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Milton C. Regan, Jr.

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NESTED ETHICS: A TALE OF TWO CULTURES

*Milton C. Regan, Jr. **

I. INTRODUCTION

As law firms have become larger and more complex,¹ many of them have adopted more sophisticated programs to ensure that lawyers in the firm comply with their professional responsibilities.² These programs attempt to achieve more consistent behavior across the firm by relying on specifically designated ethics experts who take the lead in establishing standard procedures that coordinate and reduce reliance on individual discretion.³ Aside from producing greater uniformity, such procedures also lessen reliance on the probity of individual lawyers. This reflects awareness of the powerful way that circumstances can shape behavior, particularly in large organizations. We can think of these procedures and policies as constituting the basic elements of a law firm's ethical infrastructure. This term sometimes is used to encompass a broader set of initiatives, but for analytical purposes, I want to use it in the narrower sense.

* McDevitt Professor of Jurisprudence and Co-Director, Center for the Study of the Legal Profession, Georgetown University Law Center. I would like to thank Susan Fortney and Scott Killingsworth for helpful comments on an earlier draft. I also would like to acknowledge a grant from the Law School Admission Council for a project on law firm culture that has prompted the ideas that I discuss in this Article.

1. "Law firms generally can be described as tending toward progressively formal management and internal specialization as firms move from smaller and collegial to larger, more bureaucratic forms." Elizabeth Chambliss & David B. Wilkins, *Promoting Effective Ethical Infrastructure in Large Law Firms: A Call for Research and Reporting*, 30 HOFSTRA L. REV. 691, 694 (2002). [hereinafter Chambliss & Wilkins, *Promoting Effective Ethical Infrastructure*].

2. *Id.* at 692.

3. *Id.* at 706-07.

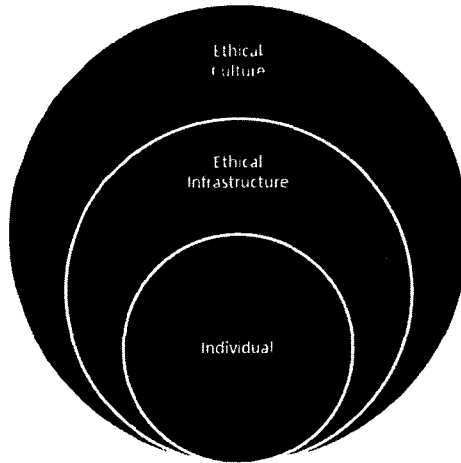
In recent years, organizations have come to appreciate that procedures and policies designed to promote ethical behavior may have limited effect if employees do not internalize the values that underlie them.⁴ Scholars suggest that organizations need to combine a focus on deterrence with an approach that emphasizes management's commitment to ethical values.⁵ As Lynn Sharp Paine describes, these values "reflect important organizational obligations and widely shared aspirations that appeal to the organization's members."⁶ This approach assumes that employees desire to act on the basis of these values and that they will be motivated to do so if they believe that the organization takes them seriously. Management therefore must ensure that rules that prescribe behavior are not mere formalities because people in positions of authority disregard and show little respect for them. Attention to this dimension of organizational life reflects an effort to promote an ethical culture that complements and reinforces a firm's ethical infrastructure. While ethical culture is sometimes described more broadly than a focus on the values embodied in an organization's ethical program, for analytical purposes, I want to use this term in the narrower sense.

Based on this account of the evolution of law firm ethics programs, we can conceptualize the components that influence ethical behavior as nested inside one another. The first level is the individual who engages in decision-making, who may receive advice from colleagues who act informally to provide ethical guidance. The second level, which provides the larger context for the first, is a firm's ethical infrastructure, which attempts in various ways to shape and channel that behavior. The third level, which provides the larger context for the first two, is a firm's ethical culture. This can prompt an individual to embrace ethical values to which a firm is committed, which provides intrinsic motivation to comply with the procedures and policies that make up the firm's infrastructure. These relationships can be depicted in this way:

4. Scott Killingsworth, *Modeling the Message: Communicating Compliance Through Organizational Values and Culture*, 25 GEO. J. LEGAL ETHICS 961, 973 (2012); Lynn Sharp Paine, *Managing for Organizational Integrity*, HARV. BUS. REV., Mar.-Apr. 1994, at 106, 111.

5. Killingsworth, *supra* note 4, at 966-68, 974.

6. Paine, *supra* note 4, at 112.

Figure 1

The ethical culture in a law firm thus provides the larger context in which individual action and the firm's ethical infrastructure operate. Ideally, it communicates that a firm is committed to practicing law consistently with the values reflected in the professional responsibilities of lawyers. While this can be crucial in strengthening ethical behavior, there still may be limits to its effectiveness.

First, members of an organization are more likely to be receptive to its ethical culture as they identify more with the organization.⁷ An expanded sense of identity more closely aligns individuals' self-interest with that of the organization, so that they see their own success as tied to the success of the larger entity. Prompting this identification, however, can be a challenge for a contemporary law firm. Most firms are extraordinarily fragile, vulnerable to the departure of their most profitable partners in the lateral market.⁸ This fragility may make partners feel that it is hazardous to act as if their long-term self-interest is tied to that of the firm. In addition, competitive pressures now prompt many firms to terminate lawyers who are not performing at a level that the firm deems adequate.⁹ This heightened vulnerability also can prevent the formation of any deep sense of attachment to a firm.

A second potential limit to the effectiveness of efforts to promote an ethical culture is that when individuals in an organization think of

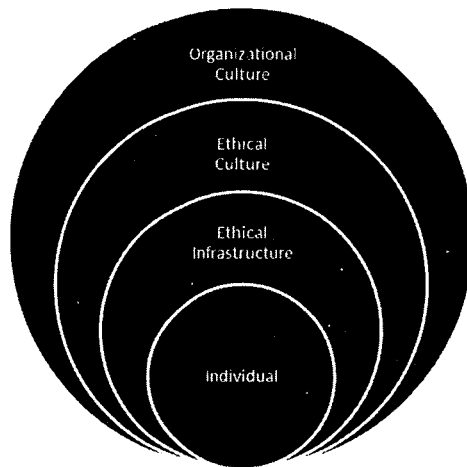
7. Killingsworth, *supra* note 4, at 975, 978.

8. See Bernard A. Burk & David McGowan, *Big but Brittle: Economic Perspectives on the Future of the Law Firm in the New Economy*, 2011 COLUM. BUS. L. REV. 1, 73; see also DAVID JARGIELLO & PHYLLIS GARDNER, FREE AGENT DYSFUNCTION: MANAGEMENT REALPOLITIK FOR U.S. LAW FIRMS 12, 17 (2010).

9. See, e.g., JARGIELLO & GARDNER, *supra* note 8, at 14-15 & nn.15-17.

ethics, what tends to come to mind is behavior broader than the type that is the focus of an ethics program.¹⁰ For members of an organization, ethics relates most prominently to how fairly the organization treats the people who work there.¹¹ Research indicates that there is a strong connection between this assessment and ethical attitudes and behavior.¹² The greater the perception of fairness, the more credible an organization's professed commitment will be to ethical values and the more successful it will be in prompting its members to identify with it.¹³ This directs attention to policies and practices that we may not even think of as relating to ethics. They include matters such as promotion, compensation, and whether people who are generous or selfish tend to get ahead in the organization.¹⁴ These issues relate to the broader culture of an organization, which in turn affects the ability to promote an ethical culture. We therefore can conceptualize organizational culture as an additional component to our model within which the others are nested:

Figure 2



These components are not necessarily sharply distinct. It is possible, for instance, to regard an organization's ethical infrastructure as including its ethical culture.¹⁵ Professor Christine Parker and her

10. LINDA KLEBE TREVIÑO & GARY R. WEAVER, *MANAGING ETHICS IN BUSINESS ORGANIZATIONS* 221 (2003).

11. Killingsworth, *supra* note 4, at 975.

12. *Id.* at 978.

13. *Id.* at 975-78.

14. Christine Parker et al., *The Ethical Infrastructure of Legal Practices in Larger Law Firms: Values, Policy and Behaviour*, 31 U.N.S.W. L.J. 158, 168-69 (2008).

