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The Curious Incident of the Law Firm that Did Nothing in the Night-Time (Reviewing Milton C. Regan, Jr., Eat What You Kill: The Fall of a Wall Street Lawyer [Univ. of Michigan Press, 2004])

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Book Review

THE CURIOUS INCIDENT OF THE LAW FIRM THAT DID NOTHING IN THE NIGHT-TIME[1]

A review of Milton C. Regan, Jr, *Eat What You Kill: The Fall of a Wall Street Lawyer* (University of Michigan Press, 2004) by Nancy B. Rapoport[2]

> "Is there any point to which you would wish to draw my attention?"
> "To the curious incident of the dog in the night-time."
> "The dog did nothing in the night-time."
> "That was the curious incident," remarked Sherlock Holmes.[3]

In *Eat What You Kill*,[4] Professor Milton Regan illustrates the lengths to which people will go to ignore egregiously bad conduct—in effect, "d[oing] nothing in the night-time". Regan describes the rise and fall of John Gellene, a well-known bankruptcy lawyer who became a federal felon.[5]

> "[I]n December 1996 federal prosecutors in Milwaukee obtained a grand jury indictment of Gellene. He was charged on two felony counts of making false declarations in the affidavits he had submitted to Judge Eisenberg. He also was charged on one felony count for using a false

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[2] Gordon & Silver, Ltd. Professor, William S. Boyd School of Law, University of Nevada, Las Vegas. I owe special thanks to my former University of Houston Law Center research assistant, Stephen Chen, who worked tirelessly on this book review while finishing his undergraduate studies at the University of Texas, and whose work was every bit as good as that of most first-year law students at any of the schools with which I have been associated. He is now a second-year law student at UH; some smart law firm should go ahead and hire him. He also wrote a dead-on accurate book review of this book.

I owe thanks as well to my two research assistants at Boyd, Robert Arroyo and Matt Seaton; and to Kelli Cline, Dr Michele Follen, Jennifer Gross, Jeff Van Niel, and Morris Rapoport. Brad Wendel gets my thanks for two reasons: because he waited so patiently for this draft and because his suggestions made it better. I also want to thank two other groups for their very helpful comments: the faculty of the William S. Boyd School of Law, University of Nevada, Las Vegas (comments during a presentation of a related paper over a year ago), and the students in my Enron class at St John's University School of Law's LLM in Bankruptcy Program (comments made during class discussions).

[3] *Silver Blaze,* Arthur Conan Doyle, *The Complete Sherlock Holmes, Volume I* (New York, Barnes & Noble Classics, 2003), 399, 413.

[4] Milton C. Regan, Jr, *Eat What You Kill: The Fall of a Wall Street Lawyer* (Ann Arbor, University of Michigan Press, 2004) [hereinafter *Eat What You Kill*].

[5]
> "Mr. Gellene was found guilty of two counts of making false oaths in a bankruptcy proceeding, in violation of 18 U.S.C. § 152(3). He was convicted specifically of 'knowingly and fraudulently' making false declarations under oath in two Rule 2014 bankruptcy applications. Twice he applied for an order approving his employment as attorney for the debtor; first, on February 18, 1994, the day he filed Bucyrus' Chapter 11 bankruptcy, and second, on March 28, 1994, after the hearing on his application, when he elaborated on potential conflicts of interest, as the bankruptcy court had requested. Those applications failed to list the senior secured creditor and related parties."

US v Gellene, 182 F 3d 578, 585–86 (7th Cir 1999) (footnotes omitted). Gellene was also convicted of one count of perjury: *ibid,* 590.

affidavit under oath to claim that Milbank was eligible to receive payment for its work on the bankruptcy. Each of the first two counts carried a penalty of up to five years in prison and a $250,000 fine. The third count was punishable by up to five years in prison and a $10,000 fine. Any prison sentence over a year would deprive Gellene of his right to vote, his ability to be a teacher, his eligibility to hold public office, and the opportunity to practice law. He was the first lawyer ever charged under federal criminal law for violating Bankruptcy Rule 2014."[6]

Gellene was convicted, and he served time for his misconduct.[7] The law firm at which he had been a partner—Milbank Tweed Hadley & McCloy ("Milbank")—was required to disgorge almost $2 million in fees and eventually settled a $100 million malpractice lawsuit.[8]

Eat What You Kill is a marvellous book: a cautionary tale for all lawyers and law students, even if they will never practise bankruptcy law. There have been many interesting reviews of this book,[9] and most of them focus on Gellene's own characteristics. Some of them focus on the sort of pressure that high-calibre law firms put on their associates.

I'm interested in a slightly different question: what was there about Milbank that caused the partners to overlook such warning signs as (1) Gellene's failure to complete his paperwork to become admitted to the New York bar, which caused him to practice without a New York law license for several years; (2) his failure, as an experienced bankruptcy partner, to disclose a "potential"[10] conflict of interest to the bankruptcy court; (3) his failure to file timesheets unless he was fined for non-submission; and (4) his tendency to hunker down, take on all of the work himself, without asking for help or keeping others apprised of his workload? How many red flags did Milbank need to understand that Gellene was a liability as well as an asset?[11] In other words, was Milbank's failure to rid itself of Gellene an isolated instance of greed overcoming common sense, or was the failure a more systemic problem of how people in organisations behave?

[6] *Eat What You Kill*, *supra* n. 4, 3.

[7] *Ibid*, 287.

[8] M.C. Regan, Jr, "Taking Law Firms Seriously" (2002) 16 *Georgetown Journal of Legal Ethics* 155, 160.

[9] See, eg, A.V. Alfieri, "The Fall of Legal Ethics and the Rise of Risk Management" (2006) 94 *Georgetown Law Journal* 1909; S. Lubet, "False Flats" (2006) 19 *Georgetown Journal of Legal Ethics* 275; M.A. Sargent, "The Moral World of Corporate Lawyers" (2006) 19 *Georgetown Journal of Legal Ethics* 289; P.C. Saunders, "When Compensation Creates Culture" (2006) 19 *Georgetown Journal of Legal Ethics* 295; T. Rostain, "Partners and Power: The Role of Law Firm Organizational Factors in Attorney Misconduct" (2006) 19 *Georgetown Journal of Legal Ethics* 281 [hereinafter Rostain]; W.H. Simon, "The Ethics Teacher's Bittersweet Revenge: Virtue and Risk Management" (2006) 94 *Georgetown Law Journal* 1985; W.B. Wendel, "Ethical Lawyering in a Morally Dangerous World" (2006) 19 *Georgetown Journal of Legal Ethics* 299 [hereinafter Wendel].

[10] The conflict in question was more than "potential"; it was real.

[11] Gellene's tragic story—and Milbank's steadfast refusal to fire someone who had significant problems complying with law firm policy, the New York bar's requirements for admission, legal ethics generally, and the bankruptcy ethics rules relating to disclosure of conflicts—reminds me of the song we sing at Passover, *Dayenu*. See, eg, http://www.greatjewishmusic.com/Midifiles/Passover/Dayenu.htm. The point of *Dayenu* is that each gift that God gave us would have been sufficient in and of itself, but God kept giving us more and more. Gellene's (and Milbank's) story is a sort of anti-*Dayenu*: had Milbank fired Gellene when it discovered that he had been representing himself as a duly admitted New York lawyer, *dayenu*; had Milbank fired Gellene when it realised that the only way to force him to turn in a timesheet was to impose thousands of dollars in monthly fines, *dayenu*; had Milbank fired Gellene when it noticed that Gellene never, ever took time to participate in the summer associate mentorship program that he had agreed to do, *dayenu* (although I don't know of any firm that would fire someone just for that infraction); had Milbank fired Gellene after several annual reviews pointed out that he kept all of his work to himself, worked like a madman, and didn't ask for help, *dayenu*. By the time Milbank found out that it was going to lose (by default) a motion to disgorge $2 million in fees if it didn't act fast, it was too late.

