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1-4-2022

## Chief Loophole Officer or Chief Legal Officer: Inside Lehman Brothers—A Film Case Study About Corporate and Legal Ethics

Garrick Apollon

*University of Ottawa's Faculty of Law & Telfer School of Management, Fellow, Hot Docs for Continuing Professional Education, Senior Fellow, Hennick Centre for Business & Law of York University,*  
apollon@telfer.uottawa.ca

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### Recommended Citation

Garrick Apollon, *Chief Loophole Officer or Chief Legal Officer: Inside Lehman Brothers—A Film Case Study About Corporate and Legal Ethics*, 12 ST. MARY'S JOURNAL ON LEGAL MALPRACTICE & ETHICS 2 (2022). Available at: <https://commons.stmarytx.edu/lmej/vol12/iss1/1>

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# ARTICLE

*Garrick Apollon*

## Chief Loophole Officer or Chief Legal Officer: *Inside Lehman Brothers*—A Film Case Study About Corporate and Legal Ethics

**Abstract.** This Article discusses the continuing legal education (CLE) visual advocacy documentary-style program, which Garrick Apollon (author of this Article) researched and developed. The case study for this CLE documentary-style program is the film *Inside Lehman Brothers*—a documentary film by Jennifer Deschamps which chronicles the story of the Lehman whistleblowers. The film presents Mathew Lee, former senior vice president overseeing Lehman’s global balance sheet; Oliver Budde, former in-house counsel (associate general counsel) of the Lehman Brothers; and the racialized female mid-tier manager whistleblowers, who all paid a steep price in the 2008 American subprime mortgage crisis, while many of the top-positioned white men remained unscathed.<sup>1</sup> The overall aim of this course, which is pioneered on the ethical

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1. *Inside Lehman Brothers: A Case Study in Compliance, Corporate Misconduct, Whistleblowing and Ethical Decision Making*, UDOCSFILM, [hereinafter *Inside Lehman Brothers: A Case Study in Compliance*] <https://courses.udocsfilm.com/courses/Inside-Lehman-Brothers> [https://perma.cc/C3ZV-4RLY] (“Although today the banks have recuperated and are back to business as usual, *Inside Lehman Brothers* is the cautionary tale for how damaging fraudulent behavior can be. The demise of the giant financial global institution Lehman Brothers, a bankruptcy estimated at \$639 billion, accelerated the global financial crisis and sparked debate in Washington over ethical issues on Wall Street and in other financial markets around the world.”). Garrick Apollon’s research for the CLE documentary-style program, *Inside Lehman Brothers: A Case Study in Compliance, Corporate Misconduct, Whistleblowing and Ethical Decision Making*, began in the context of his fellowship at the Hennick Centre for Business and Law at York University. See *Lehman Brothers—Ethics Project*, HENNICK CENTRE, <https://hennickcentre.ca/researchers/visual-legal-advocacy-program/lehman-brothers-project/> [https://perma.cc/24ND-M7EX] (detailing the origin of the CLE documentary-style program).

lessons we can ascertain from the Lehman Brothers' bankruptcy, is to prevent corporate misconduct and fraud by promoting ethical, personal, and corporate standards of behavior for legal and business professionals. This Article concentrates on visual legal advocacy as an instrument to encourage professional ethics to legal professionals and law students. Further, this Article argues that legal ethics can be more effectively understood through storytelling which illustrates how ethical decision-making can impact someone's life and, as in the case of the Lehman Brothers' bankruptcy and moral failure, how it can affect the entire world, just as it did throughout the 2008 global financial crisis.

**Author.** Garrick Apollon is a practicing corporate lawyer of the Law Society of Ontario, Canada (2004), a documentary filmmaker, an adjunct professor at the University of Ottawa's Faculty of Law, and a part-time professor of Corporate Governance and Ethics at the Telfer School of Management. Professor Apollon works on the research and production of edutainment content accredited for continuing professional education (CPE) and continuing legal education (CLE) to provide transformational experiences for legal and business professionals.

Garrick Apollon earned his J.D. from the University of Ottawa; LL.B. (Civil Law) from l'Université Laval; LL.M. (Master of International Business Law) from l'Université Laval, and LL.CM. (Master of Comparative Law) from the University of Pennsylvania Law School (Penn Law), where he studied visual legal advocacy and law-genre documentary filmmaking with Professor Regina Austin, director of the Penn Program on Documentaries & the Law. Professor Apollon would like to note that the views expressed in this Article are solely his own.

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I. THE USE OF VISUAL LEGAL ADVOCACY AND AN EDUTAINMENT  
LAW-GENRE DOCUMENTARY FILM LIKE *INSIDE LEHMAN BROTHERS*  
FOR THE DEVELOPMENT OF INTERDISCIPLINARY CONTINUING  
PROFESSIONAL EDUCATION (CPE) COURSES

*Inside Lehman Brothers: A Case Study in Compliance, Corporate Misconduct, Whistleblowing, and Ethical Decision Making*,<sup>2</sup> a continuing legal education (CLE) visual advocacy documentary-style program based upon the documentary film *Inside Lehman Brothers* by Jennifer Deschamps, is a powerful educational tool because it “provide[s] viewers with better role models to relate to, often at a personal and emotional level, than through information alone.”<sup>3</sup> Research shows effective ethics and compliance is not *merely* a rational activity, but behavioral as well, aiming to change the minds and hearts of people.<sup>4</sup> Corporate governance and ethics should not be practiced as a legal exercise for compliance within the black letters of the law, but instead as a behavioral exercise which aims to instill a corporate culture of collective and individual ethical decision-making within the whole organization, from senior management and middle management to all employees, for the betterment of society.<sup>5</sup> Therefore, a documentary-style case study is the perfect educational tool to achieve superior results in corporate fraud prevention and ethics.

