the defect was fully communicated to the highest levels of the organization in January 2014,<sup>15</sup> four of GM’s inside lawyers were terminated.<sup>16</sup> In October 2014, General Counsel Michael Millikin announced his resignation.<sup>17</sup> With the dust now settled, the overwhelming picture that emerges of the GM lawyers is one of curious indifference.

A decade ago, a wave of corporate scandals involving more reprehensible behavior but equally stunning examples of lawyer passivity motivated me to write about the role of inside lawyers. In a series of articles, beginning in

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8. VALUKAS, *supra* note 2.

9. *Id.* at 84–86.

10. *Id.* at 116–17. None of GM’s lawyers or engineers working on Cobalt matters reported being aware of the Wisconsin State Patrol report until 2014. *Id.* at 118.

11. *Id.* at 10.

12. *Id.* at 211–13, 221, 224, 231. On February 6, 2014, GM’s General Counsel learned about the specific facts relating to the Cobalt. *Id.* at 231.

13. *Id.* at 109–10.

14. *See infra* note 121 (discussing three GM lawyers).

15. VALUKAS, *supra* note 2, at 222–24.

16. The dismissed attorneys were: Jennifer Sevigny, Head of GM’s Field Performance Assessment Group; Lawrence Buonomo, Practice Area Manager of Global Process & Litigation and Head of Product Litigation and Chair of the Settlement Review Committee; Michael Robinson, Vice President for Environmental, Sustainability and Global Regulatory Affairs and former General Counsel for GM North America; William Kemp, Counsel for Global Engineering Organization. *Id.* at 104–05, 158.

17. Bill Vlasic, *In Surprise, Top Lawyer at G.M. Sets Retirement*, N.Y. TIMES (Oct. 17, 2014), [http://www.nytimes.com/2014/10/18/business/michael-millikin-gms-top-lawyer-is-retiring.html?\\_r=0](http://www.nytimes.com/2014/10/18/business/michael-millikin-gms-top-lawyer-is-retiring.html?_r=0) [https://perma.cc/P5GS-LCLR].

2005 with *The Banality of Fraud: Re-Situating the Inside Counsel As Gatekeeper*,<sup>18</sup> I suggested that it was improper for lawyers to be mere bystanders while their client representatives violated their legal obligations,<sup>19</sup> especially when such violations were directly responsible for gross harm inflicted on shareholders, employees, or third parties. In *The Banality of Fraud*, I presented a diagnosis of the problem of inside lawyer acquiescence in corporate fraud, criticized the reforms ostensibly enacted to address the problem, and offered an alternative reform, which I believed squarely addressed the structural deficiencies identified in my diagnosis.<sup>20</sup>

In making my arguments, I invoked the notion of a “gatekeeper,” which in the capital markets context I defined as a “private intermediar[y] who can prevent harm to the securities markets by disrupting the misconduct of [his or her] client representatives.”<sup>21</sup> At the time, it was widely recognized that outside professional services providers, such as investment bankers, auditors, securities analysts, outside securities attorneys, and credit rating agencies, could perform gatekeeping functions that would benefit the securities markets.<sup>22</sup> Less acknowledged and examined was the fact that inside lawyers could act as gatekeepers and possessed the capacity to stop corporate misconduct in its tracks, as Ronald Gilson first observed in his seminal article.<sup>23</sup>

More recently, in a 2011 essay entitled *Who Let You into the House?*, Lawrence Hamermesh critiqued my reform and offered his counterproposal.<sup>24</sup> His central claim and complaint was that my alternative reform would detrimentally impact the general counsel’s access to information by discouraging informal conversations with senior managers.<sup>25</sup> To buttress his argument, Hamermesh invoked the analogy of “lawyer as friend,”<sup>26</sup> an analogy made famous by Charles Fried in his

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18. Sung Hui Kim, *The Banality of Fraud: Re-Situating the Inside Counsel As Gatekeeper*, 74 *FORDHAM L. REV.* 983, 985 (2005) [hereinafter Kim, *Banality*]; see also, e.g., Sung Hui Kim, *Gatekeepers Inside Out*, 21 *GEO. J. LEGAL ETHICS* 411 (2008) [hereinafter Kim, *Gatekeepers*]; Sung Hui Kim, *Lawyer Exceptionalism in the Gatekeeping Wars*, 63 *SMU L. REV.* 73 (2010) [hereinafter Kim, *Lawyer Exceptionalism*]; Sung Hui Kim, *Naked Self-Interest? Why the Legal Profession Resists Gatekeeping*, 63 *FLA. L. REV.* 129 (2011) [hereinafter Kim, *Naked Self-Interest*].

19. By “violations,” I mean “material violation,” as defined by the SEC rules implementing Sarbanes-Oxley. “Material violation” means a material violation of U.S. federal or state securities law, a material breach of fiduciary duty arising under any federal or state law, or a similar material violation of any federal or state law. 17 C.F.R. § 205.2(i) (2016).

20. See generally Kim, *Banality*, *supra* note 18.

21. Kim, *Gatekeepers*, *supra* note 18, at 413.

22. *Id.* at 416.

23. Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 *MD. L. REV.* 869, 884 (1990).

24. See generally Lawrence A. Hamermesh, *Who Let You into the House?*, 2012 *WIS. L. REV.* 359.

25. *Id.* at 373–74.

26. See *id.* at 376.

classic piece defending the moral praiseworthiness of the lawyer's role.<sup>27</sup> By relying on this analogy, Hamermesh strongly suggested that inside lawyers should position themselves not so much as gatekeepers but as *friends* to corporate senior managers.<sup>28</sup>

In this Article, I answer Hamermesh's central complaint that, under my reform, "general counsel would lose the benefit of the informal communications from senior managers that invariably emerge in the context of a relationship of trust and confidence."<sup>29</sup> I argue that the empirical assumptions underlying Hamermesh's complaint are not only unsupported and speculative but also reflect a poor understanding of corporate environments. And even if we assume that Hamermesh's prediction about general counsel's access to information bears out, it is unlikely that his predicted costs would offset all other benefits to be gained from my reform, in particular, the enhanced willingness of inside counsel to interdict wrongdoing in serious cases.

Turning to Hamermesh's invocation of the "lawyer as friend" analogy, I argue that the notion of friendship elides the gravity of the relevant factual context and thus cannot provide useful guidance for how inside counsel should conduct themselves in the face of serious corporate wrongdoing. "Friendship" also mischaracterizes how employees ordinarily interact with one another in organizational settings and grossly misrepresents how *some* general counsel perceive their relations with senior managers and understand their fiduciary obligations to the corporate client. Thus, as a model for inside counsel, the friendship analogy is strained, inapt, and should be avoided.

Part I of this Article sets the stage by contrasting two alternative proposals to reform the inside lawyer's role—my reform and Hamermesh's counterreform. Part II discusses the primary empirical disagreements between the two approaches. Part III interrogates the propriety and the utility of invoking the "lawyer as friend" analogy as a model to guide inside counsel's relationships with managers.

## I. TWO ALTERNATIVE REFORMS

In *The Banality of Fraud*, I argued that one could understand why inside lawyers acquiesce in fraud by combining insights from decades of social scientific research on the causes of unethical behavior with known facts about inside lawyers' roles inside the corporation.<sup>30</sup> Combining these insights and facts allows us to construct and analyze the "ethical ecology"<sup>31</sup> of inside counsel. As I argued, this ethical ecology emerges from the

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27. See Charles Fried, *The Lawyer As Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976); see also *infra* notes 135–41 and accompanying text (discussing Fried's article).

28. See *infra* notes 124–31 and accompanying text.

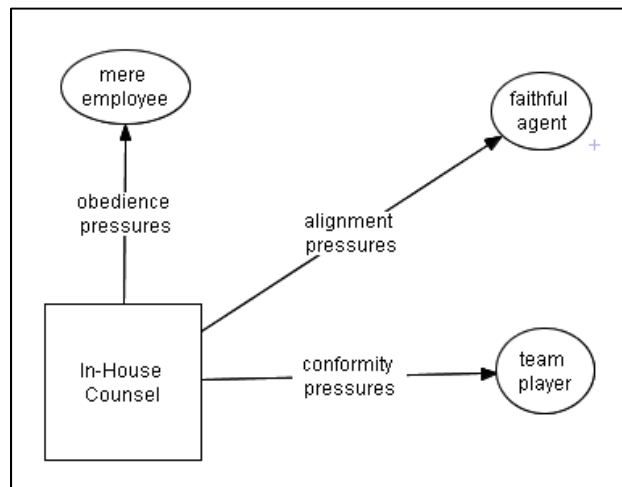
29. Hamermesh, *supra* note 24, at 374.

30. Kim, *Banality*, *supra* note 18, at 1001–34.

31. See generally *id.*

multiple roles that inside lawyers inhabit.<sup>32</sup> These roles, in turn, unleash psychological pressures that strongly affect the actions and choices of inside lawyers.<sup>33</sup> In simplified terms, inside counsel act as “mere employees” subject to obedience pressures, as “faithful agents” subject to alignment pressures, and as “team players” subject to conformity pressures.<sup>34</sup> These pressures explain why some inside lawyers turn a blind eye to unethical corporate behavior. The following diagram illustrates, somewhat crudely, this complex ethical ecology.

*The Ethical Ecology of Inside Counsel*



Given my diagnosis, I was not sanguine about the reforms enacted in the aftermath of Enron to address the problem of lawyer acquiescence in fraud.<sup>35</sup> However, in the spirit of scholarly experimentation and utility, I prodded readers to imagine what an alternative reform—one with “teeth” and responsive to the diagnosis presented—might look like. Hence, in the last twenty-two pages of the article, I explained my tripartite alternative structural reform, which should mitigate some of the obedience, alignment, and conformity pressures arising out of inside counsel’s multiple roles. The basic tenets of my reform were that

- (1) public companies transfer the oversight of the corporate legal department to a committee of independent board members;
- (2) the law guarantee whistle-blower protection to inside counsel under Sarbanes-Oxley and, accordingly, permit the disclosure of client confidences under any claim alleging retaliation under Sarbanes-Oxley or a common law claim of retaliatory discharge; and

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 1034–40.

- (3) public companies limit ex ante the amount of equity investments that an inside lawyer may accept as compensation or, in the alternative, fashion equity compensation in a manner that minimizes potential conflicts of interest.<sup>36</sup>

To be clear, I was not so delusional as to think that any of my reforms would soon or ever be enacted (or that my reform would serve as a panacea). Far-reaching reform that genuinely addresses deep structural problems, such as climate change or campaign finance, is rarely politically feasible—even after a major crisis or scandal. Still, I believed, and continue to believe, that legal scholars should not be constrained in their writing to propose only that which is politically feasible in the moment. Indeed, it would be a sorry state of affairs if academics systematically limited themselves to minor tweaks to the status quo.