I believe that Milbank's failure to act was a sort of co-dependency and that there are countless incidents of "ethical lapse" co-dependency in organisations, caused[12] not by simple greed, but by a combination of psychological and sociological factors that cause very bright people to do some very stupid things. John Gellene's story is but one example; Jeff Skilling, Andy Fastow and Ken Lay of Enron provide other examples. History is replete with such examples. The American Bar Association (with ethics codes) and Congress often will react by attempting to legislate better behaviour. Unfortunately, no amount of legislation is going to save us from the foibles of human nature. Until we understand the effects that cognitive dissonance, the diffusion of responsibility,[13] and social pressure[14] have on the human psyche, we can legislate behaviour until the cows[15] come home and we'll still see no changes in the way that people in organisations handle even the most glaring misbehaviour.

I. Enron and the Human Condition

Many people have studied Enron,[16] and most point to a combination of loopholes in the legal and business worlds to explain what went wrong. After obsessing about Enron for years, though, I believe that the exploitation of loopholes was only a symptom of the problem, not a cause. Instead, I believe that human nature—especially that part of human nature that plays mind games, such as cognitive dissonance, diffusion of responsibility, and social pressure—created the problems at Enron.

a. Cognitive Dissonance Generally

Although several academics have studied cognitive dissonance, Leon Festinger first defined it as

> "[t]he psychological opposition of irreconcilable ideas (cognitions) held simultaneously by one individual, created a motivating force that would lead, under proper conditions, to the adjust-

[12] These incidents may be exacerbated by greed, but they aren't caused by greed.

[13] "Partly in response to the highly publicized inaction of thirty-eight alleged witnesses of the death of Kitty Genovese in 1964, psychologists have conducted hundreds of field studies of helping behavior among strangers. Some of these focus on personal characteristics, such as age or sex, of the potential helper. Others focus on situational variables, such as how burdensome providing help would be. These sorts of studies can illuminate both what sorts of socialization processes abet altruism, and also how willing a well socialized person would be to trade off rectitude for, say, personal safety. Research along these lines might help rational-actor theorists decide in which people, in which situations, and in what quantities, to alloy the self-interest model with a dollop of altruism."

R.C. Ellickson, "Symposium on Post-Chicago Law and Economics: Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics" (1989) 65 *Chicago-Kent Law Review* 23, 47–48 (footnotes omitted). Cf J.J. Rachlinski, "Symposium on Law, Psychology, and the Emotions: The Limits of Social Norms" (2000) 74 *Chicago-Kent Law Review* 1537, 1556. ("Neither was Kitty Genovese really the victim of a callous, urban social norm. Rather, the presence of a passive group affected the bystander's interpretation of Genovese's plight.")

[14] See, eg, S. Asch, "Effects of Group Pressure Upon the Modification and Distortion of Judgments" in *Readings in Social Psychology 2* (G. Swanson, T. Newcomb, E. Hartley *et al* (eds), New York, Holt, 1952); K.S. Larsen, "The Asch Conformity Experiment: Replication and Transhistorical Comparisons" (1990) 5 *Journal of Social Behavior and Personality* 163.

[15] Cf text accompanying n. 23, *infra*.

[16] Including me. See N.B. Rapoport and B.G. Dharan (eds), *Enron: Corporate Fiascos and their Implications* (New York, Foundation Press, 2004) [hereinafter *Corporate Fiascos*].

> ment of one's belief to fit one's behavior—instead of changing one's behavior to fit one's belief (the sequence conventionally assumed)."[17]

In short, cognitive dissonance is the mind's creation of a justification that can explain how a good person can do something very, very bad. Cognitive dissonance tells us that, because the human mind can't tolerate acting in a way that contradicts a person's positive self-image, a person who does something unethical or immoral will come up with a "logical" explanation for that behaviour. These explanations run the gamut, justifying everything from adultery ("if my spouse weren't distant, I wouldn't cheat") to embezzlement ("I'll pay it back tomorrow, and no one's being hurt") to murder ("he made me kill him").

One of Festinger's experiments involved asking a group of people to lie. He divided that group into two subgroups—one of the subgroups received $20 in exchange for telling the lie, and the other group received $1 in exchange for telling the lie. Festinger found that the members of the $1 payment group were

> "far more likely to claim, after the fact, that they really believed the lie, than those who'd earned the twenty dollars. Why would that be? Festinger hypothesized that it is much harder to justify lying for a dollar; you are a good, smart person after all, and good, smart people don't do bad things for *no real reason*. Therefore, because you can't take back the lie, and you've already pocketed the measly money, you bring your beliefs into alignment with your actions, so as to reduce the dissonance between your self-concept and your questionable behavior. However, those folks who were paid twenty dollars to lie, they didn't change their beliefs; in effect they said, 'Yeah, I lied, I didn't believe a word of what I said, but I got paid well.' The twenty-dollar subjects experienced less dissonance; they could find a compelling justification for their fibs, and that justification had double-digits and a crisp snap."[18]

According to Festinger's theory, the smaller the payment, the more likely the creation of cognitive dissonance.[19]

When I lecture about cognitive dissonance, I usually illustrate the theory by observing that only the theory of cognitive dissonance can explain why someone would go on a second date after the first date was horrendous. To explain the action of choosing to go out on date #2, the corresponding thought must be "I am a very good judge of people, so if I'm going out on

[17] L. Slater, *Opening Skinner's Box: Great Psychological Experiments of the Twentieth Century* (New York, W.W. Norton, 2004), 113 (2004) [hereinafter Slater] (citing L. Festinger, *A Theory of Cognitive Dissonance* (Stanford, CA, Stanford University Press, 1957)).

[18] Slater, *ibid*, 117–118. In other words, cognitive dissonance occurs when someone doesn't want to admit that he did something bad for a bad reason (ie, flat-out greed); instead, he'll "justify" his decision in order to believe that he did something objectively "bad" for a "good" reason. Who wants to say that he can be bought for a mere dollar? On the other hand, who among us can say that he will not be bought for *any* price?

[19] *Ibid,* 118. I don't intend to discuss all of the literature on cognitive dissonance here. Other and better scholars have done that, and they have applied cognitive dissonance theory to lawyer behaviour in far more elegant ways than I can. See, eg, D.J. Luban, "The Ethics of Wrongful Obedience" in D.L. Rhode (ed), *Ethics in Practice: Lawyers' Roles, Responsibilities, and Regulation* (New York, Oxford University Press, 2000). But even a cursory discussion of cognitive dissonance comes up with some unusual examples: the experiment by Landis in 1924, finding that 71 per cent of subjects in his sample would chop off a rat's head if the experimenter asked them to do so; the experiment by Frank in 1944, in which subjects would do pretty much whatever the experimenter requested as long as the experimenter wore a white lab coat while making his request; Asch's superb experiment in which a group of actors could persuade an experiment's subject to disbelieve his own eyes and concur with the group's (wrong) conclusion about the length of some lines on paper; and, of course, Stanley Milbank's experiments using a fake electric shock machine to test his subjects' willingness to electrocute total strangers. Slater, *supra* n. 17, 41–48. To see some film of the subjects in Milgram's experiment, see *Enron: The Smartest Guys in the Room* (Magnolia Home Entertainment 2005).