Visual legal advocacy is “effectively evaluating and making arguments through videos and images.”<sup>6</sup> To further understand this novel concept, it is appropriate to disentangle it word by word. First, the word “visual” reflects how we are visual creatures in a visual society.<sup>7</sup> And while some

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2. *Inside Lehman Brothers: A Case Study in Compliance*, *supra* note 1.

3. *Global Program for Entertainment Education: Background and Context*, WORLD BANK, [http://web.worldbank.org/archive/website01542/WEB/0\\_\\_C-106.HTM](http://web.worldbank.org/archive/website01542/WEB/0__C-106.HTM) [<https://perma.cc/P7HM-K4JC>]. The educational benefits of films are further explored in Garrick Apollon’s article entitled *COLLARED—A Film Case Study About Insider Trading and Ethics*. Garrick Apollon, *COLLARED—A Film Case Study About Insider Trading and Ethics*, 11 ST. MARY’S J. ON LEGAL MAL. & ETHICS 2, 6 (2020).

4. Apollon, *supra* note 3, at 10–11 (citing Hui Chen & Eugene Soltes, *Why Compliance Programs Fail—and How to Fix Them*, HARV. BUS. REV. (Mar.–Apr. 2018), <https://hbr.org/2018/03/why-compliance-programs-fail> [<https://perma.cc/858Q-NAVW>]).

5. See Chen & Soltes, *supra* note 4 (asserting corporate compliance and ethics should be practiced as a behavioral exercise in order to have a real impact).

6. Visual Law Project, Yale Law School, *About Visual Law Project*, YALE L. SCH. [hereinafter Visual Law Project] <https://law.yale.edu/isp/initiatives/about-visual-law-project> [<https://perma.cc/WLZ4-8RAU>]. This definition of visual legal advocacy and the necessity of visual legal advocacy to a lawyer’s education is further explored in *Collared*. See Apollon, *supra* note 3, at 7–10 (defining visual legal advocacy and evaluating its potential use in the educating of professionals).

7. It is no wonder that we use the phrase, “A picture is worth a thousand words.”

may contend that we have always been a visual society,<sup>8</sup> technology and social media, particularly the emergence of applications like Instagram or TikTok, have made this emphasis on the visual all the more essential.<sup>9</sup> There was a time when lawyers were trained solely in written and oral advocacy, but it now appears, for the reasons mentioned previously, that speaking with images such as videos and documentaries for visual advocacy is the most effective method of communication to grasp the public's attention.<sup>10</sup> This shift is revolutionary. The continued development of and reliance on technology and media puts a newfound emphasis on interactive programming that will become vital to ensuring the positive outcome of a trial or social development of the law.<sup>11</sup> In the future, lawyers will have to plead not only with (what will soon be recognized as *antiquated*) words and writings, but with visuals such as images, videos, and documentaries circulatable on social media platforms, like YouTube, Facebook, TikTok, and Instagram. The next generation of litigators and legal educators ought to be innovative and rely on visual advocacy, more than traditional written and oral advocacy methods, to achieve victory in their cases.<sup>12</sup>

Second, the word “legal” makes visual advocacy specific to our legal experience as members of a society governed by the rule of law.<sup>13</sup> Lawyers are, above all, communicators. But communicators need more than written

8. See Becky Little, *What Prehistoric Cave Paintings Reveal About Early Human Life*, HISTORY, (Oct. 5, 2021), <https://www.history.com/news/prehistoric-cave-paintings-early-humans> [https://perma.cc/P72G-C5KR] (“Images painted, drawn or carved onto rocks and cave walls . . . reflect one of humans’ earliest forms of [visual] communication . . .”).

9. See Visual Law Project, *supra* note 6 (asserting advancing technology has made visual advocacy a “vital part of our legal education”); Apollon, *supra* note 3, at 7–10 (“[I]n today’s world marked by technology, the Internet, and social media, lawyers need also be trained in the art of visual legal advocacy.”).

10. See Apollon, *supra* note 3, at 7–10 (explaining the shift from an emphasis on oral and written advocacy to visual advocacy). This shift was further exacerbated by the COVID-19 global pandemic, which saw an increased demand for visual educational content. This increased demand further transformed the role of technology in education. *Id.* at 6 n.6.

11. See Katja Martin, *A picture is worth a thousand words*, 29 MED. WRITING 28, 28–29 (2020) (describing how technological advancements have made the visual approach to communication vital to the works understanding, reception, and success).

12. See Regina Austin, *The Next “New Wave”: Law-Genre Documentaries, Lawyering in Support of the Creative Process, and Visual Legal Advocacy*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 809, 812 (2006) (asserting the importance of visual legal advocacy for the future of legal education and the legal profession).

