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The Framing Effects of Professionalism: Is There a Lawyer Cast of Mind? Lessons from Compliance Programs

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THE FRAMING EFFECTS OF PROFESSIONALISM: IS THERE A LAWYER CAST OF MIND? LESSONS FROM COMPLIANCE PROGRAMS

Robert Eli Rosen, Christine E. Parker,** & Vibeke Lehmann Nielsen*** †*

ABSTRACT

Professionals working inside companies may bring with them frames of mind set by their professional experience and socialization. Lawyers, in particular, are said to “think like a lawyer”—to have a lawyer cast of mind. In seeking power within a company and in exercising the power that they obtain, professionals may draw on their professional background to frame, name, diagnose, and prescribe a remedy for the company’s problems. In making decisions about their compliance with the law, companies are constrained not only by their environment, but also by their agents’ understanding of whose (or what) interests the company should serve. In particular, compliance managers’ understandings will frame and influence their companies’ calculations of the value, benefits, and costs of compliance activities. The profession of the compliance manager then may influence how the company complies with the law. This Article uses data from a survey of 999 large Australian businesses to examine the professional background of the person in charge of compliance and (1) how they analyze the costs, benefits and risks of non-compliance; and (2) their company’s structures and practices of compliance. Contrary to our hypotheses, we find that the

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professional background of the individual responsible for compliance has little impact on a company's compliance management structures and practices or assessment of stakeholders. The exceptions are that having a lawyer in charge of compliance is associated with the company's perception of heightened legal risk; and where the person in charge of compliance is a lawyer, the company compliance efforts will be marked by manuals and training programs, but not more fulsome compliance structures, which are present when a compliance specialist leads the department. Unfortunately, our data also reveals that these compliance structures are generally merely formal—and likely largely symbolic.

Introduction	299
I. Julius Henry Cohen and the Lawyer Cast of Mind	303
II. Professional Frames' Influence on Business Behaviors.....	307
III. Our Study	317
A. Outline of Analytic Model/Hypotheses.....	317
B. Data and Research Strategy	322
1. Data.....	322
2. Research Strategy.....	324
3. Measures.....	326
4. Testing Hypothesis 1: Compliance Behavior of Respondent's Company.....	327
5. Testing Hypothesis 2: Respondent Company's Risk Analyses	332
6. Main Independent Variable	336
7. Control Variables	337
a. The Firm's History.....	337
b. Firm-Level Factors	339
IV. Results.....	342
A. Hypothesis 1: Direct Effects of Professional Orientation on Compliance Management Behaviors	345
B. Hypothesis 2: Indirect Effect of Profession on Risk Analyses	348
V. Discussion/Conclusion.....	352
A. Summary of Results	352
B. Limitations of Study.....	355
C. Firm Identity and the Profession of the Person in Charge of Compliance	357
D. Firm Norms and Professional Behavior	359
E. The Two Faces of Lawyers.....	362
Conclusion—Back to Julius Henry Cohen.....	364

*The mind of the lawyer is the essential part of the machinery of justice The progress of the law means the progress of the lawyer, not of a few talented men who are on the outposts of legal thought, but the great army of the commonplace*¹

INTRODUCTION

An inveterate tradition in thinking about the legal profession is to ascribe to lawyers a “cast of mind.”² “Thinking like a lawyer” supposedly names a peculiar mode of both analysis and response.³ The “great army” of lawyers is said to have “[t]he mind of the lawyer.”⁴

Experience, socialization, and education in particular, are thought to construct the lawyer cast of mind.⁵ By performing law jobs, such as

1. JULIUS HENRY COHEN, *THE LAW: BUSINESS OR PROFESSION?* 317–18 (1916) (quoting AM. BAR ASS’N, *Report of the Committee on Legal Education and Admission to the Bar*, in REPORT OF THE TWELFTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 365 (1897)).

2. David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 VAND. L. REV. 717, 718–19 (1988) (discussing de Tocqueville). The use of “mind” is definitely not intended to exclude emotions or psychological characteristics. Tocqueville was discussing “mores,” sometimes translated as “habits of the heart.” ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 36-41 (1996); see also Luban, *supra*, at 721 (discussing Brandeis).

3. The concept of “thinking like a lawyer,” like that of a lawyerly cast of mind, is a capacious one. We do not believe that there is a single definition of either of these concepts. Like “profession” itself, they are “folk concepts.” See ELIOT FREIDSON, *PROFESSIONALISM REBORN: THEORY, PROPHECY & POLICY* 20 (1994). The status of “thinking like a lawyer” as a folk concept is testified to by the number of quite different books with this exact phrase in their title. See, e.g., PATRICK M. MCFADDEN, *A STUDENT’S GUIDE TO LEGAL ANALYSIS: THINKING LIKE A LAWYER* (2001); ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOLS: LEARNING TO “THINK LIKE A LAWYER”* (2007); SARAH E. REDFIELD, *THINKING LIKE A LAWYER: AN EDUCATOR’S GUIDE TO LEGAL ANALYSIS AND RESEARCH* (2011); FRED SCHAUER, *THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING* (2009); *THINKING LIKE A LAWYER: ESSAYS ON LEGAL HISTORY AND GENERAL HISTORY FOR JOHN CROOK ON HIS EIGHTIETH BIRTHDAY* (J.A. Crook & Paul McKechnie eds., 2002); KENNETH J. VANDELDELDE, *THINKING LIKE A LAWYER: AN INTRODUCTION TO LEGAL REASONING* (1996). These are only some of the most recent examples available in print.

4. COHEN, *supra* note 1, at 317.

5. DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* (2004). On the experience of Australian law schools and their connection with the hierarchy of the legal profession, see Christine Parker & Andrew Goldsmith, *‘Failed Sociologists’ in the Marketplace: Law Schools in Australia*, 25 J.L. SOC’Y 33 (1998), simultaneously

drafting documents or appearing before tribunals, lawyers may develop habits of heart and mind. Some of these are characteristic of all fiduciaries, such as careful work, anticipation of risks, and unselfish devotion.⁶ Others are characteristic of the legal profession, such as unquestioning loyalty, partisanship, and the ability to challenge authority with respect.⁷ Yet others may be less ennobling, such as being adversarial, critical, closed, mono-disciplinary, aggressive, or arrogantly independent.⁸ There may be arguments about what character traits are taught, or how to teach them—especially given divergent moral and political values—but there is little controversy that legal practice and education develop “thinking like a lawyer.”

The framing effects of “thinking like a lawyer” may be understood as an instance of the more general framing effects of professionalism. Professional role and background as consequential for behavior has been argued for by Berle & Means,⁹ Neil Fligstein,¹⁰ Herbert Simon,¹¹ Amos Tversky,¹² and many others.¹³

Their work suggests that professional framing operates even outside what may be seen as the profession’s “jurisdiction.”¹⁴ Lawyers, for example, may prefer acquisitive, rather than internal diversification, strategies when they become CEOs.¹⁵ Or, they may spend less on Research and Development (R&D) than CEOs with

published in TRANSFORMATIVE VISIONS OF LEGAL EDUCATION 33 (Anthony Bradney & Fiona Cownie eds., 1998). See also MARGARET THORNTON, PRIVATISING THE PUBLIC UNIVERSITY: THE CASE OF LAW (2012).

6. See RESTATEMENT (THIRD) OF AGENCY §§ 8.01, 8.08 (2006).

7. See MODEL RULES OF PROF'L CONDUCT R. 1.2(a), 3.4, 8.4 (2012).

8. Michele DeStefano suggested we prominently include these characteristics as well as the more virtuous ones. We thank her.

9. See *infra* note 52 and accompanying text.

10. See *infra* note 53 and accompanying text.

11. See *infra* note 54–55 and accompanying text.

12. See *infra* note 56 and accompanying text.

13. See *infra* note 68 and accompanying text.

14. To adopt Andrew Abbott's term for the field of a particular profession's analysis and action, see ANDREW ABBOTT, SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR 53–57 (1988).

15. Jae H. Song, *Diversification Strategies and the Experience of Top Executives of Large Firms*, 3 STRATEGIC MGMT. J. 377 (1982) (internal diversification was favored by CEOs with marketing background; acquisitive diversification was favored by CEOs with backgrounds in finance, accounting, and law).

other backgrounds.¹⁶ Social fields, like the economy or the family, are sometimes “legalized,” which occurs when legal professionals reorder aspects of a social field by successfully applying legal forms, concepts, and imaginings outside a traditional legal arena (normally thereby creating jobs for the legally trained).¹⁷ Legalization, however, is (fortunately) not always successful: The power of thinking like a lawyer may or may not support lawyers as they move into jobs outside what has heretofore been considered “legal.” Or, only aspects of thinking like a lawyer may travel with the lawyer.

This Article inquires into the framing effects of professionalism on organizational compliance structures and practices, with particular attention to the distinctive influence, if any, of the lawyer cast of mind. We ask: When lawyers are compliance managers, do companies’ structures and practices of compliance differ from when a chief financial officer or specialized compliance professional, company secretary, or chief executive officer is the manager of compliance? We use survey data to measure the framing effects of professionalism and the distinctiveness of the lawyer cast of mind on compliance structures and practices.

Self-introspective writing on “the lawyer cast of mind” and “thinking like a lawyer” is vast. This Article appears in a special issue of the *Fordham Urban Law Journal* inspired by the work of Julius Henry Cohen. Part One of the Article uses his work to discuss the lawyer cast of mind. Part Two of the Article provides a brief literature review about the influence on business behavior of the professional background of managers.

In Part Three, we develop and present a theoretical model for research. We then test this model using our data from 999 large Australian businesses. Our data includes many lawyers and other professionals who manage their organizations’ compliance structures and practices. Contrary to our hypotheses, we find that the professional background of the individual responsible for compliance has little impact on a company’s compliance management structures and practices or assessment of compliance risks. The exceptions are that having a lawyer in charge of compliance is associated with the

16. Vincent L. Barker, III & George C. Mueller, *CEO Characteristics and Firm R&D Spending*, 48 *MGMT. SCI.* 782, 797 (2002) (“CEOs with legal career experience spend less on R&D than CEOs without such experience.”)

17. See, e.g., *FAMILY LAW AND FAMILY POLICY IN THE NEW EUROPE* (Jacek Kurczewski & Mavis Maclean eds., 1997); *THE IMPOSITION OF LAW* (Sandra B. Burman & Barbara E. Harrell-Bond eds., 1979).

company's perception of heightened legal risk; and where the person in charge of compliance is a lawyer, the company compliance efforts will be marked by manuals and training programs, but not more fulsome compliance structures, which are present when the department is headed by a compliance specialist. After presenting our data, we consider its significance and limitations.

Currently, there is a contest among professions about jurisdiction over compliance systems¹⁸: Who should lead them? In the United States, we are seeing Chief Compliance Officer positions emerge, often out of and separating from the legal department.¹⁹ For some, this divorce is a happy event, as the role of "cop" is removed from the legal department.²⁰ For others, this is a reduction in the lawyer role and they seek to resist it. Our research took place in Australia at a time when there was no consensus as to who should be in charge of the compliance systems that we examined. This makes our study an excellent one for seeing whether and how the lawyer cast of mind is put in play compared with other professional frames.

It is not only students of the professions who can benefit from a better understanding of the role of professionals in compliance programs. There is a great deal of policy and research interest in how companies respond to the threat of external regulation and regulatory enforcement by putting in place internal controls (compliance systems).²¹ The development of company compliance and risk management structures has been the focus of legislative, judicial, and private regulatory initiatives.²² In the United States, the presumed

18. "To an outside observer there is a strong scent of professional competition" between lawyers and non-lawyers as to who should be the "chief ethics and compliance officers." Donald C. Langevoort, *Getting (Too) Comfortable: In-house Lawyers, Enterprise Risk, and the Financial Crisis*, 2012 WIS. L. REV. 495, 500 (2012); see also ROBERT ELI ROSEN, *LAWYERS IN CORPORATE DECISION-MAKING* 103 (Quid Pro Books 2010) (1984); Christine Parker, *The Ethics of Advising on Regulatory Compliance: Autonomy or Interdependence?*, 28 J. BUS. ETHICS 339 (2000); Robert Eli Rosen, *Resistances to Reforming Corporate Governance: The Diffusion of QLCCs*, 74 FORDHAM L. REV. 1251 (2005) [hereinafter Rosen, *Diffusion*] (lawyers and board in competition).

19. Michele DeStefano, *The Government's Unofficial Stance on Compliance Departments: To Comply or Not to Comply* (draft on file with authors).

20. Robert Nelson & Laura Beth Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 LAW & SOC'Y REV. 457, 463-64 (2000) (describing inside counsel as playing a "cop" role).

21. See *supra* note 18 and accompanying text.

22. See THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: FOUNDATIONS AND IMPLEMENTATION (Radu Mares ed., 2011); Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to*

ability of the chief compliance officer to direct corporate behavior is the basis for individual liability²³ and for the strategy of the regulator.²⁴

Providing corporate leadership opportunities to professionals has been a mechanism that some have hoped would make corporations more responsible.²⁵ Their professional skills would make them better sensors of environmental influences and their professional commitments would make them lead the corporation to valuing compliance.²⁶ Either their socialization or their career interests would lead them to be carriers of professional norms inside the corporation.²⁷ As employees, they would make the corporation more permeable to regulation.²⁸ In the conclusion, we return to this hope.

I. JULIUS HENRY COHEN AND THE LAWYER CAST OF MIND

Understood functionally, the lawyer cast of mind has various aspects. First, it is normative control: it constructs what is virtue and vice for a lawyer. Second, it creates identity: it unites and separates lawyers. Third, it forges jurisdictions: it maintains, gains, and declines work for the profession. And fourth, it establishes traditions: it speaks one set of public discourses and silences others.²⁹

Although there are traditions in which being “like a lawyer” is condemned and there are those which mark lawyers as the butts of jokes, there also is a tradition that equates the lawyer cast of mind with virtuous action. Julius Henry Cohen is in that tradition. For

Achieve Public Goals, 37 *LAW & SOC'Y REV.* 691 (2003); Lawrence A. Cunningham, *The Appeal and Limits of Internal Controls to Fight Fraud, Terrorism, Other Ills*, 29 *IOWA J. CORP. L.* 267, 277–82 (2004); Sharon Gilad, *It Runs in the Family: Meta-Regulation and Its Siblings*, 4 *REG. & GOVERNANCE* 485 (2010).

23. See Anthony Pirraglia, Note, *Tangled Web: Compliance Director Liability Under the Securities Laws*, 8 *FORDHAM J. CORP. & FIN. L.* 245, 268 (2003).

24. See Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 *DUKE L.J.* 377, 464 (2006) (quoting SEC official).

25. See CHRISTINE PARKER, *THE OPEN CORPORATION: EFFECTIVE SELF-REGULATION AND DEMOCRACY* 168–96 (2002).

26. See *id.*

27. See *id.*

28. See *id.*

29. See Maureen Cain, *The Symbol Traders*, in *LAWYERS IN A POSTMODERN WORLD: TRANSLATION AND TRANSGRESSION* 15 (Maureen Cain & Christine Harrington eds., 1994); Timothy Kuhn, *Positioning Lawyers: Discursive Resources, Professional Ethics and Identification*, 16 *ORGANIZATION* 681 (2009); Christine Parker & Tanina Rostain, *Law Firms, Global Capital, and the Sociological Imagination*, 80 *FORDHAM L. REV.* 2347 (2012).

Cohen, the cause and consequence of becoming a lawyer is the lawyer cast of mind, which frames a lawyer's motives and actions and aligns them with ethics. In Cohen's day, admitting immigrants (often Jewish and Catholic) to the legal profession was at issue. Cohen supported the admission of immigrants to the profession on the ground that legal education socialized them into thinking like an "American" (i.e., non-immigrant) lawyer: "[T]he passage through the universities and the law schools . . . shows clearly that these obstacles [of poor socialization] are overcome"³⁰

To Cohen, a lawyer's identity—that lawyer's cast of mind—is an acquired virtue, and consequently the profession of law can be accessed by all. The existence of a virtuous lawyer cast of mind enabled Julius Henry Cohen to implicate democratic values into the profession: Immigrants could become lawyers and they could join with non-immigrants to be forces for justice because they learned to think (and consequently feel) alike.³¹ However, because it is an acquired virtue, guardians of the profession are needed and they must be eternally vigilant to preserve the lawyer cast of mind since what can be acquired can also be lost or misshapen.³² Julius Henry Cohen was one of those guardians.

A contrary view is that virtue and good character are traits that are developed outside of legal training³³: Who one is, not the lawyer cast of mind one has been educated into, informs ethical choices in legal practice. And passing tests on professionalism bears little relation to behavior in practice.³⁴ Legal practice then needs to be limited to good men.³⁵ Character and fitness committees should be emboldened to guard against miscreants entering the profession. The weakness of this view stems from the legendary difficulties of assessing good

30. Samuel J. Levine, *Rediscovering Julius Henry Cohen and the Origins of the Business/Profession Dichotomy: A Study in the Discourse of Early Twentieth Century Legal Professionalism*, 47 AM. J. LEGAL HIST. 1, 15 (2005) (quoting COHEN, *supra* note 1, at 317). Hence, "Cohen identified higher standards of admission to the bar as one of the central aspects of his vision of law as a profession" Levine, *supra*, at 7 n.32.