a second date with this person after the first date was so miserable, it's because I believe that the person's behavior on date #1 was an aberration". People laugh at that example, but it's a very small step from that example to why someone might stay in an abusive relationship: "I'm not a masochist, so I must be with this person because the destructive behavior is not the 'real' him."

b. Cognitive Dissonance at Enron

I've written before about the cognitive dissonance at Enron.[20] Since the publication of our Enron book,[21] Andy Fastow and Jeff Skilling have begun serving time in federal prison, and Ken Lay likely would have joined them, but for his untimely death in 2005. Even though we know that not everyone who worked at Enron was a crook, a liar, or a cheat, we also know—or at least we have a reasonable understanding—that several of the deals were designed to generate the appearance of profits at the end of quarters or fiscal years.[22] As one classic Enron joke explains,

> "Enron Capitalism: You have two cows. You sell three of them to your publicly listed company, using letters of credit opened by your brother-in-law at the bank, then execute a debt-equity swap with an associated general offer so that you get all four cows back, with a tax exemption for five cows. The milk rights of the six cows are transferred through an intermediary to a Cayman Island company secretly owned by the majority shareholder who sells the rights to all seven cows back to your listed company. The Enron annual report says the company owns eight cows, with an option on one more."[23]

In deal after deal, quarter after quarter, Enron was milking its fictitious cows for all they were ostensibly worth. There are several theories proposed to explain the behaviour of Enron's officers and directors. Congress tended to explain the behaviour as simple, unbridled greed,[24] and it tried to create negative incentives to offset this greed with Sarbanes-Oxley.[25] Others have suggested that Enron used political power to change the checks and balances on its accounting measures, as when Wendy Gramm's work at the Commodity Futures Trade Commission allowed Enron to use mark-to-market accounting on its energy deals.[26]

Enron's misdeeds weren't due to an absence of collective intelligence, because Enron regularly hired the best and the brightest (as did the late accounting firm Arthur Andersen).[27] As

[20] See, eg, "Enron, Titanic, and The Perfect Storm" in *Corporate Fiascos*, *supra* n. 16, 927.

[21] *Ibid.*

[22] *See* J.D. Van Niel and N.B. Rapoport, "Dr Jekyll & Mr Skilling: How Enron's Public Image Morphed From the Most Innovative Company in the *Fortune 500* to the Most Notorious Company Ever", in *Corporate Fiascos*, *supra* n. 16, 77, 80–83.

[23] http://politicalhumor.about.com/library/blenronomics.htm (visited 18 September 2007).

[24] 148 Cong Rec H5462-02, H5466 (25 July 2002).

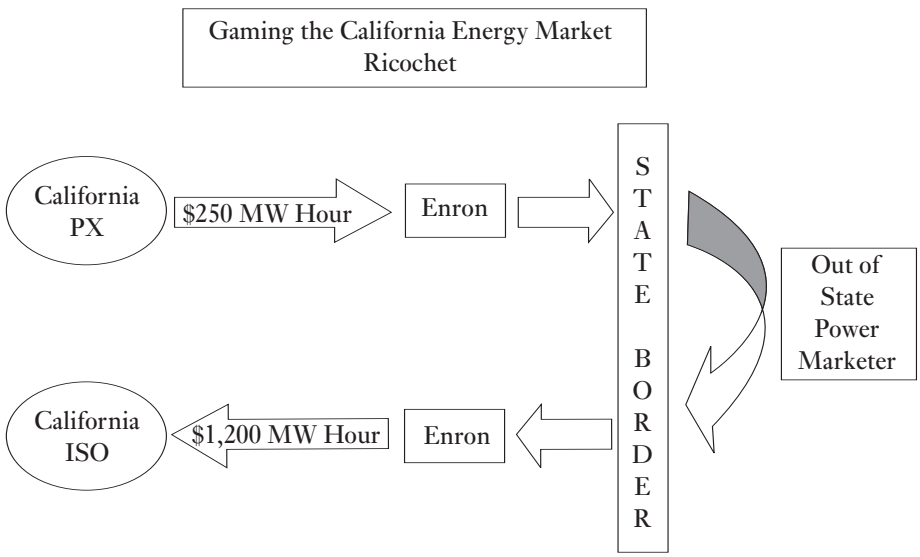
[25] *Ibid,* H5464; Public Company Accounting Reform and Investor Protection Act of 2002, Pub L No 107–204, 116 Stat 745 (codified in scattered sections of 11, 15, 18, 28, and 29 USC (2000)).

[26] See, eg, T. Fleck and B. Wallstin, "Enron's End Run: To make a mess as big as the Enron debacle, you need some friends in high places—Texas Senator Phil Gramm and his wife, for instance" *Dallas Observer*, 7 February 2002. Mark-to-market accounting isn't a problem when the "market" to which the contract's estimated profits are accelerated and recorded in year one is a real market, with the ability to verify the calculation of those profits. Where Enron went wrong was in creating both the deal and the market itself, which allowed it to manipulate both sides of the equation: the contract's calculated profit and the market that set that profit.

[27] Although Andersen's appeal of certain of the jury instructions to the United States Supreme Court was successful, *Arthur Andersen v United States*, 544 US 696 (2005), the decision came too late to save Andersen from destruction.

authors from Daniel Goleman[28] to Peter Salovey and John Mayer[29] have pointed out, though, IQ is not necessarily linked to EQ (emotional intelligence). IQ can tell a businessperson how to manipulate the rules to her advantage; EQ can tell her why she shouldn't do it.

A perfect example of Enron's failure to encourage more ethical decision-making is its exploitation of California's then-existing regulatory structure for round-trip electricity trading. According to several sources,[30] Enron traders shipped excess electricity out of California and then encouraged power plants to create false outages. Then, when California needed the electricity again, Enron[31] was able to import the out-of-California electricity at exorbitantly high prices.[32] The scheme looked something like this:[33]



California PX sells power to Enron, who ships power to out-of-state entity. Shortage of power in California triggers buying obligation by ISO, which shops for power out of state. Enron waits until prices peak on the California Grid, has the out-of-state entity ship power back to Enron, who then re-sells the same power back to ISO for up to 20 times the price that was paid that same day to bring the power out of California. The out-of-state entity charged Enron a fee to take power and return it in the same day.

[28] *See* D.P. Goleman, *Emotional Intelligence* (New York, Bantam Books, 2006); C. Cherniss and D. Goleman (eds), *The Emotionally Intelligent WorkPlace* (San Francisco, Jossey Bass, 2001); D.P. Goleman, *Working With Emotional Intelligence* (New York, Bantam Books, 1998).

[29] P. Salovey, J. Mayer and M. Brackett, *Emotional Intelligence: Key Readings on the Mayer and Salovey Model* (Portchester, NY, Dude, 2004).

[30] See M. Lifsher and E. Douglass, "The Enron Verdicts: Californians See Poetic Justice" *LA Times*, 26 May 2006, A1; T. Egan, "Tapes Show Enron Arranged Plant Shutdown" *NY Times*, 4 February 2005, A12.

[31] Other energy companies apparently also engaged in this sort of market manipulation.

[32] R.A. Oppel, Jr, "Enron's Many Strands; The Strategies: How Enron Got California To Buy Power It Didn't Need" *NY Times*, 8 May 2002, C1; M.W. Lynch and A. Moore, "Power Tripped: Energy Crisis, California", *Reason*, 1 June 2001, 33.

[33] J.D. Van Niel, "Enron—The Primer" in *Corporate Fiascos*, *supra* n. 16, 3, 22.

Was the scheme *legal*? Had Enron not manipulated the supply of electricity out of, and then back into, California, then the answer is "sure": Enron was simply pricing the electricity so as to benefit its own shareholders. But was it *ethical*? Not by any stretch of the imagination.[34] Ask anyone who lived through the rolling brownouts of the California energy crisis.

