BANKER BEHAVIOR AND THE INDIVIDUALIST ETHOS

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Greg Smith, who made headlines in 2012 when he left Goldman Sachs and simultaneously published an op-ed explaining why he had done so, was interviewed by Anderson Cooper on CBS's *60 Minutes*. In the interview, he described sales pitches made by "Wall Street" for complex products to "philanthropies, or endowments, or teachers' retirement pensions [sic] funds, in Alabama, or Virginia, or Oregon." The aim was, he explained, to get big fees from unsophisticated clients. Cooper then asked: "So, did the people you work with want unsophisticated clients?" to which Smith replied that "getting an unsophisticated client was the golden prize. The quickest way to make money on Wall Street is to take the most sophisticated product and try to sell it to the least sophisticated client."[1]

Bankers love watches. They love collecting watches. They love talking about watches. I've seen entire groups of analysts head to the nearest Rolex store the day their first bonus hits the account; the Submariner is the official Wall Street starter watch. . . . Even if you don't care about watches, it's important to care about watches. It's often the first thing someone will use to size you up. . . . The power move is to have a few watches stuffed away at home, and then, rarely, if ever, wear one. As my boss once said when a subordinate was showing off a new Rolex Yachtmaster, "I have one of those. I keep it on my yacht."[2]

From chat room transcripts:

March 23, 2007: (emphasis added)

<u>Frankfurt Euro Desk Manager</u>: **FIXINGS AS USUAL MONSIEUR? LOW 1M HIGH 6M (SAME HERE)**

<u>London MMD Manager</u>: **yes please** - thank you very much [Frankfurt Euro Desk Manager]

<u>Frankfurt Euro Desk Manager</u>: DE RIEN[.][3]

1. CLAIRE A. HILL & RICHARD W. PAINTER, BETTER BANKERS, BETTER BANKS: PROMOTING GOOD BUSINESS THROUGH CONTRACTUAL COMMITMENT 19 (2015) [hereinafter BETTER BANKERS, BETTER BANKS] (quoting *60 Minutes* (CBS television broadcast Oct. 21, 2012)). We do note in the book that there has been some doubt cast on Smith's overall story, but he is far from the only source for the sentiment expressed in his quote in the text.

2. GSElevator, *A Wall Street Guide to Watches*, BUS. INSIDER (Aug. 5, 2015, 10:32 AM), http://www.businessinsider.com/a-wall-street-guide-to-watches-2015-8.

3. *Examples of Misconduct from Written Communications*, COMMODITY FUTURES TRADING COMM'N, http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/vwrittencommunication_deutsche.pdf (last visited Feb. 11, 2017) (first and second alteration in original).

I. INTRODUCTION

Especially since the 2008 financial crisis, bankers have been much in the news for their behavior before (and during) the crisis and for many subsequent scandals such as the manipulation of the London Interbank Offered Rate (LIBOR) and involvement in money laundering and clients' tax evasion.

What has been reported has not been flattering. The depictions are frequently of bankers out to make money without regard to (and sometimes even taking joy in) the costs their activities might impose on others. And the thirst for money is part of a broader competition for status points—for more money, fancier possessions, and loftier titles than their peers—which motivates them, often apparently to the exclusion of a more diversified portfolio of goals.

The quotes at the beginning of this Essay suggest that the culture at banks has at least tolerated, and probably encouraged, problematic banker behavior. The result is the pathologies we have seen, in which bankers take financial and legal risk without sufficient regard for possible downsides; craft, for clients and themselves, techniques for doing end runs around regulations, contract provisions, and reporting conventions; and engage in conflicted behavior vis a vis their clients. Bankers' characters (and bank culture) matter because bankers' jobs enable them to do significant harm, including to remote third parties who can't do anything to prevent the harm, and of course to the broader society. Law's track record at preventing, or even significantly minimizing, the harm is not impressive. Dodd-Frank was passed in 2010,[4] and scandals continue apace. And it is not as though attempts to address banker behavior were not made before Dodd-Frank, and indeed, before the 2008 financial crisis.

Bankers are of course not monolithic, and bankers' and banks' activities are not all bad. There are many fine bankers, and there are many very good bank activities. But there is enough bad banker and bank behavior, with sufficiently serious results, that the problem is clearly not one of a few, or even many, "bad apples." The problem goes deeper.

This Essay argues that a *broader societal culture*, one that glamorizes an individualistic ethos, helps explain why banking culture got as bad as it did, and why banking culture will be difficult to change. This broader societal culture also helps explain why law is so bad at dealing with problematic banker behavior, a subject to which I now turn.