15. *Id.* at 160. Christine Parker and her colleagues, for instance, argue for "a broader conception of ethical infrastructure that incorporates informal management policies and work

colleagues suggest, however, that in much of the literature on law firms, “[t]he use of the term ‘ethical infrastructure’ . . . has focused on formal policies and structures explicitly designed to ensure compliance with professional conduct rules.”¹⁶ Similarly, it is possible to define ethical culture in a way that includes perceptions of how fairly an organization treats its members.¹⁷ Indeed, one important insight is that an organization generally does not have a discrete ethical culture that is distinct from its overall culture. As Parker and her colleagues emphasize: “All management policies, priorities and initiatives – formal or informal, and explicitly stated or implicitly assumed – can either undermine or support ethical practice within a firm.”¹⁸ There is simply culture: the complex and sometimes contradictory set of messages that an organization sends about what is valued and what is not.

It can be useful, however, to keep the concepts of ethical infrastructure, ethical culture, and organizational culture distinct. Each refers to an analytically distinct aspect of an organization’s effort to promote ethical behavior. As I will discuss in more detail, each directs law firm attention to different types of policies, and each suggests different lines of inquiry for scholars.¹⁹ Research on ethical compliance programs, for instance, has distinguished the effectiveness of programs that emphasize following rules from those that emphasize commitment to values.²⁰ In addition, differentiating ethical culture from organizational culture underscores that policies, that we normally do not think of as related to “ethics,” may have a significant impact on ethical

cultures (not just formal management policies), and the promotion of ethical dialogue and values (not just compliance with professional conduct rules).” *Id.* at 160 n.6.

16. *Id.*; see also, e.g., Chambliss & Wilkins, *Promoting Effective Ethical Infrastructure*, *supra* note 1, at 692 (“[P]rofessional regulation increasingly depends on the development of ‘ethical infrastructure’ within firms; that is, on *organizational* policies, procedures and incentives for promoting compliance with ethical rules.” (footnote omitted)); Alex B. Long, *Focusing Your Firm on Ethics: Responsibility for a Culture of Ethical Practice and Behavior*, TENN. B.J., Dec. 2009, at 14, 15 (defining ethical infrastructure as “the organizational structure, practices and procedures a firm employs to promote ethical behavior”); Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 10 (1991) (“[A] law firm’s organization, policies, and operating procedures constitute an ‘ethical infrastructure’ that cuts across particular lawyers and tasks.”).

17. See, e.g., Christine Parker & Lyn Aitken, *The Queensland “Workplace Culture Check”*: *Learning from Reflection on Ethics Inside Law Firms*, 24 GEO. J. LEGAL ETHICS 399, 401, 441 tbl.A6 (2011) (including in a survey designed to prompt “individual reflection on the ethical cultures” of a firm questions about extent to which some respondents agreed that “I am treated with respect and courtesy in my firm”; “I am treated fairly, in a consistent and predictable fashion”; and “I am able to openly discuss pay and conditions”); Linda Klebe Treviño et al., *Managing Ethics and Legal Compliance: What Works and What Hurts*, CAL. MGMT. REV., Winter 1999, at 131, 131-32 (describing “fair treatment of employees” as a “dimension[] of the organization’s ethical culture”).

18. Parker et al., *supra* note 14, at 161.

19. See *infra* Part II.

20. See, e.g., TREVIÑO & WEAVER, *supra* note 10, at 193, 211-12.

outcomes. Conceptualizing organizational culture in this way underscores, for instance, that a lawyer's decision about whether to expose the firm to risk, by deliberately ignoring a potential conflict, may depend on whether the firm offers junior lawyers meaningful professional training opportunities, and whether it provides income partners with guidance on how to engage in business development.²¹ Thus, while ethical and organizational culture may be inseparable, it can be useful to treat them as two distinct cultures within a firm.

The remainder of this Article uses the concept of nested components to chart the evolution of law firm efforts to ensure that lawyers comply with their professional responsibilities.²² It describes in more detail attempts to accomplish this by developing an ethical infrastructure and promoting an ethical culture.²³ It then discusses research indicating that an organization's values broadly defined, especially those that its members regard as related to organizational justice, can have a significant impact on ethical attitudes and behavior.²⁴ The Article concludes by suggesting that focusing on ethical infrastructure, ethical culture, and organizational culture can provide distinctive and complementary approaches to promoting and studying influences on ethical outcomes.²⁵

II. THE EVOLUTION OF LAW FIRM ETHICS PROGRAMS

A. *Individual Virtue and Informal Advice*

When firms several decades ago were smaller than today and were organized as general partnerships, the assumption tended to be that informal consultation among partners was sufficient to ensure that lawyers in the firm behaved ethically.²⁶ Reliance on particular individuals for advice evolved gradually as people tended to approach certain colleagues for guidance. The system that emerged was informal and ad hoc. Partners who developed some expertise in ethics typically were not appointed to any formal position.²⁷ Nor was there any

21. See *id.* at 221-22.

22. See *infra* Part II.

23. See *infra* Part II.A-C.

24. See *infra* Part II.D.

25. See *infra* Part II.E.

26. See Elizabeth Chambliss, *The Nirvana Fallacy in Law Firm Regulation Debates*, 33 FORDHAM URB. L.J. 119, 199-20 (2005).

27. See, e.g., Elizabeth Chambliss & David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms*, 44 ARIZ. L. REV. 559, 565 (2002) [hereinafter Chambliss & Wilkins, *The Emerging Role of Ethics Advisors*].

department or committee charged with responsibility for ethical compliance.²⁸ As one partner put it, the ethics department was “a senior partner with a copy of the Model Code in his office.”²⁹ Similarly, when a partner who counseled on ethics issues suggested that the firm should form a committee, the response tended to be: “What would the ethics committee do? It would just rubber stamp everything you say.”³⁰

Many firms during this period did not explicitly compensate a partner who focused on ethics issues for the firm.³¹ They relied instead on a partner’s personal and professional commitment to the firm, and occasionally on a willingness to volunteer time by partners whose work for clients focused on professional liability.³² Those who were not compensated for their efforts spent perhaps 400-500 hours a year on ethics compliance, almost all of which tended to be reactive.³³ As Professor Susan Fortney put it in a 1995 survey of law firm ethics programs, firms seemed to be “more inclined to designate individuals to handle ethics problems once they arise rather than rely on risk managers who might be able to take steps to avoid problems before they arise.”³⁴

Concern about conflicts generally was the impetus for regular attention to ethics issues.³⁵ Even committees that were created to address ethics compliance tended to be called “conflicts” committees, gradually broadening their focus over time to encompass other issues.³⁶ There often was no formal description of the jurisdiction of a committee.³⁷ Ethics partners tended to chair and do most of the work of committees, which in many firms met only rarely.³⁸ In addition, membership on a committee often rotated, so that other partners had little opportunity to build expertise on ethics issues.³⁹ Elizabeth Chambliss and David Wilkins suggest that this tended to result in lower overall firm investment in compliance and greater vulnerability to gaps in coverage of issues.⁴⁰ Finally, the titles and status of partners focusing on ethics

28. See, e.g., *id.*

29. *Id.* (internal quotation marks omitted).

30. *Id.* (internal quotation marks omitted).

31. See *id.* at 565, 572.

32. *Id.* at 565, 577.

33. *Id.* at 574.

34. Susan Saab Fortney, *Are Law Firm Partners Islands unto Themselves? An Empirical Study of Law Firm Peer Review and Culture*, 10 GEO. J. LEGAL ETHICS 271, 275-76, 289 (1996) [hereinafter Fortney, *An Empirical Study*].

35. Chambliss & Wilkins, *The Emerging Role of Ethics Advisors*, *supra* note 27, at 566.

36. *Id.* at 565-67.

37. *Id.* at 567.

38. *Id.* at 568.

39. *Id.* at 570-71.

40. *Id.* at 571.

issues varied considerably.⁴¹ Chambliss and Wilkins note that a partner with this responsibility might be referred to as firm counsel, general counsel or attorney to the firm, ethics partner, professional responsibility advisor, risk management partner, or loss prevention partner, among other titles.⁴²

Firms during this period thus tended to focus on individual behavior as the main object of concern, with minimal effort to establish and enforce standard procedures to coordinate and guide how partners conducted their practices.⁴³ Fortney's 1995 survey of Texas law firms, for instance, found that most firms did not monitor partners' compliance with internal procedures other than those dealing with conflicts and billing.⁴⁴ While a significant percentage of lawyers appreciated the advantages of a firm operating as a coordinated unit, rather than simply a confederation of independent lawyers, many also expressed concern about the danger of organizational procedures intruding on individual partner autonomy.⁴⁵ Law firm ethics programs during this period thus tended to reflect the notion that ethical behavior of lawyers was, as Parker and her colleagues put it, "a matter of individual, independent judgment in the specific context of their own clients in their own situations."⁴⁶

B. Ethical Infrastructure

In more recent decades, the growth of law firms, exposure of lawyers to more sources of potential liability, and the growing complexity of ethical regulation have prompted many firms to establish more systematic programs to ensure compliance with ethical rules and promote wider awareness of ethical obligations.⁴⁷ These initiatives are commonly described as the creation of an "ethical infrastructure,"⁴⁸ to underscore the emphasis on organizational policies and procedures designed to impose some regularity on how lawyers in a firm practice.⁴⁹ Not all firms have responded as comprehensively as others, and the

41. *Id.* at 565-68.