31. See *supra* note 29 and accompanying text.

32. See Levine, *supra* note 30, at 22.

33. See generally *id.*

34. See *id.* at 22 nn.31–32.

35. And women need not apply. For a survey of the historical record, see generally CYNTHIA FUCHS EPSTEIN, *WOMEN IN LAW* (1993); Cynthia Fuchs Epstein, *Women in the Legal Profession at the Turn of the Twenty-First Century: Assessing Glass Ceilings and Open Doors*, 49 U. KAN. L. REV. 733 (2001) (detailing barriers to the entry of women into the legal profession).

character. Secondary judgments substitute for primary ones: class, race, national origin and ethnic background are taken to indicate character. Democratic admission policies are then understood to threaten professionalism.³⁶ Cohen's response is that this threat can be met by the lawyer cast of mind and protecting it by vigilantly imposing strictures on how lawyers behave, maintaining the "dignity"³⁷ of the lawyer office, disciplining wayward lawyers, and regulating law schools.³⁸

The lawyer cast of mind to Cohen does not only support diversity in membership in the legal profession, but also makes possible common cause between lawyers.³⁹ Despite the sociological reality that lawyers on Wall Street, on Main Street, and on Tally's Corner have little in common except a professional degree, the conception of thinking like a lawyer creates a common bond between them. It is noteworthy, despite its usage being much more common in his day than in ours, that Cohen repeatedly speaks to "*we*" lawyers.⁴⁰ He addresses his fellow American lawyers, telling them what "*we* know" and that the lawyers' fellow citizens "call upon us to discipline, to educate."⁴¹ Speaking to "*we*" is an assertion of power and it challenges "*we*" to exercise power.⁴² Now that U.S. lawyers are more than a million strong, Cohen's vision of speaking to "*we*" lawyers invites speculation about political mobilizations "of the great army"

36. See Levine, *supra* note 30, at 7.

37. See *id.* at 28 (quoting COHEN, *supra* note 1, at 313).

38. See *id.* at 22.

39. See COHEN, *supra* note 1, at 318.

40. See Levine, *supra* note 30, at 22 (quoting COHEN, *supra* note 1, at 258-59). As Levine makes clear, Cohen uses "*we*" not to exclude others or to affirm a social position—Cohen espouses neither nativist nor Christian superiority—but he uses "*we*" to include himself and all lawyers and to deny the particularities of his social position. See *id.* at 13.

41. See *id.* at 22; see also COHEN, *supra* note 1, at xiv ("We lawyers must be reminded over and over again that we are living in a democracy."). Cohen makes use of the "Royal We," instead of an "I" at many points in the book. See, e.g., *id.* at 1-2. But, he also uses it to create identity between himself and the reader. For example, the first line of the chapter on "Officer of the Court" is "We are an insular people at best." *Id.* at 44. Cohen concludes his argument with, "We begin now to understand . . . the Russian immigrant." *Id.* at 74. Or, "We have had, it is true, individual lawyers of great distinction. . . . Hamilton, Jay, Marshall, Jefferson." *Id.* at 104.

42. The right to say "*we*" is the central theme of Rubashov's questioning in Arthur Koestler's *DARKNESS AT NOON*. See ARTHUR KOESTLER, *DARKNESS AT NOON* 78-94 (1941).

not yet taken.⁴³ To Cohen “we” lawyers emerges, with their national responsibilities and possibilities, because all lawyers have a certain cast of mind. That is, Cohen was making an empirical assertion that lawyers share a political vision because they share a cast of mind.

The lawyer cast of mind also allows the profession to occupy “jurisdictions.” It is not just individual lawyers who find work outside the traditional professional preserve, but new tasks and jobs become allocated to lawyers as a result of collective mobilization projects, including the organized bar fighting other occupations for jurisdiction over work.⁴⁴ The division of labor between professions, in part, is a form of “intentional social architecture” based on claims of knowledge to solve problems.⁴⁵ “Thinking like a lawyer” is sufficiently abstract that it allows the legal profession to “redefine its problems and tasks, defend them from interlopers, and seize new problems.”⁴⁶ It is sufficiently concrete that it also enables remedies to these problems and tasks.

In fighting against multi-disciplinary practices (MDPs), the ABA is engaged in patrolling the borders of the legal profession’s jurisdiction. Recent fighting is based on the effects such practices would have on “thinking like a lawyer.”⁴⁷ In other places, there has been more of a blurring of professional boundaries and less call for a monopoly defined by the lawyer cast of mind. In the United States, some corporate work has been outsourced to non-lawyers.⁴⁸ In the United Kingdom, the conveyancing monopoly is a thing of the past. In the United Kingdom and Australia, non-lawyers are allowed to own stock

43. COHEN, *supra* note 1, at 318. In questioning the singular nature of the legal profession and its cast of mind, we question the vision of an army of lawyers capable of being mobilized for this or that end.

44. See ABBOTT, *supra* note 14, at 86–91. For applications of this concept to the legal profession, see generally YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (1996) and RONEN SHAMIR, *MANAGING LEGAL UNCERTAINTY* (1995).

45. See DIETRICH RUESCHEMEYER, *POWER AND THE DIVISION OF LABOR* 19 (1986).

46. See ABBOTT, *supra* note 14, at 9.

47. See Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services From Lawyers in a Multidisciplinary Partnership*, 13 *GEO. J. LEGAL ETHICS* 217 (2000); Lawrence J. Fox, *Accountants, the Hawks of the Professional World: They Foul Our Nest and Theirs Too, Plus Other Ruminations on the Issue of MDPs*, 84 *MINN. L. REV.* 1097 (2000).

48. See, e.g., Milton C. Regan, Jr. & Palmer T. Heenan, *Supply Chains and Porous Boundaries: The Disaggregation of Legal Services*, 78 *FORDHAM L. REV.* 2137, 2164 (2010).

in law firms, despite claims about the ill-effects on the lawyer cast of mind.⁴⁹ Today, as a matter of professional defense, as well as to secure new tasks, such as compliance, mere recitals about a vague lawyer cast of mind are insufficient.

There is not much empirical work on whether or not there is a lawyer cast of mind. It has been more or less assumed that there is one and the debate is only about its valences. Not all agree with Cohen about its link to virtue. Some suggest, e.g., that lawyers are overly aggressive.⁵⁰ Nor do all agree that it is the distinctive voice of the legal profession. Nor do all agree with its attempted silencing of other traditions and approaches within the profession's claimed jurisdictions.

In the next Part, we survey relevant research on how the professional backgrounds of managers and executives shape company behavior. The findings of that literature point in multiple directions, raising questions about whether legal education and practice actually create a cast of mind, or at least whether it creates a cast of mind that travels with lawyers to business. Our research reveals what aspects of the lawyer cast of mind survive when lawyer jurisdiction is extended into compliance programs.

II. PROFESSIONAL FRAMES' INFLUENCE ON BUSINESS BEHAVIORS

Researchers have studied the effects of many demographic variables on the behavior of corporate actors, but professional or functional background "is the most widely cited demographic characteristic thought to affect corporate strategy."⁵¹ That managers would bring their professional attitudes and values to their work was recognized by Berle and Means who argued that the separation of

49. See Andrew Boon, *Professionalism Under the Legal Services Act 2007*, 17 INT'L J. LEGAL PROF. 195-232 (2010); John Flood, *The Re-Landscaping of the Legal Profession: Large Law Firms and Professional Re-Regulation*, 59 CURRENT SOC. 507-29 (2011); Christine Parker, *An Opportunity for the Ethical Maturation of the Law Firm: The Ethical Implications of Incorporated and Listed Law Firms*, in RE-AFFIRMING LEGAL ETHICS 96-108 (Kieran Tranter et al. eds., 2010); Christine Parker, Tahlia Gordon & Steve Mark, *Regulating Law Firm Ethical Infrastructure: An Empirical Assessment of the Potential for Management-Based Regulation of Legal Practices*, 37 J.L. & SOC'Y 466, 467 (2010).

50. See, e.g., Rand Jack & Dana Crowley Jack, *Women Lawyers: Archetype and Alternatives*, 57 FORDHAM L. REV. 933, 937-39 (1989).

51. Michael Jensen & Edward J. Zajac, *Corporate Elites and Corporate Strategy: How Demographic Preferences and Structural Position Shape the Scope of the Firm*, 25 STRATEGIC MGMT. J. 507, 509 (2004).

ownership and control allowed managers to pursue “prestige, power, or *the gratification of professional zeal*.”⁵² More recently, Neil Fligstein thought it self-evident that “having spent careers analyzing business problems in a certain way, managers come to view all problems through a certain theoretical lens.”⁵³

In a 1958 article, Herbert A. Simon found that a manager’s current job led him to perceive and interpret information differently from those holding other jobs.⁵⁴ He argued that functional background leads to selective perception and consequently particular diagnoses and remedies.⁵⁵ In a 1991 article, Amos Tversky found that attitudes toward risk vary by expertise regarding the context of a decision.⁵⁶ Others have suggested that socialization and practice shape behavior because they forge subcultures⁵⁷ and identities.⁵⁸ Others argue that professional and functional backgrounds change people’s values and that professional framing is normatively consequential, not merely perceptual.⁵⁹

52. Adolf Berle & Gardner C. Means, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 122 (1932) (emphasis added).

53. NEIL FLIGSTEIN, *THE TRANSFORMATION OF CORPORATE CONTROL* 357 (1990) (not citing any data).

54. Dewitt C. Dearborn & Herbert A. Simon, *Selective Perception: A Note on the Department Identifications of Executives*, 21 *SOCIOMETRY* 140 (1958).

55. *Id.* at 141–43 (citing that a functional background leads general managers to perceive and interpret information to reinforce their functional orientation). As Gunz and Jalland point out, some authors have ignored that Dearborn and Simon do not describe functional background, rather “the independent variable was the manager’s current job and not his or her previous work history.” Hugh P. Gunz & R. Michael Jalland, *Managerial Careers and Business Strategies*, 21 *ACAD. MGMT. REV.* 718, 734 (1996). Our data is similar to Dearborn and Simon’s. We both infer background from current jobs. In our case, except for compliance experts, it is the job they hold in addition to being the compliance manager.

56. See Chip Heath & Amos Tversky, *Preference and Belief: Ambiguity and Competence in Choice Under Uncertainty*, 4 *J. RISK & UNCERTAINTY* 5 (1991).

57. On predicting behavior from membership in a “subculture,” see George A. Akerlof, *The Economics of Caste and of the Rat Race and Other Woeful Tales*, 90 *Q.J. ECON.* 599 (1976) and George A. Akerlof & Rachel E. Kranton, *Economics and Identity*, 115 *Q.J. ECON.* 715 (2000) (cited in Reza Dibadj, *Reconceiving the Firm*, 26 *CARDOZO L. REV.* 1459, 1510 (2005)).

58. Alex Geisinger, *A Group Identity Theory of Social Norms and Its Implications*, 78 *TUL. L. REV.* 605, 606 (2004) (elaborating relations of norms and identity).

59. Barker & Mueller, *supra* note 16. Barker and Mueller argue that it is not that functional background creates biased perceptions which in turn explains performance differences but that functional background generates “*different value preferences*. . . . Therefore, CEOs with technical or marketing career experience may believe that spending money on R&D is just the ‘right thing to do’” *Id.* at 797. Tyler & Steensma argued that technical careers and educations teach people to personally

According to such research, by framing the decision, professional backgrounds define what is relevant, provide technologies of thought and socialize normative vision. Perceiving that they have relevant expertise, professionals also perceive reduced ambiguity and uncertainty in confronting issue identification, information search and processing, risk management, and remedy prescription.⁶⁰ They suffer from Veblen's "trained incapacities."⁶¹ Today, Veblen's argument would be cast in the tones of cognitive psychology, which famously describes decision-makers as myopic and egocentric, attuned to their own payoffs, discounting others' perspectives⁶²: one could characterize such an individual as "the selfish professional." This emphasis on incapacity, it is worth noting, does not legitimize a professional's authority. It also does not help a profession win a battle for jurisdiction to solve particular problems.

Another line of research has abstracted from individual professions and grouped them by functions for the company, describing mind-sets based on either "output" or "throughput" experiences.⁶³ By

value innovation. See Beverley B. Tyler & H. Kevin Steensma, *The Effects of Executives' Experiences and Perceptions on Their Assessment of Potential Technological Alliances*, 19 STRATEGIC MGMT. J. 939 (1998); cf. James P. Walsh, *Selectivity and Selective Perception: An Investigation of Managers' Belief Structures and Information Processing*, 31 ACAD. MGMT. J. 873, 887-88 (1988).

60. See Anil K. Gupta & Vijay Govindarajan, *Business Unit Strategy, Managerial Characteristics, and Business Unit Effectiveness at Strategy Implementation*, 27 ACAD. MGMT. J. 25, 36 (1984) (explaining that experience in marketing and sales equips executives for increased ambiguity and lack of control); Tyler & Steensma, *supra* note 59, at 944 (noting that engineering and technology as primary work experience led executives to perceive greater opportunities and fewer risks in technological alliances).

61. THORSTEIN VEBLÉN, *THE INSTINCT OF WORKMANSHIP AND THE INDUSTRIAL ARTS* 347 (1914).

What men can do easily is what they do habitually, and this decides what they can think and know easily. They feel at home in the range of ideas which is familiar through their everyday line of action. A habitual line of action constitutes a habitual line of thought, and gives the point of view from which facts and events are apprehended and reduced to a body of knowledge. What is consistent with the habitual course of action is consistent with the habitual line of thought, and gives the definitive ground of knowledge as well as the conventional standard of complacency or approval in any community.

Id. at 195.

62. See, e.g., John S. Carroll, Max H. Bazerman & Robin Maury, *Negotiator Cognitions: A Descriptive Approach to Negotiators' Understanding of Their Opponents*, 41 ORGANIZATIONAL BEHAV. & HUMAN DECISION PROCESSES 352 (1988).

63. See Donald C. Hambrick & Phyllis A. Mason, *Upper Echelons: The Organization as a Reflection of Its Top Managers*, 9 ACAD. MGMT. REV. 193, 199

differentiating department managers and CEOs by whether their background was in an output function, such as those that relate to sales (such as advertising and product development), or in a throughput function, that relates to intra-organizational processes (such as law and accounting), research found significant differences in company behavior, such as diversification strategies. In particular, this research suggests that the functional background of a compliance officer matters:

[O]rganizations can improve their social performance through the proactive promotion and recruiting of executives with experience in environmental scanning. Managers with output oriented backgrounds may be more sensitive to external perceptions and therefore, perhaps more responsive to problems that might jeopardize the perception of the organization by its stakeholders. For example, Johnson and Johnson's timely response to the incidents of product tampering, was largely credited to its experienced, market oriented CEO. In contrast, managers with internally oriented backgrounds [throughput functions] probably focus on process and efficiency issues to a greater extent than social issues.⁶⁴

Other research uses organizational position, which often is linked to professional background, to explain firm behavior. For example, Delmas and Toffel describe legal and marketing departments providing different "access points to institutional pressures" on organizations and that this will influence managers' sensitivity and responses to different institutional pressures.⁶⁵ Others study the

(1984). The article suggests dividing managers into those with significant experience in output functions, such as product R&D, engineering, entrepreneurship, marketing, and sales, which are externally-oriented activities that emphasize growth through development of new products and markets, and in throughput functions, such as process R&D, accounting, finance, production, administration, and legal, which focus on improving the efficiency of the organization and transform inputs into outputs. *Id.* All of our respondents have a background with throughput functions, with the exceptions of some CEOs who may have risen out of output functions. According to Hambrick and Mason, then, we should not expect to find any differences between our respondents. But it also is difficult to see legal experts in compliance as in a throughput function as their orientation is to external regulation and lawsuits.

64. Anisya S. Thomas & Roy L. Simerly, *Internal Determinants of Corporate Social Performance: The Role of Top Managers*, 1995 ACAD. MGMT. PROC. 411, 414 (1995) (finding that CEOs and top management teams have independent influence on corporate social performance and that the greater the internal orientation of the team, the lower the corporate social performance).

65. See Magali A. Delmas & Michael W. Toffel, *Organizational Responses to Environmental Demands: Opening the Black Box*, 29 STRATEGIC MGMT. J. 1027,

occupational or educational background of the Board to predict firm behavior.⁶⁶

Weber distinguishes between the authority that derives from incumbency in an organizational office and the authority that derives from being ascribed superior expertise.⁶⁷ Our respondents have both. Our hypothesis is that they will use the authority of their office to behave in professionally-biased ways. It assumes that the maintenance of their office, and possibly its attainment, stem from their expertise-biased authority.

Although it may seem self-evident that there is a lawyer cast of mind and that managers with different professional backgrounds view problems differently, the evidence for this proposition is mixed. Some have found effects of professional background on organizational behavior.⁶⁸ And others have not.⁶⁹ This might reveal

1030 (2008); see also Lauren B. Edelman et al., *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 *LAW & SOC'Y REV.* 47, 48–49 (1992); Erin Kelly & Frank Dobbin, *How Affirmative Action Became Diversity Management: Employer Response to Antidiscrimination Law, 1961 to 1996*, 41 *AM. BEHAV. SCI.* 960 (1998); John R. Sutton & Frank Dobbin, *The Two Faces of Governance: Responses to Legal Uncertainty in U.S. Firms, 1955 to 1985*, 61 *AM. SOC. REV.* 794, 795 (1996).

66. For a recent example of this literature, see Scott G. Johnson, Karen Schnatterly & Aaron D. Hill, *Board Composition Beyond Independence: Social Capital, Human Capital, and Demographics*, 39 *J. MGMT.* 232 (2013), available at <http://jom.sagepub.com/content/39/1/232.full.pdf>. For other examples of what is a voluminous literature on boards, see A. Burak Guner, Ulrike Malmendier & Geoffrey Alan Tate, *The Impact of Boards with Financial Expertise on Corporate Policies* (NBER Working Paper W11914, 2006) (finding effects when commercial bankers and finance professors join Board) and Daniel P. Forbes & Frances J. Milliken, *Cognition and Corporate: Understanding Boards of Directors as Strategic Decision-Making Groups*, 24 *ACAD. MGMT. REV.* 489, 494–95 (1999).

67. See MAX WEBER, *Legal Authority: The Pure Type with Employment of a Bureaucratic Administrative Staff*, in *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 329–36 (Talcott Parsons ed., 1947).

