Ethical Bankers

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The capstone of regulatory reform in the wake of the financial crisis has turned out to be an effort to pair substantive changes to the financial industry with an effort to get bankers to behave more ethically. Regulators have emphasized the importance of "culture" set by a "tone at the top" that makes "ethical conduct" a primary organizational value—though they have not given much content to any of these terms. This Article inquires as to what it means to operationalize ethics and culture in a regulatory project and what it tells us about the state of banking and its oversight. The content of these calls for a culture of ethics in banking appears to be an effort to impose the requirements of professional responsibility on a new industry. But banking is no ordinary profession, and the imposition of cultural change is easier said than done. There are good reasons to be skeptical of the merits of a campaign to create ethical bankers, but it may be the most acceptable of an unattractive set of alternatives.

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I. INTRODUCTION

A charge regularly leveled against the banking industry has been made against the character of those who work in it. Richard Posner has argued that banking is "unusually corrupt," largely because of "a business model [that] attracts people who have a taste for risk and attach a very high utility to money," which makes them likely to engage in "financial sharp practices."[1] Stories of ethical lapses by bankers appear regularly on the front page of prominent news outlets,[2] as well as in the speeches of presidential candidates, legislators, and religious leaders.[3]

Increasingly, the charge is also being leveled by regulators. Janet Yellen, chair of the Federal Reserve Board (Fed), has said: "[W]e expect the firms we oversee to follow the law and to operate in an ethical manner. Too often in recent years, bankers at large institutions have not done so, sometimes brazenly."[4] Those regulators, moreover, are beginning to pair their criticisms with action. The Federal Reserve Bank of New York (New York Fed) recently held a high-level, two-day meeting with executives at large banks at which it pushed them to establish a "culture of compliance" with an ethical "tone at the top."[5] The head of that bank, and the Vice-Chair of the Federal Reserve Board, has warned

1. Richard Posner & Gary Becker, *Is Banking Unusually Corrupt, and If So, Why?*, BECKER-POSNER BLOG (July 22, 2012), http://www.becker-posner-blog.com/2012/07/is-banking-unusually-corrupt-and-if-so-why-posner.html.

2. *See* Julia Kollewe et. al., *Banks pay out £166bn over six years: a history of banking misdeeds and fines*, GUARDIAN (Nov. 12, 2014), http://www.theguardian.com/business/2014/nov/12/banks-fined-200bn-six-years-history-banking-penalties-libor-forex ("The global banking industry racked up more than £166bn in fines, settlement fees and provisions between 2009 and 2013" for offenses ranging "from Libor rigging and currency market manipulation to breaching sanctions against Iran and Sudan, money laundering for Mexican drug barons and abusive mortgage practices in the US."); *The rotten heart of finance*, ECONOMIST (July 7, 2012), http://www.economist.com/node/21558281 (observing that bid-rigging and other scandals "corrodes further what little remains of public trust in banks and those who run them").

3. *See, e.g.*, Senator Bernie Sanders, Speech, Wall Street And The Economy (Jan. 5, 2016, 3:22 PM), http://www.marketwatch.com/story/text-of-bernie-sanders-wall-street-and-economy-speech-2016-01-05 (speaking as a Democratic candidate for president and arguing that "the business model of Wall Street is fraud"); Ben White, *GOP contenders try to channel Warren on Wall Street*, POLITICO (Nov. 11, 2015, 12:43 AM), http://www.politico.com/story/2015/11/gop-debate-wall-street-elizabeth-warren-215748 (describing the anti-Wall Street mood at a Republican presidential candidate debate; Ohio governor John Kasich suggested that bankers "need a good ethics lesson on a regular basis to keep them in check so we the people do not lose"); Peter Grier, *Goldman Sachs hearing pulls back curtain on bankers' ethics*, CHRISTIAN SCI. MONITOR (Apr. 27, 2010), http://www.csmonitor.com/USA/Politics/2010/0427/Goldman-Sachs-hearing-pulls-back-curtain-on-bankers-ethics ("During the Goldman Sachs hearing on Capitol Hill Tuesday, senators asked bankers why they did what they did—and the lawmakers didn't like the responses they got."). The Dalai Lama has concluded that "[u]ltimately the financial crisis was generated by greed itself—by the failure to exercise appropriate moderation and restraint in the blind quest for ever greater profits." H.H. DALAI LAMA, BEYOND RELIGION: ETHICS FOR A WHOLE WORLD 146 (2011); *see also* Justin Welby, *Archbishop's Speech At 'Creating The Common Good' Conference In New York* (Jan. 23, 2015), http://www.archbishopofcanterbury.org/articles.php/5481/archbishops-speech-at-creating-the-common-good-conference-in-new-york (warning in a speech to bankers that the banking system "seeks to get back to the enormous levels of leverage and freedom from constraint totally inappropriate to an industry that can destroy an economy overnight, or at least over a few weeks").

4. Janet Yellen, *Remarks to the Citizens Budget Commission*, quoted in Victoria McGrane, *Yellen Says Effective Supervision of Big Banks One of Fed's Top Priorities*, WALL ST. J. (Mar. 3, 2015), https://www.federalreserve.gov/newsevents/speech/yellen20150303a.htm.

5. The latter term comes from accounting. *See* Tina D. Carpenter et al., *A Changing Corporate Culture*, 197 J. ACCOUNTTANCY 57, 58 (2004),

that "[t]he evidence is pervasive that deep-seated cultural and ethical problems have plagued the financial services industry in recent years"; he has sought to make ethics one of the priorities of his administration.[6] The G-7 group of wealthy nations, of which the United States is a member, announced in 2015 an effort to develop a common set of ethical standards that would apply to all bankers, regardless of the country in which they do business.[7]

By the highly informal standards of banking regulation, this counts as a coordinated regulatory campaign.[8] Bank regulators do not often pass rules or codes; rather, they oversee their industry with relatively opaque, hands-on supervision wrought through on-site examinations and do much of their regulating by scrutinizing the balance sheets of banks.[9]

Calls for good conduct look very different. Standards-based, rather than rules-based, ethics in banking is a term rarely defined with precision. To make matters even more indefinite, calls for ethical bankers are couched, with overwhelming frequency, in the language of cultural change. "As regulators, we are as concerned with the health of an organization's risk culture, which includes ethical standards, as we are with its underwriting standards," the Comptroller of the Currency, the head of the other regulator of national banks, has said.[10] But "culture" is a concept as flexible as "ethics."[11]

An inquiry into what regulators mean when they call for a culture of ethics in banking is accordingly critical for understanding how the government hopes to control the financial industry. It is also a leading example of a modern penchant to try to use ethics as a regulatory tool.[12]

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http://www.journalofaccountancy.com/issues/2004/mar/achangingcorporateculture.html ("[T]he American Institute of Certified Public Accountants' Statement of Auditing Standards] no. 99 reiterates the theme of earlier standards that ethical corporate behavior begins with the 'tone at the top' and the values established by senior management.").

6. William C. Dudley, President and Chief Exec. Officer, Fed. Res. Bank N.Y., Opening Remarks at Reforming Culture and Behavior in the Financial Services Industry: Expanding the Dialogue (Oct. 20, 2016), https://www.newyorkfed.org/newsevents/speeches/2016/dud161020.

7. Jeff Black & Rainer Buergin, *Buck to Stop With Bankers as G-7 Seeks Conduct Code for Lenders*, BLOOMBERG (May 31, 2015, 6:01 PM), http://www.bloomberg.com/news/articles/2015-05-31/buck-to-stop-with-bankers-as-g-7-seeks-conduct-code-for-lenders.

8. *See generally* David Zaring, *Administration by Treasury*, 95 MINN. L. REV. 187 (2010) (reviewing the informality of financial regulation).

9. *See id.* at 192–97 (discussing how the Treasury Department operates).

10. Thomas Curry, Comptroller of the Currency, Remarks Before the Annual Conference of The Clearing House Association (Nov. 21, 2014).

11. *See infra* Part II.C (expanding on the idea of a culture of ethics). Nor are we alone in this. Commentators have noted the difficulties that attend attempts to pin down the analytical boundaries of the concept of culture. *See* Robert C. Ellickson, *The Evolution of Social Norms: A Perspective from the Legal Academy* 230 (Yale L. Sch., Program Studs. L., Econ., & Pub. Pol'y, Working Paper No. 230, 1999) (discussing changes in social norms); Mark J. Roe, *Can Culture Constrain the Economic Model of Corporate Law*, 69 U. CHI. L. REV. 1251 (2002) (discussing the relationship between the corporate players); Donald C. Langevoort, *Opening the Black Box of "Corporate Culture"*, 162 J. INSTITUTIONAL & THEORETICAL ECON. 80 (2006) (discussing the idea of a corporate culture).

12. For example, consider the ethics provisions of the Sarbanes–Oxley Act and the United States Sentencing Guidelines. For a review of both, see David Hess, *A Business Ethics Perspective on Sarbanes–Oxley and the Organizational Sentencing Guidelines*, 105 MICH. L. REV. 1781, 1783 (2007) (supporting the inculcation of ethics, while observing that "[m]any managers challenge such attempts to 'legislate' ethical behavior, even if they recognize the importance of proactively managing the ethical environment of their firms"). *See generally* Usha Rodrigues & Mike Stegemoller, *Placebo Ethics: A Study in Securities Disclosure Arbitrage*, 96 VA. L. REV.

In our view, ethics and culture are emphasized as an acknowledgement that regulatory oversight cannot exist if the regulated industry is "working to rule"[13] or is taking the perspective of the Holmesian bad man about the law.[14] Banking ethics are also meant to manage customer relationships, as well as address serious public relations problems that have bedeviled both the banking industry and its supervisors.

That amounts to a wide array of goals, but this Article argues that the idea of regulating through ethics codes has coherence, if not an entirely clear promise. Ethical banking regulation can best be understood as an effort to bring to banking a set of commitments that would, above all, mimic the root values adopted by professional responsibility codes. Doctors, lawyers, and accountants all police their professions with codes of ethics.

Indeed, the professions are separated from other jobs through their insistence on maintaining a set of disciplinary ethics among other rules related to professional qualifications. In the words of the New York Court of Appeals, "a profession is not a business," partly because it requires "a code of ethics imposing standards qualitatively and extensively beyond those that prevail or are tolerated in the marketplace."[15] As the sociologist Harold Wilensky has said, "any occupation wishing to exercise professional authority must," among other things, "convince the public that its services are uniquely trustworthy."[16]

Ethics codes and professional training requirements are meant to achieve this trust. They do so by limiting the ability of the professional to act in her pure self-interest at all times.[17] Instead, that professional must in some circumstances put her client's interest

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1 (2010) (taking a more critical perspective on ethics-based regulation). Many disciplines have adopted ethical codes. To just take three examples, consider the codes for accounting, *Code of Ethics for Professional Accountants*, INT'L FED'N ACCT. (2005), https://www.ifac.org/system/files/publications/files/ifac-code-of-ethics-for.pdf; engineering, *NSPE Code of Ethics for Engineers*, NAT'L SOC'Y PROF. ENGINEERS, http://www.nspe.org/sites/default/files/resources/pdfs/Ethics/CodeofEthics/Code-2007-July.pdf (last visited Mar. 24, 2017); and realtors, *Code of Ethics and Standards of Practice of the National Association of Realtors*, NAT'L ASS'N REALTORS (2017), https://www.nar.realtor/sites/default/files/policies/2017/2017-Code-of-Ethics.pdf. Indeed, such codes are a required component of the professions. *See infra* notes 15–16 and accompanying text (providing support for this requirement).

13. "In a 'work-to-rule' campaign, workers refuse to perform any tasks voluntarily or exercise any independent judgment and instead simply follow the letter of their employers' work rules." Craig Becker, *"Better Than A Strike": Protecting New Forms of Collective Work Stoppages Under the National Labor Relations Act*, 61 U. CHI. L. REV. 351, 355 n.23 (1994); *see also* WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 90 (1998) (observing that working to rule is effective because, "[i]n some areas, scrupulous compliance with the law is so burdensome and even disruptive that it occurs only as a form of protest").

14. *See* Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) ("If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.").

15. *In re* Freeman's Estate, 311 N.E.2d 480, 483 (N.Y. 1974).

16. Harold L. Wilensky, *The Professionalization of Everyone?*, 70 AM. J. SOC. 137, 138 (1964).

17. Even law and economics scholars have come to this conclusion. *See* Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MARYLAND L. REV. 869, 886–89 (1990) (arguing that lawyerly self-interest will be mitigated by the values of the profession and the way lawyers are instructed); *see also* George M. Cohen, *When Law and Economics Met Professional Responsibility*, 67 FORDHAM L. REV. 273, 276 (1998) ("[T]he existence of ethics rules and other law governing lawyers (as well as all law) presupposes the possibility of self-interested behavior.").

ahead of her own, and must in others serve as a government agent—as in the case of lawyers acting as officers of the court, doctors acting as servants of the public health, and accountants acting as the guarantors of truthful disclosure and the gatekeepers of compliance with the securities laws.[18]

Banker ethics, so often vaguely referred to by regulators or underspecified when spelled out, might be understood as the project of suffusing banking with these core professional values of public service and client commitment.

Applying these core values to banking, however, is no easy proposition. Bankers have never enjoyed the guild-like status of the professional disciplines; traditionally, much of what they do is more related to business management than it is to lawyering or accountancy.[19]

Banks, after all, do not only provide services and advice to their clients. They also sell them a product: money, in various bundles, at a price.[20] As salesmen as well as advisors, bankers make uneasy candidates for the sort of ethics rules of the professions. It is pointless to insist on a uniform ethic of client service when bankers sometimes occupy roles as trusted advisors, but at other times act as middlemen who operate between buyers and sellers of products—especially when bankers, like anyone else, are governed by the strictures against fraud and in favor of good faith.[21]

While there are those, such as Rakesh Khurana and Nitin Nohria, who argue that business managers *should* adopt the mores of a profession, the differences between the professions and business management—ranging from barriers to entry, public trust, and fiduciary obligations to the client—are significant.[22]

Moreover, a public service requirement might make sense in exchange for professional monopoly rights granted by state accreditation, which lawyers and

18. *See infra* Part V (discussing these fiduciary obligations).

19. John Gapper, a veteran observer of the banking industry, has claimed that there is no such thing as a banker. John Gapper, *There Is No Such Thing As The Banking Profession*, FIN. TIMES (Feb. 12, 2014), https://www.ft.com/content/5a024474-9039-11e3-a776-00144feab7de. There are equity brokers, foreign exchange traders, mortgage salespeople, corporate financiers, and all kinds of specialists under one roof. *Id.* There is no single set of employees unified by a professional culture and a willingness to pull together. *Id.*

20. As the former Goldman Sachs banker Matt Levine has put it: "Bankers are traveling salesmen; they fly around the country selling things to companies. And the thing they're selling is basically money, ways to get money, and a few related services, like buying other companies." Logan Sachon, *How Dealbreaker's Matt Levine Does Money*, BILLFOLD (July 20, 2012), https://thebillfold.com/how-dealbreaker-s-matt-levine-does-money-10f7f3f917c0#.490t3jrmx.

