**Article**

# The Lawyer As Accomplice: Cannabis, Uber, Airbnb, and the Ethics of Advising "Disruptive" Businesses

**Charles M. Yablon†**



† Professor of Law and Academic Director of the Samuel and Ronnie Heyman Center for Corporate Governance, Benjamin N. Cardozo School of Law. I am grateful to Michael Burstein, Jennifer Hill, and Jessica Roth, as well as participants in faculty speaker series at the University of Sydney Law School and the Universita degli Studi Roma Tre for very helpful suggestions on earlier drafts of this Article. I want to thank Michael Freyberg for great research and editorial assistance. 

## INTRODUCTION

Recently I learned that one of my former students, a very bright and likeable young man who had become a partner at a major New York law firm, was leaving that firm to start his own more specialized practice. He believed that the field of law he had chosen to specialize in was likely to grow enormously in the near future. It was one that most large firms had neither the expertise nor desire to engage in, and where he felt that establishing a good reputation at any early stage would provide a competitive advantage. He intended to specialize in advising businesses engaged in the production and sale of cannabis products. Intrigued, I invited him to come back to the law school and discuss his new venture before a student audience. In many ways, his presentation was similar to that of any other lawyer leaving a big firm to go out on their own. He talked about the problem of controlling overhead costs, client acquisition and retention, relationships between partners, etc. At one point, however, almost as an aside, he noted, "of course, from a certain perspective, everything we do is a violation of the law."

While the issues facing those practicing cannabis law are in some respects unique, the problem of counseling firms with business models involving deliberate and repeated violations of the law is certainly not. Many of the most prominent "new economy" companies, including Uber and Airbnb, pursue business strategies designed to give them a competitive edge by deliberately ig-

noring the regulatory restrictions the law imposes on other companies that might be deemed their competitors.[1] In this regard, Uber claims it is not operating a taxi or limousine service, but it is merely an app that facilitates ride sharing by independent contractor drivers.[2] Airbnb argues that it merely enables homeowners to share their residences with paying guests and therefore is not subject to the regulations governing hotel or accommodation booking services.[3] These claims are often legally dubious and have been rejected by courts and regulatory bodies.[4] Nonetheless, such companies continue to pursue their illegal business practices, hoping that their popularity among consumers will lead to few or no sanctions for their violations or, better yet, changes in the law.[5] In doing so, they are pursuing a strategy of legal risk management. They treat the risk of adverse legal consequences as similar to financial and business risks, seeking to quantify both their likelihood and potential penalties, to reduce them if possible, and to determine whether the potential benefits to the firm justify those risks.[6] This requires the advice of lawyers, who are expected to opine as to the likely costs, dangers, and effectiveness of various strategies involved in evading or violating the law.[7]

Advising such businesses raises serious ethical issues for conscientious lawyers. The basic guidance is set forth in Rule 1.2(d) of the ABA Model Rules of Professional Conduct, which states that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . . ."[8] The Rule draws a sharp distinction between

1. *See infra* notes 200–11, 238–47, and accompanying text.

2. *See infra* notes 199–203 and accompanying text.

3. Airbnb makes a colorable argument that these regulations are preempted by a federal statute, but this argument has been rejected by a number of federal courts. *See infra* notes 236–57 and accompanying text.

4. *See infra* notes 203–11, 255–61, and accompanying text.

5. *See* Elizabeth Pollman & Jordan M. Barry, *Regulatory Entrepreneurship*, 90 SO. CALIF. L. REV. 383, 386 (2017) ("Uber and many other businesses are built around and based upon a plan to change the law—and, in some instances, to simply break the law in the meantime."); *see also* Elizabeth Pollman, *Corporate Disobedience*, 68 DUKE L.J. 709, 712–13 (2019).

6. *See infra* notes 93, 126–29, and accompanying text.

7. Pollman and Barry refer to this strategy as "regulatory entrepreneurship." Pollman & Barry, *supra* note 5.

8. MODEL RULES OF PROF'L CONDUCT r. 1.2(d) (AM. BAR ASS'N 2016). In New York, the equivalent ethics rule prohibits advising or assisting with respect to conduct that is "illegal or fraudulent." N.Y. RULES OF PROF'L CONDUCT

past and prospective client activities. If Vito Corleone is indicted for drug smuggling and conducting a racketeering enterprise, there is nothing in the Rules that would prevent an ethical criminal lawyer from providing him with a vigorous legal defense. However, if Vito Corleone asks a corporate lawyer to set up some shell companies through which he can more easily operate his drug smuggling and racketeering enterprises, an ethical corporate lawyer would have to politely decline.[9] The Rule prohibits such assistance even though the legal work involved is quite routine when performed for a client not planning to use the corporate form for criminal purposes.[10]

In many circumstances, the distinction created by Rule 1.2 is sensible and easily justified. Providing a legal defense to a client for past criminal activity safeguards important principles and is unlikely to cause serious societal harm. Advising and assisting prospective criminal conduct violates the lawyer's basic commitment to the rule of law.[11] It turns the lawyer into an accomplice of sorts, helping to make the client's socially harmful conduct more effective and harder to detect.[12] Moreover, it tends to diminish the already low public reputation of the legal profession.[13] Rule 1.2(d) makes it clear that the only advice lawyers

r. 1.2(d) (N.Y. STATE BAR ASS'N 2018). The definition of "illegal" conduct in that context is unclear but may include intentional torts. Lewis Tesser & Timothy Nolen, *"Illegal" Conduct Under Rule 1.2: When Does Advice to a Client Violate an Attorney's Ethical Obligations?*, N.Y. LEGAL ETHICS REP. (Apr. 2015) http://www.newyorklegalethics.com/illegal-conduct-under-rule-1-2-when-does-advice-to-a-client-violate-an-attorneys-ethical-obligations/ [https://perma.cc/XX8A-MDLT].

9. Presumably *very* politely.

10. This Article focuses on ethical issues, not criminal liability, but there have been situations in which advising clients has led to criminal or civil charges of aiding and abetting liability against lawyers, or at least consideration of such charges. *See* Matthew A. Smith, *Advice and Complicity*, 60 DUKE L.J. 499, 516–17 (2010) (discussing potential criminal liability of lawyers for advising in the Enron, Lincoln Savings, and other situations); *see also*, Vince Farhat & Calon Russell, *"Houston, We Have a Problem": Clients Who Engage in Unlawful Conduct During Your Representation*, WHITE COLLAR CRIME COMMITTEE NEWSL., Winter/Spring 2015, at 1.

11. *See* 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 22.2 (3d ed. 2009) ("[L]awyers contribute to the peaceful running of a lawful society by advising their clients what the law is, and by carrying out their client's wishes within the bounds of law.").

12. *See id.*

13. *See infra* notes 304–07 and accompanying text.

should give regarding prospective criminal conduct should be to help clients determine whether such conduct violates the law.[14]

Accordingly, different ethical standards apply to lawyers advising business clients from those engaged in criminal defense work. Criminal lawyers can raise all but the most blatantly frivolous or fraudulent arguments in defense of their clients knowing that the court will ultimately adjudicate their merits or lack thereof.[15] The corporate lawyer, in contrast, is expected to determine whether a client's proposed conduct is criminal or fraudulent.[16] If so, the lawyer must advise the client of that fact and then refrain from further assistance.[17] Failure to do so would not only be an ethical violation but could subject the lawyer to serious adverse consequences, including criminal or tort liability.[18]

Problems arise when Rule 1.2 is applied to lawyers advising clients who operate at the "edge" of criminality, or the "not-quite-legal."[19] My former student, the cannabis lawyer, is well aware that the businesses he advises are selling a product that constitutes a Schedule 1 "controlled substance" under federal law and that, constitutionally speaking, federal law preempts countervailing state laws. Yet he is also aware that many states have passed laws that purport to legalize the sale and use of cannabis products, and there have been little or no efforts to enforce prohibitions on cannabis-related businesses. Moreover, he truly believes that the trend in the law is towards full and complete legalization, and, within a few years, sale and production of cannabis products will be as legal as sale and production of alcohol. Similarly, when lawyers representing Uber, Airbnb, and similar companies help develop business plans which violate various state and municipal laws,[20] they can justify their actions

14. "[A] lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." MODEL RULES OF PROF'L CONDUCT r. 1.2(d) (AM. BAR ASS'N 2016).

15. *See id.* r. 3.1.

16. *See id.* r. 2.1.

17. *See id.* r. 1.16 cmt.; *see also* Smith, *supra* note 10, at 507 ("[T]he systemic protections afforded by the adversarial process disappear in the context of the lawyer's advising role, since no opposing counsel or neutral arbiter acts as a check on partisan representation.").

18. See *infra* notes 183–89 and accompanying text.

19. Pollman and Barry call this "taking advantage of legal gray areas," while noting that for disruptive businesses this is often indistinguishable from "breaking the law." Pollman & Barry, *supra* note 5, at 398–99.

20. Many of the regulatory violations of companies like Uber and Airbnb

by claiming: (1) that the services they are providing are popular with the general public; (2) that the laws they are violating are old, outdated, and not frequently or consistently enforced; and (3) that, in the near future, the laws will likely be changed to make the services their companies provide clearly and unambiguously legal.[21]

Yet neither lack of enforcement nor likelihood of future changes in the law provide any ground under the Model Rules for counseling or assisting the violation of a criminal law. Accordingly, the conduct of these lawyers poses a dilemma both for themselves and the legal order. While the criminal prosecution or disbarment of such lawyers is unlikely,[22] it is not impossible. Most lawyers would certainly prefer to conduct their business without any such threats hanging over their heads. Somewhat more troubling is the possibility that lawyers' criminal or ethical violations might be used against them in other disputes. For ex-

are misdemeanors at best, carrying only the danger of minor financial penalties. *See* Pollman & Barry, *supra* note 5, at 417–18 (noting that regulatory entrepreneurs are often willing to pay a "civil fine" but avoid violating criminal laws that might lead to "incarceration of the executives."). Unlike cannabis, where the activity involves a federal felony and potential incarceration, it is reasonable to ask whether regulatory violations by companies like Uber and Airbnb, where the potential criminal penalties are mostly minor financial ones, should be considered "criminal" within the meaning of Rule 1.2. *See* Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1548 (1995) (questioning the coherence of the Model Rules' distinction between criminal and civil violations). Yet violation of any criminal law raises both practical and ethical concerns for corporate lawyers. The practical concern is not actual criminal prosecution or disbarment, but the creation of a worrying argument about their unethical conduct that might be used against them in private litigation, for example, to deny malpractice insurance coverage or the protection of the attorney-client privilege. There is no indication in the language of Rule 1.2 itself or any official comments that it is limited to felonies or other "serious" crimes. Moreover, as an ethical matter, it is hard to say which violations of criminal laws do not have serious moral consequences. If the violation of driver licensing requirements or premises inspections by Uber and Airbnb create serious dangers to public safety, who is to say those violations are minor? Finally, as applied to corporations, who cannot be jailed, all potential penalties are financial penalties (except perhaps for the risk of dissolution). With startup companies having billions of dollars potentially at stake, who is to say which criminal acts might be financially worth taking?

21. Pollman & Barry, *supra* note 5, at 400–10.

22. Mike France, *Close the Lawyer Loophole*, BUS. WKLY., Feb. 2, 2004, at 70 ("Corporate lawyers are almost never sent to jail for helping out white-collar criminals.").

ample, opposing litigants might seek to deny their client communications the protection of the attorney-client privilege.[23] Malpractice insurers could refuse to pay on their policies.[24] For society generally, and particularly the lawyers within it, the existence of a large number of respectable and well-regarded lawyers who are consistently advising and assisting their clients to violate the law poses even more fundamental questions. Can such legal representation be justified, or at least tolerated, or will it lead to erosion of respect for the law and even greater disrespect for the legal profession? Would prohibiting companies like Uber and Airbnb from formulating legal risk management plans with the aid of lawyers lead to fewer legal violations or more, and should that be the major concern? Can a principled line be drawn between the blatantly illegal and the not-quite-legal, with different consequences for counseling the latter rather than the former?[25]

Those questions, and others, are explored in this Article. Part I examines the changing role of corporate counsel over time to understand how lawyers have come to be seen as potential accomplices in client criminal conduct. Part I describes how corporate lawyers, once seen as arbiters of appropriate business conduct for their clients, have had their role gradually narrowed to that of legal technician, solving legal problems to advance client interests. In the current and more complex legal environment, with the advent of new "disruptive" business strategies, the corporate lawyer's role appears to be shifting again, as many

23. Such damaging consequences have been invoked in articles warning lawyers against advising cannabis businesses. *See, e.g.*, Bruce E. Reinhart, *Dazed and Confused—Legal and Ethical Pitfalls in Marijuana Law*, 31 CRIM. JUST. 4, 4, 8 (2017) (explaining that the consequences to representing cannabis businesses includes no liability insurance coverage and the fee could be subject to forfeiture).

24. *See id.*

25. There is a salutary tradition in much academic work on legal ethics to focus not just on the minimum standards prescribed by ethics rules, but to conduct a broader normative inquiry as to what lawyers should do in various circumstances not only to avoid punishment, but to advance the welfare of the profession and society at large and to be true to defensible moral principles. In that sense, the goals of this Article are similar to those stated by Stephen Pepper in his seminal article on a related ethical question: "(1) to provide guidance for lawyers in working with their clients in these situations and (2) to explore some of the difficult underlying questions of both law and lawyering entailed by the effort to provide that guidance." Pepper, *supra* note 20, at 1549.

are asked to advise with respect to client business conduct that deliberately violates criminal law.[26]

Part II takes a closer look at three different businesses whose activities all raise serious issues for the existing ethical framework. The cannabis industry represents a particular type of not-quite-legal conduct. The formal prohibition on the activity is clear, but there are many contrary objective manifestations of popular and even governmental support for the activities involved, as well as stated policies of non-enforcement at the federal level.[27] As many state ethics commissions have concluded, current cannabis regulation provides a compelling case for loosening the prohibitions of Rule 1.2(d) to permit lawyers to advise and assist clients in this almost-legal environment.[28] Uber, in contrast, provides a sobering example of the dangers of legal risk management. The company's self-image as a disruptor with little concern for legal rules helped create an environment that encompassed not just disregard of local regulations, but other illegal activities no conscientious lawyer could ethically advise or assist.[29] Airbnb appears to represent an intermediate case. Shielded in part by a federal statute which it can argue preempts local laws, Airbnb has conducted a litigation campaign against such local regulations as it tries to build market share and popular support to explicitly legalize its business model.[30] Its strategy seems to be to violate the law only when absolutely necessary while seeking to negotiate new mutually acceptable rules of conduct with regulatory authorities.[31] Uber and Airbnb demonstrate that any change in the ethical rules to permit lawyers to assist and advise businesses engaged in not-quite-legal conduct must also contain clear and reasonable limits on the kinds of conduct encompassed by such a change.

Part III takes on the fundamental normative issues raised by contemporary changes in law and businesses practices. Part

26. This Article focuses on the ethical concerns of lawyers, particularly corporate lawyers advising their clients on conduct that violates the law. A related but quite distinct problem is whether corporate managers may, consistent with their fiduciary duty, cause their companies to violate the law. That is a question of corporate law, not ethics, and has been the subject of considerable debate among corporate law scholars. *See* Pollman, *supra* note 5, at 724–28.

27. *See* discussion *infra* Part II.A.

28. *See infra* notes 168–72 and accompanying text.

29. *See* discussion *infra* Part II.B.

30. *See infra* notes 236–61 and accompanying text.

31. *See* discussion *infra* Part II.C.

III seeks to delineate appropriate ethical considerations for lawyers advising clients whose conduct is not just legally uncertain but actually violates the formal strictures of criminal law. These are not easy questions. Powerful arguments can be made for preserving Model Rule 1.2(d)'s current strict prohibition on any aid or assistance to criminal conduct, particularly when the client's primary purpose is just to increase its profits.[32] Yet I argue that overall, both the legal profession and contemporary society will be better off if corporate lawyers are permitted to advise and assist on certain discrete forms of not-quite-legal conduct. Such advice and assistance should be limited to conduct that: (1) is part of a law reform effort with an objectively reasonable likelihood of success; (2) involves only activities that are public and not concealed in any way; and (3) the client itself has determined, through a committee of independent directors, that the proposed activities are ethically justified.

## I. A BRIEF AND NOT ENTIRELY DEPRESSING HISTORY OF CORPORATE LAWYERING

The first law firms engaged in a distinctively "corporate" practice emerged in America at the turn of the twentieth century.[33] Since then, both the work of corporate lawyers and the conception of their appropriate role have gone through a number of changes. The earliest corporate lawyers viewed themselves as statesmen-liaisons between popular government and the giant corporate entities that were increasingly dominating the American economy.[34] They saw their job as not just to advance corporate interests but to shape those interests by counseling their clients to accept reasonable and politically popular governmental constraints on their actions.[35] Such a role presumed a substantial degree of autonomy by corporate counsel as well as relative equality of lawyer and client. It also presupposed a different ethic for lawyers whose primary role was advising corporations rather than litigating on their behalf. Not zealous advocacy, but a deep understanding of the long-term best interests of the corporate client, of the broader needs of American society, and a good faith effort to reconcile the two, were the hallmarks

32. *See* discussion *infra* Part III.B.

33. *See infra* notes 42–45 and accompanying text.

34. *See* discussion *infra* Part I.A.

35. Such governmental constraints included laws relating to occupational safety, anticompetitive practices, and rights to unionize. *See infra* notes 54–57 and accompanying text.

of elite corporate counsel.[36] Later in the century, a more instrumental view of the role of the corporate lawyer became dominant. As corporate conduct was increasingly constrained by complex regulatory structures and litigation threats, corporate lawyers began to market and see themselves as "problem solvers," possessing technical expertise in both law and business that enabled them to resolve business problems in cost effective and legally defensible ways.[37] The distinction between counseling and advocacy became narrowed as lawyers developed innovative business or financial strategies of uncertain legality which subsequently had to be defended vigorously in litigation.[38] Meanwhile, the status and self-conception of the corporate lawyer was diminished from trusted counselor to legal technician. Accordingly, the history of corporate lawyering is frequently presented as a story of lawyers' decline—in status, power, and ethical responsibility—if not in wealth.[39]

This history, while factually accurate, is a little too bleak and lacks nuance. First, the concept of the lawyer-statesman as liaison between corporate and broader public interests was always more of an ideal than a reality. Even the most ethical and

36. *See infra* notes 52–57 and accompanying text.

37. *See* discussion *infra* Part I.B.

38. *See infra* notes 84–89 and accompanying text.

39. *See* Robert W. Gordon, *The American Legal Profession, 1870–2000*, *in* 3 THE CAMBRIDGE HISTORY OF LAW IN AMERICA: THE TWENTIETH CENTURY AND AFTER (1920– ) 73, 101 (Michael Grossberg & Christopher Tomlins eds., 2008) [hereinafter Gordon, *Legal Profession*]; Robert W. Gordon, *The Citizen Lawyer—A Brief Informal History of a Myth with Some Basis in Reality*, 50 WM. & MARY L. REV. 1169, 1178 (2009) [hereinafter Gordon, *Citizen Lawyer*]. Professor Gordon has provided the most important historical accounts of the ideal of the corporate lawyer as statesman and its decline. While recognizing all the difficulties of application and the hypocrisies of the lawyers who embraced it, he has still found it a useful vehicle for criticizing more instrumental contemporary conceptions of the role of corporate lawyer. *See, e.g.*, Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255, 256–57 (1990) [hereinafter Gordon, *Corporate Law Practice*]; Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 4–5 (1988) [hereinafter Gordon, *Independence of Lawyers*]. Others have also attributed some current problems of the profession to the decline of the lawyer as statesman model. *See* JAMES C. FOSTER, THE IDEOLOGY OF APOLITICAL POLITICS: THE ELITE LAWYERS' RESPONSE TO THE LEGITIMATION CRISIS IN AMERICAN CAPITALISM: 1870–1920, at 136–41 (1986). *See generally* ANTHONY KRONMAN, THE LOST LAWYER (1993) (stating that the decline of the lawyer-statesmen is the root cause of modern problems in the legal profession).

socially minded of corporate lawyers found it difficult to effectuate in practice.[40] The emerging role of legal technician, on the other hand, better comported with the nature of law and corporate legal practice in the late twentieth century. The rise of the regulatory state required expert legal technicians who understood their clients' business and could provide specific and detailed legal advice on how to achieve business goals while minimizing potential legal and regulatory problems.[41] While the lawyer-statesmen were frequently guardians of the social as well as legal status quo, the new lawyer technicians were frequently innovators whose new approaches to law were developed on behalf of groups like corporate raiders and activist investors, many of whom would have been excluded from the circle of socially approved clients in earlier days.[42] Finally, even in their "technician" role, corporate lawyers will usually counsel their clients to avoid business strategies that may cause substantial injury to other societal groups or violate strong government policies.[43] Rather than cautioning against such policies on ethical or social grounds, however, they are more likely to say they are seeking to avoid unnecessary litigation or reduce legal and regulatory risk.[44]

Appreciating the value of the lawyer as technician model also enables us to appreciate the ways in which it is currently under threat, the threat that is a focus of this Article. Corporate lawyers are increasingly being asked not only how to accomplish business objectives by legal means, but how to avoid detection or serious sanctions of business activities that are likely to be held to be violations of law, often criminal law.[45] This new and uncomfortable role of "lawyer as accomplice" reflects several recent developments. The growth of compliance departments, as well as greater awareness by management of the need to quantify and minimize corporate risk, has led to increased interest in "legal risk management."[46] Changes in policies and allocation of resources to enforcement also make it increasingly difficult to determine exactly what activities still violate the law and which

40. *See infra* notes 58–74 and accompanying text.
41. *See* discussion *infra* Part I.B.
42. *See supra* note 39 and accompanying text; discussion *infra* Parts I.A–B.
43. *See infra* notes 102–14 and accompanying text.
44. *See infra* notes 110–14 and accompanying text.
45. *See infra* notes 126–29 and accompanying text.
46. *See infra* notes 126–29 and accompanying text.

have been effectively "decriminalized" by nonenforcement.[47] Advising on these matters presents conscientious corporate lawyers with complex new dilemmas and little realistic guidance from the Model Rules.