68. See, e.g., Rajeswararao Chaganti & Rakesh Sambharya, *Strategic Orientation and Characteristics of Upper Management*, 8 *STRATEGIC MGMT. J.* 393 (1987) (finding that fewer executives with finance backgrounds and more executives with production and R&D backgrounds resulted in firm following product innovation strategy); Urs S. Daellenbach, Anne M. McCarthy & Timothy S. Schoenecker, *Commitment to Innovation: The Impact of Top Management Team Characteristics*, 29 *R&D MGMT.* 199 (1999) (discussing higher R&D spending associated with CEO background in technical work); Daniel P. Forbes & Frances J. Milliken, *Cognition and Corporate: Understanding Boards of Directors as Strategic Decision-Making Groups*, 24 *ACAD. MGMT. REV.* 489, 494–95 (1999); Vijay Govindarajan, *Implementing Competitive Strategies at the Business Unit Level: Implications of Matching Managers to Strategies*, 10 *STRATEGIC MGMT. J.* 251 (1989) (discussing the influence of background on firm's competitive strategy); Pol Herrmann & Deepak K. Datta, *CEO Successor Characteristics and the Choice of Foreign Market Entry*

the “complexity of other factors that modify the importance” of background.⁷⁰ For example, weak relations between professional background and organizational behavior may be found because personality factors are intervening (and sometimes overwhelming) factors. Or professional background may be found to be relevant only because it is a proxy for cognitive and social processes. Indeed, some have called for “a moratorium on the use of demographic variables as surrogates for psychosocial constructs.”⁷¹

Mode: An Empirical Study, 33 J. INT’L BUS. STUD. 551 (2002) (finding that background was associated with international entry via joint ventures and contractual arrangements, as opposed to acquisitions); Michael A. Hitt & Beverly B. Tyler, *Strategic Decision Models: Integrating Different Perspectives*, 12 STRATEGIC MGMT. J. 327, 344–45 (1991); Mark I. Miller, *Lawyers in Congress: What Difference Does it Make?*, 20 CONGRESS & PRESIDENCY 1 (1993) (discussing how lawyers behave differently from non-lawyers); Sally S. Simpson & Christopher S. Koper, *The Changing of the Guard: Top Management Characteristics, Organizational Strain, and Antitrust Offending*, 13 J. QUANT. CRIM. 373 (1997) (finding CEOs with finance and administrative backgrounds more likely to engage in antitrust violations); Mark Smith & Michael C. White, *Strategy, CEO Specialization, and Succession*, 32 ADMIN. SCI. Q. 263 (1987) (discussing the link between a new CEOs functional background and diversification strategy); Anisa S. Thomas, Robert J. Litschert & Kannan Ramaswamy, *The Performance Impact of Strategy-Manager Coalignment: An Empirical Examination*, 12 STRATEGIC MGMT. J. 509 (1991) (finding that CEOs with marketing, sales, and R&D functional backgrounds favored product and market innovation strategies as opposed to accounting/finance, production, administration); Mary J. Waller et al., *Functional Background as a Determinant of Executives’ Selective Perception*, 38 ACAD. MGMT. J. 943, 964–66 (1995); A. Burak Güner, Ulrike Malmendier, & Geoffrey Alan Tate, *The Impact of Boards with Financial Expertise on Corporate Policies* (Nat’l Bureau of Econ. Research, Working Paper W11914, 2006) (finding effects when commercial bankers and finance professors join Board).

69. See generally Bradley R. Agle et al., *Who Matters to CEOs? An Investigation of Stakeholder Attributes and Salience, Corporate Performance, and CEO Values*, 42 ACAD. MGMT. J. 507 (1999); see also Janice M. Beyer et al., *The Selective Perception of Managers Revisited*, 40 ACAD. MGMT. J. 716, 729 (1997); Marjorie A. Lyles, *Defining Strategic Problems: Subjective Criteria of Executives*, 3 ORG. STUD. 263, 276 (1987) (finding no relationship between functional background and approaches to problem formulation); Waller, *supra* note 68, at 964; Walsh, *supra* note 59, at 887–88 (replication of Dearborn and Simon). Finkelstein and Hambrick have argued that these results may follow from greater cross-functional rotation of managers and their broader training, so that it is inappropriate to classify executives as having biases from a single functional background (and there is little differentiation across firms in their CEOs’ portfolios of human capital). See SYDNEY FINKELSTEIN & DONALD C. HAMBRICK, STRATEGIC LEADERSHIP: TOP EXECUTIVES AND THEIR EFFECTS ON ORGANIZATIONS 95–96 (1996).

70. Richard Reed & Margaret Reed, *CEO Experience and Diversification Strategy Fit*, 26 J. MGMT. STUD. 251, 267 (1989).

71. Kimberly B. Boal & Robert Hooijberg, *Strategic Leadership Research: Moving On*, 11 LEADERSHIP Q. 515, 523 (2001); see also Barbara S. Lawrence, *The Black Box of Organizational Demography*, 8 ORG. SCI. 1, 20 (1997); Patricia Pitcher

Another line of research studies top management teams (rather than individuals). Of particular interest has been the homogeneity or heterogeneity of the functional backgrounds represented on the team; the general finding is that heterogeneity is helpful.⁷² This line of research too has been criticized for relying on demographic variables, and another set of research has emerged that focuses on the psychological processes of team decision-making.⁷³ That research also has been criticized for abstracting from individual managers' personality attributes.⁷⁴

Research on managers' professional backgrounds and their influence on company behavior replays the debate between Julius Henry Cohen and those who opposed increasing the demographic heterogeneity of the bar.⁷⁵ Thus, there are those who believe that professions create identities and casts of mind, as did Cohen regarding lawyers. Nevertheless, there are others who believe that pre-existing personality attributes and psychological dispositions are the relevant explanatory variables for behavior. There are also some—as the summary of the literature above also shows—who

& Anne D. Smith, *Top Management Team Heterogeneity: Personality, Power and Proxies*, 12 *ORG. SCI.* 1, 15 (2001).

72. See Karen A. Bantel & Susan E. Jackson, *Top Management and Innovations in Banking: Does the Composition of the Top Team Make a Difference?*, 10 *STRATEGIC MGMT. J.* 107, 118 (1989) (finding that diversity of functional backgrounds of top management teams was associated with organizational innovation); L. Richard Hoffman & Norman R.F. Maier, *Quality and Acceptance of Problem Solutions by Members of Homogeneous and Heterogeneous Groups*, 62 *J. ABNORMAL & SOC. PSYCH.* 401, 405 (1961); Sumita Raghuram & Raghu Garud, *The Vicious and Virtuous Facets of Workforce Diversity*, in *SELECTED RESEARCH ON WORK TEAM DIVERSITY* 155, 156 (Marian N. Ruderman et al. eds., 1995) (finding that heterogeneous teams bring multiple perspectives to tasks and thereby outperform homogeneous teams in generating ideas).

73. "Over the past decade, researchers have begun downplaying the influence of TMT [Top Management Team] demographics on firm performance and increasingly focus on the processes underlying TMT decision making such as comprehensiveness, consensus, social integration, conflict, and decision speed." S. Trevis Certo et al., *Top Management Teams, Strategy and Financial Performance: A Meta-Analytic Examination*, 43 *J. MGMT. STUD.* 813, 814 (2006) (citations omitted) (analyzing prior studies and finding these as the relevant variables).

74. For a discussion of various personality factors that have been found to bear a relation to implementation of environmental compliance programs, see Esteban Fernandez et al., *Managers' Profile in Environmental Strategy: A Review of the Literature*, 13 *CORP. SOC. RESP. ENVTL. MGMT.* 261, 265–68 (2006); see generally Steven A. Frankforter et al., *Determinants of Governance Structure Among Companies: A Test of Agency Theory Predictions*, 24 *INT'L J. MGMT.* 454 (2007) (uses variety of personality factors to predict CEO behavior).

75. See *supra* notes 30–38 and accompanying text.

believe that intrinsic psychological factors are determinative even when individuals operate in group settings.

All sides in this debate agree that managers bring their identity with them into business. The question is “what is brought?” The virtuous lawyer cast of mind, as Cohen describes it, would bring values independent from business. On the other hand, individual and social psychology may have more impact on the lawyer outside the profession than in it (as is reflected in the view that lawyers in business are something less than lawyers). Confidence about knowing which qualities travel with professionals as they become managers does not emerge from this literature.

Various sociologists have opined on what travels with professionals to business management. Institutionalists, like Selznick, would understand lawyer psychological and social frames as being tested as lawyers lead companies towards their mission⁷⁶: Lawyers managing compliance programs would be led by the company’s mission as they lead the company to a more compliant one. There also are lines of research that stress the importance of professional identity in business by examining battles for jurisdiction to solve companies’ problems.⁷⁷ Larson, for example, would join the professional and the bureaucrat. She would find that the ability that “makes the use of discretion predictable” travels with the lawyer.⁷⁸ Although their visions of what travels with the professional differ, and so too does their understanding of professional power, both depict professionals acting within companies in distinctive ways.

A New Institutional analysis of organizations suggests that a company has reasons or pressures that lead it to select a compliance manager with a particular occupational and professional background.⁷⁹ Some organizations might respond to these pressures

76. See, e.g., PHILIP SELZNICK, *LEADERSHIP IN ADMINISTRATION: A SOCIOLOGICAL INTERPRETATION* (Quid Pro Books 2011) (1957) (including preface by Robert Eli Rosen).

77. See S. Carmona, M. Ezzamel & F. Gutiérrez, *Towards an Institutional Analysis of Accounting Change in the Royal Tobacco Factory of Seville*, 25 *ACCT. HISTORIANS J.* 115 (1998); Bruce G. Carruthers, *Accounting, Ambiguity, and The New Institutionalism*, 20 *ACCT. ORG. & SOC’Y* 313, 320, 325 (1995); Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 *AM. SOC. REV.* 147, 150 (1983).

78. MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* 198 (1977).

79. For an early statement of the New Institutional position, see *THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* (Paul DiMaggio & Walter Powell eds., 1991).

and choose the profession of the person in charge of compliance mimetically, copying what others do. In other organizations, regardless of efficiency concerns, professionals are hired to demonstrate “normative isomorphism,” to signal the company’s professed alignment with social/professional norms.⁸⁰ And some organizations may perceive the importance of liberal values in choosing which professionals should manage compliance.⁸¹

In all these organizations, the choice of a particular professional to lead compliance is indicative of something about the organization itself. A strong institutional account might suggest that pressures are relieved by the managerial appointment. But, it may be that these pressures go further and the professional’s cast of mind and its influence on organizational behavior are precisely what the firm seeks in choosing a leader with a particular professional background for its compliance department. Analysis by the profession of the person in charge of compliance would then reveal differences between companies.

Other research focuses very closely on the exchanges between the organization and its external environment.⁸² According to this approach, in order to account for why a company might hire a lawyer to manage compliance and determine whether the lawyer so hired behaves distinctively, we must understand the different interdependencies of the company with the environment. Because a company responds to the environment it perceives, compliance behavior depends on how legal constraints become meaningful to the firm⁸³: “[It] is the firm’s managers who determine which stakeholders are *salient* and therefore will receive management’s attention.”⁸⁴ And often, the organization is not tightly coupled to its environment so that: “[O]ne can identify a firm’s stakeholders . . . but managers may

80. *See id.*; *see also* Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147, 147–48 (1983).

81. *Cf.* Terence C. Halliday, *Recursivity in Global Law-Making: A Sociolegal Agenda*, 5 ANN. REV. L. & SOC. SCI. 263 (2009).

82. Organizations have collective interpretations of the environment that are shaped by managers. *See generally* Jeffrey D. Ford & David A. Baucus, *Organizational Adaptation to Performance Downturns: An Interpretation-Based Perspective*, 12 ACAD. MGMT. REV. 366 (1987).

83. PARKER, *supra* note 25, at 57–60.

84. Ronald K. Mitchell et al., *Toward a Theory of Stakeholder Identification and Salience: Defining the Principle of Who and What Really Counts*, 22 ACAD. MGMT. REV. 853, 871 (1997).

or may not perceive the stakeholder field correctly.”⁸⁵ Managers mediate the environment’s influence on company behavior, and they determine the organization’s critical contingencies.⁸⁶ On the other hand, although the company is beset by “pragmatic ambiguity,” there are interpretive, or hermeneutic, constraints that limit intra-firm power struggles and reflect the company’s ties to its environment.⁸⁷ Some research finds that many organizations are closely tied to their environments and managers have little room for interpretive play.⁸⁸ Our research, however, considers a weak and relatively undefined compliance arena: there is room for the managers of compliance to play.

In response to its interdependence with the law, personnel or sub-units may be specially assigned to manage the firm’s response to an aspect of its legal environment.⁸⁹ To attain and maintain intra-organizational power and influence, managers of compliance have incentives to portray the regulatory environment as powerful and uncertain, as the company’s strategic contingencies.⁹⁰ But what aspect of the environment will be cast as strategic? Is there something distinctive about the way a lawyer will paint the environment? We hypothesize that the professional background of a manager influences how the firm perceives and responds to its legal environment. For example, we hypothesize that a chief executive officer (CEO) would find the law to be meaningful to the firm differently than would a general counsel. And we hypothesize that a compliance function headed by the chief financial officer (CFO) would perceive and respond to the law differently than would one headed by a compliance professional.

85. *Id.*

86. See David J. Hickson et al., *A Strategic Contingency Theory of Intraorganizational Power*, 16 ADMIN. SCI. Q. 216, 223 (1971).

87. See generally Helene Giroux, *It Was Such a Handy Term: Management Fashion and Pragmatic Ambiguity*, 43 J. MGMT. STUD. 1227 (2006). See also Jos Benders & Kees Van Veen, *What’s in a Fashion? Interpretive Viability and Management Fashions*, 8 ORGANIZATION 33, 37–39 (2001); Sandy Edward Green, Jr., *A Rhetorical Theory of Diffusion*, 29 ACAD. MGMT. REV. 653, 663 (2004).

88. H.E. ALDRICH, ORGANIZATIONS AND ENVIRONMENTS (1979); P.R. LAWRENCE & J.W. LORSCH, ORGANIZATION AND ENVIRONMENT: MANAGING DIFFERENTIATION AND INTEGRATION (1986).

89. See PARKER, *supra* note 25, at 53–55.

90. Christine Parker & Sharon Gilad, *Compliance Management Systems: Structure, Agency and Culture*, in EXPLAINING COMPLIANCE: BUSINESS RESPONSES TO REGULATION 170–95 (C. Parker & V. Nielsen eds., 2011).

If there is a relation between the profession of the manager in charge of compliance and company behavior, then professional values and ideologies are being carried by the firm. Professional schools and organizations shape professional values and ideologies. By employing professionals as managers, if there is such a relation, then the firm becomes open to influences by professional bodies, educational institutions, and the collective mobility projects of professionals.⁹¹ The literature leaves open whether there is such a relation between the manager in charge of compliance and company behavior.

III. OUR STUDY

A. Outline of Analytic Model and Hypotheses

Our main hypothesis is that the professional background of the manager of the compliance function will be significant for the structure of the company's compliance system and for the company's compliance behaviors.

Some of the literature just reviewed predicts that our hypothesis will be confirmed, but other of the literature does not. In particular, when a lawyer is in charge of compliance, we hypothesize there will be significant differences from when others are in charge. Very little of the literature just reviewed concerns lawyers. Our research took place on largely untrodden territory. Our hypothesis is that we will find differences providing evidence that aspects of the lawyer cast of mind operate in the company's management of compliance. Our research thus will demonstrate what many have assumed, including Julius Henry Cohen, that legal socialization creates framing effects that lawyers carry with them in and out of legal practice. We have three reasons for this hypothesis: the discretionary power of managers, the company's selection of the professional, and the self-serving biases of survey evidence.

Members of professions have been socialized into, educated by, and connected to a professional community. Thereby they develop different forms of analysis, reasoning, and preferred remedies.⁹² We might therefore expect people from different professional or occupational backgrounds to have different approaches to managing compliance. They may have different natural taken-for-granted reflexes about how to manage compliance issues. They may have

91. *See id.* at 168–96.

92. *See generally* ABBOTT, *supra* note 14.

different values about what the organization's priorities should be in relation to compliance issues and how to value the economic and social relationships with the organization's stakeholders. They may perceive the risk, and indeed the coercive pressure, of the organization's stakeholders in different ways. They also may value differently the policy and managerial choices in governing compliance behavior.

In the face of uncertainties about the goal of compliance, the discovery and consequences of non-compliance and the costs of prevention, one would expect that "biases" and "heuristics" would emerge to increase the efficiency of decision-making.⁹³ Professional expertise supplies such cognitive shortcuts. Members of professions also have commitment biases, so that "cognitive conservatism" and "self-serving biases" lead them to interpretations that are consistent with and indeed require professional expertise.⁹⁴ At least from a cognitive perspective, then, we expect that the manager in charge of compliance will exercise his or her discretionary power in a manner that embeds professional norms inside the company. Of course, the consequences of these cognitive frames—either for efficiency or compliance—are not settled by their professional source.

A second reason that we expect the profession of the person in charge of compliance to make a difference focuses not on that individual, but on his or her employer. Firms' compliance and risk management structures are responses to their environment—including pressures from stakeholders and the likelihood of regulatory investigation, enforcement, and sanction.⁹⁵ But different firms will not necessarily respond to the same combination of environmental pressures in the same way: different firms balance or compromise between various stakeholder and regulator pressures external to the firm in different ways.⁹⁶ Firms

93. See, e.g., Bamberger, *supra* note 24, at 411 (discussing cognitive theory in the context of regulation).

94. See *id.* at 422–23.

95. See Parker & Gilad, *supra* note 90, at 170–90; Christine Parker & Vibeke L. Nielsen, *Corporate Compliance Systems: Could They Make Any Difference?*, 41 ADMIN. & SOC'Y 3, 6 (2009).

96. See, e.g., Christine Parker & Vibeke Nielsen, *How Much Does It Hurt? How Australian Businesses Think About the Costs and Gains of Compliance with the Trade Practices Act*, 32 MELBOURNE U. L. REV. 555 (2008) [hereinafter Parker & Nielsen, *How Much Does It Hurt?*]; see also PARKER, *supra* note 25, at 62–83; Vibeke Nielsen & Christine Parker, *To What Extent Do Third Parties Influence Business Compliance?*, 35 J. LAW & SOC'Y 309 (2008) [hereinafter Nielsen & Parker, *Third Parties*].

have different preferences regarding individual risks and total risk.⁹⁷ Firms frame external pressures differently and they will frame their responses in different ways.⁹⁸ Firms have compliance cultures.⁹⁹ Regarding compliance with legal norms, firms have their own norms.