42. *Id.* at 565.

43. Chambliss & Wilkins, *Promoting Effective Ethical Infrastructure*, *supra* note 1, at 699.

44. Fortney, *An Empirical Study*, *supra* note 34, at 284-85.

45. *Id.* at 292-94.

46. Parker et al., *supra* note 14, at 158.

47. Chambliss & Wilkins, *Promoting Effective Ethical Infrastructure*, *supra* note 1, at 702-03, 710.

48. Parker et al., *supra* note 14, at 172.

49. The term appears to have originated with Ted Schneyer. See Ted Schneyer, *A Tale of Four Systems: Reflections on How Law Influences the "Ethical Infrastructure" of Law Firms*, 39 S. TEX. L. REV. 245, 246, 253, 270 (1998).

features of programs vary across firms. Nonetheless, there has been a decided shift toward the adoption of measures at the organizational level that are aimed at promoting ethical compliance.⁵⁰

An important component of such an infrastructure is a partner who is formally designated as an ethics specialist who is specifically compensated for playing this role.⁵¹ Depending on the firm, this person may work on developing standards for matters such as client intake; conflicts checks; engagement letters; advance conflict waivers; voluntary and mandatory withdrawals from engagements; fee negotiations and terms; the provision of opinions on behalf of the firm; compliance with practice-specific regulatory regimes; and trading in securities to avoid insider trading violations.⁵² The work also involves responding to bar complaints, disqualification motions, and lawsuits against the firm.⁵³ In addition, an ethics partner can serve as someone for lawyers to consult with outside the normal supervisory chain of command on a matter, which may encourage lawyers to come forward about potential problems and cloak such communications with the attorney-client privilege vis-à-vis third parties.⁵⁴

As they have become more systematic, law firm ethics initiatives have come to bear some resemblance to corporate legal compliance programs. Chambliss and Wilkins explicitly suggested in the early 2000s that law firms look to such programs as models of an institutional approach to influencing behavior.⁵⁵ As they note, “research on the regulation of organizations in other contexts suggests that the effectiveness of external regulation depends significantly on the scope and effectiveness of compliance procedures within firms. Thus, the firm remains the central arena—and agent—of regulation.”⁵⁶ Compliance professionals have played a role in defining “best practices” in various industries, identifying risks of liability, and designing organizational programs to minimize these risks.⁵⁷

50. Parker et al., *supra* note 14, at 178.

51. *Id.* at 179.

52. Chambliss & Wilkins, *The Emerging Role of Ethics Advisors*, *supra* note 27, at 566-67; Chambliss & Wilkins, *Promoting Effective Ethical Infrastructure*, *supra* note 1, at 698.

53. Chambliss & Wilkins, *The Emerging Role of Ethics Advisors*, *supra* note 27, at 567.

54. Anthony E. Davis, *Legal Ethics and Risk Management: Complementary Visions of Lawyer Regulation*, 21 GEO. J. LEGAL ETHICS 95, 107, 112 (2008). For a detailed description of the elements of a law firm's ethical infrastructure and risk management system, see generally ANTHONY E. DAVIS & PETER R. JARVIS, *RISK MANAGEMENT: SURVIVAL TOOLS FOR LAW FIRMS* (2d ed. 2007); Davis, *supra*.

55. Chambliss & Wilkins, *Promoting Effective Ethical Infrastructure*, *supra* note 1, at 693-94.

56. *Id.* (footnote omitted).

57. *See id.* at 706, 715.

Indeed, many ethics counsel have come to think of their role mainly in terms of risk management.⁵⁸ They typically represent their firms in dealings with insurance carriers, which are apt to regard law practice as but one of many activities that can pose various types of risks.⁵⁹ As Anthony Davis observes:

[A] key component of all insurance has been the management of risk, and the development of systems to improve the management of risk. Professional liability insurers have learned that the practice of law is in this respect no different than a construction site. Just as insurers require construction workers to wear hard hats, they are increasingly focused on the adoption by law firms of appropriate risk management systems, from client intake through practice management. The availability of coverage, the size of deductibles, the limits available, the terms of coverage, and the price of malpractice insurance are more and more dependent on law firms' ability to demonstrate to underwriters that they have adopted and institutionalized appropriate risk management systems.⁶⁰

Reflecting the shift in focus from the individual to the organization, risk management "attempts to put in place a set of standard policies and procedures that minimize individual discretion and emphasize uniform responses to specific situations."⁶¹

Law firms that appreciate the importance of establishing an ethical infrastructure can look for guidance on best practices to an organization such as the Attorneys Liability Assurance Society or other insurers, as well as to other law firms. Firms also can adapt the standards for an effective compliance and ethics program that are set forth in the Organizational Sentencing Guidelines,⁶² and borrow ideas from a

58. Parker et al., *supra* note 14, at 179-80.

59. Davis, *supra* note 54, at 100.

60. *Id.* (footnote omitted).

61. Milton C. Regan, Jr., *Risky Business*, 94 GEO. L.J. 1957, 1962 (2006).

62. The relevant section of the Guidelines states:

(b) Due diligence and the promotion of an organizational culture that encourages ethical conduct and a commitment to compliance with the law within the meaning of subsection (a) minimally require the following:

(1) The organization shall establish standards and procedures to prevent and detect criminal conduct.

(2) (A) The organization's governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program.

(B) High-level personnel of the organization shall ensure that the organization has an effective compliance and ethics program, as described in this guideline. Specific individual(s) within high-level personnel shall be assigned overall responsibility for the compliance and ethics program.

thriving corporate compliance industry.⁶³

What type of research might scholars pursue in studying law firms' ethical infrastructure? Chambliss and Wilkins lay out some possibilities.⁶⁴ They suggest that research should be guided by an "institutional" approach to the adoption of compliance programs.⁶⁵ This

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

(3) The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program.

(4) (A) The organization shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program, to the individuals referred to in subparagraph (B) by conducting effective training programs and otherwise disseminating information appropriate to such individuals' respective roles and responsibilities.

(B) The individuals referred to in subparagraph (A) are the members of the governing authority, high-level personnel, substantial authority personnel, the organization's employees, and, as appropriate, the organization's agents.

(5) The organization shall take reasonable steps—

(A) to ensure that the organization's compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct;

(B) to evaluate periodically the effectiveness of the organization's compliance and ethics program; and

(C) to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.

(6) The organization's compliance and ethics program shall be promoted and enforced consistently throughout the organization through (A) appropriate incentives to perform in accordance with the compliance and ethics program; and (B) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct.

(7) After criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization's compliance and ethics program.

(c) In implementing subsection (b), the organization shall periodically assess the risk of criminal conduct and shall take appropriate steps to design, implement, or modify each requirement set forth in subsection (b) to reduce the risk of criminal conduct identified through this process.

U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 (2012).

63. See, e.g., Lori A. Richards, Dir., Office of Compliance Inspections and Examinations, U.S. Sec. & Exch. Comm'n, Speech by SEC Staff: The Culture of Compliance (April 23, 2003).

64. Chambliss & Wilkins, *Promoting Effective Ethical Infrastructure*, *supra* note 1, at 702-05.

65. *Id.* at 702-03.

maintains that regulatory provisions and potential liability may not be the only factors that determine if an organization creates an ethical infrastructure.⁶⁶ Instead, “organizations take their structural cues primarily from each other.”⁶⁷ A company may create an infrastructure if other similar organizations have done so, regardless of potential liability, or may not establish one, despite exposure to liability, because enforcement efforts and internal mechanisms of accountability are weak.⁶⁸ Chambliss and Wilkins suggest that the timing of a firm’s creation of an infrastructure may provide clues about the reasons that the firm adopted it.⁶⁹ Research might focus on which firms have been the first to adopt programs.⁷⁰ To what extent have they been subject to regulatory scrutiny or liability? Do their clients operate in heavily regulated industries? Does the identity of a firm’s insurance carrier matter? How do firms learn about what structures are being adopted by their peer organizations?