4. Dodd-Frank Wall Street Reform and Consumer Financial Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of the U.S. Code).

II. THE LIMITS OF LAW

In *Better Bankers, Better Banks*, Richard Painter and I discuss the limits of law in dealing with banker and bank behavior.[5] Regulators have fewer resources to expend on detecting problematic behavior and enforcing prohibitions than banks do in staying one step ahead of regulators; regulators may be captured; Congress may be unduly influenced by bank lobbying to relax rules or not enact them in the first place (or to not fully fund detection and enforcement efforts); and banks can play different jurisdictions (and regulators) off against one another to get more favorable rules and move operations to places where the rules are more favorable.[6]

Another reason we discuss for law's limits is that we don't know well enough what should or should not be illegal. Much of the conduct at issue is on a continuum, and we cannot agree on where the line should be. A salesman cannot legally lie to sell a product, but how much does he have to second-guess all of his customers' sales decisions? (And surely we shouldn't punish being good at persuasion—or should we?) When is a financial instrument "equity" and when is it "debt"? When is something a "hedge" and when is it an investment? Our difficulties in agreeing reflect that the matters at issue are complex and that the line is necessarily arbitrary. But the difficulties may also reflect, or result in, gaming. Indeed, in the back-and-forth with European regulators as to the definition of debt, the regulators may have been manipulated into agreeing to a definition which minimized the precise "debt" to be incurred by Greece when Greece was attempting to enter the Eurozone and needed a low enough debt level.

Even if we could agree on what should and shouldn't be illegal, detecting who or what was a little bit on the wrong side of the line would be very hard. (Sometimes, detecting who is more than a little bit on the wrong side of the line is hard too. Repo 105, in which Lehman Brothers managed to depict itself as having far better finances than it had, provides a prime example.[7] Senior people and reputable law firms were involved in structuring and vouching for the technique, but the Board of Directors was not told.) And insofar as the line would be drawn as to a specific technique, end runs around the whole regime would very quickly be developed.

Law, almost tautologically, tries to get people to behave differently than they would behave in the absence of law. But law's limits are particularly meaningful in the context of banks, and not just for the reasons discussed above. What banks can make money doing can cause enormous harm. Consider the ABACUS CDO Goldman Sachs designed and sold to

5. *See generally* BETTER BANKERS, BETTER BANKS, *supra* note 1.
6. *See generally id.* at 127–45.
7. *See id.* at 40–41.

investors wanting to go "long" on mortgage securities, when it did not disclose the involvement of the "short" position in selecting the securities.[8] Consider the Greek cross-currency swap designed by Goldman Sachs, where those who incurred costs may have included those who mistakenly believed Greece had the (low) debt level it claimed to have.[9] While the harm at issue has sometimes been for the benefit of clients, banks have also been willing to do harm to benefit themselves when they were faced with potential losses.

Two examples are illustrative:

> Citigroup had mortgage exposure it wanted to get rid of. It structured a synthetic CDO [Class V III]. But how would it get investors to buy the long position? . . . [T]ell them the assets on which they were betting were selected by someone who had a reputation for picking high-quality assets, Credit Suisse Alternative Capital, Inc. (CSAC), while having a significant portion of the assets actually be picked by Citigroup, to enable Citigroup to short certain assets it wanted to short. CSAC went along with this. The SEC's complaint against Citigroup included a quote from an e-mail written by a Citi employee to his supervisor: "This is [Trading Desk Head]'s prop [proprietary] trade (don't tell CSAC). CSAC agreed to terms even though they don't get to pick the assets." The portfolio selected by Citigroup included deals Citigroup had done, where Citigroup still held long positions. Almost all the names selected by Citigroup defaulted, whereas those selected by CSAC did not. Citigroup earned $160 million, while the investors lost all their investment. Investors were not told of Citigroup's role in selecting the assets or its short position.[10]

> [Senior Goldman Sachs personnel] "sent out numerous sales directives or 'axes' to the Goldman sales force, stressing that Timberwolf was a priority for the firm [even though senior personnel thought the deal was 'shitty']. [One] suggested issuing 'ginormous' sales credits to any salesperson who sold Timberwolf securities, only to find out that large sales credits had already been offered. In May, while Goldman was internally lowering the value of Timberwolf, it continued to sell the securities at a much higher price than the company knew it was worth. At one point, a member

8. *See id.* at 30–31.