13. Lynn Mather, *Law and Society*, in OXFORD HANDBOOK OF LAW AND POLITICS 681 (Keith E. Whittington et al. eds., Oxford University Press 2008) (“The study of law and society rests on the belief that legal rules and decisions must be understood in context. Law is not autonomous, standing outside of the social world, but is deeply embedded within society.”).

words—now more than ever. Disputes in our society are resolved and guided by rights-based, power-based, and interest-based approaches.<sup>14</sup> However, the world in which lawyers practice today seems to necessitate using a wide array of sensory tools geared to persuade, clarify, entertain, and enthrall.<sup>15</sup>

Third, the word “advocacy” is defined as “public support that somebody gives to an idea, a course of action or a belief,” or as “support, advice and help given to people, often with special needs or aims, who are unable to speak for themselves.”<sup>16</sup> Hence, my argument is that visual legal advocacy, in comparison to written and oral advocacy, is a more effective method of persuasion in terms of social psychology.<sup>17</sup> This is why courts are reluctant to permit the use of edited videos (e.g., video settlement documentaries) that could amount to the presentation of a documentary film by a litigant to a judge or jury.<sup>18</sup> Considering the definition of advocacy, a legal advocate can garner the support of the jury or public and give their client a more effective voice with legal arguments presented through videos and images.

Consider the role of biases in the legal realm.<sup>19</sup> It is well-known that one (prominent) way biases are constructed is through media, such as television shows and films.<sup>20</sup> I argue that to deconstruct the unjust and unfair social

14. See Garrick Apollon, *MMA Negotiation*, 15 U. DENV. SPORTS & ENT. L.J. 3, 15 (2013) (detailing the three core approaches on which negotiation and dispute resolution are founded).

15. Visual Law Project, *supra* note 6 (“Visual and digital technologies have transformed the practice of law. Lawyers are using videos to present evidence, closing arguments, and victim-impact statements; advocates are making viral videos to advance public education campaigns; and scholars are debating ideas in a multimedia blogosphere.”).

16. *Advocacy*, OXFORD LEARNER’S DICTIONARIES, <https://www.oxfordlearnersdictionaries.com/definition/english/advocacy> [<https://perma.cc/3PEV-LXQ9>].

17. See Apollon, *supra* note 3, at 9 (“Visual legal advocacy is not only an art but also a behavioral science founded on social psychology and the science of persuasion.”).

18. See Austin, *supra* note 12, at 851–53 (discussing the challenges of using a video, such as a video settlement documentary, in the courtroom).

19. Biases, such as racism or sexism, are based on false perceptions, simplifications, or prejudicial value judgments, and can be learned and unlearned.

20. See generally Adam J. Schiffer, *Teaching Media Bias: The Case of the Trump Presidency*, 17 J. POL. SCI. EDUC. 1, 1–18 (2021) (providing a template for teaching about media bias, using the case of President Trump and his administration). See also Peter Beattie, *Theory, Media, and Democracy for Realists*, 30 CRITICAL REV. 1, 1 (2018) (suggesting documentaries are a great source of critical self-reflection to explore new points of view and can help to mitigate biases); HARRY M. BENSHOFF & SEAN GRIFFIN, *AMERICA ON FILM: REPRESENTING RACE, CLASS, GENDER, AND SEXUALITY AT THE MOVIES* 3 (Wiley-Blackwell 3d ed. 2021) (“It is a basic principle of this work that by studying American film history, we can gain keen insights into the ways that different groups of American people have been treated (and continue to be treated.”). In discussing how various types of people are represented in American cinema, Benshoff and Griffin offer the example of:

biases based on race, gender, sexual orientation, and socioeconomic class depicted in *Inside Lehman Brothers*, a legal advocate will essentially need to fight fire with fire by torching the biases through the use of visual legal advocacy. For instance, the original Netflix documentary series *Trial by Media* examines the outcomes of famous court cases from the 1980s–2000s, which are believed to have been dramatically affected by extensive (and ultimately damning) media coverage.<sup>21</sup> However, I am not a proponent of the amorality theory for lawyering and advocacy.<sup>22</sup> Instead, I strongly contend lawyers are responsible for what they do when representing their clients.<sup>23</sup>

Visual legal advocacy is still a novel and experimental approach within the legal profession, but it is arguably the future of the law considering the overall importance of visual advocacy in a digital society.<sup>24</sup> *Inside Lehman Brothers: A Case Study in Compliance* is a visual legal advocacy documentary because it is a “true” and “real” story of “law as lived experience.”<sup>25</sup> Law

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[A] film about both a white man and a Native American man. The story alternates between the two characters, showing their daily activities: getting up, eating, interacting with their family and friends, working, and then going to sleep. There would seem to be nothing necessarily biased or prejudiced according to this description of the film’s content. Yet, in this hypothetical film, all the scenes with the white man are brightly lit, with the camera placed at eye-level; the shots are of medium length, and calm, pleasant music is used for underscoring. In contrast, all the scenes of the Native American man are composed with dark shadows, with the camera constantly tilted at weird angles; the shots are quick and choppy, and dark, brooding music is used for underscoring. Such choices obviously slant how a viewer is supposed to react to these two characters. The content of the film may have seemed neutral, but when the other axes of film form are analyzed, one realizes that the white man was presented in a favorable (or neutral) light, while the Native American man was made to seem shifty or dangerous.