21. Moreover, seemingly laudable, if ultimately misguided, purposes should not suggest that regulation by ethics is revolutionary. Disciplinary codes create barriers to entry and thus, if anything, enhance the ability of lawyers, accountants, and doctors to earn good incomes; some commentators argue that the erection of professional barriers is little more than rent-seeking. *See* Jonathan R. Macey, *Public and Private Ordering and the Production of Legitimate and Illegitimate Legal Rules*, 82 CORNELL L. REV. 1123, 1138 (1997) (discussing the "passage of costly legislation to protect the professions by erecting inefficient barriers to entry"); *see also* Conrad S. Ciccotello et al., *Will Consult for Food! Rethinking Barriers to Professional Entry in the Information Age*, 40 AM. BUS. L.J. 905, 907 (2003) (examining "the current barriers to entry for four financial service professions"). Nor is it clear that, even when performing advisory functions, bankers are appropriately subject to ethics-like discipline; after all, consultants, who also provide confidential business advice, have no such constraints. Tanina Rostain, *The Emergence of "Law Consultants"*, 75 FORDHAM L. REV. 1397, 1401 (2006) (stating that consultants "actively opposed state certification and other formal barriers to entry").

22. Rakesh Khurana & Nitin Nohria, *It's Time to Make Management a True Profession*, HARV. BUS. REV. (Oct. 2008), https://hbr.org/2008/10/its-time-to-make-management-a-true-profession.

accountants enjoy. But there is no banking monopoly; the modern banking industry has never been more fragmented.[23] Shadow banks that are not regulated like banks, but provide financing like banks, have taken market share from conventional institutions.[24] These shadow banks include money market funds that finance the day-to-day operations of large firms with their appetite for commercial paper, venture capital funds that finance and develop new businesses, business development corporations that invest in small and midsize firms, and hedge funds that can take on any of these functions, along with others.[25] These institutions do what banks do, but no one expects hedge funds or money market operations to take on the mantle of public service.[26]

Finally, a change in culture is not simple, nor does it necessarily move along the paths which one might hope to direct it.[27] Measures thus far proposed by regulators[28]—whether general exhortations or top-down edicts—will not necessarily produce real change. Neither would the successful establishment of a culture of ethics within banking likely cure all of banking's ills.

At best, ethical banking, while being no substitute for demanding rule-based regulation, may be a complement to it. The fact that it has become a priority for regulation is both a testament to the achievements made since the financial crisis and a sign that regulators are perplexed by the problem of cementing that progress. The move has been from the specific to the general, away from regulatory requirements and toward getting bankers to take the attitude that such requirements are meant to be embraced.

In this, the regulators are adopting the "foggy" approach to the imposition of

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23. Kathryn Judge, *Fragmentation Nodes: A Study in Financial Innovation, Complexity, and Systemic Risk*, 64 STAN. L. REV. 657, 659 (2012) (positing that new products created by the shadow banking system increase the riskiness of the financial sector); ZOLTAN POZSAR ET AL., SHADOW BANKING, STAFF REPORT NO. 458, FED. RES. BANK N.Y. 1 (Feb. 2012), http://www.newyorkfed.org/research/staff_reports/sr458.pdf.

24. *See* Tom C.W. Lin, *The New Investor*, 60 UCLA L. REV. 678, 691 (2013) ("Partially as a result of private exchanges and dark pools, a 'shadow banking' infrastructure now casts a large penumbra over the financial system.").

25. *See* Edward McBride, *Shadow and substance*, ECONOMIST (May 10, 2014), http://www.economist.com/news/special-report/21601621-banks-retreat-wake-financial-crisis-shadow-banks-are-taking-growing (reviewing the various sorts of firms that can be characterized as shadow banks and the sort of services they provide).

26. Claims from bankers themselves as to the public service orientation of banking, though, are not uncommon. These have tended to be seen as, at best, public relations work; at worst, transparent attempts at justifying sketchy behavior (*see infra* notes 105–114 and accompanying text). There is thus a disconnect between the actual public good banks perform and likely popular resistance to the idea that they do public good resulting from the persistence of unethical behavior. There is an ever-present risk of the rhetoric of the public good being deployed in the service of ethical "greenwashing."

27. *See* Part IV.A (discussing the processes of culture change).

28. Ryan Tracy & Victoria McGrane, *New York Fed Takes Aim at Bank Culture*, WALL ST. J. BLOG (Sept. 19, 2014, 4:04 PM), http://blogs.wsj.com/moneybeat/2014/09/19/new-york-fed-takes-aim-at-bank-culture (describing a conference asking regulators to consider taking steps to transform culture). Ethics also made an appearance in the ordinary supervision applied to banks; see FED. DEPOSIT INS. CORP., DSC RISK MANAGEMENT MANUAL OF EXAMINATION POLICIES § 4.1 (Apr. 2005), https://www.fdic.gov/regulations/safety/manual/section4-1.pdf (including a mention of ethics in the discussion of risk). Additionally, the Federal Reserve Bank of New York has created a web page on the topic of culture reform. *Governance & Cultural Reform*, FED. RES. BANK N.Y., http://www.newyorkfed.org/governance-and-culture-reform (last visited Mar. 24, 2017).

deliberative standards that scholars such as Seana Shiffrin have praised.[29] They have eschewed the sorts of specific requirements for ethics that Claire Hill and Richard Painter have urged on American regulators.[30]

Moreover, they represent a particular mood in American regulation. Regulation through ethics is regulation at its softest, and today soft forms of regulation such as guidance, best practices, and memorandums of understanding with other regulators are growth areas in administrative law.[31] Regulating banks through culture and ethics is accordingly not just important for understanding how banking supervision is now meant to work, but serves as an example of this sort of so-called new governance.[32]

In our view, informal regulation can work, particularly in the context of the coordination of international oversight over a global industry like the financial services industry.[33] But we are skeptical of these calls for a warm—and seemingly quite fuzzy—culture of ethics. We move to problematize both the "culture" and the "ethics" here, urging caution in delineating the uses to which each of these concepts will be put in the context of banking. We aim to demonstrate that critical engagement with the concept of culture can yield specific insights about how ethical behavior might come to be self-sustaining within the banking profession.

Culture may be found within the interplay of directive action and organically arising forces.[34] Examples of such processes in action lay conveniently to hand. For example, recent cases by the Delaware Supreme Court policing investment bankers for conflicts of interest when advising on merger transactions while also offering financing for the completion of those transactions demonstrate the active incorporation of ethical standards into legal regulation in a concrete way.[35]

The view of culture that we describe here complicates the notion of culture as operationalizable and able to be turned to specific ends (no matter how worthy), able to be generated from the top down, or amenable to directive change. At the same time, however,

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29. *See generally* Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214 (2010) (advocating for the so-called "foggy" approach to imposing moral standards).

30. *See generally* CLAIRE HILL & RICHARD PAINTER, BETTER BANKERS, BETTER BANKS: PROMOTING GOOD BUSINESS THROUGH CONTRACTUAL COMMITMENT (2015) (advocating for stringent regulations on bankers).

31. *See supra* note 12 and accompanying text (providing examples of professions with ethical codes and acts with ethical considerations); *see also, e.g.*, David Zaring, *Best Practices*, 81 N.Y.U. L. REV. 294, 297 (2006) (explaining how best practices work as a regulatory tool).

32. *See generally* Orly Lobel, *New Governance as Regulatory Governance*, *in* THE OXFORD HANDBOOK OF GOVERNANCE (David Levi-Faur ed., 2012) (discussing the new governance literature); David M. Trubek & Louise G. Trubek, *New Governance & Legal Regulation: Complementarity, Rivalry, and Transformation*, 13 COLUM. J. EUR. L. 539, 541 (2007) ("'[N]ew governance'[] may encourage experimentation; employ stakeholder participation to devise solutions; rely on broad framework agreements, flexible norms and revisable standards; and use benchmarks, indicators and peer review to ensure accountability.").

33. *See, e.g.*, David Zaring, *Finding Legal Principle in Global Financial Regulation*, 52 VA. J. INT'L L. 683, 711 (2012) (suggesting soft forms of regulation like peer review for the international financial market).

34. ANNA LOWENHAUPT TSING, FRICTION: AN ETHNOGRAPHY OF GLOBAL CONNECTION 267 (2005) (arguing that despite capital's seeming homogenization of culture, the universal and the particular make each other).

35. *See infra* notes 131–133 and accompanying text (discussing the fiduciary duties banks and bankers owe their clients).

these critiques may serve useful in the work of regulators in anticipating and avoiding likely difficulties in implementing the vision of ethical bankers, helping regulators to encourage a culture of ethics that is both effective in increasing compliance and more than ethical "greenwashing."

In what follows, we begin in Part II with a survey of the growth of ethics concerns regarding bankers, which has been met by a campaign on the part of American regulators for ethical banking. After briefly outlining the complexities in using culture as an analytical tool, in Part III we flesh out the argument analogizing ethical banking to disciplinary codes of ethics. We proceed in Part IV with a critical evaluation of the import of the decision to pursue ethical banking. Although our conclusions about the potential of regulating for ethical banking as they stand now, with their vague gestures toward professional ethics, are skeptical, we agree with regulators that the concepts of culture and law-abidingness are meaningful.

In Part V, we identify some ways that ethics, defined carefully, might contribute to a regulatory program, or at least an understanding of an industry that might provide the baseline for thinking about regulatory interventions that could work. We think that, when bankers have been hired to act as non-conflicted advisors to clients, they might be usefully subject to ethical obligations, though these could be obviated by contract. It might make sense to hold senior managers liable for reckless behavior by their subordinates. And, although we acknowledge there is no bright line rule to be had, there is room for encouraging banks not to engage in persistent rule-skirting; though regulators should not rest on the assumption that their calls for a worthy tone at the top will do the trick. A brief conclusion follows.

II. THE DEMAND FOR, AND SUPPLY OF, ETHICAL BANKING NORMS

Bankers are often accused of venality, but so are many other occupations, and yet the call for a better culture has become particularly acute for the oversight of banking. To make sense of this novel regulatory approach, some evidence of a lack of ethics by banks is considered in this Part on the assumption that it has animated the new regulatory call for ethical banking. It is followed by a consideration of what ethical requirements might tell us about how banking supervision works. The various calls for ethical banking—both hortatory and conjoined with ordinary supervision—are then explored, with an eye to establishing that the turn towards ethics by banking's regulators is recent, vibrant, and widespread.

A. The Need for Ethics?

1. Observed Need

While it is difficult to know whether the lack of ethics is more serious in banking than elsewhere, there is little doubt that many—including bankers themselves—worry about the issue. In 2013, the *Economist* surveyed 400 financial executives; over 50% revealed that they had gotten to where they were by at least in part being "flexible" over ethical standards.[36] A recent survey of financial market participants in the U.S. and UK revealed

36. INTELLIGENCE UNIT, A CRISIS OF CULTURE, ECONOMIST 4 (2013),

that 51% of individuals earning $500,000 or more per year suspected that their competitors had engaged in unethical or illegal activity in order to gain an edge in the marketplace.[37] One-third of the respondents believed that their compensation structures might incentivize employees to compromise ethics or commit legal violations.[38]

The social science is not favorable, either. One particularly amusing—or particularly unsettling—study found that bankers were more likely to take advantage of counterparties in psychological exercises if they were reminded that they were bankers before engaging in the exercise.[39] Karen Ho's ethnographic study of Wall Street banks led her to conclude that the culture was one of "reckless expediency."[40] A variety of studies have found that money increases the likelihood of arguably unethical behavior: people become "less helpful and fair in their dealings with others" when money is on the line, and they are "more likely to cheat" if shown a large amount of money.[41] These studies have implications for banking with its bonus-based incentive structure. Christina Skinner has collected more evidence of the widespread misconduct of financial institutions, which she characterizes as a "serious problem."[42]

Moreover, people do not trust bankers and have not for a very long time. As one commentator has observed: "In the public imagination, no other lawful industry is as synonymous with moral failure, deception, and public opprobrium as investment banking."[43] The familiarity with banking bred by the crisis has produced particular contempt. Numerous polls have suggested that bankers are among the least trusted of all the professions.[44] The popular press has often inveighed against "banksters."[45] Bankers have been compared to vampire squid and reckless gamblers, they have been called fat and greedy, and they have been mocked for suggesting that they have been serving as targets for all-purpose opprobrium.[46]

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https://www.cfainstitute.org/about/research/surveys/Documents/crisis_of_culture_report.pdf.

37. Ann Tenbrunsel & Jordan Thomas, *The Street, The Bull and The Crisis: A Survey of the US & UK Financial Services Industry*, SEC WHISTLEBLOWER ADVOCS. 3 (May 2015), www.secwhistleblioweradvocate.com/LiteratureRetrieve.aspx?ID=224757.

38. *Id.*

39. Alain Cohn et al., *Business culture and dishonesty in the banking industry*, NATURE 1 (2014), http://www.nature.com/nature/journal/vaop/ncurrent/full/nature13977.html.

40. KAREN HO, LIQUIDATED: AN ETHNOGRAPHY OF WALL STREET 285 (Duke University Press ed., 2009) [hereinafter HO, LIQUIDATED].

41. Francesca Gino & Cassie Mogilner, *Time, Money, and Morality*, 25 PSYCHOL. SCI. 414, 414 (2014).

42. Christina Parajon Skinner, *Misconduct Risk*, 84 FORDHAM L. REV. 1559, 1561 (2016).

43. Andrew F. Tuch, *The Self-Regulation of Investment Bankers*, 83 GEO. WASH. L. REV. 101, 124 (2014).

44. *See, e.g.*, Lydia Saad, *Nurses Shine, Bankers Slump in Ethics Ratings*, GALLUP (Nov. 24, 2008), http://www.gallup.com/poll/112264/nurses-shine-while-bankers-slump-ethics-ratings.aspx (illustrating the high accolades nurses receive in regard to ethics and honesty amongst professionals and especially compared to bankers).

45. *See, e.g.*, Ellen Brown, *Making the World Safe for Banksters*, COUNTERPUNCH (Sept. 5, 2013), http://www.counterpunch.org/2013/09/05/making-the-world-safe-for-banksters (explaining how the Financial Services Agreement of the World Trade Organization relaxed banking regulations in the United States and globally). The former securities plaintiffs' lawyer, William Lerach, provides some admittedly biased context for the term: "In the wake of the 1929 Crash, Congress's Pecorra hearings exposed the rawest kind of self-dealing, abuse and fraud by corporate insiders, Wall Street bankers (coining the term "banksters"), and the accounting firms during the 1920s." William S. Lerach, *Plundering America: How American Investors Got Taken for Trillions by Corporate Insiders*, 8 STAN. J.L. BUS. & FIN. 69, 75 (2002).

46. *See, e.g.*, Brooke Masters, *Banks Will Fail To Win Back Trust With Tragedy Analogies*, FIN. TIMES

Classically, the problems have been attributed to the middleman role of the banker. Louis Brandeis viewed it as a problem of anticompetitive conspiracy, in which "the growth of power of our financial oligarchs comes from wielding the savings and quick capital of others," in many cases through "secret arrangements and understandings in restriction of competition through the agency of the banking house."[47] As Geoffrey Miller has observed, "the perception that banks are subject to unique obligations arising from their custodianship of funds contributed by others is deeply entrenched in popular culture."[48]

This Article will not try to adjudicate the merits of the case against the morality of bankers, other than to note that there is plenty of sentiment for assuming the worst, and a lengthy history of it. Doing something to make bankers better behaved is thus both popular among the public and rooted in at least some research. While it is easy to overstate the case against any profession—lawyers have been known to suffer from plenty of public opprobrium, but that does not mean that they are all venal—it is clear that the case against bankers has been made in a variety of contexts, using a variety of methods, ranging from harangues to controlled experiments.[49]

2. Functional Need

All of this suggests that there is something to the idea that there is something wrong with the values adopted by those in the banking industry. But something rotten does not necessarily make the case for regulation through the imposition or encouragement of the adoption of ethical norms by the regulated. Many administrative agencies are founded not on the idea that the regulated industry will eagerly comply with bureaucratic orders because of their moral responsibility to do so, but rather on the suspicion that the industry will avoid compliance however it can. Tax regimes are structured to aggressively police taxpayers who are presumed to be constantly seeking to evade findings of deficiencies, as are antitrust agencies with regard to ever more creative restraints on trade.[50] These regulators do not insist on the adoption of rules of ethical behavior in their area—rather, they expect that the regulated will, to some extent, seek to shun regulation and pursue self-interest.