Research also can attempt to obtain detailed information about the elements of law firms’ infrastructures.⁷¹ These include features such as the scope of its jurisdiction, how frequently it is used, the formal and informal authority of the lawyers who manage it, the members of a firm’s ethics committee, whether they are elected or appointed, whether membership on the committee rotates, if a firm compensates partners for serving on the committee, and the scope of responsibility of a firm’s ethics advisor.⁷²

Chambliss and Wilkins propose that researchers also consider how to evaluate the effectiveness of a firm’s infrastructure.⁷³ What is its impact on the daily behavior of lawyers in a firm? One way to gauge this is to assess lawyers’ awareness of the infrastructure, the extent to which they use it, and their view of its effectiveness.⁷⁴ They acknowledge, however, that there are limits to what outside researchers can learn.⁷⁵ They therefore urge firms to conduct reviews of their programs to determine how effectively they are operating.⁷⁶ This would be consistent with the provision of the Organizational Sentencing Guidelines that

66. *Id.*

67. *Id.* at 703.

68. *Id.*

69. *Id.* at 707-08.

70. *Id.* at 708-11.

71. *Id.* at 704.

72. *Id.* at 705.

73. *Id.* at 712.

74. *Id.* at 714.

75. *Id.*

76. *Id.* at 715.

states that an indication of an effective compliance and ethics program is a periodic assessment of its effectiveness, accompanied by revisions to address any shortcomings that this process reveals.⁷⁷

Some have cautioned that conceptualizing ethical issues as matters of risk may “put lawyer moral decisionmaking in jeopardy by shifting responsibility for hard normative judgments to others inside the firm bureaucracy, such as in-house ethics advisors and committees.”⁷⁸ As Anthony Alfieri argues, “[b]y diminishing a lawyer’s *individual* responsibility for making moral choices about his role in law and society, firm-devised risk spreading systems may induce a kind of moral apathy.”⁷⁹ Alfieri contends that “the rising dominance of lawyer malpractice, loss prevention, and professional liability norms and narratives” can “dilute our professional ambitions and traditions, deform ethical judgment, and inhibit moral integration.”⁸⁰

While we need to keep in mind the potential for this risk to materialize, we also need to be careful not to implicitly compare more systematic law firm programs coordinated by ethics specialists with, in Chambliss’s words, “a nostalgic, collective ideal, in which all partners engage in firm management and collective self-regulation.”⁸¹ Substantial increases in size have made such an ideal unrealistic for many law firms, and numerous studies establish the crucial role of an organizational environment in influencing individual behavior.⁸² Furthermore, as Chambliss suggests, more robust management controls can expand awareness of ethical obligations and make them more salient in the deliberations of individual lawyers.⁸³

C. Ethical Culture

Another concern about law firm programs that emphasize risk avoidance and compliance with a more elaborate set of rules is that they may foster a utilitarian approach in which individual conformity to ethical responsibilities depends on a cost-benefit calculation.⁸⁴ This is the approach to the law of Oliver Wendell Holmes’s “bad man, who

77. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 (2012).

78. Anthony V. Alfieri, *The Fall of Legal Ethics and the Rise of Risk Management*, 94 GEO. L.J. 1909, 1939 (2006).

79. *Id.*

80. Anthony V. Alfieri, *Big Law and Risk Management: Case Studies of Litigation, Deals, and Diversity*, 24 GEO. J. LEGAL ETHICS 991, 1040 (2011).

81. Chambliss, *supra* note 26, at 123.

82. *See, e.g., id.* at 135-36, 141.

83. *Id.* at 122.

84. Killingsworth, *supra* note 4, at 966-67.

cares only for the material consequences which such knowledge enables him to predict,"⁸⁵ rather than the substantive values that the law expresses. For someone with this perspective, compliance with ethical and legal provisions is a matter not of acknowledging inherently normative obligations, but primarily a means of avoiding penalties.

Research on corporate compliance initiatives indicates that a program can trigger this instrumental orientation if it fails credibly to emphasize the substantive values that the program is designed to vindicate.⁸⁶ Such a program will elicit only provisional and contingent compliance, and may even undercut its basic objective on encouraging ethical behavior.⁸⁷ Aggressive monitoring of employee behavior, for instance, may lead employees to develop an adversarial attitude toward an organization that undermines motivation to follow rules and guidelines. In addition, it may subtly affect employees' perceptions of their own motivation for compliance, attributing it to a desire to avoid sanctions, rather than their own desire to behave ethically or in compliance with the law. This can result in a self-fulfilling prophecy that leads employees to violate rules when the probability of detection or the expected penalty is low.

A program also can undercut compliance because of the implicit signal it may send to employees about the behavior they can expect from their colleagues.⁸⁸ If the program relies heavily on monitoring and sanctions, it may send the message that people generally cannot be trusted to act appropriately on their own. The expectation that others are likely to act in their own self-interest may prompt individuals to behave this way in self-defense, and to frame situations in terms of what behavior will best further their own interests.

These concerns lead researchers on corporate programs to differentiate between a "compliance-based" approach and a "values-based" approach.⁸⁹ The former "focuses primarily on preventing, detecting, and punishing violations of the law," while the latter "aims to define organizational values and encourage employee commitment to ethical aspirations."⁹⁰ As Paine describes, organizations that emphasize values promote a conception of ethics:

85. Oliver Wendell Holmes, *The Path of the Law*, in COLLECTED LEGAL PAPERS 171 (1920).

86. Killingsworth, *supra* note 4, at 974.

87. *See id.* at 966-67.

88. *Id.* at 968.

89. Treviño et al., *supra* note 17, at 135.

90. *Id.*

as a driving force of an enterprise. Ethical values shape the search for opportunities, the design of organizational systems, and the decision-making process used by individuals and groups. They provide a common frame of reference and serve as a unifying force across different functions, lines of business, and employee groups. Organizational ethics helps define what a company is and what it stands for.⁹¹

Paine suggests that, while corporate counsel may be involved in designing and implementing this type of compliance program, management of an organization plays the most critical role in ensuring that employees internalize ethical values and are intrinsically motivated to behave in accordance with them.⁹²

A values-based program will necessarily rely to some degree on policies and procedures that are designed to prevent, detect, and penalize behavior inconsistent with ethical and legal obligations. If, however, the organization credibly communicates a genuine commitment to ethical values and the importance of appropriate behavior for its own sake, “compliance activities can be perceived as part of an overall system of support for ethical behavior. Without a strong emphasis on values orientation, however, compliance activities might be perceived to be part of a system aimed only at detecting misconduct” because management does not trust its members to act in accordance with ethical obligations.⁹³ The combination of the two approaches ideally means that when individuals have to make decisions that are unlikely to be monitored by the compliance system, they will be guided by appreciation of the importance of affirming ethical values, not simply of complying with ethical rules to avoid punishment.

This research thus underscores that an effective compliance program requires that an organization promote an ethical culture, not just that it prescribe to a set of rules and procedures with which individuals must comply.⁹⁴ While it is possible to conceptualize ethical culture as a component of an organization’s ethical infrastructure, the two often are treated as distinct. A focus on ethical culture sweeps more broadly than the rules and procedures that many regard as constituting a firm’s ethical infrastructure. It illuminates the informal ways in which an organization deliberately or unwittingly reinforces or undermines its professed commitment to ethical behavior.

91. Paine, *supra* note 4, at 111.

92. *Id.* at 109-11.

93. TREVIÑO & WEAVER, *supra* note 10, at 212.

94. *Id.*

How might a law firm take into account research on the importance of an ethical culture? Parker and her colleagues suggest that a firm with an ethical culture should promote:

- Awareness and understanding of individual lawyers of:
 - Their own personal values;
 - The range of different approaches to ethical decision-making;
 - The standards set out in the rules and law on professional conduct (trying to follow the rules is just one approach to ethical decision-making);
 - Their own preferred ethical approach ('ethical position');
 - Day-to-day situations where ethical issues may arise;
 - Informal signals in legal practice of the risk of unethical conduct; and,
 - The ability to identify them when they occur.⁹⁵

An ethical culture also supports the “capacity and willingness by individual lawyers to: Discuss their own ethical position with others in the firm; Seek to understand the ethical position of others within the firm; Make a judgment about competing ethical positions in complex situations; and Act on that judgment.”⁹⁶ In addition, a firm with an ethically supportive culture encourages all firm members to discuss with their colleagues ethical questions about work in the firm.⁹⁷ It regards such discussion as valuable, and it ensures that no one who raises ethical concerns faces recriminations.⁹⁸ A firm also should not regularly permit partners to successfully appeal decisions by its ethics counsel, and should ensure that profitable partners who violate ethical standards are not able to avoid penalties for their behavior.