Turning to Hamermesh's critique of *The Banality of Fraud*, he took issue with my reforms, calling them "radical,"<sup>37</sup> while neglecting to challenge any aspect of the diagnosis on which those reforms were based. He was especially displeased with the proposal to "re-situat[e] control of general counsel's hiring and supervision"<sup>38</sup> to a "committee of independent board members who may be organized as the audit committee or a separate" Qualified Legal Compliance Committee, as defined in the regulations of the Securities and Exchange Commission<sup>39</sup> (SEC). That proposal was designed to mitigate inside lawyers' obedience pressures and to redress the sad reality that many general counsel lack independent access to the board, as was demonstrably the case with Tyco's former general counsel Mark Belnick.<sup>40</sup> As radical as my proposal may have seemed at the time, similar proposals have been, and as recently as 2015 continue to be, embraced by other legal scholars.<sup>41</sup> Incidentally, a similar restructuring has been widely adopted for chief compliance officers in the financial industry.<sup>42</sup>

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36. *Id.*

37. Hamermesh, *supra* note 24, at 367, 369, 372, 374, 386 (referring to my reform as "radical" on five occasions).

38. *Id.* at 374.

39. Kim, *Banality*, *supra* note 18, at 1055.

40. *Id.* at 1054.

41. See, e.g., Kabir Ahmed & Dezso Farkas, *A Proposal to Encourage Up-The-Ladder Reporting by Insulating In-House Corporate Attorneys from Managerial Power*, 39 DEL. J. CORP. L. 861, 883 (2015) ("[T]he authors propose to modify the procedure for up-the-ladder reporting to bypass the CEO at every stage in the process. . . . [T]he authors propose that a separate committee of the Board comprised of independent directors be made responsible for hiring the company's CLO and the final approval over terminating the employment of the CLO and any corporate attorneys that work directly for the firm."); Rutheford B. Campbell, Jr. & Eugene R. Gaetke, *The Ethical Obligation of Transactional Lawyers to Act As Gatekeepers*, 56 RUTGERS L. REV. 9, 42 (2003); Jill E. Fisch & Kenneth M. Rosen, *Is There a Role for Lawyers in Preventing Future Enrons?*, 48 VILL. L. REV. 1097, 1136 (2003); Robert Eli Rosen, *Resistances to Reforming Corporate Governance: The Diffusion of QLCCs*, 74 FORDHAM L. REV. 1251, 1253 (2005). Some proposals are less radical and more politically feasible, but nonetheless incorporate a mandatory element. See, e.g., Stephen M. Bainbridge & Christina J. Johnson, *Managerialism, Legal Ethics, and Sarbanes-Oxley Section 307*, 2004 MICH. ST. L. REV. 299, 324 ("The SEC might have required . . . that the

Hamermesh admonished that “access and respect . . . would not be as readily accorded to a general counsel more generally perceived and situated as ‘cop’ or ‘gatekeeper.’”<sup>43</sup> As a consequence, “general counsel would lose the benefit of the informal communications from senior managers,”<sup>44</sup> which—Hamermesh clarified—“is the central issue raised by [his] Essay.”<sup>45</sup> In conclusion, Hamermesh declared: “It certainly cannot be assumed that a radical alteration in the relationship between general counsel and senior management will have no impact on general counsel’s access to internal corporate information.”<sup>46</sup>

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audit committee and/or the board meet periodically with the general counsel outside the presence of other managers and inside directors.”).

42. James A. Fanto, *Surveillant and Counselor: A Reorientation in Compliance for Broker-Dealers*, 2014 BYU L. REV. 1121, 1134–35. Also, under the Federal Sentencing Guidelines, for an organization to be deemed to have an effective ethics and compliance program for purposes of calculating the culpability score,

[s]pecific individual(s) within the organization shall be delegated day-to-day operational responsibility for the compliance and ethics program. Individual(s) with operational responsibility shall report periodically to high-level personnel and, as appropriate, to the governing authority, or an appropriate subgroup of the governing authority, on the effectiveness of the compliance and ethics program. To carry out such operational responsibility, such individual(s) shall be given adequate resources, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority.

U.S. SENTENCING COMM’N, U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)(2)(C) (2014), [http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/CHAPTER\\_8.pdf](http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/CHAPTER_8.pdf) [<https://perma.cc/U23D-WQNS>].

43. Hamermesh, *supra* note 24, at 373.

44. *Id.* at 374.

45. *Id.*

46. *Id.* This statement and others like it are straw men. For another straw man, see *id.* at 377 (“[I]t is at least as speculative to conclude that re-situating control of general counsel will have no effect on informal cooperation and sharing of information by management.”). In fact, I expressly acknowledged the possibility of negative consequences under my hypothetical reform. See Kim, *Banality*, *supra* note 18, at 1058–63 (noting potential objections to my proposed reform based on ineffectiveness, impracticability, and circumvention). Additionally, I devoted an entire section in *Gatekeepers Inside Out* to the issue of how managers might circumvent both in-house and outside lawyers. See Kim, *Gatekeepers*, *supra* note 18, at 457–60 (Part V). Elsewhere, Hamermesh seems to acknowledge that I addressed these potential negative consequences in my article but neglects to respond to my specific arguments. See Hamermesh, *supra* note 24, at 373 (“[Kim] explains the possibility that ‘corrupt’ senior management could simply choose not to consult with inside counsel, and thereby circumvent counsel’s gatekeeping influence.”).

For yet another stark example of Hamermesh’s habit of mischaracterizing my arguments, see Hamermesh, *supra* note 24, at 374 & n.52 (“Kim quotes Professor Koniak for the proposition that ‘without lawyers, few corporate scandals would exist and fewer still would succeed long enough to cause any significant damage.’ . . . Kim adds nothing to back up that *remarkable* statement.” (emphasis added)). First, Hamermesh mischaracterizes the actual text for which Professor Koniak’s work was cited. The *actual* statement for which I cited her work was other than what Hamermesh claims. The actual statement was: “[M]ost significant frauds require the cooperation or acquiescence from inside lawyers.” See Kim, *Banality*, *supra* note 18, at 1062 & n.481. Second, Hamermesh misleadingly suggests that Koniak’s work was the sole source cited to support the text. In fact, her work was just one of *three* sources cited in the specific footnote to support my statement. See *id.* at 1062 n.481. Third and more fundamentally, in light of the extensive social psychological evidence that I marshaled in *The Banality of Fraud* to demonstrate that acquiescence in fraud is banal, Hamermesh needs to either (i) contest the evidence or (ii) provide *some* explanation as to

If Hamermesh's main point was to highlight that there may be trade-offs from adopting my reform, I could not agree more. Indeed, it would be odd for any meaningful reform not to have trade-offs. I expressly acknowledged some trade-offs, including the possibility that managers might avoid or circumvent inside lawyers.<sup>47</sup> The important issue, of course, is not whether trade-offs *exist* but whether they are *on net* beneficial. But I will defer that specific discussion to Part II below.

The other possibility is that Hamermesh was presenting yet another tired defense of the status quo. If so, we should not be surprised. As William Simon observed, the most common response of the legal profession to any attempts at reform has been to "circ[le] the wagons" around traditional standards.<sup>48</sup> Histories of congressional and regulatory attempts to impose even minimal responsibilities on lawyers to prevent client fraud reveal fierce and organized opposition from the American Bar Association and its state counterparts.<sup>49</sup> Hamermesh's essay may ultimately be just another example of this penchant for resisting outside regulation. Predictably, Hamermesh displays the common judgmental biases that characterize the rhetoric of lawyers dodging regulation,<sup>50</sup> including, among others, the omission bias (the systematic tendency to discount harms arising from inaction as opposed to action) and the status quo bias (the systematic tendency to prefer the current state of affairs to a different state of affairs).<sup>51</sup>

Of course, apologists for the status quo never want to come off as apologists. Accordingly, in lieu of my *three* measures, Hamermesh proposed an impressive *seven* measures, which, he claimed, would "promote general counsel's independence and contribut[e] to effective corporate governance"<sup>52</sup>—without generating the types of negative consequences that might arise from adopting my reforms. Those measures are

- (1) explicitly and continually identifying general counsel's independence as a norm and expectation by consensus of both independent directors and senior managers;

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why lawyers would be more immune to the psychological pressures that I identified. Hamermesh does neither; instead, he simply asserts that it is "remarkable" that anyone would think that lawyers acquiesce in fraud to any significant degree. Unfortunately, such a declaration is not an argument, let alone a rebuttal.

47. See Kim, *Banality*, *supra* note 18, at 1062–63.

48. William H. Simon, *After Confidentiality: Rethinking the Professional Responsibilities of the Business Lawyer*, 75 FORDHAM L. REV. 1453, 1453 (2006).

49. See, e.g., Kim, *Lawyer Exceptionalism*, *supra* note 18, at 77–93 (Part I); Susan P. Koniak, *When the Hurlyburly's Done: The Bar's Struggle with the SEC*, 103 COLUM. L. REV. 1236 (2003); Deborah L. Rhode & Paul D. Paton, *Lawyers, Ethics, and Enron*, 8 STAN. J.L. BUS. & FIN. 9, 11 (2002) [hereinafter Rhode & Paton I]; Deborah L. Rhode & Paul D. Paton, *Lawyers, Ethics, and Enron*, in ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS 625, 645 (Nancy B. Rapoport & Bala G. Dharan eds., 2004) [hereinafter Rhode & Paton II].

50. For an analysis of the biases, see Kim, *Naked Self-Interest*, *supra* note 18.

51. Robert A. Prentice & Jonathan J. Koehler, *A Normality Bias in Legal Decision Making*, 88 CORNELL L. REV. 583, 593, 597 (2003).

52. Hamermesh, *supra* note 24, at 379.



- (2) involving independent directors in interviewing and evaluating general counsel candidates;
- (3) encouraging the CEO to consult with independent directors in selecting the general counsel;
- (4) encouraging the CEO to consult with independent directors in designing and revising the general counsel's compensation package;
- (5) encouraging the CEO to establish a relationship with the general counsel in which the general counsel has direct access to the CEO, and in which the general counsel is expected to engage in an advisory function rather than simply manage delegation of responsibility for providing legal services to the corporation;
- (6) providing regular opportunities for the independent directors to consult with the general counsel in an "executive session," outside the presence of the CEO and other senior managers; and
- (7) otherwise encouraging independent directors to consult with the general counsel, without the intervention of other senior managers.<sup>53</sup>

It is quite possible that Hamermesh's measures will generate no negative consequences. But that is hardly the standard by which reform should be judged. After all, one way in which a proposal might have no negative impact is by having *no* impact—good *or* bad. When one glances at the verbs employed in Hamermesh's measures (the principal verb being "encourag[e]"), one not only wonders whether these measures will have any impact but also whether that was the intention.