(Dec. 12, 2014), https://www.ft.com/content/3ceb1fa6-8128-11e4-b956-00144feabdc0 (discussing the financial industry's struggle to change its culture and win back the public's trust).

47. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW BANKERS USE IT 18, 48 (1914) (quoting H.R. REP. NO. 1593, at 148 (1913)).

48. Geoffrey P. Miller, *Essential Papers on the Economics of Financial Law* 4 (NYU Law and Economics Research Paper No. 16-01, Jan. 11, 2016) (forthcoming in ECONOMICS OF FINANCIAL LAW (EDWARD ELGAR 2016)), http://ssrn.com/abstract=2713832.

49. *See, e.g.*, Benjamin H. Barton, *The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 N.C. L. REV. 411, 414 (2005) (stating "many lament the public's low opinion of the legal profession"); Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805, 808–24 (1998) (demonstrating this unpopularity with reference to surveys and lawyer jokes). Indeed, much of the gaming of the system that irritates observers of banking is enabled by lawyers, or so Claire Hill and Richard Painter have argued. HILL & PAINTER, *supra* note 30, at 182 ("Much of the bankers' gaming of the system is enabled by lawyers who put perceived obligations to fee-paying clients ahead of lawyers' obligation to the legal system and society as a whole.").

50. *See* Kristin E. Hickman & Claire A. Hill, *Concepts, Categories, and Compliance in the Regulatory State*, 94 MINN. L. REV. 1151, 1162–63 (2010) (discussing the tax regime in this vein); Eric Kades, *Windfalls*, 108 YALE L.J. 1489, 1561 (1999) ("[T]reble damages under the antitrust acts reflect the difficulty of detecting and proving collusion in its myriad forms.").

To justify a focus on banking ethics, one must make the case that the way banking regulation works is different from other kinds of regulation, that it requires regulation by ethics codes in a way that, say, pharmaceutical drug approval does not. In our view, the case for difference lies in the close relationship between supervisors and banks, the sense that banks can undermine regulation by complying with its letter, rather than its spirit. This relationship is exacerbated by the risk that banks will use their superior information to the detriment, rather than the benefit, of their clients and the poor reputation banks have earned.

Banking regulation has long been high-touch, low-opacity regulation. The regulators sit next to the bankers and communicate as much through discussions about, say, position limits and new lines of business, as through specific rules setting forth appropriate conduct or its opposite.[51] In this sense, banking regulation is nothing like, say, an EPA rule on the sort of emission levels that will be tolerated. There are fewer such rules, and more discretion, applied through the sort of daily oversight that other regulators cannot offer. Hundreds of Fed staffers work inside large banks every day; other regulators do not embed in their charges.[52] Moreover, all of this—the regulatory relationship, the nature of the instructions issued by regulators to their charges, and the nature of the response—is shrouded in secrecy. This sort of regulation may require a degree of willing cooperation from the banks to work at all.

However, if banks get around the rules with behavior that frustrates regulators but that does not violate a specific rule, regulators decry a compliance orientation, which has often been thought to be a problem with the financial industry in particular.[53] As Justin O'Brien has observed in his study of one large American bank's approach to compliance, regulation has created an atmosphere fertile for "functional compliance, with interested parties transacting their way around explicitly internally sanctioned or illegal activities."[54]

Bankers also occupy a role in the economy that makes them susceptible to succumbing to temptation, while also making rule-based supervision difficult. They know more than their clients about the products they sell—a problem that has increased as banking products have become more and more complex.[55] Bankers do deals with thousands of counterparties, from whom they frequently acquire private information that places them in an advantageous position not just against their clients, but against client competitors, or those who do business with clients.[56] This can mean that they trade with more information

51. *See* Jake Bernstein, *Inside the New York Fed: Secret Recordings and a Culture Clash,* PROPUBLICA (Sept. 26, 2014, 5:00 AM), http://www.propublica.org/article/carmen-segarras-secret-recordings-from-inside-new-york-fed (providing a case study of how regulators oversee banks from within and a claim that the approach is not working).

52. *Id.*

53. JUSTIN O'BRIEN, REDESIGNING FINANCIAL REGULATION: THE POLITICS OF ENFORCEMENT 109 (2006).

54. *Id.*

55. In the run up to the financial crisis, "information asymmetry turned the MBS market into a living version of a sour lemon market . . . ." Simin Gao & Guifeng Shi, *Sweetening the Lemon with Fair Cost: Flaws the U.S. Government's Toxic Asset Programs and Possible Legal Solutions*, 129 BANKING L.J. 314, 315 (2012); *see also* Steven L. Schwarcz, *Banking and Financial Regulation*, *in* THE OXFORD HANDBOOK OF LAW AND ECONOMICS 5 (Francesco Parisi ed., 2015), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6038&context=faculty_scholarship (explaining the problem of information failure).

56. Gavin Clarkson, *Wall Street Indians: Information Asymmetry and Barriers to Tribal Capital Market Access,* 12 LEWIS & CLARK L. REV. 943, 944 (2008).

about the market than their counterparties can attain—and often, with more of a sense about how market conditions might affect what their clients are hoping to do. They also have so many clients that undivided loyalty to all would be a difficult policy to implement. Banks have created conflict committees and so-called Chinese walls in these situations to address problems that fiduciary obligations do not cover or where such obligations would not apply.[57] But there have long been suspicions that these measures cannot ensure that banks avoid divided loyalties.[58]

Banks also suffer from an image problem of their own (perhaps unavoidable) making. They are risky ventures that are set up to look like the risk is being hidden. Prone to crisis, banks are stocked with bankers who wear suits and sit in sturdy, richly appointed buildings, generating the image of stability—only to periodically come catastrophically acropper, necessitating an unpopular government bailout.[59] This is the sort of seeming dishonesty that occasioned Ho's critique of Wall Street banks, and it underlies an indictment that, as we will see, has been leveled by regulators across the globe.[60]

Some of these problems may be overstated, and any student of administration will wonder about a branch of the administrative state that insists that the way it supervises its industry is necessarily different than that of most industries. In fact, banking regulation has always been rather different,[61] but relying on ethics as a regulatory tool is more different still, as the next Part of this Article will show.

B. The Emerging Supply of Ethics Requirements

Whatever the merits of ethical requirements as a regulatory response to the travails of banking, regulators have bought into the idea, and are increasingly positing, that the regime designed to improve the safety and soundness of banks will only succeed given more and better ethics. The problem is often characterized as one of oversight and culture, at which an ethical tone must be set at the top that will filter down to the bank employees.[62]

What that tone should sound like is less clear, but a careful parsing of regulators'

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57. *See generally* Christopher M. Gorman, Note, *Are Chinese Walls the Best Solution to the Problems of Insider Trading and Conflicts of Interest in Broker-Dealers?*, 9 FORDHAM J. CORP. & FIN. L. 475 (2004) (discussing how effective Chinese walls are with broker-dealer regulation and insider trading).

58. As Senator William Proxmire (R-WI) once said, "[i]n case after case after case, the Chinese Wall is a phony, it's a fake, it doesn't work, there's too much temptation to go back and forth, it's in the same firm . . . ." *Improper Activities in the Securities Industry: Hearings Before the Senate Comm. on Banking, Housing, and Urban Aff.*, 100th Cong. 89 (1987); *see also*, H. Nejat Seyhun, *Insider Trading and the Effectiveness of Chinese Walls in Securities Firms,* 4 J.L. ECON. & POL'Y 369, 371 (2008) ("The evidence provided in this study suggests that the Chinese Walls are porous and ineffective, and material, nonpublic information about the client firm is allowed to pass between departments of the securities firms."); Gorman, *supra* note 57, at 476 ("Chinese Walls, whether used conceptually to prevent insider trading or structurally to prevent conflicts of interest, are inefficient, largely ineffective and have more shortcomings than advantages.").

59. "The bank looked like, well, a bank: steps and columns for a grand entrance, high ceilings. All spoke of confidence." Howard Mansfield, *Why We Build Fortresses,* N.Y. TIMES (Sept. 15, 1985), http://www.nytimes.com/1985/09/15/nyregion/new-jersey-opinion-why-we-build-fortresses.html.

60. HO, LIQUIDATED, *supra* note 40, at 291; *see also infra* Part II.B (describing the problems with ethics as a regulatory tool in the banking industry).

61. *See generally* Zaring, *supra* note 8 (detailing the financial crisis and Treasury reaction).

62. PARLIAMENTARY COMMISSION ON BANKING STANDARDS, CHANGING BANKING FOR GOOD, 2013–2014, HL 27-V, HC 175-V, at 1445 (UK), http://www.frank-cs.org/cms/pdfs/UK/UK_Parl_Banking_VolumeV_19.6.13.pdf.

speeches and actions is revealing. Financial regulation has embraced ethics in two ways. The first has been the method of chastisement, in which senior supervisors hold meetings and give speeches oriented on changing the culture of banking. These calls for more ethics might be characterized as both preliminary and *in terrorem*—the former because they do not lay out more specific ethical requirements, and the latter because they are meant as a warning to banks that they must shape up. Behind the chastisement is the idea, as Andrew Tuch has put it, that banks' "organizational cultures may also promote self-interested behavior over other-regarding behavior, undermining efforts that may prevent or constrain misconduct."[63]

The second approach is one of ordinary supervision, which permits supervisors to assess the safety and soundness of an institution in part by evaluations of the quality of management. While in the past that might have required an assessment of the competence of the bankers at the top, in the wake of the financial crisis, it is more focused on command and control. And rather than risk management alone, supervisors have been reminded that they can scrutinize the quality of the bank's embrace of ethics, an amorphous term that means not just the promulgation of a code of ethics (which most systemically significant banks have now),[64] but of a norm of compliance with regulatory inputs.

Both initiatives—the scrutiny of the ethics of managers and others at the bank and the harping on poor "cultures" and prior misdeeds—are designed to make the job of overseeing banks easier for regulators, one presumes, but the question is how they will do so. And here, the words of the regulators themselves are somewhat instructive.

William Dudley, a president of the New York Fed, vice-chair of the Federal Reserve Board, and a former investment banker himself, emphasizes the view that regulated banks must act ethically if they hope to meet the requirements that their regulatory supervisors expect of them.[65] In addition to decrying the "deep-seated cultural and ethical failures"[66] seen in the financial system, Dudley warned that if things do not improve, consequences would ensue:

> [I]f those of you here today as stewards of these large financial institutions do not do your part in pushing forcefully for change across the industry, then bad behavior will undoubtedly persist . . . . In that case, financial stability concerns would dictate that your firms need to be dramatically downsized and simplified so they can be managed effectively. It is up to you to address this cultural and ethical challenge.[67]

Under Dudley's auspices, the New York Fed called in the large banks under its

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63. Tuch, *supra* note 43, at 124.

64. The American Bankers Association has created an Institute of Certified Bankers (ICB) to adopt and administer its code of ethics. *ICB Code of Ethics*, AM. BANKERS ASSOC., http://www.aba.com/Training/ICB/Pages/ethics.aspx (last visited Mar. 24, 2017).

65. William C. Dudley, President & Chief Exec. Officer, Fed. Res. Bank N.Y., Remarks to the Global Economic Policy Forum: Ending Too Big to Fail 7 (Nov. 7, 2013), http://www.bis.org/review/r131108g.pdf ("There is evidence of deep-seated cultural and ethical failures at many large financial institutions.").

66. *Id.*

67. William Dudley, President & Chief Exec. Officer, Fed. Res. Bank N.Y., Remarks at the Workshop on Reforming Culture and Behavior in the Financial Services Industry: Enhancing Financial Stability by Improving Culture in the Financial Services Industry (Oct. 20, 2014), https://www.newyorkfed.org/newsevents/speeches/2014/dud141020a.html.

jurisdiction for a two day, high level workshop on how to improve banking ethics; he spoke at the meeting, as did other senior American banking regulators.[68] The New York Fed's general counsel has also posited that "a strong ethical culture will lead to better behavior," though, again, the specifics of what banks should do to create that culture are not spelled out.[69] And Paul Volcker himself has justified the Volcker Rule—a Dodd–Frank requirement that broadly prohibits banks from trading on their own account—in part because it would change the "trading culture" created when traders take senior management positions at banks.[70]

These developments add to a regime that has already made ethics of the bankers a part of its supervisory framework, though it has not, until now, emphasized the fact. Banks that have failed to establish a sufficiently ethical culture may be deemed "undercapitalized" by the Federal Deposit Insurance Corporation (FDIC) and forced to raise money or, ultimately, give up their charter to someone else. As the FDIC has explained in its handbook for managers subject to bank evaluations, banks must establish a set of policies and goals, and "[t]hese objectives and policies should, at a minimum, cover . . . internal routine and controls, audit programs, conflicts of interest, code of ethics, and personnel."[71]

The agency's CAMELS rating system has always included an M for evaluating management quality by a variety of metrics, including their trustworthiness.[72] In this sense, American ethics regulation is not entirely new; the tools for requiring ethical banking have long been a part of the supervisory toolkit. It is the post-crisis emphasis on including a view of ethics as a component of assessing the safety and soundness of a bank that is new, along with the interest in generating this culture of ethics—what we might gloss as self-sustaining, rather than externally imposed, ethical norms.

Judging by their general exhortations, banking regulators seek a pervasive, self-sustaining norm of ethics—an ethical *weltanschauung*. The practical suggestions that they have generated are amorphous but tend to take the form of top-down directives. In the next Section, we consider the possibility that, given the complexities of culture change, these directive measures are misaligned to the broader goal.

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68. *Id.*

69. Emily Glazer & Christina Rexrode, *As Regulators Focus on Culture, Wall Street Struggles to Define It*, WALL ST. J. (Feb. 1, 2015, 7:57 PM), http://www.wsj.com/articles/as-regulators-focus-on-culture-wall-street-struggles-to-define-it-1422838659?mod=WSJ_hp_LEFTWhatsNewsCollection (quoting general counsel). In the same vein, the Comptroller of the Currency has said, "[i]t is not going to work if we approach it from a lawyerly standpoint . . . . It is more like a priest-penitent relationship." Peter Eavis, *Regulators Size Up Wall Street, With Worry*, N.Y. TIMES DEALBOOK (Mar. 12, 2014, 8:51 PM), http://dealbook.nytimes.com/2014/03/12/questions-are-asked-of-rot-in-banking-culture (quoting the Comptroller).

70. *See also* Robert Kuttner, *Too Big To Be Governed?*, AM. PROSPECT (Nov. 5, 2010), http://prospect.org/article/too-big-be-governed-0 (examining the change in trading culture).

71. As the FDIC has explained in its handbook for managers subject to bank evaluations, banks must establish a set of policies and goals, and "[t]hese objectives and policies should, at a minimum, cover . . . internal routine and controls, audit programs, conflicts of interest, code of ethics, and personnel." FDIC, *supra* note 28, § 4.1-2.