### A. THE CORPORATE LAWYER AS STATESMAN

The modern corporate lawyer was a product of the early twentieth century. Although some lawyer-statesmen of earlier eras like Alexander Hamilton and Abraham Lincoln had corporations as clients,[48] such businesses were not the primary focus of their practice, and their legal services consisted mostly of litigation advocacy, not counseling and advice.[49] By 1900, corporate practice had become dominated by firms like that of Paul D. Cravath, "an independent multispecialty firm that served exclusively corporate clients."[50] Lawyers at such firms presented and

47. *See* discussion *infra* Part II.A (discussing how these issues have affected the cannabis business).

48. *See* Paul Finkelman, *Alexander Hamilton, Esq.: Founding Father as Lawyer*, 1984 AM. B. FOUND. RES. J. 229, 246 (1984) (stating Hamilton was "on retainer for the United Insurance Company and the Bank of New York . . . ."); John S. Skilton, *Abraham Lincoln: A Lawyer "For the Ages,"* 2011 WIS. L. REV. 1, 6 (2011) (noting Lincoln and his partners represented railroad lines in seventy-one cases but opposed them in sixty-two others).

49. *See* Gordon, *Legal Profession*, *supra* note 39, at 92–93; *see also* William H. Rehnquist, *The Lawyer-Statesman in American History*, 9 HARV. J.L. & PUB. POL'Y 537, 554–57 (1986).

50. Gordon, *Legal Profession*, *supra* note 39, at 93; *see* Wayne K. Hobson, *Symbol of the New Profession: Emergence of the Large Law Firm*, 1870–1915, *in* THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 19–20 (Gerard W. Gawalt ed., 1984) (discussing the growth of the Cravath firm). Such firms were considered the "pinnacle" of the legal profession, and recruited potential new partners from the top law schools. Gordon, *Legal Profession*, *supra* note 39, at 93 (noting that their recruiting was "largely restricted to white Protestant males"). Much of their transactional work was fairly routine and boring—title searches, blue sky compliance, drafting trust indentures and other complex financing instruments. *Id.* The most senior corporate partners at such firms, however, also assumed a more exalted role as counselors to top corporate management. *Id.* What these elite lawyers mostly provided to their clients were connections. They acted as "brokers and fixers," introducing industrial firms to sources of finance capital and linking sellers of American equity and debt securities to potential buyers in the U.S and abroad. *Id.* at 94–95. They also functioned as liaisons between corporate America and various government officials. *Id.* They tried to prevent regulatory interference with their clients' business, but also sought governmental favors such as, "concessions, franchises, tax exemptions, subsidies, regulatory loopholes, monopoly rights, and public-works contracts." *Id.* at 94. Since the most successful corporate lawyers were likely to be the most effective providers of such services, it behooved these lawyers to

likely viewed themselves as socially and intellectually equal to the corporate leaders they counseled, if not superior.[51] As such, they functioned as intermediaries of a sort between the rougher-edged industrialists of the Gilded Age and an older political elite that was worried about labor unrest, anticompetitive practices, threats to public health and safety, and other evils associated with the new corporate giants.[52] These corporate lawyers assumed the traditional lawyerly American role of statesmen, seeking to reconcile the interests of corporate America with broader public concerns.[53] They announced their support for such items of the progressive agenda as occupational safety, antitrust laws, and rights to unionize, and urged their clients to accept such innovative developments in general.[54] Yet they also sought to advance their clients' business interests by publicly supporting appointment of business-sympathetic regulators, limitations on antitrust enforcement and centrist union managements willing to partner with big business.[55] These lawyers were not merely seeking compromise for compromise sake, they were setting forth a coherent, and to them, quite attractive, vision of an American future in which well-managed and well-regulated industrialization would provide a better life for all.[56] This was a vision that these lawyers sought to effectuate both in their private roles as corporate counsel but also in the public political sphere as cabinet members and in other important government roles.[57]

cultivate their networks and connections in the world of finance, government and communications.

51. They were likely to be more educated, more worldly and better integrated into the social, economic, and political elites of their respective communities. *See* Gordon, *Legal Profession*, *supra* note 39, at 94–95.

52. *See id.* at 92–96.

53. *See* Gordon, *Citizen Lawyer*, *supra* note 39, at 1193; Hobson, *supra* note 50 at 4.

54. *See* Gordon, *Citizen Lawyer*, *supra* note 39, at 1192–93; Gordon, *Legal Profession*, *supra* note 39, at 95–96.

55. *See* Gordon, *Citizen Lawyer*, *supra* note 39, at 1192–93; Gordon, *Legal Profession*, *supra* note 39, at 95–96.

56. *See* Gordon, *Legal Profession*, *supra* note 39, at 98.

57. Gordon describes the worldviews of these corporate lawyers who became actual statesmen:

> In many respects, their roles in office were their private roles writ large—making the state, nation, and world a congenial environment for American capitalism. Eastern corporate lawyers—Elihu Root, Charles Evans Hughes, James Coolidge Carter, Henry Stimson, Russell Leffingwell, William J. Donovan, Dean Acheson, and John Foster

Progressives like Louis D. Brandeis saw corporate lawyers as potential allies in their battles for more effective regulation of big business.[58] Brandeis was not a corporate lawyer in the manner of Cravath, but he did represent corporate clients in his private practice.[59] It is significant, therefore, that in his famous 1905 address to the Harvard Ethical Society,[60] he described the profession of a corporate lawyer as one that presented "unusual opportunities for usefulness."[61] The "opportunity" he urged on Harvard students was to reconcile management with labor, constrain industrial power through enlightened regulation, and to do so in a peaceful manner that avoided domestic strife.[62] The call was an ethical one, and it presupposed that these Harvard students would someday be in positions to effectuate such reconciliation between corporate interests and progressive values.

> Dulles—dominated high foreign policy posts in the first half of the twentieth century. The policies of such men generally reflected the interests of their business clienteles: a peaceful, prosperous, and economically reconstructed Europe; the use of military and diplomatic power to promote stable governments reliably committed to promoting and protecting foreign direct investment and payment of foreign debts; and a system of international treaties and arbitration to enforce transnational contracts and settle international disputes. To be sure, such lawyer-statesmen were much more than tools for clients: their vision was often broader, more cosmopolitan, and more farsighted in anticipating that compromises would have to be made for the sake of industrial peace.

*Id.* at 96.

58. See MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 300–26 (2009), for a discussion on Brandeis' progressivism and attitudes toward big business. Biographical accounts of Brandeis have been described as "rang[ing] from the admiring to the hagiographical." John Braeman, *"The People's Lawyer" Revisited: Louis D. Brandeis Versus the United Shoe Machinery Company*, 50 AM. J. LEGAL HIST. 284, 285 n.5 (2008). See Thomas K. McCraw, *Louis D. Brandeis Reappraised*, 54 AM. SCHOLAR 525, 525 (1985), for argument from one of the few dissenters.

59. *See generally* Philip Cullis, *The Limits of Progressivism: Louis Brandeis, Democracy and the Corporation*, 30 J. AM. STUD. 381 (1996) (discussing the various corporate clients Brandeis represented).

60. LOUIS D. BRANDEIS, *The Opportunity in the Law (May 4, 1905)*, *in* BUSINESS—A PROFESSION 313 (1914).

61. He acknowledged that some contemporary lawyers had become "mercenary" due to corporate interests' willingness "to pay vast sums for questionable services." *Id.* He reserved his main criticism for lawyers who advocated publicly for legislation on behalf of private corporations without taking any account of the broader public interest, which he saw as an improper extension of the lawyer's advocacy role. *Id.*

62. *Id.*

This was not an easy balancing act to pull off. Brandeis' own controversial representation of the United Shoe Machinery Co. illustrates the problems and limitations of the ideal of the corporate lawyer-statesman.[63] Brandeis had become a director of the company at the request of some important clients.[64] In that role, he publicly testified before the Massachusetts legislature against a bill that would have prohibited the anticompetitive tying arrangements on which the company's business model was based.[65] The bill was defeated, but a few months later, Brandeis resigned his directorship.[66]

63. *See* UROFSKY, *supra* note 58, at 310–17. *See generally* Braeman, *supra* note 58 (discussing Brandeis' history with United Shoe Machinery Company).

64. Brandeis had a longstanding relationship with the Henderson family, principal shareholders of the McKay Shoe Machinery Company. UROFSKY, *supra* note 58, at 310. When McKay, along with a number of other companies, combined to form the United Shoe Machinery Company, Brandeis agreed to represent it on some matters and also became a director. *See id.* at 310–11. The combined entity owned patents covering almost all the critical equipment needed for the manufacture of shoes. *Id.* at 310. It provided these patents to shoe manufacturers through restrictive leases which made it virtually impossible for shoe manufacturers to deal with any other equipment suppliers and gave United Shoe a market share of "near total monopoly proportions." Braeman, *supra* note 58, at 290.

65. *See* Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 YALE L.J. 1445, 1519–20 (1996); Braeman, *supra* note 58, at 291. While such tying agreements were controversial and increasingly criticized, they were not clearly illegal at the time. It was also apparently important to Brandeis to note that he was not speaking as "counsel" for the company. Spillenger, *supra* note 65, at 1520. Brandeis argued that as the patent holder on some shoe manufacturing equipment, United Shoe had a right to its dominant market position, and that because of it, United Shoe was able to provide better service and lower equipment prices to the many shoe manufacturers who were its customers. *See* Braeman, *supra* note 58, at 291–92. There is some debate whether these arguments represented Brandeis' actual views at the time he made them. Brandeis said that they did, and that he later changed his views. Spillenger, *supra* note 65, at 1519.

66. *See* Braeman, *supra* note 58, at 292; Spillenger, *supra* note 65, at 1520. The reasons for his resignation are unclear. He told United Shoe's President that because the company was so successful, he felt he no longer needed to stay on the board to protect the interests of the Hendersons, his original clients, and also complained that he lacked influence over company policy as only one member of a nineteen-member board. *See* Braemen, *supra* note 58, at 294. Yet he acknowledged to others that his views concerning the legality of United Shoe's business practices were changing. *See id.* at 294–95. A third factor was a potential conflict with Brandeis' representation of a number of large shoe manufacturers, who were a more important part of his practice and had begun to complain about United Shoe's lease contracts. *See id.* at 292–94. Brandeis was

For the next few years, Brandeis made no public statements concerning United Shoe. In 1910, however, he began to speak out publicly against United Shoe's business practices.[67] This prompted a firestorm of criticism accusing Brandeis of disloyalty to former clients and unethical conflicts of interest.[68] It was a major point raised by opponents of his nomination to the Supreme Court.[69]

The United Shoe example suggests that the problem with the lawyer-statesman ideal was not simply the failure of corporate lawyers to adopt it. There were conceptual difficulties with the ideal itself. One was dealing with the legal and moral uncertainties of real-world business practices. Brandeis was likely ambivalent about United Shoe's business practices when he publicly defended them in 1906.[70] United Shoe's practices were not clearly illegal nor, to his mind, immoral, and they had certainly made United Shoe immensely successful.[71] In such instances, a corporate lawyer might be expected to resolve such uncertainties as Brandeis did, interpreting the law in accordance with his client's best interests. This example also illustrates the inherent conflicts in seeking to be both a private representative of clients and a public advocate for broader social values. Brandeis' prior advocacy of United Shoe's interests in public fora made it difficult for him to later publicly express his own personal and differing views without encountering substantial criticism for unethical conduct toward a former client.[72] To the extent the

instrumental in getting United Shoe to engage in negotiations with those manufacturers regarding possible changes in the equipment leases. *See id.* at 294–95; Spillenger, *supra* note 65, at 1520.

67. Acting on behalf of a consortium of shoe manufacturers, he testified before Congressional committees and federal agencies concerning United Shoe's "flagrant" anticompetitive practices, even condemning the initial mergers that created United Shoe as a violation of the Sherman Act. *See* Braeman, *supra* note 58, at 295–96; Spillenger, *supra* note 65, at 1520. The reasons for the change were again a mix of public and private motives. Antitrust policy was an increasingly important part of political debates. *See* Braeman, *supra* note 58, at 296. New case law had helped change Brandeis' mind as to the legality of tying arrangements, and he was incensed over United Shoe's treatment of a potential competitor, the very company that had unsuccessfully tried to hire Brandeis a few years previously. *See id.* at 295–96; Spillenger, *supra* note 65, at 1520.

68. Braeman, *supra* note 58, at 295–99.

69. UROFSKY, *supra* note 58, at 450–51.

70. Braeman, *supra* note 58, at 291–92.

71. *Id.*

72. Spillenger calls this "the dilemma of private action in the public sphere." Spillenger, *supra* note 65, at 1521.

lawyer-statesman model entails an obligation to speak out publicly on important political, social, and economic concerns, it may simply be incompatible with representation of private corporate interests relevant to those concerns.[73] It is also doubtful that elite corporate lawyers could simply persuade clients that it was in their long-term best interests to modify corporate practices toward more socially beneficial goals.[74] Brandeis' inability to achieve any meaningful modifications of the United Shoe tying contracts in negotiations illustrates the difficulties of asking corporate clients to curb their profit-maximizing behavior to achieve better long-term relationships with their customers.

Not at all coincidentally, the early twentieth century also saw a professionalization of lawyering through the growth of bar associations and new emphasis on professional ethics. The elite corporate law firms were in the forefront of this movement.[75] One of their major accomplishments was the 1908 adoption by the American Bar Association of the first Canons of Professional Ethics.[76] Although much ethical criticism had been aimed at elite lawyers at corporate firms, the ABA committee that drafted the Canons was largely composed of lawyers from such firms,[77]

73. Brandeis was able to avoid this dilemma in many instances by "guiding" his clients to solutions to their business problems that comported with his social values and by establishing his independence as a public figure free to take public positions inconsistent with potential client interests. *See* Gordon, *Independence of Lawyers*, *supra* note 39, at 27, 32–33; Spillenger, *supra* note 65, at 1510, 1522–24. As the United Shoe situation illustrates, even Brandeis was unable to maintain that balancing act in all circumstances, and it is unlikely that even the most prestigious corporate lawyers could have the same influence on and independence from client interests today.

74. Spillenger, *supra* note 65, at 1510–22.

75. *See* James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 FORDHAM L. REV. 2395, 2406 (2003).

76. *See generally id.* (describing each Canon and its meaning in detail).

77. *Id.* at 2462 n.365. The Canons were a response to the criticism, most notably by President Theodore Roosevelt, that the legal profession, particularly its "most influential and most highly remunerated members," had abandoned independent ethical standards in order to help their corporate clients "evade the laws which are made to regulate in the interest of the public the use of great wealth." THEODORE ROOSEVELT, *The Harvard Spirit (June 28, 1905)*, *in* IV PRESIDENTIAL ADDRESSES AND STATE PAPERS 407, 419–20 (1910); *accord* Altman, *supra* note 75, at 2406–09. Brandeis had made similar allegations in his speech to the Harvard Ethical Society. *See* Brandeis, *supra* note 60, at 323 (stating that the bar has "not only failed to take part in constructive legislation designed to solve in the public interest our great social, economic and industrial problems, but they have failed likewise to oppose legislation prompted by selfish

and the Canons mostly targeted other types of lawyers.[78] The Canons said relatively little about the ethical obligations of lawyers engaged primarily in transactional work.[79] The closest the Canons come to a specific duty of corporate lawyers is a duty to advise clients "to observe the statute law."[80] The Canons reveal another serious problem with the lawyer-statesman ideal. When given the chance to exercise their moral judgment, the elite bar did so in a way that preserved their own status and autonomy at the expense of their less wealthy and prestigious colleagues.

### B. THE CORPORATE LAWYER AS TECHNICIAN

Later in the century the lawyer-statesman ideal was gradually replaced by an alternative vision: the lawyer as technician, a skilled and reliable expert who used legal means to solve busi-

interests"). The Canons were an effort to restore higher ethical standards and increase public respect for the profession. Altman, *supra* note 75, at 2413.

78. They sought to regulate unscrupulous or overzealous litigation tactics by prohibiting assertion of claims or defenses that involve a "violation of law" or "fraud or chicane." CANONS OF PROFESSIONAL ETHICS c. 15, 30 (AM. BAR ASS'N 1908); Altman, *supra* note 75, at 2453, 2456. They prescribed rules of conduct for litigators toward opposing counsel and witnesses. CANONS c. 17, 18; Altman, *supra* note 75, at 2454. They placed limits on lawyer advertising, solicitation of clients, and other forms of commercialism, Altman, *supra* note 75, at 2475–91, and sought to prevent bar admission and encourage disbarment of people of low character and moral standards. CANONS c. 29. The Canons "enhanced the stratification" within the modern legal profession," placing detailed restrictions on the conduct of lawyers engaged in personal injury litigation or criminal defense, but providing only the most general exhortations to the corporate bar to act morally and with honor. Altman, *supra* note 75, at 2503; s*ee also* Gordon, *Legal Profession*, *supra* note 39, at 100 (describing stratification of the bar by clientele).

79. They had the purely negative "right to decline employment" from any client who might seek their advice on "questionable transactions" or other work that might "offend the lawyer's conscience." CANONS c. 31; Altman, *supra* note 75, at 2458. The final Canon 32 expands on this obligation in broad terms and is a reply of sorts to President Roosevelt. It states that no "client, corporate or individual" is entitled to any "service or advice" which involves "disloyalty to the law." CANONS c. 32. It also required "exact compliance with respect to the strictest principles of moral law." *Id.* Obligations phrased at that level of generality, of course, left corporate lawyers free to do whatever their "consciences" dictated.

80. *See* CANONS c. 32. The Canons make clear, however, that such lawyers usually had substantial leeway to make their own judgments of the "just meaning and extent" of such laws. *Id.* "[U]ntil a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent." *Id.*

ness problems and advance managerial goals. This change reflected the increasing importance of the administrative state. Businesses were subject to complex new regulations and oversight,[81] which often carried both criminal and civil penalties,[82] and could be enforced through private rights of action.[83] Corporations needed lawyers with highly specialized expertise not only to defend them before courts and administrative agencies, but to develop business practices that would avoid or reduce potential liability.

During the same period, legal realism became the dominant theory taught in elite law schools[84] and introduced students to a more instrumental, empirical understanding of legal rules. Law was seen less as embodying fundamental moral principles and more as a positive means of structuring and regulating social and economic activities.[85] Legal rules could be analyzed on a cost-benefit basis.[86] Corporate avoidance of liability or fines was simply a matter of risk management and cost reduction.[87] Mindful of the Holmesian pronouncement that law was simply "prophecies of what the courts will do in fact,"[88] lawyers recognized the indeterminate and tentative nature of many legal rules, particularly when confronting new and complex factual

81. *See* Gregory A. Mark, *The Corporate Economy: Ideologies of Regulation and Antitrust, 1920–2000*, *in* 3 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 613, 628–33 (Michael Grossberg & Christopher Tomlins eds., 2008); Gordon, *Citizen Lawyer*, *supra* note 39, at 1195–97.

82. John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 YALE L.J. 1875, 1879–81 (1992).

83. James D. Cox & Randall S. Thomas, *The Evolution in the U.S. of Private Enforcement via Litigation and Monitoring Techniques: Are There Lessons for Germany?*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 2–8 (Jeffrey N. Gordon & Wolf-George Ringe eds., 2018).

84. David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 468 (1990); *cf.* Eugene V. Rostow, *American Legal Realism and the Sense of the Profession*, 34 ROCKY MTN. L. REV. 123, 134–35 (1962) (defending legal realism and its importance in the legal profession); Joseph W. Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 467 (1988) ("We are all legal realists now.").

85. *See* Pepper, *supra* note 20, at 1552–54.

86. For an interesting analysis of the relationship between legal realism and cost-benefit analysis among lawyers and judges, see Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179 (1986).

87. *See* Pepper, *supra* note 20, at 1553.

88. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

situations. This enabled lawyers to develop business strategies that "pushed the envelope" of what the law allowed and encouraged clients to ask them to be innovative in providing legal solutions to business problems.[89]

The management of corporations was also becoming professionalized as more companies were run by graduates of top business schools.[90] CEOs had less need for lawyer-statesmen to ease their entry into elite social and political circles and more need for experts on the complex rules governing taxation, financial disclosure, employment opportunity, environmental regulation, and other rapidly changing legal fields.[91] Rather than a "trusted counselor," managers preferred to rely on "general counsel," a loyal in-house subordinate who hired, supervised, and coordinated the legal work of numerous specialists, both in-house and at outside firms.[92] In addition, a new profession, compliance officers, were increasingly used to translate complex legal requirements for non-lawyer employees, as well as to prevent employee conduct that could subject the company to serious liability.[93]

89. *See, e.g.*, Wellman v. Dickinson, 475 F. Supp. 783 (S.D.N.Y. 1979). In *Wellman*, an innovative strategy to rapidly acquire a publicly traded company, described by the court as a "brilliantly designed, lightning strike," was held invalid as an illegal tender offer. *Id.* at 790. The subsidiary that conducted the strategy was named "L.H.I.W.", Inc. (an acronym for "*Let's* [sic] *Hope It Works*"). *Id.*

90. *See generally* RAKESH KHURANA, FROM HIGHER AIMS TO HIRED HANDS: THE SOCIAL TRANSFORMATION OF AMERICAN BUSINESS SCHOOLS AND THE UNFULFILLED PROMISE OF MANAGEMENT AS A PROFESSION 23–50 (2007) (explaining the rise of large corporations and the role of business schools).

91. As Gordon notes, in this later period corporations were more interested than they were previously in challenging regulations or labor agreements which they saw as interfering with their activities or profitability. Gordon, *Legal Profession*, *supra* note 39, at 114. They sought lawyers who would raise such challenges or at least find useful loopholes and exemptions to them. *See id.* at 115.

92. *Id.* at 116.

93. *See* Robert C. Bird & Stephen Kim Park, *The Domains of Corporate Counsel in an Era of Compliance*, 53 AM. BUS. L.J. 203, 248–49 (2016) ("The increasing immensity and complexity of business regulation have paved the way for a robust compliance function, increasingly headed by a CCO and managed by a separate compliance department under its control."); *id.* at 203–04, 217–18 (describing recent steep regulatory costs to corporations and resulting increases in job opportunities and salaries in the compliance profession); *see also* Donald C. Langevoort, *Caremark and Compliance: A Twenty-Year Lookback*, 90 TEMP. L. REV. 727, 727–28 (2018) (listing and citing to such legal and regulatory changes, including *In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996), and the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745).