9. *See id.* at 54–55.

10. BETTER BANKERS, BETTER BANKS, *supra* note 1, at 31 (alteration in original) (footnotes omitted) (quoting Complaint at 10, SEC v. Citigroup Glob. Mkts. Inc., 827 F. Supp. 2d 328 (S.D.N.Y. 2011) (No. 11 Civ. 7387)).

> of the SPG [Structured Product Group] Trading Desk issued an email to clients and investors advising them that the market was rebounding and the downturn was 'already a distant memory.' Goldman also began targeting Timberwolf sales to 'non-traditional' buyers and those with little CDO familiarity, such as increasing its marketing efforts in Europe and Asia." . . . Goldman [reportedly] took a short position on approximately 36 percent of the assets underlying Timberwolf.[11]

Goldman and Citigroup did pay considerable fines and settlements in connection with these three deals: Goldman, for ABACUS and Timberwolf; and Citigroup, for Class V III.[12] But many people believe that the punishment was too light, and that it has not served to deter future problematic conduct.

Many more examples could be given. Again, the bottom line is that law's limits, always present, are particularly problematic where the behavior law is trying to guard against is potentially very profitable but can cause considerable harm.

The depiction of bank and banker behavior thus far poses a critical puzzle: why isn't reputation more of a constraint?[13] Why and how could bank culture develop to accept and often encourage behavior that one might think would be precluded or at least discouraged by concerns about reputation? An important part of the answer relates to the broader societal culture. Bank culture has arguably worked against the spirit (and at times the fact) of the law, and in this, it has been aided by a broader societal culture.

III. BAD BANKING CULTURE

In *Better Bankers, Better Banks,* Richard Painter and I argue that bad bank culture serves as a counterweight to law (and to behavior the law might favor, including behavior that law might merely encourage rather than seek to force), providing a reward for behaving in ways the law disfavors and blunting constraints against such behavior.[14] We describe how getting compensated for, and getting caught up in, the craft of helping clients (and the bank) do end runs around regulation crowds out broader

11. *Id.* at 34 (fourth alteration in original) (quoting STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, 112TH CONG., WALL STREET AND THE FINANCIAL CRISIS: ANATOMY OF A FINANCIAL COLLAPSE 394 (2011)).

12. *Id.* at 30, 32 (noting the $550 million Goldman settlement for ABACUS and $285 million Citigroup settlement for Class V III).

13. Banks clearly aren't immune from criticism. Indeed, they became a political punching bag for both major party candidates in the presidential election.

14. *See generally* BETTER BANKERS, BETTER BANKS, *supra* note 1.

consideration of what the regulation is for.[15] We describe as well how spending most of one's time with fellow bankers, working on computer screens using abstract and complex formulas, far removed from other types of input, can mute outside considerations.[16] We describe how bankers can get caught up in competitions to sell the most "dogs."[17] That is "bad" banking culture. We have a sense of what good banking culture looks like. (To overstate considerably, think of the Frank Capra film *It's a Wonderful Life*. To characterize more seriously, good culture would be mindful of effects on others, taking responsibility rather than hiding behind limited liability, a subject Painter and I discuss at considerable length in *Better Bankers, Better Banks*.)

Banking culture—bad culture as a cause of problems and changes in culture as part of the solution—has attracted considerable attention from scholars as well as regulators and others involved in law and lawmaking.[18] Bad banking culture led a judge to impose a lighter sentence on a banker:

> A former top executive at the Credit Suisse Group was sentenced to two and a half years in prison on Friday for inflating the value of mortgage bonds as the housing market collapsed.
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> . . . .
>
> . . . Wearing a dark suit and blue tie, Mr. Serageldin remained stoic as Judge Alvin K. Hellerstein of the United States District Court in Manhattan handed down the sentence, which was less than the roughly five-year sentence called for by nonbinding sentencing guidelines. Judge Hellerstein showed mercy on Mr. Serageldin in part because of what he said was a toxic culture at Credit Suisse and its rivals.

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15. *See id.* at 116–17.

16. *See id.* at 114.

17. *See id.* at 112.