72. *Id.* § 4.1-14. This sort of management, actually, has some history as skepticism about the morality of bankers has been a feature of American political discourse. Perhaps for this reason, good citizenship requirements have long been a part of banking charters, and remain so today. *See generally* Robert C. Hockett & Saule T. Omarova, *"Special," Vestigial, or Visionary? What Bank Regulation Tells Us About the Corporation—and Vice Versa*, 39 SEATTLE. U. L. REV. 453 (2016) (discussing this tradition in banking chartering). Needless to say, these sorts of character constraints almost never appear in the modern version of the corporate charter. *Id.*

C. A Culture of Ethics

In instilling ethics in banks, regulators have emphasized the importance of culture, if in rather broad ways. The Office of the Comptroller of the Currency (OCC) has issued guidelines for federally chartered banks meant to address the way that banks might approach creating a good "risk culture" within the institution.[73] But the guidelines are broad. As the Comptroller has admitted: "The strength of an organization's risk culture is not easy for regulators to measure. It's not like credit quality or earnings strength. But it's important because it has an incredibly powerful influence on the risk decisions and behaviors at all levels of an organization."[74]

How might a regulator instill the right sort of culture? OCC is "looking to boards of directors and the senior management of our large banks to set the tone at the top that leads to a healthy organizational culture that abhors improper practices and excessive risk taking."[75]

The enthusiasm for "culture" as a possible regulator for bankers seems overdone. We use scare quotes deliberately here. The concept of culture has numerous complex meanings as an analytical tool employed in various disciplines and for various scholarly communities, but has nonetheless undergone over the past few decades a certain schematization.

It is important to clarify the term "culture" as it is used by regulators and as we use it. The term has gained a particular popularity in the corporate context; it gained, too, a great degree of vagueness, becoming widely used less as an analytical tool than as a buzzword.[76] Popular conceptions of corporate culture might take any number of forms. They may include references to, for example, "the values and attitudes of employees in the business or organization"[77] or "[a] blend of the values, beliefs, taboos, symbols, rituals and myths all companies develop over time."[78] The concept might be described in flexible terms[79] or in terms quite cut and dried, becoming a singular thing[80] having characteristics that may

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73. OCC, *OCC Guidelines Establishing Heightened Standards for Certain Large Insured National Banks, Insured Federal Savings Associations, and Insured Federal Branches* 26 (Dec. 16, 2014), http://www.occ.gov/news-issuances/news-releases/2014/nr-occ-2014-4a.pdf.

74. Thomas Curry, Comptroller Currency, Remarks Before the Annual Conference of The Clearing House Association: Unwritten Rules: The Importance of a Strong Risk Culture (Nov. 21, 2014), https://www.theclearinghouse.org/research/banking-perspectives/2014/2014-q3-banking-perspectives/unwritten-rules-the-importance-of-a-strong-risk-culture.

75. *Id.*

76. Glazer & Rexrode, *supra* note 69.

77. Luanne Kelchner, *Importance of a Healthy Corporate Culture*, HOUS. CHRON., http://smallbusiness.chron.com/importance-healthy-corporate-culture-20899.html (last visited Mar. 24, 2017).

78. *Small Business Encyclopedia: "Corporate Culture" Definition*, ENTREPRENEUR, http://www.entrepreneur.com/encyclopedia/corporate-culture (last visited Mar. 24, 2017).

79. Investopedia.com, an online glossary of business terms aimed toward laypersons, describes corporate culture as something that is "implied, not expressly defined, and develops organically over time from the cumulative traits of the people the company hires." *"Corporate Culture" Definition*, INVESTOPEDIA, http://www.investopedia.com/terms/c/corporate-culture.asp (last visited Mar. 24, 2017). Similarly, Inc.com notes that corporate culture (as an object, not as a concept) "does not lend itself to reorganization by a rearrangement of standard building blocks." *"Corporate Culture" Definition*, INC, http://www.inc.com/encyclopedia/corporate-culture.html (last visited Mar. 24, 2017).

80. It will be "a culture," Kelchner, *supra* note 77, perhaps, or one "real culture," as opposed to other apparent ones that "may sound better but may not be the true one." INC, *supra* note 79.

be evaluated as more or less salutatory ("a healthy corporate culture," perhaps, or "a great corporate culture").[81]

The idea of culture as a tool to be utilized to increase an organization's profitability runs throughout this discourse.[82] It is frequently tied to homogeneity—to similarity across a group;[83] to fitting in[84] by means of individual buy-in to a top-down,[85] unitary[86] program designed to specific ends.[87]

But culture here always stands for some unknowable something else. Its power comes less from what it is—from its substance—than from what it does. Anthropologist Annelise Riles, in her work regarding Japanese bankers in the wake of the financial crisis and the Fukushima disaster, writes of a very particular but still broadly familiar use of the concept of culture in "the moment after the collapse of pure faith in neoliberalism."[88] In Japan, as in the United States, this loss of faith brought with it a new interest in something Riles's informants called culture and which Riles recognized to be something of an empty

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81. For "a healthy corporate culture": Kelchner, *supra* note 77. For "a great corporate culture": John Coleman, *Six Components of a Great Corporate Culture*, HARV. BUS. REV. BLOG (May 6, 2013), http://blogs.hbr.org/2013/05/six-components-of-culture.

82. Books on corporate culture come from a number of different arenas, but one major strand is that of practical guides marketed toward managers and aiming to teach them how best to optimize and operationalize this culture, such as in EDGAR SCHEIN, THE CORPORATE CULTURE SURVIVAL GUIDE (2009); NAOMI STANFORD, CORPORATE CULTURE: GETTING IT RIGHT (2010); ERIC FLAMHOLTZ & YVONNE RANDLE, CORPORATE CULTURE: THE ULTIMATE STRATEGIC ASSET (2011). Articles similarly aimed abound as well. *See, e.g.*, Steve Olenski, *How One Brand Uses Corporate Culture To Maximize Productivity*, FORBES (Aug. 27, 2014, 11:26 AM), http://www.forbes.com/sites/steveolenski/2014/08/27/how-one-brand-uses-corporate-culture-to-maximize-productivity (explaining how Wishabi utilizes soft regulatory measures). Entrepreneur.com describes corporate culture as eminently changeable: "If you're not happy with your current culture, there are things you can do to start changing it now. Look for a symbol, story, ritual or other tool you could use to bring out the values and practices you want for your company. Your cultural tool might be a new corporate logo symbolizing your company's personality. Or you could choose a story to embody your approach and make it part of your culture. If you can't find a tool, make one. For example, you can turn an admired former employee into a symbol by giving an award named after that individual, complete with ritual ceremony." ENTREPRENEUR, *supra* note 78.

83. INC, *supra* note 79 ("Corporate culture refers to the shared values, attitudes, standards, and beliefs that characterize members of an organization and define its nature.").

84. *See, e.g.*, *id.* ("Around here who fits in and who doesn't?"); *see also* Max Chopovsky, *How One Brand Uses Corporate Culture to Maximize Productivity*, CHI. CREATIVE SPACE (Sept. 5, 2014), http://chicagocreativespace.com/how-one-brand-uses-corporate-culture-to-maximize-productivity ("[A] cohesive corporate culture lends to high-trust teams working towards a common goal together.").

85. *See, e.g.*, INC, *supra* note 79 (asserting that "[p]revailing corporate culture begins at the top" and is "by definition, something that flows from management downward and outward"); *Corporate Culture*, OGILVY & MATHER, http://www.ogilvy.com/About/Our-History/Corporate-Culture.aspx (last visited Mar. 24, 2017) ("'An atmosphere of ferment and innovation' . . . was David Ogilvy's idea for Ogilvy & Mather. To accomplish it, he behaved as he wanted his company to behave. Thus, a corporate culture was born.").

86. Olenski, *supra* note 82 ("[T]he Microsoft culture," say, is described as having been in its early years known as "scrappy, humble, intensely hungry and passionate.").

87. Lauren Weber, *Changing Corporate Culture is Hard. Here's How Lenovo Did It.*, WALL ST. J. (Aug. 25, 2014, 9:00 AM), http://blogs.wsj.com/atwork/2014/08/25/changing-corporate-culture-is-hard-heres-how-lenovo-did-it ("[I]ntegrating the Eastern culture in which they emerged with the Western values of many of their customers and . . . employees").

88. Annelise Riles, *Market Collaboration: Finance, Culture, and Ethnography After Neoliberalism* 115 AM. ANTHROPOLOGIST 555, 556 (2013) (discussing the loss of faith in the free market after the financial disaster in Japan).

signifier.[89] Culture here "functions as a placeholder for what is not knowable within the dominant paradigm: it simply stands for anything and everything that cannot be explained within the dominant rational actor paradigm as well as any and every possible method exploring such phenomena."[90] "Culture" becomes for regulators a Leatherman tool supplementing demonstrably flawed legal and technical expertise.

Culture in any meaningful sense is hard to measure. This difficulty likely springs primarily from two sources. First, in the more common buzzword senses, the concept may tend to be bereft of analytical value. Second, in any of its "thicker" conceptions, it resists this type of schematization, is difficult to operationalize, and stymies operationalist goals.

This brace of difficulties does not mean, however, that the concept is either hopelessly squishy or in practice useless. To the contrary—critical reevaluation of these seeming difficulties can yield specific insights about how ethical behavior might come to be self-sustaining within the banking profession.

While much of culture's elusive quality arises from and feeds the trouble people have defining it, definition is not the key here. Instead, the key is to settle upon its parameters as an analytical concept in this context. Here, we aim to evade both the terminal fuzziness of culture-as-buzzword and the overly schematized definitions common to efforts to analyze it.

This method of engagement with the idea comports with the ways anthropologists have long dealt with it. When anthropologists undertake, say, an "ethnography of law," they do it with an understanding that they are not dissecting some determined object that might be called "a culture." Further, they recognize that the aspects of cultural life they are studying are necessarily bound up in other issues such that they do not imagine that they might select one bit and study it in isolation. Here is early legal anthropologist Paul Bohannan's take on the unproductivity of seeking to understand culture by starting out sharply dividing things up:

> At the beginning of a study, it is necessary to delimit the area of investigation, and often this is stated not in terms of what is left out, but rather what is put in. Such a preliminary definition often blinds the scholar to important dimensions of the subject under consideration . . . . [O]ne must be more circumspect in examining culture itself.[91]

This two-step plays out similarly in communicating the anthropologist's findings: we must theorize the concept sufficiently to delimit our object, but remain sufficiently unattached to this version of it to avoid concealing the knobbly, three-dimensional data behind our sketches of that object.

Since our analytical focus is upon just that ornery complexity that must be subdued to produce such a sketch as might render culture amenable to modeling, the concern is not for pinning down one solid definition but for provisional definitions—descriptions, really—that refine and clarify the concept while retaining its flexibility.

Within anthropology, there are a number of different stances upon the nature,

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89. *Id.* at 557.

90. *Id.* at 561–62.

91. Paul Bohannan, *Rethinking Culture: A Project for Current Anthropologists*, 14 CURRENT ANTHROPOLOGY 357, 357 (1973).

functions, and limits of cultural analysis.[92] Common to these, however, is the development of the concept into an analytical device highlighting processes, tensions, and relations, rather than thing-like entities or identities.

Like the visions of culture within anthropology, the culture concepts indigenous to the areas of research from which the legal literature tends to draw—organizational studies,[93] business ethics,[94] and especially economics[95]—each have their particular usefulness as analytical tools. Whatever version of culture one prefers to utilize, delineating its uses and its limits makes possible the use of the concept as a rigorous analytical tool in ways that can yield practical solutions.

Further, the sorts of conceptual and definitional problems that we will see plaguing the operationalization of a concept of culture also bedevil the concept of ethics. In the contexts we describe, the use of "ethics," too, is more a gesture toward a constellation of ideas than a bounded subject. As a result, regulation requiring ethical banking might take on a variety of disparate forms.

In the next Part, we contrast traditional methods of supervising the banking industry with two common ways of imagining the form that self-sustaining ethical normative

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92. For discussions of the development of the culture concept within the discipline of anthropology, see generally *id.* and *id.* at 357 ("Culture as an idea is so simple . . . that it is difficult to reassess."). NICHOLAS B. DIRKS ET AL., CULTURE/POWER/HISTORY: A READER IN CONTEMPORARY SOCIAL THEORY (Nicholas Dirks et al. eds., 1994); Sherry B. Ortner, *Theory in Anthropology Since the Sixties*, *in* CULTURE/POWER/HISTORY (Nicholas Dirks et. al. eds., 1994); AKHIL GUPTA & JAMES FERGUSON, CULTURE, POWER, PLACE: EXPLORATIONS IN CRITICAL ANTHROPOLOGY (James Ferguson & Akhil Gupta eds., 1997); Leslie A. White, *The Concept of Culture*, 61 AM. ANTHROPOLOGIST 227 (1959); Roger M. Keesing, *Theories of Culture*, 3 ANN. REV. ANTHROPOLOGY 73 (1974); Annelise Riles, *Representing In-Between: Law, Anthropology, and the Rhetoric of Interdisciplinary*, 1994 U. ILL. L. REV. 597, 597 (1994); Ira Bashkow et al., *Introduction*, 106 AM. ANTHROPOLOGIST 433, 433–34 (2004); Ira Bashkow, *A Neo-Boasian Conception of Cultural Boundaries*, 106 AM. ANTHROPOLOGIST 443, 443–58 (2004); Andrew Orta, *The Promise of Particularism and the Theology of Culture: Limits and Lessons of "Neo-Boasianism"*, 106 AM. ANTHROPOLOGIST 473, 473–87 (2004).

93. *E.g.*, John Weeks & Charles Galunic, *A Theory of the Cultural Evolution of the Firm: The Intra-Organizational Ecology of Memes*, 24 ORG. STUD. 1309 (2003) (referencing organizational studies); V. Lynn Meek, *Organizational Culture: Origins and Weaknesses*, 9 ORG. STUD. 453 (1988); Andrew D. Brown, *Narcissism, Identity, and Legitimacy*, 22 ACAD. MGMT. REV. 643 (1997); Andrew D. Brown, *A Narrative Approach to Collective Identities*, 43 J. MGMT. STUD. 731 (2006); Yochanan Altman & Yehuda Baruch, *Cultural Theory and Organizations: Analytical Method and Cases*, 19 ORG. STUD. 769 (1998).

94. *E.g.*, Thomas W. Dunfee & Thomas Donaldson, *Contractarian Business Ethics: Current Status and Next Steps*, 5 BUS. ETHICS Q. 173 (1995) (referencing business ethics); Thomas Donaldson & Thomas W. Dunfee, *When Ethics Travel: The Promise and Peril of Global Business Ethics*, 41 CAL. MGMT. REV. 45, 45 (1999); Ronald R. Sims & Johannes Brinkmann, *Enron Ethics (Or: Culture Matters More than Codes)*, 45 J. BUS. ETHICS 243 (2003); Andrew Spicer et. al., *Does National Context Matter in Ethical Decision Making? An Empirical Test of Integrative Social Contracts Theory*, 47 ACAD. MGMT. J. 610 (2004); Brian W. Kulik, *Agency Theory, Reasoning and Culture at Enron: in Search of a Solution*, 59 J. BUS. ETHICS 347 (2005).

95. *E.g.*, Max H. Boisot, *Markets and Hierarchies in a Cultural Perspective*, 7 ORG. STUD. 135 (1986) (referencing economics); David M. Kreps, *Corporate Culture and Economic Theory*, *in* PERSPECTIVES ON POSITIVE POLITICAL ECONOMY (James E. Alt. & Kenneth A. Shepsle eds., 1990); Jacques Crémer, *Corporate Culture and Shared Knowledge*, 2 INDUS. & CORP. CHANGE 351 (1993); Geoffrey M. Hodgson, *Corporate Culture and the Nature of the Firm*, *in* TRANSACTION COST ECONOMICS & BEYOND 249 (John Groenewegen ed., 1996); Benjamin E. Hermalin, *Economics and Corporate Culture*, *in* THE INTERNATIONAL HANDBOOK OF ORGANIZATIONAL CULTURE AND CLIMATE (S. Cartwright et al. eds., 2001); Dennis A. Gioia et al., *Organizational Identity, Image, and Adaptive Instability*, 25 ACAD. MGMT. REV. 63 (2000); George A. Akerlof & Rachel E. Kranton, *Identity and the Economics of Organizations*, 19 J. ECON. PERSP. 9 (2005).

patterns might take—forms resembling professional ethics and resembling standards structuring expectations from the top-down. We consider the difficulties each presents in shaping the behavior of bankers.