Attention to ethical culture suggests a set of research questions that are distinctive from, although complementary to, those that are associated with the study of ethical infrastructure more narrowly defined. These may include, for instance: Have you ever been asked by a client to do anything about which you feel uncomfortable? If so, have you raised your concern with someone in the firm? What was the response? Who decides whether taking on a matter would create a conflict of interest with another client? How much do ethical considerations influence that decision as compared to business concerns? Have you ever seen colleagues behave in ways that you regarded as ethically problematic? Did anyone in the firm raise any concerns about

95. Parker et al., *supra* note 14, at 184 (footnote omitted).

96. *Id.*

97. *Id.*

98. *Id.* at 184-85.

that? How narrowly do lawyers in the firm tend to construe a discovery request when the issue is whether a troublesome document must be produced to an opponent in litigation? How has the firm responded when its lawyers have been found to violate ethical rules? Such questions are designed to determine, to borrow a phrase from Roscoe Pound, “how much the law in action [is consistent with] the law in the books.”⁹⁹

One example of research that focused explicitly on ethical culture in law firms is the Workplace Culture Check conducted by the Legal Services Commissioner in the state of Queensland in Australia.¹⁰⁰ This consisted of a survey of individuals in fifteen law firms in Queensland that posed questions about lawyers’ awareness of the availability of systems and resources for ethical support in their firms.¹⁰¹ It asked for assessments of whether lawyers are encouraged to raise ethical issues, whether they personally feel that they have the capacity to do so, and whether the firm responds appropriately when someone raises an issue.¹⁰² Among the questions that the survey included were how strongly lawyers agreed or disagreed with the following statements:

I am able to discuss ethically complex dimensions of my work with partners/senior members of the firm

I can talk with others in my firm about the ethical bases of decisions we make or actions we take

I am able to raise ethical issues in confidence

If I raise concerns, they are given consideration

....

I am able to express honest opinions on issues that may have serious consequences if others disagree

....

When a conflict arises I know that I will not be under pressure to put the firm’s interests ahead of the client’s

....

I know where to turn for ethical advice in my firm

I know who can make a decision on the best course of action if an ethical issue arises for me in my work

I am helped to recognize when ethical dilemmas emerge¹⁰³

99. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 35-36 (1910).

100. Parker & Aitken, *supra* note 17, at 407.

101. *Id.* at 408.

102. *Id.*

103. *Id.* at 441 tbl.A6.

Directing attention to ethical culture thus underscores the importance of fostering a commitment to the professional values that underlie a formal compliance program.¹⁰⁴ In a myriad of ways, an organization, such as a law firm, communicates to its members how seriously it regards such values. That message must be consistent with formal rules for individuals to internalize those values and develop an intrinsic motivation to behave according to them.¹⁰⁵ Ethical culture, in other words, must reinforce ethical infrastructure.

D. Organizational Culture

Assessing a firm's ethical culture tends to focus, for the most part, on the extent to which a firm sends a clear message about the importance of lawyers complying with their professional obligations in addition to legal provisions that are applicable to everyone.¹⁰⁶ Such professional obligations generally are set forth in ethical rules, in agency regulations in some areas of practice, and in common law standards of behavior.¹⁰⁷ They relate to duties to clients and to the legal system, and also establish limits on how far lawyers can go in vigorously representing their clients.¹⁰⁸ An effective ethical culture serves to reinforce a firm's expectation that its lawyers fulfill these duties, ideally enhancing the likelihood that they internalize them in conducting their daily practices.¹⁰⁹

For individuals to be receptive to an organization's ethical culture and to use it as a guide to behavior, however, they must feel some meaningful sense of connection to the organization.¹¹⁰ As Scott Killingsworth puts it:

When membership in a group is important to us, we identify positively with the group, forming an emotional commitment to it; we internalize the group's values, expectations and norms (or, in a larger

104. See *id.* at 406.

105. Killingsworth, *supra* note 4, at 965.

106. Long, *supra* note 16, at 15.

107. See Killingsworth, *supra* note 4, at 966.

108. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.3 (2012) ("A lawyer shall act with reasonable diligence and promptness in representing a client."); *id.* R. 1.16(b) ("Except as stated in paragraph (c), a lawyer may withdraw from representing a client if: (1) withdrawal can be accomplished without material adverse effect on the interests of the client . . ."); *id.* R. 8.3(a) ("A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.").

109. Killingsworth, *supra* note 4, at 971-72.

110. Tom R. Tyler, *Promoting Employee Policy Adherence and Rule Following in Work Settings: The Value of Self Regulatory Approaches*, 70 BROOK. L. REV. 1287, 1303 (2005).

group, its culture), we become intrinsically motivated to adhere to the values and expectations that we have internalized, and we govern our behavior within the group by those norms.¹¹¹

Law firms may find it especially difficult to establish this sense of connection on the part of their members. As Parker and her colleagues observe: “The increasing degree of mobility in the upper end of the legal profession – that is, how quickly experienced lawyers move in and out of the firm – makes it difficult to transmit a positive ethical culture throughout a whole firm.”¹¹² Some of this mobility is voluntary, but some of it reflects law firm termination of lawyers who are not meeting productivity targets.¹¹³ This risk of being let go can make individuals reluctant to identify with and make a commitment to a firm.¹¹⁴

Findings thus far on a research project on which I am working with a colleague suggest that an important influence on lawyers’ sense of connection to a firm is their perception of the firm’s broad cultural values.¹¹⁵ These values come into play with respect to various types of behavior that go beyond compliance with the ethics rules. They involve matters such as sharing billing credit, stepping aside to avoid a business conflict, mentoring junior lawyers, and sharing clients.¹¹⁶ Behavior relating to these issues contributes to a sense of how fairly members of the firm treat each other, and the extent to which the firm attempts to encourage such fairness through compensation decisions and other forms of recognition and support.¹¹⁷ This, in turn, affects the extent to which a lawyer identifies with the firm.¹¹⁸

A firm may adjust a partner’s compensation, for instance, based on how generous or selfish he or she is in sharing origination credits with others.¹¹⁹ It may reward someone who is willing to relinquish a matter or a client to avoid a conflict by resolving the next business conflict in his or her favor.¹²⁰ It may give compensation credit for time spent mentoring junior lawyers, and may penalize or reward a partner based on his or her

111. Killingsworth, *supra* note 4, at 971.

112. Parker et al., *supra* note 14, at 173.

113. Robert W. Hillman, *The Hidden Cost of Lawyer Mobility: Of Law Firms, Law Schools, and the Education of Lawyers*, 91 KY. L.J. 299, 303 (2002).

114. *See id.* at 302.

115. Milton C. Regan, Jr. & Lisa H. Rohrer, *Money and Meaning: The Moral Economy of Law Firm Compensation*, 10 U. ST. THOMAS L.J. (forthcoming 2013) (manuscript at 7, 37) (on file with Hofstra Law Review).

116. *Id.* (manuscript at 82).

117. *Id.* (manuscript at 81-82). On the complex role of compensation in shaping attitudes toward the firm, see generally *id.*

118. *Id.* (manuscript at 55, 81-82).

119. *Id.* (manuscript at 32).

120. *Id.* (manuscript at 56-57).

willingness to share work for a client with other partners.¹²¹ It may work with a lawyer to arrange a schedule that permits him or her to meet family responsibilities or to deal with health challenges.¹²² All of these measures may convince a lawyer that it is safe to act cooperatively toward the firm and others in it, which can help create a culture to which people feel a strong connection.

Research on employees' attitudes toward ethics and compliance programs is consistent with these findings.¹²³ It indicates that support for such programs is significantly affected by the perception of an organization's overall culture, not simply its ethical culture.¹²⁴ As Tom Tyler observes, "people are motivated to align their behavior with the rules of organizations or groups they belong to when they view those groups as being legitimate and consistent with their own sense of right and wrong."¹²⁵

Especially important in this process is the assessment of how fairly the organization treats its members.¹²⁶ In making this judgment, employees use a "broad fairness heuristic" to evaluate what Linda Treviño and Gary Weaver call an organization's "overall fairness climate."¹²⁷ This takes into account the fairness of how organizational rewards are distributed: whether people are treated fairly and with respect.¹²⁸ These assessments relate to fair outcomes and to fair process, respectively. Reliance on a fairness heuristic reflects the fact that when employees focus on ethics they tend to think first of how the organization treats its members.¹²⁹ As Tyler declares:

[P]eople who experience justice when dealing with their work organization first think that its rules are legitimate and ought to be obeyed. They also feel that the values of their work organization are

121. *Id.* (manuscript at 78-80).

122. *See id.* (manuscript at 60).