*Id.*

21. See TRIAL BY MEDIA (Netflix 2020) (showcasing infamous trials in which media presence may have impacted the trajectory of the case due to public exposure).

22. See César Arjona, *Amorality explained. Analysing the Reasons that Explain the Standard Conception of Legal Ethics*, 4 RAMON LLULL J. OF APPLIED ETHICS 51, 53 (2013) (“[T]he amorality theory claims that by being morally neutral the lawyer achieves moral righteousness.”).

23. See Rebecca Roiphe, *The Decline of Professionalism*, 29 GEO. J. LEGAL ETHICS 649, 650 (2016) (discussing the importance of professionalism and ethics in the legal profession). For instance, the historic hostility for attorneys and the legal profession goes back to the 14th century in England. As evidence, we find Shakespeare’s character saying, “The first thing we do, let’s kill all the lawyers.” WILLIAM SHAKESPEARE, HENRY VI, act 4, sc. 2, l. 65. This history is all the more reason to act with care and restraint in the performance of professional duties by lawyers.

24. See Apollon, *supra* note 3, at 8 (highlighting the efforts of educational institutions and professors to incorporate visual legal advocacy, though it is not yet an institutionalized practice).

25. *Inside Lehman Brothers: A Case Study in Compliance*, *supra* note 1; see Austin, *supra* note 12, at 815 (characterizing stories in which law is a central theme as “law as a lived experience”).



as “lived experience,” in the context of visual legal advocacy, is the storytelling of a person such as a plaintiff or a defendant in civil cases or a victim, defendant, or prosecutor in criminal cases.<sup>26</sup> This storytelling is a representation of the lived legal experiences and choices of a given person in a trial or legal debate, as well as the knowledge that one acquired from these experiences and choices.<sup>27</sup> *Inside Lehman Brothers: A Case Study in Compliance* is an advocacy documentary because of its interest in influencing decision-makers and regulating Wall Street and financial markets worldwide in various areas of society such as legal, political, and economic institutions.<sup>28</sup>

Visual legal advocacy needs to be a vital part of our legal education to make the law more accessible and less boring.<sup>29</sup> Stop and take a minute to think about who society considers to be a great trial lawyer. Does a jury react more to a monotone and rational trial lawyer, or a passionate and entertaining one?<sup>30</sup> Consider the depiction of attorneys in Hollywood legal drama films and television shows. Has Atticus Finch been admired for decades as the ideal lawyer because he was lackluster and apathetic? Quite the opposite, the dramatization and passion depicted in the character of Atticus Finch in *To Kill a Mockingbird* has had a lasting impact on what it means to be a model lawyer.<sup>31</sup>

Postman’s assertion that our culture has been “transformed into congenial adjuncts of show business” might be true; however, research conducted on edutainment by the World Bank’s 2015 World Development Report, *Mind, Society and Behavior*, does not conclude, as Postman did, that we are at risk of

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26. See Austin, *supra* note 12, at 862 (assessing the strength of video settlement documentaries to address the aspects of a case in which legal argumentation and storytelling overlap).

27. See *id.* at 815 (discussing the core characteristics which truly set nonfiction films apart from narrative or fictional works about law).

28. *Inside Lehman Brothers: A Case Study in Compliance*, *supra* note 1.

29. Stanford Law School has characterized visual advocacy as a way “to make law less boring.” See *Visual Advocacy: How to Make Law Less Boring*, STAN. L. SCH., <https://law.stanford.edu/event/visual-advocacy> [<https://perma.cc/YTJ9-73WL>] (advertising an event about the power of visual advocacy).

30. See James R. Elkins, *Reading/Teaching Lawyer Films*, 28 VT. L. REV. 813, 859–60 (2004) (“The lawyers’ failure that we see in lawyer films is an inevitable truth, a truth both entertaining and educational.”).

31. Scholar Alice Petry remarked that “Atticus has become something of a folk hero in legal circles and is treated almost as if he were an actual person.” See *The Significance of Atticus Finch in The Legal World*, RMN AGENCY (Aug. 5, 2013), <https://www.thermagency.com/the-significance-of-atticus-finch-in-the-legal-world/> [<https://perma.cc/YH2M-MB25>]; see also Elkins, *supra* note 30, at 864 (noting how Hollywood legal drama films and television shows have a blurring effect on the conventional lines between the “serious” and the “entertaining” aspects of our society).