Corporate law firms changed as well. Transactional lawyers often specialized not just in a particular area of law, but in a particular kind of transaction: e.g., mergers, project financings, or corporate restructurings.[94] Corporations whose legal work was controlled by cost-conscious general counsel rarely sent all their outside work to a single firm, but rather expected firms to compete in "dog and pony shows" demonstrating their expertise and cost effectiveness.[95] There was intra-firm competition as well as individual lawyers vied with each other to generate more revenue, enhance their professional reputations, and build strong personal bonds with important clients, all of which were seen as ways to maximize their prestige and earning power.[96]

These changes made corporate lawyers, particularly at the top firms, more successful and substantially richer. Elite firms expanded enormously, becoming national and international in scope.[97] By 2016, senior equity partners at such firms were averaging seven-figure compensation.[98] The new style of practice also encouraged legal creativity, as lawyers were expected to develop new legal approaches to dealing with corporate problems. Corporate practice became more egalitarian, both in the kinds of lawyers the firms hired and the clients they serviced.[99] Yet all

94. Jaap Bosman, *Are Lawyers Being Trapped In Their Practice Niches*?, ABA J. (Oct. 23, 2018, 6:00 AM), http://www.abajournal.com/voice/article/are_lawyers_being_trapped_in_their_practice_niches [https://perma.cc/FC8W-GW26] (questioning whether the "hyperspecialization" of law firm practice areas has "gone too far").

95. KRONMAN, *supra* note 39, at 284–87.

96. *See generally* Robert W. Hillman, *Law Firms and Their Partners Revisited: Reflections on Three Decades of Lawyer Mobility*, 96 TEX. L. REV. 787 (2018) (discussing the effects of lawyer mobility on law firms); KRONMAN, *supra* note 39, at 277–83 (explaining the rise in lateral movement between firms and the increased paychecks and hours worked by associates).

97. *See* Eli Wald, *Smart Growth: The Large Law Firm in the Twenty-First Century*, 80 FORDHAM L. REV. 2867, 2873 (2012).

98. JEFFREY A. LOWE, 2016 PARTNER COMPENSATION SURVEY, 11–12, https://law.yale.edu/system/files/area/department/cdo/document/2016-partner-compensation-survey-web.pdf [https://perma.cc/QHX3-YLPP].

99. *See* Scott Flaherty, *Law Firms Took Steps Forward in Diversity in 2018, Not Leaps: Report*, AM. LAW. (Jan. 9, 2019), https://www.law.com/americanlawyer/2019/01/09/law-firms-took-steps-forward-in-diversity-in-2018-not-leaps-report/?slreturn=20190820190529 [https://perma.cc/4Z9J-ESF4] (reporting growth in law firm hiring of minorities and women, but still substantial underrepresentation). As to clients, consider the enormous success of Skadden Arps, whose legendary partner, Joe Flom, was famous for advising corporate raiders and similar clients when more traditional law firms would not. *See* Ashby Jones & Joanna Chung, *Flom, Consummate M&A Lawyer, Dies*, WALL

this success came with an undeniable diminution of social status. Corporate lawyers were no longer trusted counselors, merely well paid and technically proficient hired hands.[100] This, as well as the increasing competitiveness and punishing hours, seemed to have also led to a substantial increase in unhappiness among corporate firm lawyers.[101]

Whether the lawyer-as-technician model also led to a decline in ethical conduct is a more difficult question. Many have drawn this conclusion, arguing that the modern corporate lawyers' devotion to their clients' interests destroys any possibility of exercising independent moral judgment or speaking out publicly on matters affecting their clients.[102] However, a focus on technical competence and problem solving does not mean that lawyers must act unethically. It is certainly possible that the role of lawyer-technician embodies its own set of ethical principles, less grandiose than those of the lawyer-statesman, but more realistic, appropriate to current societal needs, and equally defensible on moral grounds.[103] Much of the work of the modern corporate technician is either morally neutral or somewhat beneficial to

STREET J. (Feb. 24, 2011), https://www.wsj.com/articles/SB10001424052748703775704576162103978038360.

100. Many corporate managers also viewed them, or at least the work they performed, as a necessary but unfortunate cost of doing business. *See* Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 241–42 (1984).

101. Studies show that lawyers are substantially more depressed, suicidal, and alcoholic than the public at large. Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 874–80 (1999); Martin E.P. Seligman et al., *Why Lawyers Are Unhappy*, 23 CARDOZO L. REV. 33, 37–38 (2001) (focusing on young lawyers at big law firms).

102. *See, e.g.*, Gordon, *Corporate Law Practice*, *supra* note 39, at 257 ("Corporate counselors whose compliance guidance is likely to run into resistance from their clients tend either not to offer it or rapidly convert the advice into neutral risk-analysis and themselves into adversary advocates.").

103. Such principles will often turn on the question of how much ethical responsibility a lawyer has for assisting clients to accomplish goals that are morally suspect but not violative of the law. *Cf.* Judith A. McMorrow & Luke M. Scheuer, *The Moral Responsibility of the Corporate Lawyer*, 60 CATH. U.L. REV. 275, 275–80 (2010) (evaluating the nonaccountability theory and its principle that "the attorney is not morally accountable" for their clients' objectives); Richard W. Painter, *The Moral Interdependence of Corporate Lawyers and Their Clients*, 67 S. CAL. L. REV. 507, 511, 513–14, 553–60 (1994) (arguing that a lawyer "cannot always deny moral responsibility for their clients' conduct" because lawyers and clients work interdependently).

society.[104] Corporate lawyers, aided by law and economic concepts with roots in legal realism, saw themselves as increasing the value of societal assets by facilitating transactions that moved assets to higher valuing users, providing information to securities markets that enabled them to price stocks more efficiently, and helping create and regulate the market for corporate control, which disciplined managers and increased shareholder value.[105]

Yet it must be acknowledged that the morality of the lawyer-as-technician role depends crucially on the morality of the corporate conduct being facilitated. To the extent there had been a progressive consensus in the early years of the twentieth century, by the latter part of the century no such consensus existed.[106] This was due in part to the success of the progressive

104. Much of what corporate lawyers do increases efficiency, both for the firms they represent and the markets in which those firms operate. *See* Gilson, *supra* note 100, at 243–44. The question of whether market efficiency itself has moral value or is morally neutral is a longstanding unresolved debate. *See* Robert Skidelsky, *The Moral Vulnerability of Markets*, PROJECT SYNDICATE (Mar. 11, 2008), https://www.project-syndicate.org/commentary/the-moral-vulnerability-of-markets?barrier=accesspaylog. *See generally* ADAM SMITH, THE THEORY OF MORAL SENTIMENTS (1759) (exploring morality across various disciplines).

105. *See* Gilson, *supra* note 100, at 264. It is also worth remembering that many of the shares whose value is increased are held by hospitals, universities, union pension funds, and other socially beneficial institutions. *Cf.* Edward Glaeser, *The Governance of Not-For-Profit Firms* (Nat'l Bureau of Econ. Research, Working Paper No. 8921, 2002), nber.org/papers/w8921.pdf [https://perma.cc/63LW-AUMB] (discussing management of nonprofits, including hospitals and universities).

106. *See* Ben W. Heineman, Jr. et al., HARVARD LAW SCH. CTR. ON THE LEGAL PROFESSION, LAWYERS AS PROFESSIONALS AND AS CITIZENS: KEY ROLES AND RESPONSIBILITIES IN THE 21ST CENTURY 9–13 (2014), https://clp.law.harvard.edu/assets/Professionalism-Project-Essay_11.20.14.pdf [https://perma.cc/VW2P-62Q6]. This ambitious project seeks to set forth "a practical vision of the responsibilities of lawyers as both professionals and as citizens" which includes both the roles of "expert technician[]" and "wise counselor[]." *Id.* at 5. The authors argue for a broad and diverse set of potential sources for determining the right course of conduct in a given legal context. *Id.* at 11 (including "the spirit and letter of the Model Rules of Professional Conduct; an implied social contract between state-licensed professionals and the rest of society; the enlightened self-interest of the institutions in which lawyers serve; the role of law, regulation, and norms as the foundation and expression of public policy and private ordering; and lessons about lawyers' roles in the history of our constitutional democracy and political economy.").

and reform agenda itself, which had placed many aspects of private business activities under regulatory scrutiny and control.[107] Questions about appropriate corporate conduct had thereby been converted from primarily moral questions to legal and regulatory ones.[108] To the extent such debates invoked moral concerns as well as economic, political, and social ones, there was no clear consensus on such issues within the public at large nor among a political or social "elite."[109]

Individual lawyers, of course, are usually free to reject work from clients whose products or actions they find morally objectionable,[110] and many do.[111] But most corporate lawyers, in my experience, do not seek to pass moral judgment on the entire regulatory framework under which contemporary corporations conduct their business.[112] While most have views as to whether there should be more or less regulation in particular areas, they view the system as a whole, if not as a positive moral good, at least as a relatively accurate reflection of the political and social

107. *See supra* notes 81–83 and accompanying text.

108. Such technical questions may still have substantial normative content. *See* Heineman et al., *supra* note 106, at 9–11 (discussing the distinction between the questions "is it legal?," "is it right?," and "what should we do?").

109. See David Dana, *Environmental Lawyers and the Public Service Model of Lawyering*, 74 OR. L. REV. 57 (1995) and Ted Schneyer, *Fuzzy Models of the Corporate Lawyer as Environmental Compliance Counselor*, 74 OR. L. REV. 99 (1995), for a discussion of the diverse factors that could influence the advice lawyers give to corporate clients on complex environmental law matters.

110. MODEL RULES OF PROF'L CONDUCT r. 1.16 (AM. BAR ASS'N 1983). A lawyer must refuse or withdraw from representation that would result in "violation of the rules of professional conduct or other law." *Id.* r. 1.16(a)(1). A lawyer also has the option of withdrawing from representation "where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement." *Id.* r. 1.16 cmt. Such optional withdrawal is only permitted when it "can be accomplished without material adverse effect on the client's interests." *Id.* In practical terms, this means that corporate advisors are usually freer to refuse or withdraw from representation than advocates engaged in ongoing litigation. *See* Louis M. Brown & Harold A. Brown, *What Counsels the Counselor? The Code of Professional Responsibility's Ethical Considerations—A Preventive Law Analysis*, 10 VAL. U. L. REV. 453, 474–75 (1976).

111. Michael I. Krauss, *On Lawyers Defending Views They Don't Believe In*, FORBES (Mar. 11, 2014), https://www.forbes.com/sites/michaelkrauss/2014/03/11/on-lawyers-defending-views-they-dont-believe-in [https://perma.cc/T8CP-2KZN] ("Many of my students, for instance, have told me they will refuse to represent tobacco companies upon graduation . . . .").

112. *See* Heineman et al., *supra* note 106, at 10 (arguing that current laws and regulations should be a source for normative decision-making).

consensus that created it.[113] Accordingly, they see ethical value in: (1) helping their clients to conform their activities to those laws; (2) advising, cajoling, or discussing the bad consequences that will ensue if the corporation violates those laws; and (3) steering corporate clients towards actions that can at least be credibly argued to be within the bounds of the law.[114]

In many ways, the ABA Model Rules of Professional Conduct, particularly Rule 1.2(d), reflect this more limited ethical role for the lawyer-technician. The Model Rules do not expect lawyers to ensure that their clients' goals are ethical, nor do they prescribe what those goals should be.[115] Rather they view the lawyer's job as ensuring that the means clients use to achieve

113. *See id.*

114. In this context, it is worth noting that under the Model Rules, the lawyer's advising function may include not just considerations of legality but may refer to "other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." MODEL RULES OF PROF'L CONDUCT r. 2.1.

115. *See id.* r. 1.2(d). The Model Rules, adopted by the ABA in 1983, reflect a somewhat defensive response to new concerns about the legal profession which were coming not just from the public but from courts and administrative agencies. *See* ELLIOTT A. KRAUSE, DEATH OF THE GUILDS: PROFESSIONS, STATES, AND THE ADVANCE OF CAPITALISM, 1930 TO THE PRESENT 32–33 (1996) (describing a loss of "guild power" in the legal and other professions after the mid-1960s due to growing power of regulatory agencies); *see also* Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 650 (1981). The Supreme Court had held that the legal profession was a "trade or commerce" whose professional standards were subject to antitrust scrutiny. Goldfarb v. Va. State Bar, 421 U.S. 773, 773 (1975). Even more troubling for corporate lawyers was the potential liability of securities lawyers who were either involved in preparation of false and misleading public filings or failed to disclose such violations. At least one federal court had found such liability, SEC v. Nat'l Student Marketing. Corp., 457 F. Supp. 682, 682 (D.D.C. 1978), and the SEC had begun disciplinary proceedings against some lawyers from prominent firms who had engaged in such conduct. *See* Michael J. Powell, *Developments in the Regulation of Lawyers: Competing Segments and Market, Client, and Government Controls*, 64 SOC. FORCES 281, 295–96 (1985). The ABA strongly criticized the SEC's actions. *Id.* at 296. The Model Rules failed to provide any specific ethical standards for lawyers practicing in particular fields, such as securities or in-house corporate counsel, opting instead for an "intermediate" level of generality which provided different rules addressed to different legal tasks like "advising, advocacy, negotiating, intermediating, and evaluating." Robert J. Kutak, *Evaluating the Proposed Model Rules of Professional Conduct*, 1980 AM. B. FOUND. RES. J. 1016, 1019 n.10 (1980). Model Rule 1.6(b) was later amended to reflect new disclosure obligations of corporate lawyers under the Sarbanes-Oxley Act in light of the Enron and Worldcom scandals. *See* Clifton Barnes, *ABA, States, and SEC Hash Out Lawyers' Responsibility in Corporate Settings*, 28 B. LEADER 6, 6 (2003).

those goals are within the bounds of the law, at least the criminal law.[116] Fostering compliance by clients with positive law, which reflects contemporary social, economic, and political norms, is the primary moral justification for the work of the corporate lawyer.[117]

### C. THE CORPORATE LAWYER AS ACCOMPLICE

The great danger of the lawyer-as-technician model is that an exclusive focus on achieving the client's goals can transform corporate lawyers from expert advisors to accomplices in immoral, fraudulent, or illegal business practice.[118] In recent years, there has been increasing concern that many corporate lawyers have stepped over the line from technicians to accomplices.[119] This concern reflects a number of significant changes in the world of business and law.

In some areas of considerable interest to business, the law has become increasingly obscure even contradictory. Consider the legality of marijuana sales, a felony under federal law, yet legal under statutes in many states.[120] This not-quite-legal activity could represent a substantial opportunity for certain types of businesses but advising such clients poses great dangers for lawyers who seek to advise them.[121] In the marijuana case, the contradictory legal rules are primarily the result of differing regional conceptions of the propriety and benefits of marijuana usage and the lack of a national consensus on that issue.[122] In other

116. *See supra* notes 8–11, 20 and accompanying text.

117. The Model Rules have been described as an attempt to "reprofessionalize" the business of lawyering by preserving substantial "autonomy of technique." Powell, *supra* note 115, at 300. Unlike the medical profession, where government regulations had a major impact on the way doctors provided medical services, "the essential task autonomy of lawyers remains unfettered." *Id.* It has also been argued that the adoption of the Model Rules moved ethical considerations away from the "aspirational tradition" of the lawyer-statesman, substituting a conception of ethics as composed solely of "clear penal rules." Gordon, *Citizen Lawyer*, *supra* note 39, at 1197.

118. *See infra* pp. 60–61, 73–74.

119. *See infra* pp. 60–61, 73–74.

120. *See infra* notes 126–30 and accompanying text.

121. *See infra* Part II.A.

122. *See infra* notes 123–25 and accompanying text. The ambiguity also reflects the increasing tendency of the executive, faced with legislative gridlock, to use the enforcement policy to effectively repeal or lessen the impact of disfavored laws. *See* Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 787–92 (2013); *see also* Zachary S.

areas, uncertainty may be created by large disparities between laws and regulations "on the books" and the way those laws and regulations are applied and enforced in actual practice.[123] Disparities may reflect that the formal rules have become technologically outdated, overly expensive to comply with, or lacking in government resources or commitment for detection and enforcement.[124] In these cases, so-called "disruptive" businesses may seek to operate in conscious disregard of such regulations with the hope of creating a social consensus in favor of their modification or repeal.[125]

Second, business professionals have increasingly come to see the law, or the adverse consequences of violations of the law, as simply another form of business risk that should be identified, quantified, minimized, and managed.[126] Corporate clients expect their lawyers and compliance departments to help structure their business operations to minimize legal exposure and detect lower level wrongdoing that could subject the company to unnecessary liability.[127] Yet they are also open to the possibility that certain corporate actions, although violations of laws with criminal penalties attached, might still constitute risks worth taking.[128] In making such determinations, corporate officers increasingly expect their legal advisors to give them information

Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 689–90 (2014).

123. *See infra* Parts II.B–C.

124. *See infra* Parts II.B–C.

125. *See* Pollman & Barry, *supra* note 5, at 427–28.

126. Pepper, *supra* note 20, at 1559–64; Pollman, *supra* note 5, at 724–28; Pollman & Barry, *supra* note 5, at 417–18, 427–28.

127. *See supra* note 93 and accompanying text.

128. Compliance departments treat legal risk by first evaluating the potential type, severity, and likelihood of risk contemplated. *See* Robert C. Bird & Stephen Kim Park, *Turning Corporate Compliance into Competitive Advantage*, 19 U. PA. J. BUS. L. 285, 304–11 (2017) (describing companies' varied approaches to, and inefficiencies in evaluations of, compliance risks); Maureen Mohlenkamp, *Compliance Risks: What You Don't Contain Can Hurt You*, DELOITTE, https://www2.deloitte.com/us/en/pages/finance/articles/cfo-insights-compliance-risks.html [https://perma.cc/59UP-KYVT] (defining "compliance risk" as "the threat posed to a company's financial, organizational, or reputational standing resulting from violations of laws, regulations, codes of conduct, or organizational standards of practice," and describing how Chief Compliance Officers (CCOs) mitigate such risk); *see also* Geoffrey Parsons Miller, *Compliance: Past, Present and Future*, 48 U. TOL. L. REV. 437, 438 (2017) (stating that CCOs, while calculating risks, "must take account of and be sensitive to the

not just on the content of the law, but the likelihood of its enforcement against the company in specific circumstances, as well as the monetary and other penalties that authorities are likely to impose.[129]

There is also concern that corporate lawyers are becoming less able and less willing to resist client requests for advice on how to violate the law while minimizing risks of detection and sanctions. This is partially the result of recent changes in the structure of corporate law firms, the increased specialization of corporate lawyers, and the intensity of both inter- and intrafirm competition among them.[130] It also reflects support, by some lawyers, for the "disruptive" practices of some contemporary businesses, which see violations of "minor" regulatory strictures as necessary to restructure industries more efficiently and profitably.[131]

Some corporate lawyers have always had trouble walking the line between advising clients about the law and facilitating criminal misconduct. My use of the phrase "lawyer as accomplice" is meant in a broad, metaphorical sense to describe any morally questionable facilitation of such misconduct, whether or not the lawyers involved meet the actual requirements for criminal liability as accessories. However, there have certainly been

basic business pressures facing their organizations"). Based on such evaluations, management and counsel might very well conclude that even criminally prosecutable actions are worth committing. *See* Constance E. Bagley et al., *Who Let the Lawyers Out?: Reconstructing the Role of the Chief Legal Officer and the Corporate Client in a Globalizing World*, 18 U. PA. J. BUS. L. 419, 439–48 (2016) (describing the increase of corporate criminal activity in recent years, possibly due to justifications that such misconduct would be "economically rational" and asking, "[h]ave companies accepted the payment of fines and damages as just a cost of doing business?"); Pollman, *supra* note 5, at 731–48 (listing numerous examples of open and intentional corporate legal violations).

129. *See supra* note 128.

130. Tax lawyers may have been among the first to succumb to such pressures. The development of a market in "abusive tax shelters" for corporations was based, in substantial part, on the exploitation by tax lawyers of the limited resources of the Treasury for detection and enforcement of shelters based on questionable factual or legal claims. *See* Tanina Rostain, *Sheltering Lawyers: The Organized Tax Bar and the Tax Shelter Industry*, 23 YALE J. REG. 77, 78 (2006). Although some of these abuses were ultimately constrained by new legislative and regulatory measures (supported by much of the tax bar), substantial issues remain. *See* John S. Dzienkowski & Robert J. Peroni, *The Decline in Tax Adviser Professionalism in American Society*, 84 FORDHAM L. REV. 2721, 2724–26 (2016).

131. *See infra* Parts II.B–C.

instances in recent history of criminal charges brought or threatened against corporate lawyers whose advice allegedly facilitated corporate crimes.[132]

Two recent developments have raised further concerns about the ethics of corporate lawyers. First, the Global Witness report demonstrated the willingness of many major law firms to aid what appeared to be corrupt foreign clients bringing money into the United States in violation of anti-money laundering and other laws.[133] Second, the Panama Papers documented actual in-

132. Two prominent examples are the Enron scandal (where no criminal charges against its law firm Vinson & Elkins were brought, but were likely deterred by a $30 million civil settlement) and the Lincoln Savings Bank collapse (where criminal charges were actually brought against Kaye Scholar by the banking regulator but were later settled). *See* Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1189 (2003); *see also* Smith, *supra* note 10, at 513–20.