Turning from his verbs to his omissions, Hamermesh categorically rejects any reform that addresses the *structural* forces likely to lead inside lawyers to succumb to psychological pressures in their multiple roles.<sup>54</sup> He rejects any attempt to guarantee the general counsel formal independent access to the board, even though many inside counsel desire greater access to the board.<sup>55</sup> Even creating a dotted line reporting relationship from the general counsel to a committee of independent directors would, no doubt, be seen as "too subversive." Additionally, he neglects to address the perverse incentive effects associated with compensating counsel in equity, which many legal academics believe to be problematic.<sup>56</sup> Further, he fails

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53. *Id.* at 362.

54. *Id.* at 361.

55. In a survey of 1216 in-house counsel conducted in 2003, "44 percent believed that better access to the board of directors was needed to ensure the well-being of their company." Chad R. Brown, *In-House Counsel Responsibilities in the Post-Enron Environment*, ACCA DOCKET, May 2003, at 92, 97.

56. See, e.g., Z. Jill Barclift, *Corporate Responsibility: Ensuring Independent Judgment of the General Counsel—A Look at Stock Options*, 81 N.D. L. REV. 1 (2005); John S. Dzienkowski & Robert J. Peroni, *The Decline in Lawyer Independence: Lawyer Equity Investments in Clients*, 81 TEX. L. REV. 405, 414 (2003); Kim, *Banality*, *supra* note 18, at 1007 n.143 (reporting the views of Richard Painter and Susan Koniak); Donald C. Langevoort, *When Lawyers and Law Firms Invest in Their Corporate Clients' Stock*, 80 WASH. U. L.Q. 569, 570 (2002); Nancy J. Moore, *Conflicts of Interest for In-House Counsel: Issues Emerging from the Expanding Role of the Attorney-Employee*, 39 S. TEX. L. REV. 497,

to even acknowledge the need to protect inside lawyers from retaliation, a measure favored by a chorus of legal academics<sup>57</sup> as well as inside lawyers.<sup>58</sup> This particular omission is troubling in light of recent findings that 21 percent of U.S. workers who reported misconduct at their workplace also reported suffering from retaliation.<sup>59</sup>

The impotent verbs and the glaring omissions suggest that Hamermesh is advancing little more than a precatory laundry list of incremental best practices.<sup>60</sup> While there is nothing inherently wrong with best practices, best practices do not have a strong track record of success with those companies representing the lion's share of the problem—prominent, large-capitalization companies widely known to have dysfunctional corporate cultures, such as GM, Enron, WorldCom, and, now, Volkswagen.<sup>61</sup> For example, Jeffrey Gordon observed that Enron had implemented nearly all of the best practices proposed by corporate governance authorities—“independent directors, specialized committees (especially an audit committee) consisting exclusively of independent directors to perform crucial monitoring functions, and clear charter of board authority,” as well

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540 (1997); Poonam Puri, *Taking Stock of Taking Stock*, 87 CORNELL L. REV. 99 (2001); Rhode & Paton I, *supra* note 49, at 25.

57. See generally Eric Alden, *Blocking the Ax: Shielding Corporate Counsel from Retaliation As an Alternative to White Collar Hypercriminalization*, 36 U. HAW. L. REV. 95 (2014); Grace M. Giesel, *The Ethics or Employment Dilemma of In-House Counsel*, 5 GEO. J. LEGAL ETHICS 535, 540 (1992); Stephen Gillers, *Protecting Lawyers Who Just Say No*, 5 GA. ST. U. L. REV. 1, 5 (1998); Nancy Kubasek, M. Neil Browne & Julie Harris, *The Social Obligation of Corporate Counsel: A Communitarian Justification for Allowing In-House Counsel to Sue for Retaliatory Discharge*, 11 GEO. J. LEGAL ETHICS 665, 688 (1997); Alex B. Long, *Whistleblowing Attorneys and Ethical Infrastructures*, 68 MD. L. REV. 786, 790 (2009); Jennifer M. Pacella, *Conflicted Counselors: Retaliation Protections for Attorney-Whistleblowers in an Inconsistent Regulatory Regime*, 33 YALE J. ON REG. (forthcoming 2016); Daniel S. Reynolds, *Wrongful Discharge of Employed Counsel*, 1 GEO. J. LEGAL ETHICS 553 (1988); Sally R. Weaver, *Client Confidences in Disputes Between In-House Attorneys and Their Employer-Clients: Much Ado About Nothing—Or Something?*, 30 U.C. DAVIS L. REV. 483 (1997).

58. See Brown, *supra* note 55, at 97 (reporting that “48 percent [of 1216 attorneys serving as general counsel or other in-house counsel] believed that establishment of laws protecting attorney whistleblowers” was necessary to ensure the well-being of the organizational client).

59. ETHICS RES. CTR., NATIONAL BUSINESS ETHICS SURVEY 13 (2013).

60. Alden, *supra* note 57, at 165 & n.211 (“This is in essence a precatory list of suggested best practices, and nothing more.”).

61. See DENNIS B. BERESFORD ET AL., REPORT OF INVESTIGATION BY THE SPECIAL INVESTIGATIVE COMMITTEE OF THE BOARD OF DIRECTORS OF WORLDCOM, INC. 18–24 (2003) (describing WorldCom’s corporate culture); Ronald R. Sims & Johannes Brinkmann, *Enron Ethics (Or: Culture Matters More than Codes)*, 45 J. BUS. ETHICS 243 (2003) (discussing the culture at Enron); Ben W. Heineman, Jr., *GC and CEO Responsibility for GM’s Dysfunctional Culture*, CORP. COUNS. ONLINE (June 6, 2014) (available online through Lexis Advance) (discussing GM’s “badly broken safety culture”); Jerry Useem, *What Was Volkswagen Thinking?*, ATLANTIC, Jan./Feb. 2016, at 26, 28, <http://www.theatlantic.com/magazine/archive/2016/01/what-was-volkswagen-thinking/419127/> (discussing culture in connection with the recent Volkswagen scandal) [<https://perma.cc/8E5N-HA7T>].

as stock-based compensation for directors.<sup>62</sup> Yet, the Enron board was “ineffectual in the most fundamental way, the Audit Committee particularly somnolent if not supine.”<sup>63</sup> In these types of companies, making the banal recommendation that board members should pay more attention to their general counsel is not likely to do much. As Eric Alden, a former equity partner of two AmLaw 100 law firms, predicted, “[Hamermesh’s] soft, precatory measures . . . would leave the status quo in effect unchanged.”<sup>64</sup>

## II. EMPIRICAL DISAGREEMENTS

As noted above, Hamermesh posited that “access and respect . . . would not be as readily accorded to a general counsel more generally perceived and situated as ‘cop’ or ‘gatekeeper.’”<sup>65</sup> Accordingly, “[G]eneral counsel would lose the benefit of the informal communications from senior managers that invariably emerge in the context of a relationship of trust and confidence.”<sup>66</sup> Hence, the crux of Hamermesh’s critique is his central prediction that, under my reform, the general counsel would lose access to information via informal communication channels.<sup>67</sup> Part II explores this central prediction and the attendant empirical disagreements that ground our disparate approaches.

Let me start off by noting that Hamermesh offers no direct or indirect empirical evidence to support the central prediction lying at the heart of his critique.<sup>68</sup> Let me also concede that, given the paucity of relevant data on the subject, that omission is hardly cause for protest. Less forgivably, however, Hamermesh offers no explicit *theory* to explain why or how transferring the oversight of the corporate legal department to a committee of independent board members should chill informal conversations between the general counsel and senior managers. On close examination, it becomes clear that his central prediction is predicated on a vague and undefended behavioral assumption.<sup>69</sup>

Hamermesh’s principal behavioral assumption is that general counsel’s demeanor would change once the reassignment takes place.<sup>70</sup> According to

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62. Jeffrey N. Gordon, *What Enron Means for the Management and Control of the Modern Business Corporation: Some Initial Reflections*, 69 U. CHI. L. REV. 1233, 1241 (2002).

63. *Id.*

64. Alden, *supra* note 57, at 164.

65. Hamermesh, *supra* note 24, at 373.

66. *Id.* at 374.

67. *See id.*

68. There is one exception in which indirect evidence is arguably marshaled; unfortunately, it does not support Hamermesh’s contention. *See infra* notes 170–75 and accompanying text.

69. *Id.*

70. I am not the first to notice that Hamermesh implicitly posits this behavioral assumption. *See* Alden *supra* note 57, at 165 (“The structural centerpiece of [Hamermesh’s] argument is that corporate counsel which is protected from retaliatory termination and supervised directly by the audit committee will begin to be perceived (*presumably based on actual conduct*) as a ‘cop’ and ‘gatekeeper,’ whereas counsel which lives in fear of

Hamermesh, managers will avoid a general counsel who is “actively independent,”<sup>71</sup> “aggressively independent,”<sup>72</sup> “distant,”<sup>73</sup> and “adversarial”<sup>74</sup>—akin to a “cop”<sup>75</sup> or an “adversarial monitor.”<sup>76</sup> He doesn’t explain why this should occur or even what *actively independent*, as opposed to *just independent*, behavior looks like. Does an “actively independent” or “adversarial” general counsel report up the ladder more frequently? Apparently not, as Hamermesh explicitly denies that he is making any claims about the likelihood of reporting misconduct up the ladder.<sup>77</sup> Without any explanation as to what “actively independent” or “adversarial” entails in terms of real behavior or why such alleged behavior should come about, we are left with the vague objection that the general counsel will respond to a reassignment in a way that would invariably be perceived as deeply alienating to senior managers, causing senior managers to clam up in the company of the general counsel.

These types of vague and hyperbolic objections are not new. In prior work analyzing the bar’s reactions to post-Enron calls for reform, I observed how the bar worried about lawyers being “‘overanxious,’ as ‘cry[ing] wolf,’ . . . acting in an ‘imprudent and uninformed manner,’ and making ‘mountains’ out of ‘mole hills.’”<sup>78</sup> In fact, I anticipated objections of this ilk when I first proposed my reform. In *The Banality of Fraud*, I expressly addressed the concern that “an ambitious, overeducated, newly empowered, and more independent inside lawyer will become unduly confrontational and uncooperative, making frequent and unnecessary reports (‘false alarms’) to the board.”<sup>79</sup> In response to this concern, I wrote:

[I] believe that this scenario is very unlikely, precisely because there is no way to eliminate conformity pressures. Pressures to be a “team player,” despite all of my reforms, will remain and persist substantially. To the

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termination will conduct themselves in such a way so as to be perceived as being a ‘close friend’ of the senior business managers.” (emphasis added)).

71. Hamermesh, *supra* note 24, at 376.

72. *Id.* at 386.

73. *Id.* at 378.

74. *Id.* at 376.

75. *Id.*

76. *Id.* at 378.