“amusing ourselves to death.” Rather, the World Bank asserts (with cautionary principles): “[E]ntertainment education or the purposeful use of mass media entertainment may” have a positive impact on social change and can “be an effective tool to change norms and behaviors.” The World Bank went so far as to assert: “There is an unprecedented opportunity to use entertainment media to change the lives of billions of people, especially in urban areas. Entertainment education or edutainment thus, can be a game-changer for development.”<sup>32</sup>

The importance of an ethics education has been discussed for decades, as the public appears to continually be disgusted by the greed of Wall Street and the modern capitalist world.<sup>33</sup> However, the public often forgets that the problem is not simply the pathological pursuit of profit, but the human behaviors among corporate players—competition and vanity—that result from this compulsive societal framework. Research on ethics education argues that this subject is multidisciplinary and cannot be taught in a classroom, as it is a multifaceted and multilateral process which must be ongoing for the rest of our lives. Further, it is not only an intellectual process, but also an emotional process.<sup>34</sup> This is why, as an expert in forensic psychology discussed in my first film *Collared*, people with sociopathic traits, such as emotional manipulation, are often sought after and successful in the business world.<sup>35</sup>

The process of ethics education should include the ability to inspire the minds and hearts of the actors in our society and to provide them with the moral frameworks and practical tools to assess ethical risks and, above all, evaluate the consequences of their actions and decisions.<sup>36</sup> Conventional wisdom teaches us that the basic principle of ethical behavior is based on a

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32. Apollon, *supra* note 3, at 15 (footnotes omitted).

33. See John Paul Rollert, *Greed Is Good: A 300-Year History of a Dangerous Idea*, ATLANTIC (Apr. 7, 2014), <https://www.theatlantic.com/business/archive/2014/04/greed-is-good-a-300-year-history-of-a-dangerous-idea/360265/> [https://perma.cc/NKL3-Y3TY] (“Greed has always been the hobgoblin of capitalism, the mischief it makes a canker on the faith of capitalists.”).

34. See Charlene Foley Deno & Lisa Flynn, *Ethical Standards for Accounting Students: A Classroom Exercise on Internal Controls*, 7 J. BUS. & EDUC. LEADERSHIP 4, 4–11 (2018) (discussing the process of ethics education).

35. *Collared/Documentary on Insider Trading*, The Hennick Ctr. For Bus. & L., <https://hennickcentre.ca/researchers/visual-legal-advocacy-program/documentary/> [https://perma.cc/M2TR-RG52].

36. See generally Apollon, *supra* note 3 (advocating for the use of visual legal advocacy to better equip lawyers to make ethical decisions in personal and professional situations).

guideline that is used in situations to balance right and wrong.<sup>37</sup> And yes, ethics is about right and wrong, but this dual concern theory can also lead to an oversimplification of ethics in action in our real world. In an effort to avoid this oversimplified understanding—that ethics are black and white—documentary case studies provide viewers with a profound reflectional and sensorial human experience, allowing them to consider the “grey area” of ethics. To that end, *Inside Lehman Brothers* provides a transformational experience to the viewers as it is an exciting way to increase awareness, widen ethical decision-making umbrellas, and dissect the consequences of the intersection of law and ethics on people and society.

In sum, visual legal advocacy is activity used by visual legal advocates to influence decision-making within legal, political, economic, and social institutions. Therefore, the success of visual legal advocates largely rests on captivating the attention of others.<sup>38</sup> Let me ask you these questions: If your jury or the public does not take notice of your legal arguments, how will you successfully advocate for the interests of your client or cause? If the jury or public does not listen to you, how can you lead your argumentation effectively? And if you cannot capture the attention of your jury or public, how will your client’s interest or cause of action survive? With these questions in mind, the question then becomes, how are we going to go about captivating such attention? I argue edutainment (with cautionary principles) is one important source of social change because lawyers, with the ability to implement such techniques, play key roles as public advocates, legal educators, and drivers of access to justice. The film *Inside Lehman Brothers* is the perfect illustration of such legal awareness.<sup>39</sup> As the film promotes the transmission of legal consciousness, it helps us analyze the larger political-institutional structure of Wall Street that has shaped its legal-institutional nature. In addition, the film invites us to critically examine the capitalist institutions which impact our daily lives in order to elevate our social consciousness, a prerequisite component of positive social change.<sup>40</sup>

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37. See *id.* at 37 (equating virtue ethics and doing the right thing).

38. See generally Ben Parr, *7 Ways to Capture Someone’s Attention*, HARV. BUS. REV. (Mar. 3, 2015), <https://hbr.org/2015/03/7-ways-to-capture-someones-attention> [<https://perma.cc/KR6B-5N86>] (listing research-based methods to capture people’s attention).

39. INSIDE LEHMAN BROTHERS (Ina Fichman, Frederick Lacroix 2018) [hereinafter INSIDE LEHMAN BROTHERS].

40. See generally Elena A. Pevtsova et al., *Ensuring Human Rights and the Development of Legal Awareness of Juvenile Offenders in Closed Institutions*, 11 INT’L. J. ENV’T & SCI. EDUC. 10435, 10435–10444 (2016) (discussing how to grow legal awareness in our society).