III. ETHICAL BANKING AS A BID FOR DISCIPLINE

A. The Traditions of Banking Supervision

Ethics represent a next step in a broad-reaching effort to recreate credible financial standards in the wake of the financial crisis, and one fascinatingly different from the prior efforts. Post-crisis reform has been many things, but one unifying principle has been the effort to develop highly detailed and very quantitative measures of the positions and resources of financial institutions. There is nothing quantitative or detailed about the effort to impose ethics on banks.

Regulators, above all, supervise banks to make sure that they are safe and sound or, at least, safe enough and sound enough so as not to threaten, upon their collapse, the larger economy. Classically, this means requiring banks to keep money on hand to deal with the shock posed by a financial crisis or a run by depositors seeking to withdraw all of their money at once.

On this view, the stability of the financial system is critically dependent upon the maintenance by banks of strong capital positions. More generally, strong capital helps banks absorb unexpected shocks and reduces the moral hazard associated with the federal safety net. As former Fed Chair Ben Bernanke said before the financial crisis:

> Both robust risk management and strong capital positions are critical to ensure that individual banking organizations operate in a safe and sound manner that enhances the stability of the financial system. More generally, strong capital helps banks absorb unexpected shocks and reduces the moral hazard associated with the federal safety net.[96]

As a matter of rules, ensuring these strong capital positions has entailed focusing on what banks can do, what sort of cushion of cash they must hold to deal with shocks, how they compensate their employees, and in the case of disaster, how the disaster will be wound up.

Most of the hard and specific rules of banking regulation involve activity restrictions, capital charges, resolution, and compensation rules. For example, in the wake of the crisis, there was an effort to hive off derivatives trading from the more basic commercial and consumer lending operations of banks.[97] More generally, the previously unregulated

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96. Ben S. Bernanke, Chairman, Fed. Res. Bd. of Governors, *Modern Risk Management and Banking Supervision* (June 12, 2006), http://www.federalreserve.gov/newsevents/speech/bernanke20060612a.htm.

97. This so-called "swaps pushout rule," however, was ultimately overruled by Congress. For a discussion of the rule by a former SEC Commissioner, see Annette L. Nazareth et al., *Dodd-Frank Act Finalizes Swap Pushout Rule*, HARV. L. SCH. F. CORP. GOVERNANCE & FIN. REG. (July 7, 2010), https://corpgov.law.harvard.edu/2010/07/07/dodd-frank-act-finalizes-swap-pushout-rule/. For a discussion of its rollback, see Daniel R. Warren, *Congress's Rollback of the Dodd-Frank Swaps Push-Out Rule*, 34 REV. BANKING & FIN. L. 443, 443 (2015) ("The original purpose of this rule was to forbid banks that bought or sold 'swaps' from receiving certain types of federal assistance, especially any kind of government bailout. The amended version of Section 716 relaxes many of these restrictions on banks' swaps activities.").

derivatives industry was subjected to the sort of safety regulation to which banks are accustomed.[98] The so-called Volcker Rule, another activity restriction, prevents banks from engaging in risky trades on their own account.[99]

The Basel III capital adequacy rules, an international effort on to which American regulators have signed, have increased the capital that big banks must keep on hand and have imposed a number of other capital ratios that are meant to preclude them from gaming any one capital buffer requirement.[100] Hence the post-crisis development of leverage requirements, liquidity coverage ratios, total loss-absorbing capacity, and net stable funding ratios that force banks to keep a higher proportion of their assets in less profitable, but very safe, endeavors.[101] These measures are assessed quantitatively, and might best be described as regulation through accounting oversight, rather than through law, because they focus entirely on ensuring that portions of the complex balance sheets of banks adhere to predesignated numerical ratios with other portions of those balance sheets.

All of these are mathematically complicated efforts, and they have been paired in the United States with stress tests, which force banks to assess the adequacy of their capital under a variety of adverse and hypothetical circumstances—an economic collapse, a rogue trader, a sudden change in the value of the dollar—and share those results with their supervisors.[102]

Here too, much of the process of applying and surviving stress tests turns on math and models. The various funding ratios required by international accord and applied by American regulators are complicated indeed when handled on their own; when taken together, they are extraordinarily complex and are all but the opposite of regulation through ethical codes.[103]

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98. For an overview of this transformation, see generally Arthur W.S. Duff & David Zaring, *New Paradigms and Familiar Tools in the New Derivatives Regulation*, 81 GEO. WASH. L. REV. 677 (2013) (arguing that the Dodd–Frank Act is transformative in its regulatory goals, but traditional in the tools it uses to achieve these goals).

99. Dodd–Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 1851 (2010).

100. *See International Regulatory Framework for Banks (Basel III)*, BANK INT'L SETTLEMENTS, http://www.bis.org/bcbs/basel3.htm (last visited Mar. 24, 2017) (compiling the various documents that form a part of Basel III); David Zaring, *Legal Obligation in International Law and International Finance*, 48 CORNELL INT'L L.J. 175, 208 (2015) (discussing Basel III's merits); Narissa Lyngen, *Basel III: Dynamics of State Implementation*, 53 HARV. INT'L L.J. 519, 527 (2012) ("The main goal of the Basel III Framework is to strengthen the global capital framework by raising the quality, consistency and transparency of the capital base.") (internal quotation marks omitted).

101. For a discussion of these, see Robert F. Weber, *Structural Regulation As Antidote to Complexity Capture*, 49 AM. BUS. L.J. 643, 728 (2012) ("[T]he Basel III Framework also . . . imposes for the first time at the Basel Committee level a leverage ratio and two liquidity ratios, referred to as the 'net stable funding' ratio and the 'liquidity coverage' ratio.").

102. Mehrsa Baradaran, *Regulation by Hypothetical*, 67 VAND. L. REV. 1247, 1283 (2014). Another classic role of financial regulation has been to create a fast bankruptcy process that can take over a failed bank, and penalize its principals for the failure, without disrupting the financial system and the businesses of its counterparties and clients. The American resolution regime is run by the FDIC. Chaos ensued in the last financial crisis when Lehman Brothers, a multijurisdictional financial institution, went bust—with an attendant race for courthouses and assets across the globe. KATHLEEN C. ENGEL & PATRICIA A. MCCOY, THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE, AND NEXT STEPS 105 (2011) (describing Lehman Brothers' bankruptcy filing as "sending worldwide markets into a panic").

103. *See* David Zaring, *Why Do Bank Supervisors Love Acronyms? Your TLAC Explainer*, CONGLOMERATE (Nov. 9, 2015), http://www.theconglomerate.org/2015/11/why-do-bank-supervisors-love-acronyms-your-tlac-

B. Ethical Banking as a Bid for Professional Responsibility

Banks are full of professionals, but they have not, until now, been urged to adopt codes of professional responsibility; in our view, that is the right way to understand the calls for ethical bankers. Max Weber's conception of the nature of a "profession" is helpful.[104] Weber's phrase *beruf* has been translated in varied ways—not only as "profession" but also "occupation," "vocation," and "calling." This variance gives us a hint as to one difficulty in shaping something resembling the codes of the professions to a goal as broad as a pervasive culture of ethics and a profession as functionally diverse as banking. Weber's ideal professional politicians and scientists are "called" to their occupations.[105] Their engagement might be described as both inward and outward facing: spirit and meaning, as well as service and social value, animate it.[106]

Banking supervisors have waxed ambiguous as to what ethical banking requires, but in sorting through what they have been worried about, and in parsing their suggestions about how ethical banking might be embraced, two factors stand out.

The first is that ethics can and should be deployed to ensure the banks are capable of complying with the *spirit* of banking supervision. Ethical bankers might eschew regulatory arbitrage and would avoid compliance evasion. They might police their co-workers for wrongdoing, and banks themselves would set up internal controls to catch ethical issues before they cross the line into unethical behavior and to encourage self-policing by their employees.

This is ethics as a form of compliance, a degree of cooperative self-regulation meant to make the heavy hand of supervision less necessary. By pursuing the regulatory interest, on occasion at least, rather than self-interest, ethically obligated bankers would help implement the sort of subject-to-interpretation rules replete in post-crisis banking supervision.[107]

Second, ethics are meant to make clear occasions when bankers must put the interests of their customers ahead of their own. Regulators address this in the language of consumer protection.[108] Some invoke fiduciary obligations.[109] The idea appears to be that a *caveat emptor* approach would be better replaced with a more duty-of-care-like perspective with regard to customers.

The banker's responsibility to the customer might be good for the industry, of course—bankers would be less likely to be the subject of public opprobrium and might earn the public trust for which bank supervisors have called. But there is also an underlying

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explainer.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+theconglomerate%2Ffeed+%28Conglomerate%29 (discussing this further).

104. MAX WEBER, FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77–156 (Hans Heinrich Gerth & Charles Wright Mills eds., 1946).

105. *Id.*

106. *Id.*

107. Of course, banking regulation has promulgated very specific, as well as very general, rules.

108. One of the signature reforms of the Dodd–Frank Reform Act was to create the Consumer Financial Protection Bureau, which also polices the relationship banks have with their customers. Dodd–Frank Wall Street Reform & Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (codified as amended in scattered sections of 12 U.S.C.) (2010).

109. See discussion of shareholders in Dudley, *supra* note 67 (discussing how by making the company a risk bearer by the company, not the directors, limits discipline options for shareholders).

supervisory reason for the client service focus: with fewer information asymmetries being exploited, bankers would be less likely to put clients into risky trades (while perhaps also reducing the risk in the bank's own portfolio) and possibly less likely to take risks themselves.

The goals of public service and client service are not new, at least not if the discipline of banking is compared to the professions. They lie at the heart of most professional ethics codes. These codes regulate their disciplines and educate professionals as to their responsibilities while making the case that the specialized knowledge of the trade, combined with special care to ensure that information asymmetries are not used to exploit, can make for a well-regulated market for services. The professions police their members for compliance with the ethical codes and sanction those who fail to comport themselves with them.[110]

These professional values might seem to be alien to the rough and tumble world of Wall Street, but they regulate the professions with whom bankers often interact: accountants and lawyers have their own codes of professional ethics and, in both, the need to support government regulators to ensure, for example, legal compliance and accounting consistency serve this function.[111]

Accounting ethics have been around since the Renaissance, and lawyerly ethics principles are also traceable to the dawn of the profession.[112] Robert Montgomery has argued "[a]ccountants and the accountancy profession exist as a means of public service; the distinction which separates a profession from a mere means of livelihood is that the profession is accountable to standards of the public interest, and beyond the compensation paid by clients."[113]

Lawyers have evinced their commitment to clients through the traditions of "zealous advocacy."[114] Their principles of professional responsibility were once aspirational in the way the banking supervisors have hinted that banking should be, but have since become more codified and institutionalized.[115]

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110. The sanctions for such codes can amount to expulsion from the guild. The American bank supervisor William Dudley has suggested that bankers take on ethical codes that would permit that sort of expulsion. Dudley suggested "it would be helpful if financial firms, prior to making a hiring decision, could look up a candidate's 'ethics and compliance score' that reflects the individual's past performance at other financial firms." Dudley, *supra* note 67.

111. For a discussion of a time when these efforts went awry, see Lawrence G. Baxter, *Reforming Legal Ethics in A Regulated Environment: An Introductory Overview*, 8 GEO. J. LEGAL ETHICS 181, 184 (1995) ("[T]he time had come for some comprehensive reflection on the evolving standards of lawyer responsibility in the regulatory context. Furthermore, the regulatory misadventures of accountants, seeming to parallel and, at times, even outdo those of lawyers.").

112. The founder of accounting, Luca Pacioli, wrote on accounting ethics in his treatise on the profession. LUCAS PACIOLI & DOMENICO MANZONI, ANCIENT DOUBLE-ENTRY BOOKKEEPING: LUCAS PACIOLI'S TREATISE (A.D. 1494—THE EARLIEST KNOWN WRITER ON BOOKKEEPING) (JOHN B. GEIJSBEEK, 1914), http://www.mckinneyphd.net/BMGT428D/Readings/BMGT%20428-BOOK%201914%20Gelisbeck-Ancient%20Double-Entry%20Bookkeeping.pdf.

113. MICHAEL PAKALUK & MARK CHEFFERS, ACCOUNTING ETHICS AND THE NEAR COLLAPSE OF THE WORLD'S FINANCIAL SYSTEM 12 (2011) (citing R.H. Montgomery).

114. Paula Schaefer, *Harming Business Clients with Zealous Advocacy: Rethinking the Attorney Advisor's Touchstone*, 38 FLORIDA ST. U. L. REV. 251, 253–54 (2011).

115. For example, a number of lawyers agreed to provide legal advice to a fictional rapacious foreign government official in a sting and were defended by professional responsibility scholars for following the letter

In both disciplines, the service providers also serve as gatekeepers for compliance with government rules; lawyers advise their clients on how to comply with the law, and accountants do something similar, at least for those portions of the law that include the requirement for certain accounting standards. Lawyers are officers of the court and are obligated by their rules of professional responsibility not to counsel legal disobedience or to cover up crimes.[116] Of course, there are plenty of doubts in society that these disciplines achieve their public service ends.[117]

Compliance and public service accordingly sound like the kind of thing any regulator might support, though it is worth noting that client service and public service obligations do not always coexist easily. Sometimes, clients are interested in services that will help them skirt rules or take large risks that regulators might find unappealing. Sometimes, public service requires reporting on client conduct that clients would rather keep quiet. Nonetheless, it appears that banking regulators are analogizing with the professions when they think about how to make more ethical bankers.

IV. Two Possible Implications of the Ethical Banking Vogue

There are good reasons to be skeptical about the promise of banking regulation through ethics and would-be professionalization. A call for ethics might suggest a surrender by regulators, a sense that regulation cannot make banks safer, but that perhaps hortatory lectures might do the job. After all, why not just pass rules making bankers do the right thing? Why delegate responsibility to ethical commitments?

There are more rule-based alternatives. Claire Hill and Richard Painter have condemned the lack of ethics among bankers, but their solution is much less diffuse than the idea of imposing ethical standards and hoping for the best. Hill and Painter argue that bankers should "be personally liable from their own assets for some of their banks' debts" and "personally liable from several years of their past, present, and future compensation for some portion of fines and fraud-based judgments (including settlements) against the bank."[118] Christina Skinner has suggested that countries that adopt rules that facilitate the uncovering of misconduct ought to get a break on the capital that their banks must hold under Basel III.[119]

Moreover, the turn to soft standards must contend with the ways that banking does not really suit a call for ethics; two differences in particular are salient here. First, the happy story told to encourage the adoption of ethics—the idea that it is "win-win" and would just make banking better for everyone, including the bankers—is implausible. The second

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of their legal codes. Robert Palmer, *Lowering the Bar*, GLOBAL WITNESS (Feb. 1, 2016) https://www.globalwitness.org/en/reports/loweringthebar.