One difference in firm compliance structures is in the nature of their leadership. Firm compliance structures can be differentiated by the professional background of their leader. In some firms, the CEO or senior managers also manage various types of compliance. In others, a specialist is hired to run a compliance function. In still others, chief legal officers or a member of their staff manages compliance. And in others, chief financial officers or a member of their staff manages compliance. The selection of an agent from a profession to lead compliance may be an indicator of the firm's compliance culture. It is a company choice about what behavior it seeks. In many cases, the firm seeks to reduce its uncertainty and gain legitimacy by incorporating the practices of a profession.¹⁰⁰

The frailty of survey evidence is a third reason for expecting the professional background of the survey respondent to be significantly related to the reported compliance structures and practices. A survey skeptic would be reluctant to accept the responses as being accurate reflections of the company. Rather, the skeptic would focus on the values and interests of the respondent. This leads straight back to the professional background of the respondent, now not as determining company behavior, but as determining the survey responses. If they view the survey through their professional cast of mind, then self-serving, social desirability and uncertainty-reducing biases will induce their responses to reflect the normative and cognitive biases of their profession. Our analysis of the surveys then should reveal differences by the professional background of the respondents. In particular, a lawyer respondent who is reflecting herself in her answers to our survey, if she had Cohen's virtuous cast of mind, would stress the importance of having a lawyer in charge of compliance, depict her company as compliant with the law, imply legal aspirations for herself and her company, and take a legalistic approach wherever possible, especially in areas of uncertainty.

97. See sources cited *supra* note 96.

98. See sources cited *supra* note 96.

99. See Parker & Gilad, *supra* note 90, at 170-90.

100. See Edelman et al., *supra* note 65, at 50-51; Lauren B. Edelman et al., *Legal Ambiguity and the Politics of Compliance: Affirmative Action Officers' Dilemma*, 13 *LAW & POL'Y* 73, 74-75 (1991) [hereinafter Edelman et al., *Legal Ambiguity*].

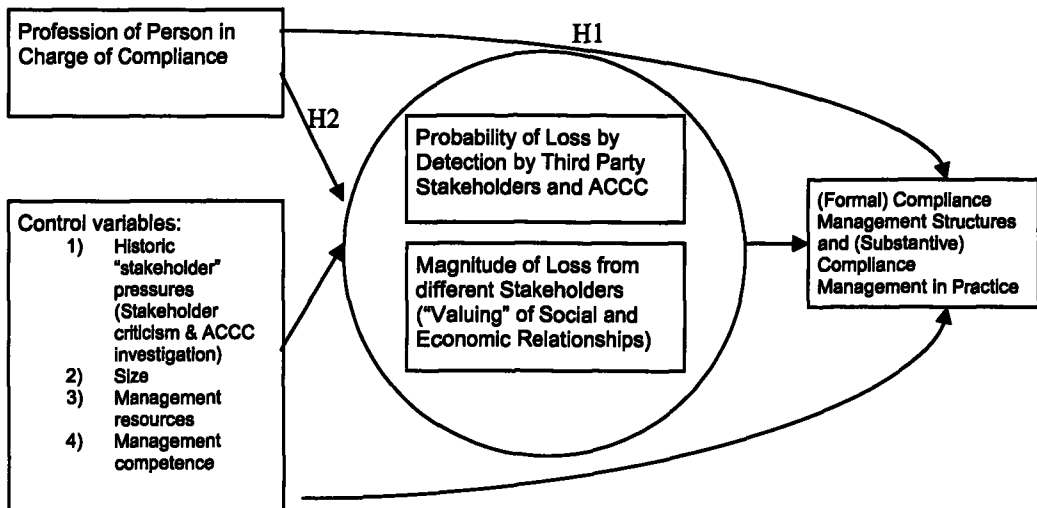


Figure 1. Conceptual Model

On the basis of the literature and research described above, we propose the model (shown in Figure 1) as to how the profession of the person responsible for compliance influences the firm's compliance structures and substantive compliance behaviors. The model posits that the professional's cast of mind directly influences how the professional will construct the compliance system and practices. For example, lawyers will construct different compliance systems than would those in finance. "Stakeholders" are the individuals and groups who have the ability to sanction firm non-compliance, either through the withdrawal of esteem,¹⁰¹ or the imposition of economic costs. The model also posits that professions

101. Cf. Richard McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 355-57 (1997). The ACCC has neither the resources nor the powers to monitor and enforce business compliance with the law on a proactive basis, and its enforcement activity is primarily driven by one-off responses to complaints. Moreover, at the time of the research the ACCC had powers only to investigate potential contraventions and to take alleged offenders to court for the imposition of civil (rarely criminal) penalties, injunctions, and other orders. In the case of a "reactive" regulator like the ACCC, the actors with the most frequent and crucial regulatory roles are likely to be third parties. The ACCC usually only investigates potential breaches where there has been a complaint by a customer, supplier, or competitor, or where a media story makes it obvious that there could be a breach. Moreover, since the ACCC does not investigate or take enforcement action in relation to most complaints, the only direct experience of "enforcement" that many non-compliant businesses are likely to experience is the actions of third parties.

differently assess the firm's environment and the firm's stakeholders. In particular, individuals from different professions will weigh differently the monitoring of the firm's compliance by third parties. Lawyers, for example, may weigh the response of legal regulators to be more important than the responses of customers, who may be more important to business executives. We expect that the professional cast of mind will influence the probability of detection assigned to different third parties, and also influence the probabilities assigned to losses from detection and the magnitude of such losses. These different assessments of third parties will themselves cause changes in the compliance structures and practices at the firms. If the professional cast of mind influences how the environment is perceived, and how the environment is perceived directly affects compliance, then the profession of the person in charge of compliance indirectly influences the firm's compliance structures and behaviors.

This model generates two main hypotheses about the direct and indirect effects of the professional orientation of the person responsible for compliance on the way the firm manages compliance, respectively. The two sets of hypotheses are indicated in Figure 1 by labeled arrows.

Hypothesis 1: Direct Effect of Professional Orientation: Reported compliance behaviors will differ between firms who have individuals from different professions in charge of compliance.

Hypothesis 1A: The profession of the "individual in charge of compliance" will make for differences in the formal compliance system elements that they report have been implemented at their firm.

Hypothesis 1B: The profession of the "individual in charge of compliance" will make for differences in the substantive management behaviors aimed at promoting compliance that they report have been implemented at their firm.

Hypothesis 2: Indirect Effect of Professional Orientation: Firms with individuals from different professions in charge of compliance will be reported to perceive the costs and risks of non-compliance differently, which will in turn influence the reported compliance management behaviors that are in place.

Hypothesis 2A: The profession of the “individual in charge of compliance” will make for differences in the reported concerns about the loss of esteem by and economic sanctions from various stakeholders if they breach the law.

Hypothesis 2B: The profession of the “individual in charge of compliance” will make for differences in their assessments of the risks of (i) stakeholders and (ii) regulators detecting non-compliance.

Hypothesis 2C: These different analyses of the costs and risks of compliance will lead to differences in what formal systems and more substantive management behaviors firms have in place to promote compliance—so that the profession of the person responsible for compliance will have an indirect effect on compliance management behaviors.

Of course, the person in charge of compliance is not the only factor influencing a firm’s risk analysis and compliance behaviors. We also expect each firm’s history in relation to compliance and its size, resources, and managerial competence¹⁰² to influence its compliance risk analyses and compliance behaviors. These are our control variables.

We explain the way in which we test these hypotheses and the measures we use for each of these concepts in the following section.

B. Data and Research Strategy

1. Data

Our data comes from a quantitative survey of business experience of enforcement and compliance in relation to Australia’s national competition and consumer protection legislation, the Trade Practices Act of 1974 (Cth) (TPA).¹⁰³ The TPA applies to all Australian

102. Originally we also controlled for industry, but it had no effect and, therefore, for the sake of simplicity we have left it out of our model. Industry was classified according to Australian Bureau of Statistics, *Australian and New Zealand Standard Industrial Classification*, ABS Catalogue No 1292.0, (66-74) (2006) (“ANZSIC”). The statistics are on file with the authors.

103. For more detail, see Vibeke Nielsen & Christine Parker, *The ACCC Enforcement and Compliance Survey: Report of Preliminary Findings* (2005). Note that on January 1, 2011, the TPA was renamed the Competition and Consumer Act

businesses and prohibits certain anti-competitive conduct (e.g., price-fixing, abuse of market power, etc.), unfair trading practices (especially misleading and deceptive advertising), non-compliance with legislated product safety standards, and unconscionable conduct in business dealings.¹⁰⁴ The 2,321 largest Australian businesses trading in 2004 and readily contactable were identified (through a publicly available commercial list, the Dun and Bradstreet list), with special efforts made to include all those large businesses that had been the target of ACCC enforcement activity in the previous seven years, as identified by ACCC Annual Reports.¹⁰⁵

The businesses were surveyed with a mailed self-completion questionnaire, and repeated telephone follow-up yielding 999 responses—a response rate of 43%.¹⁰⁶ Our response rate compares well with the 35.5% average response rates for similar questionnaire research of top management of business.¹⁰⁷ The profile of our respondents compares well with the profile of the whole list of the largest Australian businesses in terms of size and industry.¹⁰⁸

The questionnaire was to be filled in by the most senior person in the organization responsible for trade practices compliance, with a focus on contacting first the compliance manager, then the in-house counsel, the company secretary, the CFO, and, finally, the CEO, in that order. Forty-two percent of those who filled out a questionnaire

(Cth). Since this research and these data predate that change, the legislation is referred to throughout as the TPA.

104. The concerns of the TPA include those that first attracted U.S. attention to the importance of internal controls. See Cunningham, *supra* note 22, at 278–79 (discussing the antitrust scandals of the 1960s).

105. Two hundred seventy-three of the 2,321 businesses surveyed were identified in this way.

106. This underestimates the actual response rate because we cut 4.3% of the responses actually received from the study because those respondents were too small (less than 100 employees) for our sample of large businesses. If we, quite reasonably, assume that similarly 4.3% of the entire list of companies surveyed (including non-respondents) were “too small,” then we would have a response rate of 45%. For a full report of the survey, including the sample and methodology, see Nielsen & Parker, *supra* note 103, at 7–19; see also Christine Parker & Vibeke Lehmann Nielsen, *The ACCC Enforcement and Compliance Project: Explanation of Project and Methodology*, MELBOURNE L. SCH. CARTEL PROJECT, <http://www.law.unimelb.edu.au/cartel/related-projects/the-australian-competition-and-consumer-commission-enforcement-and-compliance-project> (last updated Dec. 12, 2012).

107. Yehuda Baruch, *Response Rate in Academic Studies—A Comparative Analysis*, 52 HUM. REL. 421, 431 (1999) (reporting that average for that type of questionnaire in articles published in high quality management journals is 35.5%).

108. See Nielsen & Parker, *supra* note 103, at 12–13.

were CEOs, company secretaries or CFOs, and a further twenty percent general counsel or compliance managers. There were 263 CFOs, 123 CEOs, and 81 Chief Legal Officers (CLOs) or General Counsels. Eighty-five of the respondents were compliance professionals. Because we did not collect information on graduate degrees, we proceed by assuming that the current occupational position reflects the individual's profession. To the extent this assumption is inaccurate, its significance is minimized because current occupational position also has significant framing effects that match the profession normally associated with the occupational position.¹⁰⁹

Table 1. Profession of Respondents

Profession	Number (and percentage)
Legal or General Counsel	181 (18%) (incl. 81 Chief Legal Officers)
Business Executive	288 (29%) (incl. CEO=123)
Finance Officer	316 (32%) (incl. CFO=263)
Compliance Officer	85 (9%)
Company Secretary	95 (10%)
Unknown	34 (3%)
TOTAL	999 (100%) (34 missing from total sample)

2. Research Strategy

To measure the effect of professionalism, we conduct two regressions—one including the profession of the individual in charge of TPA compliance and one without in order to see what difference, if any, it makes. In other words, we compare the results and explanatory power of testing a model that does not include the profession of the person responsible for compliance as an independent variable with one that does. This helps us test the extent to which professional orientation has an influence on compliance management behavior.

We test our hypotheses in two stages using regression analyses (see Tables 10 and 11 explained and discussed below). Our control variables are included in all these regressions.

First, we test the extent to which the profession of the individual who is in charge of TPA compliance makes a direct difference to how

109. Cognitive structures vary according to current organizational position (where you stand depends on where you sit). See Paul S. Goodman, *The Measurement of an Individual's Organizational Map*, 13 ADMIN. SCI. Q. 246 (1968).

he or she reports the way the organization manages TPA compliance in terms of implementation of formal compliance systems and substantive compliance management behavior (testing Hypotheses 1A and 1B).

In the same series of regressions we also test the impacts of the way the firm weighs worries about different stakeholder pressures in relation to TPA compliance and the way it assesses the risk of stakeholder action in relation to TPA compliance (including regulatory enforcement action) on compliance management behavior. Hypothesis 2C states that the profession of the person responsible for compliance should have an indirect effect on compliance management behavior by influencing these risk analyses of non-compliance by the firm. We need to determine which risk analyses do in fact have any effect on compliance management behavior to specify our test of Hypotheses 2A and 2B (concerning the influence of professional orientation on the firm's risk analyses) so as not to include effects irrelevant to compliance.

We then test whether the profession of the person responsible for compliance has any influence on the way the firm is reported to weigh worries about pressures in relation to TPA compliance from different stakeholders and the way it assesses the risk of stakeholder pressure. In these regressions we test for professional influence only on those worries about stakeholders that we found have an influence on compliance management behaviors. As with our other analyses, we also conduct two sets of regressions so that we can compare the explanatory power of including the profession of the individual in charge of TPA compliance and not including the profession of the individual in charge. This helps us to be more confident as to whether or not the profession of the person responsible for compliance makes any difference. The measures used are described immediately below and the results are described and discussed in the following section.

The explanatory model has been estimated using ordinary least squares (OLS) regression. Appropriate visual inspections and statistical tests were conducted to verify that OLS regression assumptions were met for these models. To test the robustness of the model—and as far as possible exclude the possibility that our findings are not simply random experimental effects created by the large amount of variables—we use low p-values, making it harder to get

significant results.¹¹⁰ We also tested for multicorrelation, and found nothing above level of tolerance.

In each regression we exclude insignificant variables one at a time (apart from the profession of the person responsible for compliance which is the focus of our model). The final regressions only are shown. That is, the final regressions show only variables for which any significant association was found and none for which no significant association was found.

3. Measures

Each of our measures is based on our respondents' self-reported answers to questions in our surveys. The wording of each question was based on our earlier qualitative and documentary research on the nature of ACCC enforcement activities and their impact on business compliance,¹¹¹ as well as theoretical considerations and previous studies.

Self-report measures are particularly useful where the object of interest is a perception or attitude.¹¹² Our interest in the lawyer's cast of mind, and different professional orientations, can be elicited by self-reports as respondents' perceptions provide good evidence of certain aspects of professional orientation. Of course, self-reports are not merely self-referential. They do tell us something about the firms. In large business organizations no one person may have sufficient knowledge of all parts of the organization or its history to be able to answer a survey accurately. The high rank and position of those who actually filled out the questionnaire for each organization (see Table 1 above) suggests that we may have succeeded in finding the person in the organization best informed about trade practices compliance to fill out our questionnaire.

A more fundamental problem with self-report measures is that respondents might show social desirability or other biases that make

110. We also estimated the model including the most theoretically likely interaction variables (between size of company and each different worry). None of these turned out to be significant which is why they were left out of the model in the end.

111. See CHRISTINE PARKER & NATALIE STEPANENKO, COMPLIANCE AND ENFORCEMENT PROJECT: PRELIMINARY RESEARCH REPORT 5-13 (2003).

112. Vibeke L. Nielsen & Christine Parker, *Mixed Motives: Economic, Social, and Normative Motivations in Business Compliance*, 34 LAW & POL'Y 428, 438 (2012).

it difficult for them to answer questions truthfully.¹¹³ Like other researchers, we sought to overcome this set of potential reliability problems by making (and following through on) strict guarantees of confidentiality and anonymity in our handling of the data in order to ensure that respondents felt they could safely answer questions honestly. Moreover, to the extent possible, we framed our questions as specifically as possible so that it should be relatively easy for the person filling out the questionnaire to objectively determine whether the answer should be yes or no, eliminating as far as possible the element of subjectivity that makes it easier to respond in a socially desirable way. The examples in Table 2 illustrate the types of questions we asked. Nevertheless our results should be interpreted bearing in mind that they rely on self-reports only, and that they therefore may reflect limited knowledge and the way respondents feel they *should* think and behave. In the context of the analysis in this Article, however, this is, in a sense, a strength. Although the responses may be biased judgments of how their firm behaves, they also may be self-servingly biased, reflecting normative conceptions of thought and behavior of the respondent's specific professional background.

4. Testing Hypothesis 1: Compliance Behavior of Respondent's Company

In order to test Hypothesis 1, we evaluate the extent of influence of the type of professional in charge of compliance on two measures of compliance management behaviors of the businesses—implementation of (formal) compliance management systems and the (substantive) way compliance is managed in practice.¹¹⁴

(a) *Implementation of formal compliance system elements* (Table 2): The questionnaire asked respondents to provide yes or no answers to a series of twenty-one very specific questions about whether their organization had implemented various procedures and actions

113. Christine Parker & Vibeke L. Nielsen, *The Challenge of Empirical Research on Business Compliance in Regulatory Capitalism*, 5 ANN. REV. L. & SOC. SCI. 45, 62 (2009).