Let's assume, though, that some of the people at Enron actually agonised over the "round-tripping" of electricity in California, as well as over Enron's business losses and the ridiculous deals designed to cover them up. In fact, there were many who expressed their unease regarding those deals.[35] So then why did these smart people facilitate those deals, by participating in them[36] or by remaining silent about them?[37]

[34] Had Enron (allegedly) not manipulated the demand for electricity by agreements, then the question of whether Enron's round-trip trading was ethical is much more difficult. Lawyers are supposed to find gaps and, yes, loopholes in regulations for the benefit of their clients. Still, the enormous profits generated by round-trip trading raise a related question: is there such a thing as too much profit?

[35] See generally M. Swartz and S. Watkins, *Power Failure: The Inside Story of the Collapse of Enron* (New York, Doubleday, 2003); see also Watkins' email to Lay, available at http://www.itmweb.com/f012002.htm.

[36] One possibility is that these very smart people had very poor moral reasoning skills. Maybe part of the problem at Enron was created by the relative youth of many of the key players: see, eg, "Key Enron Executives' Penalties" *Washington Post*, 14 December 2006, D1; J.S. Emshwiller, "'Benron' Behind Bars; An inside look at the life of Ben Glisan, Jr, the first Enron executive to go to jail" *Wall Street Journal*, 21 April 2007, A1, as well as a concomitant lag in their moral reasoning abilities: *see* R. Kegan, *In Over our Heads: the Mental Demands of Modern Life* (Cambridge, MA, Harvard University Press, 1998). My very-uneducated guess would place Fastow (and many of his colleagues) in stages one or two of Kohlberg's moral reasoning scale.

According to Kohlberg, moral reasoning progresses in relatively well-defined stages. In stage one, people decide to do or not do an act merely out of a desire to avoid punishment. See N.B. Rapoport, "Lord of the Flies (1963): The Development of Rules Within an Adolescent Culture" in R. Strickland, T. Foster and T. Banks (eds), *Screening Justice—The Cinema of Law: Fifty Significant Films of Law, Order and Social Justice*, (Buffalo, William S. Hein & Co, 2005) [hereinafter *Flies*]. Stage two decisions represent a *détente* or a *quid pro quo* between actors. See M.D. Daneker, "Moral Reasoning and the Quest for Legitimacy" (1993) 43 *American University Law Review* 49, 54 [hereinafter Daneker]; cf C. Gilligan *et al* (eds), *Mapping the Moral Domain: A Contribution of Women's Thinking to Psychological Theory and Education* (Cambridge, MA, Harvard University Press, 1988) [hereinafter *Mapping*]; C. Gilligan, "Getting Civilized' (1994) 63 *Fordham Law Review* 17; C. Menkel-Meadow, "What's Gender Got To Do With It?: The Politics and Morality of an Ethic of Care" (1995) 22 *New YorkUniversity Review of Law and Social Change* 265, 276 and n. 39 (reviewing J.C. Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (New York, Routledge, 1993)); see also P.S. Karlan and D.R. Ortiz, "In a Diffident Voice: Relational Feminism, Abortion Rights, and the Feminist Legal Agenda" (1993) 87 *Northwestern University Law Review* 858, 863, 870 (contrasting Kohlberg's theory of moral development with Gilligan's theory). Only after stage two does the concept of a social contract—a higher power than the relationship between two actors—start to come into play. In stage three, people enforce rules because the rules exist. The difference between stage three and stage four reasoning is that, in stage three, society enforces the rules because they exist: see Daneker, 54–55; in stage four (the "law and order" stage), society enforces the rules because the rules have been enacted by majority rule, which provides an independent rationale for the "rightness" of those rules: *ibid*, 55. Stage five reasoning goes beyond majority rule to an articulable theory of rights (eg, natural law): *ibid*, 56, which allows stage five actors to factor in the rights of the minority: *ibid*. And the final stage, stage six, uses "universal ethical principles" to help the actor decide how to behave: *ibid,* 56 (footnotes omitted).

Once Enron started on its downhill track, by making riskier and more complicated deals in order to cover up its business failures, its executives were faced with a Hobbesian dilemma: take the losses, make the charges against earnings public and reap the consequences, or come up with Rube Goldberg-like deals to disguise its problems. See M. Flood, "Glisan Chips Away at Lay, Skilling Defense" *Houston Chronicle*, 23 March 2006, A1. (In all likelihood, Fastow's machinations enabled Enron to stay afloat far longer than it would have if Enron had come clean about its business failures at the time that the failures occurred.) I think that it's fair to assume that stage three–stage six reasoning didn't occur. In fact, I think that the key players at Enron stayed solidly in stage one. If the only reason to obey the rules is to avoid punishment, and if one discounts the risk of punishment by the likelihood of getting caught, then choosing to ignore the rules is a logical outgrowth of stage one reasoning. B. McLean and P. Elkind didn't name their book *The Smartest Guys in the Room* by accident. See *The Smartest Guys in the Room: The Amazing Rise and Scandalous Fall of Enron* (New York, Portfolio, 2003).

[37] "The only thing necessary for the triumph of evil is for good men to do nothing." Quotation attributed to Edmond Burke. See http://www.bartleby.com/66/18/9118.html, but see http://forum.quoteland.com/1/

c. Diffusion of Responsibility at Enron

Part of the answer must lie with the very human tendency to assume that "someone else" is taking care of the problem. The Powers Report to the Enron Board is a perfect example: the board blamed the accountants and the lawyers for Enron's downfall; the lawyers blamed the board and the accountants; and the accountants blamed the lawyers and the board.[38] None of these groups took responsibility for Enron's actions.

The classic example of diffusion of responsibility involves Kitty Genovese's murder on a warm, New York summer evening.[39] Genovese's murder took a long time to complete, and many people in many nearby apartments heard her cries for help, but no one called the police—on the assumption that someone else hearing her cries certainly must have called the authorities.[40] With everyone hoping that someone else was taking action, no one took any responsibility himself.

So it went at Enron. Various employees were uncomfortable with the shaky deals that Fastow and Skilling proposed,[41] but there are few examples of anyone at Enron calling "shenanigans"[42] on those deals. Sherron Watkins, in her now-famous memo, tried to get Ken Lay to own up to Enron's misdeeds—not because she was acting as a whistleblower, which she wasn't, but because she believed that Lay had not been involved in Enron's machinations. My guess is that Fastow *et al* counted on this facet of human nature in structuring the deals. Certainly Skilling's "rank and yank" reviews of Enron employees encouraged people to keep their heads down and their opinions to themselves, as did the amount of fees going to the professionals representing Enron. But neither cognitive dissonance nor diffusion of responsibility can provide a complete explanation of what went wrong at Enron.

d. Social Pressure at Enron

Social pressure played a large role in Enron's ability to keep its shady deals quiet. In Solomon Asch's famous experiment,[43] various actors were able to persuade the experimental subjects that the line that the subjects thought *was* identical to another line *wasn't* identical—even though the two lines were, in fact, exactly the same length.[44]

Even though the actors in the experiment were clearly wrong, the subject conformed to the social pressure in order to alleviate his own anxiety about the misidentification. If a subject can conform in a low-stakes situation, what likelihood was there that an Enron worker who "knew" that the deals weren't generating real money was going to speak out? Was someone at

OpenTopic?a=tpc&s=586192041&f=099191541&m=4131014151 (suggesting that the quotation has been misattributed to Burke).