116. MODEL RULES OF PROF'L CONDUCT, r. 3.4 (AM. BAR. ASS'N 2015).

117. *See generally* Paul Campos, *Lawyers and Spoiled Identity*, 28 GEO. J. LEGAL ETHICS 73 (2015) (discussing the negative public perception of lawyers); Leonard E. Gross, *The Public Hates Lawyers: Why Should We Care?*, 29 SETON HALL L. REV. 1405 (1999) (explaining that the steps taken to address lawyers' public image problem are fruitless); Elena Romerdahl, *The Shame of the Legal Profession: Why Eighty Percent of Those in Need of Civil Legal Assistance do not Receive It and What We Should do About It*, 22 GEO. J. LEGAL ETHICS 1115 (2009) (arguing that pro bono hours should be required by the American Bar Association in order to ensure that more people in need of civil legal assistance receive that aid).

118. HILL & PAINTER, *supra* note 30, at 8.

119. Skinner, *supra* note 42, at 1598–603.

evinces doubt about whether bankers can truly be characterized as professionals like lawyers and accountants and whether it makes sense to do so.

A. Happy Bankers?

The turn by regulators to ethics is occasionally justified with the suggestion of the advantages of a *weltanschauung*, where ethics may be appropriately imposed on bankers by supervisors and by their superiors, and yet, at the same time, the outcome is not just meant to assuage regulatory risk, but also to lead to a better banking system, full of wealthy, happy, well-loved bankers.

If a simplified definition of ethics is that it is supposed to tell you when you should put the interest of others ahead of your own, the notes sounded in ethical banking requirements, to the extent that they are defined at all, are about when bankers should subordinate their self-interest.[120] That is, when the customer is supposed to come first, and how to think of clients as customers to be served rather than counterparties to be left to look out for their own interests. A similar concern suffices the hope that ethics will induce bankers to occasionally put the public interest before their own.[121]

Putting other interests ahead of one's own sounds like a way to impose costs on bankers. But much of the support for ethics in banking, and business ethics more generally, lies in the hope that there is such a thing as win-win ethics. Very popular amid advocates of "social impact" initiatives is the idea that ethics, imposed through a threat and eventually adopted as an internal constraint, could create a good culture and self-regulation without impeding profitability.[122] The lore around the value of this kind of a client service perspective is high, and not without a degree of suspect pleading.

There may be something to the case for win-win ethics, though we are skeptical. The case for them turns in part on the value of reflection and the value of public relations—the latter because "putting client interests first" will likely be rewarded with more client business, while in contrast, a reputation for acting unethically is likely to induce clients to take their business elsewhere.

For reflection, commitment to ethics is a commitment to the sort of Aristotelian virtue that improves the self, realized by self-examination, and the application of standards to personal conduct.[123] This Article is not the place for an extended discussion of the philosophical merits of standards-based regulation. However, the literature regarding the value of a set of standards meant to encourage reflection, perspective, and community

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120. *See supra* Part III.C (discussing this self-interest).

121. These twin goals are not the only reasons to loudly call for more ethical bankers. There is surely a component of the call for ethics that amounts to little more than greenwashing-style public relations for an industry and its supervisors—merely pious-sounding commitments to ethical conduct in the interest of rehabilitating the image of an image-conscious industry. Regular denouncements of a lack of ethics among bankers might engender sympathy for regulators, and establish their toughness over the industry, without in fact leading to any change in the quality of supervision.

122. For an example, see generally Shiffrin, *supra* note 29 (advocating social impact initiatives).

123. Judge Evelyn Keyes described "Aristotle's conception of eudaimonia, in which the objective of morality is 'living well and doing well,' or living so as to actualize and further the flourishing life as defined by the one whose life it is." Evelyn Keyes, *The Just Society and the Liberal State: Classical and Contemporary Liberalism and the Problem of Consent*, 9 GEO. J.L. & PUB. POL'Y 1, 3 n.10 (2011) (quoting ARISTOTLE, NICOMACHEAN ETHICS, bk. I, at 5 (C.D.C Reeve trans., Hackett Pub. Co. 1985) (350 B.C.) (emphasis omitted)).

mindedness is large enough. Seana Shiffrin has argued that fuzzy standards can encourage deliberation of a valuable self-actualizing sort.[124]

Some proponents of business ethics more generally think of the establishment of this mutually beneficial component of ethics as critical to its adoption in the community. Notable management scholars such as Michael Porter have made the advantage offered by ethical approaches in the long-term as a cornerstone of their work endorsing ethical conduct by business leaders.[125] The *Academy of Management Review* and *Business Ethics Quarterly* are replete with articles purporting to show the risks posed by neglecting ethics in all ranges of business, including environmental concerns, the entry into foreign markets, and the like.[126] Others look at the popularity in the sorts of surveys in which bankers finish well behind doctors and nurses and argue that a professional commitment to the interests of others is entirely consistent with a successful and prosperous career, as well as a degree of high regard in the community.[127] On this view, neglecting ethics is bad for business because of the downside risks of scandal and the upside posed by a reputation for trustworthiness.

It is often quite unsatisfying to assume that the only way to justify ethics is to find some way that it can contribute to the long-term health of a business. But it is almost definitionally impossible to make the case that a commitment to client service and public service would not in many cases make the work of the bank less lucrative. If this were not the case, then the need for ethics would be minimal. For these reasons, the happy banker paradigm of banking ethics should be treated with a degree of skepticism. Given the difficulties we have outlined in depending upon law, culture, *and* ethics, is there any hope for an "ethical banking culture" as a paradigm?

B. A Failed Paradigm?

The turn to ethics as a mechanism of banking supervision is a fascinating concession

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124. *See generally* Shiffrin, *supra* note 29 (arguing that "open-ended" standards may serve moral and democratic deliberative purposes).

125. *See, e.g.*, Michael E. Porter & Mark R. Kramer, *Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility*, HARV. BUS. REV. 78, 84 (Dec. 2006), https://hbr.org/2006/12/strategy-and-society-the-link-between-competitive-advantage-and-corporate-social-responsibility ("The mutual dependence of corporations and society implies that both business decisions and social policies must follow the principle of shared value. That is, choices must benefit both sides.") (emphasis omitted).

126. *See generally, e.g.*, Michael C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, 12 BUS. ETHICS Q. 235 (2002) (advocating for the theory of enlightened value maximization); Dirk Matten & Andrew Crane, *Corporate Citizenship: Toward an Extended Theoretical Conceptualization*, 30 ACAD. MGMT. REV. 166 (2005) (arguing that contemporary understandings of corporate citizenship are flawed and suggesting an alternative); Stephen J. Kobrin, *Private Political Authority and Public Responsibility: Transnational Politics, Transnational Firms, and Human Rights*, 19 BUS. ETHICS Q. 349 (2009) (arguing for the implementation of a hybrid public-private regime which relies on non-hierarchical compliance mechanisms to account for the structure of the emerging transnational order); Andreas Georg Scherer et al., *Global Rules and Private Actors: Toward a New Role of the Transnational Corporation in Global Governance*, 16 BUS. ETHICS Q. 505 (2006) (arguing that instrumental stakeholder theory and business and society research can only partially solve the global governance issue); Waheed Hussain & Jeffrey Moriarty, *Corporations, the Democratic Deficit, and Voting*, 12 GEO. J.L. & PUB. POL'Y 429 (2014) (discussing the aforementioned articles).

127. *See* Langevoort, *infra* note 133 and accompanying text (stating that investment advisors owe fiduciary duties to their clients).

by regulators that sensible supervision alone is unlikely to realize the regulatory mission of a relatively stable banking system. It makes bankers and regulators partners in pursuing safety and soundness, which in turn amounts to an admission that bankers are, to a large degree, masters of their own regulatory compliance. Behind the scolding and tough talk about culture, deep-rooted ethical lapses, and the lack of leadership lies the hope that bankers will somehow put the needs of compliance ahead of the needs, or at least the self-interests, of the banks.

The idea that client service is something that might be ethically required has a similar function; though, again, the duty to put the interest of the client ahead of the interests of the banker is conceptually different than the obligation to put the interests of regulatory compliance ahead of pure financial self-interest. But, in both cases, it is not clear that the obligations created by quasi-professionalization, at least with regard to ethics, will work.[128]

Much of what bankers do is difficult to separate from self-interest. Bank financing is both client service and an arms-length transaction little different from the sort of investment that shareholders, venture capitalists, and others make in firms. Nothing about investment decisions requires a patina of ethical duty other than perhaps the fiduciary obligations that directors, officers, and managing partners take on with regard to those providing them with funding. Nor are the obligations contained by the general idea that sometimes clients must be put first easily relatable to jobs that are not dissimilar from sales jobs—investment bankers have, after all, been compared to travelling salesmen of money, and the ethical codes observed by salesmen are not renowned for their heft.[129]

Regulators characterize ethics as a way to inculcate banking with a less transactional approach. This is, indeed, different from the current model of banking; banks certainly spend lots of time thinking about client service, but never because of the notion that such service is ethically required, as opposed to good for the business and, accordingly, the self-interest of the banker.[130]

The other professions offer services to their clients, but that is not what banks do, or at least not only what they do. To be sure, in some cases, banks offer the sorts of services that are not dissimilar from those of the professions. Investment advisers do have fiduciary obligations toward their clients.[131] Investment bankers owe their clients some degree of loyalty, at least according to the Delaware courts.[132] Broker-dealers who invest client funds

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128. As Andrew Tuch has observed, the self-regulatory mechanisms in place for American investment bankers almost never result in sanctions against those bankers; American self-regulation is focused on client service, and to the extent that it has an ethical component, Tuch's study is no endorsement of the promise of the shared approach to regulation. Tuch, *supra* note 43, at 123.

129. Darren K. Carlson, *Nurses Remain at Top of Honesty and Ethics Poll*, GALLUP (Nov. 27, 2000), http://www.gallup.com/poll/2287/nurses-remain-top-honesty-ethics-poll.aspx (revealing that consumers viewed car salesmen as the least ethical businesspeople).

130. That is behind, for example, the idea that banks should be run to be "long term greedy," as Gus Levy, the former head of Goldman Sachs, was known to say. *See* Arthur Levitt, Jr., *The SEC at the Crossroads*, 106 COLUM. L. REV. 1483, 1487 (2006) ("Companies need leaders who will get out in front of the curve, not just reacting to scandal but constantly working to raise the level of ethics in their companies and their industries.").

131. Although the area is a new one as far as regulation goes, the conflicts are explored in Arthur B. Laby, SEC v. Capital Gains Research Bureau *and the Investment Advisers Act of 1940*, 91 B.U. L. Rev. 1051 (2011).

132. Andrew F. Tuch, *Banker Loyalty in Mergers and Acquisitions*, 94 TEX. L. REV. 1079, 1134–46 (2016).

have fiduciary obligations as well, and banks are increasingly involved in that business.[133]

Moreover, banks may be similar to the professions in that they often justify themselves with reference to the provision of public goods (hence the "officer of the court" paradigm embraced by lawyers).[134] If a critical role of the professions turns on their provisions of public goods—law-abidingness, accurate reports, public health—the financial system offers its own public goods and may be analogous in that sense.

But otherwise, banks sell products—financial products, to be sure, but products that may be characterized as inputs that commercial firms need to do business, like electricity, upstream supplies, and labor.[135] Much of their purpose is to serve as capital allocators, a function that by definition does not depend on loyalty to this or that potential recipient of funds. That allocation is distinctively different than the provision of legal services or accountancy, where the professionals are representing clients, rather than picking between them. For these reasons, it is not clear that the effort to create and professionalize the banking sector is something that fits well with what the banking sector does. It is exceedingly difficult to understand the ethical component of finding counterparties to do a currency or interest rate swap, let alone many of the basics of commercial lending.

Nor is it clear, in an era of so-called shadow banks, exactly what the banking sector is.[136] Professions have well-guarded barriers to entry, but with hedge funds, private equity funds, angel investors, mutual funds, and others providing capital and financing to businesses, the dividing line between banks and non-banks has never been less clear.[137]

In addition to the difficulties presented by deep differences between the nature of the professions and of the banking industry, codes such as those that govern the professions are unsuited to the ultimate goal sought by regulators—pervasive, self-generating ethical norms.

Consider that lawyers, by many accounts, are terrible people.[138] A long history of public commentary (and lawyer jokes) pegs them as leeches, liars, and crooks, despite the sturdiness of their codes of ethics. The wrongs they commit in the eyes of the public—the perceived "crookedness" attendant to a defense lawyer's helping a client already guilty in the public mind avoid a conviction; the "sharklike" persistence of a corporation's lawyers in pursuing violators of its copyrights; the "sliminess" of a personal injury lawyer's work—do not necessarily have anything to do with breaches to the bounds of that code. On the contrary, the dogged pursuit of clients' interests, the complex language, even the courtroom wiliness, are positives, not negatives, and an essential component of the adversarial system.

Lawyers may be sharks, but they learn and hew to their code of professional responsibility. For lawyers, the twin goals outlined above are protected by responsibilities

133. *See* Donald C. Langevoort, *Brokers As Fiduciaries*, 71 U. PITT. L. REV. 439, 440 (2010).

134. *See supra* Part IV.A (discussing perceptions of banking as a public good).

135. Indeed, as Daniel Schwarcz has observed, "when banks sell products unprotected by FDIC insurance they routinely warn consumers of this fact." Daniel Schwarcz, *Transparently Opaque: Understanding the Lack of Transparency in Insurance Consumer Protection*, 61 UCLA L. REV. 394, 443 (2014).

136. *See, e.g.*, David Min, *Understanding the Failures of Market Discipline*, 92 WASH. U. L. REV. 1421, 1449 (2015) ("Unlike traditional banking, shadow banking does not have formal government safety nets or strong prudential oversight by government regulators.").

137. *See supra* notes 23–25 and accompanying text (describing the lack of clarity between banks and non-banks).

138. *See supra* note 49 and accompanying text (demonstrating examples of lawyers being terrible people and the public's perception of lawyers).

to the bar and to clients, respectively. But it is doubtful that anyone would attribute to the legal profession the publicly oriented ethical worldview imagined by financial regulators.

It is not "the public interest" that is directly or primarily protected by the lawyer's code of professional responsibility; instead, the directives protect specific vulnerabilities of the client and the reputation of the bar.

The calls for ethics for bankers, on the other hand, hold as an essential component the interest of the public, rather than interests of clients or the reputation of the banking industry. Meanwhile, the specific suggestions regulators make resemble the specifics of professional codes. While the code for lawyers is suited to the ends of client protection and protection of the profession, a similar code for bankers will unlikely serve this broad goal. Due both to the amorphous nature of this goal and to the functional diversity of client relationships within banking, such a code is unlikely to be effective. The ultimate goal of regulators is not merely protection of clients nor only protection of the industry; instead, the desire is for changes that would also, and crucially, protect the public good.

That does not mean that the idea that ethics might be required by banking supervisors is an entirely benighted idea or a futile hope. After all, regulators do not just propose to police banks for their good-natured selflessness. Instead, they impose activity restrictions, capital requirements, and other ethically-neutral rules designed to have little to do with ideals about client service or the role of banking in society. Regulators hope that attention to regulatory compliance and client service will make it easier to enforce those regulations. Nonetheless, if the question is how to ensure a stable banking system, the answer is unlikely to lie solely—or even much—in the embrace of ethics by bankers.