77. Hamermesh explicitly denies that he is making the claim that managerial candor will erode due to an expectation of diminished confidentiality in anticipation of more frequent reports up the ladder. He notes that the issue of whether protecting in-house counsel (after they’ve blown the whistle and revealed confidences) would “discourage communication[s] from [managers]” is a “somewhat different context” and that he is concerned only about “chilling communication[s] resulting from re-situating control of the general counsel.” *Id.* at 377. He also notes that my citation of empirical evidence casting doubt on the link between expectations about confidentiality and client candor “does not directly address the point [made in his essay],” yet again emphasizing that he is making no claim about the impact of an expectation of diminished confidentiality. *Id.*

78. Kim, *Naked Self-Interest*, *supra* note 18, at 152 (quoting Letter from the N.Y.C. Bar Ass’n to Jonathan G. Katz, Sec’y, SEC (Apr. 7, 2003), [http://www.abcny.org/pdf/report/300062186\\_4.pdf](http://www.abcny.org/pdf/report/300062186_4.pdf) [<http://perma.cc/3P2F-FWUA>]); Letter from Sullivan & Cromwell LLP to Jonathan G. Katz, Sec’y, SEC (Apr. 7, 2003), <http://www.sec.gov/rules/proposed/s74502/sullivan040703.htm> [<http://perma.cc/UV59-265V>].

79. Kim, *Banality*, *supra* note 18, at 1075.

extent that these pressures will reduce the likelihood of opportunistic and overly aggressive inside lawyer conduct, conformity pressures can be good.<sup>80</sup>

No one, not even a director or lawyer, is immune to conformity pressures, which are automatically triggered by group membership and organizational settings.<sup>81</sup> And no amount of redrawing of reporting lines can eliminate the team player pressures “to go along to get along” that are ubiquitous in corporate workplaces.<sup>82</sup> Further, those pressures are likely to inhibit the dramatic change in the general counsel’s demeanor, a change that Hamermesh apparently assumes.

Additionally, Hamermesh ignores the fact that, even under my reform, the general counsel can still be terminated. Directors can still lose faith in the general counsel for all sorts of reasons, including for not being sufficiently creative in devising outside-the-box legal solutions to business problems or for simply being “obstreperous” and “difficult to work with.” And while in recent years directors have generally become more independent from the CEO, there are many companies in which boards still operate like rubber-stamps for the CEO<sup>83</sup>—a possibility that even Hamermesh acknowledges.<sup>84</sup>

Also, Hamermesh conveniently ignores the available empirical evidence on the behavior of lawyers—evidence that tends to undermine his behavioral assumption. For example, in 1985, sociologist Robert Nelson reported in his survey of 224 randomly selected lawyers that only approximately 16 percent of respondents reported *ever* having refused an assignment or potential work due to a conflict with their personal values (very broadly defined).<sup>85</sup> And of the forty-six individuals who claimed to have refused work, only ten (out of 224) reported doing so because the client was committing a crime,<sup>86</sup> and only *one* lawyer reported convincing a client not to proceed for ethical reasons.<sup>87</sup> In another study of 787 randomly selected lawyers conducted in 1995, John Heinz et al. reported that only 20 percent of lawyers working in law firms of over one hundred lawyers, and only 9 percent of inside lawyers, admitted to *ever* having refused an assignment due to a conflict with their personal values.<sup>88</sup> In 2004, Roger Cramton et al. observed, “[I]t is clear that the incidence of

80. *Id.*

81. *See id.* at 1019–24 (discussing conformity pressures).

82. *See id.* at 1024–25 (discussing conformity pressures in the workplace, particularly with respect to the stigma associated with dissent).

83. Bainbridge & Johnson, *supra* note 41, at 304 (“There are still management-captured boards, even if there are not as many as there used to be.”).

84. Hamermesh, *supra* note 24, at 381 (noting that a board’s formal approval of the CEO’s decision to hire general counsel “may frequently amount to little more than a rubber stamp”).

85. Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Firm*, 37 *STAN. L. REV.* 503, 535–36 (1985).

86. *Id.*

87. *Id.*

88. JOHN P. HEINZ ET AL., *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR* 117 (2005).

whistleblowing by lawyers is astonishingly low given the fact that most or all states require disclosure when a crime or fraud has been perpetrated on a tribunal.”<sup>89</sup> Perhaps most revealing, since 2002, lawyers “appearing and practicing before the [SEC] in any way in the representation of issuers”<sup>90</sup> have been granted the discretion to report out to the SEC, without the issuer’s consent, confidential information relating to unrectified material law violations.<sup>91</sup> To date, *no lawyer* has reportedly done so. The aforementioned empirical evidence suggests that the scenario of an unduly confrontational or “adversarial” general counsel is overblown.

If the evidence on the behavior of lawyers does not persuade, perhaps the evidence on auditors will. According to the U.S. Supreme Court, the “‘public watchdog’ function [of auditors] demands that the accountant maintain total independence from the client at all times and requires complete fidelity to the public trust.”<sup>92</sup> Yet, the evidence to date suggests that even auditors rarely display so-called “actively independent” behavior. Since 1995, auditors have been under a statutory obligation to report to the SEC any unrectified law violations encountered in their work for public corporate clients.<sup>93</sup> Given the number of public companies registered with the SEC—almost 12,000 by the end of 1999<sup>94</sup>—one might expect the number of auditors reporting out law violations to be in the hundreds. To the contrary, from 1995 to 2003, auditors reported only twenty-nine violations.<sup>95</sup>

Of course, one could believe that lawyers and auditors do not report violations because there are so few violations to report. But that belief seems contrary to what is generally known about the various forms of

89. Roger C. Cramton, George M. Cohen & Susan P. Koniak, *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILL. L. REV. 725, 816–17 (2004).

90. 15 U.S.C. § 7245 (2012).

91. 17 C.F.R. § 205.3(d)(2) (2014).

92. *United States v. Arthur Young & Co.*, 465 U.S. 805, 818 (1984).

93. See Private Securities Law Reform Act of 1995, Pub. L. No. 104-67, § 301, 109 Stat. 737, 762–64 (codified as amended at 15 U.S.C. § 78j-1); John C. Coffee, Jr., *Attorney As Gatekeeper: An Agenda for the SEC*, 103 COLUM. L. REV. 1294, 1306 (2003).

94. See Lynn M. LoPucki & Sara D. Kalin, *The Failure of Public Company Bankruptcies in Delaware and New York: Empirical Evidence of a “Race to the Bottom”*, 54 VAND. L. REV. 231, 242 (2001) (citing SEC, DIRECTORY OF COMPANIES REQUIRED TO FILE ANNUAL REPORTS WITH THE SECURITIES AND EXCHANGE COMMISSION 1 (1999) (reporting the number of public companies from 1983 to 1999)). By 1999, the number was 11,998. *Id.*

95. U.S. GOV’T ACCOUNTABILITY OFFICE, SECURITIES EXCHANGE ACT: REVIEW OF REPORTING UNDER SECTION 10A (2003) (reporting violations from 1995 to 2003).

Of course, this evidence might lead one to (reasonably) think that imposing gatekeeping duties on lawyers is futile. To that objection, I responded:

But we live in a world of neither perfect solutions nor ideal gatekeepers, so the relevant issue is not so much whether lawyers make good gatekeepers in some absolute sense but always as compared to what? . . . Suffice it to say that . . . it seems odd to exempt those professionals who are presumably most adept at identifying law violations.

Kim, *Naked Self-Interest*, *supra* note 18, at 159–60. Also, Tanina Rostain’s study suggests that the gatekeeper vision is attainable—at least for some general counsel. See Tanina Rostain, *General Counsel in the Age of Compliance: Preliminary Findings and New Research Questions*, 21 GEO. J. LEGAL ETHICS 465, 473–80 (2008).

organizational misconduct, including, for example, securities fraud. While there is no way of ascertaining with any precision the total incidence of securities fraud, we do know that public company restatements of financial data, which reduce previously reported income, are not exactly rare. From 2003 to 2012, there were 2422 financial restatements announced by public companies in which the restatement reduced previously reported income, of which over 1300 were sufficiently material to have been reported on the SEC Form 8-K.<sup>96</sup> Turning to other workplace infractions, survey evidence suggests that workplace ethical breaches are not uncommon.<sup>97</sup> For example, in surveys conducted annually since 2000 by the Ethics Resource Center, between 41 and 55 percent of the employee-respondents<sup>98</sup> reported that they had observed some type of misconduct in the workplace.<sup>99</sup> We also know that other unethical behavior—e.g., cheating—is believed to be widespread.<sup>100</sup> Several laboratory studies on cheating found that people tend to “cheat when given . . . an easy, unverifiable opportunity to do so.”<sup>101</sup> A recent experiment conducted on bank professionals found that “a significant proportion” of these bankers cheated in a simple coin-flip experiment.<sup>102</sup> With respect to consumer fraud in the United States, the Federal Trade Commission estimates that there were 37.8 million incidents of fraud in 2011, and Stanford University’s Financial Fraud Research Center estimates the annual cost of fraud to be over \$52 billion.<sup>103</sup> While

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96. SUSAN SCHOLZ, FINANCIAL RESTATEMENT TRENDS IN THE UNITED STATES: 2003–2012, at 14 fig.9 (2012), <http://www.thecaq.org/docs/reports-and-publications/financial-restatement-trends-in-the-united-states-2003-2012.pdf> [<http://perma.cc/PWA9-HUVH>]. Of course, we have no way of knowing what percentage of these errors were intentional.

97. See ETHICS RES. CTR., *supra* note 59, at 15.

98. The Ethics Resource Center has “polled and reported findings on more than 34,000 [public sector] employees” over the course of its ethics research. *Id.* at 10. Respondents in the 2013 survey “were 18 years of age or older; currently employed at least 20 hours per week for their primary employer; and working for a company that employs at least two people.” *Id.*

99. *Id.* at 15 (reporting rates from 2000 to 2013). Examples of the types of misconduct reported include “[l]ying to employees, . . . [d]iscrimination[,] . . . sexual harassment[,] . . . falsifying company financial data and public reports[,] . . . misleading information on financial reports[, and offering] a bribe to public officials.” *Id.* at 20.

100. See, e.g., JOSEPHSON INST. OF ETHICS, 2012 REPORT CARD ON THE ETHICS OF AMERICAN YOUTH 41 (2012), <https://charactercounts.org/wp-content/uploads/2014/02/ReportCard-2012-DataTables.pdf> (noting that in a survey of high school students, nearly one-half admitted to cheating on a test during the past year) [<https://perma.cc/3Q8H-TY66>].

101. MAX H. BAZERMAN & ANN E. TENBRUNSEL, BLIND SPOTS: WHY WE FAIL TO DO WHAT’S RIGHT AND WHAT TO DO ABOUT IT 7 (2011) (citing Francesca Gino & Lamar Pierce, *The Abundance Effect: Unethical Behavior in the Presence of Wealth*, 109 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 142 (2009)); Nina Mazar & Dan Ariely, *Dishonesty in Everyday Life and Its Policy Implications*, 25 J. PUB. POL. & MKTG. 117 (2006); Maurice E. Schweitzer, Lisa Ordóñez & Bambi Douma, *Goal Setting As a Motivator of Unethical Behavior*, 47 ACAD. MGMT. J. 422 (2004).