[38] Powers report available at http://i.cnn.net/cnn/2002/LAW/02/02/enron.report/powers.report.pdf; J.C. Coffee, Jr, "Understanding Enron: 'It's About the Gatekeepers, Stupid' ", reprinted in *Corporate Fiascos*, *supra* n. 16, 125–143.

[39] "Queens Woman is Stabbed to Death in Front of Home" *NY Times*, 14 March 1964, 26.

[40] M. Gansberg, "Thirty-Eight Who Saw Murder Didn't Call the Police" *NY Times*, 27 March 1964.

[41] Swartz and Watkins, *supra* n. 35, 131–132; see also R. Bryce, *Pipe Dreams: Greed, Ego, and the Death of Enron* (Oxford, Public Affairs, 2002); B. Cruver, *Anatomy of Greed: The Unshredded Truth from an Enron Insider* (Carroll & Graf, 2002); *The Crooked E: The Unshredded Truth about Enron* (CBS television broadcast, 5 January 2003).

[42] Cf *South Park: Cow Days* (Comedy Central television broadcast, 30 September 1998) (Kyle calls "shenanigans" on a rigged carnival game). Brava to Jennifer Gross for finding this source.

[43] Asch, *supra* n. 14.

[44] See n. 14, *supra*.

Enron likely to say that the Dabhol power plant in India could never generate a profit, or that Azurix in Houston was mathematically incapable of making money? Hardly.

Cognitive dissonance kept the lawyers, the accountants, the employees, and the board from recognising that they had crossed the line repeatedly in their ill-fated attempts to keep Enron afloat. Even when they knew that something about the deals wasn't kosher, a combination of social pressure and diffusion of responsibility may have kept many of them from speaking out. Enron isn't unique—as the misadventures at WorldCom,[45] Tyco,[46] Global Crossing,[47] Hewlett-Packard,[48] Brocade,[49] and Dell[50] (among others) demonstrate. Milbank wasn't unique, either.[51]

II. Gellene, Milbank, and the Human Condition

What makes *Eat What You Kill* so interesting is its description of how Gellene's own insecurities managed to combine with Milbank's cavalier disregard for clear warning signs, thus creating a train wreck that sent Gellene to prison and Milbank to its malpractice insurer. Regan offers the two "prevailing explanations":

> "The first is that Gellene was a moral rogue, an aberrant partner with a weakness for cutting corners when it suited his purposes. The second is that Gellene was the fall guy, someone pressured by his firm to conceal a conflict of interest so that Milbank could reap a reward of almost $2 million in fees. From this perspective, Gellene was done in by a corrupt organization. The first explanation blames Gellene's fall on flawed character; the second depicts him as the victim of circumstances that he couldn't resist."[52]

Of course, each explanation is incomplete. Neither "the person" nor "the situation" is the only explanation; rather, it's the synergistic combination of character and context that explains it.

a. Law Firms—The Context

To understand why Milbank overlooked Gellene's clear ethical lapses, *Eat What You Kill* quite correctly begins with the social pressures that modern law firms face. Regan describes the three features of modern law firm life:

[45] See, eg, J. Sanberg *et al*, "Disconnected: Inside WorldCom's Unearthing of a Vast Accounting Scandal" *Wall Street Journal*, 27 June 2002, A1.

[46] See, eg, M. Maremont and J. Markon, "Leading the News: Former Tyco Executives are Charged: New York Prosecutors Say Ex-CEO, Finance Officer Ran 'Criminal Enterprise' " *Wall Street Journal*, 13 September 2002, A3.

[47] See, eg, S. Romero, "SEC Scrutinizing Another Company" *NY Times*, 9 February 2002, A1.

[48] See, eg, J.B. Stewart, "The Kona Files: How an Obsession with Leaks Brought Scandal to Hewlett-Packard" *The New Yorker*, 19 February 2007, 152.

[49] See, eg, E. Iwata, "Former Brocade CEO Guilty of Backdating; Conviction is First in Nationwide Crackdown" *USA Today*, 8 August 2007, B1.

[50] See, eg, M. Quinn, "Earnings; Dell Reveals it Manipulated its Books" *LA Times*, 17 August 2007, C1.

[51] See, eg, M. Neil, "Milberg Weiss in the Hot Seat: Should Law Firms Ever Be Indicted?" (2006) 92 *ABA Journal* 34 (December); "US Supreme Court Denial of Review Ends Sidley & Austin Bid to Avoid Monetary Relief Issue in Age Bias Case" *US Fed News*, 2 October 2006.

[52] *Eat What You Kill*, *supra* n. 4, 6.

"Focusing on these questions directs attention to three features that are common to practice in modern large law firms. First, a shift to merit-based compensation and away from job security means that partners as well as associates are competitors in a tournament [that never ceases, even after someone becomes a partner] . . .

. . . The common way to describe this system in the large firm is that you "eat what you kill". There are two main ways to be an entrepreneur who can compete successfully in a tournament organized around this principle. The first, and preferable, way is to be a "rainmaker": someone who develops contacts with clients that lead to regular business. The second is to cultivate a good relationship with a rainmaker, thereby gaining access to the work that his or her clients generate."[53]

In essence, then, the larger the law firm, the more important one's practice peers are in setting the social norms for that practice. Especially because the largest firms are, quite simply, too large to monitor everyone, life in large firms is lived at the departmental level, not the firm-wide level. And it was in the bankruptcy department that Gellene found himself, complete with a rainmaker (Larry Lederman) who needed a workhorse (Gellene).

"The particular move that ultimately begat the Gellene scandal was an effort to specialize in the representation of large corporate debtors in the bankruptcy reorganization process. Milbank had bankruptcy experience, but did most of its work on behalf of individual creditors: steady piecework, but not highly profitable. Directing reorganization on behalf of a large debtor, on the other hand, was a major project that could yield huge fees, ordered by the bankruptcy court and payable off the top of the estate. To move into this niche, it hired Larry Lederman, a "rainmaker" from the mergers and acquisitions powerhouse Wachtell, Lipton, Rosen & Katz, and gave him a free hand to wheel and deal. Gellene . . . saw Lederman as his ticket to continued success in the tournament. Economic pressures worked in grotesque synergy with his own psychological problems as Gellene committed his bizarre crime. Since even rainmakers are only a bad year away from unemployment, Lederman felt the same pressures. Consequently, when Gellene obliquely raised the possibility of a conflict on at least one occasion, Lederman either missed the point or chose to ignore it.[54]

[53] *Eat What You Kill*, *supra* n. 4, 7–8. Regan goes on to list the other two attributes of modern large law firm life. First, that ethical norms are established more within departments than firm-wide, leading to the very real chance that specialties would create their own, and possible aberrant, ethics rules. The other attribute involved the fact that various groups within a firm would team up temporarily for particular client matters and then would disband, and that the goal of the temporary teams was simply to "win"—to get a good result for the client—rather than to spend time thinking about firm-wide norms of ethical behaviour. *Ibid.* Conley and Baker note the same pressures:

"Regan's (2004) depiction of Milbank, Tweed and the fall of John Gellene presents a vivid instance of the standard economic account of change in large law firms. By the late 1960s client companies were increasingly buffeted by the competitive pressures of globalization and a technology-driven decline in the life cycles of their products. As they looked for ways to cut costs, legal services were not exempt. Clients began to shop, in the process realizing that large firms were generally fungible and that work could be divided up among competing firms. As a consequence, whereas large firms had once sent one-line bills 'for services rendered' that were paid without question, they were now forced to act like retailers, cutting prices to match the competition and even offering loss leaders. Firm profit margins fell as big-firm lawyers were suddenly thrust into the cutthroat global economy. Large corporate firms that had prospered for generations went out of business without warning.