133. *See* GLOBAL WITNESS, LOWERING THE BAR: HOW AMERICAN LAWYERS TOLD US HOW TO FUNNEL SUSPECT FUNDS INTO THE UNITED STATES (2016), https://www.globalwitness.org/documents/18208/Lowering_the_Bar.pdf [https://perma.cc/U6JA-CSW4]. Global Witness was a hoax, developed by an international NGO, to investigate the ethics of some major New York corporate law firms. *Id.* at 1. An investigator posed as an advisor to a West African government minister who was seeking to move millions of dollars, earned in exchange for granting mining rights, to a U.S. bank account. *Id.* at 1, 5–6. While none of the thirteen firms contacted actually agreed to take the minister on as a client, all except one provided helpful suggestions, apparently in anticipation of future representation. *Id.* at 1. Some suggested using anonymous companies or trusts to hide the assets, offered advice on how to move the money into the U.S. or offered use of their own bank accounts. *Id.* Only two firms stated that they could not assist. *Id.* Legal ethics professors William Simon and John Leubsdorf, after reviewing transcripts of the conversations between the investigator and three of the New York lawyers, concluded that each of the lawyers would have violated their ethical duties if the undercover investigator had been an actual prospective client. *See* Letter from John Leubsdorf, Distinguished Professor of Law, Rutgers Sch. of Law, William. H. Simon, Professor, Columbia Law Sch., and Professor Emeritus, Stanford Law Sch., to Global Witness (Jan. 28, 2015), https://www.globalwitness.org/documents/18209/Opinion_of_John_Leubsdorf_and_William_Simon.pdf [https://perma.cc/P55S-MD63]. Indeed, the Appellate Division of the New York Supreme Court recently issued public censures to at least two of the attorneys named in the report. Scott Flaherty, *Undercover '60 Minutes' Video Leads to NY Lawyer's Public Censure*, N.Y. L.J. (Jan. 16, 2019), https://www.law.com/newyorklawjournal/2019/01/16/undercover-60-minutes-video-leads-to-ny-lawyers-public-censure/. Several of the lawyers named in the report have publicly objected to the investigation's methods or the report's interpretations of their statements to the undercover investigator, or have otherwise tried to justify their statements as ethically permissible. *See* Louise Story, *Report Describes Lawyers' Advice on Moving Suspect*

stances of a Panamanian law firm helping clients evade detection of tax liability, money laundering, and other laws.[134] These actions are deeply troubling and have prompted powerful and well-taken jeremiads against the declining ethical standards of the profession.[135]

*Funds into U.S.*, N.Y. TIMES (Jan. 31, 2016), https://www.nytimes.com/2016/02/01/us/report-describes-lawyers-advice-on-moving-suspect-funds-into-us.html [https://perma.cc/33LG-FFJ7] (stating that one attorney "told The Times by email that his comment was meant to address privacy concerns that the supposed minister might have" as opposed to providing money laundering advice, and quoting another lawyer that said his clients use LLCs "not because they're hiding money" but because "they're afraid of being screwed by somebody").

134. *See* Eric Lipton & Julie Creswell, *Panama Papers Show How Rich United States Clients Hid Millions Abroad*, N.Y. TIMES (June 5, 2016), https://www.nytimes.com/2016/06/06/us/panama-papers.html [https://perma.cc/X373-A4WK]. The "Panama Papers" refer to the estimated eleven million leaked documents created by the Panamanian law firm Mossack Fonseca, documenting how it set up offshore bank accounts and shell companies on behalf of wealthy individuals from the U.S. and abroad. *See id.*; *see also* Peter J. Henning, *Panama Papers Show How Lawyers Can Turn a Blind Eye*, N.Y. TIMES (Apr. 11, 2016), https://www.nytimes.com/2016/04/12/business/dealbook/panama-papers-show-how-lawyers-can-turn-a-blind-eye.html [https://perma.cc/M2PM-BZ9D]. The leak prompted many in the media, as well as legal scholars, not only to question whether lawyers could avoid helping their clients engage in illegal activity, but also the rules dictating lawyers' obligations relating to such clients. *See, e.g.*, Henning, *supra* note 134 (describing how "legal ethics rules do little to restrict how lawyers can represent clients who flirt with the edges of the law"); *see also* Heather M. Field, *Offshoring Tax Ethics: The Panama Papers, Seeking Refuge from Tax, and Tax Lawyer Referrals*, 62 ST. LOUIS U. L.J. 35, 47–48 (2017) (suggesting that broadened enforcement of, or changes to, the Model Rules and other laws might prevent unethical referrals). In response to the Panama Papers, some countries have taken action to prevent lawyers from assisting their clients with committing tax evasion, money laundering, and similar crimes. *See* Laurel S. Terry & José Carlos Llerena Robles, *The Relevance of FATF's Recommendations and Fourth Round of Mutual Evaluations to the Legal Profession*, 42 FORDHAM INT'L L.J. 627, 638–39 (2018) (listing actions taken in Europe, the Middle East, and Latin America). In the U.S., five of Mossack Fonseca's American clients were recently indicted for "'falsely and fraudulently fail[ing] to report' their undeclared offshore accounts." Will Fitzgibbon, *What the Panama Papers Tell Us About the Clients in the Latest Bombshell Charges*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (Dec. 7, 2018), https://www.icij.org/investigations/panama-papers/what-the-panama-papers-tell-us-about-the-clients-in-the-latest-bombshell-charges [https://perma.cc/EN7L-PDW4].

135. *See, e.g.*, Mike Donaldson, *Lawyers and the Panama Papers: How Ethical Rules Contribute to the Problem and Might Provide a Solution*, 22 LAW & BUS. REV. AM. 363 (2016) (discussing how the ethical rules are insufficient to prohibit attorneys from helping clients break the law).

The focus of this Article, however, is somewhat different. It seeks to analyze and understand more morally ambiguous forms of legal advice. Such advice deals with activities which I term "not-quite legal." These activities are technical violations of criminal laws. Therefore, advising clients about them also violates Model Rule 1.2.[136] Yet the activities involved do not raise serious moral concerns for the lawyers involved nor perhaps for most members of the general public. Three of the most salient current examples of such activities are: (1) marijuana businesses; and "disruptive" startup enterprises like (2) Uber and (3) Airbnb. Part II provides a detailed analysis of the unique ethical problems each of these businesses pose for lawyers seeking to advise them.

## II. A LOOK AT THE ETHICAL AND LEGAL PROBLEMS OF SOME "DISRUPTIVE" BUSINESSES

### A. MIXED SIGNALS: THE LEGAL ETHICS OF ADVISING CANNABIS BUSINESSES

In most American states today, advising clients about the "law" regulating cannabis businesses requires interpretation of a complex mix of state regulation and contrary federal statutes, as well as ambiguous federal enforcement guidelines mixed with some reading of political tea leaves. Cannabis businesses currently operate in a gray area of the not-quite-legal, where their ability to conduct business requires conformity to complex state regulatory regimes while also attempting to remain outside of existing federal enforcement guidelines for activities that are still a clear, formal violation of federal criminal law.[137] Ethics commissions and advisory opinions increasingly recognize that in this unique legal environment, conscientious lawyering requires informing and assisting clients concerning federal enforcement policies to minimize the likelihood of enforcement action by federal authorities.[138] The very complexity and ambiguity of the law itself has created a situation where, in order to adequately advise the client, many lawyers feel it necessary to discuss and advise their clients on the likelihood of enforcement and the kinds of conduct that would minimize potential enforcement. Accordingly, the line drawn in Rule 1.2(d) between "advising"

136. MODEL RULES OF PROF'L CONDUCT r. 1.2 (AM. BAR ASS'N 2016).

137. *See infra* notes 140–44 and accompanying text.

138. *See infra* notes 171–77 and accompanying text.

about the content of the law and "assisting" in its violation seems to break down completely.[139]

The black letter law regarding production and sale of cannabis products can be succinctly stated. "Marihuana" is a Schedule I controlled substance under the federal Controlled Substances Act.[140] Any person or entity that "knowingly or intentionally" manufactures, distributes, or dispenses marijuana, or possesses with intent to manufacture, distribute, or dispense such a substance, is guilty of a criminal violation of federal law and is subject to imprisonment and substantial fines.[141] Nevertheless, many states have adopted statutes that purport to legalize the manufacture, distribution, dispensing, and possession of marijuana, either for medical or recreational purposes.[142] These statutes, while frequently declaring certain uses and sales of marijuana products "lawful," do not and cannot change the federal statutory prohibition.[143] Accordingly, as a matter of authoritative legal doctrine, marijuana use, sale, and manufacture remains illegal in all fifty states, with no exceptions for medical or other use.[144]

When we move from the "law on the books" to the "law in action," however, the situation looks quite different. The passage of legislation purporting to legalize marijuana has given rise to

139. MODEL RULES OF PROF'L CONDUCT r. 1.2(d) (AM. BAR ASS'N 2016).

140. 21 U.S.C. § 812(c) (2012).

141. *Id.* § 841.

142. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 11357 (West 2018); COLO. REV. STAT. § 44-12-102 (2018); N.Y. PENAL LAW § 221 (McKinney 2019).

143. Although it has been cogently argued that these state statutes are not preempted by federal law, because they are compatible with obedience to federal law, such arguments do not challenge the continued validity of the federal prohibition. *See, e.g.*, Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 102–03 (2015); Franklin Guenthner, *Pot,* Printz*, and Preemption: Why States Can "Just Say No" to Jeff Sessions and the Controlled Substances Act*, MINN. L. REV.: DE NOVO (Apr. 26, 2017), http://www.minnesotalawreview.org/2017/04/pot-printz-and-preemption [https://perma.cc/PZ7V-LZ39].

144. There have been a few attempts by legal scholars to argue that subsequent developments may have rendered the federal prohibition on marijuana production and sale invalid, but they seem unlikely to be adopted by federal courts in the near future. *See* Robert Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV 1421, 1423 (2009); *see also* Andrew LeVay, Note, *Urgent Compassion: Medical Marijuana, Prosecutorial Discretion and the Medical Necessity Defense*, 41 B.C. L. REV. 699, 701 (2000).

a multi-billion dollar industry.[145] "Legal" sales of marijuana products in the United States were estimated to be about 9 billion dollars in 2017.[146] At that time, 30 states had laws legalizing marijuana use for medical purposes, and nine had laws legalizing recreational use.[147] In January 2018, licensing authorities in California were instructed to begin issuing licenses to businesses providing recreational marijuana for adult use.[148] News media and other forms of popular discourse frequently refer to states that have "legalized" marijuana.[149] One can easily find advertisements for programs that purport to instruct potential entrepreneurs how to start and operate various cannabis-related businesses.[150] There are also programs directed at lawyers who seek to advise such businesses.[151]

Underlying all this activity is the perception by most knowledgeable observers that the likelihood of federal enforcement action against activities expressly permitted under the various state statutes is slight. This was not always the case. During George W. Bush's administration, the federal government frequently took action against businesses engaged in the sale of

145. Aaron Smith, *The U.S. Legal Marijuana Industry Is Booming*, CNN MONEY (Jan. 31, 2018), https://money.cnn.com/2018/01/31/news/marijuana-state-of-the-union/ [https://perma.cc/Y75N-MZUM].

146. *Id.*

147. *Id.* Other authorities have put the number of states permitting "some extent of medical marijuana use" at thirty-five. *See* BLUE RIBBON COMM'N ON MARIJUANA POLICY, PATHWAYS REPORT: POLICY OPTIONS FOR REGULATING MARIJUANA IN CALIFORNIA (2015) https://www.safeandsmartpolicy.org/wp-content/uploads/2015/07/BRCPathwaysReport.pdf [https://perma.cc/CZ4E-S5XW].

148. CAL. BUS. & PROF. CODE § 26012(d) (West 2018).

149. *See, e.g.*, Zoe Chevalier, *Recreational Marijuana: A Business Boon for States?*, U.S. NEWS (Aug. 1, 2018), https://www.usnews.com/news/best-states/articles/2018-08-01/the-legalization-of-recreational-marijuana-an-economic-opportunity-for-states [https://perma.cc/8S5Q-AV2E] (discussing the possible boon to Massachusetts in "legalizing" marijuana); Adia Robinson, *Where States Stand on Legalizing Recreational and Medical Marijuana*, ABC NEWS (July 14, 2018), https://abcnews.go.com/Politics/states-stand-legalizing-recreational-medical-marijuana/story?id=56466308 [https://perma.cc/K9EN-4BNP]; *see also* Sean Williams, *3 Surprising Stocks That Could Benefit from Marijuana's Legalization*, MOTLEY FOOL (Sept. 13, 2018), https://www.fool.com/investing/2018/09/13/3-surprising-stocks-that-could-benefit-from-mariju.aspx [https://perma.cc/SEU7-RMBD].

150. *See* GREENZIPP, https://greenzipp.com [https://perma.cc/H24Q-G9AM].

151. *See, e.g.*, Brochure, DRI Cannabis Law Seminar: Litigation Tips, Risk Mitigation, Policy Updates, and Strategies in a Developing Regulatory Landscape (May 15, 2019) (on file with author).

medical marijuana.[152] During his first Presidential campaign, Barack Obama pledged to curtail such raids.[153] After his election, the Justice Department issued a series of statements which seemed to effectuate and even go beyond that pledge. A 2009 statement by Deputy Attorney General Ogden announced that, "[a]s a general matter, pursuit of [federal] priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."[154] After this statement was issued there was substantial expansion of medical marijuana dispensaries.[155] The Justice Department quickly backtracked. It issued another announcement in 2011 stating that the Ogden Memorandum "was never intended to shield [marijuana production and sale] from federal enforcement action and prosecution, even where those activities purport to comply with state law."[156] This retrenchment was accompanied by actual legal actions taken by U.S. Attorneys against marijuana dispensaries in a number of states.[157] On August 29, 2013, however, federal policy appeared to change once again.[158] Deputy Attorney General James Cole issued a memorandum setting forth federal "priorities" for enforcement of the law regarding marijuana production and sale.[159] In general, those priorities were compatible with the new state laws and seemed to signal a federal policy of noninterference with reasonable and well-administered state laws regarding marijuana sales.[160]

152. *See, e.g.*, Cheryl Thompson, *DEA Chief Tough on Medical Marijuana*, WASH. POST, Aug. 21, 2001, at A4.

153. Chemerinsky et al., *supra* note 143, at 86.

154. Memorandum from Deputy Attorney General David Ogden to Selected United States Attorneys (Oct. 19, 2009) (on file with author) [hereinafter Ogden Memo].

155. Chemerinsky et al., *supra* note 143, at 87.

156. Memorandum from Deputy Attorney General James Cole to All United States Attorneys (June 29, 2011) (on file with author) [hereinafter Cole Memo I].

157. Chemerinsky et al., *supra* note 143, at 88.

158. *See* Memorandum from Deputy Attorney General James Cole to All United States Attorneys (Aug. 29, 2013) (on file with author) [hereinafter Cole Memo II].

159. *Id.* These priorities included prevention of sale to minors, denying revenue to criminal enterprises, and preventing facilitation of sales of other illegal drugs.

160. *See* Bradley Markano, *Enabling State Deregulation of Marijuana Through Executive Branch Nonenforcement*, 90 N.Y.U. L. REV. 289, 291 (2015)

The election of Donald Trump was followed by a new announcement of federal enforcement policy. On January 4, 2018, Attorney General Sessions issued a statement disavowing the need for any "nationwide guidance specific to marijuana enforcement" and expressly rescinded all the guidance issued on this subject during the Obama administration.[161] Instead, he stated that federal prosecutors should "follow the well-established principles that govern all federal prosecutions."[162] While some observers believe the Sessions Memo may portend a new round of federal prosecutions in legalizing states, so far this does not appear to have occurred.[163]

At the formal level, state and federal law are directly contradictory and incompatible. The flexible and discretionary nature of federal enforcement policy, however, has created the possibility that cannabis businesses in many states can conduct their activities, if not quite legally, at least without state or federal impediment.[164] This is obviously critical information for

(commenting on the President's apparent intention to "deprioritize and even ignore" marijuana activity that is monitored and regulated by the states); *see also* Cole Memo II, *supra* note 158, at 3 (stating in part that, "[i]n jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems . . . enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity").

161. Memorandum from Attorney General Jefferson Sessions to All United States Attorneys (Jan. 4, 2018) (on file with author) [hereinafter Sessions Memo].

162. *Id.*; *see also* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 9-27.200 (218) (elaborating on the probable cause requirement and the principles of prosecutorial discretion U.S. Attorneys have in launching an investigation into a supposed violation of federal law).

163. A number of bills that would legalize marijuana businesses in states that permit it have been introduced in Congress. The one that has received the most attention is the "Strengthening the Tenth Amendment Through Entrusting States Act" (STATES Act) introduced on June 7, 2018 by Senators Cory Gardner and Elizabeth Warren. STATES Act, S. 3032, 115th Cong. (2018). Many interpret President Trump's positive comments regarding the STATES Act and his meeting with Senator Gardner to mean that the Sessions Memo's rescinding of prior guidance will not inhibit the cannabis industry in states like Colorado. *See* Evan Halper, *Trump Administration Abandons Crackdown on Legal Marijuana*, L.A. TIMES (Apr. 13, 2018), https://www.latimes.com/politics/la-na-pol-marijuana-trump-20180413-story.html [https://perma.cc/XQP9-NJGU].

164. *See supra* notes 152–63 and accompanying text (detailing the broad swings in federal enforcement policy in recent years).

lawyers to impart to their clients who wish to engage in cannabis-related activities. The mere fact that it can be done, however, is insufficient. Lawyers must explain how it can be done. What kinds of activities are likely to come to the attention of federal authorities? What kinds of activities are most likely to concern them? Can such activities be prevented, diminished, or concealed from federal scrutiny? It is easy to see how attempting to answer such questions could be construed as "assisting" a federal criminal enterprise, not merely "advising" on matters of law.

Of course, it is possible for lawyers of the old school to counsel their clients against engaging in such activities at all, at least until the law has been clarified by definitive statutes or court rulings.[165] It is hard to imagine many contemporary American corporate lawyers concluding that is the appropriate advice to give. For one thing, it would probably lose them the client.[166] For an entrepreneur contemplating starting or expanding a cannabis business where such an enterprise would be legal under state law, the legal risks of going forward would appear to be far outweighed by the business risks of waiting.[167] Moreover, as state marijuana legalization laws proliferate and the businesses themselves grow at fantastic rates, it becomes increasingly hard to imagine any federal administration seeking to change enforcement policies in a way that would dismantle a multi-billion dollar industry that is a source of rapidly increasing tax revenues.[168]

More importantly, it is extremely doubtful that, in the current legal environment, advising a client to avoid or abandon a

165. *See, e.g.*, Reinhart, *supra* note 23, at 8–9.

166. On the contemporary importance of lawyers retaining their clients, see *supra* text and notes 97, 104–05.

167. There is undoubtedly a first mover advantage to being one of the early entrants into the market, establishing a loyal customer base, perhaps some brand recognition and reputational good will, all before larger, richer competitors come in and make it more difficult to get a foothold on the market. From this perspective, even the uncertainty regarding the legality of the product represents a sort of competitive advantage, since it likely is keeping the big cigarette, liquor and drug companies out of the market for some time. Even the remaining legal risk has some upside in that it makes the business seem attractively disruptive and "edgy." *See* Katie Conley, *The Dopest Cannabis Commercial (Ever)*, DOPE MAG. (Nov. 7, 2017), https://dopemagazine.com/briteside-pharma-parody-commercial/ [https://perma.cc/C35S-S69U] (discussing the Briteside delivery company's pharmaceutical-parody commercial, featuring trite strumming instrumentals over lines describing their product as "sticky-icky").

168. *See supra* notes 145–49 and accompanying text.

marijuana business because of its formal illegality would be complete and accurate legal advice. First, it fails to provide clients with a realistic account of the actual legal situation their businesses face. The fact that all cannabis businesses are formally illegal under federal law should not be treated as the sole dispositive fact but simply one of many legally significant facts about current regulatory practices, which indicate some degree of acquiescence by federal authorities in the newer state approaches to "legalization."[169] This presents the client with a fuller, more accurate picture of what "the law" in this area actually is.

Second, many lawyers would view the issue here as not one of legality to be determined by the lawyer, but one of risk preference to be determined by the client. That is, once the lawyers have set forth all the relevant legal and regulatory considerations, including their best estimate of the probabilities of various changes in the status quo, it is up to the client to make the ultimate risk assessment as to whether to conduct such activities based on business, financial, and legal concerns.[170] This does not mean that every legal question should be converted to a risk management problem. But in the unique circumstances of marijuana regulation, where government enforcement policies rather than formal legal rules appear to provide the most relevant normative guidance, a risk management-based client decision might well be both appropriate and prudent.

State ethics commissions are increasingly coming to similar conclusions,[171] although there remain divergences and disagreements in the advice they give to lawyers regarding advising marijuana businesses. Recognizing the unique state of the law in this area, some states have promulgated additional rules to their codes of professional conduct, additional comments to the existing rules, or issued specific advisory ethics opinions dealing with the appropriate role of the lawyer in advising marijuana businesses.[172] A number of early opinions took the formalist position, concluding that the federal statutory prohibition makes it unethical for lawyers to advise or assist marijuana businesses, even in states that have legalized it for medical or other purposes.[173]

169. *See supra* notes 152–63 and accompanying text (detailing varied federal enforcement policies).

170. *See supra* notes 85–89, 105–14 and accompanying text.

171. *See infra* note 173 and accompanying text.

172. *See infra* note 174 and accompanying text.

173. However, many of these decisions have subsequently been rescinded or

Others essentially track the language of the Model Rule, stating that as long as lawyers disclose both relevant state and federal laws concerning marijuana, lawyers may "discuss the legal consequences of any proposed course of conduct with a [marijuana business] client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."[174] These rules permit lawyers to "counsel and assist" clients regarding application of state law and frequently cite the need to discuss federal "policy" as well as "law."[175] This suggests it is permissible for lawyers to render assistance to clients who seek to establish marijuana businesses so long as they are compliant with state law and unlikely to engender enforcement interest under federal policy guidelines. They do not, however, expressly say that.

A third category of rules, comments, and advisory opinions expressly allow lawyers to render legal assistance to marijuana businesses irrespective of contrary federal law with various levels of specificity. For example, the New York State Bar Ethics Committee concluded in 2014 that New York's Rules of Professional Conduct permits a lawyer "to assist a client in conduct designed to comply with state medical marijuana law, notwithstanding that federal narcotics law prohibits [such sales]."[176] Illinois Rules of Professional Conduct state that lawyers may "counsel or assist a client in conduct expressly permitted by Illinois law that may violate or conflict with federal or other law, as

modified. *See, e.g.*, Me. Prof'l Ethics Comm'n Op. No. 199 (July 7, 2010), *superseded by subsequent opinions*, Me. Prof'l Ethics Comm'n Op. No. 214 (May 4, 2016), *and* Me. Prof'l Ethics Comm'n Op. No. 215 (Mar. 1, 2017). *Compare* Ohio Bd. of Prof'l Conduct Op. 2016-6 (Aug. 5, 2016) ("[A] lawyer cannot deliver legal services to assist a client in the establishment and operation of a state regulated marijuana enterprise that is illegal under federal law."), *with* OHIO RULES OF PROF'L CONDUCT 1.2(d)(2) (OHIO STATE BAR 2017) (explaining, after a rules amendment adopted only one month after the Ohio Board of Professional Conduct's opinion, that "[a] lawyer may counsel or assist a client regarding conduct expressly permitted under [Ohio's medical marijuana statute]").