114. For further detail and justification of these measures, and discussion of descriptive statistics from these measures, see Nielsen & Parker, *supra* note 103, at 30–64; Christine Parker & Vibeke L. Nielsen, *Do Businesses Take Compliance Systems Seriously? An Empirical Study of Implementation of Trade Practices Compliance Systems in Australia*, 30 MELBOURNE U. L. REV. 441, 451 (2006) [hereinafter Parker & Nielsen, *Do Businesses Take Compliance Systems Seriously?*]. See generally Parker & Nielsen, *supra* note 95.

expected to be part of a good (formal) compliance system.¹¹⁵ The questions were later grouped into four different indices measuring the implementation of system elements concerning a) complaints handling, b) communication and training from the top of the organization to employees, c) management accountability and whistle-blowing, and d) compliance performance measurement and discipline. We use these four measures to look at four different dimensions of compliance system implementation (rather than one index of all the items) because businesses will not necessarily implement all potential aspects of compliance systems equally.¹¹⁶ On the other hand, using these four indices rather than looking at variation in each of the twenty-one elements individually gives a clearer picture that takes into account the fact that there are different ways of performing the different functions of a compliance system.¹¹⁷

Table 2. Measure of Implementation of Four Aspects of (Formal) Compliance Systems

Four Aspects	Questions (Yes/No)	% Answering Yes (n=958-982)
Complaints Handling Mean: 57 Std.dev.: 24 Min: 0 Max: 100	In my organization there is a clearly defined system for handling complaints from customers/clients;	91
	In my organization we keep records of complaints from customers, competitors and/or suppliers;	87
	In my organization there is a clearly defined system for handling compliance failures identified by staff, competitors, suppliers or the ACCC;	53
	In my organization we actively seek out consumer opinion about new advertising and/or new products;	40
	In my organization we have a hotline for complaints about our compliance with the TPA.	13

115. See PARKER, *supra* note 25, at 302-11.

116. These four indices are treated as formative indices made by adding the score for each variable together. The logic behind this is that the more elements the business has implemented, the more it is trying to comply. In contrast to reflective indices, we do not necessarily expect interdependence between the variables included in the index. Therefore it makes no sense to test for reliability.

117. We also conducted the regression analyses reported below on each of the twenty-one measures individually—but found no major difference in the patterns of influence from what is reported in this Article: statistics on file with the authors.

Commc'n & Training Mean: 31 Std. dev.: 33 Min: 0 Max: 100	My organization has a written compliance policy about trade practices compliance;	45
	In my organization employees are now and then sent to a brush up course on how to comply with the TPA;	38
	Live training sessions are a part of our training of employees in trade practices compliance;	34
	In our organization we use a compliance manual in trade practices compliance;	31
	My organization has a dedicated compliance function taking care of trade practices compliance;	30
	Induction for new employees includes substantial training in trade practices compliance;	28
	At least half our employees have attended an employee seminar about the TPA during the last 5 years;	21
	In my organization we use a computer based training program in trade practices compliance.	17
Management Accountability & Whistle-blowing Mean: 30 Std. dev.: 30 Min: 0 Max: 100	My organization has written policies to encourage and protect internal whistleblowers;	43
	In the last 5 years an external consultant has reviewed our compliance system;	35
	In my organization managers are asked to report regularly on compliance;	26
	In my organization we have systematic audits by external professionals to check for trade practices breaches.	17
Compliance Performance Measurement & Discipline Mean: 15 Std. dev.: 26 Min: 0 Max: 100	Trade practices compliance performance indicators are included in the corporate plan;	20
	Compliance performance indicators relevant for the TPA are among the individual performance indicators for our employees;	13
	In my organization in the last 5 years employees have been disciplined for breaching our trade practices compliance policy.	12

(b) *Compliance management in practice* (Table 3): Implementation of a compliance system is aimed at putting formal structures in place that managers and employees can use to identify, prevent and correct

compliance.¹¹⁸ This should be helpful in influencing the way activities are managed in practice to improve actual compliance. But it is not enough on its own.¹¹⁹ It is possible for an organization to implement the various elements of compliance management programs in a formulaic, formalistic, or purely symbolic way.¹²⁰ But the key to a compliance management program's impact on compliance will be the impact it has on everyday routines and practices.¹²¹ Effective compliance management in practice means that management and employees identify compliance problems, communicate them to those who can fix them, and rectify them as a part of their everyday routines and practices.¹²² The aim of compliance management programs is to ensure compliance by improving compliance management in practice. Again we constructed a single measure by adding together fourteen questions containing specific statements about what business management actually does in order to make sure they comply with the TPA (shown in Table 3).

118. See Parker & Gilad, *supra* note 90, at 170–90; Parker & Nielsen, *Do Businesses Take Compliance Systems Seriously?*, *supra* note 114, at 450–52; Parker & Nielsen, *supra* note 95, at 4.

119. See SALLY S. SIMPSON, CORPORATE CRIME, LAW, AND SOCIAL CONTROL 144–45 (2002); Marie McKendall, Beverly DeMarr & Catherine Jones-Rikkens, *Ethical Compliance Programs and Corporate Illegality: Testing the Assumptions of the Corporate Sentencing Guidelines*, 37 J. BUS. ETHICS 137, 380 (2002); Parker & Nielsen, *supra* note 95, at 27.

120. See Sharon Gilad, *Institutionalizing Fairness in Financial Markets: Mission Impossible?*, 5 REG. & GOVERNANCE 309, 309 (2011).

121. See Hambrick & Mason, *supra* note 63 and accompanying text.

122. See Hambrick & Mason, *supra* note 63 and accompanying text.

Table 3. Management in Practice

Questions	Mean Responses for Each Question (Scale from 1–5 'Strongly disagree' to 'Strongly agree'.)	Whole Measure
In our organization the people responsible for compliance find it easy to get access to top management;	4.10	Cronbach Alpha: 0.83 Mean: 3.51 n=869–993
In my organization compliance problems are quickly communicated to those who can act on them;	3.99	
In my organization systemic and recurring problems of non-compliance are always reported to those with sufficient authority to correct them;	3.77	
Compliance requirements of laws, regulations, codes and organizational standards are integrated into my organization's day to day operating procedures;	3.69	
Managers in our organization know what aspects of compliance they are responsible for;	3.61	
Compliance failures are always investigated to understand their cause;	3.58	
In our organization everyone knows where the buck stops for compliance (reversed);	3.58	
My organization allocates adequate resources to enable the implementation of the compliance policy;	3.40	
In my organization we review our compliance program on a regular basis;	3.39	
My organization is not one of those organizations that try to have the best compliance of any organization in the country (reversed);	2.96	
My organization invests a lot of time and money in compliance training;	2.94	
My organization sometimes spends time and resources figuring out how to get what we want without directly breaching the Trade Practices Act;	2.69	
In my organization compliance advice is often ignored by line managers (reversed);	2.14	
In my organization compliance advice is often ignored by the board (If you don't have a board, please skip this question) (reversed).	1.79	

5. *Testing Hypothesis 2: Respondent Company's Risk Analyses*

Risk analysis requires determining both the magnitude of the loss and the probability that the loss will occur.¹²³ As there are multiple stakeholders who can sanction non-compliance, the salience of a stakeholder sanction must be determined in addition to the weight it is accorded.¹²⁴ As the regulator is reactive,¹²⁵ we add to the measure of legal detection of non-compliance, detection by stakeholders.

(a) *Respondents' Weighting of Losses from Different Stakeholders* (Table 4): We measure the way the firm weighs the magnitude of loss for non-compliance resulting from sanctions from different stakeholders by a series of questions asking about how much they would worry about (i) *economic losses* in relation to various different stakeholders if their firm was accused of breaches of the TPA; and (ii) *losses of respect and esteem* in relation to various different stakeholders *if their firm was accused of breaches of the TPA*. These questions are all predicated on the hypothetical that the firm is "accused of breaches of the TPA one day in the future." In so doing, we attempt to segregate out the seriousness of the norm violation from the probability of it being detected.

The businesses worry most by far about *economic losses* in relation to customers (46% worry "a lot" and 37% worry "very much") and then shareholders (42% worry "a lot" and 39% worry "very much").¹²⁶ The next highest was only 39% worrying "a lot" or "very much" about economic losses from employees.¹²⁷ As with worries about economic losses, the businesses worry most about losing the *respect or esteem* of customers (33% worry "a lot" and 58% "very much") and shareholders (84% worry "a lot" or "very much").¹²⁸ But the vast majority (83%) would also worry "a lot" or "very much" about losing the respect or esteem of employees, and 73% would worry "a lot" or "very much" about business partners.¹²⁹

In our tests of Hypothesis 1 (see Table 4 below) we test the extent to which these various worries explain variation in what businesses do

123. See Parker & Nielsen, *How Much Does It Hurt?*, *supra* note 96, at 562.

124. See *id.* at 564; Nielsen & Parker, *Third Parties*, *supra* note 96, at 313.

125. See Parker & Nielsen, *Do Businesses Take Compliance Systems Seriously?*, *supra* note 114, at 445.

126. For further discussion of these findings, see Nielsen & Parker, *Third Parties*, *supra* note 96, at 317.

127. See *id.*

128. See *id.*

129. See *id.*

with regards to compliance. It is not necessarily the case, however, that the more and more businesses worry about third party reactions to non-compliance, the more and more they will continue to try to improve their compliance behavior. It seems more reasonable to expect there to be some “tipping point” at which a certain degree of worry about third parties motivates change in compliance behavior. Inspection of the data,¹³⁰ however, could not identify any consistent “tipping point” at which a certain degree of worry about third parties was, on average, associated with a significant change in compliance behavior.

Another way of modeling the relationship between worries about third parties and business behavior—especially in the light of the fact that most businesses worry quite a lot in relation to most third parties—is to hypothesize that it is only worries above the average that we can expect to have any effect on behavior. In the regression analyses reported in Table 10, therefore, we measure whether or not worrying about specific third parties *more than average* has an effect on compliance behavior or not.¹³¹ We do this by transforming the measures of worries about third parties described above into dummy variables measuring whether or not each business rates their worries about third parties in the event of non-compliance as higher than the mean.¹³²

In the tests of Hypothesis 2 reported in Table 11, however, since we are interested in the extent to which the profession of the person responsible for compliance (and other variables) explains variation in the various worries about stakeholders, we do not use these dummy variables. Instead we use as dependent variables the original ratings of one to five given by the firm respondents about the extent to which they worried about each stakeholder.

130. This inspection was carried out by running a one way ANOVA-test of each variable measuring worries about third parties against the dependent variables to see if there was any significant difference in the score on the dependent variable associated with one of the five levels of worry compared to the other four.

131. For previous uses of this technique, see, e.g., Vibeke Nielsen, *Power in Public Implementation: A Complex, but Important Part of Power Studies*, 28 SCANDINAVIAN POL. STUD. 349, 357 (2005); Vibeke Nielsen, *Differential Treatment and Communicative Interactions: Why the Character of Social Interaction Is Important*, 29 LAW & POL'Y 257, 271 (2007).

132. Mean or less than the mean = 0; more than the mean = 1.

Table 4. Weighting of Losses from Different Stakeholders if Accused of Breach of TPA

If your organization were accused of breaches of the TPA one day in the future, how much would your organization worry about . . .	Mean (Standard Deviation) 1 to 5 ("Worry very little" to "Worry very much")
Economic <i>. . . economic losses in relation to the following groups of people: (n=924-964)</i>	
Your customers	4.18 (0.99)
Your shareholders	4.08 (1.06)
Your employees	3.87 (1.04)
The media	3.52 (1.27)
Your business partners	3.50 (1.12)
Consumer groups/NGOs	3.13 (1.29)
Informal business networks	2.99 (1.17)
Other organizations in your industry	2.90 (1.23)
Your suppliers	2.82 (1.28)
Your industry association	2.73 (1.31)
Total mean (all added together)	3.37 (0.85)
Social <i>. . . losing the respect and esteem of the following groups of people? (n=939-973)</i>	
Your customers	4.41 (0.87)
Your shareholders	4.22 (1.02)
Your employees	4.13 (0.97)
Your business partners	3.83 (1.02)
The media	3.66 (1.22)
Consumer groups/NGOs	3.51 (1.20)
Other organizations in your industry	3.28 (1.24)
Your industry association	3.27 (1.24)
Your suppliers	3.26 (1.23)
Informal business networks	3.21 (1.19)
Lawyers/compliance professionals	3.14 (1.26)
Politicians	3.13 (1.30)
Relatives	3.03 (1.27)
Total mean (all added together)	3.54 (0.83)

(b) *Respondents' Assessment of Detection Risk (Tables 5 and 6)*: We measure respondents' assessment of the risk of detection for TPA violations, differentiating between informal and formal sanctioning processes.

(i) *"Risk from Third Parties"*: The respondents' *perception as to the likelihood that third parties would notice whether they breached the TPA*: a single measure that puts together responses to three separate questions asking respondents to consider whether their trade practices are being closely observed by consumers, suppliers and business partners, respectively (shown in Table 5).

(ii) *"Likelihood of ACCC Enforcement" and "Seriousness of Risk of ACCC Enforcement"*: respondents' perceptions of the *likelihood* and *seriousness of ACCC enforcement action* (shown in Table 6).

Table 5. Measure of Perceived Risk of Complaints from Third Parties

Mark the number closest to the view of most managers in your organization:	Mean (Standard Deviation) 1 to 5 ('Strongly disagree' to 'Strongly agree')	Whole Measure
Our customers are aware of the TPA and keep a close eye on our compliance.	3.59 (1.00)	Mean: 3.19 Std. dev.: 0.86 Min: 1 Max: 5 Cronbach's Alpha: 0.86
Our suppliers are keeping a close eye on our trade practices.	3.52 (0.96)	
Our business partners focus a lot on the TPA and keep an eye on our compliance.	3.47 (0.95)	

Table 6. Measures of Likelihood & Severity of ACCC Enforcement Action

	Mean (Standard Deviation) 1 to 5 ('Strongly disagree' to 'Strongly agree')	Whole Measure
Likelihood of ACCC Enforcement		
If we breach the TPA the chances of the ACCC catching us are large.	3.35 (1.01)	Mean: 3.14 Std. dev: 0.67 Min: 1 Max: 5 Cronbach's alpha: 0.73
If we were caught by the ACCC in breach of the TPA the prospects of ACCC enforcement against the organization are large.	3.77 (0.91)	
It is easy for the ACCC to find out when organizations breach the law.	2.82 (1.03)	
In the light of the size and complexity of their task the ACCC has appropriate resources.	2.67 (1.01)	
A breach of the TPA does not have to be severe before the ACCC bothers to do anything about it.	3.18 (1.02)	
The investigative staff of the ACCC is very competent compared to the staff and lawyers of the companies they are regulating.	2.89 (0.80)	
The ACCC is generally keeping a close eye on our industry	3.23 (1.07)	
Seriousness of Risk of ACCC Enforcement		
The level of sanctions imposed for trade practices breaches is generally very high.	3.35 (0.98)	Mean: 3.5 Std. dev.: 0.76 Min: 1 Max: 5 Cronbach's alpha: 0.44
The ACCC has a wide range of effective sanctions against non-complying organizations.	3.65 (0.90)	

6. Main Independent Variable

Our survey was to be filled out on behalf of the organization by the most senior person in the organization with day-to-day responsibility for TPA compliance. We asked this person to write down their job description. These answers were then coded into business executives

(including CEO of the business), legal counsel (including General Counsel),¹³³ finance officers (including CFOs), compliance officers, and Company Secretaries. In Australia, the Company Secretary is an executive managerial position, fundamentally different in responsibilities than in the United States.¹³⁴ The number and proportion in each category are shown in Table 1, *supra*. For the regression analyses reported in this Article, we created five dummy variables to represent each of these groups of respondents.¹³⁵ We coded as a lawyer any Australian respondent who so self-identified.

7. *Control Variables*

a. *The Firm's History*

The firm's past compliance and non-compliance with the TPA are likely to influence how the firm manages compliance and how it assesses the costs and benefits of compliance and the risks of detection. Unfortunately, it is difficult to obtain reliable measures of the organization's past (and present) compliance and non-compliance. Instead, we examine the impact of complaints about non-compliance. We thus only examine the slice of the firm's history in which stakeholders have been acknowledged as attempting to sanction the company. The experience of these pressures may account for features of the formal compliance process as well as how compliance is managed in practice. The experience of these pressures also may account for how the firm now assesses the seriousness and risk of non-compliance.

(i) "*Stakeholder Criticism*" (Table 7): a measure of how often each business had been criticized by various external parties in relation to

133. In thirty-one responses to our survey, a person described himself or herself as both a legal counsel and also a company secretary or compliance officer. Wherever a person described himself as legal counsel, they have been counted only as legal counsel for the purposes of the analyses reported in this Article. This is because we are interested in whether identifying oneself as a lawyer makes a difference.

134. *Compare What Does a Governance Professional Do?*, CHARTERED SECRETARIES AUSTL., <http://www.csaust.com/knowledge-resources/governance-foundations/what-does-a-governance-professional-do.aspx> (last visited Jan. 31, 2013), with *Role of a Secretary*, SOC'Y CORP. SECRETARIES & GOVERNANCE PROFS., <http://main.governanceprofessionals.org/GOVERNANCEPROFESSIONALS/About/RoleofSecretary/> (last visited Jan. 31, 2013). See also Rosen, *Diffusion*, *supra* note 18, at 1304–08 (discussing different understandings of the role of the corporate secretary).

135. A dummy variable is a variable that has only two possible outcomes—e.g., is the respondent a legal or general counsel? Yes (1) and no (0).

their trade practices compliance¹³⁶ (divided into three groups—those who had experienced no criticism from any of the name groups; those who had experienced criticism from between one and seven of the various types of stakeholder; and those who had experienced criticism from between eight and fifteen of the various types of stakeholder). In an attempt to avoid self-serving denials, the question asked not only whether the firm but also whether comparable “others” had been criticized. When such criticism is known, even if it is indirect, it becomes part of the firm’s history.