By Regan's account, the impact of these economic forces on the professional lives of Wall Street lawyers and the cultures of their firms was direct and dramatic. For the first time, law firm partners were forced to think like business managers."

J.M. Conley and S. Baker, "Fall From Grace or Business as Usual? A Retrospective Look at Lawyers on Wall Street and Main Street" (2005) 30 *Law and Social Inquiry* 783, 798 [hereinafter *Fall From Grace*].

[54] *Fall from Grace, ibid*, 799–800.

I'm not the first (or the best) person to apply social science principles to Gellene's (and Milbank's) downfall.[55] But few people have taken that analysis beyond Gellene's own characteristics to view Milbank's complicity in his behaviour, or to compare Milbank's inaction with the inaction that occurred at Enron. In order to understand how the situation at Milbank compared with the situation at Enron, we must still first examine how Gellene signalled that Milbank should have kept a closer watch on him.

b. What were Gellene's Signals to Milbank?

By all accounts, Gellene was a loner and an insanely hard worker.[56] And Milbank was aware of both of these characteristics, much as it was aware that Gellene didn't pay attention to the non-billable aspects of firm life. Even something as mundane as filling out his timesheets on a regular basis was apparently beneath Gellene, who was routinely as late as a month in turning them in.[57] Mentoring and recruiting functions also weren't his forte.[58] In sum, Gellene was a keep-his-head-down, focus-on-the-task-at-hand kind of lawyer: not unusual at a large firm, but perhaps more pathological than most.

When I say "pathological," I mean that Gellene was off the deep end in terms of understanding how his actions might relate to his professional conduct. Not every partner who submits very late timesheets needs psychological help, but every partner (or associate) who does so must recognise that he can't possibly recreate his timesheets accurately. Law firms tend to view slow timesheet submission as an accounting problem. I disagree. I view it as an ethics problem: late timesheets necessarily mean that the lawyer must "guess" how much time he spent on every matter, and thus those timesheets either underbill or overbill[59] the clients. No matter on which side of the coin the "guesstimates" land, the end result is the

[55] Brad Wendel has done a superb job of applying social science principles to Gellene. See Wendel, *supra* n. 9, 302–308.

[56] "Milbank's annual compensation committee reports on Gellene are studded with comments on his hard work from partners: 'works tremendously hard'; 'a very hard worker'; 'tireless worker'; 'overworked'; and 'work[s] fiendishly hard'.

Colleagues also describe a lawyer who tended to take too much on himself without delegating responsibility to or involving others. . . . Barry Radick, cohead of the firm's bankruptcy practice, put it more vividly: He is a control freak and a loner. He refuses help; *we are concerned that he may get himself into trouble because he is working so hard*."

Eat What You Kill, *supra* n. 4, 53–54 (emphasis added).

[57] *Ibid.*

[58] ". . . In a similar vein, the head of the firm's summer associate program reported in 1992 that Gellene had been '[f]ired as partner mentor this Summer—after 4 weeks had still not made a single contact with his Summer Associates'. In 1994 the compensation committee was told, 'The recruiting staff has determined, based on experience, that Gellene should not be asked to assist the Firm with recruiting or interviewing; he generally refuses or, if he agrees he then cancels.' Gellene's intense immersion in his work thus gave rise to a tunnel vision that obscured anything he saw as not immediately relevant to the task at hand.

Ibid.

[59] One of the problems with late timesheets is that every lawyer could easily make both types of mistakes: underbilling and overbilling. A lawyer will *under*bill when he forgets to bill for a matter on which he worked. The same lawyer will *over*bill when he recreates a late timesheet along the following lines: "well, I worked on this matter for seven days straight, and I probably put in ten-hour days, so I'll bill 70 hours for this matter." The odds are good that the lawyer didn't actually fill the entirety of those days with billable work. Underbilling cheats the law firm out of earned fees. Overbilling cheats the client—period.

same: the lawyer has lied about how he spent his time. And lies have an annoying tendency to multiply.[60]

Milbank was aware of something else about Gellene, at least after Gellene became a partner: he was practising in New York without a license.

> "Only a few months after earning partnership on January 1, 1989, [Gellene's] achievement was in jeopardy. In late May of that year, Milbank was conducting a routine check of the credentials of all its lawyers. It confirmed that he was a member of the New Jersey bar. The firm discovered however, that, contrary to his representation, Gellene was not listed as a member by the New York state bar. This in turn meant that his putative membership in the federal bar in New York City was invalid. In other words, for almost nine years Gellene had practiced law in New York without a license. When confronted with this discrepancy, Gellene did not immediately confirm that Milbank's information was correct. Eventually, however, he admitted that he had never completed the steps necessary to become a member of the New York bar.[61]

The portrait of Gellene thus falls into sharper focus: he was a loner, an insanely hard worker, and someone who believed that certain rules didn't apply to him. As Gellene's story unfolds, Milbank would also find out that Gellene was someone who would fail to disclose a conflict of interest to a court, fail to respond to a motion to disgorge fees in that case (the *Bucyrus* case) and, until he was cornered, fail to provide his fellow partners with undoctored versions of pleadings filed against him and the firm.

c. Cognitive Dissonance at Milbank[62]

If Gellene had so many problems, why did Milbank keep him on, first as an associate and then later as a partner? The likely answer is that Gellene was enough of a billing machine that he was profitable.[63] At some point, though, profit isn't enough of an answer.

Take Gellene's failure to take the time to complete his character and fitness requirements for the New York bar. That failure probably stemmed from the same tunnel vision that he had exhibited throughout his career. Milbank knew about Gellene's problems with his timesheets and with abandoning summer associates, and perhaps it could dismiss such mistakes as "merely internal" problems; however, Gellene's practice of law without a license created a problem externally for the firm.[64] The firm had tolerated other associates' failure to complete their character and fitness portions of bar applications,[65] so it would not have been unreasonable for Gellene to assume that the firm would tolerate his delay as well. And it did, in a manner of speaking.

[60] "Oh what a tangled web we weave,
When first we practise to deceive!"

Sir Walter Scott, *Marmion,* Canto vi, stanza 17, available at http://www.quotationspage.com/quote/ 27150.html.

[61] *Ibid,* 60.

[62] Cf *Eat What You Kill*, *supra* n. 4, 304–305.

[63] Someone more cynical than I might contend that Gellene was profitable enough, even with disgorgement and malpractice lawsuits filed against him, that the risk to the firm was worth it, financially. Cf *Ford Pinto Fuel-Fed Fires,* Center for Auto Safety, available at http://www.autosafety.org/article.php?did=522&scid=8.

[64] Cf *ibid,* 61. ("In all likelihood this failure was clue to a sense that he was too busy at the time with his clerkship duties to fill out the forms and make the trip to Albany—just as he later was too busy at Milbank to submit his billing records on time or help with summer associates.")

[65] *Ibid.*

Gellene completed his application and was sworn in some ten months after Milbank originally discovered the problem. The only action that Milbank took was to demote Gellene to "of counsel" for the rest of the year; Milbank reinstated him as a partner, but in a newer-partner compensation bracket, which rankled Gellene considerably.

What rationale could the management at Milbank give itself for retaining Gellene as a partner after realising that he had knowingly practised for years without a New York licence? As Tanina Rostain correctly observes, "A fundamental purpose of law firm discipline should be to address the organizational factors, and specifically the dynamics of power, that contribute to individual wrongdoing".[66] Gellene wasn't the first Milbank lawyer who had neglected to finish the paperwork for admission to the New York bar. Why did Milbank look the other way, not just in Gellene's case, but in several Milbank lawyers' situations? One explanation is that Milbank was reluctant to admit that hiring Gellene (and the other lawyers) could have been a mistake. By rationalising that Gellene had, ultimately, been admitted to the New York bar, Milbank could say that the delay in admission was merely due to overwork.