18. For instance, there have been speeches by top officials of the Federal Reserve Bank of New York, including one by Executive Vice President and General Counsel Thomas Baxter, *see* Thomas C. Baxter, Exec. Vice President & Gen. Counsel, Fed. Reserve Bank of N.Y., The Rewards of an Ethical Culture (Jan. 20, 2015), https://www.newyorkfed.org/newsevents/ speeches/2015/bax012015, and one by President and Chief Executive Officer William Dudley, *see* William C. Dudley, President & Chief Exec. Officer, Fed. Reserve Bank of N.Y., Enhancing Financial Stability by Improving Culture in the Financial Services Industry (Oct. 20, 2014), https://www.newyorkfed.org/newsevents/ speeches/2014/dud141020a. *See also* Daniel K. Tarullo, Governor, Bd. of Governors of the Fed. Reserve Sys., Good Compliance, Not Mere Compliance (Oct. 20, 2014), https://www.federalreserve.gov/newsevents/speech/tarullo20141020a.pdf.

> "He was in a place where there was a climate for him to do what he did," the judge said. "It was a small piece of an overall evil climate inside that bank and many other banks."[19]

Moreover, banking culture, bad and good, was discussed at some length in the Salz Review, an independent review commissioned by Barclays Bank in the wake of financial scandals at Barclays such as the manipulation of LIBOR. The Review mentions the word culture 366 times.[20] Other banks are increasingly considering culture,[21] including with prominent mentions on their webpages. For instance, a page on Deutsche Bank's website contains the following heading, and begins with the following text: "Corporate culture and corporate values[:] The impact of the economic crisis has made a long-term change of corporate culture in the financial sector absolutely imperative and cultural change is needed. We understand the message: Responsibility has to be the focus of our actions."[22]

Will this focus on bad bank culture, and attempts to move towards better bank culture, help? The typical critiques are that attempts to change culture have no "teeth"—that they are wishful thinking and soothing pronouncements that ultimately won't have much of an effect. The recent change in Presidential administration may also signal greater tolerance of problematic bank culture, leading perhaps to less of an impetus to work towards improvements in the culture. But there is an additional reason why it may be hard to change bank culture and banker behavior for the better.

IV. THE INDIVIDUALIST ETHOS

One important obstacle that complicates the move from bad to good *banking* culture is the *society's broader culture*- and one feature of it in particular. As social psychologist Geert Hofstede has demonstrated, the United States has an "individualistic" culture.

> [I]ndividualism[] can be defined as a preference for a loosely-knit social framework in which individuals are expected to take care of only themselves and their immediate families. Its opposite, collectivism, represents a preference for a tightly-knit framework

19. Rachel Abrams & Peter Lattman, *Ex-Credit Suisse Executive Sentenced in Mortgage Bond Case,* N.Y. TIMES: DEALBOOK (Nov. 22, 2013, 6:37 PM), http://dealbook.nytimes.com/2013/11/22/ex-credit-suisse-executive-sentenced-in-mortgage-case/.

20. ANTHONY SALZ, SALZ REVIEW: AN INDEPENDENT REVIEW OF BARCLAYS' BUSINESS PRACTICES (2013), http://online.wsj.com/public/resources/documents/SalzReview04032013.pdf.

21. *See generally* BETTER BANKERS, BETTER BANKS, *supra* note 1, at 10–12.

22. *Corporate Culture and Corporate Values*, DEUTSCHE BANK, https://www.db.com/cr/en/concrete-cultural-change.htm?kid=werte.inter.redirect (last visited Feb. 11, 2017).

> in society in which individuals can expect their relatives or members of a particular in-group to look after them in exchange for unquestioning loyalty.[23]

(Indeed, Hofstede measures the United States' individualistic nature as higher than any other country's.[24])

Complementing this "out for one's self" mentality is the assumption that what the "self" wants—what counts as success, as getting ahead—is getting more—more money, more prestige, more power, and so on—than others of things in short supply.

This state of affairs is to some extent lauded or at least accepted as inevitable. But why? First, it is incorrectly advanced as an unfortunate, but true and inescapable, fact of human nature.

Second, as Richard Painter and I have argued elsewhere, this "fact" is perniciously advanced *as a normative fact about the world—as an indication of "rationality"*—by the field of law and economics, and surprisingly often, by the field of behavioral law and economics as well, when it characterizes its mission as identifying and potentially addressing "irrationality."[25] The message is not just directed to, or received by, academics. It permeates more broadly in the depictions of the normalcy (and desirability) of competitive acquisition and consumption of trappings of success and prestige, whether goods or experiences.[26] The competitive aspect is explained evolutionarily—the large yacht or expensive convertible is like the peacock's tail, helping its possessor, at least in theory if not in practice, to attract the attention of desirable females with which it will breed to populate the next generation.