## II. WHAT IS YOUR INITIAL REACTION AFTER WATCHING THE FILM?

*"I agree we need some help-but the BROs always wins!!"*<sup>41</sup>

—Dick Fuld, former CEO of Lehman Brothers

First, let me start with a short synopsis of the film: *Inside Lehman Brothers* chronicles the stories of Lehman's whistleblowers.<sup>42</sup> The whistleblowers here—Mathew Lee, former senior vice president overseeing Lehman's global accounting and balance sheet; Oliver Budde, former in-house counsel of Lehman; and the predominantly female mid-tier managers—all suffered dire consequences in the 2008 American subprime mortgage calamity.<sup>43</sup> Banks, on the other hand, have been bailed out with taxpayer money and are back to conducting business as usual.<sup>44</sup> *Inside Lehman Brothers* provides a cautionary tale of how damaging fraudulent behavior in the banking world effects not only the banking world, but the *entire* global world.<sup>45</sup> Today, *Inside Lehman Brothers* provides a captivating story in "what not to do" in American business history—with multiple studies and analyses offering various determinations for its demise.<sup>46</sup> But for those individuals directly effected, the "little men," who do not have the luxury of sitting around and wondering what *should* have been done differently, they are still reeling from the effects of the crisis and subsequent recession, "as their home values, their jobs, their retirement savings, and their beliefs in the integrity of the financial markets [have] yet to be restored."<sup>47</sup> And adding insult to injury, the current global recession caused by the COVID-19 pandemic, and its

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41. Julia La Roche, *20 Infamous Quotes That Wall Street Wishes Were Never Made Public*, BUS. INSIDER (Aug. 10, 2012, 8:42 AM), <https://www.businessinsider.com/infamous-wall-street-quotes-2012-8#the-bros-always-wins-1> [<https://perma.cc/CM9B-YD86>].

42. INSIDE LEHMAN BROTHERS, *supra* note 39.

43. *Id.* Though not surprisingly, "[m]any of the top-positioned men [survived] untouched." *Id.*

44. *Id.*

45. *Id.* ("The demise of the giant financial global institution Lehman Brothers, a bankruptcy estimated at \$639 billion, accelerated the global financial crisis and sparked debate in Washington over ethical issues on Wall Street and in other financial markets around the world.")

46. See Joseph L. Zales, *\$22 Trillion Lost, Zero Wall Street Executives Jailed: Prosecutors Should Utilize Whistleblowers to Establish Criminal Intent*, 6 NOTRE DAME J. INT'L COMP. L. 167, 167 (2016) (discussing the 2008 financial crisis which was caused by excessive risk-taking on Wall Street).

47. *Id.* at 168–69.

associated government public health policies, will make it virtually impossible for many to recover.<sup>48</sup>

I researched and published a visual legal advocacy online course entitled *Inside Lehman Brothers: A Case Study in Compliance* offered in a documentary-style format.<sup>49</sup> Overall, the course is founded on the ethical lessons we can realize from the world's largest bankruptcy and one of the major causes of the 2008 global financial crisis.<sup>50</sup>

To start this Article on a strong note, I would like to ask my readership for its initial reaction after watching the documentary film *Inside Lehman Brothers*. This request will hopefully pique curiosity and encourage those who have not had the opportunity to view it to give it a watch. Until I get some feedback from my readership, I will share with you my initial reaction. The film's director, Jennifer Deschamps, brilliantly constructed the ideal documentary case study which demonstrates, to legal and business professionals, aspiring professionals (university students), and also the public at large (what old common law arrogantly refers as "the layperson"), the negative human consequences of corporate greed and vanity on our society.<sup>51</sup> *Inside Lehman Brothers* explores the moral bravery of whistleblowers who attempted to lessen the disastrous consequences of the 2008 global financial crisis<sup>52</sup>—a crisis that has cost the world trillions of dollars.<sup>53</sup> However, it is an abstract concept, and we must talk about the catastrophic human consequences—the millions of jobs, homes, lives, and retirement savings lost.

I often talk about the importance of social psychology and organizational behavior to change the pathological culture of Wall Street and its leaders. Sharing this same impression, internationally-respected organizational

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48. See Martin McKee & David Stuckler, *If the World Fails to Protect the Economy, COVID-19 Will Damage Health Not Just Now But Also in the Future*, 26 NATURE MED. 640, 641 (explaining the importance of bold economic action to save off the most devastating effects of the pandemic).

49. See *Inside Lehman Brothers: A Case Study in Compliance*, *supra* note 1 (advertising a course on business ethics and risk management in the financial sector).

50. *Id.* "The overall objective of this course is the promotion of professionalism" and ethics by encouraging "the personal and corporate standards of behavior expected by legal and business professionals to prevent corporate misconduct and fraud." See *id.*

51. INSIDE LEHMAN BROTHERS, *supra* note 39.

52. *Id.*

53. See John Cassidy, *The Real Cost of the 2008 Financial Crisis*, NEW YORKER (Sept. 10, 2018), <https://www.newyorker.com/magazine/2018/09/17/the-real-cost-of-the-2008-financial-crisis> [<https://perma.cc/4U8N-8PMJ>] ("[T]he Fed provided close to five trillion dollars in liquidity and loan guarantees to large non-American banks. It also provided roughly ten trillion dollars to foreign central banks through currency swaps.").

behavior scholar Henry Mintzberg,<sup>54</sup> in summarizing the global financial crisis, states, “[W]hat we call a financial crisis is really at its core a crisis of management, and not just a crisis of management, but a crisis of management culture. . . . In other words, what you had is a detachment of people who *know* the business from people who are *running* the business.”<sup>55</sup> Thus, in a period in which management is touted over and over again as a critical variable in defining the success or failure of organizations, it becomes all the more important to look at the other side of the leadership coin—how leaders create culture and how culture defines and creates leaders.