Table 7. Measure of Level of Criticism by Third Parties

Below you will find a number of different groups of people who may have criticized your organization or others in your industry for their perceived failure to comply with the TPA. For each of these, please state whether they have expressed such a criticism within the past six years.	% Respondents Reporting Criticism (n=999)	Index (the number of groups who have criticized have been added together for each respondent. After that the scores have been divided into three categories):
The ACCC	25%	n = 999 Mean: 1.45 Std. dev.: 0.57 Min.: 1 Max.: 3
Customers	26%	
Competitors	17%	
Media	12%	
Australian Securities and Investments Commission (ASIC)	12%	
Consumer groups/NGOs	11%	
Employees	10%	
Lawyers/compliance professionals	10%	

136. The questionnaire gave respondents a list of different groups of people (shown in Table 7) and they were asked to indicate which, if any, had expressed criticism of “your organization or others in your industry for their perceived failure to comply with the Trade Practices Act” within the past six years. As Table 7 shows, only very few businesses reported that each group had criticized them or others in their industry. Most of the respondent businesses have never been criticized (53%), while 1% of the businesses reported they had been criticized by all the mentioned groups of people. Customers, competitors, and the media were the most common groups from which criticism was experienced, with customers by far the most frequent. This distribution of the actual experience of complaint is consistent with the respondents’ perception of the risk of complaints where 48% of respondents reported that they agreed that their customers were keeping a close eye on their compliance with the TPA. The Pearson’s correlation exists between the two measures if 0.201 and it is statistically significant at a 0.01 level (two-tailed).

Politicians	9%	
Suppliers	8%	
Industry association	8%	
Business partners	6%	
Shareholders	5%	
Relatives of management	2%	
Informal business networks	2%	

(ii) “*ACCC Investigation*”: Participants were asked whether the firm had been the subject of an ACCC investigation in the previous six years,¹³⁷ because this situation represents significant coercive pressure from a regulatory agency. Fourteen percent (141) of all respondents self-reported they had been the subject of an ACCC investigation of an alleged breach by their business. The vast majority of ACCC investigations (over 90%) result in a settlement or court order in which the business suffers some adverse consequences (e.g., payment of compensation, financial penalties, and implementation of a compliance system).¹³⁸

b. Firm-Level Factors

In previous analyses of our respondents’ compliance behavior, we have found the level of management oversight and planning to be very important, and size and resources also to be influential.¹³⁹

(i) “*Size*”: We might expect that larger firms are more likely to have done more to implement compliance systems and manage compliance since the costs of doing so should be relatively lower for them. Furthermore, they are likely to perceive themselves as more visible to a range of stakeholders because of their size and

137. The people filling out the questionnaire should generally have had enough knowledge to remember whether there had been an ACCC investigation in the previous six years as the median length of years they had spent working in the organization was six years (with a mean of nine years). It was necessary to go back six years in order to get enough cases of companies having had ACCC investigations for statistical manipulation. We use a self-report measure, rather than official ACCC records of investigation, on the basis that it is more salient to measure those businesses that actually remember having been investigated by the ACCC.

138. See PARKER & STEPANENKO, *supra* note 111, at 19–5.

139. See Parker & Nielsen, *Do Businesses Take Compliance Systems Seriously?*, *supra* note 114, at 464–65.

reputation.¹⁴⁰ It has been widely reported that larger businesses perceived themselves to be a greater target for ACCC enforcement action.¹⁴¹ On the other hand, larger firms may also feel less vulnerable to small amounts of criticism and pressure because of their size. We measure size by number of employees.

(ii) *“Organizational Resources”* (Table 8): Similarly, companies that have greater resources to understand the TPA and their strategic environment might also have a higher perception of the risks from various external stakeholders if they breach the TPA. They should also be in a better position to implement compliance systems and other management behaviors. The measure combines four questions that addressed how “well-resourced—either by contracting out or by using in-house expertise—do you think your organization is” regarding legal knowledge, economic knowledge, research and development, and technical knowledge relevant to compliance.

Table 8. Questions Included in Measure of How Well-Resourced Is the Respondent Organization

Question: How “well-resourced”—either by contracting out by using in-house expertise—do you think your organization is in the following respects?	Mean Responses for Each Question (Scale from 1–5 ‘Very badly resourced’ to ‘Very well resourced’. 3 = ‘Neither well nor badly resourced’)	Whole Measure
Research and development	3.20 (n=961)	Mean = 3.54 Cronbach’s Alpha = 0.78 n = 970 Min. = 1 Max = 5 Std. dev. 0.75
Legal knowledge	3.66 (n=970)	
Economic knowledge	3.69 (n=968)	
Technical knowledge relevant to compliance	3.60 (n=968)	

140. Research on corporate social responsibility has shown that most of the companies that have actually changed their CSR behavior are those with highly visible brands who have experienced specific criticism. See DAVID VOGEL, *THE MARKET FOR VIRTUE* 46–74 (2006).

141. See Christine Parker & Vibeke L. Nielsen, *What Do Australian Businesses Think of the ACCC and Does It Matter?* 22 (University of Melbourne Law School, Legal Studies Research Paper No. 377, 2007), available at <http://ssrn.com/abstract=1365513>.

(iii) *“Level of Management Oversight and Planning”* (Table 9): Similarly, we expect firms that are better managed to be more aware of external stakeholders (and the risks associated with breach in relation to a range of stakeholders), and also to be in a better position to manage compliance better.

Table 9. Questions Included in Measure of Level of Management Oversight and Planning

Questions	Mean Responses for Each Question (Scale from 1–5 'Strongly disagree' to 'Strongly agree'.)	Whole Measure
Our senior managers know very well what is going on in every part of our organization.	3.89 (n=969)	Mean = 3.76 Cronbach's Alpha = 0.64 n = 972 Min. = 1 Max = 5 Std. dev. 0.72
Our managers give a lot of priority to long term strategic planning.	3.63 (n=972)	

IV. RESULTS

Table 10. Tests of Influence of Profession of Respondent, Risk Analyses, Worries About Stakeholders (& Other Variables) on Compliance Management Behavior

	Compliance Mgmt. in Practice		Complaints Handling		Comme'n & Training		Mgmt. Account'y & Whistle-blowing		Compl. Perf. Meas't & Discipline	
Control Variables										
<i>Size</i>	.08* (2.37)	.07* (2.37)	.09* (2.55)	.08* (2.18)	.14*** (4.47)	.10*** (3.31)	.11*** (3.33)	.10** (2.88)	.08* (2.43)	NS
<i>Resources</i>	.32*** (10.54)	.32*** (10.18)	.16*** (4.45)	.16*** (4.49)	.21*** (6.62)	.17*** (5.46)	.20*** (5.90)	.19*** (5.49)	.16*** (4.68)	.15*** (4.32)
<i>Mgmt. O'sight</i>	.15*** (4.97)	.15*** (4.85)	NS	NS	NS	NS	NS	NS	NS	NS
Firm History										
<i>ACCC Investig.</i>	NS	NS	NS	NS	.21*** (6.89)	.18*** (6.19)	.18*** (5.36)	.17*** (4.98)	.18*** (5.36)	.16*** (4.68)
<i>Stakeholder Criticism</i>	NS	NS	NS	NS	NS	NS	.10** (2.95)	.08* (2.46)	NS	NS
Assessment of Detection Risk										
<i>ACCC Likelih'd</i>	.18*** (5.21)	.18*** (4.96)	NS	NS	.17*** (4.58)	.15*** (4.09)	.11** (2.78)	.11** (2.62)	NS	NS
<i>ACCC Severity</i>	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS
<i>Third Parties</i>	.16*** (5.32)	.17*** (5.60)	.16*** (4.57)	.17*** (4.80)	.14*** (4.64)	.13*** (4.39)	.09* (2.58)	.09* (2.62)	.16*** (4.73)	.17*** (4.93)
Worries About Economic Losses from:										
<i>Cons. Grps./ NGOs</i>	NS	NS	.08* (2.50)	NS	-.14*** (3.83)	-.14*** (3.96)	NS	NS	NS	NS
Worries About Losing Respect and Esteem of:										
<i>Emp'ees</i>	.10*** (3.50)	.10*** (3.34)	.13*** (3.74)	.15*** (4.38)	.11*** (3.55)	.13*** (4.44)	NS	NS	NS	NS
<i>Cons. Grps./ NGOs</i>	NS	NS	NS	NS	.13** (3.21)	.14*** (3.62)	NS	NS	NS	NS

<i>Other Org. in Industry</i>	NS	NS	NS	NS	-.12** (3.49)	-.10** (3.16)	NS	NS	NS	NS
<i>Share- holders</i>	.09*** (3.05)	.09*** (2.96)	.09* (2.59)	.09** (2.74)	.08* (2.53)	NS	.10** (3.04)	.09** (2.94)	NS	NS
Person Responsible for Compliance is:										
<i>Fin. Off. (Constnt)</i>	#	(7.18)	#	(-1.59)	#	(-9.84)	#	(- 6.50)	#	(-7.39)
<i>Bus. Exec.</i>	#	NS	#	NS	#	NS	#	NS	#	NS
<i>Legal Counsel</i>	#	NS	#	NS	#	.16*** (4.69)	#	NS	#	NS
<i>Compl. Off.</i>	#	.07* (2.48)	#	.09* (2.60)	#	.10*** (3.28)	#	.13*** (3.74)	#	.14*** (4.05)
<i>Co'y Sec.</i>	#	NS	#	NS	#	NS	#	NS	#	NS
Model Stats:										
N =	798	785	781	777	781	781	801	788	838	826
Adj. R ²	0.40	0.40	0.21	0.21	0.38	0.39	0.23	0.24	0.17	0.17
F-value of full model	55.10 ***	37.93 ***	20.13 ***	15.36 ***	37.74 ***	33.04 ***	27.14 ***	19.57 ***	22.09 ***	15.18 ***

Note: *** = $p < .001$; ** = $p < .005$; * = $p < .01$ (two-tailed). Cell entries are standardized regression coefficients with the absolute value of t-statistics in parentheses.

Table 11. Tests of Influence of Profession of Respondent (& Other Variables) on Weighting of Worries and Perceptions of Risk

	Worries About Econ. Losses from:		Worries About Losses of Respect and Esteem from:								Risk from Third Parties	Likelihood of ACCC Enforcement			
	<i>Consumer Groups/ NGOs</i>	<i>Employees</i>	<i>Consumer Groups/ NGOs</i>	<i>Share-holders</i>	<i>Other Orgs in Industry</i>										
Control Variables															
<i>Size</i>	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS	.14 *** (4.54)	.13 *** (4.05)	
<i>Resrcs</i>	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS	.11 ** (3.16)	.10 ** (2.71)	.16 *** (4.84)	.15 *** (4.28)	
<i>Mgmt. O'sight</i>	NS	NS	.11 ** (3.27)	.11 ** (3.99)	.13 *** (3.71)	.12 ** (3.34)	.13 *** (3.77)	.13 *** (3.77)	.11 ** (3.03)	.10 ** (2.78)	.13 *** (3.76)	.12 *** (3.59)	NS	NS	
Firm History															
<i>Stakeholder Criticism</i>	NS	NS	NS	NS	NS	NS	NS	NS	NS	-.11 *** (3.20)	-.10 * (2.81)	.15 *** (4.52)	.14 *** (4.21)	.14 *** (4.40)	.12 *** (3.64)
<i>ACCC Investig.</i>	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS	.09 * (2.61)	NS	.14 *** (4.39)	.12 *** (3.82)	
Person Responsible for Compliance is:															
<i>Fin. Off. (Cnstnt)</i>	#	(8.06)	#	(14.44)	#	(9.65)	#	(13.4)	NS	NS	#	(3.75)	#	(14.11)	
<i>Bus. Exec.</i>	#	NS	#	NS	#	NS	#	NS	NS	NS	#	NS	#	NS	
<i>Legal Counsel</i>	#	NS	#	NS	#	NS	#	NS	NS	NS	#	.12 ** (3.15)	#	.11 ** (2.94)	
<i>Compl. Off.</i>	#	NS	#	NS	#	NS	#	NS	NS	NS	#	NS	#	NS	

<i>Co'y Sec.</i>	#	NS	#	NS	#	NS	#	NS	NS	NS	#	NS	#	NS
Model stat's:														
N =	920	907	936	922	933	919	907	893	935	921	891	878	945	932
Adj. R ²	0.01	0.02	0.02	0.02	0.02	0.02	0.03	0.03	0.02	0.03	0.08	0.09	0.13	0.13
F-value of full model	3.01	2.79	4.96	3.40	3.82	3.07	6.82	3.96	5.42	3.59	16.75	10.55	29.13	16.85
		**	***	***	***	**	***	***	***	***	***	***	***	***

Note: *** = $p < .001$; ** = $p < .005$; * = $p < .01$ (two-tailed). Cell entries are standardized regression coefficients with the absolute value of t-statistics in parentheses.

The regressions shown in Tables 10 and 11 test whether the profession of the respondent—the person responsible for compliance within the firm—has an effect on compliance management behavior directly (Hypothesis 1) or indirectly (Hypothesis 2). Each Table shows a number of regressions because we use a number of dependent variables to measure compliance management behavior (Table 10) and analyses of risk of non-compliance (Table 11). In each case, as mentioned above, two models are tested with and without the profession of the respondent in order to test whether inclusion of the profession adds anything to the explanation or not. The test of the model that includes the profession of the person responsible for compliance is on the right and in bold for each pair of regressions for each dependent variable.

A. Hypothesis 1: Direct Effects of Professional Orientation on Compliance Management Behaviors

We hypothesized first that compliance management behaviors will differ between firms that have individuals from different professions in charge of compliance. Table 10 shows there is in fact little evidence of any direct effect of profession on any of our dependent variables measuring formal compliance system implementation and substantive compliance management. The R-squares for each pair of regressions for each of the five dependent variables remains the same, or improves only very slightly, when we include the profession of the person responsible for compliance into the model. This suggests that profession does not add much, if anything, to the explanation. Moreover, when profession is included in the regressions, except for compliance officers, it is rarely significant.

Hypothesis 1A: The profession of the “individual in charge of compliance” will make for differences between firms in the formal compliance system elements that they are reported to have implemented.

Table 10 shows that if the profession of the respondent was finance officer, business executive, or company secretary, such profession had no significant effect on the formal compliance system elements reported as being implemented. For firms with legal counsel or, particularly, compliance officer respondents, the implementation of more formal compliance system elements was reported. If the person responsible for compliance is a legal counsel, this is only true for “communication and training” elements of compliance systems. But where it is a compliance officer, the organization is significantly more likely to have put in place each of the elements of formal compliance systems. “Communication and training” elements include the presence of manuals and training programs about the Act.

In the set of equations reported in Table 10, including the profession of the person responsible for compliance in the model makes no dramatic changes in the regression equation factors except in relation to two variables: (1) when profession is included the implementation of “communication and training” elements of compliance systems is not significantly related to worries about losing the respect and esteem of shareholders; (2) similarly, worries about economic losses from consumer groups/NGOs drops out of the explanation for implementation of “complaints handling” elements of compliance systems when profession is included in the model. In both cases, however, having a compliance officer responsible for compliance is significantly associated with implementation of the relevant compliance system element. In the case of worries about shareholders and implementation of the communication and training elements of compliance systems, having a legal counsel responsible for compliance is also significant. These findings suggest that the professional orientation of the person responsible for compliance is responsible for the reported worries about economic losses from consumer groups or NGOs and losses of esteem of shareholders.

Hypothesis 1B: The occupational/professional background of the “individual in charge of compliance” will make for differences between firms in their substantive compliance management behaviors.

Table 10 shows that having a compliance officer responsible for compliance is the only professional orientation that is significantly

associated with compliance management in practice, but that association is fairly weak.

In Table 10, we also test for the influence of firms' risk analyses on compliance management behaviors.¹⁴² Worries about the reactions of employees and shareholders to non-compliance most consistently factor into implementation of both formal and more substantive compliance management behaviors. In both cases it is losses of respect and esteem, not economic losses, that have an effect.

We also find that worries about both economic losses and social losses from consumer groups or NGOs relate to implementation of communication and training elements of formal compliance systems. Worries about economic losses from consumer groups or NGOs are also weakly significant for implementation of complaints handling systems. Finally, worries about losses of respect and esteem from "other organizations in your industry" are significantly associated with lower implementation of communication and training elements of formal compliance systems.¹⁴³

It is these worries that actually impact on compliance management behavior. Thus we hypothesize (Hypothesis 2) that it is by influencing the perceptions of these risks that the profession of the person in charge of compliance has an indirect effect on the firm's compliance behaviors. We test this hypothesis in Table 11 (discussed below).

Compliance management behavior is also significantly influenced by the likelihood of ACCC enforcement and likelihood of complaint from third parties. Consequently, to test Hypothesis 2, we also need to know to what extent these assessments of risk are influenced by the profession of the respondent.

142. Because of the significance of perception of risk of complaint by third parties in the results of these analyses (and the lack of significance of worries about economic and social losses in relation to the various third parties), we also made the same analyses again excluding the perception of risk of complaints from third parties to check whether this had been masking the significance of worries about third parties. This made no difference to the significance of worries about third parties. Similarly, we also made the regression step-wise with ACCC investigation added as an independent variable last in case it was masking the influence of third parties. This also made no difference to the results.

143. These findings have been discussed at greater length in separate papers on data from the same survey published previously by two of the co-authors of the current Article. See generally Nielsen & Parker, *Third Parties*, *supra* note 96; Parker & Nielsen, *How Much Does It Hurt?*, *supra* note 96.

B. Hypothesis 2: Indirect Effect of Profession on Risk Analyses

We have seen in the discussion of the results in Table 10 above that professional orientation has little *direct* effect on compliance management behaviors. We also have seen that firms' risk analyses have some influence on compliance management behavior. Table 11 shows the results of tests to determine whether the profession of the person responsible for compliance has an *indirect* effect on compliance management behavior by influencing the way in which the firm is reported to analyze the risks of non-compliance and to be worried about different stakeholders. To do this we used a series of regressions (shown in Table 11) to test the influence of the profession of the person responsible for compliance on each of the worries and risk analysis variables that turned out to have a significant influence on compliance management behavior (as shown in Table 10). We also include the same control variables as for the regressions in Table 10.