If my hypothesis is correct, Milbank certainly wouldn't be the only law firm that might pride itself on its sweatshop-like work conditions. Many (most?) of the largest firms use billable hours as a way to measure their associates' work ethic. It's a race to exhaustion, a race to sloppiness, and a race to malpractice, but it's a very macho race, nonetheless. And macho behaviour is the norm at the top firms.[67]

d. Diffusion of Responsibility

Another problem endemic to organisations is diffusion of responsibility. Think how many Milbank partners knew about Gellene's foibles generally, and how few of them took action. Regan describes the scene at Milbank when Gellene's partners discovered that he had not replied to the disgorgement motion in *Bucyrus*:

> "Lichstein [one of Gellene's partners] was piqued that Lederman and Gellene had downplayed her earlier inquiries about a potential conflict. She suggested to Lederman that perhaps they should have taken her more seriously. Gellene nonetheless appeared composed during the meeting. He did not talk about the specifics of the JNL motion [for disgorgement of fees in the *Bucyrus* case]. . . . A response to the motion, he said, was due that coming Friday, February 28. He gave no indication of any problems with the response. The other Milbank partners apparently left the meeting feeling reassured that Gellene was on top of the situation, and that there was no danger to the firm.
>
> After the meeting, Lichstein continued to ask Gellene for the full set of papers associated with the motion. She would be happy, she said, to help with the response. Gellene said that he would prepare a draft response the next day, which she could then review before it was filed on Friday. As the day went on, Lichstein's exasperation mounted as her repeated calls to Gellene failed to result in receipt of the papers. At one point, Lichstein enlisted Barist [another partner] and asked for his help. Barist called Gellene, but the latter was not in his office.
>
> Finally, late that afternoon Lichstein sat down to read closely the only document she had, the memorandum of law. She was surprised by the fact that it referred to an accompanying affidavit

[66] Rostain, *supra* n. 9, 286.

[67] See, eg, M.H. Trotter, *Profit and the Practice of Law: What's Happened to the Legal Profession* (Athens Georgia, University of Georgia Press, 1997), 90. ("There is something in the system that smacks of fraternity hazing . . . The senior lawyers assume that younger lawyers would not answer the fire bell and work at night or weekends if necessary to get the job done.").

> of Andy Rahl dated December 12, 1996. That's odd, she thought. Why would a motion that had been filed in February be accompanied by an affidavit executed two months earlier? Lichstein then asked David Gelfand [another partner] to go up to Gellene's office to get a copy of the full set of papers. Gelfand had no more luck than she had, and came back empty-handed. Finally, early that evening, Lichstein phoned Gellene in his office and asked why the Rahl affidavit was dated in December. Gellene said that he would come down to talk to Lichstein and Gelfand.
>
> Gellene was quite distraught when he entered Lichstein's office. As Gelfand put it, '[W]hat happened next was a very difficult thing to witness.' Gellene broke down in front of his colleagues. He felt terrible, he said, but he couldn't lie to Lichstein and Gelfand any longer. He said that the JNL motion papers had actually been served on him in December 1996, and that he had later received a second set of papers filed on behalf of Bucyrus. He explained why the memorandum that he had given Lichstein had no date on the signature page: Gellene had whited it out. . . . [Gellene] had sought an extension of time to file a response [to the two motions]. The court, however, had denied his request. As a result, he had missed the deadline by about two weeks. Milbank thus faced the prospect that [the court] would rule that the firm had to return almost $2 million to Bucyrus.
>
> David Gelfand undertook a preliminary investigation of the matter on behalf of the firm. Milbank eventually called in the law firm of Sidley Austin to handle the matter. The February 14 deadline for responding to the JNL and Bucyrus motions had passed. Gelfand, however, prepared an affidavit stating that no one at the firm other than Gellene had been aware of the motions. The court then granted Milbank an extension of the time to reply until March 21.[68]

The motion to disgorge was, I believe, inevitable, based on Gellene's habit of playing things close to the vest. For a long time, Milbank had tolerated Gellene's habits, and even rewarded them: he wasn't fired after the firm discovered that he had been practising without a licence; he was fined a pittance when he turned in timesheets chronically late; and he was allowed to run large bankruptcy cases virtually by himself. What else could Milbank have expected would happen, given the extraordinary pressures that Gellene—and everyone else at Milbank—was under?

Milbank isn't an isolated firm, populated with bad actors. It is a large law firm, and it is run—like other law firms—by lawyers, few of whom have had any training as managers. Most law firms operate at a breakneck pace, with precious little time for thought about client matters, let alone law firm matters. I wouldn't be a bit surprised to find that the lawyers who worked with Gellene assumed that the firm either (1) knew about what was happening and was taking care of it, or (2) knew about what was happening and quietly approved of it. I also wouldn't be surprised to find out that the firm's management assumed that lawyers working more closely with Gellene would have alerted firm management if they thought that anything was amiss. After all, what behaviour counts as normal in such a fast-paced environment?

e. Social Pressure

To the extent that Milbank, like other large law firms, is organised into departments by practice groups, those departments create powerful incentives to conform to practice group norms. In bankruptcy groups, for example, conflicts of interest can be interpreted very differently from how they would be interpreted in, say, commercial litigation departments, or

[68] *Eat What You Kill*, *supra* n. 4, 212–214.

in tax departments, etc.[69] Without input from other departments, there is a risk that the departmental group norms will override any firm-wide (or professional) norms.

> "The result of all this is that teams can shape individual perceptions in powerful ways by creating a shared cognitive and moral universe. Members reinforce for one another the idea that their framework for interpreting events is accurate and reasonable. This process can result in 'groupthink', a situation in which individuals arrive at a consensus without exploring all options or paying enough attention to information that challenges their framework. Group influence will be especially pronounced when members face stress and ambiguity, and when they perceive an external threat or adversary. It also may be especially potent when a project team is comprised of members from different organizations. The absence of a single entity with overall managerial responsibility in these cases may make it harder to prompt group members to view things from the standpoint of a broader organizational mission.
>
> The large-firm lawyer thus practices under conditions dramatically different from a quarter century ago. Firms are more loosely organized, partners are more akin to individual entrepreneurs, and competition is a relentless fact of life. These changes have been especially vivid at Wall Street firms, because they were the most insulated from competitive pressures for a good part of the twentieth century. All large firms, however, now inhabit a universe whose governing laws are those of the market."[70]

That competitive, never-say-die atmosphere was clear, and Gellene's behaviour was consistent with that ethic as he began work on the *Bucyrus* case:

> "Gellene . . . told Lederman, 'I don't believe that we have to disclose that we represent Salovaara because he's not a creditor.' Gellene testified that he had thought of Salovaara when preparing the declaration, but had told himself that 'it's not related and he's not even a creditor.' The latter conclusion apparently was based on the view that Salovaara individually was not someone to whom Bucyrus owed money. Gellene didn't share his reasoning on this issue with anyone else at the time, because 'we were in the middle of this fire drill to get everything done, and everybody was off doing something else. There was so much work to be done that everybody had to work on one thing and not really look at what somebody else was doing'."[71]

Although it's possible that Gellene's failure to push the disclosure of the Salovaara relationship was part of some "nudge-nudge, wink-wink"[72] signalling from Lederman, Gellene was a partner at the time, and he was certainly capable of understanding that bankruptcy courts prefer to decide conflicts issues themselves, after full disclosure. Gellene was experienced enough to know that he