I am coming dangerously close to wading into huge debates about social construction of values (and reality). This is not my aim, except at the margin. *That the activities at issue are being depicted as normatively desirable increases their desirability. Thus, the opposition between what bankers might want to do and what the law doesn't want them to do increases.* So, in addition to the difficulties mentioned above—of figuring out what behavior should be illegal, of trying to detect and punish that behavior, against a backdrop of resource-poor regulators and resource-rich banks, sometimes-captured regulators, and other obstacles—we have an

23. *National Culture*, THE HOFSTEDE CTR., https://geert-hofstede.com/national-culture.html (last visited Feb. 11, 2017) (scroll to "Individualism versus Collectivism (IDV)" heading; then click to expand).

24. *What About the USA?*, THE HOFSTEDE CTR., https://geert-hofstede.com/united-states.html (last visited Feb. 11, 2017).

25. *See* Claire A. Hill, *The Rationality of Preference Construction (and the Irrationality of Rational Choice),* 9 MINN. J.L. SCI. & TECH. 689 (2008).

26. *See generally* ROBERT H. FRANK, LUXURY FEVER: WHY MONEY FAILS TO SATISFY IN AN ERA OF EXCESS (1999).

additional, and considerable, obstacle; a strong force tending to push against the very thing law is trying to accomplish.

Continuing in this vein, consider too the individual and group dynamics concerning the pursuit of these zero- and negative-sum behaviors.

> Wall Street has always been obsessed with status and hierarchy. Dare to break rank? You might as well set your boss' Hermès tie on fire. In 2012, when a disgruntled Goldman Sachs employee named Greg Smith exploded his career with a tell-all op-ed, in which he called the bank's culture "toxic and destructive," many Wall Streeters reacted by mocking the fact that, at age 33, Smith had only made it to vice president.[27]

A great salesman is reputed to be able to sell sand to a person in the Sahara—an attribute that he can boast about to himself and to his peers.[28] Those structuring some of the most "toxic" securities transactions joked about a possible name for one transaction: Nuclear Holocaust 2007-1, Subprime Meltdown 2007, and Mike Tyson's Punchout.[29] Again, there are many examples. And yes, when this hit the newspapers, people were "shocked." But I would argue that the glamorization of this mindset remains. There is a reputational hit, but there is grudging admiration as well, a point to which I will return below.

V. WE ARE PART OF THE PROBLEM

> In a September 26, 2007, e-mail to Lloyd Blankfein, Goldman's chief executive officer, a senior Goldman banker said that "the institutions don't and I wouldn't expect them to, make any comments like ur [sic] good at making money for urself [sic] but not us. The individuals do sometimes, but while it requires the utmost humility from us in response I feel very strongly it binds clients even closer to the firm, because the alternative of take ur [sic] money to a firm who is an under performer and not the best,

27. Kevin Roose, *The New Class System for Young Wall Street Bankers,* N.Y. POST (Feb. 17, 2014, 9:43 PM), http://nypost.com/2014/02/17/the-new-caste-of-wall-street-bankers-under-30-battle-for-supremacy/.

28. If you have an extra fifteen minutes, you may want to google "'he could sell' quotes" to see the range of quality the internet has to offer. My main reason for googling this was to confirm my prior belief that the concept was an accepted one.

29. BETTER BANKERS, BETTER BANKS, *supra* note 1, at 36.

> just isn't reasonable. Clients ultimately believe that association with the best is good for them in the long run."[30]

If even bank clients expect smart people to be "helping themselves"—taking advantage—and believe that those who don't help themselves are not so smart, it is easy to see why they continue going to these banks.

This idea is of a piece with the idea that helping one's self may mean hurting the other guy, and that hurting the other guy is only problematic for instrumental reasons, because the other guy may strike back. Arch "rationalists" (certain orthodox economists) speak as though but for instrumental-type constraints, people would be "capable of anything." When internal constraints on behavior are discussed, they are characterized as "internalized," as though they started first as external. This worldview may be internally consistent, but in my opinion it is wildly counterintuitive. There are many things that (many) people would not consider doing and would conclude that others would not consider doing, on account of their own internal constraints, which may have "come from the external" or may not have. But norms, internal and external, are not unchanging. The influence of the individualist/"rational" credo silences internal norms that might support a bank culture in which bankers had more regard for others. Recognizing what we are up against is a needed step.

30. *Id.* at 3 (quoting STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, 112TH CONG., WALL STREET AND THE FINANCIAL CRISIS: ANATOMY OF A FINANCIAL COLLAPSE 625 (2011)).