Again we conducted two regressions for each dependent variable comparing the power of the explanation with and without including the profession of the respondent in the analysis. Once again, as Table 11 shows, adding the professional or occupational background of the person responsible for compliance to the explanatory model does not improve the R-squares for each of the regressions, or makes them only very slightly higher. This means that including the profession of the person responsible for compliance to the model does not add much to the explanation.

Hypothesis 2A: The professional background of the "individual in charge of compliance" will make for differences between firms in their reported concern about the loss of esteem by and economic sanctions from various stakeholders.

We find no evidence that the profession of the person responsible for compliance makes any significant difference at all to the *weighting (or valuation) of worries about economic and social losses in relation to different stakeholders* if the organization were to breach the TPA at some point in the future. We only examine the worries that we found to make a difference to compliance management behavior in Table 10. The R-squares for the regressions seeking to explain variation in worries about the various stakeholders are very poor (0.01–0.03)—suggesting that there are other things explaining this variation that we have not captured in our model. We do, however, find that one of our control variables, management oversight and planning, makes a significant difference to most of these worries.

This suggests that there may be something about the management style of a firm that leads to it worrying more about stakeholder reactions to non-compliance, but our model is not powerful enough to draw further conclusions about this.¹⁴⁴

Hypothesis 2B: The professional background of the “individual in charge of compliance” will make for differences between firms in their assessments of the risks of (i) stakeholders and (ii) regulators detecting non-compliance.

Where the person responsible for compliance in the firm is a lawyer, the firm is significantly more likely to perceive both a higher risk of complaint from third parties about TPA compliance issues and a higher likelihood and severity of ACCC enforcement action. Apart from this finding, the profession of the person responsible for compliance does not make any significant difference to the way firms *assess the more immediate risk from stakeholders and the regulator* in relation to TPA compliance.

As we would expect, those organizations that had experienced actual criticism from stakeholders in relation to TPA compliance in the past also see the likelihood of further pressure from both third parties and the regulator as higher. This was true regardless of whether the person responsible for compliance was included in the model or not. This fits well with general observations that people estimate the risk of something they know and see as immediate as higher than something they do not know or have not experienced before, regardless of true probabilities.¹⁴⁵

Those organizations that have experienced an ACCC investigation in the past also see the likelihood of further regulatory enforcement action as well as complaints from third parties as higher (and we saw above that these worries do influence implementation of compliance management behaviors). But, this changes when we include the person responsible for compliance in the explanatory model: the fact

144. For further discussion of the importance of management oversight and planning (or long term management approach, as we sometimes label this variable) throughout our analyses of these survey data, see generally Parker & Nielsen, *supra* note 95; Parker & Nielsen, *How Much Does it Hurt?*, *supra* note 96.

145. See generally MARTIN FISHBEIN & ICEK AJZEN, *BELIEF, ATTITUDE, INTENTION, AND BEHAVIOR: AN INTRODUCTION TO THEORY AND RESEARCH* (1975); JAMES G. MARCH, *A PRIMER ON DECISION MAKING: HOW DECISIONS HAPPEN* (1994); Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 AM. ECON. REV. 1449 (2003); Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24 OXFORD J. LEGAL STUD. 173 (2004).

that a lawyer is responsible for the firm's compliance is significantly related to perceptions of the risk of third party and regulator action on non-compliance, and the significance of the ACCC having investigated the firm in the past drops out of the equation.

This probably reflects the fact that lawyers are likely to be made the person responsible for TPA compliance after a firm has experienced an ACCC investigation. In this Article, we do not seek to explain why firms select persons of particular professional backgrounds to be the person responsible for compliance.¹⁴⁶ But we do know from analysis of our data that the size of the firm and whether it has had contact with or has been investigated by the ACCC in the past, is significant in explaining whether a lawyer is the person responsible for compliance.¹⁴⁷ An organization that has had an ACCC investigation is more likely to have put a lawyer in charge of TPA compliance (at some stage—we do not know when—but it may well have been in response to the investigation), and that lawyer will assess the risk of future ACCC enforcement actions and third party complaints as significantly higher than people with other professional orientations in other organizations.

146. For a discussion of this topic, see Deepak K. Datta & James P. Guthrie, *Executive Succession: Organizational Antecedents of CEO Characteristics*, 15 STRATEGIC MGMT. J. 569 (1994).

147. See *infra* Table 12.

Table 12. Lawyers More Likely to be Responsible for Compliance Where Firm Has Had ACCC Investigation

Independent Variables	Respondent Is a Law Professional
<i>Size</i>	.58***
<i>Industry</i>	
1. Primary Industries	.34
2. Manufacturing & Construction	.29
3. Wholesale Trade	.01
4. Retail & Hospitality	-.22
5. Fin. & Ins., Property & Bus. Servs., Transport & Storage	.29
6. Government & Essential Services	-.01
7. Education & Other Services	.01
<i>Admit breach (No = 0, Yes = 1)</i>	.09
<i>Investigated by the ACCC (No = 0, Yes = 1)</i>	.82*
<i>Interaction with the ACCC (No = 0, Yes = 1)</i>	.97***
<i>Level of experienced criticism</i>	.31
<i>Model statistics:</i>	
N = Naglekerke's R ²	.919
F-value of full model	.23***

Note: *** = $p < .001$; ** = $p < .005$; * = $p < .01$ (two-tailed). Cell entries are B-coefficients

Control Variables. We also find that larger and better-resourced firms are significantly more likely to perceive the risk of ACCC enforcement and third party complaints as higher. As mentioned in our discussion of our hypotheses, this is probably because larger firms see themselves as a larger target. It may also be because they have more resources to be aware of the risk.¹⁴⁸

148. See Parker & Nielson, *How Much Does It Hurt?*, *supra* note 96, at 597.

V. DISCUSSION

A. Summary of Results

We hypothesized that firm compliance behavior was responsive to the professional background of the person responsible for compliance in two interrelated ways—directly and indirectly.

Directly, we expected that the profession of the respondent would lead to reporting different levels of implementation of formal compliance systems and different substantive compliance management practices. We thought we would find this result for three different reasons.

First, we had several accounts of professional framing. Because different professions have different norms and heuristics, we hypothesized that compliance departments led by members of different professions would operate differently. Or, because different professions have different cognitive structures, for respondents from different professions, different factors would be salient and more likely to be reported.

Second, we expected that the selection of a particular profession to lead compliance might reflect something about the firm. These differences would be reported back to us by the different professionals.

Third, to the extent that there is subjectivity in the responses to our survey, the subjectivity would lead to the display of that which is normatively desirable in the respondent's profession. Or, the subjectivity might lead to more instrumental responses, justifying their profession's cast of mind as appropriate for management of the compliance function.

We also expected an indirect influence of the respondent's profession by influencing the firm's identity and values in relation to its environment and therefore its compliance management behavior. We hypothesized that the professional background of the individual inside the firm who was in charge of compliance would influence the firm to weigh the risk of stakeholder reactions to non-compliance differently, and that this in turn would lead them to put in place different compliance management behaviors.

Overall, we found little evidence of either direct or indirect influence. The main effects of professional orientation we found were that having a compliance officer in charge of compliance leads to a direct effect on both implementation of formal compliance systems and also more substantive compliance management

behaviors. Having a lawyer in charge of compliance leads to a direct effect on only one aspect of formal compliance system implementation: communication and training elements. Having a lawyer in charge also has an effect on implementation of both formal compliance system elements and substantive compliance management through the lawyer's influence on the firm's increased perception of risk from third parties and the regulator.

Those who are in charge of compliance who identify as compliance specialists are more likely to make sure that the organization implements more fulsome compliance systems. This is hardly surprising given the compliance profession specializes in putting compliance structures in place in an organization. We might have thought, given the professional rhetoric of compliance officers, that the structures they have in place would also be more likely to translate to substantively better compliance management in practice. Although our evidence is consistent with this expectation, it is not as dramatic as we, and compliance specialists, might have wished.

We find no direct relation between having a lawyer in charge of compliance and there being complaint handling mechanisms within the firm. Neither do we find any relation between putting a lawyer in charge of compliance and increased management accountability and whistle-blowing mechanisms. Further, we do not find any relation between having a lawyer in charge of compliance and the firm measuring compliance and disciplining non-compliance. By contrast, having a designated compliance manager in charge of compliance leads to all of these structures promoting compliance and punishing non-compliance.

We do not find that having a lawyer in charge of compliance has any effect on compliance management in practice. Items such as "Compliance failures are always investigated" or "Managers in our organization know what aspects of compliance they are responsible for" are not reported more (or less) often by lawyer respondents than non-lawyer respondents. Table 10 shows that having a compliance officer responsible for compliance is the only professional orientation that is significantly associated with compliance management in practice, but that association is fairly weak.¹⁴⁹ This suggests that the compliance system elements introduced by legal counsel and compliance officers may be purely formal, even symbolic. Lawyers and compliance officers might find it important to make the symbolic

149. See *supra* Table 10.

and formal efforts of making a compliance system, but this does not necessarily mean it makes any difference in compliance practice.

We do find that lawyers are more likely to report that their firm has a greater likelihood of regulatory enforcement and a greater likelihood of complaints (suits) by third parties about regulatory breaches. That is, lawyers see the firm as more legally exposed. These measurements of risk do have an impact on firm structure and behavior. We therefore find an indication of some sort of cycle of legal risk or legalization in which the experience of a close shave with the ACCC might mean an organization puts a lawyer in charge of TPA compliance and the lawyer maintains a constant perception of a high risk from the ACCC and other third parties in relation to TPA non-compliance.

This does not, however, seem to play out into any sort of different thinking by the lawyer regarding the economic and social value of different stakeholders for the organization, and how that might affect the organization's compliance activities. Nor does it play out in changing commitments to compliance. Its result appears only to increase the likelihood that the firm will have written policies, manuals, and training programs.

Overall it is the perception of risk of discovery of non-compliance by third parties and the government, rather than the profession (and presumably the values or ideology) of the person responsible for compliance that makes a difference in what the businesses do about compliance according to our data.¹⁵⁰ Experience of actual coercive pressure from stakeholders (i.e., ACCC investigation and, to a lesser extent, experienced criticism by third parties and the perception of risk of loss from stakeholders) are very important for compliance behavior both directly (Table 10) and also indirectly through influence on the way risks are perceived (Table 11).¹⁵¹ Including the profession of the person responsible for compliance in our models makes little difference. This suggests that a history of non-compliance detection—through third party criticism and ACCC investigation—and associated heightened perceptions of risk for the future, have a direct impact on firm thinking about risks of non-compliance and that is not necessarily mediated through the professional orientation of the person responsible for compliance.

150. Note that it is risk of discovery that is explanatory rather than reported worries about loss of respect or esteem or economic losses from stakeholders.

151. We have discussed this finding in greater depth in another paper based on the same data. See Nielsen & Parker, *Third Parties*, *supra* note 96, at 329–38.

B. Limitations of Study

There are some potential limitations on the general application of our data, which suggest further research in this area should be undertaken. We found a lack of permeation of norms/stakeholder concerns into the firm via the profession of the person responsible for compliance. This may be because the area of compliance we are looking at (competition and consumer protection law) is simply not an area where there are clear social norms with which any particular professional group clearly identifies.¹⁵² It might have been different if we had looked at firms' occupational health and safety compliance and compared firms with safety engineers, lawyers, and business executives in charge of compliance.

It may simply be that the knowledge of how to stimulate and monitor compliance may not be part of the lawyerly cast of mind. Compliance may require organizational skills, which may not be part of what a lawyer's practice or socialization develops. It may simply be that the legal profession has no interest in claiming jurisdiction over compliance jobs, despite the fact that we are speaking of compliance with the law.

Moreover, our model of how legal norms become embedded within firms makes a number of assumptions. First, it assumes that the interests of the "individual in charge of compliance" derive from their occupational/professional background. Second, it assumes that "the individual in charge of compliance" has the capacity to direct corporate behaviors.

Our model, however, is not dependent on a restricted view of power or agency. We are taking the selection of a compliance leader as a proxy for understanding cognitive and social processes within the organization.¹⁵³ For example, we recognize that in examining only the professional role of the person in charge of compliance, we are eliding that decision-making often is the product of a team¹⁵⁴ and occurs

152. The competition policy side of the Australian TPA may be particularly ambiguous in its level of professional and political support. *See generally* Fiona Haines & Caron Beaton-Wells, *Ambiguities in Criminalizing Cartels: A Political Economy*, 52 *BRIT. J. CRIM.* 953 (2012); Christine Parker, *Economic Rationalities of Governance and Ambiguity in the Criminalization of Cartels*, 52 *BRIT. J. CRIM.* 974, 974 (2012).

153. *See generally* Mason A. Carpenter et al., *Upper Echelons Research Revisited: Antecedents, Elements, and Consequences of Top Management Team Composition*, 30 *J. MGMT.* 749 (2004).

154. *See* Hambrick & Mason, *supra* note 63, at 202.

within a political structure.¹⁵⁵ Although we often speak about the consequences of having a certain type of leader, we are not wedded to an anthropocentric model of a leader deciding. Instead, we are adopting a shorthand to describe corporate processes. Behind our model is the more general claim that differences between firms are revealed by or result from the occupational/professional identity of the person in charge of compliance.

We also have assumed that our categorization of the respondents into different professions and functional backgrounds is accurate. We do not know the educational training of our respondents. We do not know how long they practiced law or whether they are the CFO now, but were the CLO last year. We did not ask these questions in our survey because its focus was on compliance, not professionalism. Nonetheless, we are rather confident that all those we coded as lawyers are legally trained and have practice experience. That army of 181, all of whom claim a lawyer identity, does not appear to be standing on the machinery of justice or at the outposts of the legal profession.¹⁵⁶

With the exception of CEOs who may have emerged from sales or product development, all of our respondents have what has been termed “throughput experiences.”¹⁵⁷ Administration, law, and accounting are classified as “throughput functions” and hence, our data may confirm those who claim that it is “output” versus “throughput” experience that divides managers. The lack of environmental scanning responsibilities, however, is what distinguishes throughput experiences.¹⁵⁸ Our respondents did scan the environment since external risks are central to the compliance function, and they perceived the environment differently. There is sizable variation in their responses, but we have not by our analyses in this Article explained the variation. Except as we have explained, their professional background and their company’s compliance behaviors were not linked to their scanning.

Finally, these findings may suffer from the problem of reverse causality¹⁵⁹: because the firm wanted manuals and internal training

155. See generally James G. March, *The Business Firm as a Political Coalition*, 24 J. POL. 662 (1962).

156. See *supra* note 1.

157. See *supra* note 63.

158. See *supra* note 64 and accompanying text.

159. See Barker & Mueller, *supra* note 16, at 795 (“What is the causal nature of the relationships we have found between CEO characteristics and R&D spending?”)

programs, it hired lawyers. Because the firm desired robust formal compliance systems, they hired compliance experts. Given the limitations of our data, we have no way to determine causality.

C. Firm Identity and the Profession of the Person in Charge of Compliance

In determining the salience of different stakeholders, and the pressures they can bring to bear, a firm makes choices about its identity. We hypothesized that compliance departments headed by members of different professions would worry about economic and esteem losses from different stakeholders. By influencing the company's perceptions of the risks of non-compliance, the professional would indirectly influence compliance behavior.

Our respondents were surveyed about ten stakeholders who could impose economic losses on the firm and thirteen stakeholders whose esteem for the firm might be damaged should the firm be accused of TPA breaches. There is a fair amount of variation in the respondents' ratings of their worries about different stakeholders and from stakeholder to stakeholder.¹⁶⁰

Yet, contrary to our hypotheses, we find no evidence that the profession of the person responsible for compliance makes a difference to the firm's perception of the risks of non-compliance in relation to these different stakeholders. To the extent that people responsible for compliance have different values and norms in relation to how the firm should value different stakeholders, this does not appear to track professional identity. The cognitive distinctiveness of the different professions is blanded out in intra-firm processes. Although the professionals inside the corporation are known as "boundary-spanning" personnel, we find no evidence that the professionals responsible for compliance cause the firm to focus on either the economic or social good will of particular external stakeholders. It is not the person in charge of compliance who coordinates or controls the firm's perception of its stakeholders.

Because we lack longitudinal data, we cannot tell how stable the relationships are across time. This limitation also means that . . . there is the possibility of reverse causality. For example, it could be that firms spending large amounts on R&D look for CEO candidates with R&D or marketing career experience."); Chaganti & Sambharya, *supra* note 68, at 396; Datta & Guthrie, *supra* note 146, at 574; Smith & White, *supra* note 68, at 271 (finding relationship between firm's previous strategy and successor's functional background); Thomas et al., *supra* note 68, at 514–20.

160. See *supra* Table 4.

We often think of implementation of compliance systems, including complaint handling systems, as directed at convincing external stakeholders, like customers, that an organization is doing the right thing. But our results suggest that internal stakeholders (employees) are in some ways a more important “audience” for compliance management activities than many external stakeholders. In Table 10, worries about losing the respect and esteem of employees was significantly associated with increased implementation of the basic aspects of formal compliance structures and also compliance management in practice. This may be because senior managers understand that by definition, employees are keeping a “close eye” on compliance from the inside, and risk of detection is what motivates compliance practices.¹⁶¹

The second part of risk analysis is the measurement of the risk of loss, in this case from the detection of noncompliance. We also find, with one exception, no evidence of professional orientation making a difference to this component of risk analysis. Our data suggests that risk analysis within the firm must be controlled by other norms regarding both the legal and non-legal enforceability of compliance.

The sole exception concerns lawyers. Although lawyers do not differently weigh the types and magnitudes of losses from non-compliance, they are more likely to perceive that both the regulator and third parties would detect noncompliance. This finding may support the position of those who argue that lawyers tend to overstate legal risks.¹⁶² The lawyer cast of mind may induce lawyers to be lightning-rod salesmen of charged conflict.