174. MODEL RULES OF PROF'L CONDUCT r. 1.2(d) (AM. BAR ASS'N 2019). *See, e.g.*, COLO. RULES OF PROF'L CONDUCT r. 1.2 cmt. 14 (COLO. BAR ASS'N 2016); OR. RULES OF PROF'L CONDUCT r. 1.2(d) (OR. STATE BAR 2018) ("[A] lawyer may counsel and assist a client regarding Oregon's marijuana-related laws. In the event Oregon law conflicts with federal or tribal law, the lawyer shall also advise the client regarding related federal and tribal law and policy."); WASH. RULES OF PROF'L CONDUCT r. 1.2 cmt. 18 (WASH. STATE BAR ASS'N 2018).

175. OR. RULES OF PROF'L CONDUCT r. 1.2(d).

176. N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op. 1024 ¶ 26 (Sept. 29, 2014).

long as the lawyer advises the client about that federal or other law and its potential consequences."[177]

Increasingly, various state authorities on the ethics of advising marijuana clients seem to tacitly endorse the conclusion that, under the complex and uncertain state of current law and federal enforcement policy, it is appropriate for lawyers to advise cannabis clients as to how to comply with relevant state laws while also minimizing the danger of federal enforcement.[178] While the existence of such authorities make it unlikely the lawyers will be subject to state disciplinary proceedings for providing such advice or assistance, this can only be a small comfort to cannabis lawyers, whose more serious concerns lie elsewhere.[179] Moreover, the relatively permissive attitude of the new ethics rules are based, implicitly and frequently explicitly, on the non-interventionist federal enforcement policies of the later Obama years. The rules regarding the counsel of cannabis clients would certainly change if the Trump Justice Department adopts a more aggressive policy of enforcement of federal marijuana laws.[180] Additionally, ethics advisory opinions and rule comments are not binding on courts,[181] making the threat of private lawsuits the greatest danger to marijuana lawyers.[182]

177. ILL. RULES OF PROF'L CONDUCT r. 1.2(d) (ILL. STATE BAR ASS'N 2016). *See also id.* cmt. 10 (stating that Rule 1.2(d) was adopted to "address the dilemma facing a lawyer in Illinois after the passage of the Illinois Compassionate Use of Medical Cannabis Pilot Program Act").

178. *See supra* notes 171–77 and accompanying text.

179. David L. Hudson Jr., *Not So Fast*, 103 A.B.A. J. 24 (Jan. 2017) ("'As far as I know, no attorney has ever been disciplined for providing typical services to someone who is obeying state law on medical marijuana,' says Robert Mikos, an expert on federalism and drug law who teaches a course on marijuana law and policy at Vanderbilt University Law School . . . .").

180. *See, e.g.*, N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op. 1024 ¶ 25 (Sept. 29, 2014).

181. *See, e.g.*, VA. STATE BAR PROF'L GUIDELINES § 10-2(C) (VA. STATE BAR 2016) ("Advisory Opinions express the judgment of the Committee and are not binding on any judicial or administrative tribunal."); *Colorado Ethics Handbook*, COLORADO BAR ASS'N, https://www.cobar.org/ethicsopinions [https://perma.cc/R6DU-KW39] ("Formal Ethics Opinions are issued for advisory purposes only and are not in any way binding on the Colorado Supreme Court, the Presiding Disciplinary Judge, the Attorney Regulation Committee, or the Office of Attorney Regulation Counsel and do not provide protection against disciplinary actions.").

182. It is in private lawsuits that the potential loss of attorney-client privilege, malpractice insurance coverage, and some of the other risks of representing marijuana businesses are most likely to occur. *See infra* notes 185–87 and accompanying text.

In the Winter 2017 issue of *Criminal Justice*, an ABA publication, a former federal prosecutor cautioned that "tremendous legal and ethical risks exist for any lawyer representing clients in [the cannabis market], despite state laws and bar opinions to the contrary."[183] He went on to list some of the many potential adverse consequences, all of which flowed from the possibility that any lawyer who goes beyond strictly advising about the prohibitions of federal marijuana law risks being found to have "assist[ed]" and thereby aided and abetted a criminal act.[184] Lawyers who are held to have aided and abetted such criminal acts could be denied coverage under their malpractice insurance if they are ever sued for malpractice by a disgruntled marijuana client.[185] Their attorneys' fees could be subject to forfeiture for knowingly accepting money from an illegal source.[186] And their conversations with marijuana clients might not be protected as attorney-client communications in any lawsuits to which they were relevant.[187]

These risks are substantial and serious enough that they are probably keeping a large number of corporate lawyers from seeking to advise marijuana businesses despite their ability and expertise. Some might view this as a positive result: an example of appropriate lawyer caution in dealing with companies skirting the boundaries of criminal illegality.[188] Such concerns are not without foundation, as discussed in later parts of this piece.[189] In the particular case of assisting marijuana businesses, however, I believe they are misplaced.

Lawyers who avoid assisting marijuana businesses solely out of fear of adverse consequences are doing so neither out of ethical concerns nor respect for the law. They are simply reacting, in a hyper-cautious way, to the complex and uncertain legal

183. Reinhart, *supra* note 23, at 5.

184. *Id.* at 5. It is worth noting that these warnings were made before the Sessions statements that modified Cole Memo II. *See supra* notes 159–61 and accompanying text.

185. Reinhart, *supra* note 23, at 9.

186. *Id.* (detailing further that if the fee is more than $10,000 and the lawyer knows it came from a legal marijuana business, it may constitute a separate money laundering crime under 18 U.S.C. § 1957 (2018)); *see* 18 U.S.C. § 1957 (2012).

187. Reinhart, *supra* note 23, at 8.

188. Indeed, it would seem that articles like Reinhart's were intended to encourage precisely such lawyerly caution. *Id.* at 8–9 (detailing all the reasons not to represent marijuana businesses).

189. *See infra* Part III.B.

environment that currently constitutes regulation of the cannabis business. That complexity and uncertainty are not the result of any conscious regulatory choices by political or judicial actors, but stem from a series of compromises and contradictions engendered by: (1) local politicians ignoring difficult problems of federalism; (2) legislative gridlock at the federal level; (3) an increasing tendency of the federal executive to substitute enforcement policies for legislative proposals; and (4) deep political divisions among Americans themselves.[190] The results are unfortunate for both cannabis businesses and the lawyers who would like to represent them. Many such lawyers will decide the risks are simply too great, thereby reducing the number of skilled, talented, and ethical lawyers available to such businesses. This not only increases the cost of legal services to such businesses but also makes it more likely many will be counseled by unskilled lawyers, unethical lawyers, or by no lawyers at all. Finally, the lawyers who do undertake such representation must always operate under a cloud of uncertainty and unnecessary risk created not by their own actions, but by the incoherence of the regulatory environment in this field. This "debilitating instability and uncertainty"[191] provides the strongest argument in favor of modifying or at least interpreting current ethical rules in a way that clarifies lawyers' obligations and reduces their risks.

### B. THE DOWNSIDE OF DISRUPTION: UBER AND ITS DISCONTENTS

Uber is a spectacular financial success but a legal and ethical disaster. Until its recent initial public offering, it was considered the most valuable private start-up company in the world,[192] having received proposals from Wall Street banks valuing it at as much as $120 billion.[193] At the same time, it is the subject of

190. Chemerinsky et al., *supra* note 143, at 77 ("The ongoing clash over marijuana laws raises questions of tension and cooperation between state and federal governments and forces policymakers and courts to address the preemptive power of federal drug laws. Divergent federal and state laws also create debilitating instability and uncertainty on the ground in those states that are pioneering new approaches to marijuana control.").

191. *Id.* at 77.

192. Nathan McAlone, *How Uber Became the Most Valuable Startup in the World*, BUS. INSIDER (Sept. 14, 2015), https://www.inc.com/business-insider/how-uberbecame-the-most-valuable-startup-in-the-world.html [https://perma.cc/44YT-RVLE]; Sara Ashley O'Brien, *Uber Is the Most Valuable Startup in the World*, CNN MONEY (July 31, 2015), https://money.cnn.com/2015/07/31/technology/uber-50-billion-valuation [https://perma.cc/AF9R-2MTH].

193. Liz Hoffman et al., *Uber Proposals Value Company at $120 Billion in a*

at least five federal criminal investigations.[194] Its founder and CEO, Travis Kalanick, was forced to resign at the request of major investors.[195] It has a problematic workplace culture that has given rise to allegations of discrimination and sexual harassment.[196] Some municipalities have passed legislation specifically designed to limit further growth of Uber's business,[197] and commentators have called for regulators to dissolve the company, citing, among other things, its "fundamental illegality."[198]

There is no serious dispute that Uber's business success is based in substantial part on its violation of existing law. Although it styled itself as a technology company, Uber is basically a private car service that allows pre-booking and the collection of driver and customer information with a very sophisticated app.[199] Uber's great competitive advantage, however, is that it

*Possible IPO*, WALL STREET J. (Oct. 16, 2018), https://www.wsj.com/articles/uber-proposals-value-company-at-120-billion-in-a-possible-ipo-1539690343 [https://perma.cc/KT7G-ZQL8]. When the actual initial public offering took place, Uber shares were priced to give a valuation of about $82.4 billion, which was considered somewhat disappointing. Michael J. de la Merced & Kate Conger, *Uber I.P.O. Values Ride-Hailing Giant at $82.4 Billion*, N.Y. TIMES (May 9, 2019), https://www.nytimes.com/2019/05/09/technology/uber-ipo-stock-price.html [https://perma.cc/5J7J-M3CC].

194. Eric Newcomer, *Uber Pushed the Limits of the Law. Now Comes the Reckoning*, BLOOMBERG (Oct. 11, 2017), https://www.bloomberg.com/news/features/2017-10-11/uber-pushed-the-limits-of-the-law-now-comes-the-reckoning [https://perma.cc/F8KD-TTSZ].

195. Mike Isaac, *Uber Founder Travis Kalanick Resigns as C.E.O.*, N.Y. TIMES (June 21, 2017), https://www.nytimes.com/2017/06/21/technology/uber-ceo-travis-kalanick.html [https://perma.cc/W3TP-TTJK].

196. Mike Isaac, *Inside Uber's Aggressive, Unrestrained Workplace Culture*, N.Y. TIMES (Feb. 22, 2017), https://www.nytimes.com/2017/02/22/technology/uber-workplace-culture.html [https://perma.cc/G5QB-RW8A].

197. Emma G. Fitzsimmons, *Uber Hit with Cap as New York City Takes Lead in Crackdown*, N.Y. TIMES, (Aug. 8, 2018), https://www.nytimes.com/2018/08/08/nyregion/uber-vote-city-council-cap.html [https://perma.cc/7ZX5-VQJ2].

198. Benjamin Edelman, *Uber Can't Be Fixed—It's Time for Regulators to Shut It Down*, HARV. BUS. REV. (Jun. 21, 2017), https://hbr.org/2017/06/uber-cant-be-fixed-its-time-for-regulators-to-shut-it-down [https://perma.cc/W9SC-CZQY]; *see also* Frank Pasquale & Siva Vaidhyanathan, *Uber and the Lawlessness of 'Sharing Economy' Corporates*, GUARDIAN (July 28, 2015), https://www.theguardian.com/technology/2015/jul/28/uber-lawlessness-sharing-economy-corporates-airbnb-google [https://perma.cc/W57Z-7EUW].

199. Pollman & Barry, *supra* note 5, at 385 ("Uber is essentially running a taxi dispatch service for the smartphone age.").

chose not to comply with the costly regulatory structure that governed taxis and car services in most municipalities.[200] By ignoring those regulations, Uber became the cheapest and most cost-effective provider of ride services in the municipalities in which it operated,[201] despite its illegality.[202]

Uber's basic business model certainly involved the deliberate violation of laws with criminal penalties.[203] For some commentators, that fact alone, plus the harm it has caused to traditional taxi drivers, is enough to condemn it.[204] Others, however, point out that the regulatory structure that Uber is challenging is itself subject to serious criticism as antiquated, inefficient, monopolistic, and designed to increase costs to consumers.[205] This was certainly the view that Uber's management (and its lawyers) took.[206] It is important to note that Uber was not breaking the law merely to gain a cost advantage over competitors. It was seeking to build a popular constituency for changes in the law,

200. *Id.* ("Uber and many other businesses are built around and based upon a plan to change the law—and, in some instances, to simply break the law in the meantime.").

201. Edelman, *supra* note 198 ("With regular noncommercial cars, Uber and its drivers avoided commercial insurance, commercial registration, commercial plates, special driver's licenses, background checks, rigorous commercial vehicle inspections, and countless other expenses. With these savings, Uber seized a huge cost advantage over taxis and traditional car services.").

202. *See infra* notes 209–10 and accompanying text.

203. *See, e.g.*, Complaint at 1–2, 8, City of Portland v. Uber, No. 14-cv-01958 (Or. Cir. Ct. Dec. 8, 2014) [hereinafter Uber Complaint] (seeking a declaration that Uber was operating in "violation of the City of Portland's Private For-Hire Transportation Regulations and Administrative Rules" which among other things, provided for criminal penalties of "a fine of $1,000 or imprisonment for not more than six months or both").

204. Thor Berger et al., *Drivers of Disruption? Estimating the Uber Effect*, OXFORD MARTIN (Jan. 23, 2017), https://www.oxfordmartin.ox.ac.uk/downloads/academic/Uber_Drivers_of_Disruption.pdf [https://perma.cc/6HD2-SMTG] (finding a mixed effect by Uber on employment by traditional taxi services, but that "it has reduced the earnings potential of incumbent drivers"); Emma G. Fitzsimmons, *Taxi Drivers in New York Are Struggling. So Are Uber Drivers*, N.Y. TIMES (June 17, 2018), https://www.nytimes.com/2018/06/17/nyregion/uber-taxi-drivers-struggle.html [https://perma.cc/8LB8-6P65].

205. *See* Judd Cramer & Alan B. Krueger, *Disruptive Change in the Taxi Business: The Case of Uber*, 106 AM. ECON. REV. 177, 181 (May 2016) (finding greater efficiency of ride sharing services over conventional taxis attributable to, *inter alia*, technological innovation and avoidance of outdated regulation); *see also* Pollman & Barry, *supra* note 5, at 391 (explaining the ability of "regulator entrepreneurship" to combat laws whose costs exceed their benefits).

206. Newcomer, *supra* note 194.

changes that it thought would be beneficial to consumers as well as other private car services, although its own business was likely to benefit most.[207]

Uber's basic business model can be seen as posing an ethical dilemma for its lawyers analogous, in certain ways, to that of the cannabis lawyers. It involves deliberate conduct which clearly violates laws containing criminal penalties, but there were good reasons to believe those laws might be underenforced and potentially subject to modification in many municipalities.[208] Indeed, that had been the experience of Uber and other ride sharing companies. While some municipalities, like Portland, Oregon strongly opposed their illegal operations,[209] many others were willing to negotiate modifications of their regulations that permitted Uber to operate legally.[210] Accordingly, if we focus only on the illegality of Uber's basic ride-sharing business, a good case can be made that the ethical rules pose unnecessary limits on useful legal advice and unduly restrict potentially beneficial legal change. Accordingly, as with cannabis, a case could be made that Uber's lawyers should be able to freely advise on the company's efforts to change its not-quite-legal activities to legal ones.

But Uber's basic business model should not be viewed in isolation. Something went badly wrong with Uber's corporate culture, and its approach to law and law-breaking was an important part of that failure.[211] Uber's deliberate violations of law were not limited to the questionable municipal taxi regulations challenged by Uber's basic business model.[212] It extended to a great deal of other illegal and frequently criminal activities which were designed to give Uber further competitive advantages that could not be justified under any reasonable concept of law reform.

207. Pollman & Barry, *supra* note 5, at 398–406.

208. Newcomer, *supra* note 194 (explaining that Uber management apparently took the position that they had tacit approval to operate anywhere the existing regulations were not being "actively enforced").

209. *See* Uber Complaint, *supra* note 203.

210. *See* Pollman & Barry, *supra* note 5, at 400–03 (referring to this power as becoming "too big to ban").

211. See Jennifer Hill, *Legal Personhood and Liability for Flawed Corporate Cultures* (Sydney Law Sch., Research Paper No. 19/03, 2019), http://ssrn.com/abstract=3309697 (follow "Open PDF in Browser"), for an insightful contemporary discussion of "toxic" corporate cultures and comparative legal responses to them.

212. *See infra* notes 226–33 and accompanying text.

Foremost among these unreasonable illegal advantages was the "Greyball" program, which reportedly used "data collected from the Uber app and other techniques to identify and circumvent officials who were trying to clamp down on the ride-hailing service."[213] When Uber began operating in violation of existing regulations, Greyball enabled Uber to identify enforcement officials who were seeking to verify and provide evidence of Uber's illegal operations.[214] If the program determined the purported customer was likely to be a government inspector, it sought to avoid detection by: (1) telling that customer no cars were available; (2) scrambling "ghost cars" on the app; or (3) in cases where the rider had already been picked up, instructing the driver to terminate the ride immediately.[215] The program was utilized globally and was approved by Uber's General Counsel.[216] The use of the Greyball program to evade governmental detection may well have been a criminal violation in itself.[217] The approval given by Uber's lawyers would have also constituted unethical advice and assistance to Uber's criminal conduct under Rule 1.2(d).

Attempting to evade detection by government authorities undercuts the entire law reform rationale of Uber's business model. The effort at law reform is based on public demonstrations of the efficiency and convenience of Uber's ride hailing service and the absence of the kinds of problems regulators feared would result from the operation of such service without existing administrative safeguards.[218] Preventing government officials

213. Mike Isaac, *How Uber Deceives the Authorities Worldwide*, N.Y. TIMES (Mar. 3, 2017), https://www.nytimes.com/2017/03/03/technology/uber-greyball-program-evade-authorities.html [https://perma.cc/JZR8-Z5D2].

214. *Id.*

215. *Id.*

216. *Id.*

217. Peter Henning, a law professor at Wayne State University, noted that the Greyball program might violate the federal Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (2012), or constitute "intentional obstruction of justice, depending on local laws and jurisdictions . . . ." *Id.* In 2017, the Department of Justice apparently opened a criminal investigation concerning Greyball. Dan Levine & Joseph Menn, *Exclusive: Uber Faces Criminal Probe over Software Used to Evade Authorities*, REUTERS BUS. NEWS (May 4, 2017), https://www.reuters.com/article/us-uber-tech-crime-exclusive/exclusive-uber-faces-criminal-probe-over-software-used-to-evade-authorities-idUSKBN1802UI [https://perma.cc/FPT5-54UL].

218. Isaac, *supra* note 213 ("The mayor of Portland, Ted Wheeler, said in a statement, 'I am very concerned that Uber may have purposefully worked to thwart the city's job to protect the public.'").

from observing that service and potentially misleading them about its actual operations is inconsistent with such efforts.[219] It brings Uber counsel's actions closer to those of the Global Witness and Panama Papers lawyers, helping a client evade detection of ongoing criminal conduct for the sole purpose of avoiding criminal penalties.[220]

Greyball was bad enough, but Uber has been accused of a number of other forms of criminal misconduct even more serious, although less closely connected to its basic ride-hailing business.[221] There has been general agreement that these problems were primarily self-inflicted and stemmed from Uber's seriously toxic corporate culture.[222] Even Dara Khosrowshahi, who became Uber's CEO after Travis Kalanick's departure, recognized the serious problems, pledging to clean up Uber's culture and instill a new ethic of doing "the right thing."[223] Corporate culture is not a topic that is frequently discussed by corporate lawyers

219. *See*, *e.g.*, Levine & Menn, *supra* note 217.

220. Isaac, *supra* note 213; *cf.* Lipton & Creswell, *supra* note 134 (explaining how lawyers encouraged the use of off-shore accounts and straw men to avoid detection for tax fraud).

221. These include theft of intellectual property in connection with self-driving vehicles, violation of price transparency laws regarding its drivers, bribery of foreign officials under the Foreign Corrupt Practices Act, using Greyball-like programs to spy on drivers for competing companies, misleading consumers and the FTC about its privacy and data security practices, and gender discrimination. Press Release, Fed. Trade Comm'n, Uber Agrees to Expanded Settlement with FTC Related to Privacy, Security Claims, (Apr. 12, 2018), https://www.ftc.gov/news-events/press-releases/2018/04/uber-agrees-expanded-settlement-ftc-related-privacy-security [https://perma.cc/R6GU-NAZM]; Greg Bensinger, *Uber Faces Federal Investigation Over Alleged Gender Discrimination: EEOC Investigators Have Been Seeking Information Relating to Hiring Practices, Pay Disparity and Other Matters*, WALL STREET J. (July 16, 2018), https://www.wsj.com/articles/uber-faces-federal-investigation-over-alleged-gender-discrimination-1531753191 [https://perma.cc/9BF8-JEM9]; Ashlee Kieler, *Uber Facing at Least 5 Federal Investigations, Claims Report*, CONSUMERIST (Oct. 11, 2017), http://consumerist.com/2017/10/11/uber-facing-at-least-5-federal-investigation-claims-report [https://perma.cc/94CV-2K8M]; Newcomer, *supra* note 194.

222. Shannon Bond, *Uber Chief Says Workplace Culture Needs Improvement*, FIN. TIMES (Oct. 22, 2018), https://www.ft.com/content/a247a728-d644-11e8-a854-33d6f82e62f8.

223. *Id.*

or legal academics,[224] although it is a subject of substantial interest in business schools.[225] One of the central features of Uber's corporate culture appears to have been a disregard for the law. It is worth trying to figure out how Uber got that way.

Accounts indicate that Uber did not begin its operations with a deliberate plan to violate municipal laws governing ride hailing companies.[226] Two of Uber's competitors, Lyft and Sidecar, first began to operate in the San Francisco area without complying with municipal laws.[227] Kalanick spoke out publicly condemning the conduct of his rivals as blatantly illegal.[228] When authorities failed to shut those companies down, however, Kalanick decided to adopt a similar business model.[229] He sought to rapidly expand Uber's operations in any market where regulations against it did not appear to be strictly and vigorously enforced.[230]

In doing so, he sought the advice and assistance of his lawyers, who he pushed to be more "innovative" in a context in which "innovation" was often code for breaking the law.[231] The lawyers, after a time, appeared to have embraced this analogy of law breaking with technological innovation.[232] They signed off on Greyball and other legally questionable practices, moved employees engaged in questionable practices to jurisdictions where

224. *See* Donald C. Langevoort, *Opening the Black Box of "Corporate Culture" in Law and Economics*, 162 J. INST. & THEOR. ECON. 80, 81 (2006) (discussing how because there are two different theories about the role corporate culture plays, neither party talks about it); *see also* Hill, *supra* note 211, at 3 ("Commentators have described the expression, 'corporate culture', as 'inherently slippery.'").