V. ORGANICALLY-ARISING ETHICAL BANKING CULTURE?

We think that the push to develop ethical banking norms that adopt the client service and public service values of the professions are likely to fail. Despite our cautions, however, there are reasons to hope that some considerations attending the ethical banking push might result in positive change. First, as recent work by cultural anthropologists demonstrates, the domains of finance are already brimming with cultures of ethics, if not those that might be longed for by regulators.[139] Perhaps the push for banking ethics will

139. *See generally* HO, LIQUIDATED, *supra* note 40 (describing the structures and strategies of the finance industry); Hirokazu Miyazaki, *The Materiality of Finance Theory*, *in* MATERIALITY 165 (Daniel Miller ed., 2005) (redefining what counts as materiality in the social studies of economics and finance); Hirokazu Miyazaki & Annelise Riles, *Failure as an Endpoint*, *in* GLOBAL ASSEMBLAGES: TECHNOLOGY, POLITICS, AND ETHICS AS ANTHROPOLOGICAL PROBLEMS 320 (Aihwa Ong & Stephen J. Collier eds., 2005) (showing a field study in a major Japanese securities firm and failures in the market); HIROKAZU MIYAZAKI, ARBITRAGING JAPAN: DREAMS OF CAPITALISM AT THE END OF FINANCE (2013) (examining the shift away from the era of high finance); Horacio Ortiz, *Financial Professionals as a Global Elite*, *in* THE ANTHROPOLOGY OF ELITES: POWER, CULTURE, AND THE COMPLEXITIES OF DISTINCTION 185 (Jon Abbink & Tijo Salverda eds., 2013) (clarifying how professionals of the finance industry can be thought of as central to the political process); Karen Ho, *Situating Global Capitalisms: A View from Wall Street Investment Banks*, 20 CULTURAL ANTHROPOLOGY 1, 68 (2005) (analyzing the ways in which Wall Street investment banks proclaim and define themselves as global and project images of their dominance and hegemony) [hereinafter Ho, *Situating Global Capitalisms*]; Karen Ho, *Disciplining Investment Bankers, Disciplining The Economy: Wall Street's Institutional Culture of Crisis and the Downsizing of "Corporate America,"* 111 AM. ANTHROPOLOGIST 2, 177 (2009) (countering the mystique of finance as abstract and disembedding) [hereinafter Ho, *Disciplining Investment Bankers*]; Bill Maurer, *Repressed Futures: Financial Derivatives' Theological Unconscious*, 31 ECON. & SOC'Y 1, 15 (2002) (arguing that derivatives can take on the

take the form of attention to the granular detail of bankers' moral narratives in such a way as to give rise to more effective regulatory initiatives. Another is that initiatives already afoot resemble the processes anthropologists describe regarding the interaction of top-down structural changes and organically arising behavior. Thus, the situation is far more dynamic than might initially be apparent.

A. Attention to the Granular Detail of Bankers' Moral Narratives May Give Rise to More Effective Regulatory Initiatives

In the social scientific literature, law and morality are not merely linked. Rather, questions regarding moral orders seem to breed questions about legal ones, and vice-versa. This is not a direct or simple relationship. Èmile Durkheim wrote that the sacrifice of individual will to a common one will always be a moral issue because it "necessarily implies some spirit of sacrifice and abnegation."[140] Transcendence, then—some kind of attachment to something larger, some sort of sacrifice to general utility—is the source of the moral. Ethics, for Durkheim, is a limited field: it "comprises all the rules of action that are imposed categorically upon behavior and to which a punishment is attached, but goes no further . . . ."[141] Law arises out of this morality,[142] is buttressed by it,[143] maintains it,[144] and makes it semi-accessible to social scientific inquiry.[145]

Similar concerns intrigued another father of social scientific inquiry—although Max Weber's arrangement of law and moral or ethical norms appears, at least, far less messy.[146] "Ethical orders" may be equated with convention,[147] where approvals or disapprovals of some conduct are expressed within a certain group.[148] There must be some test defining the group, whatever that definition may consist of. The group does not have to be particularly organized—it needs merely this definitional boundary. The validity of law, on the other hand, "is necessarily a corollary of organized collective action."[149] The major distinction between legal and ethical orders is that the former has recourse to coercive power wielded by a specialized staff.[150] Weber places the two orders on a continuum such that there is no sound break between them: both may be seen to govern either or both

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particular power they hold in such accounts only through a repression of their mathematical technique); Annelise Riles, *Collateral Expertise: Legal Knowledge in the Global Financial Markets*, 51 CURRENT ANTHROPOLOGY 6, 795 (2010) (offering an ethnographically grounded critique of and an alternative to science-studies-inflected approaches to the social studies of finance); Riles, *supra* note 88, at 555 (arguing for a "collaborative economy" as a way to retool both financial and anthropological expertise); Caitlin Zaloom, *Markets and Machines: Work in the Technological Sensoryscapes of Finance*, 58 AM. Q. 3, 815 (2006) (examining the impact of innovative communication technologies on the speed and scale of financial markets).

140. EMILE DURKHEIM, THE DIVISION OF LABOUR IN SOCIETY 17 (Lewis Coser ed., 1997) [hereinafter DURKHEIM DIVISION].

141. *Id.* at 15.

142. *Id.* at 98.

143. *Id.* at lvii.

144. *Id.* at xxxiv.

145. DURKHEIM DIVISION, *supra* note 140, at 172.

146. The terms "moral" and "ethical" are used interchangeably here. MAX WEBER, ECONOMY AND SOCIETY 193 (Max Rheinstein ed., Edward Shils & Max Rheinstein trans., 1967).

147. This means that Weber equates moral orders, ethical orders, and convention.

148. WEBER, *supra* note 146, at 25.

149. *Id.* at 25.

150. *Id.* at 27.

internal and external conduct.[151]

As the preceding discussion of Weber and Durkheim makes clear, cultural change can and does happen—but it does not happen by fiat. As it is described in anthropological literatures, cultural change is often a dialectic of laws and morals, an alchemy of regulation and behavior by people "on the ground"—not merely those setting the "tone at the top."

Culture is all over the seemingly anodyne worlds of finance. The churning of cultural processes is illustrated in recent ethnographic work on Wall Street bankers, providing illuminating examples of what organic culture looks like in context.[152] Karen Ho finds evidence of "a particular investment banker habitus"[153] that, seemingly perversely, very much does not render bankers more empathetic to the plight of downsized workers outside the world of finance. Instead, their experiences with their own "liquidity" make it, for them, merely the way of the world—the way, that is, of the market. This naturalization allows bankers "to recommend these experiences for all workers."[154]

Oddly, Wall Street denizens spread the gospel of shareholder value "while engaging in actions that not only undermine[d] it but produce[d] corporate and financial market crisis."[155] In the face of this, the shareholder value-centric worldview somehow maintained its legitimacy. The moral orders the bankers narrate for themselves show that they saw themselves as embodiments of the market and as *doing good* in being so.[156] Bankers' narratives demonstrate that they saw themselves as engines of capitalism, raising and distributing the stuff on which our corporations—nay, our entire economic life—are built.[157]

The myths that sustained this worldview generally also went unquestioned in the wider world. Since, according to this narrative, it was investment banks that brought the corporate system into being, it was investment bank finance that served, then and now, as that system's blood.[158] The moral order is related to, and spun out of, this origin myth. The

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151. *Id.* at 21, 26.

152. *See generally* HO, LIQUIDATED, *supra* note 40 (detailing a study of "reckless expediency" at Wall Street banks). Ho, *Situating Global Capitalisms*, *supra* note 139 (analyzing how Wall Street investment banks craft their image to project an image of dominance); Ho, *Disciplining Investment Bankers*, *supra* note 139 (investigating the role that investment banker's work experiences, market temporalities, and organizational culture play in recent Wall Street downsizing); Karen Ho, *Occupy Finance and the Paradox/Possibilities of Productivity*, CULTURAL ANTHROPOLOGY (May 15, 2012), http://culanth.org/fieldsights/340-occupy-finance-and-the-paradox-possibilities-of-productivity (discussing how Wall Street bases their legitimacy on productivity and how this can be utilized by groups such as Occupy Wall Street). Ho's work is part of a recent increase in work studying "up"—ethnographic research examining the worlds of elites; of financiers, for example, and corporate actors. *See* Laura Nader, *Up the Anthropologist: Perspectives Gained from Studying Up*, *in* REINVENTING ANTHROPOLOGY 284 (Dell Hymes ed., 1972) (describing the "studying up" of society and reasons for the method); *see also* Hugh Gusterson, *Studying Up Revisited*, 20 POL. & LEGAL ANTHROPOLOGY REV. 114 (1997) (re-examining Nader's article and assessing progress in developing anthropology). "[F]inance and money," she has noted, "may be anthropology's 'new exotic.'" HO, LIQUIDATED, *supra* note 40, at 34. The moral is everywhere.

153. HO, LIQUIDATED, *supra* note 40, at 11.

154. *Id.*

155. *Id.* at 25.

156. *Id.* at 5–6, 27. Bankers were "righteous" in their work; they were "the incarnations of the market." *Id.* at 27. Over and over again, Ho heard from her bankers "a restorative narrative of entitlement and succession" characterized by "'origin myths,' particular interpretations of neoclassical economic thought, and investment banking histories of shareholder rights." HO, LIQUIDATED, *supra* note 40,

157. *Id.* at 27.

158. *Id.* at 27–28.

bankers' world was built on, and built, its own particular morality.

There is culture here, and ethics, though it might be counterintuitive to see them in finance. There is a line of thinking in which cultural values and morals are seen as antithetical to market participation and economic success. In fact, the alienating effects of money, of markets, of capitalism were long a familiar trope in the social sciences.[159]

These views are not, of course, without nuance. According to Weber, these arenas are necessarily rife with community, with group-feeling, and with something he describes as a particular ethics.[160] Money, he asserted, creates a certain kind of community and a moral order of its own.[161] Its value comes from the trust on the part of its participants that all of its participants intend to behave in a certain way; standardization becomes a conduit for a trust in strangers.[162] This sort of relationship was, and is, important due to business life's dependence upon social and credit relationships.[163]

Weber's businessperson's ethic is one oriented toward that which might suit a general "everyone." It is therefore oriented toward the bare commonalities in expectation—of delivery of goods, of reimbursement of debts, of payment for services—with all of these actions performed in an utterly calculable way, with a putatively perfect equality.[164] None

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159. *See, e.g.*, Karl Marx, *Economic and Philosophic Manuscripts of 1844*, *in* THE MARX-ENGELS READER (R.C. Tucker ed., 1978) (discussing the negative effects of capitalism on wage workers); GEORG SIMMEL, THE PHILOSOPHY OF MONEY (D. Frisby ed., T. Bottomore & D. Frisby trans., 1990) (explaining that people generate value by producing products and that money allows for precise calculation of that value). Arguably related to this is a particular focus upon what has been characterized as an ever-increasing abstraction of capitalist enterprise. Benjamin Lee & Edward LiPuma, *Cultures of Circulation: The Imaginations of Modernity*, 14 PUB. CULTURE 191 (2002); BENJAMIN LEE & EDWARD LIPUMA, FINANCIAL DERIVATIVES AND THE GLOBALIZATION OF RISK (2004); Igor Kopytoff, *The Cultural Biography of Things: Commoditization as a Process*, *in* THE SOCIAL LIFE OF THINGS (Arjun Appadurai ed., 1986). Additionally, the decoupling of capitalist enterprise from local material conditions is noteworthy. Arjun Appadurai, *Introduction: Commodities and the Politics of Value*, *in* THE SOCIAL LIFE OF THINGS (Arjun Appadurai ed., 1986); Arjun Appadurai, *Global Ethnoscapes: Notes and Queries for a Transnational Anthropology*, *in* MODERNITY AT LARGE (1996).

160. WEBER, supra note 146, at 192.

161. *Id.*

162. Max Weber, *The Protestant Sects and the Spirit of Capitalism*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 302, 305 (H. H. Gerth & C. Wright Mills eds., 1946) [hereinafter Gerth & Mills, FROM MAX WEBER]; *see generally* MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (1904) (discussing how the Protestant work ethic contributed to the rise of economic enterprises and investment in Northern Europe). Carolyn Rouse has drawn my (Gordon's) attention to the resemblance of this analysis to a sort of proto-Actor-Network-Theory theorization of money: money becomes a mediator shaping the way people think, act, and relate to one another.

163. *See* Gerth & Mills, FROM MAX WEBER, *supra* note 162, at 303. But this moral order is, Weber goes on, of a very specific type. *Id.* Weber relates jurist's decisions regarding the enforcement of commodity exchange agreements to their attribution to participants of schematic "inner states"—X intended, *legally*, to act in a certain standardized manner because Y *believed* X, this individual strange person about whom Y knows nothing, would act in a certain standardized manner. *Id.* The intent imputed by law to market participants is a standardized one that is based upon the recognition of "such attitudes which are held by the average party concerned with the case." WEBER, *supra* note 146, at 193. The markets become seemingly impersonal because, in the orientation of its participants toward the rational pursuit of their interests, market ethics become directed not merely by the actual participant but by the participant as potentiality. *Id.* Each participant is expected to act in an interchangeable fashion: each person may be counted on to react with precise uniformity. *Id.*

164. Gerth & Mills, FROM MAX WEBER, *supra* note 162, at 215 ("The 'objective' discharge of business primarily means a discharge of business according to *calculable rules* and 'without regard for persons.'") (emphasis in original).

of the bumps and stutters of personality and thus of *humanization*[165] are meant to intrude upon and slow down and obscure the workings of this abstracted-out person.[166] But while market relationships appear inimical to the cultural, the ethical, the familial, ultimately they are not.[167]

In new work in the anthropology of finance, the seeming movement of the financial capitalist away from any particular, human ethic is revealed to be illusory: bankers' worldviews are as grounded as anyone's in stories, myths, and social practices.[168]

Thus the importance, in analyzing financial culture, of taking into account bottom-up practices in addition to the more obvious top-down ones. Critiques of finance and the business of banking that give too much credence to their abstraction, their seeming disconnect from the social, do more than merely miss out on detail. They can also oversell the power and inevitability of the negatives of capitalism, making financiers and bankers into larger-than-life specters invulnerable to change as opposed to textured creatures deserving of nuanced analysis. The orientation is thus simultaneously insufficiently and

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165. *Id.* at 216.