[69] I've based a large part of my career on my obsession about conflicts of interest in bankruptcy cases, especially in chapter 11 cases. See, eg, N.B.Rapoport, "Bankruptcy Ethics Issues for Solos and Small Firms", in *Attorney Liability in Bankruptcy* C. Cooper (ed), and C. E. Vance (contributing ed), *Attorney Liability in Bankruptcy* (ABA, 2006); N.B. Rapoport, "The Intractable Problem of Bankruptcy Ethics: Square Peg, Round Hole" (2002) 30 *Hofstra Law Review* 977; N.B. Rapoport, "Our House, Our Rules: The Need for a Uniform Code of Bankruptcy Ethics" (1998) 6 *American Bankruptcy Institute Law Review* 45; N.B. Rapoport, "Turning the Microscope on Ourselves: Self-Assessment by Bankruptcy Lawyers of Potential Conflicts of Interest in Columbus, Ohio" (1997) 58 *Ohio State Law Journal* 1421; N.B. Rapoport, "Seeing the Forest *and* the Trees: The Proper Role of the Bankruptcy Attorney" (1995) 70 *Indiana Law Journal* 783; N.B. Rapoport, "Turning and Turning in the Widening Gyre: The Problem of Potential Conflicts of Interest in Bankruptcy" (1994) 26 *Connecticut Law Review* 913.

[70] *Eat What You Kill*, *supra* n. 4, 41–42.

[71] *Ibid,* 148.

[72] See http://en.wikipedia.org/wiki/Nudge_Nudge (explaining the origin of the phrase as part of a Monty Python skit).

[73] *Eat What You Kill*, *supra* n. 4, 155.

> "had an ongoing obligation during the bankruptcy proceeding to inform the court if the firm developed new ties with any claimant. In asserting that Milbank had no connections to any party in interest other than those listed in his affidavit, Gellene already had crossed a crucial divide. To put it bluntly, he had lied to the court."[73]

He may have rationalised that lie on the grounds that everyone was feverishly busy with Bucyrus's first-day motions (cognitive dissonance thus rearing its ugly head), but he lied, nonetheless. And that lie, coupled with more lies and a cover-up, eventually sent him to prison. Would Gellene have lied about the conflict had he been working at a slower-paced law firm, or on a smaller case, or if he were a rainmaker on his own, not dependent on others' largesse for his assignments? It's hard to say. Those factors operated to make the decision to lie more likely, though.

III. Conclusion: The Inevitability of Human Nature

Outside of most *Perry Mason* episodes, guilty people don't confess until they've been caught. After the jury verdict in the Ken Lay and Jeff Skilling cases, both defendants acted as if the verdicts were based on a simple factual misunderstanding:

> "Speaking to reporters outside the courthouse, Lay expressed shock at the verdict and continued to maintain his innocence as his wife Linda stood by his side.
>
> 'I firmly believe I am innocent of the charges,' he said. 'Despite what has happened I'm still a very blessed man.' . . .
>
> Outside the courtroom after court was adjourned, Skilling said, 'We fought a good fight. Some things work. Some things don't.'
>
> 'Obviously I'm disappointed, but that's the way the system works,' he added."[74]

Each man stayed in character, with Lay maintaining that his inattention[75] and Fastow's greed caused Enron's downfall, and Skilling maintaining that ordinary people[76] couldn't understand why Enron entered into such creative deals.

Gellene also had a theory for his downfall: a combination of his perfectionism and his inaction. Starting with his failure to finish his bar application, he explained:

> "I think I have two things to say. First, is that I have not just for my adult life but before that I've been recognized as a person with gifts in terms of my intellect and my ability to deal with problems, and I've been very good and very competent at the kinds of problems presented [by] my clients in the practice of law and in academics and so on.
>
> And that is I think such a part of me and who I hold myself out to be and who I am that when I am confronted with mistake, an act of inadvertence that is stupid that I'm—it is very difficult for me to stand up and say I did a stupid thing.
>
> When I was a young lawyer, I did a very stupid thing. I got caught up in my work and I didn't fill out the forms, and as time went on it got more and more absurd and I could not stand up and say, I did something stupid. And when that first happened in my life in a traumatic way, I could not say it to myself and I could not say it to others so I hid it. I lied, and when it was

[74] S. Pasha and J. Seid, "Lay and Skilling's day of reckoning: Enron ex-CEO and founder convicted on fraud and conspiracy charges; sentencing slated for September" *CNN Money*, 25 May 2006, at http://money.cnn.com/2006/05/25/news/newsmakers/enron_verdict/index.htm.

[75] Somehow, Lay never realised that a CEO's inattention to business was itself problematic.

[76] That is, jurors.

> discovered, I set about to repair it. It was a long process. Nine years ago it would have taken three weeks and it took almost a year later but I fixed it and moved on.
>
> When I did that with the state court, I didn't do it with the federal court, the other major court in New York City and I should have done that. And it would have been—certainly after the year that went on in my life with the New York bar, it would have been a very simple thing to do, but I was confronted again with the absurd stupidity of not filling out forms that thousands of lawyers fill out year in and year out and I couldn't stand up and say, I did this. I did something stupid so I didn't do it."[77]

Seeing a pattern in his own inaction, Gellene continued, in an effort to explain his actions in Bucyrus:

> "When I saw the [Bucyrus] papers in December, the same crushing weight of what I had experienced in May occurred again and it occurred at the culmination of a year that was personally and professionally very difficult and had created a sense of isolation from my colleagues, from my work, from things that I had invested thousands of hours in trying to give meaning to myself and to my life and I could not deal with it. I just fell apart during the month of December. I didn't work. I didn't do anything. I would sit at my desk.
>
> And only when I absolutely had to did I zip up all of that and for whatever time it took put a face before the world that didn't reveal what was going on with me. I did that and I've done that because through my adult life I have not been able to deal in a responsible and mature and forthright way with the imperfections that I like anyone else have and the shortcomings that I think any man or woman has in a world that's not perfect."[78]

More interesting than Gellene's self-psychoanalysis, though, is his rather offhand comment, "*on the one hand, you can see this pattern of behavior*".[79] On this point, Gellene was absolutely correct. Milbank could have seen this pattern of behaviour, had the right people connected the right dots. Although people saw Gellene's behaviour with respect to timesheets and workaholism, that behaviour was normal enough not to trigger any alerts. By the time the abnormal behaviour surfaced, in the guise of a motion to disgorge, it was too late.

In Enron's case, as well as in Milbank's case, misbehaviour was an open secret. No matter how much Andy Fastow, or Jeff Skilling, or Ken Lay fooled themselves, others witnessed their machinations, and very few of them spoke out. Neither Enron nor Milbank did anything "in the night-time".

Some may argue that neither group spoke out because it was well-fed (read: greedy), but I hesitate to attribute simple greed as the sole answer. Using greed as the answer implies that the problem is cured when the guilty are spirited away.

Rather, I attribute the cause as the mind's ability to fool itself, not just in discrete circumstances, but for a prolonged period. Enron's workforce, as well as Milbank's workforce, was socialised to expect certain behaviour—"work hard, play hard"—and certain consequences, such as interesting deals and a very comfortable standard of living. There weren't counter-examples valuing those who played by the rules. If the only myths of an organisation involve overwork, outsmarting the opposition, and pushing the envelope, then few inside that organisation will be able to withstand the pressure to conform. Those who want a different environment will leave. Those who stay will continue to be swayed by the group's norms.

"Do nothing in the night-time?" Actually, that's not curious at all.

[77] *Eat What You Kill*, *supra* n. 4, 262–263.
[78] *Ibid*, 263.
[79] *Ibid*, 264 (emphasis added).