123. *See, e.g.,* TREVIÑO & WEAVER, *supra* note 10, at 276-78.

124. *See* Tyler, *supra* note 110, at 1303-04.

125. *Id.* at 1291. Tyler goes on to state that, if employees believe that corporate policies are "congruent with their own personal *moral values*," then:

[T]hey will be motivated by their own moral values to follow corporate rules because they will see those rules as being consistent with—and developed from—a set of moral values with which they agree. Thus, they may follow rules in their effort to do what they feel is morally right.

Id. at 1299.

126. TREVIÑO & WEAVER, *supra* note 10, at 268-69.

127. *Id.* at 285.

128. *Id.*

129. *See id.* at 268.

more congruent with their own, so that their own motivation to behave morally leads them to support their work organization.¹³⁰

Thus, the broad values expressed by the organization's overall culture, not simply those embodied in its ethics program, can be critical in prompting ethical behavior.

Why are people's attitudes toward ethics programs affected by their perception of how fairly an organization treats its members? Weaver and Treviño note that social cognition theory suggests that people tend to store information in general categories, which they use to "interpret incoming information and to retrieve information from memory."¹³¹ The ethics category is likely to hold information relating to concepts such as justice, fairness, rights, and obligations.¹³² When an organization directs attention to ethics, "this is likely to cue a cognitive connection with the ethical issues that are salient to employees, such as fairness in hiring, promotion, performance appraisal, pay, [and] restructuring."¹³³

An organization that treats its employees unfairly on these and other matters provokes skepticism that it is genuinely committed to the values expressed in its ethics program.¹³⁴ Individuals who feel such skepticism will be reluctant to identify with an organization because they fear that it may take advantage of them.¹³⁵ As Weaver and Treviño describe this process:

People must make decisions concerning the extent to which they will constrain their own interests and identity in light of the interests and welfare of the organization or other collective to which they belong. Exhaustive consideration of all relevant information is impossible in the context of real world relationships between individuals and organizations. Thus, people inevitably rely on judgmental heuristics to determine whether to entrust their interests and identity to the organization and align their goals and behavior with the organization. Among the factors affecting this decision, fairness concerns appear to function preeminently. The "fairness heuristic" is sufficiently powerful as to constitute a "pivotal" cognition affecting persons' attitude and behavior toward organizations or other collectives.¹³⁶

130. Tyler, *supra* note 110, at 1302-03.

131. Gary R. Weaver & Linda Klebe Treviño, *The Role of Human Resources in Ethics/Compliance Management: A Fairness Perspective*, 11 HUM. RESOURCES MGMT. REV. 113, 115 (2001).

132. *Id.*

133. *Id.* at 115-16.

134. *Id.* at 116-17.

135. *See id.* at 121.

136. *Id.* at 116 (citation omitted).

An organization that treats people fairly communicates to its members that they will incur minimal risk from conforming to organizational expectations.¹³⁷ It also gives them a sense that there is “no need to balance the scales of justice by looking for opportunities to improve their own outcomes at the organization’s expense.”¹³⁸ Individuals feel that they are valued and that the organization respects them. As a result, their commitment to the organization can serve as an important way in which they maintain their identities and further their interests. Perception of this linkage between individual and organizational welfare makes it likely that members will take the initiative to engage in acts of organizational citizenship that go beyond what their jobs formally require.

The importance of judgments of organizational justice to commitment to ethics programs underscores the importance of integrating ethical concerns with the full range of organizational activities.¹³⁹ Programs that are created in response to regulation or public pressure sometimes are treated as self-contained functions that have little connection to organizational practices relating to planning, budgeting, personnel policies, and other matters.¹⁴⁰ This is problematic because, as Weaver and Treviño put it, “an ethics program raises the profile of fairness issues in general (whether or not those issues are explicitly addressed in the ethics program).”¹⁴¹ It therefore “becomes more important to see that the ethical ideals are integrated across all organizational functions.”¹⁴²

Researchers suggest that increased involvement of human resource departments in corporate ethics management is especially important.¹⁴³ These departments generally deal with the issues that employees see as ethically salient, such as fair hiring, promotion, performance appraisal, compensation, and the like.¹⁴⁴ Perceived fair treatment is closely linked to ethics in employees’ minds because of the “natural cognitive association between discussions of organizational ethics and information employees hold in memory about justice, fairness, and rights. . . . [A]lthough organizational structures may separate ethics management from human resources, employees do not.”¹⁴⁵

137. TREVIÑO & WEAVER, *supra* note 10, at 269.

138. *Id.*

139. Weaver & Treviño, *supra* note 131, at 120-21.

140. *Id.*

141. *Id.* at 121.

142. *Id.*

143. TREVIÑO & WEAVER, *supra* note 10, at 288.

144. *Id.* at 287.

145. *Id.* at 287-88.

Research by Treviño and Weaver on more than 15,000 employees in companies with ethics or compliance programs in place analyzes the link between perceptions of organizational justice and the amount of observed unethical behavior in an organization.¹⁴⁶ Components of the former variable included the extent of agreement or disagreement that: the company treats employees fairly, employees think of the company as fair, rewards are allocated fairly, employees are rewarded fairly, people get rewards or punishments they deserve, supervisors treat employees with dignity and respect, employees can count on being treated with courtesy and respect, consistent ethical behavior helps someone advance in firm, and people of integrity get rewards in the firm.¹⁴⁷ Examples of unethical behavior included actions that “might harm the organization or increase the employee’s inputs,” such as padding expense accounts, taking longer than necessary to do a job, concealing errors, falsifying reports, and lying to supervisors.¹⁴⁸ The study also examines the relationship between perceived fair treatment and the extent to which employees informed management about bad news in the organization, including ethical violations.¹⁴⁹

As Treviño and Weaver report: “A key study finding was the strong relationship between perceived general fair treatment and ethics-related outcomes. . . . [A] broad spectrum of unethical actions was significantly lower if employees believed that their organization generally treated people fairly.”¹⁵⁰ In addition, perceived organizational justice contributed to a willingness to deliver bad news to management.¹⁵¹ This is consistent with the idea that perceived justice and injustice can be a powerful motivation for behavior. A perception of justice moves employees to reciprocate with helpful behavior, while a perception of injustice arouses feelings of anger and resentment toward the organization, and can lead to covert attempts to balance the scales in the individual’s favor.¹⁵²

This study reinforces the need for ensuring that the overall values expressed by organizational policies and decisions are consistent with an organization’s professed commitment to ethical behavior as reflected in its compliance program. Treviño and Weaver note:

146. *Id.* at 276.

147. *Id.* at 278.

148. *Id.* at 277.

149. *Id.*

150. *Id.* at 282-84.

151. *Id.* at 285-86.

152. *Id.* at 286.

Ethics programs generally are administered separately from other human resource programs and practices. Therefore, ethics program administrators have little influence on employees' broader evaluations of organizational justice. Yet it is the broader justice evaluations that had the most powerful separate influence on key outcomes in this study, explaining 30 percent of the variance in observed unethical conduct and 52 percent of the variance in reporting. . . . This suggests that ethics/compliance management should be more tightly coupled with the management of the broader organizational culture to improve employees' perceptions of fairness in the organization in general and in the ethics/compliance program.¹⁵³

The perception of fair treatment incorporates notions of both distributive justice—fair outcomes—and procedural justice—fair process.¹⁵⁴ Assessment of outcomes reflects the judgment that people receive what they deserve, based on conceptions of desert that are appropriate to specific types of decisions.¹⁵⁵ Assessment of process takes into account both how decisions are made, and, more generally, whether people are treated with dignity and respect.¹⁵⁶

Research on procedural justice indicates that people assess the fairness of the process by which decisions are made separately from the outcomes that result from that process.¹⁵⁷ Those who do not receive an outcome that they desire may nonetheless accept it as legitimate if they regard the process that produced it as a fair one.¹⁵⁸ Tyler suggests that judgments about procedural justice are influenced by an assessment of four different components of an organization's process.¹⁵⁹ The first is the quality of the decision-making, which focuses on decision-maker neutrality, the objectivity of decision-making and the extent to which it is based on factual findings, and whether rules are consistently applied.¹⁶⁰ The second is the quality of people's treatment by authorities in the organization.¹⁶¹ This involves the extent to which individuals are treated with courtesy and dignity, and with a concern for their rights.

153. *Id.* at 287.

154. Regan & Rohrer, *supra* note 115 (manuscript at 47-48, 59).

155. *Id.*

156. *See id.* (manuscript at 59-60).