102. Alain Cohn et al., *Business Culture and Dishonesty in the Banking Industry*, 516 NATURE 86, 86 (2014) (finding that “when their professional identity as bank employees is rendered salient, a significant proportion of [employees of a large, international bank] become dishonest”).

103. MARTHA DEEVY & MICHAELA BEALS, FIN. FRAUD RESEARCH CTR., THE SCOPE OF THE PROBLEM: AN OVERVIEW OF FRAUD PREVALENCE MEASUREMENT 19, 28 (2013),

there is no way of knowing the actual frequency of material law violations, it seems naïve to think that they are uncommon.

Hamermesh might reply that no one has a crystal ball, and thus it is impossible to accurately assess the impact of any reform. Hence, even if his predicted costs are speculative, they still would be *plausible*. I agree that those costs are plausible, as I acknowledged in *The Banality of Fraud*.<sup>104</sup> But the fact that a particular reform has some plausible costs does not establish that reform's disutility. What is relevant is a reform's *net* impact—whether the desirable effects of a reform outweigh the potentially undesirable ones of decreased information. In other words, if we assume that the predicted costs (loss of some information containing the red flags of misconduct) will be incurred, would those costs likely offset all other benefits to be gained from my reform?

To even begin to answer that question, it is necessary to situate those costs in the context of all other information sources. As I observed in *Gatekeepers Inside Out*, information can flow through both informal and formal communication channels.<sup>105</sup> In addition, inside counsel can learn of information from the perpetrators themselves or from other sources, e.g., other inside lawyers, outside vendors, or other employees. By intersecting these insights, we see that critical information can be gained (1) directly from perpetrators through informal communications; (2) from nonperpetrators through informal communications; (3) directly from perpetrators through formal communications; and (4) from nonperpetrators through formal communications. The following two-by-two matrix classifies the relevant information categories according to the sources of information (perpetrator vs. nonperpetrator) and their relevant modes of transmission (informal vs. formal). These information categories are identified by their respective quadrants.

	<b>Perpetrators*</b>	<b>Nonperpetrators**</b>
<b>Informal Communications</b>	Quadrant I	Quadrant II
<b>Formal Communications</b>	Quadrant III	Quadrant IV

\* Perpetrators are those principally engaged in the wrongdoing. Hamermesh's central prediction assumes the perpetrators are senior managers.

\*\* Nonperpetrators include inside counsel, outside counsel, and other company employees who are not principally engaged in the wrongdoing.

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[http://fraudresearchcenter.org/wp-content/uploads/2013/11/Scope-of-the-Problem-FINAL\\_corrected2.pdf](http://fraudresearchcenter.org/wp-content/uploads/2013/11/Scope-of-the-Problem-FINAL_corrected2.pdf) [https://perma.cc/9ZSZ-SME8].

104. See *supra* note 46.

105. See Kim, *Gatekeepers*, *supra* note 18, at 448–54.



The above matrix clarifies that Hamermesh's central prediction—that there would be a decrease in informal communications between senior managers and the general counsel—narrowly concentrates on the information classified in a single quadrant, namely, Quadrant I (perpetrators, informal communications). While it is plausible that there would be a decrease in Quadrant I information, it is only *one* category of information sources and may not even be the primary source of critical information for the general counsel.

First, the general counsel could gain the critical information from formal or informal conversations with subordinate inside counsel or outside lawyers (Quadrants II and IV). In larger companies with larger legal budgets, the general counsel will not handle all legal risks posed, nor will she be the sole legal mind involved in discussions. Much legal work will be delegated to subordinate inside counsel as well as outside lawyers, some of whom may have closer access to the relevant facts. For example, the Valukas Report found that many of GM's subordinate inside and outside lawyers handled cases involving ignition switch and airbag nondeployment problems in fatal collisions but failed to link the two problems.<sup>106</sup> Because the general counsel is likely to have routine interactions with members of her legal department, this may be the primary source of critical information for the general counsel.

Second, the general counsel could gain the critical information from formal or informal conversations with other employees not directly involved in the misconduct, including employees staffed in the company's compliance, internal audit, or risk departments, as well as other employees who may be incidental victims of wrongdoing (Quadrants II and IV). For example, Cynthia Cooper, the former Vice President of Internal Audit and famed whistleblower at WorldCom, initially learned in 2002 about WorldCom's fraudulent accounting practices not from the perpetrator of the fraud (CFO Scott Sullivan) but from one of its *victims*. That victim happened to be a manager in the wireless division who told Cooper that corporate accounting had taken \$400 million out of his reserve account and used it to boost WorldCom's income.<sup>107</sup> Moreover, this manager was not alone in his knowledge of the misdeed. WorldCom's investigative report observed that “[n]umerous individuals—most of them in financial and accounting departments, at many levels of the Company and in different locations around the world—became aware in varying degrees of senior management's misconduct.”<sup>108</sup> Hamermesh's myopic focus on informal communications emanating from the perpetrator ignores the fact that the corporate scandals publicized at the turn of the century were predominantly transgressions facilitated by *groups* of top executives and their advisors,

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106. See VALUKAS, *supra* note 2, at 110–15, 124–42, 211–13.

107. Amanda Ripley, *The Night Detective*, TIME, Dec. 30, 2002, at 45, 46.

108. BERESFORD ET AL., *supra* note 61, at 18.

rather than isolated individuals.<sup>109</sup> Group transgressions are naturally harder to conceal from colleagues within the company.

Third, the general counsel could glean the critical information from *formal* discussions with senior managers (Quadrant III). After all, managers do not consult inside counsel out of a desire to widen their social network; they consult inside lawyers because their jobs often require them to do so. In some cases, such as in Enron's off-balance sheet structured finance transactions where lawyers drafted the relevant documents and provided legal opinions, legal assistance may be *necessary* to perpetrate the illegal scheme in the first place.<sup>110</sup> In those situations, managers have some built-in incentive to err on the side of more disclosure. If the manager lies or withholds critical information from inside counsel in an effort to conceal wrongdoing, he also risks receiving inadequate legal help at his own peril. Inside lawyers can gain important information during formal discussions by, for example, interrogating the purpose of the proposed scheme. For example, if Kristina Mordaunt, a former Enron senior inside attorney, had genuinely inquired about the purpose of the fraudulent LJM1/Rhythms Hedging Transaction that was brought to her attention, she might have learned that it was a "hedge for financial accounting purposes only, lacking any economic substance or rational business purpose, but was intended by certain Enron officers to manipulate Enron's financial statements."<sup>111</sup> In other cases, legal assistance may not be necessary to the scheme, such as in a pure accounting fraud, but an adept lawyer, i.e., one who pays attention to financial issues and has a good "spider sense," may still be able to catch wind that something is awry. The point is that inside counsel can still gain important information during *formal* consultations and meetings.

That said, we do not actually know the underlying rate at which perpetrators reveal critical information directly to their inside lawyers—either formally *or* informally. Whether perpetrators do so in any given case will depend on the nature of the wrongdoing (e.g., the degree to which legal assistance is necessary) and the perpetrator's state of mind (e.g., intentional vs. reckless), as well as other characteristics of the perpetrator (e.g., loquacious vs. reticent). With respect to *intentional* misconduct, it is unclear whether the amount of critical information ordinarily revealed to inside lawyers would be of threshold significance. As Stephen Bainbridge and Christina Johnson have noted, "Managers who intentionally commit fraud or breaches of fiduciary duty will only rarely consult their legal counsel."<sup>112</sup> And even honest mistakes in judgment may never be

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109. See James Fanto, *Whistleblowing and the Public Director: Countering Corporate Inner Circles*, 83 OR. L. REV. 435, 445–57 (2004) (making this point by surveying the evidence of Enron, WorldCom, Tyco, Xerox, Global Crossing, Adelphia Communications, Qwest, Sprint, and HealthSouth).

110. See Milton C. Regan, Jr., *Teaching Enron*, 74 FORDHAM L. REV. 1139, 1157–62 (2005) (discussing the legal opinions and documents issued in connection with Enron's structured finance transactions).

111. Final Report of Neal Batson, Court Appointed Examiner at 53 app. C, *In re Enron Corp.*, 357 B.R. 257 (Bankr. S.D.N.Y. 2006) (No. 01-16034), 2003 WL 23109187.

112. Bainbridge & Johnson, *supra* note 41, at 321.

acknowledged by the perpetrator. For example, Raymond DeGiorgio, the GM engineer who originally approved the substandard ignition switch in 2002 and then covertly replaced it in 2006,<sup>113</sup> never admitted to anything—let alone confessed anything to GM’s general counsel. Even when DeGiorgio was confronted during a deposition in 2013 with incontrovertible evidence of his colossal errors, he simply testified that he could not remember.<sup>114</sup> Therefore, it is not clear whether the particular information costs pointed out by Hamermesh are even significant enough for policymakers to be seriously concerned.

But even if we assume that the information disclosed directly by perpetrators reaches threshold significance, any decrease in such information is unlikely to outweigh all other benefits to be gained from my reform. One such benefit may be an increase in the flow of information from nonperpetrators to inside counsel. To the extent that redirecting oversight of the legal department conveys the strong message to company employees that the board takes compliance very seriously, employees may be more willing to come forward with critical information.

Another (and perhaps more important) likely benefit of my reform is the enhanced willingness by the general counsel to intervene in cases of suspected managerial wrongdoing. Under my reform, the general counsel is legally protected from retaliation and has at least formal independent access to the board.<sup>115</sup> As a result, she should feel more emboldened to confront the wrongdoing manager or to take a report of evidence of a material violation to the board. Under Hamermesh’s reform, the general counsel has none of these protections and thus remains quite vulnerable should she confront the wrongdoing manager.

Alden highlighted how important it is for policymakers to understand the structural forces that frame this moment of ethical choice for inside lawyers. Lambasting Hamermesh’s reforms for not legally protecting inside counsel from retaliation, Alden noted:

[P]recisely the situation for which one must be prepared, precisely the situation for which protective rules are implemented, is the . . . unfortunate case where senior business managers know very well what they are doing and are determined to proceed with an illegal course of conduct in the pursuit of advantage. This is the acid test. This is when it counts. This is when you need corporate counsel with the intestinal fortitude and practical ability to say, “Stop.” The last thing in the world one wants at this juncture is cringing, sycophantic, pliable counsel unable or unwilling, due to an entirely justified fear of termination and the tremendous personal consequences which can easily and foreseeably flow therefrom, to assert themselves successfully against determined, corrupt senior managers engaged or proposing to engage in illegal conduct.<sup>116</sup>

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113. VALUKAS, *supra* note 2, at 51, 98–100, 101 n.416.

114. *Id.* at 199.

115. *See supra* note 36 and accompanying text.