225. *See*, *e.g.*, John R. Graham et al., *Corporate Culture: Evidence from the Field*, 1–5 (unpublished paper for 27th Annual Conference on Financial Economics and Accounting Paper; Duke I&E Research Paper No. 2016-33; and Columbia Business School Research Paper No. 16-49) (2019), https://ssrn.com/abstract=2805602.

226. Edelman, *supra* note 198; Newcomer, *supra* note 194.

227. Edelman, *supra* note 198; Newcomer, *supra* note 194.

228. Edelman, *supra* note 198; Newcomer, *supra* note 194.

229. Edelman, *supra* note 198; Newcomer, *supra* note 194.

230. Edelman, *supra* note 198; Newcomer, *supra* note 194.

231. *See* Olga V. Mack & Katia Bloom, Embracing Risk: *How Uber GC Salle Yoo Defines Her Career*, ABOVE L. (Sept. 19, 2016), https://abovethelaw.com/2016/09/embracing-risk-how-uber-gc-salle-yoo-defines-her-career/ [https://perma.cc/JW3F-DCQN]; *see also* Newcomer, *supra* note 194.

232. Edelman, *supra* note 198; Newcomer, *supra* note 194.

they were less likely to be arrested and prosecuted, and, consequently, were a major factor in fostering an attitude of disregard for legal rules and legal limits within the company.[233]

We can see in the development of Uber's "culture" the dangerous transition from lawyer-as-technician to lawyer-as-accomplice. The questions being asked of the lawyers had clearly shifted substantially from "whether conduct was legal" to "whether it was detectable" and "whether the company or its employees would be severely sanctioned for it." We can also see a clear and dangerous progression from the misdemeanor violations involved in operating an unlicensed taxi service to the much more serious conduct which was the subject of the federal investigations.[234] It is unclear whether Uber's lawyers actually embraced this culture of law breaking as "innovation" or were simply unable to resist or dissuade senior management from pursuing it; it was probably a combination of both.[235] What does seem clear is that once the company began to violate the law, neither its lawyers nor executives put forward any reasons to stop. It appears they had no coherent legal or ethical basis for distinguishing between violations that could be justified as legitimate law reform efforts and those that could not.

The Uber case can therefore justify either of two somewhat contradictory conclusions: (1) that ethical rules like Rule 1.2 are needed to prevent an inevitable deterioration in the lawyer's role from assisting minor lawbreaking to advising and approving more serious forms of corporate criminal misconduct; or (2) that by prohibiting all advice on activities that potentially carry criminal penalties, Rule 1.2 makes it difficult for lawyers to distinguish between potentially justifiable efforts at legal reform of inefficient or outdated laws and seriously criminal misconduct.

### C. TRYING TO BE ACCOMMODATING: THE DILEMMAS OF AIRBNB

The business of Airbnb, the second most highly valued U.S. private start-up,[236] initially appears very similar to Uber. It too operates a peer-to-peer internet platform from which consumers

233. Edelman, *supra* note 198; Newcomer, *supra* note 194.

234. *See supra* notes 203–04 and accompanying text.

235. *Cf.* Newcomer, *supra* note 194 ("Kalanick . . . defined Uber's culture by hiring deputies who were, in many instances, either willing to push legal boundaries or look the other way.").

236. Scott Austin et al., *The Billion Dollar Startup Club*, WALL STREET J. (Feb. 18, 2015), https://www.wsj.com/graphics/billion-dollar-club/ (last updated December 2018).

can book short-term rentals in the homes of third party "hosts" who list with Airbnb.[237] Similar to Uber, many of these listings are illegal because they violate various municipal regulations, some with criminal penalties, that limit the rights of homeowners to offer such short-term rentals.[238] Many of Airbnb's hosts are breaking the law, and Airbnb is clearly facilitating that lawbreaking.[239] Yet unlike Uber, Airbnb has had a colorable argument that it is not liable in the United States for any such lawbreaking. That claim is primarily based on Section 230 of the Communications Decency Act (CDA).[240] Section 230 "establish[es] broad 'federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.'"[241] Airbnb's basic position is that it is merely making available information originating from third-party host users of the service, and the CDA renders Airbnb immune from claims alleging the services offered by its hosts are illegal, improper, or unsatisfactory.[242] The scope of this immunity is far from clear, and Airbnb takes a very expansive view of its extent.[243]

237. Plaintiffs' Joint Notice of Motion and Motion For Preliminary Injunction at 3, Airbnb v. City and Cty. of San Francisco (N.D. Cal. Sept. 6, 2016) (No. 3:16-cv-03615-JD), 2016 WL 8808864 [hereinafter Airbnb Motion] ("Airbnb and HomeAway provide Internet platforms through which persons desiring to book accommodations ('guests') and those listing accommodations available for rental ('hosts') can find each other, make arrangements, and enter into agreements for rentals.").

238. Memorandum from the Office of Eric T. Schneiderman, N.Y. Att'y Gen., Airbnb in the City 8 (Oct. 2014), https://ag.ny.gov/pdfs/AIRBNB%20REPORT.pdf [https://perma.cc/F9FN-LA49] (stating that seventy-two percent of private short-term rentals on Airbnb present an apparent violation of New York law).

239. Jana Kasperkevic, *Airbnb Purged More than 1,000 New York Listings to Rig Survey–Report*, GUARDIAN (Feb. 10, 2016), https://www.theguardian.com/technology/2016/feb/10/airbnb-new-york-city-listings-purge-multiple-apartment-listings [https://perma.cc/6CCD-PBD2] ("A report released by the New York state attorney general's office in October 2014 said that about 72% of Airbnb's listings potentially violated local laws . . . .").

240. 47 U.S.C. § 230(c)(1) (2012).

241. Perfect 10 v. CCBill, 488 F.3d 1102, 1118 (9th Cir. 2007) (quoting Zeran v. America Online, 129 F.3d 327, 331 (4th Cir. 1997)). Airbnb frequently quotes this language in its litigation documents. *See* Airbnb Joint Motion, *supra* note 237, at 10, 12.

242. *See* Airbnb Motion, *supra* note 237, at 11 ("Courts have interpreted the CDA to establish broad immunity for online providers . . . .").

243. Edvard Pettersson & Olivia Zaleski, *Airbnb May Be Its Own Worst Enemy*, BLOOMBERG BUSINESSWEEK (Sept. 13, 2018), https://www.bloomberg.com/

Uncertainty regarding the scope of the immunity conferred by the CDA means that Airbnb has at least a colorable claim that its own activities are not illegal.[244] This has enabled Airbnb's lawyers to advise and assist the company in its operations without serious concern that they are violating Rule 1.2. They seem to have advised Airbnb to engage in an aggressive litigation campaign against local and state regulations. Such regulations, many recently enacted, seek to enforce local laws against short term rentals and impose new restrictions and reporting requirements on Airbnb.[245]

The fact that Airbnb's basic business model does not violate Rule 1.2 does not mean that its actions are ethical or socially beneficial. There has been much debate on this question, starting with the undeniable proposition that Airbnb facilitates large amounts of conduct by its hosts that do violate municipal laws.[246] Critics have also made more debatable charges about the harm Airbnb poses to neighborhoods, the tourism industry, and the failure to vet hosts for unsafe conditions, criminal records, etc.[247] Airbnb can credibly respond, however, that its services are extremely popular, both among renters and hosts, and offer many homeowners the opportunity to earn extra income from their

new/articles/2018-09-13/airbnb-may-be-its-own-worst-enemy [https://perma.cc/6528-8A4L].

244. *See* Airbnb Motion, *supra* note 237, at 11–13.

245. *Id.*

246. Airbnb's position that such facilitation is not illegal, and that the CDA protects it from aiding and abetting charges, is a defensible position legally, but perhaps not morally. While the Airbnb website does provide some information to potential hosts about the need to be aware of local regulations, *What Regulations Apply to My City?*, AIRBNB, https://www.airbnb.com/help/article/961/what-regulations-apply-to-my-city [https://perma.cc/RG8F-8Y8S], some hosts have alleged that the information is insufficient and difficult to find. *See* Ron Lieber, *A Warning for Hosts of Airbnb Travelers*, N.Y. TIMES (Dec. 1, 2012), https://www.nytimes.com/2012/12/01/your-money/a-warning-for-airbnb-hosts-who-may-be-breaking-the-law.html [https://perma.cc/EX8G-U47P]; *see also* Autumn C. Gear, Host at Your Own Risk: Monitoring the Legality of Airbnb Rentals at the Platform Level, 12 (Spring 2016) (unpublished submission for the King Scholar Program), https://www.law.msu.edu/king/2015-2016/Gear.pdf [https://perma.cc/SS24-3BW5].

247. *See* Brittany McNamara, *Airbnb: A Not-So-Safe Resting Place*, 13 COLO. TECH. L.J. 149, 156–59 (2016); *see also* Nicole Gelinas, *Airbnb Is a Problem for Cities Like New York and San Francisco*, N.Y. TIMES (June 16, 2015), https://www.nytimes.com/roomfordebate/2015/06/16/san-francisco-and-new-york-weigh-airbnbs-effect-on-rent/airbnb-is-a-problem-for-cities-like-new-york-and-san-francisco [https://perma.cc/SRX7-LK8G].

property.[248] Many municipalities, prompted by the alleged harms of Airbnb,[249] have enacted regulations directed at Airbnb and similar short-term rental platforms. Most either restrict such companies from posting listings that fail to meet certain requirements[250] or require them to disclose certain information about their hosts and rentals.[251] Interestingly, no municipality, in the United States or overseas, appears to have tried to prohibit Airbnb's operations entirely.[252]

Nonetheless, such ordinances raise costs and constrain the business operations of Airbnb. The company has embarked on a long campaign of federal litigation against such ordinances, claiming that they are preempted by the CDA, violate Airbnb's First Amendment rights, and other objections.[253] In some cases, Airbnb has succeeded in obtaining preliminary injunctive relief against government enforcement.[254] Longer term, however, Airbnb appears to be losing, at least with respect to ordinances that prohibit listing any rental by hosts who have not registered

248. Memorandum from Airbnb to the Fed. Trade Comm'n, Shared Opportunity: How Airbnb Benefits Communities, https://www.ftc.gov/system/files/documents/public_comments/2015/05/01740-96152.pdf [https://perma.cc/W5MW-6UPN] (stating Airbnb's position on the FTC's investigation of the "sharing" economy); *see also*, Josh Bivens, *The Economic Costs and Benefits of Airbnb*, ECON. POL. INST. (Jan. 30, 2019), https://www.epi.org/files/pdf/157766.pdf [https://perma.cc/ET4X-PXZE].

249. These regulatory changes also appear to have been influenced by extensive lobbying by the hotel industry. *See* Katie Brenner, *Inside the Hotel Industry's Plan to Combat Airbnb*, N.Y. TIMES (Apr. 16, 2017), https://www.nytimes.com/2017/04/16/technology/inside-the-hotel-industrys-plan-to-combat-airbnb.html?partner=bloomberg [https://perma.cc/W4Q3-KAPU].

250. *See*, *e.g.*, SAN FRANCISCO CITY ADMIN. CODE § 41A.5(e) ("[A]ny Hosting Platform that provides a Booking Service for a Residential Unit to be used for Tourist or Transient Use in violation of the Hosting Platform's obligations under this Chapter 41A, shall be guilty of a misdemeanor.").

251. *See*, *e.g.*, N.Y.C. Local Law 2018/146, N.Y.C. ADMIN. CODE § 26-2102(a) ("A booking service shall periodically submit to the administering agency a report of transactions for which the booking service charged, collected or received a fee . . . .").

252. Katherine Lagrave, *13 Places Cracking Down on Airbnb*, CONDÉ NAST TRAVELER (Dec. 13, 2018), https://www.cntraveler.com/galleries/2016-06-22/places-with-strict-airbnb-laws [https://perma.cc/9VA4-ZCJD].

253. *See* Pettersson & Zaleski, *supra* note 243.

254. Benjamin Weiser & J. David Goodman, *Judge Blocks New York City Law Aimed at Curbing Airbnb Rentals*, N.Y. TIMES (Jan. 3, 2019), https://www.nytimes.com/2019/01/03/nyregion/nyc-airbnb-rentals.html [https://perma.cc/QTD8-4XJ7].

with local authorities. Its motion for a preliminary injunction enjoining a San Francisco ordinance to that effect was denied,[255] and Airbnb's challenge to a similar Santa Monica ordinance was dismissed at the pleading stage.[256] Accordingly, Airbnb has begun to face situations where the legal ambiguities have been clarified and its former activities determined to be illegal.[257] Airbnb has had to either comply with such municipal ordinances or deliberately violate them.

While the evidence remains preliminary, Airbnb seems to have followed its initial litigation with serious attempts at negotiation leading to substantial compliance. In San Francisco, it had argued that enforcement of the ordinance would cause "substantial disruption to its business, and erosion of customer goodwill."[258] After losing its preliminary injunction motion, however, Airbnb announced a settlement with the city that essentially complied with the requirements of the ordinance.[259] Airbnb appears reluctant to engage in the kind of blatant law-breaking that would violate Rule 1.2. Even while challenging municipal ordinances, it has generally sought, and rather successfully, federal court orders preliminarily enjoining municipalities from enforcing their ordinances during the pendency of its federal lawsuits.[260] There do not appear to be any reported instances where Airbnb has been ordered to cease and desist or been charged with violations of such ordinances.[261]

To be sure, Airbnb has many good reasons not to deliberately violate municipal laws in addition to the potential ethical

255. Dan Levine & Heather Somerville, *Judge Rejects Airbnb's Bid to Halt San Francisco Ordinance*, REUTERS TECH. NEWS (Nov. 8, 2016), https://www.reuters.com/article/us-airbnb-sanfrancisco-ruling/judge-rejects-airbnbs-bid-to-halt-san-francisco-ordinance-idUSKBN1332OE [https://perma.cc/X777-D8CN].

256. Airbnb v. City of Santa Monica, Nos: 2:16-cv-06641-0DW (AFM) & 2:16-cv-08645-0DW (AFM), 2018 WL 3013245, at *5 (C.D. Cal. June 14, 2018), *aff'd*, 918 F.3d 676 (9th Cir. 2019).

257. *See supra* notes 246–52 and accompanying text.

258. Plaintiffs' Joint Motion, *supra* note 237, at 3.

259. Heather Somerville & Dan Levine, *Airbnb, San Francisco Settle Lawsuit over Short-Term Rental Law*, REUTERS BUS. NEWS (May 1, 2017), https://www.reuters.com/article/us-airbnb-sanfrancisco-settle-lawsuit-over-short-term-law-idUSKBN17X254 [https://perma.cc/9UGU-X6MQ].

260. *See* Weiser & Goodman, *supra* note 254.

261. Unlike Uber, which simply ignored such an order from the City of San Francisco in 2010. Pollman, *supra* note 5, at 712–13.

concerns of its lawyers. On the other hand, it has sufficient economic clout and enough popular support among hosts and renters that its lawyers and management might well have contemplated a campaign of "corporate disobedience" to try to move the law further in their favor. The fact that they have not engaged in this kind of campaign suggests that legality still counts in the deliberations of the lawyers and management of some "disruptive" companies.

The three preceding case studies illustrate the complexities involved in determining the appropriate ethical standards for lawyers advising "disruptive" business. The dilemmas of cannabis lawyers provide an appealing case for loosening the strict prohibitions of Rule 1.2. Yet the excesses of Uber and its descent to blatant illegality provide a sobering warning against lawyers condoning any form of criminal activity. Airbnb provides an intermediate case but also illustrates the need for greater clarity and guidance for lawyers dealing with these issues. The final section of this Article seeks to provide some such guidance.

## III. THE NATURE OF THE PROBLEM AND A PROPOSED SOLUTION

### A. THE ISSUES AT STAKE

Part III draws on the previous history of corporate lawyers and disruptive business case studies to further clarify the problem and suggest a path towards a possible solution. The disruptive industries discussed in Part II frequently operate in a recognizable zone of "not-quite-legal" conduct, in which their activities go beyond the merely ambiguous to deliberate violations of law. Part II noted such conduct can be viewed as part of a larger plan of law reform and frequently is so viewed by the companies undertaking it. By creating consumer demand, conducting public relations campaigns, political lobbying, and strategic litigation, they seek to convert the not-quite-legal into the fully legal.[262] Advising these sorts of businesses not only creates an ethical problem for corporate lawyers under the Rules of Professional Conduct, but it poses a genuine dilemma for any lawyer

262. *See generally* Pollman, *supra* note 5, at 712–13, 728–48 (describing Uber's strategy and the contexts in which companies push legal boundaries and listing examples); Pollman & Barry, *supra* note 5, at 398–430 (describing how such "regulatory entrepreneurs" create legal change, and the conditions that cultivate this type of entrepreneurship).

who identifies with and seeks to advance the goals of the company she advises, while also feeling both a professional and moral obligation to advise and assist only corporate policies that are justifiable under existing law. Accordingly, any proposed solution to the problem must involve more than just a change to the Rules of Professional Conduct or the interpretation of those rules. It must suggest a coherent ethical framework which can justify some, but by no means all, the activities undertaken by "disruptive" businesses and provide the ethically concerned corporate lawyer with guidelines for determining what types of not-quite-legal corporate conduct can be ethically aided and justified.[263]

### 1. Not-Quite-Legal Corporate Conduct Is Extensive and Expanding

Businesses such as cannabis, Uber, and Airbnb operate in a legal environment I have referred to as "not-quite-legal." By this I mean something quite specific and somewhat different from ordinary legal uncertainty.[264] The "not-quite-legal" is limited to situations where the actions contemplated or taken by the corporate client are very likely to be determined by competent authorities to violate existing law,[265] but where other objective evidence creates a reasonable belief among knowledgeable observers that the laws currently prohibiting such conduct are

263. Given the disparities between the businesses discussed in the previous section, one might reasonably ask why have a general set of guidelines for the not-quite-legal? Why not decide on a case-by-case basis, as many state ethics boards seem to be doing with cannabis businesses? The short answer is that ethics rules are supposed to provide guidance for lawyers who are trying to conform their conduct to standards. To do that requires some broader set of ethical guidelines that can be applied in many different contexts. *See* Pepper, *supra* note 20, at 1609–10.

264. Pollman and Barry accurately note that disruptive businesses often seek to take advantage of "legal grey areas" through conduct that is indistinguishable from "breaking the law." Pollman & Barry, *supra* note 5, at 398–99. Uber's lawyers similarly failed to distinguish between conduct that was legally innovative and conduct that was illegal. *See supra* notes 200–11 and accompanying text. Yet this distinction is ethically extremely important. Indeed, it is the line between conduct currently permissible under Rule 1.2 and conduct which is not. This section seeks to more carefully delineate that distinction by contrasting legally uncertain conduct with not-quite-legal conduct.

265. In this context, determination that an action is very likely to be a violation of law is to be based on a formal analysis of the content of the formal statutes, case law and other authoritative legal rules (i.e., the "law on the books"), without reference to likelihood of detection or enforcement.

likely to be repealed or substantially modified in the foreseeable future. This is the situation present with advising cannabis businesses. Although they are objectively in violation of federal law, contradictory state laws and permissive federal enforcement policies have created a situation where, in fact, cannabis businesses can operate relatively freely.[266] The regulatory environments in which Uber and Airbnb operate are in many respects analogous. Many of the laws that they are violating are older, technical administrative regulations, usually promulgated at the local level.[267] These regulations are rarely or intermittently enforced, potentially obsolete, and lack any significant public support beyond the specific commercial interests that benefit from them.[268] As discussed in Part II, companies like Uber and Airbnb seek to demonstrate the obsolescence and lack of support for such laws by successfully operating in defiance of them, thereby creating a constituency for their repeal or modification.

Businesses that deliberately operate in the zone of the "not-quite-legal" are relatively new and conceptually distinguishable from businesses that operate in areas of legal uncertainty. Business lawyers are used to dealing with situations where the controlling legal authorities are vague, ambiguous, or lack controlling legal authority.[269] Acting in their "lawyer as technician" mode, such lawyers have been willing to advise taking innovative legal approaches where such positions advance the client's goals. This is an approach implicitly endorsed by the Model Rules.[270] The "not-quite-legal," however, goes a step beyond mere legal uncertainty. With legal uncertainty, businesses take innovative actions they expect will be legally challenged and leave it

266. *See supra* text and accompanying notes 144–63.

267. *See supra* text and accompanying notes 221–33, 246–61.

268. *See* Alice Armitage et al., *Design Thinking: The Answer to the Impasse Between Innovation and Regulation*, 2 GEO. L. TECH. REV. 3**,** 19–22, 64 (discussing how innovative companies argue that old rules should not apply to them, and the public pressures that regulators and certain private interests face as a result of innovative companies); *see also* Pollman, *supra* note 5, at 733 (quoting BRAD STONE, THE UPSTARTS: HOW UBER, AIRBNB, AND THE KILLER COMPANIES OF THE NEW SILICON VALLEY ARE CHANGING THE WORLD 49 (2017)) ("In the eyes of [Uber's] co-founders, the app had the potential 'to take on an entrenched taxi industry that they felt was more interested in blocking competition than in serving customers."); Pollman & Barry, *supra* note 5, at 418–19, 441 (stating that innovative companies are more likely to target less popular local laws, and describing the concentrated benefits of zoning ordinances).

269. *See supra* notes 81–93 and accompanying text.

270. *See supra* notes 115–17 and accompanying text.

to the courts to clarify and specify the scope of the ambiguous legal rules. This notion of judges as legitimate lawmakers is now well understood and accepted, reflecting the predominant legal realist perspective.[271] Executive detection and enforcement policies, unlike judicial interpretations, have generally not been seen as part of the legitimate lawmaking function.[272] A client who acts aggressively for their own benefit in an area of legal ambiguity is seen as taking a legal risk but not as deliberately violating the law. In the not-quite-legal, however, the formal legal rule is clearly being violated. The uncertainty is whether the executive will detect and seek sanctions for the legal violations. Accordingly, advising clients to take actions that violate formal legal rules based on executive policies of detection and enforcement create serious ethical issues for lawyers asked to give legal advice.