In regard to fraudulent mortgage and lending practices, these same financial institutions were approving loans to nearly anyone and with little regard to their creditworthiness. As a result, many of the individual consumers obtaining these loans were “subprime” borrowers, who were, unsurprisingly, unable to repay their debt upon maturity.<sup>56</sup> Such subprime loans were then pooled consciously with loans of somewhat higher quality to disguise their risk.<sup>57</sup> Thus, fraud and financial misrepresentations, in addition to greed and moral lapses that are not necessarily illegal, were clearly rampant on Wall Street in the run-up to the 2008 global financial crisis.

It has been suggested that “[h]igh levels of segregation create a natural market for subprime lending and cause riskier mortgages and thus foreclosures to accumulate disproportionately in minority neighborhoods

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54. In addition to his work in organizational behavior, Henry Mintzberg completed his master's degree in Management and PhD from the MIT Sloan School of Management. He currently runs two programs at the Desautels Faculty of Management of McGill University which have been designed to teach his alternative approach to management and strategic planning. *Henry Mintzberg*, MCGILL, <https://www.mcgill.ca/desautels/henry-mintzberg> [https://perma.cc/9GGY-YCKA].

55. *MBA: Mostly Bloody Awful*, Background Briefing with Stephen Crittenden, AUSTL. BROAD. CORP. (Mar. 29, 2009), <https://www.abc.net.au/radionational/programs/backgroundbriefing/mba-mostly-bloody-awful/3143174> [https://perma.cc/A9V8-RUS7] (emphasis added).

56. See Elizabeth Gravier, *The average credit score of a subprime borrower is 578—here's how much income and debt they have*, CNBC (Oct. 19, 2021), <https://www.cnbc.com/select/breakdown-of-a-subprime-borrower/> [https://perma.cc/54R7-Q8NB] (“Experian’s most recent data from Q1 2020 shows that subprime borrowers have an average 578 FICO credit score. On the FICO credit score scale ranging between 300 on the low end to 850 on the high end, a 578 falls under ‘very poor.’”).

57. “These pooled loans then were securitized into collateralized debt obligations (CDOs), asset backed securities (ABS), mortgage backed securities (MBS), and credit default swaps (CDS) by creative financial engineers at the investment banks. These highly complex derivative products were blessed by self-interested rating agencies, too sophisticated for the majority of industry regulators to fully comprehend, and marketed and sold to less than sophisticated buyers with less than sufficient disclosures.” Zales, *supra* note 46, at 170 (footnote omitted).

within racially segregated metropolitan areas.”<sup>58</sup> Thus, in my opinion, the subprime loans can be analogized to a predatory Ponzi mortgage scheme that targets and aims to dispossess underprivileged and mainly racialized Americans, such as African-Americans and Hispanics.<sup>59</sup> Economic racism, as such, is often misunderstood and minimized, but the documentary shows that the quest for economic justice remains in America.

The documentary demonstrates Wall Street financiers’ reckless risk-taking, fraudulent mortgage and lending practices, and perversions around increasingly complex financial products.<sup>60</sup> As noted by Anton Valukas in the documentary, experts hired experts to try to understand the complex financial products structured by Lehman Brothers.<sup>61</sup> One of the key hallmarks of a pyramid scheme, as defined by the U.S. Securities and Exchange Commission’s (SEC) Office of Investor Education and Advocacy, is a “[c]omplex commission structure.”<sup>62</sup> Due to the sheer complexity of such structure, the SEC goes further by educating investors to “[b]e concerned unless commissions are based on products or services that you or your recruits sell to people outside the program. If you do not understand how you will be compensated, be cautious.”<sup>63</sup> This concern arose as “[e]xcessive risk-taking was all too prevalent on Wall Street in the decade or so leading up to the Financial Crisis.”<sup>64</sup> It must further be noted that “[i]t was during this time that sophisticated Wall Street financiers claimed to have ‘banish[ed] risk,’ when, in fact, they had simply lost track of it” in their pathological pursuit of profit.<sup>65</sup>

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58. Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 AM. SOCIOLOGICAL REV. 629, 630 (2010).

59. *See id.* at 638 (arguing the crisis was based on the extortion of wealth from the working classes and racial minorities (African Americans and Hispanics), which led to economic discrimination).

60. INSIDE LEHMAN BROTHERS, *supra* note 39.

61. *See A Postmortem on Lehman Brothers: Oh, Brother*, ECONOMIST (Mar. 12, 2010), <https://www.economist.com/finance-and-economics/2010/03/12/oh-brother> [<https://perma.cc/D552-XMRS>] [Hereinafter *A Postmortem on Lehman Brothers*] (explaining how “Mr[.] Valukas and his team took more than a year to research their report” in which “[t]hey collected more than 5m documents and reviewed an estimated 34m pages of information”).

62. *Beware of Pyramid Schemes Posing as Multi-Level Marketing Programs*, U.S. SEC. AND EXCH. COMM’N (Oct. 1, 2013), [https://www.sec.gov/oiea/investor-alerts-bulletins/investor-alerts-ia\\_pyramid.htm](https://www.sec.gov/oiea/investor-alerts-bulletins/investor-alerts-ia_pyramid.htm) [<https://perma.cc/8227-XCYL>].