116. Alden, *supra* note 57, at 165–66.

As the above passage suggests, saying “stop” is not as easy as people assume. To be sure, *some* inside counsel will have the gumption to say “stop” under any regulatory regime. But for many others, such as former Apple General Counsel Nancy Heinen<sup>117</sup> and the more than twenty other former inside counsel who were fired, demoted, or forced to resign amidst investigations or allegations that they had acquiesced in the backdating of managerial stock options,<sup>118</sup> saying “stop” to the senior manager was apparently *not* so easy. For these critical moments, hoping that boards have heeded Hamermesh’s advice to “continually identify[] general counsel’s independence as a norm”<sup>119</sup> will not stop the train wreck.

Hamermesh’s reform fails because it is based on a faulty diagnosis—that insufficient access to information poses the greatest threat to inside counsel’s gatekeeping abilities. But, as I suggested in prior work, it is not so much the lack of information (i.e., the “capacity to monitor”), but rather the *unwillingness to interdict*, that poses the greatest obstacle for inside counsel gatekeepers.<sup>120</sup> And these observations, I believe, would still generally hold true even under my alternative reform. It is noteworthy that the GM lawyers implicated in the scandal did not suffer from lack of access to information about the existence of a problem but from a marked unwillingness to rock the boat in an effort to solve the problem before them.<sup>121</sup> When GM’s CEO Mary Barra finally announced the removal of these employees, she did not complain that her lawyers were poorly informed. Rather, she stated that they “simply didn’t do enough: they didn’t take responsibility; didn’t act with any sense of urgency.”<sup>122</sup> On the more pressing problem of inside counsel’s unwillingness to interdict, Hamermesh’s reform does little to change the structure on which inside counsel’s incentives to interdict are grafted. My alternative reform is more likely to enable the general counsel to take an ethical stand precisely when it counts.

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117. SEC, LITIGATION RELEASE NO. 20683, SEC SETTLES OPTIONS BACKDATING CHARGES WITH FORMER APPLE GENERAL COUNSEL FOR \$2.2 MILLION (2008), <https://www.sec.gov/litigation/litreleases/2008/lr20683.htm> [<http://perma.cc/KCC7-LVNW>].

118. See Yuri Mikulka & John M. Horan, *General Counsel Under Attack: Criminal and Enforcement Proceedings, Investigations, and the Travails of In-House Counsel*, AM. BAR ASS’N (Oct. 17, 2007), [http://apps.americanbar.org/litigation/committees/corporate/docs/2007\\_materials\\_underattack.pdf](http://apps.americanbar.org/litigation/committees/corporate/docs/2007_materials_underattack.pdf) (identifying seventy-seven inside counsel targeted in criminal and enforcement proceedings and investigations and identifying counsel implicated in options backdating) [<https://perma.cc/797F-CX6S>].

119. Hamermesh, *supra* note 24, at 379.

120. See Kim, *Gatekeepers*, *supra* note 18, at 457, 460–61.

121. Lawrence Buonomo, Head of Product Litigation and, since 2012, Chair of the Legal Review Committee that decided settlements, “saw numerous fatal crash cases pass before him”; William Kemp, Counsel for GM’s Global Engineering Organization, was a member of that same committee since 2006 and as early as 2004 was involved in ignition switch problems; Jennifer Sevigny, Head of GM’s Field Performance Assessment Group, worked on assessments of the ignition switch problem. Sue Reisinger, *GM In-House Lawyers ‘Removed’ in Ignition-Switch Purge*, CORP. COUNS. ONLINE (June 9, 2014) (available online through Lexis Advance).

122. *Id.*

In sum, the principal behavioral assumption on which Hamermesh's central prediction rests—that the general counsel will become appreciably “adversarial” in the ordinary course—is far-fetched. As a consequence, the central prediction on which his critique is based—that there would be a decrease in informal communications between senior managers and the general counsel as a response to a perceived change in the general counsel's demeanor—remains speculative. And even assuming that his central prediction bears out, information disclosed directly by the perpetrators themselves is only one source of information and may not even be of threshold significance. Accordingly, any decrease in such information is unlikely to outweigh all the other benefits to be gained from my reform—foremost of which is the increase in counsel's willingness to interdict when faced with evidence of a material breach in legal obligations.

### III. COMPETING VISIONS

Above I described the basic empirical disagreements underlying our two proposals. But perhaps these empirical disagreements mask the deeper philosophical differences between our disparate approaches. Indeed, our respective reforms are animated by two different understandings of the inside counsel role. In this part, I critique the “lawyer as friend” analogy that inspires Hamermesh's vision for the role of inside lawyers. Along the way, I describe an alternative vision—“lawyer as gatekeeper”—a vision demonstrably espoused by the respondents in Tanina Rostain's 2008 pilot empirical study of the general counsel of ten blue-chip companies.<sup>123</sup>

Hamermesh invokes the “lawyer as friend” analogy *explicitly* in two rhetorical questions, which he believed definitively resolved the principal empirical issues raised by our respective proposals:

- (1) [I]n a situation involving potentially adverse regulatory consequences (e.g., financial penalties or even imprisonment), is it more comfortable, other things being equal, to share personal and confidential information about the situation with a policeman or regulator or with a *close friend*?<sup>124</sup>
- (2) [I]s a suggestion that some course of conduct may be improper and should be avoided more likely to be accepted and internalized if received from a *close friend*, or from someone perceived as an enforcer whose incentives include avoiding potential liability for any failure to stop improper conduct?<sup>125</sup>

Hamermesh also invokes the analogy *implicitly*, by repeatedly suggesting that “trust and confidence,” “trust,” “trust and respect,” or “intimacy” are the primary reasons why employees share confidential corporate information.<sup>126</sup> In fact, “trust” or “trust and confidence” is invoked

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123. See generally Rostain, *supra* note 95.

124. Hamermesh, *supra* note 24, at 376 (emphasis added).

125. *Id.* at 378 (emphasis added).

126. See, e.g., *id.* at 359, 368, 374–76.

eighteen times in his essay.<sup>127</sup> As the senior manager's close friend, the inside lawyer's principal role remains that of giving advice; indeed, Hamermesh seems to privilege the advice-giving function of inside lawyers above all other functions.<sup>128</sup> Hamermesh recommends that general counsel cultivate "an active *advisory* relationship of trust and confidence with senior management"<sup>129</sup> such that managers will come to regard the general counsel as the "*persuasive* counselor."<sup>130</sup> Hamermesh urges boards to encourage "a relationship in which the general counsel is expected to engage in an *advisory* function with the CEO and other senior officers."<sup>131</sup>

Of course, the friendship analogy is a familiar one, especially for legal ethicists. Simon observed that the friendship analogy may have surfaced as early as the seventeenth century as a justification for the attorney-client privilege in the law of evidence.<sup>132</sup> As it was understood then, the rule mandating confidentiality followed from the more general principle that "gentlemen do not reveal each other's confidences."<sup>133</sup> And analogies to friendship have been invoked in legal articles dating back to the 1950s.<sup>134</sup>

The first formal defense of friendship as the proper model for the lawyer-client relationship occurred in 1976, when Charles Fried published *The Lawyer As Friend: The Moral Foundations of the Lawyer-Client Relation*.<sup>135</sup> In the essay, Fried defended the moral praiseworthiness of lawyers serving their clients by drawing an analogy to friends helping friends.<sup>136</sup> Just as ordinary individuals are morally justified in preferring the interests of their friends and family over everyone else, Fried argued, lawyers are morally justified in preferring their clients' interests over those of the "wider collectivity"—third parties or the public at large.<sup>137</sup> The moral right of individuals to lavish care on close others, even at the expense

127. *Id.* abstract, 361, 374, 375, 375–76 (twice), 376 (twice), 377, 378 (twice), 379, 385 (twice), 386 (four times).

128. *See, e.g., id.* at 382–83 ("The general counsel's ability to achieve the stature and access to information . . . is . . . viewed as dependent on the establishment of a close working relationship with the CEO, a relationship in which the general counsel is expected to engage in an advisory function with the CEO and other senior officers, *rather than simply manage delegation of responsibility for providing legal services to the corporation.*" (emphasis added)).

129. *Id.* at 379 (emphasis added).

130. *Id.* at 380 (emphasis added) (quoting E. Norman Veasey & Christin T. Di Guglielmo, *The Tensions, Stresses, and Professional Responsibilities of the Lawyer for the Corporation*, 62 *BUS. LAW.* 1, 28 (2006)).

131. *Id.* at 383 (emphasis added).

132. *See* William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 *WIS. L. REV.* 29, 107.

133. *Id.*

134. *See, e.g.,* CHARLES P. CURTIS, *IT'S YOUR LAW* 1 (1954) ("Justice is a chilly virtue. It is of high importance that we be introduced into the inhospitable halls of justice by a friend.").

135. Fried, *supra* note 27.

136. *See id.* at 1073 ("When I say the lawyer is his client's legal friend, I mean the lawyer makes his client's interests his own insofar as this is necessary to preserve and foster the client's autonomy within the law.").

137. *Id.* at 1066.

of distant others, Fried argued, was integral to preserving the fundamental moral interests of personality, identity, and liberty.<sup>138</sup>

Fried's arguments have proven controversial.<sup>139</sup> Indeed, the friendship analogy has been deftly criticized on both normative<sup>140</sup> and descriptive grounds.<sup>141</sup> Here is not the place to weigh in on the debate and further interrogate the propriety or utility of the analogy as applied to the legal profession as a whole. Suffice it to say that, for purposes of this Article, Hamermesh's invocation of the friendship analogy seems particularly inapt for the in-house role and the types of factual scenarios specifically invoked by Hamermesh and contemplated by our respective reforms.

*First*, friendship poorly reflects what inside lawyers *should* do if and when faced with serious managerial misconduct. On these occasions, Hamermesh recommends that the lawyer *should* invite the wrongdoing manager's "trust and confidence" in the lawyer to afford the lawyer ample opportunity to dissuade the manager from proceeding with his illicit plans. I agree that the first thing that lawyers should do in such a scenario is to attempt to dissuade the manager from doing wrong. But on what basis is it appropriate for the lawyer to invite the manager's trust and confidence? Although Hamermesh repeatedly invokes "trust and confidence" as the main inducement for the manager's voluntary disclosure to the lawyer,<sup>142</sup> he does not answer the critical question that is raised: Trust and confidence *in what?*

As a matter of professional responsibility and fiduciary obligation, the lawyer cannot reassure the manager that his communication will remain confidential<sup>143</sup> or that the manager will be shielded from adverse consequences.<sup>144</sup> After all, that manager will usually not be entitled to those assurances. As Simon explained, "[The] authority to invoke or waive the organization's confidentiality rights usually belongs to organizational

138. *Id.* at 1067–68, 1074.