Moreover, the zone of the "not-quite-legal" appears to be getting larger. In part this is the result of the well-known phenomenon of legislative gridlock, or the inability or unwillingness of legislatures to promulgate effective rules to deal with new social or economic developments.[273] Such legislative inaction is often attributed to extreme partisanship and interparty rancor.[274] It may also result, however, from: (1) lobbying by business or labor groups that benefit from existing regulatory structures; or (2) a lack of understanding of technological or social changes that have rendered existing regulations outmoded.[275] What is clear is

271. *See*, *e.g.*, KARL LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 55 n.36 (1962) (stating that many important writings have discussed the "judicial creation of law").

272. *See* Cary Coglianese & Christopher S. Yoo, *Introduction: The Bounds of Executive Discretion in the Regulatory State*, 164 U. PA. L. REV. 1587, 1599 (2016) ("[S]ome scholars will no doubt still be inclined to argue that the President has no direct authority that can impose a duty to execute on the administration.").

273. *See generally* Josh Chafetz, *The Phenomenology of Gridlock*, 88 NOTRE DAME L. REV. 2065, 2073–75 (2013) (exploring the causes of legislative action rather than the absence of action in legislative gridlock).

274. *Id.*

275. *See*, *e.g.*, Brenner, *supra* note 249; Eric Evarts, *Dealers Not Always Plugged in About Electric Cars, Consumer Reports' Study Reveals*, CONSUMER REP. (Apr. 22, 2014), https://www.consumerreports.org/cro/news/2014/04/dealers-not-always-plugged-in-about-electric-cars-secret-shopper-study-reveals/index.htm [https://perma.cc/P38Q-92NA] (finding a lack of understanding among car dealerships of electric cars, and a correlating lack of encouragement for people to buy them); Cecilia Kang et al., *Knowledge Gap Hinders Ability of Congress to Regulate Silicon Valley*, N.Y. TIMES (Apr. 12, 2018), https://

that more and more regulatory decisions have become, either deliberately or by default, executive decisions regarding enforcement.[276] As the disparity between formal legal rules and enforcement policies grows, so does the zone of the not-quite-legal.

The other cause of growth of the not-quite-legal are the disruptive businesses themselves. By deliberately violating the rules governing taxis or hotel accommodations, they force potential enforcers to adopt policies as to whether and how such regulations will be enforced, as well as the amount of wealth and energy that will be expended in such enforcement. The actions or inactions of such governmental enforcers are likely again to reveal a gap between the formal legal rules and the policies regarding their enforcement, which expands the zone of the not-quite-legal.

2. Disruptive Industries Are Engaged in a Version of Law Reform that Raises Unique Moral Issues

Companies like Uber and Airbnb are actively engaged in a process of promoting legal change. Far from apologizing for promoting or actually committing deliberate violations of law, management of these companies see their actions as law reform efforts.[277] They seek to demonstrate the obsolescence of existing regulatory structures and build a public constituency in favor of their modification or repeal.[278] They may justify their law-breaking as a necessary evil, or as actions of no moral consequence which have to be taken to achieve a greater good for the public.[279]

www.nytimes.com/2018/04/12/business/congress-facebook-regulation.html [https://perma.cc/TYQ2-YDXA]; Nicholas Vinocur, *European Labor Wins Battle, Not War, Against Uber*, POLITICO (Dec. 20, 2017), https://www.politico.eu/article/uber-ecj-ruling-european-labor-wins-battle-not-war/ [https://perma.cc/34RE-F9P4].

276. *See*, *e.g.*, Brendan Cheney, *Manhattan DA Will No Longer Prosecute Turnstile Jumping*, POLITICO (Feb. 1, 2018), https://www.politico.com/states/new-york/city-hall/story/2018/02/01/manhattan-da-will-no-longer-prosecute-turnstile-jumping-229568 [https://perma.cc/B2GR-DCRK]; Delahunty & Yoo, *supra* note 122, at 787–92.

277. *See* Newcomer, *supra* note 194.

278. *See*, *e.g.*, Uber Complaint, *supra* note 203, at 5–6; Airbnb Motion, *supra* note 237, at 10.

279. *See* Pollman, *supra* note 5, at 713 (quoting Alex Davies, *Travis Kalanick's Great Defender Writes a Hell of a Motivational Letter*, WIRED (Aug. 30, 2017), https://www.wired.com/story/uber-shervin-pishevar-kalanick-letter/ [https://perma.cc/KH8H-TAVT]) ("An Uber investor referred to the company's work as 'a just cause' and 'one of the grandest business and moral battles of our generation.'"); *see also id.* at 736 (quoting Sharon Driscoll, *Lawyering at the*

This notion of violating the law in the pursuit of a greater good invokes concepts of morally motivated civil disobedience that may seem incongruous when applied to giant corporations pursuing profit-maximizing business ventures.[280] Yet these companies are genuinely engaged in a version of law reform. In that sense, their motives are also easily distinguishable from the clients in the Panama Papers or Global Witness situations, who deliberately sought to violate the law without being detected but were not seeking to change any laws.

Morally speaking, the actions of lawyers advising businesses acting in the zone of the not-quite-legal fall in an intermediate category: neither as admirable as those of the great civil rights lawyers nor as bad as those who counseled the Panama Papers and Global Witness clients. It is easy to imagine a lawyer being genuinely perplexed by the moral dilemma of advising clients who propose to take actions that are not-quite-legal. Accordingly, it is worth examining in detail the differences between these three different sorts of legally advised lawbreakers.

### *a. The Moral Contrasts Between Civil Disobedience and Deceptive Criminality*

The movement which led to the abolition of de jure racial segregation in the United States and the passage of the 1964 Civil Rights Act was a combination of litigation, public demonstrations and protests, as well as public and private advocacy for legislative change.[281] Led in part by dedicated lawyers, one of its main tactics was civil disobedience.[282] Many of the actions of the

*Edge of Innovation: A Conversation with Kent Walker, Google's General Counsel and Senior Vice President*, STAN. LAWYER 27 (Nov. 9, 2016), https://law.stanford.edu/stanford-lawyer/articles/lawyering-at-the-edge-of-innovation-a-conversation-with-kent-walker-googles-general-counsel-and-senior-vice-president/ [https://perma.cc/RX37-BKSJ] (quoting Google's general counsel, who stated, "[o]ur rule of thumb has been if our products are creating value for people and society, courts will usually come out on the side of delivering that kind of benefit.")).

280. *See* Caleb Pershan, *Airbnb CEO Apologizes for Gandhi Comparison Tweet*, SFIST (Feb. 16, 2015), https://sfist.com/2015/02/16/airbnb_ceo_apologizes_for_gandhi_co/ [https://perma.cc/46TM-UF64].

281. The role that law and lawyers played in the Civil Rights movement has been a topic of great scholarly interest among lawyers, historians and others. See Risa Goluboff, *Lawyers, Law, and the New Civil Rights History*, 126 HARV. L. REV. 2312, 2314–17 (2013) (reviewing KENNETH W. MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER (2002)), for a recent overview.

282. *Id.* at 2317–21.

early civil rights movement, the sit-ins, and lunch counter desegregations, were deliberate violations of Jim Crow laws.[283] The intentional flouting of such laws both demonstrated their moral illegitimacy and helped to rally public support for their abolition. It is important to note that such deliberate violations of law were always carried out publicly and transparently, and the laws being violated were either morally wrong or facially neutral but being applied in an unfair and morally illegitimate manner.[284] In either event, the clear moral imperative to end racial segregation more than justified the violation of even neutral statutes that were being used to interfere with that goal.[285]

The legal advice involved in the Panama Papers and Global Witness situations provide a number of stark contrasts. One key difference is the lack of transparency. Whereas the Civil Rights movement disclosed and sought to publicize its violations of existing law, the primary advice being sought by the Panama Papers and Global Witness clients was how to avoid both public disclosure and detection by government authorities.[286] A central goal of the Civil Rights movement was legal change. The goal of the Global Witness and Panama Papers clients was not to change existing law in any way but simply to realize personal profits by avoiding taxes, laundering money, and violating other

283. See TAYLOR BRANCH, PARTING THE WATERS, AMERICA IN THE KING YEARS, 1954–63 (1988), for the most complete and comprehensive history of the civil rights movement. *See also*; TAYLOR BRANCH, AT CANAAN'S EDGE, AMERICA IN THE KING YEARS, 1965–68 (2006); TAYLOR BRANCH, PILLAR OF FIRE, AMERICA IN THE KING YEARS, 1963–65 (1998).

284. Examples in the latter category include restrictions on public gatherings, requirements for parade permits, and laws prohibiting disorderly conduct. *See* Walker v. City of Birmingham, 388 U.S. 307, 314 (1967) (affirming contempt order issued against Dr. Martin Luther King Jr. and others for violating court's order by marching without a parade permit).

285. The civil rights movement, and the militancy that followed it, gave rise to a vigorous debate in the legal and philosophical literature about the appropriate definition and limits of civil disobedience. *See* JOHN RAWLS, A THEORY OF JUSTICE, 363–68 (1971) (defining civil disobedience in a "nearly just" society as "a public, nonviolent, conscientious political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government."). In support of this definition, Rawls cites, among other things, Martin Luther King's "Letter from a Birmingham Jail." *Id.*; *see also* Robert B. McKay, *Civil Disobedience: A New Credo?*, 2 GA. L. REV. 16, 19 (1967) ("Civil disobedience is the violation of law by nonviolent means . . . ."); Delbert D. Smith, *The Legitimacy of Civil Disobedience as a Legal Concept*, 36 FORDHAM L. REV. 707, 709–11 (1968) (discussing when civil disobedience may be considered justified).

286. *See supra* notes 133–35 and accompanying text.

existing laws without detection or enforcement action being taken against them.

Most importantly, the civil rights movement was a powerful moral crusade. The undeniable justness of the goals was sufficient to justify the incidental and relatively minor concerns that some laws, and even some morally neutral and justifiable laws were sometimes being violated in the effort to achieve those goals. In contrast, the law-breaking by the Panama Papers and Global Witness clients lacked any independent moral justification whatsoever. The acts they sought to undertake were at best morally neutral, like the nonpayment of taxes, or deeply morally suspect, like facilitating the use and availability of funds derived from organized criminal activities or governmental corruption.[287] There is no "greater good" that can justify the violations of law in such cases, only lesser and greater evils.[288]

*b. Law Reform by Disruptive Businesses: An Intermediate Moral Case*

The law reform efforts of disruptive businesses are neither as morally admirable as the Civil Rights movement nor as reprehensible as the actions of the Panama Papers and Global Witness clients. Unlike the latter, they are a genuine effort at law reform. However, it is not directed at a high moral purpose but rather at the more mundane but still respectable purpose of maximizing profits for companies and their stakeholders. On the question of transparency, the disruptive businesses discussed in Part II have taken a substantial divergence of approaches. Airbnb seems fairly committed to a policy of full disclosure about its operations as part of its ongoing litigation campaign against laws which it believes illegally interfere with those operations.[289]

287. *See* Donaldson, *supra* note 135, at 379.

288. Even representing and advising clients who are engaged in morally justifiable civil disobedience may create dangers for contemporary lawyers. *See* American Bar Assn., *How to Advise Clients on Civil Disobedience*, ABA NEWS (Nov. 2018), https://www.americanbar.org/news/abanews/publications/youraba/2018/november-2018/consider-this-advice-before-adding-civil-disobedience-defense-to/ [https://perma.cc/7GHB-LMDD].

289. *See, e.g.*, Complaint of Airbnb, Inc. for Declaratory and Injunctive Relief at 5–9, Airbnb, Inc. v. City of Boston, 386 F.Supp.3d 113 (D. Mass. 2019) (No. 1:18-cv-12358), 2018 WL 5923843 (discussing its operations relating to how Airbnb collects fees and protects users' privacy); Complaint for Declaratory and Injunctive Relief at 9–13, Airbnb, Inc. v. City of New York, 373 F.Supp.3d 467 (S.D.N.Y. 2019) (No. 1:18-cv-07712) (describing the process guests use to sign into Airbnb's website and how hosts create a listing).

It also makes active efforts to inform its hosts about the legality of short-term rentals in their area and to negotiate openly with regulators to reduce restrictions on its hosts whenever possible.[290] Uber, in contrast, has in some instances concealed aspects of its operations and actively sought to thwart governmental detection and enforcement efforts, most notably through the "Greyball" software.[291]

Disruptive businesses have justifications for their legal violations, but they are not primarily moral ones. They are arguments about public policy and social benefit, with some libertarian concerns about promoting consumer choice and individual freedom to engage in entrepreneurial activity thrown into the mix.[292] These industries argue that they provide services that customers want in a more efficient, convenient, and less expensive form than traditional taxis, hotels, etc.[293] They attack the regulatory structures they are violating, often with some justification, for being a means of protecting existing market participants by raising barriers to entry, increasing costs to consumers, and stifling innovation.[294]

Such considerations raise substantial ethical questions for conscientious lawyers. Since they represent these clients, they are likely to agree with the basic policy arguments that underlie their law reform efforts. They may well believe that the world will be a better place if existing laws are changed to permit their businesses to operate freely. This does not mean, however, that they are or should be comfortable counseling their clients to break the law. This is not only a violation of Model Rule 1.2, but

290. *See supra* notes 246–47, 259 and accompanying text.

291. *See supra* notes 213–16, 225–33 and accompanying text.

292. *See* Pollman & Barry, *supra* note 5, at 398–410, 427–28.

293. *See, e.g.*, Jonathan V. Hall & Alan B. Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States* 25 (Princeton Univ. Indus. Relations Section, Working Paper No. 587, 2015), https://dataspace.princeton.edu/jspui/bitstream/88435/dsp010z708z67d/5/587.pdf [https://perma.cc/9Z7R-EBZJ] ("[T]he availability of modern technology, like the Uber app, provides many advantages and lower prices for consumers compared with the traditional taxi cab dispatch system, and this has boosted demand for ride services . . . ."); McNamara, *supra* note 247.

294. *See* Randall Stross, *Why Companies like Uber Get Away with Bad Behavior*, N.Y. TIMES (June 13, 2017), https://www.nytimes.com/2017/06/13/opinion/travis-kalanick-uber-bad-behavior.html [https://perma.cc/NWX3-LD7U] (quoting a report co-authored by Eric Holder recommending that Uber change official "core values" such as "Always Be Hustlin'" that were "used to justify poor behavior"); *supra* note 279 and accompanying text.

of the moral principle that stands behind it—that deliberate violation of criminal law is inherently wrong, and lawyers should never facilitate or aid their clients in violating such laws.[295] Inherent in this rule is the moral principle that adherence to the law is itself a moral virtue, and disobedience, a moral failing.[296]

If one accepts the basic principle that it is wrong to violate criminal law, at least without a morally justifiable reason, then counseling disruptive businesses to violate such laws raises difficult and complex issues. On the one hand, the laws being violated rarely have strong moral content.[297] Yet the justifications for their violation are also largely matters of efficiency and convenience rather than morality.[298] When, if ever, can such considerations justify deliberate acts of criminal conduct, even of a mild, non-violent sort, and when, if ever, can lawyers provide advice that aids and abets such behavior?

### B. SHOULD LAWYERS ADVISE CLIENTS WHO SEEK TO VIOLATE CRIMINAL LAWS FOR PROFIT?

While the prohibitory language of Rule 1.2(d) seems absolute, its underlying justification is ambiguous. The prohibition on advising against conduct that is "criminal or fraudulent" is itself a compromise of sorts, in that it implicitly permits lawyers to counsel their clients regarding conduct that is tortious, breaches contracts, or otherwise violates civil law.[299] In that sense, it is hardly a strong ethical prohibition against all forms of law breaking.[300] Yet the basic idea that lawyers should not

295. This principle is analyzed in greater detail *infra* Part III.B.

296. This does not mean that all criminal law-breaking is always morally wrong. Although Model Rule 1.2 seems to present this principle in absolute terms, I suspect that most lawyers, when thinking about all the laws that carry criminal penalties, and all the possible reasons for violating them, would take a somewhat more relativistic view. While violating a criminal statute is always morally problematic, such actions can be justified when there are strong moral reasons to do so, and the law being violated does not prohibit inherently immoral conduct. Violating a traffic law to bring a sick child to the hospital would be one clear example. The civil rights movement's acts of civil disobedience are another.

297. *See* discussion *supra* Part II.

298. *See supra* note 104.

299. MODEL RULES OF PROF'L CONDUCT 1.2(d) (AM. BAR ASS'N 2016); *see also* Pepper, *supra* note 20, at 1588–89; *supra* notes 8–14, 20 and accompanying text.

300. The predecessor to Model Rule 1.2(d), N. Y. LAWYER'S CODE OF PROF'L RESPONSIBILITY DR 7-102(A)(7) (AM. BAR ASS'N 2013), stated that a lawyer could not "[c]ounsel or assist the client in conduct that the lawyer knows to be

help their clients break the law, especially criminal law, unless they have a very good reason to do so, still seems like a fairly sensible and useful standard of conduct for most lawyers in most situations.

Nonetheless, there are situations in which most would agree that lawyers are justified in helping their clients violate the law,[301] but is the desire to help clients make money one of them? Many commentators assume not, telling lawyers, for example, of the ethical and financial dangers of representing cannabis businesses.[302] Others have argued that the deliberate and persistent law-breaking activities of Uber or Airbnb's effective encouragement of law-breaking by its hosts make them morally suspect.[303] It cannot be denied that these companies have engaged in morally questionable behavior, much of which was directly related to their efforts to conceal or minimize law-breaking by them or their affiliates.

Nonetheless, when we consider the whole panoply of businesses that are or might be involved in conduct that enters the zone of the not-quite-legal, how strong is the argument that lawyers should never advise such clients on matters like enforcement policies or provide any other form of legal assistance, but should merely tell such clients that their contemplated activities violate criminal law and then politely show them the door?

illegal or fraudulent." *See supra* notes 79–80 and accompanying text discussing the Canons' prohibition on counseling violations of "statute law."

301. *See* discussion *supra* Part III.A.2.

302. *See supra* notes 165–66 and accompanying text.

303. *See, e.g.*, First Amended Class Action Complaint ¶ 60, La Park La Brea A LLC v. Airbnb, Inc., 285 F. Supp. 3d 1097 (C.D. Cal. 2017) (No. 2:17-cv-04885) (alleging that "Airbnb fails to warn guests that they may be booking an apartment that is being sublet without the apartment owner's permission, even when Airbnb is aware that the apartment owner has refused to provide permission to the subletting activity and knows that the short-term rental violates the host's lease agreement and is unlawful."); Hannah Lownsbrough, *Uber's Practices Are Morally Unacceptable—But a Boycott Won't Help*, GUARDIAN (July 13, 2017), https://www.theguardian.com/commentisfree/2017/jul/13/uber-practices-company-london-consumer-sumofus [https://perma.cc/JB6F-TK45] (discussing Uber's treatment of drivers and its response to employee sexual harassment complaints); Carolyn Said, *Airbnb Rentals Prompt Eviction in San Francisco*, SEATTLE TIMES (Apr. 8, 2014), https://www.seattletimes.com/life/travel/airbnb-rentals-prompt-eviction-in-san-francisco/ [https://perma.cc/2WA5-V95Z] (quoting a San Francisco-based tenant's attorney, who stated "[my clients] thought it was OK to rent out on Airbnb because the company didn't tell them otherwise. Airbnb should be defending these tenants, or they should disclose to every person who rents in San Francisco that (short-term rentals are illegal) and tenants are being evicted").

Should the limited exceptions some states and ethics committees have recognized for cannabis businesses be extended more generally to permit advising companies that seek to operate in the zone of the not-quite-legal? The issue is a complex one, with substantial arguments on both sides.

1. Effect on Public Perceptions of Law, the Legal Profession, and Corporate Lawyers

Allaying negative perceptions of the bar and of corporate lawyers has been a primary motivating factor in the development of ethical codes.[304] The notion that rich corporations with high-priced lawyers can get away with actions that ordinary people cannot has been a common belief among populists of both the left and right.[305] It also undercuts the public's respect for law itself.[306] Rule 1.2(d) can be seen as a formal rejection of that popular perception. Accordingly, it is reasonable to worry that any weakening of its prohibition would confirm critics' worst suspicions, that corporate lawyers give only lip service to the concept of "rule of law," and that their real job is helping corporate clients do whatever they please. It is especially troubling since this negative perception comes uncomfortably close to describing the actual role of many corporate lawyers in their lawyer-as-technician mode.[307]

Yet this concern is not necessarily a dispositive reason to reject any modifications of Rule 1.2. First, it is unlikely that these negative perceptions of law and lawyers are affected very much by the language of ethics codes. Rather, they are a result

304. *See supra* notes 77–80, 115–17 and accompanying text.

305. *See* Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789, 1791 (2015) (demonstrating, with supportive data, the difficulty of prosecuting corporate employees in part because of large scale white collar defense resources, and noting that, in these cases "[p]rosecutors typically obtained light sentences and experienced quite high numbers of outright losses in the form of acquittals and dismissals"); Robert M. Palumbos, *Within Each Lawyer's Conscience a Touchstone: Law, Morality, and Attorney Civil Disobedience*, 153 U. PA. L. REV. 1057, 1077–78 (2005) (discussing the double standard for judging attorney civil disobedience); France, *supra* note 22, at 70 ("In a wide variety of settings that go well beyond the tax world, attorneys are essentially empowered to give business customers something very valuable: a get-out-of-jail-free card.").

306. *See* MODEL RULES OF PROF'L CONDUCT Preamble ¶ 1 (AM. BAR ASS'N 2018) ("A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.").

307. *See supra* Part I.B.

of actions actually taken by corporations with the advice and sanction of their attorneys. Reports of blatantly illegal and socially harmful conduct by companies like Uber and Airbnb are hardly improved by noting that, in advising on such conduct, their lawyers violated the ethics rules.[308] It is quite possible that a more nuanced ethical rule recognizing certain exceptions to the general prohibitions might actually provide more effective and realistic guidance to real corporate lawyers, and in so doing, help them deter their clients from some of the more egregious instances of corporate misconduct.

Second, the concept of "law" in Rule 1.2 could be more expansively interpreted to include government policies regarding enforcement as well as formal legal rules. In this way, the prohibition of Rule 1.2 against advising with respect to criminal activity can be preserved, but a broader discussion can be permitted of activities that are not-quite-legal, and in certain situations, it might be concluded that some such activities do not fall within the prohibition of Rule 1.2.