157. *Id.*

158. *Id.*

159. Tyler, *supra* note 110, at 1310.

160. *Id.*; *see also* Killingsworth, *supra* note 4, at 976 (“[O]pportunity to be heard; clear, understandable rules and decision processes; consistency of management decisions over time and across cases; articulated reasons for decisions; and application of the same rules to everyone regardless of position or status.”).

161. Tyler, *supra* note 110, at 1310.

People identify with organizations that make them feel respected, listened to, trusted, and valued.¹⁶²

An organization can communicate information about the quality of its decision-making and the quality of its treatment of individuals in two ways. One is through formal sources such as the rules and structures of the organization and its statements about values. Thus, an organization may have a formal grievance procedure that enables employees to present complaints, as well as a statement that persons participating in that process are to be treated with respect and that their concerns are treated seriously.¹⁶³ A second source of information about procedural justice is an employee's experience with supervisors.¹⁶⁴ Persons in positions of authority are constrained to some degree by formal procedures and policies, but typically have some discretion in how they apply them in particular cases. Thus, as Tyler observes: "The same decision-making procedure can be implemented either in a way that emphasizes the dignity of those involved or in a manner that treats employees rudely or dismissively."¹⁶⁵

Individuals make assessments of each of the four components of procedural justice independently of the favorability of particular outcomes.¹⁶⁶ Tyler and Steven Blader's "group engagement" model suggests that this is because these assessments provide information that is relevant to individual decisions about the desirability and risk of drawing a sense of identity from membership in an organization.¹⁶⁷ Groups can provide people with a way of constructing a social identity, thereby shaping "people's definitions of themselves and their feelings of well-being and self-worth."¹⁶⁸ At the same time, identification with a group can make one vulnerable to negative experiences that damage identity and self-esteem.¹⁶⁹ The group engagement model argues that, "to the degree that people feel that the group makes decisions via fair procedures, they are more likely to feel that their identity can be safely

162. Killingsworth, *supra* note 4, at 977.

163. Tyler, *supra* note 110, at 1310.

164. *Id.* at 1310-11.

165. *Id.* at 1311.

166. *Id.*

167. Tom R. Tyler & Steven L. Blader, *The Group Engagement Model: Procedural Justice, Social Identity, and Cooperative Behavior*, 7 PERSONALITY & SOC. PSYCHOL. REV. 349, 354 (2003).

168. *Id.* at 353.

169. *Id.* at 358.

and securely merged with that of the group.”¹⁷⁰ In this way, procedural fairness provides a form of “identity security.”¹⁷¹

This occurs because a fair decision-making process provides assurance that decisions will not be based upon stereotypes or personal prejudices.¹⁷² In addition, treating people with respect in making decisions and in other interactions communicates that a person is valued by others in the organization.¹⁷³ This communicates information about one’s status within the organization and allows for inferences about the nature of his or her connection to it in the future. The identity security provided by fair process strengthens a sense of connection to the organization, which in turn enhances willingness to cooperate and abide by organizational rules and policies.¹⁷⁴

In sum, research indicates that employees’ embrace of an organization’s ethics and compliance program depends on their judgments about the extent to which the organization acts in accordance with broader values to which employees subscribe.¹⁷⁵ Whether the organization is perceived as treating its members fairly is an especially important consideration.¹⁷⁶ This includes providing people with the rewards that they deserve, engaging in a decision-making process that is uniform and neutral, and treating people with dignity and respect.¹⁷⁷ An organization that does so signals that an individual can safely derive at least part of his or her identity from connection and commitment to the organization.¹⁷⁸ This sense of connection motivates an individual to cooperate with the organization on matters such as abiding by its rules on ethics and legal compliance.¹⁷⁹ As Scott Killingsworth puts it: “In essence, when managers say ‘ethics,’ employees hear ‘fairness.’”¹⁸⁰

E. Organizational Fairness and Law Firms

What are the implications for law firms of the connection between ethical outcomes and overall firm culture? Most fundamentally,

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 359.

174. *Id.* at 356. “The key argument of the group engagement model is that people’s level of cooperation with groups is primarily shaped by the extent to which they identify with those groups.” *Id.* at 355.

175. Tyler, *supra* note 110, at 1302-03.

176. *Id.* at 1303.

177. Killingsworth, *supra* note 4, at 976.

178. Tyler & Blader, *supra* note 167, at 358.

179. Killingsworth, *supra* note 4, at 978.

180. *Id.* at 975.

awareness of this connection makes clear that what might seem to be solely “business” or “human resource” decisions, which do not relate directly to lawyers’ professional responsibilities, may nonetheless have a significant impact on attitudes and behavior that do.¹⁸¹ These decisions may involve matters that affect perceptions of organizational fairness.¹⁸² They also may relate to matters such as developing a new practice area, opening an office in a new location, or determining how well the firm integrates laterals into its operations and culture. This means that firms must be sensitive to the ethical risks that any given decision may create.

One way to enhance sensitivity to such risks is to conceptualize the role of law firm general counsel more expansively than many firms currently do. Responsibilities are divided in different ways in different firms. Some assign responsibility for professional ethics to the general counsel; others assign this responsibility to ethics counsel, with the general counsel playing a broader role as lawyer for the firm.¹⁸³ It is unclear, however, even in the latter firms whether the general counsel is regarded as part of the top management team who weighs in on the potential legal risks of strategic and operational decisions. This is the trend in corporate legal departments, where general counsel advise at least on matters of compliance risk, and increasingly more broadly on overall enterprise risk.¹⁸⁴

Deloitte’s 2011 *Global Counsel Report*, for instance, indicates that two-thirds of Chief Legal Officers or senior inside counsel said that corporate counsel are “now a member of the senior management/executive team,” compared to 47% who said this five years earlier.¹⁸⁵ Some 42% of global respondents said that corporate counsel is involved in strategy development, compared to 24% five years ago.¹⁸⁶ The percentage was even higher among U.S. counsel, with 51% stating that this is the case, in comparison to 35% who said so five years before.¹⁸⁷ Regulatory compliance and risk management were the two most prominent responsibilities of corporate counsel, cited by 75% and a little over 60% of counsel, respectively.¹⁸⁸ Similarly, former Delaware Supreme Court Chief Justice Norman Veasey and Christine Di Guglielmo’s recent book on the role of the Chief Legal Officer observes

181. *Id.* at 981-82.

182. Tyler, *supra* note 110, at 1304.

183. Chambliss & Wilkins, *Promoting Effective Ethical Infrastructure*, *supra* note 1, at 706-07.

184. DELOITTE, DELOITTE GLOBAL CORPORATE COUNSEL REPORT 2011, at 11 (Inaugural Global (U.S. Version) ed. 2011).

185. *Id.* at 2.

186. *Id.* at 11.

187. *Id.*

188. *Id.*

that “[g]eneral counsel perform the increasingly important function of assessing legal risks and translating those risks into business terms in order to facilitate decision-making concerning those risks.”¹⁸⁹

Given the increasing legal risks to which law firms are subject, law firm general counsel arguably should be playing a similar role with respect to legal risk and compliance. Such risks arise from regulation under state ethical rules; court rules; common law standards of liability; some specialized regulation applicable to particular practice areas, such as banking, securities, and tax law; and generally, civil and criminal statutes such as those relating to consumer fraud and money-laundering, respectively.¹⁹⁰ Appreciation of the impact of organizational culture on attitudes and behavior suggests that law firm general counsel should have a seat at the table at least for discussions about the legal risk that may be created by firm strategy, policies, and important business decisions. There also may be an argument that law firm general counsel should play a role in advising on enterprise risk more broadly, but that is a subject beyond the scope of this Article.¹⁹¹

With respect to research, positing a connection between organizational fairness and support for ethics programs is generally consistent with the research we have conducted to date on our law firm culture project.¹⁹² Lawyers do tend to refer to matters beyond compliance with ethics rules when they discuss behavior within the firm that they regard as having ethical significance.¹⁹³ This behavior can involve sharing compensation credit; taking time to mentor junior lawyers; participating in pitches to prospective clients; helping out colleagues who encounter personal or professional emergencies; stepping aside to avoid an ethical or business conflict that would prevent the firm from representing a significant client; and spending time on

189. E. NORMAN VEASEY & CHRISTINE T. DI GUGLIELMO, *INDISPENSABLE COUNSEL: THE CHIEF LEGAL OFFICER IN THE NEW REALITY* 43 (2012).