139. See, e.g., Jerold S. Auerbach, *What Has the Teaching of Law to Do with Justice?*, 53 N.Y.U. L. REV. 457, 468 (1978); Robert J. Condlin, "What's Love Got to Do with It?" "It's Not Like They're Your Friends for Christ's Sake": *The Complicated Relationship Between Lawyer and Client*, 82 NEB. L. REV. 211 (2003); Edward A. Dauer & Arthur A. Leff, *Correspondence: The Lawyer As Friend*, 86 YALE L.J. 573, 579 (1977); Alan Donagan, *Justifying Legal Practice in the Adversary System*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 128 (David Luban ed., 1983); David Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS*, *supra*, at 84, 104–11; Simon, *supra* note 132, at 106–13.

140. For example, Luban noted, "[W]e are not . . . willing to do grossly immoral things to help our friends, nor *should* we be." Luban, *supra* note 139, at 106 (emphasis added).

141. For example, Simon remarked, "Fried's lawyer is a friend in the same sense that your Sunoco dealer is 'very friendly' or that Canada Dry Ginger Ale 'tastes like love.'" Simon, *supra* note 132, at 109.

142. See *supra* note 127 and accompanying text.

143. See, e.g., Simon, *supra* note 48, at 1468 ("[C]orporate counsel can never assure managers of strong confidentiality.").

144. *Id.* at 1467 ("[W]e know that corporations often cooperate in prosecutions against errant former managers in order to gain leniency for themselves. And they sometimes sue former managers for damages for wrongdoing. Boards have a fiduciary duty to sacrifice managers when it is in the interest of the organization to do so.").

agents different from those who made the confidential communications.”<sup>145</sup> If the manager is actively planning or engaging in material breaches of legal obligation, he is acting disloyally and likely exposing the organization to significant legal liability. Hence, that manager is legally adverse to the organization and its lawyers with whom he now has an active conflict of interest. Because the lawyer may be required to report the conversation up the ladder to the board,<sup>146</sup> or even be required to testify against the manager in a court of law,<sup>147</sup> it would be entirely inappropriate for the lawyer to reassure her colleague of her continuing loyalty or confidentiality. Contrary to what has been implicitly suggested, the lawyer’s duty of “[c]onfidentiality will not block disclosure within the organization, and it will not prevent the organization from disclosing outside, no matter how harmful internal or external disclosure is to the [manager].”<sup>148</sup>

Indeed, the leading treatise on in-house practice advises inside counsel in these sticky situations to tread lightly and give the manager a “‘corporate *Miranda* warning,’ which puts the manager on notice that counsel owes a duty of loyalty to the company alone (and not to any manager) and thus cannot promise confidentiality or loyalty to any individual manager.”<sup>149</sup> To suggest that inside lawyers position themselves as close friends and invite the wrongdoing manager’s (continued) trust and confidence not only ignores the legally adverse nature of the lawyer-manager relationship but also contradicts what are widely accepted as “best practices” for inside counsel. In these types of situations, the *only* thing that the lawyer can properly promise the manager is that she will listen carefully and not rush to judgment, which is the behavior that anyone would reasonably expect of a competent professional (irrespective of any preexisting friendship).

Of course, it is certainly possible that the lawyer will successfully dissuade the manager from going forward with his illicit plan. This good result may be reached through some form of moral dialogue that Hamermesh and others are right to recommend.<sup>150</sup> What Hamermesh blithely ignores, however, is the sobering reality that persuasion does not

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145. See William H. Simon, *Duties to Organizational Clients*, 29 GEO. J. LEGAL ETHICS (forthcoming 2016) (on file with author).

146. See 17 C.F.R. §§ 205.1–7 (2016); MODEL RULES OF PROF’L CONDUCT r. 1.13(b) & cmt. 5 (AM. BAR ASS’N 2015). Moreover, lawyers generally have the discretion to report out material corporate misconduct. See 17 C.F.R. § 205.3(d)(2) (permitting lawyers to “reveal to the Commission, without the issuer’s consent, confidential information related to the representation” under specified circumstances); MODEL RULES OF PROF’L CONDUCT r. 1.13(c).

147. See, e.g., Simon, *supra* note 48, at 1468 (“Recall . . . that the privilege protects only the communication and not the information it contains. This means that when a corporate lawyer learns something that he must disclose under the civil discovery or securities laws, the privilege does not affect his duty to see that the information is disclosed, whether or not the communicating manager wishes the information disclosed.”).

148. Simon, *supra* note 145, at 10.

149. Kim, *Gatekeepers*, *supra* note 18, at 444 (citing John K. Villa, *When and How to Issue Corporate Miranda Warnings*, 24 ACC DOCKET 76 (2006)).

150. See Hamermesh, *supra* note 24, at 380; Russell G. Pearce & Eli Wald, *Rethinking Lawyer Regulation: How a Relational Approach Would Improve Professional Rules and Roles*, 2012 MICH. ST. L. REV. 513, 525–26.



always work. Not all lawyers will be skillful in the art of moral suasion, and sophisticated senior managers, who find themselves in desperate enough situations to be considering wrongdoing in the first place, may not be receptive to it.<sup>151</sup> Sometimes the only option available to the lawyer is to issue a stern warning that higher-ups may need to be alerted.<sup>152</sup> As Elihu Root put it, “About half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop.”<sup>153</sup> And, even if the manager does back down, Hamermesh is wrong to assume that this is where the lawyer’s duty to escalate necessarily ends: the inside lawyer may still have an organizational duty or expectation to report the conversation up the ladder, if in her considered judgment she believes that the manager continues to pose a threat to the organization.<sup>154</sup>

*Second*, as a descriptive matter, friendship does not accurately portray how *some* general counsel perceive their role and their relationship with senior managers. In particular, the notion of friendship discounts, if not entirely ignores, the general counsel’s gatekeeping function and the seriousness with which general counsel regard their legal obligation to protect the organization from harm. In many companies, “inside counsel are intentionally carved into corporate decision-making process to constrain

151. While I agree that moral dialogue is important, there is no evidence that it works to any significant degree. As Condlin has noted with respect to outside lawyers representing clients who want to pursue an immoral course of action:

[M]ore dialogue is as likely to lead to intransigence, capitulation, impasse, and polarization, as it is to consensus, and its outcome, when it reaches one, is as likely to be based on stamina, deceit, and obstreperousness, as it is on insight and learning. Even ostensible agreement can be misleading if the person more skilled at “dialogue” (i.e., more glib), has simply silenced rather than convinced the person less skilled, by talking him into the ground. In the end, there are only two principled courses of action open to lawyers who are unwilling to withdraw from a representation, and who disagree with their clients about how to proceed. They can do what the clients say, or they can coerce the clients into accepting their (the lawyers’) views instead.

Condlin, *supra* note 139, at 288–89.

152. None of this is to deny the fact that some general counsel may have final authority on some issues. *See, e.g.*, BEN W. HEINEMAN, JR., *THE INSIDE COUNSEL REVOLUTION: RESOLVING THE PARTNER-GUARDIAN TENSION* (forthcoming Ankerwycke Press 2016) (draft manuscript dated Feb. 1, 2016, on file with author).

153. 1 PHILIP C. JESSUP, ELIHU ROOT 133 (1938) (quoting Elihu Root); *see also* HEINEMAN, *supra* note 152.

154. This organizational duty or expectation may emanate from company policy or practice. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 96 cmt. e (2000) (“A lawyer is also required to act diligently . . . by taking steps to prevent reasonably foreseeable harm to a client. . . . The lawyer is not prevented by rules of confidentiality from acting to protect the interests of the organization by disclosing within the organization communications gained from constituents who are not themselves clients.”); *see also id.* § 96 cmt. b (“By representing the organization, a lawyer does not thereby also form a client-lawyer relationship with all or any individuals employed by it or who direct its operations . . . . A lawyer representing only an organization does not owe duties of care[,] . . . diligence[,] . . . or confidentiality . . . to constituents of the organization.”). To be sure, the lawyer who has (ill-advisedly) solicited the manager’s trust and confidence and then turns around and reports up the ladder will be perceived as having pulled a bait-and-switch. I could not agree more with this characterization, which is precisely why Hamermesh’s friendship analogy is inapt and misleading.

managerial discretion and safeguard the company from legal trouble.”<sup>155</sup> While providing disinterested advice to business managers is a valuable function of the in-house role, it is not the only—and may not be the most important—function. Inside counsel not only advise others but also *act*,<sup>156</sup> and their actions can have as much legal significance as the actions of their business coagents. Furthermore, “inside counsel often have direct responsibility over compliance and are expected to intervene when significant legal risks are at stake.”<sup>157</sup> In the best companies, inside counsel do not take that responsibility lightly.

For example, the general counsel respondents in Rostain’s 2008 study “articulated a robust account of their jurisdiction over questions of legal risk.”<sup>158</sup> They were not resigned to playing the role of mere advisors-for-hire—giving advice and then looking the other way. Instead, her respondents “were unanimous in insisting that responsibility for determining the appropriate level of risk to be undertaken by their companies lay with them.”<sup>159</sup> They characterized their gatekeeping functions “in very strong terms” and were “confident of their capacity to stop deals that they believed posed significant legal risks to the company.”<sup>160</sup> Although they occasionally judged it appropriate to cede the final call on low-level risks to managers, these general counsel “were the ultimate arbiters of which risks were negotiable and which were not,”<sup>161</sup> and they professed a willingness to say “no” in situations implicating significant civil or criminal liability.<sup>162</sup> In short, these general counsel expressed an alternative vision to the “lawyer as friend.” Indeed, they were strong exemplars of the “lawyer as gatekeeper.”

To be sure, not all inside lawyers exercise their gatekeeping functions as robustly as the general counsel in Rostain’s study. One reason for this is that many inside counsel are not sheltered by employment agreements<sup>163</sup> and thus remain economically vulnerable to their client representatives. This economic vulnerability provides the *third* reason why Hamermesh’s friendship analogy is malapropos. As I noted in *The Banality of Fraud*:

First, inside counsel are necessarily economically dependent on a single client. If they get fired, they lose their entire income, their insurance, and their basic livelihood. If pensions or stock options have not vested, then enormous sums of money can be forfeited as well. Even worse, if they get fired for whistleblowing, they may get blacklisted—without recourse under the law to sue for retaliatory discharge.

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155. Sung Hui Kim, *The Ethics of In-House Practice*, in *LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT* 197, 198 (Lynn Mather & Leslie Levin eds., 2012).

156. HEINEMAN, *supra* note 152.

157. Kim, *supra* note 155, at 198.

158. Rostain, *supra* note 95, at 473. The following brief summary of the findings in Rostain’s study is largely duplicative of Kim, *supra* note 155, at 215.

159. Rostain, *supra* note 95, at 473.

160. *Id.* at 473–74.

161. *Id.* at 479.