Corporate lawyers already advise clients in situations where the law is vague or ambiguous.[309] Litigators have even greater leeway.[310] State bar ethics committees have expanded the advice-giving function for cannabis clients to include advice regarding enforcement policies.[311] It may well be that an expanded concept of what constitutes legal advice would permit conscientious corporate lawyers to provide not-quite-legal businesses with advice regarding matters that could reasonably be considered "legal" in light of enforcement policies and the likelihood of sanctions, while also permitting them to provide ordinary corporate law services.

### 2. Providing Not-Quite-Legal Businesses with Competent and Ethically Informed Counsel

The strongest argument for modifying the existing prohibition of Rule 1.2 is that it is not preventing many businesses from breaking the law, but it may well be preventing them from obtaining the best legal advice and services from competent and ethically informed counsel. Given the powerful first-mover advantages of operating in areas that are not-quite-legal, it is likely

308. *See* discussion *supra* Parts II.B–C.

309. *See* MODEL RULES OF PROF'L CONDUCT r. 1.2(d) (Am. Bar Ass'n 2016).

310. *See* FED. R. CIV. P. 11(b)(2).

311. *See supra* notes 180–87 and accompanying text.

that such strategies will continue to attract many start-up companies and budding entrepreneurs.[312] This certainly seems to be the case with cannabis, and the enormous financial success of Uber and Airbnb makes it likely that their business models will also have many imitators. If so, the current absolute prohibition may well be self-defeating, leaving such companies to operate with less competent or experienced lawyers, or with those who have no compunction against operating outside legal or ethical norms.

Rule 1.2(d) prohibits counsel from providing even ordinary transactional lawyering services to businesses operating in the zone of the not-quite-legal.[313] This prohibition is hard to justify for businesses that are hardly traditional criminal enterprises. While it is likely that such companies will always manage to find some lawyer willing to draft contracts for them, set up corporate subsidiaries and limited liability companies, etc., the ethical restrictions of Rule 1.2 will likely reduce the number of lawyers they can choose from and probably eliminate some of the most experienced and competent. Similarly, the most ethically conscientious lawyers, and perhaps the most risk averse, will be the ones unable or unwilling to compete for the business of such companies.[314]

Of course, clients organizing disruptive businesses will likely seek not only ordinary legal services, but also advice about their planned law-breaking activities, including advice on enforcement, detection, and potential sanctions. Uber provides a disturbing example of what can happen when corporate lawyers see themselves as promoting "disruption" and acting beyond traditional legal or moral norms.[315] Would it not be better to expand the boundaries of ethically permissible advice-giving so that lawyers and companies who seek their advice are operating under coherent and reasonably well-defined ethical principles? One argument for expanding the kinds of legal advice that lawyers can

312. *See supra* notes 167–68 and accompanying text.

313. MODEL RULES OF PROF'L CONDUCT r. 1.2(d) (stating a lawyer may not "assist" a client's criminal conduct). This would prohibit providing any legal services to, for example, a cannabis business. *See* Reinhardt, *supra* note 23, at 8–9 ("The lawyer sits in a different position once the legal services go beyond giving advice and begin assisting with transactions that help the business operate. At that point, the lawyer arguably becomes an aider and abettor of an illegal drug enterprise.").

314. *See supra* notes 183–89 and accompanying text.

315. *See supra* Part II.B.

ethically give regarding potential law-breaking conduct is that it provides an opportunity to create a more realistic and nuanced standard of ethical conduct for lawyers advising such clients, and thereby avoid the worst excesses of the "disruptive" mindset.

The counterargument to this rosy scenario is that we need more and stronger prohibitions, both on illegal activities and the lawyers who abet and condone them.[316] Such a view rejects the assumption that current ethics rules can have no effect on businesses that seek to operate in an expanding zone of the not-quite-legal.[317] It seeks to shut down not-quite-legal businesses or, at the very least, reduce their profitability through greater enforcement of both the criminal laws companies violate and the ethical rules that lawyers ignore.[318] While recognizing the powerful incentives companies have to engage in not-quite-legal conduct, proponents of this view are likely to point out that no criminal law is ever completely effective and that the goal is to reduce such corporate misconduct, not encourage it by permitting lawyers to help make it more effective.[319]

### 3. Interference with the Legislative Process and Executive Enforcement of the Law

Are the efforts of businesses to reform the law by disregarding existing rules a social harm or a social benefit? Once again, reasonable minds can differ, both in general and in specific cases.[320] Disruptive businesses interfere with ordinary governmental decision-making processes by creating new businesses, new constituencies of consumers, and new workers before governmental authorities have had a chance to fully study the issues or consider the effects on all relevant parties.[321] This can be viewed as manipulative, antidemocratic, and violative of the fundamental normative principle that lawmakers and executive branch law enforcement should make their decisions based on a disinterested concern for the best interests of the public. The

316. The Global Witness and Panama Papers controversies have given added force to this argument. *See supra* notes 133–35 and accompanying text.

317. *See supra* notes 133–35 and accompanying text.

318. *See supra* notes 133–35 and accompanying text. *See generally* Reinhart, *supra* note 23 (discussing the criminal laws a marijuana business violates and the ethical rules a lawyer implicates when assisting these businesses).

319. *See* Pollman, *supra* note 5, at 724–28 (discussing varying scholarly viewpoints on corporate law breaking).

320. *See id.*

321. *See supra* Part II.

counterargument is that such attempts at law reform through creation of new businesses are no worse than the older, common corporate tactic of influencing lawmakers through lobbying, campaign contributions, and other methods. Indeed, one benefit of the new law reform strategies is that operating a business, even a somewhat illegal one, must be done mostly in public to generate consumer demand, unlike lobbying and campaign practices that take place mostly behind closed doors.[322] The counterargument is that creating new consumer demand does not replace lobbying and other strategies for influencing government decision-making, but simply makes them more effective. It is also more clearly illegal than lobbying or campaign contributions.[323]

4. The Immorality of Breaking the Law

The previous arguments in Part III were all consequentialist. They sought to consider the likely results of a change in existing prohibitions on advising law-breaking clients and tried to ascertain whether those results would, on balance, be socially harmful or beneficial. Yet Rule 1.2 can also be seen as reflecting a deontological position that violating the law is itself a moral wrong. People, and corporations, should obey the law for the same reason they should tell the truth and be kind to others; because it is the right thing to do. This does not mean that people should never break the law. There are sometimes good moral grounds for breaking the law,[324] just as there are sometimes good moral grounds for lying or being unkind to certain other people. But they must be *moral* reasons, not mere concerns for personal benefit. Anyone who lies or is unkind to others merely to obtain a personal benefit is a jerk. Similarly, any person or corporation who violates existing laws just to increase profits or market share is acting in an immoral manner.

There is no clear-cut refutation of this sort of argument, whose strength depends largely on acceptance of its premises. One could argue that there is no inherent moral value in a rule merely because it has been validly enacted by the relevant governmental authorities.[325] Rather, all such rules should be judged by their own inherent moral content and can be good, bad, or

322. *See supra* note 262 and accompanying text.

323. *See supra* Part II.

324. *See supra* notes 291–96 and accompanying text.

325. This comes close to the more instrumentalist legal realist positions. *See supra* notes 84–89 and accompanying text.

morally indifferent. In this view, there is no moral obligation to obey mere "technical" rules about licensing, regulation of certain industries, or prohibitions on enjoyable and potentially useful products like cannabis.[326] Rather, an expanded version of the "efficient breach" concept should be applied so that companies that will benefit from violating such rules and are willing to risk the penalties involved should be free to do so.

A second, and to my mind somewhat weaker justification, is that disruptive businesses are engaged in morally justifiable activities that can overcome objections to their law-breaking. Acceptance of this argument depends on how much moral content one is willing to ascribe to greater convenience, lower prices for consumers, or greater job opportunities for those seeking part-time work. While it is highly doubtful that such benefits can justify the kinds of egregious corporate wrongdoing engaged in by Uber, there may well be specific companies, like medical marijuana businesses, that can credibly argue that their businesses have positive moral content which justifies the relatively minor legal violations involved.

I have purposely presented these arguments for and against modification of Rule 1.2 in a tentative "on the one hand, on the other" style, rather than the more confident, result-oriented arguments that characterize most legal briefs and many law review articles. This is in part because I believe that discussions of legal ethics should recognize the difficulties of making generalized moral judgments under conditions of uncertainty, and because I believe that on this particular issue, there are substantial arguments for both sides. But the main reason for noting the strengths of both sides' arguments is to suggest that the best response to this problem is a compromise of sorts. I suggest a limited and highly conditional expansion of the kinds of advice authorized by ethical rules to permit discussion and assistance of some not-quite-legal activities. This would avoid the worst effects of the current prohibition while maintaining some moral focus and impose reasonable ethical limits on the kinds of aid and advice that can be given to companies that seek to break the law. That is the goal of the next and final section.

326. In many ways, this argument reflects the traditional criminal law distinction between offenses that are *malum prohibitum* and those that are *malum in se*, a distinction which itself is falling out of favor with criminal law academics. *See* Richard L. Gray, *Eliminating the (Absurd) Distinction Between* Malum In Se *and* Malum Prohibitum *Crimes*, 73 WASH. U. L.Q. 1369, 1370–72 (1995).

### C. A NEW PROPOSED STANDARD

Ideally, a modification of Rule 1.2 would expand the concepts of "law" and "legal advice" to permit lawyers to aid and advise businesses regarding activities that have obtained some degree of public acceptance but still remain within the zone of the not-quite-legal. At the same time, to maintain respect for the law and integrity of legal practice, any such rule should also set relatively clear and morally justifiable limits on the kinds of not-quite-legal activities on which lawyers can ethically aid and advise. I believe this can be done with a new standard that (1) permits lawyers to aid their clients and advise them on activities which currently violate formal legal rules, but for which there is a reasonable basis for believing they will become legal in the foreseeable future. Such aid and advice can only be extended to such activities, however, if they are also (2) fully disclosed, and no attempts are made to prevent governmental authorities from detecting or observing them, and (3) the lawyers have reasonable, independent grounds for concluding that the activities are not otherwise unethical or harmful to the public. Although this new standard could be the basis for a revision of Rule 1.2 or its equivalents in various state ethics codes, it is also possible, and probably preferable, to add it as a commentary or advisory opinion to the existing rule, as some states have already done in connection with advising cannabis clients.[327]

#### 1. Expanding Permissible Subjects for Legal Aid and Advice

Current ethical rules forbid advising or assisting a client "in conduct that the lawyer knows is criminal or fraudulent."[328] Note that if the lawyer does not "know" the planned conduct is criminal, but thinks it merely *might* be because the authorities are vague, conflicting, or confusing, the rules do not forbid advising and assisting on such matters.[329] In effect, the zone of permissible advice-giving is expanded under the current Model Rules to include not just clearly legal conduct, but conduct that might be legal under a reasonable interpretation of the existing rules. Certain other legal rules extend the zone of permissible legal discourse even further. Most notably, Rule 11(b)(2) of the Federal

327. An advisory opinion would not be binding on courts, *see supra* note 181, but would provide for a longer, more reasoned discussion of the issues involved, and would likely be persuasive to lawyers and governmental authorities, while also leaving room for exceptions and special cases.

328. *See supra* note 8.

329. *See supra* note 8.

Rules of Civil Procedure extends the realm of permissible legal argument in civil lawsuits not just to arguments warranted by existing law, but to any "nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law."[330] In short, what constitutes "the law" for lawyers varies from discourse to discourse and for various purposes. Litigators have more leeway than corporate legal advisors, who probably have more leeway than, say, treatise writers.[331]

When does a lawyer "know" that contemplated client conduct is criminal? Certainly not when it is merely uncertain or ambiguously legal. What if, as with cannabis businesses, the conduct violates federal law, but is permitted by state law, and there are objective indications that the federal authorities are disinclined to enforce federal law in areas where it conflicts with state law? As discussed, state ethics boards have been willing to extend the zone of permissible advice-giving to such clients, permitting lawyers to do ordinary corporate work for them as well as advise them about current governmental enforcement policies.[332] What about businesses that are contemplating other conduct, like operating an unlicensed ride sharing service, where such conduct would violate express licensing requirements carrying criminal penalties, but where other companies have engaged in such activities in recent years and no governmental action has been taken against them? I would argue that such conduct can also be characterized as within a new expanded zone of legal ambiguity, and lawyers should therefore be permitted, under some circumstances, to aid and advise such businesses as well.[333]

I would generalize this rule as follows: Lawyers may advise or assist clients with respect to conduct that may appear possibly criminal, if objective evidence creates a reasonable belief that such conduct is likely to be permitted in the foreseeable future.[334] This rule attempts to define the zone of the not-quite-

330. FED. R. CIV. P. 11(b)(2); *see also* MODEL RULES OF PROF'L CONDUCT r. 3.1 (AM. BAR ASS'N 2018).

331. Legal advisors can offer their clients innovative or idiosyncratic interpretations of uncertain legal rules. *See supra* notes 85–89 and accompanying text. Treatise writers can, at best, acknowledge such views with a "but see" citation.

332. *See supra* notes 173–81 and accompanying text.

333. This would permit assisting with much but not all of the conduct of Uber, Airbnb, and other disruptive businesses. *See supra* Parts II.B–C.

334. This change would leave the prohibition in Rule 1.2 on advising or assisting "fraudulent" conduct unaffected.

legal and to extend permissible aid and advice-giving to that zone. It recognizes the importance of legal advice to clients engaged in law reform efforts, as many disruptive businesses claim to be, but only permits such advice when there is objective evidence that such law reforms are "likely to be successful" in the "foreseeable future." The requirement of "reasonable belief" based on "objective evidence" is important. It makes it clear that aid and advice does not extend to any corporate law-breaking which the client hopes might someday be legalized, but only to situations where "objective evidence" shows some public ambivalence, governmental ambivalence, or uncertainty about continuing regulation or enforcement of the law. State laws legalizing cannabis sales would certainly constitute such evidence, but so would policies of nonenforcement or underenforcement of regulations governing specific businesses like car services or short-term rentals. Trends in the law, like an announced policy of nonenforcement in other cities or states, might also constitute such objective evidence of likely legal change. In that sense, a business might be able to demonstrate its entitlement to legal advice and aid by the success of its own prior law reform efforts or those of its competitors. By emphasizing objective evidence of likely legal change, however, I hope to preserve the current rule's attempt to demonstrate respect for law and the obligation of lawyers to act within the bounds of the law. The revised rule should not be seen as sanctioning law-breaking, but rather as recognizing and expanding the zone of legal uncertainty and ambiguity, where clients perhaps most need legal advice and assistance.[335]

Lawyers should have no difficulty providing standard contract drafting, tax advice, and other ordinary legal services to clients whose conduct meet the requirements of the expanded rule. With respect to giving advice regarding conduct that violates existing law, lawyers can certainly advise about the formal law itself, potential sanctions, and enforcement policies. They can also discuss other objective evidence of likely legal change. Because of the need to uphold the basic principle of lawyers' commitment to the rule of law, however, such discussions should not extend to methods for avoiding detection of conduct that violates the law.

335. It is important to remember that the revised rule would not legalize any such conduct but would simply permit lawyers to provide advice as to all aspects of its present or future legality.

2. Conduct Must Be Fully Disclosed and Observable

Having expanded the kinds of conduct for which clients can seek aid and advice, it is equally important to set clear and morally justified limits on such conduct. Some corporate cultures, having defined themselves as disruptive law-breakers, show a greater willingness to jettison all kinds of constraints on other harmful and morally questionable behavior.[336] Accordingly, any expansion of the aiding and advice-giving function must also include strict limits on extending those functions to conduct inconsistent with a basic commitment to the rule of law. Uber clearly crossed that line with the "Greyball" project, which sought not to challenge existing law, but to evade it.[337] Full disclosure of potentially illegal conduct was also a feature that distinguished legitimate civil disobedience from seedy tax avoidance and money laundering schemes.[338] Assistance and advice-giving, therefore, must be limited to conduct which is fully disclosed and observable by the public and government officials. It may not be extended to conduct which seeks to avoid detection by such authorities. Similarly, ethical lawyers can give no advice on how to avoid such detection.

To a certain extent, this rule will be self-enforcing with respect to startup businesses, since every company which seeks to sell goods or services to the public must provide a fair amount of truthful information about its operations.[339] There will, however, be some line-drawing issues. The rule against concealing not-quite-legal conduct should not be used to impose a full-scale securities disclosure regime on privately held businesses. There is no need to disclose all material information about a company, just about activities that arguably violate criminal laws. Information about the activities need not be filed with governmental authorities on some kind of disclosure form so long as they are publicly observable by any governmental authority that wants to observe them.[340] Lawyers would be ethically prohibited from

336. *See supra* Part II.B.

337. *See supra* notes 213–16 and accompanying text.

338. *See supra* notes 281–86 and accompanying text.

339. Moreover, in their law reform efforts, companies often seek to "make an issue as publicly salient as possible" in order to "rally the public to their cause." Pollman & Barry, *supra* note 5, at 387.

340. Since the governmental resources devoted to enforcement is one of the criteria for determining whether an activity is a likely subject for law reform, the rules should not make it *unusually* easy to detect and punish such violations.

providing any advice or assistance regarding potential corporate criminal activities that were not disclosed in this manner. This does not mean, however, that such lawyers would have to disclose such conduct to the authorities. Ordinary attorney-client principles remain in effect, which require such disclosure of prospective criminal conduct only in limited circumstances.[341]

This unwaivable requirement of full disclosure should enable lawyers to draw a clear distinction between clients engaged in some version of law reform, even a self-interested one, and clients seeking to simply enrich themselves by gaming the legal system. By denying legal advice and assistance to the latter, ethically conscientious lawyers will still be affirming a coherent vision of the rule of law.

3. Proposed Activities Must Not Be Harmful or Otherwise Immoral

Deliberately breaking the law is a morally serious matter that should not be undertaken without strong justification. Accordingly, any standard that permits lawyers to assist and give advice to clients in connection with potentially law-breaking activities should also require them to make reasonable efforts to determine that the corporate activities involved are moral, or at least not socially harmful or otherwise morally unjustifiable. Legal assistance should not be given to companies that cannot make such a showing about their own conduct.

Standards for judging whether conduct is socially harmful or immoral are numerous and often contradictory, particularly for businesses, and especially start-up businesses.[342] Much will depend on one's views concerning the morality of promoting free choice, consumer protection versus efficiency and cost reduction, increased competition and promotion of innovation, related matters like environmental protection, the welfare of employees or of independent contractors, and promotion of diversity and antidiscrimination. Consequently, it would be surprising if most corporate lawyers could not find ways to conclude that the activities of their clients were, in most instances, socially beneficial or at least morally neutral. Their clients would certainly agree, even if others with different perspectives might not. It would therefore seem that such a requirement is unlikely to prevent much legal assistance or advice.

341. MODEL RULES OF PROF'L CONDUCT r. 1.6(b) (AM. BAR ASS'N 2018).

342. *See supra* notes 104–21 and accompanying text.

With respect to the vast majority of business clients who are organized as corporations or other business entities, however, it is possible for lawyers to require a somewhat more objective manifestation of the morality of their clients' conduct. They can advise and assist with law-breaking activities only after they have received a determination that such proposed conduct is not harmful or otherwise immoral from an independent committee of a client's board.[343]

The use of independent committees to monitor and review controversial or questionable corporate actions is a common and generally well-regarded aspect of modern corporate practice.[344] It is seen as providing both a formal check and an alternative perspective on managerial actions that might subject the company to potential liability.[345] At the very least, it creates a reporting requirement to board members for decisions which cannot or should not be taken by incumbent management alone by requiring them to be considered by a committee whose interests are not too closely tied to management's. In a well-functioning company, such committees will approve most managerial decisions, but this is not a foregone conclusion.[346] Moreover, the very prospect of independent committee review may deter management from taking actions that are questionable or difficult to justify.[347]

343. A similar obligation for approval by independent advisors can be placed on LLCs and other noncorporate business entities.

344. *See* Corporate Laws Committee, ABA Section of Business Law, *Corporate Director's Guidebook—Sixth Edition*, 66 BUS. L. 975, 1013–15 (2011); Peter J. Henning, *Board Dysfunction: Dealing with the Threat of Corporate Criminal Liability*, 77 U. CIN. L. REV. 585, 585–86 (2008) (discussing corporate board responses to the threat of liability, including internal investigations and special committees).

345. *See* Frank Aquila & Samantha Lipton, *Making Good Use of Special Committees*, PRACTICAL L.J., Oct. 2010, at 44, https://www.sullcrom.com/siteFiles/Publications/Aquila_Lipton_Oct_2010.pdf [https://perma.cc/77JP-KSDF] ("The formation of a special committee tends to reduce the criticism and litigation that naturally results from transactions in which the target's entire board may not be viewed as disinterested and independent."); *see also* Henning *supra* note 344.

346. *See* Aquila & Lipton *supra* note 345, at 46 ("A special committee should be empowered to act on behalf of the corporation independently of the interested directors or any controlling stockholder.").

347. *See, e.g.*, Sarbanes-Oxley Act, Pub. L. No. 107-204, 116 Stat. 745 § 301 (2002) (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.) (outlining the requirements for an independent audit committee).

A requirement of independent committee review of the morality of any corporate actions that are not-quite-legal would serve both practical and expressive functions. It would provide a review of the morality of proposed managerial conduct at a high level by sympathetic but independent observers. At best, it might deter some of the overreaching and misconduct observed with companies like Uber. It would also give ethically conscientious lawyers additional assurance that the morality of their client's conduct has been considered at the highest levels. Finally, it would demonstrate to the business world at large, and disruptive industries in particular, that even when stretching the boundaries of the law is possible and profitable, such conduct raises serious moral issues that are not to be taken lightly.

## CONCLUSION

Ethical rules should provide guidance to conscientious lawyers, not merely seek to constrain their most egregious conduct. This Article has shown the need for such guidance for lawyers facing the complex dilemmas of modern corporate practice. That need is particularly great for lawyers advising companies in disruptive, rapidly changing business and regulatory environments. The modest changes to the ethics standards proposed here seek to balance the needs of lawyers and their clients with a commitment to innovation and beneficial law reform, while also trying to avoid the dangers of advice that goes beyond the formal limits of the law. It also recognizes that a lawyer's most fundamental commitment must be to the values embodied in the concept of the rule of law.