166. MAX WEBER, ON LAW IN ECONOMY AND SOCIETY 193 (Max Rheinstein ed., Edward Shils & Max Rheinstein trans., 1967). Thus it is that, for Weber, "[t]he 'free' market, that is, the market which is not bound by ethical norms, with its exploitation of constellations of interests and monopoly positions and its dickering, is an abomination to every system of fraternal ethics. In sharp contrast to all other communities which always presuppose some measure of personal fraternization or even blood kinship, the market is fundamentally alien to any type of fraternal relationship." *Id.*

167. A thriving strand of research has countered traditional views of market relationships with some researchers challenging claims of impersonal markets and unsocial money by paying attention to the culture of the markets. *See, e.g.*, MICHEL CALLON, THE LAWS OF THE MARKETS (1998) (exploring how markets are created and then stabilized at a time when it is becoming difficult to define "market"); DONALD MACKENZIE, AN ENGINE, NOT A CAMERA: HOW FINANCIAL MODELS SHAPE MARKETS (2008) (discussing how new modern economic theories have shaped the financial world); DONALD A. MACKENZIE ET AL., DO ECONOMISTS MAKE MARKETS? (2007) (analyzing the role that economics play in shaping the economic markets); BILL MAURER, MUTUAL LIFE, LIMITED: ISLAMIC BANKING, ALTERNATIVE CURRENCIES, LATERAL REASON (2005) (examining alternative moneys affect the world of finance); VIVIANA ZELIZER, THE SOCIAL MEANING OF MONEY: PIN MONEY, PAYCHECKS, POOR RELIEF, AND OTHER CURRENCIES (1994) (considering the various ways that money has been outside of its conventional means); Webb Keane, *Market, Materiality and Moral Metalanguage*, 8 ANTHROPOLOGICAL THEORY 27 (2008) (evaluating the role that morality has in economic transactions); Donald MacKenzie, *Is Economics Performative? Option Theory and the Construction of Derivatives Markets*, 28 J. HIST. ECON. THOUGHT 29 (2006) (studying the theory of options under the assumption that economics is performative). Others have challenged claims of impersonal markets and unsocial money by questioning both triumphal and elegiac views of the separation of markets from their material underpinnings. JEAN COMAROFF & JOHN L. COMAROFF, MILLENNIAL CAPITALISM AND THE CULTURE OF NEOLIBERALISM (2001); HO, LIQUIDATED, *supra* note 40; Webb Keane, *Money is No Object: Materiality, Desire, and Modernity in an Indonesian Society*, *in* THE EMPIRE OF THINGS: REGIMES OF VALUE AND MATERIAL CULTURE 65 (Fred R. Meyers ed., 2001); MAURER, MUTUAL LIFE, *supra*; Miyazaki, *The Materiality of Finance Theory*, *supra* note 139; Miyazaki & Riles, *supra* note 139; ZELIZER, *supra*; VIVIANA ZELIZER, THE PURCHASE OF INTIMACY (2005); Keane, *supra*; Maurer, *supra* note 139; Bill Maurer, *The Anthropology of Money*, 35 ANN. REV. OF ANTHROPOLOGY 15 (2006) [hereinafter Maurer, *Money*]; Hirokazu Miyazaki, *The Temporalities of the Market*, 105 AM. ANTHROPOLOGIST 255 (2003); Zaloom, *supra* note 139. Ho, for example, has argued that "allowing finance to be simply abstract lets it off the hook." HO, LIQUIDATED, *supra* note 40, at 34. Instead, many of the social harms that have attended the ascendance of finance are attributable less to abstract financial theory than to "the local, cultural habitus of investment bankers, the mission-driven narratives of shareholder value, and the institutional culture of Wall Street." *Id.*

168. *See, e.g.*, *infra* notes 172–173 (providing sources discussing the way the Delaware courts have increasingly policed the activities of investment bankers in merger contexts).

overly generous.[169]

While a popular imagining of bankers and banks would take them to be devoid of the "thickness" prized by culture-hounds, contemporary research finds instead life-worlds rich in varieties of faith, belief, and cultural specificity.[170] This suggests an already fertile ground for re-thinking the ways a culture of ethics in banking might be brought into being.

This new attention to bottom-up processes is not, of course, to say that structural or directive work has no influence upon cultural change.[171] Practically speaking, this means that actual top-down changes coupled with incentive changes and changes to personal decision-making—changes, that is, to grounding forces for bankers' cultural narratives—could in fact be a start to the culture of ethics of which regulators speak.

B. Possibilities for Dynamism

In this Section, we compare the "softly, softly" approach of banking regulators to

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169. A number of anthropologists, Ho among them, have critiqued this tendency to represent capitalisms, finance, or corporations as overwhelmingly powerful. "Overarching scripts of universalizing financial logics and capitalist globalization not only obscure the heterogeneous particularities of Wall Street practices and effects and prevent the interrogation of Wall Street investment banks' hegemonic claims, but also ironically parallel the marketing schemes and hyped representations of Wall Street capitalist promoters." HO, LIQUIDATED, *supra* note 40, at 33; *see also, e.g.*, Maurer, *Money*, *supra* note 167; Marina Welker, *Notes on the Difficulty of Studying the Corporation*, 39 SEATTLE U. L. REV. 397 (2016).

170. Instead of proceeding down the path of grand theory, many researchers have moved toward the mundane and the material—toward examinations of the quotidian instead of upon grand sweeps of economic theory and epochal transformation. *See, e.g.*, Maurer, *supra* note 139 (analyzing the power of derivatives and how that power derives from separating mathematical technique from religion); *see generally* MATERIALITY, *supra* note 139 (assessing materiality's place in shaping human history and how it can be challenging to separate from the immaterial). In her work on the day-to-day disciplinary practices of traders and the materials with which they interact at the Chicago Board of Trade (CBOT) and a London dealing firm (LDF), Caitlin Zaloom shows us the practices by which their work lives become a positively Weberian calling. Zaloom, *supra* note 139; Caitlin Zaloom, *The Discipline of Speculators*, *in* GLOBAL ASSEMBLAGES: TECHNOLOGY, POLITICS, AND ETHICS AS ANTHROPOLOGICAL PROBLEMS (Aihwa Ong & Stephen J. Collier eds., 2005); CAITLIN ZALOOM, OUT OF THE PITS: TRADERS AND TECHNOLOGY FROM CHICAGO TO LONDON (2006) [hereinafter ZALOOM, OUT OF THE PITS]. The market becomes for its participants a divine arbiter of financial and moral value. This linkage is at once precisely as metaphorical and profoundly more literal than it is for Karen Ho's interlocutors: it is not the will of the traders but of the market that moves. The discipline of the speculators requires that they "purge themselves of affect and individuality" so as to become perfect tools of the market. Zaloom, *Discipline of Spectators*, *supra*, at 254. Thus, the traders Zaloom studied attempt to de-socialize themselves and the space in which they work—to leave their lives outside the trading room. The traders discipline themselves, but when their discipline falters—when they begin to ruminate upon a streak of successful trades, say, and begin to narrate to themselves their own cleverness, taking their attention out of the moment, out of the market—they draw the market's wrath. Traders and managers professed to Zaloom a calm faith in discipline. *Id.* at 256. It was in a surrendering of their agency—in putting in the background their hope for immediate profit—that traders hoped to profit. *Id.* at 254, 260. Hirokazu Miyazaki and Annelise Riles take another look at approaches that tend to glamorize economics and especially the way social studies of finance orient themselves toward an imaginary of a "complete" knowledge. Miyazaki & Riles, *supra* note 139; Miyazaki, *supra* note 167; *see also* Annelise Riles, *Real Time: Unwinding Technocratic and Anthropological Knowledge*, *in* FRONTIERS OF CAPITAL: ETHNOGRAPHIC REFLECTIONS ON THE NEW ECONOMY (Melissa S. Fisher & Greg Downey eds., 2006) (using the Japanese bank culture to evaluate conflicts between ethnography, analysis, and reception); Riles, *supra* note 139, at 795–806 (examining the finance world from a ethnographic viewpoint as an alternative to other ways in which finance and trading are studied).

171. When anthropologists examine culture, recall, they look at synergies between top-down and bottom-up actions.

other financial regulatory schemes that take a more concrete and actionable method to ethics. There are ways, in other words, to police the conduct of bankers in a way that is amenable to measurement. Why haven't banking supervisors adopted these sorts of proposals? We suspect it is because they see that ethics and cultures are priorities that are meant to complement the existing, fundamentally accounting-based, regulatory regime.

Ethics does not only have to serve as a complement to capital rules, however. There are possibilities for the dynamic regulation of banking supervisors. Some initiatives are putting organic "bottom-up" behavior into play with more narrow and targeted top-down directives in ways that may prove productive of dynamism generative of change. There are, in other words, kinds of requirements designed to get banks to act ethically that do define what is meant by ethics in a way that might be measured by a court or a regulator. Banking supervisors have eschewed this sort of specificity, making it clear that they view ethics as a soft regulatory standard rather than a hard law tool.

But hard law tools are available to the regulator who wishes to instill ethics with something that would look like a cause of action for either an agency or a private plaintiff. The Delaware courts, for example, are imposing a coherent, if controversial, set of obligations on investment bankers that concern conflicts of interest.[172] The courts have, for example, successfully discouraged investment banks from combining their advisory services on mergers with so-called "stapled financing" because it gives the banks an incentive to recommend their clients go through with transactions (assuming the buyer uses the banks to finance the deal), even if the transactions might not be in the best interests of the client.[173] The courts have also penalized banks for conflicts of interest related to the way they set up a sale process.[174]

These cases offer some specific guidance on how banks handle conflicts of interest, and, moreover, they concern the sort of advisory services where the financial institutions look most like lawyers or accountants. By the same token, efforts to hold boards of directors liable for risk management failures, as Claire Hill and Richard Painter have suggested, offers more specificity than cultural hectoring by supervisors.[175]

This sort of importation of ethical rules into legal ones looks to the traditional fiduciary obligations of boards and advisors and modifies them to meet some of the modern challenges of risk management and advice-giving. If anything, these sorts of plausible uses for ethics offer more detail than does the resort to codes of ethics.

Hill and Painter argue that this sort of liability might best be imposed through contract. In their view, bankers "should bear significant liability if their banks fail, and they should

172. *In re* El Paso Corp. S'holder Litig., 41 A.3d 432, 433, 452 (Del. Ch. 2012); *In re* Del Monte Foods Co. S'holders Litig., 25 A.3d 813, 839–40 (Del. Ch. 2011).

173. For a discussion of the way the Delaware courts have increasingly policed the activities of investment bankers in merger contexts, see William W. Bratton & Michael L. Wachter, *Bankers and Chancellors*, 93 TEX. L. REV. 1, 3 (2014) (noting that recent Delaware decisions "rocked the world of mergers and acquisitions (M&A) by casting standard practices into question, most prominently 'stapled' financing—an arrangement in which the selling company's banker-advisor also finances the purchase price for the buyer"). Robert Hockett has long evinced concern about the practice of stapled financing in increasingly diverse financial conglomerates. Robert Hockett, *A Fixer-Upper for Finance*, 87 WASH. U. L. REV. 1213, 1288 (2010).

174. Steven Davidoff Solomon, *Ruling in Rural/Metro Case Could Affect All Wall St. Banks*, N.Y. TIMES (Oct. 30, 2015), http://nyti.ms/1irrr2w.

175. *See generally* HILL & PAINTER, *supra* note 30 (explaining how Hill & Painter's position to hold boards of directors liable for risk management failures offers more specifically the cultural hectoring of supervisors).

have to pay a portion of fines, civil judgments involving fraud, and settlements in lieu of such fines or judgments."[176] "Covenant banking" is the term used to describe this sort of liability to shareholders or to the bank itself, depending on the sort of dereliction of duty that would lead to a conclusion that the covenant between the bank and its senior employees or between those employees and the firm's owners would be broken.[177]

The problem of regulating an industry through rules alone are documented and, to some degree, ubiquitous. The kind of oversight an agency can impose on the industry it regulates range from prohibitions to codes of conduct to exhortations and advice and, on occasion, to the sort of supervision by an agency that amounts to little more than a public relations campaign designed to paint the industry and its regulator in a good light. Some regulators do not purport to do much non-rule-based regulation.[178] Others, like those who regulate the professions, rely on codes of conduct to police how the industry comports itself.[179]

The call for ethics in banking is not the same thing as this sort of constraint. But it is consistent with the modern affection of regulators for guidance, best practices, and other so-called methods of soft law that can be used to try to orient an industry toward a preferred regulatory direction without requiring it to do anything specific.[180]

There is little doubt that soft law can be an effective form of regulation.[181] Indeed, efforts to solve cross-border problems are increasingly pursued, not through the promulgation of hard rules, but through informal agreements that often have a principles-based cast. Internationally, the recent accord on emissions reductions designed to combat global warming exemplifies this sort of informal nonbinding target.[182] Similarly, the source of the hard rules that American regulators used to ensure that their banks have adequate capital to deal with shocks and plans for the prospect of bankruptcy arise from these sorts of informal processes.[183]

Assuming that they are serious about the business of their regulatory mission, why might regulators prefer to regulate with a little less rigor and more of an appeal to principle?

We have already argued that banking ethics regulation makes little sense if it is a bid by regulators to create a code for an occupation that simply is not a profession, and that has fragmented between universal banks, specialized institutions and boutiques, shadow banks, and the like. But as a complement to regulation and a catch-all meant to dissuade banks from observing only the letter of financial oversight without considering its spirit, it might

176. *Id.* at 190.

177. *Id.* at 146–76.

178. *See supra* Section II.A.2 (discussing the EPA, which exemplifies this type of agency).

179. *See supra* notes 16–18 and accompanying text (reviewing the fundamentals for regulation of the disciplines).

180. *See generally* Jean Galbraith & David Zaring, *Soft Law as Foreign Relations Law*, 99 CORNELL L. REV. 735 (2014) (discussing these sorts of approaches).

181. *See generally* CHRISTOPHER BRUMMER, SOFT LAW AND THE GLOBAL FINANCIAL SYSTEM (2014) (discussing soft law in banking); ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2007) (analyzing how the regulatory variant of soft law can be used to solve global problems).

182. The Paris Agreement to the United Nations Framework on Climate Change, http://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf; *see* Jean Galbraith, *The Legal Structure of the Paris Agreement*, REGBLOG (Dec. 21, 2015), http://www.regblog.org/2015/12/21/galbraith-legal-structure-paris-agreement (discussing its informal bases).

183. *See* BRUMMER, *supra* note 181 (discussing soft law in banking). Zaring, *supra* note 33, at 698.

serve some purpose. It might encourage deliberation, as we have suggested, and that could result in the sort of caution that regulators appear to value when they talk about the importance of a good "risk culture."[184] It also presumably reflects the fact that all legal systems require a degree of willing compliance if they are to be effective.

Moreover, there are some ethical norms, even some that courts or regulators are imposing on banks, that could be worthwhile. For example, we think that, when bankers have been hired to act as unconflicted advisors to clients, they might be usefully subject to ethical obligations, though these could be obviated by contract. Indeed, the Delaware courts have recently held as much, and while many firms hire bankers as advisors precisely because of their relationships with others, in some cases, banks might find their advice impeached by their desire to help finance transactions involving the counterparties of their clients.[185]

It also might make sense to hold senior managers liable for reckless behavior by their subordinates as a way of skirting the principle-agent problem posed by middlemen operating in a space where rogue traders can jeopardize the ability of firms to make markets.

And, although we acknowledge there is no bright line rule to be had, there is room for encouraging banks not to engage in persistent rule-skirting, though regulators should not rest on the assumption that their calls for a worthy tone at the top will do the trick. We think that culture is important, but we do not believe that it can be created by speech or hectoring; to us, even the scrutiny of the code of ethics chosen by the bank is unlikely to be sufficient. Nonetheless, the close nature of the relationship between the supervisors and the supervised and the not-always-clear nature of the regulations suggest that, even if banking is not a profession, it cannot be regulated at all if it adopts the perspective of the Holmesian bad man and the law.[186] As C. D. Stone has argued, the law has limited steering capabilities because of complexity, time lag, and difficulties of implementation.[187] Without support from a real, self-adopted set of cautions, the regulatory environment in many business contexts, but perhaps especially in banking, may be doomed to failure.

Our ultimate judgment about the vogue for inculcating ethics in bankers, then, is skeptical, but nuanced.

VI. CONCLUSION

The claim in this Article has been that the emerging effort to regulate bankers for their ethics is rooted in a sense by regulators that the core commitments of professional responsibility codes—partly that the client interests must be put ahead of the banker's interests and partly that bankers are obligated to serve as officers of the court—are

184. *See supra* note 10 and accompanying text (discussing the health of an organization's risk structure, including ethical standards).

185. *See supra* note 172 and accompanying text (discussing how courts have penalized banks for conflicts of interest).

186. *See* Holmes, Jr., *supra* note 14, at 459 ("If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.").

187. CHRISTOPHER D. STONE, WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR, ch. 11 (1975).

appropriately applied to financiers. Our judgment is that those efforts represent a curious new emphasis on culture by regulators that is beset with challenges. But it is also an example of modern-day "soft" regulation, which has a place if paired with other forms of substantive supervision. The challenge for banks, and bank supervisors, will be to ensure that both parts of the requirements of effective regulation are met when it comes to fitting culture and ethics into the context of high-quality financial regulation.

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