190. Cf. Regan, *supra* note 61, at 1969.

191. Professor Fortney, for instance, has made the argument for law firm general counsel to have a broad role in advising on enterprise risk. Susan Saab Fortney, *Law Firm General Counsel as Sherpa: Challenges Facing the In-Firm Lawyer's Lawyer*, 53 U. KAN. L. REV. 835, 840-50 (2005). For instance, she suggests that it would make sense for law firm general counsel to “advise the firm on matters related to firm structure, such as partnership, professional corporation, and limited liability partnership issues”; “monitor compliance with applicable legislation in all jurisdictions where firm lawyers practice”; “help firm leaders appreciate the role that compensation systems play in causing people to behave in ways that they are measured and paid”; “conduct or oversee an audit of employment practices within the firm”; and, more generally, “guide firm lawyers in avoiding and addressing various legal and organizational challenges.” *Id.* at 840-42, 847, 850.

192. See generally Weaver & Treviño, *supra* note 131 (focusing their study on human resources’ role in “(1) the control orientation embodied in ethics programs and (2) the extent to which ethics program policies and goals are integrated with other organizational functions”).

193. Killingsworth, *supra* note 4, at 976-77.

firm citizenship activities such as serving on the compensation or executive committee, investing time in developing a new practice area, opening an office in a new location, and helping devise a new training and evaluation system for associates or a new compensation system for partners.¹⁹⁴ The extent to which a firm encourages and recognizes such behavior may have a powerful effect on its members' perception that the firm treats people fairly. So may a firm's willingness to help lawyers balance work and family responsibilities, deal with health problems, or rebuild their practices in response to market changes.¹⁹⁵ How a firm compensates incoming laterals also can affect judgments about how fairly it treats its members.¹⁹⁶

Research that focused on these and similar issues could enrich our understanding of the ability of law firms to promote ethical behavior by their lawyers. At the same time, this research may need to take account of some distinctive features of law firms and the legal profession. As I have mentioned, one phenomenon that research on overall law firm culture may need to consider is that creating and sustaining a sense of connection to the organization is especially difficult in a law firm because of the fragility of many of these entities.¹⁹⁷ Rainmakers—lawyers who have close relationships with lucrative clients—can easily move from firm to firm.¹⁹⁸ Their allegiance to any particular firm may be primarily instrumental, dependent on the support that the firm provides for the development and expansion of their practice.¹⁹⁹ This sense of connection is contingent and unstable, and may not generate motivation to guide their behavior by the professional values that a firm wants its members to internalize.²⁰⁰

Furthermore, lawyers who are not rainmakers may fear that they will be laid off if the firm's financial performance declines.²⁰¹ This perception that the firm will not be loyal to them can lead them to regard their own interest as distinct from that of the firm, and to place priority on pursuing it. It thus may be difficult for a firm to encourage these lawyers to develop a strong sense of connection to the firm and to internalize professional values that may constrain self-interest.

Another challenge for firms is that many lawyers exhibit some distinctive personality traits that can make it especially difficult to

194. Regan & Rohrer, *supra* note 115 (manuscript at 54-60, 78).

195. *Id.* (manuscript at 60).

196. *Id.* (manuscript at 46-47).

197. *See supra* Part II.D.

198. JARGIELLO & GARDNER, *supra* note 8, at 14 n.15.

199. *Id.* at 10.

200. *See id.* at 11-14.

201. *See id.* at 14-15.

encourage them to develop a strong commitment to a firm.²⁰² One is an especially strong desire for autonomy, on which lawyers tend to score at close to the ninetieth percentile.²⁰³ This inclination is reinforced by a strong tradition of individual lawyer independence.²⁰⁴ Many lawyers tend to guard their autonomy jealousy and bristle at anything they perceive as outside interference that makes them feel like employees. They may be quicker than others to regard firm efforts to inculcate a particular culture as efforts to control their behavior, which can lead them to treat the firm with some suspicion.

Lawyers also tend to rank high on skepticism and low on trust.²⁰⁵ As David Maister suggests, lawyers “are selected, trained, and hired to be pessimistic and to spot flaws.”²⁰⁶ This means that many of them may be especially likely to look for self-interest in others, and to question others’ statements and motives.²⁰⁷ This can make it hard to convince lawyers that it is safe to identify with the firm and that their cooperation will be reciprocated. Lawyers also tend to be less concerned than the average person with building and maintaining relationships with others.²⁰⁸ Many prefer to work in solitary concentration.²⁰⁹ This may make them less interested than others in being a part of a cooperative venture, and in developing a strong connection to a firm. Maister argues that “the combination of a desire for autonomy and high levels of skepticism make most law firms *low-trust environments*.”²¹⁰

It also may be worth exploring the ways in which law firms are different from other organizations with respect to the connection between fairness assessments and support for ethics programs. Research on ethics in the corporate context implicitly assumes that employees who do not feel a sense of connection to a corporation must fall back on their own personal values in determining how to behave in the work setting.²¹¹ That is, they must do without the added support for those values that identifying with the company could provide. Without this

202. The description that follows draws from SUSAN SWAIM DAICOFF, *LAWYER, KNOW THYSELF: A PSYCHOLOGICAL ANALYSIS OF PERSONALITY STRENGTHS AND WEAKNESSES* 160-61 (2004); Larry Richard, *Herding Cats: The Lawyer Personality Revealed*, REP. TO LEGAL MGMT., Aug. 2002, at 1, 9 (2002).

203. Richard, *supra* note 202, at 9.

204. *Id.*

205. *Id.* at 4.

206. David Maister, *The Trouble with Lawyers*, AM. LAW., Apr. 2006, at 96, 98.

207. *Id.*

208. *Id.* at 99-100.

209. *See id.*

210. *Id.* at 98 (emphasis added).

211. *See* Parker et al., *supra* note 14, at 183-84.

assistance, their values could be vulnerable to pressure from self-interest or animosity toward the organization.

Lawyers who do not identify with a firm, however, might still identify with the legal profession and its ideals.²¹² Deriving a sense of identity from being a member of the profession could reinforce personal values and make them less vulnerable to being overridden than if an individual had to rely on those values alone. It might provide a source of motivation to support a firm's ethics program that is not dependent on identification with the firm. If so, a commitment to abide by ethics rules might exist despite a lawyer's perception that the firm does not act fairly towards its members on other issues.

One complication of this account is that the meaning of ethical rules is intertwined to some degree with a law firm's approach to practice.²¹³ Rules are fleshed out as they are applied in specific circumstances, and a firm may communicate a distinctive interpretation of their meaning through the accumulation of interpretations by its members over time. The extent to which a lawyer develops a practical understanding of his or her ethical obligations thus may be dependent on the degree to which the lawyer identifies with the firm. If this is so, a lawyer who identifies only minimally with a firm may not have a robust conception of the rules that will provide much useful guidance. In any event, it might be worthwhile to explore the extent to which professional identity provides a source of motivation beyond personal values that is not available to other employees.

An additional potentially relevant difference between law firms and other organizations is that many firms tend to have a more decentralized authority structure than the typical business corporation.²¹⁴ While firms are moving toward more centralized management, it is still necessary for managers to negotiate with and attempt to gain support from others in the firm in order to adopt any significant policies.²¹⁵ Lawyers in a firm, especially partners, therefore may view the organization less monolithically than do employees in corporations. Relationships with other lawyers may be highly important, and the extent to which an individual regards colleagues' values as congruent with his or her own may vary considerably across the lawyers with whom he or she has contact.

212. See Milton C. Regan, Jr., *Ethics, Law Firms, and Legal Education*, 55 ME. L. REV. 363, 366 (2003).

213. See *id.* at 365.

214. Maister, *supra* note 206, at 98.

215. See *id.*; see also Chambliss, *supra* note 26, at 127.

III. CONCLUSION

I have framed my analysis as a tale of two cultures in order to underscore the distinctive implications for law firms and scholars of distinguishing between ethical culture and organizational culture.²¹⁶ In practice, of course, they are not so sharply separate. The overall culture of an organization sends messages about what is and is not valued with regard to a number of matters.²¹⁷ Many of these may affect ethical attitudes and behavior, even though they seem on the surface not to relate to what we think of as “ethical” issues.²¹⁸ Law firm management therefore needs to be sensitive to the potential ethical implications of a wide range of practices, procedures, and decisions.²¹⁹ It may be tempting to conceptualize ethics and business issues as occupying separate domains. The lives that people live, however, are more integrated than this imagery suggests. Appreciating the nested relationships among ethical infrastructure, ethical culture, and organizational culture provides a more useful way of understanding the complex influences that shape attitudes and behavior in the modern law firm.²²⁰

216. *See supra* Part II.

217. *See supra* Part II.C.

218. *See supra* Part II.C–D.

219. *See supra* Part II.E.

220. *See supra* Part II.