Unfortunately, the causal direction is not clear. It might equally be the other way around—that those firms that do in fact have a higher risk of detection and enforcement of this area of law by the regulator or third parties are more likely to have a lawyer in charge of compliance. Researchers of compliance in other areas of law have found that compliance managers are more likely than lawyers to overstate legal risks.¹⁶³ Others have shown that compliance structures, especially those adopted in response to overstated risks,

161. We have discussed this in more detail in another paper focusing on other aspects of our data. See Nielsen & Parker, *Third Parties*, *supra* note 96, at 337.

162. See, e.g., Donald C. Langevoort & Robert K. Rasmussen, *Skewing the Results: The Role of Lawyers in Transmitting Legal Rules*, 5 S. CAL. INTERDISC. L.J. 375, 379–80 (1997).

163. See, e.g., Edelman et al., *Professional Construction*, *supra* note 65, at 80. This finding is discussed further below at text accompanying note 181.

divert the firm from concern with noncompliance, offering formal compliance instead of a changed workplace.¹⁶⁴

Our findings would support these conclusions. What our findings add is the independence of perceptions of risk of loss from the perceptions of the magnitude of loss. Although lawyers may overstate risk, the definition of the situation—how and why non-compliance is worrisome—does not change. Our data would predict that when lawyers lead compliance programs, firms will introduce measures that reduce the risk of loss but that the firm will not experience change in its understandings of the significance of noncompliance or the value of compliance.

We see more evidence here of businesses pragmatically responding to focused application of stakeholder pressure than of businesses responding in a principled way to their assessment of stakeholder values and concerns. This is reflected in the fact that greater normative commitment to compliance is correlated to the perception of being watched, rather than worries about economic losses or losses of respect and esteem.

Obedience to the law when one is not being monitored distinguishes mere compliance with the law from “willing acceptance of the law.”¹⁶⁵ In these terms, we find that the person in charge of compliance reports that the firm has not accepted the law. We do not find a “compliance norm,” or “norm of law abidingness” that “should elicit compliance even where the firm’s activity is shielded from the regulator’s gaze.”¹⁶⁶

D. Firm Norms and Professional Behavior

We have found that neither direct nor indirect influences of professional orientation are very good at explaining compliance

164. See generally Lauren B. Edelman & Shauhin Talesh, *To Comply or Not to Comply—That Isn’t the Question: How Organizations Construct the Meaning of Compliance*, in *EXPLAINING COMPLIANCE: BUSINESS RESPONSES TO REGULATION* 103 (Christine Parker & Vibeke Lehmann Nielsen eds., 2011); Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 *LAW & SOC’Y REV.* 497, 499–500 (1993); Edelman et al., *Legal Ambiguity*, *supra* note 100, at 75; Gilad, *supra* note 120, at 326–27; Carol A. Heimer, *Competing Institutions: Law, Medicine, and Family in Neonatal Intensive Care*, 33 *LAW & SOC’Y REV.* 17 (1999).

165. Tom R. Tyler, *Promoting Employee Policy Adherence and Rule Following in Work Settings: The Value of Self-Regulatory Approaches*, 70 *BROOK. L. REV.* 1287, 1292 (2005).

166. Timothy F. Malloy, *Regulation, Compliance and the Firm*, 76 *TEMP. L. REV.* 451, 455 (2003) (citations omitted).

behavior and that there is no evidence that the person in charge of compliance mediates the influence of stakeholders. Instead, we are led to infer that there are firm-level (non-legally enforceable) norms that determine compliance behavior. Firms have compliance cultures¹⁶⁷ and their norms restrain the exercise of professional judgment. The person in charge of compliance abides by these norms.

This contradicts our model, which had depicted professional norms as shaping firm behavior. Our model suggested that the person in charge of compliance might defect from other firm norms. Judged from the perspective of the firm, such defections are costly, both in terms of morale and future cooperation.¹⁶⁸ Thus, it is not surprising that we find evidence that firms must have informal governance mechanisms that inhibit such defections. Finding that the persons in charge of compliance are guided by firm—not professional—norms, is consistent with recognizing that they have been “promoted” to this position and have been rewarded for subscribing to firm norms.¹⁶⁹

On the other hand, in choosing professionals, whether they are financial, legal, compliance, or the company secretary, to lead compliance, the firm signals that it has incorporated external norms into its decision-making. It signals that compliance with law extends beyond ordinary managerial decision-making. Despite these signals, however, we find that the firm integrates professional norms in a manner that is least disruptive to the internal workings of the organization.¹⁷⁰

The governance structure that our results reveal makes action in the firm relatively impermeable to social pressures. It does not include professional norms in its definition of the situation. It also does not especially include the environment to which the professional is responsive. Even though firm interests sometimes will support professional ones, such as when internal whistle-blowing deters

167. Rosen, *Diffusion*, *supra* note 18, at 1289.

168. See Roderick M. Kramer, *Trust and Distrust in Organizations: Emerging Perspectives, Enduring Questions*, 50 ANN. REV. PSYCH. 569, 592 (1999); see also Ann E. Tenbrunsel & David M. Messick, *Sanctioning Systems, Decision Frames and Cooperation*, 44 ADMIN. SCI. Q. 684, 687 (1999).

169. Donald C. Langevoort, *Resetting the Corporate Thermostat: Lessons from the Recent Financial Scandals About Self-Deception, Deceiving Others and the Design of Internal Controls*, 93 GEO. L.J. 285, 302-03 (2004) (noting as well that the promoted actor may conceal “the inclination to defect when necessary”).

170. See Bamberger, *supra* note 24, at 428.

potentially expensive misconduct,¹⁷¹ the relative impermeability of the firm to professional and social norms supports unlawful behavior, as decision-making is unmoored from social interests.¹⁷² The insularity of the firm is attested to by our findings that concerns about reactions from employees, not external others, best predicts compliance behavior.

We find that firms do not allocate formal compliance resources in a manner consistent with their risk analyses. Given this result, we suspect that the additional formal compliance elements that are implemented when lawyers and compliance officers are in charge of compliance are side-payments to them. Consequently, the firm's implementation of formal compliance elements may be the result of rent-seeking behavior by those in charge of compliance.

On the other hand, a company that hires a compliance manager to run a compliance system may know that they are buying a compliance system with more elements. If they hire a lawyer, they may know that they are buying manuals and training programs. These come along with lawyers as standard equipment that cannot be refused.¹⁷³ Firms may choose to contract with these agents, incurring these costs in exchange for more valuable benefits.

Firms may hire compliance experts or lawyers (or other professionals) to reduce the costs of monitoring these managers. But, they find that this will result in increased expenses for formal compliance elements. These expenses may serve as signals to outsiders of compliance, even if they are mere window dressing. These expenses also serve as signals to the person in charge of

171. Donald C. Langevoort, *Agency Law Inside the Corporation: Problems of Candor and Knowledge*, 71 U. CIN. L. REV. 1187, 1212 (2003).

172. See Diane Vaughan, *Toward Understanding Unlawful Organizational Behavior*, 80 MICH. L. REV. 1377, 1391 (1982).

173. "[L]egal compliance professionals have an incentive to recommend means of containing legal risk or legal ambiguity that require substantial involvement by legal compliance professions and fall squarely within their area of expertise such as . . . employee manuals, or . . . requiring certain types of employee training." Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 529-30 (2003).

Producing manuals and conducting training programs at the organizational level enables corporations to assign blame to employees who failed to follow the lessons . . . [and] shift liability away from the corporation or board. . . . This can occur even if the manuals and programs are weakly calibrated to promote actual substantive performance.

Cunningham, *supra* note 22, at 314.

compliance of the firm's commitment to her. Our data suggest that they substitute for firm commitments to legal values.

This explanation is consistent with our very strong findings that compliance behavior is responsive to organizational size and resources. This suggests that to understand compliance behavior, one must examine not only the risks to which the organization is subject, but also "organizational slack," how uncommitted managerial resources are accumulated and distributed in the firm.¹⁷⁴ Formal compliance systems may be investments in binding the person in charge of compliance to the firm, paid for by using organizational slack.

E. The Two Faces of Lawyers

In a prior analysis of data from the same survey,¹⁷⁵ we sought to determine what effect lawyers had on clients. We found that lawyers often reinforced client commitments to legal compliance. Clients, however, differed in their attitudes to compliance and their lawyers followed their clients' lead. We found that there was "evidence that lawyers (and compliance officers) do more to implement compliance systems, improve knowledge and understanding of compliance and monitoring of compliance within the organization than where others are in charge of compliance."¹⁷⁶ Yet, lawyers draw back from changing client normative commitments to compliance. They contribute technical information and means.

We also found that when "[l]awyers are charged with being overly adversarial, putting stumbling blocks in the path of regulation, instigating clients not to comply with regulators, and souring relations between their clients and regulators," they often do so in response to client demands, not as part of their professional cast of mind.¹⁷⁷

174. See generally L.J. Bourgeois, III, *On the Measurement of Organizational Slack*, 6 ACAD. MGMT. REV. 29, 31 (1981). Organizational slack, when it is not described as inefficient, has been said to serve four different functions: (1) it can be used to bind members to the firm; (2) it can be used for conflict resolution; (3) it can be used to manage workflow, and (4) it can be deployed for expanding the adaptive capacities of the firm. See generally Mark P. Sharfman et al., *Antecedents of Organizational Slack*, 13 ACAD. MGMT. REV. 601 (1988).

175. See generally Christine Parker, Richard Eli Rosen & Vibeke L. Nielsen, *The Two Faces of Lawyers: Professional Ethics and Business Compliance with Regulation*, 22 GEO. J. LEGAL ETHICS 201 (2009).

176. See *id.* at 238.

177. See *id.* at 239.

On the other hand, we did find that lawyers lead clients to “game-playing.” We asked the respondents to scale whether a “wise organization uses the loopholes in the law” and whether “my organization spends time and resources figuring out how to get what we want without directly breaching” the regulations. Even in firms committed to compliance, some lawyers adopted this game-playing attitude, leading clients to non-compliance.¹⁷⁸

We concluded that the dichotomy of professional versus non-professional failed to take into account both the determining effects of clients who are committed to compliance and that lawyers “negotiate with themselves and the profession over the character of professionalism in the law.”¹⁷⁹ When clients are committed to compliance, lawyers can create a virtuous cycle, unless the lawyer understands game-playing to be part of the professional cast of mind.

In this Article, we find only two possible components of a lawyer cast of mind. First, lawyers may put in place paper compliance systems, like manuals, and training programs: these do not change the normative orientation of the client toward compliance. Paper compliance systems are consistent with our earlier finding of lawyers as engaged in game-playing.¹⁸⁰ Lawyers may assume an identity as window-dressers prettifying the firm for the regulator without improving compliance.

Second, we find that lawyers stress the likelihood of litigation, either private or public. This finding depicts lawyers as lightning-rod salesmen, stressing that precautions should be taken because “you should be frightened.” The problem is that we do not find that the firms take substantive precautions in response to this fear mongering.

In our findings, lawyers more than compliance officers stressed the risk of litigation. In Edelman’s research on affirmative action, she found that human resource officers were more likely than lawyers to stress the risk of litigation, even distorting cases to increase the perceived risk.¹⁸¹ She explained that these human resource officers were in competition with lawyers and depicted the legal environment as a risky one in order to support their claims to corporate power.¹⁸² As in Edelman’s work, in our research, compliance managers and lawyers may be in conflict over who should be in charge of TPA

178. *See id.* at 240.

179. *Id.*

180. *Id.* at 241.

181. *See* Edelman et al., *supra* note 65, at 72–73.

182. *See id.* at 76.

compliance. This work suggests that stressing the risk of litigation is instrumental.¹⁸³ By stressing the risk of litigation, our lawyers are competing for power within the firm. Rather than the lightning-rod salesperson being part of the lawyer cast of mind, it may be a persona that lawyers, like Edelman's human resources personnel, adopt when it suits their instrumental needs. But, as our data shows, when lawyers gain power they use it only to window-dress the firm.

Donald Langevoort has suggested that the "emerging ethics and compliance industry . . . promot[e] their own professional autonomy" by claiming that "there is something in the language, training, socialization, personality and/or professional identity of lawyers that has this effect, . . . that lawyers predictably frustrate focus on ethics beyond minimal legal compliance."¹⁸⁴ In particular, he wonders whether the lawyer cast of mind obscures differences between "a 'paper program' . . . and one that actually drives desired behavior in a meaningful way."¹⁸⁵ Our data defends lawyers because they are lightning-rod salespeople, stressing the risk of detection. More important, our good news is that the emerging ethics and compliance profession is similarly afflicted by the charges they cast against lawyers.

CONCLUSION: BACK TO JULIUS HENRY COHEN

Cohen knew the lawyer cast of mind as an acquired virtue, particularly frail and subject to counter-socialization.¹⁸⁶ He campaigned against business entering the profession.¹⁸⁷ Here, we have the profession entering business, and our results suggest that the lawyer cast of mind is subject to dissolution: business (or firm) norms displace professional ones.

Cohen also knew "thinking like a lawyer" to be an aspect of professional identity that created "we lawyers."¹⁸⁸ Our findings here, consistent with what we found previously,¹⁸⁹ suggest that lawyers, even those who occupy the same position within companies, are too diverse to produce strong results when analyzed as a group. Lawyers are not a "we" who can be organized toward particular ends or whose

183. *See id.* at 73.

184. *See* Langevoort, *supra* note 18, at 518.

185. *See id.* at 501.

186. *See supra* notes 30–31 and accompanying text.

187. *See supra* notes 33–38 and accompanying text.

188. *See supra* notes 40–43 and accompanying text.

189. *See generally* Parker et al., *supra* note 175, at 238–41.

individual moral character can be ignored. We do not find a shared vision of to whom a company answers or what should be a company's attitude towards complying with the law.

Lawyers as a collective can also mobilize to claim the right to solve problems, to occupy certain positions, and to make jurisdictional claims. Lawyers might be able to argue that they should be the ones to teach company managers what regulation requires and what compliance entails. We find no evidence that lawyers are mobilizing to gain compliance jobs. Our data finds that only 18% of those in charge of compliance were lawyers. Despite the tight relation between compliance and legal regulation and the hoped for relation between legal controls and social reform, lawyers may not be more suitable than others to lead compliance departments. Despite the need of young lawyers, at least, to find non-distinctively legal jobs as traditional legal jobs face closure, lawyers claim no special ability to diagnose, analyze, or remedy compliance issues.

Our findings are consistent with a lawyer cast of mind developing particularly well an individual's communication skills. According to our data, when a company employs someone with a legal background as manager of compliance, it is buying training manuals, educational programs, and warnings about the prospect of legal sanction. This is consistent with a prior study of individuals who took their legal degrees and went into management, who report that law school served them well by developing their communication skills.¹⁹⁰ Legal writing and oral advocacy are traditional lawyer skills and lawyers take these into compliance when they write manuals and train employees.

Generally, however, we find a lack of evidence of the influence of a lawyer cast of mind in compliance management. To conclude with just one area where having a lawyer in charge of compliance appears to make no difference: there is no evidence that employing a lawyer to be in charge of compliance leads to increased hot lines and other whistle-blowing possibilities. Lawyers are still not involved in "mending the information net."¹⁹¹ Lawyers still do not see their job as improving decision-making.¹⁹² The ball is still in the business manager's court, to decide how to play the game after receiving the

190. Robert Eli Rosen, *Educating Law Students to be Business Leaders*, 9 INT'L J. LEGAL PROF. 27 (2002).

191. CHRISTOPHER D. STONE, CORPORATE RESPONSIBILITY: LAW AND ETHICS 199 (1975).

192. See generally Rosen, *supra* note 18.

lawyers' manuals and sitting through the seminars offered by the lawyers.

Cohen's idealization of the profession is not unique. Many have valued professions as a cultural tradition that permits new ideas and skills to emerge and mature.¹⁹³ The ability of professions to enter situations and remake them, bringing the weight of culture and a profound skill set, has often been lauded—not least by the professions themselves, who have an economic project sustained by such beliefs.¹⁹⁴ Unfortunately, we find little evidence here. Perhaps the professions have decided to keep their hands off compliance, which can be an area in which one can get burnt when non-compliance is discovered.

According to one view, sociology cannot determine what is ethical. The empirical and the normative should be kept separate. Nonetheless, research such as undertaken here “may give us a ‘general orientation’ . . . in the light of which certain ways of looking at ethics become more plausible than others.”¹⁹⁵ If we had found individuals acting in a role-differentiated way, then it becomes more plausible to think of developing ethics in such a way. If we had found the lawyer cast of mind in a strong sense, then it would make sense to consider what the law of lawyering regarding compliance and compliance systems should be. On the contrary, given our results, it is more plausible to speak of professional ethics as only a species of general ethics. The quality of the compliance manager and what she accomplishes appears from our results to stem not from her profession, but rather from her ethical character. This is not the result Julius Henry Cohen would have imagined or desired. Yet he has a comeback: these individuals have forsaken their profession for business.

As we have argued, many, including Julius Henry Cohen, have assumed that there is a lawyer cast of mind, without demonstrating its existence. We hope our negative findings spur others to be explicit about the parameters and consequences of socialization by legal education and practice experiences. We hope our negative findings

193. DOROTHY EMMET, ROLES, RULES AND RELATIONS 158 (1966) (citing Talcott Parsons); PHILIP SELZNICK, LEADERSHIP IN ADMINISTRATION: A SOCIOLOGICAL INTERPRETATION 121 (1957). For a critical discussion of this tradition in the commercial law context, see Christine Parker & Tanina Rostain, *Law Firms, Global Capital, and the Sociological Imagination*, 80 FORDHAM L. REV. 2347 (2012).

194. MAGALI SAFRATTI LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS (1997).

195. EMMET, *supra* note 193, at 4.

spur lawyers who come to lead compliance programs to do more than merely write manuals and lecture to employees, perhaps instead leading the company to substantively value compliance with the law.