162. *Id.*

163. HEINEMAN, *supra* note 152.

Second, even if getting fired is not likely, inside counsel feels unremitting pressure to justify herself and her department as a corporate cost center. In today's competitive and profit-oriented environment, no position feels completely secure, and the case that an adequate return on firm investment is being achieved must always be made. The best way to do so is to facilitate, not interfere with, corporate transactions favored by management.<sup>164</sup>

The typical friendship is not characterized by this degree of economic vulnerability or dependency. Stated another way, by invoking "friendship," Hamermesh too casually dismisses important aspects of the lawyer-client relationship, namely, the prominent role of money. As Simon observed in his critique of *Lawyer As Friend*, "[I]f Fried's definition is amplified to reflect the qualification . . . that the lawyer adopts the client's interests *for money*, it becomes apparent that Fried has described the classical notion, not of friendship, but of prostitution."<sup>165</sup> Not only does Hamermesh ignore the economic vulnerability of inside counsel but he also ignores its potential ethical consequences. As Max Bazerman and Ann Tenbrunsel explain in their discussion of "motivated blindness," a "core finding of behavioral ethics" is that "if you are motivated to turn a blind eye to someone's unethical behavior, you won't see it," even when you regard yourself as honest.<sup>166</sup>

*Fourth*, encouraging lawyers to serve as managers' close friends exacerbates enduring psychological pressures to overlook wrongdoing in an effort to reduce cognitive dissonance.<sup>167</sup> As Deborah Rhode and Paul Paton noted:

To reduce the cognitive dissonance, lawyers will often unconsciously dismiss or discount evidence of misconduct and its impact on third parties. The risks of such dissonance are exacerbated when lawyers bond socially and professionally with the client's management team. The more that counsel blends into the culture of corporate insiders, the greater the pressures of cohesiveness. That, in turn, encourages lawyers to underestimate risk and to suppress compromising information in order to preserve internal solidarity. Yet, in the long run, this dynamic ill serves all concerned. Clients lose access to disinterested advice about their own liability; lawyers lose capacity for independent judgment and moral autonomy; and the public loses protection from organizational misconduct. Enron is a case history of all those costs.<sup>168</sup>

Hence, Hamermesh's recommendation that inside lawyers pose as managers' close friends may perversely lead to greater, not less, acquiescence in managerial misconduct.

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164. Kim, *Banality*, *supra* note 18, at 1005–06.

165. Simon, *supra* note 132, at 108.

166. BAZERMAN & TENBRUNSEL, *supra* note 101, at 81.

167. Cognitive dissonance theory predicts that when a person exhibits behavior that seems inconsistent with her prior attitudes such that psychic unrest is aroused, her internal attitudes will shift to generate greater alignment with her outward behavior. See Kim, *Naked Self-Interest*, *supra* note 18, at 146–48 (describing cognitive dissonance theory).

168. Rhode & Paton I, *supra* note 49, at 32.

The friendship analogy is not just ill-suited to situations of managerial misconduct. The *fifth* reason for rejecting the analogy is that it mischaracterizes the ordinary, default understanding of employee relationships and the more formal nature of office interactions in most corporate settings. Of course, friendships can and do arise in office settings and, yes, lawyers can and do find friends among their nonlawyer colleagues.<sup>169</sup> But friendship is by no means the primary mode of office interactions. To briefly illustrate this point, let us turn to the sole piece of evidence cited by Hamermesh to support his central empirical prediction that the “general counsel would lose the benefit of the informal communications from senior managers.”<sup>170</sup> Hamermesh first promises that his prediction will bear out because “[t]here is evidence . . . both *anecdotal* and more *sweeping*, that access to information correlates directly with the level of trust and confidence reposed by the source with the recipient.”<sup>171</sup> While withholding the so-called “sweeping” evidence of such correlation, Hamermesh proceeds to offer his “anecdotal” evidence in a single footnote:

*See, e.g., Stan Schroeder, Facebook Privacy: 10 Settings Every User Needs to Know, MASHABLE.COM (Feb. 7, 2011), <http://mashable.com/2011/02/07/facebook-privacy-guide/> (“[Y]ou might want to customize the settings and set a certain type of content to be visible to the people on some of your lists, and invisible to others. For example, only my close friends can see all my photos, while business associates can see just a few.”).<sup>172</sup>*

The above internet blogpost explains how a single user customizes his Facebook settings. If this blogpost supports anything, it likely supports a proposition that undermines Hamermesh’s point: that managers do *not* ordinarily think of their office colleagues (including lawyers) as friends. According to this blogger, “[O]nly my *close friends* can see all my photos, while *business associates* can see just a few.”<sup>173</sup> It must have escaped Hamermesh’s attention that inside lawyers would more readily be classified as “business associates” than as “close friends.”

Finally, not only does Hamermesh’s “lawyer as friend” vision poorly describe the default mode of office interactions but, as specifically portrayed by Hamermesh, the vision is also inconsistent with the notion of friendship itself. Hamermesh’s recommendation that inside counsel act as “close friends” of senior managers is predicated on the promise that inside counsel will not only be able to gain access to information but also will gain

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169. Cf. Condlin, *supra* note 139, at 296–97 (“It is not that lawyers and clients can never be friends, but just that when they are it will be because of qualities independent of their status as lawyers and clients. Put another way, lawyers and clients will be friends when they would be friends if they were not lawyers and clients; being lawyers and clients has nothing to do with forming friendships, one way or the other.”).

170. Hamermesh, *supra* note 24, at 374.

171. *Id.* at 375 (emphasis added).

172. *Id.* at 375 n.57 (emphasis added).

173. *Id.* (emphasis added).

“respect,” “stature,” and “authority” within the company.<sup>174</sup> Hamermesh writes:

The general counsel’s ability to achieve the *stature* and *access* to information enabling her to most effectively counsel the corporation is widely and plausibly viewed as dependent on the establishment of a close working relationship with the CEO[;] a direct and close relationship with the CEO can only enhance the general counsel’s *stature* and *authority* within the company, not to mention her or his access to corporate strategy development and critical internal information[;] . . . [e]stablishing a direct relationship between general counsel and independent directors is also likely to enhance general counsel’s *stature*.<sup>175</sup>

The reasons offered by Hamermesh for following his advice are self-serving and careerist; they seem opportunistic and deeply inconsistent with the notion of friendship.<sup>176</sup>

In sum, Hamermesh’s plea that inside lawyers position themselves as close friends ignores the legally adverse status of malfeasant managers in the relevant contexts and contradicts established best practices. It does not accurately portray how many general counsel understand their relationships with senior managers and too heavily discounts the gravity with which some general counsel perceive their gatekeeping function. At the same time, it ignores the economic vulnerability of many inside counsel and the related phenomenon of motivated blindness, trivializing financial pressures to acquiesce in misconduct. And it ignores the very real psychological pressures to overlook wrongdoing in an effort to reduce cognitive dissonance. It also badly mischaracterizes the default way in which corporate employees interact with one another in office settings. By assuming that friendship is the governing norm in office suites, Hamermesh confuses friendship with friendliness<sup>177</sup> and confuses corporate workplaces with college fraternities. Moreover, Hamermesh’s prescription that inside lawyers pose as friends of management for instrumental self-serving benefit undermines the very notion of friendship itself.

#### CONCLUSION

Despite the inaptness of the “lawyer as friend” vision, that vision is superficially appealing and may even have guided the conduct of the GM

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174. *Id.* at 382–83.

175. *Id.* (emphasis added).

176. *Cf.* Condlin, *supra* note 139, at 267 (“True friendship is based principally on love rather than self-interest. While there are utilitarian dimensions to friendship, true friends are loved for their own sake and for the goodness of their character, not for the advantage they can help one realize.”).

177. *See, e.g.*, Condlin, *supra* note 139, at 294–95 (“Friendliness is simply a social practice designed to make day-to-day interaction pleasant and efficient by removing the friction produced by overinterpretation of the other’s motives. One can be friendly toward anyone, even an enemy, under just about any circumstances, and should be most of the time, but one can be a friend to someone only under the demanding conditions described above, and even then, only when the other person wants to be a friend in return, and is willing to invest the time and energy needed to develop the relationship.”).

lawyers. According to the Valukas Report, in a 2012 meeting about the nondeployment of a Cobalt airbag, a junior GM lawyer inquired whether there should be a recall. He was promptly “told that the issue had already been raised with engineering, that the engineers were working on it, and that they had not come up with a solution.”<sup>178</sup> The junior lawyer reportedly “got the ‘vibe’ that the lawyers had ‘done everything [they could] do.’”<sup>179</sup> This behavior is entirely consistent with the “lawyer as friend” vision, which posits that the lawyer’s role is merely to facilitate the autonomous decisionmaking of other individuals. Under this vision, the problems with the Cobalt essentially belonged to *someone else* (i.e., the engineers). Accordingly, so long as the GM lawyers flagged the legal risks to responsible engineers and made themselves available to provide confidential advice, they had discharged their “friendship” responsibilities in full.

By all accounts, the notoriously ineffective GM lawyers had been regarded as trustworthy friends. Three of the four terminated GM lawyers were longstanding employees who *each* served thirty years at GM before being removed.<sup>180</sup> And one of those longstanding GM lawyers was William Kemp, GM’s lead engineering and safety lawyer. According to the Valukas Report, Kemp was “widely regarded as GM’s most knowledgeable, experienced and *trusted* safety lawyer.”<sup>181</sup> Yet, it was this most *trusted* lawyer who failed to protect GM, its customers, and its reputation. As early as 2004, Kemp negotiated with the National Highway Traffic Safety Administration over the problem of moving stalls in GM’s vehicles.<sup>182</sup> He also orchestrated GM’s in-house investigation of the defective ignition switch for more than two years prior to the recall.<sup>183</sup> When finally asked during the internal investigation about why he waited so long—until February 2014—to directly notify the general counsel about the Cobalt problems, Kemp replied that he did not know.<sup>184</sup> Unfortunately, what GM needed at this critical juncture in its history was something other than a friend.

But there is an alternative vision—that of “lawyer as gatekeeper.” This vision insists that the GM lawyers could have done otherwise and that it was not enough to simply hand off issues to engineering to be resolved by them and merely stand by to provide just-in-time legal advice. This vision rejects the proposition that lawyers are there merely to facilitate the autonomous decision making of other individuals. This vision understands that serious safety problems are not the problems of someone else but are GM’s problems for which the GM lawyers are directly responsible for resolving as expeditiously as possible. Although this vision understands

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178. VALUKAS, *supra* note 2, at 108.

179. *Id.*

180. Reisinger, *supra* note 121.

181. VALUKAS, *supra* note 2, at 104 (emphasis added).

182. *Id.* at 73.

183. *Id.*

184. *Id.* at 231–32.

that the GM lawyers, not being engineers, could not have resolved the ignition switch defect on their own, they should have assumed ownership of the problem before them and not permitted it to languish in dead-end investigations and fester as one committee meeting after another got postponed. This vision understands that the GM lawyers should have reported the problem to the general counsel years earlier and, if the general counsel were not responsive, further escalated the issue up the ladder to the board—even if doing so would be perceived as brazen. This vision understands that being an inside lawyer is not a popularity contest and certainly not about making friends. Rather, being an inside lawyer is about protecting the organization—even from threats arising from within.