63. *Id.*

64. *See* Zales, *supra* note 46, at 169 (“Investment banks on Wall Street were leveraged upwards of 30-to-1 pre-Crisis, meaning they were executing their often risky trading strategies with borrowed money. Indeed, these leverage ratios had ratcheted upwards from 2004 to 2008, skyrocketing from about 12-to-1 to 33-to-1, respectively.”).

65. *Id.* at 169 n.11.

Anton Valukas is a key subject matter expert in the documentary and the author of the considerable “forensic accounting flavored” legal report examining the causes of Lehman Brothers’ bankruptcy.<sup>66</sup> His most important discovery, which aids in better understanding this case, is the off-balance-sheet accounting gimmick orchestrated by Lehman and the fact that experts hired experts in an effort to understand it.<sup>67</sup> Consequently, *Inside Lehman Brothers* provides a depressing view of how a “culture of greed, zero accountability, and risk-taking”<sup>68</sup> has infiltrated the core of Wall Street, ultimately resulting in the perfect storm: the collapse of taxpayer-funded government bailouts and the largest bankruptcy in the world’s history.<sup>69</sup> The film leaves us wondering whether it was only the pathological corporate culture at Lehman Brothers or all the firms on Wall Street that burned the world economy, and the “little people” along with it?

Overall, my initial reaction—albeit from an emotional point of view (that lives were wrecked, some beyond repair)—is that this film case study offers viewers a complete sensorial and reflectional human experience on the “overlooked” American story of corporate greed and untrustworthiness. Ironically, the global financial crisis was rooted in trust for sovereign bodies. “*In God We Trust*”—the official motto of the United States<sup>70</sup>—was always more than just a religious statement. Pull out your wallet and take a look at the inscription present on every U.S. dollar: “it’s an affirmation that its allegedly democratic financial system is better than everything else out

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66. See *A Postmortem on Lehman Brothers*, *supra* note 61 (noting how the “nine-volume, 2,200-page report . . . published on Thursday March 11th, has a table of contents that lasts for 38 pages”).

67. See John Carney, *Report: Lehman Brothers Used “Accounting Gimmick” To Hide The Size Of Its Balance Sheet*, BUSINESS INSIDER (Mar. 11, 2010), <https://www.businessinsider.com/report-lehman-brothers-used-accounting-gimmick-to-hide-the-size-of-its-balance-sheet-2010-3> [<https://perma.cc/PCE6-6WLT>] (“Lehman used what Valukas describes as an ‘accounting gimmick’ to make it appear as if it had off-loaded risky assets and reduced its balance sheet.”). The gimmick, known inside the walls of Lehman as “Repo 105,” gave way to a transaction in which “Lehman would raise cash by selling assets with a promise to buy them back later. . . . And because it was really a financing rather than a sale, the assets remained on Lehman’s balance sheet.” *Id.* But, in actuality, Lehman would handle the transaction as if it were a legitimate sale and remove the risky assets from its books. *Id.*

68. See Zales, *supra* note 46, at 179 (discussing the flagrant corporate culture of perpetual greed and risk on Wall Street commonly overlooked by federal regulators and prosecutors).

69. The 2008 global financial crisis “eventually led to a four-year global ‘Great Recession’ and resulted in sovereign debt crises for many nations, including Greece.” *Id.* at 168.

70. *About, History of ‘In God We Trust’*, U.S. DEPT. TREAS. (Mar. 8, 2011, 9:34 AM) <https://www.treasury.gov/about/education/pages/in-god-we-trust.aspx> [<https://perma.cc/5DEZ-ZWKV>].



there.”<sup>71</sup> But is it actually though? Clearly not, as 2008 changed how we regard the guardians of the financial order.<sup>72</sup> Arguably, the “God” referenced in “In God We Trust” may not be what we traditionally think of as the God of Christianity or Islam. In most religions, God is more of a metaphor to what is fair and just, and all men are equal.<sup>73</sup> But that is not the case in the global financial order, where inequality among banks and corporations and their respective clients runs rampant.<sup>74</sup> Thus, it is apparently not in “God” or in “equality” we trust, but in “corporate higher-up’s”—the Goliath’s—that we trust (or *thought* we could trust). Thus, viewing the crisis through the eyes of the Biblical tale of David and Goliath<sup>75</sup>—as represented by the brave whistleblowers who tried to stand up against Lehman Brothers—we are able to consider in whom we *actually* trust.

### III. THE FILM DISCUSSES THE STORY OF CORPORATE WHISTLEBLOWERS AND THE HUMAN CONSEQUENCES OF THEIR MORAL BRAVERY. WHAT IS THIS FILM TEACHING US ABOUT WHISTLEBLOWING IN PRACTICE?

*Inside Lehman Brothers* reveals the story of what happened to those who suspected the collapse was coming, tried to warn the world, and ultimately were unsuccessful. According to *Black’s Law Dictionary*, the legal definition for “whistleblower” is an employee who reports “illegal or wrongful activities of his employer or fellow employees.”<sup>76</sup> The SEC defines an “eligible whistleblower” as “a person who voluntarily provides the SEC with original information about a possible violation of the federal securities laws

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71. Alexander, *The Price of Trusting “God”*, MEDIUM (Dec. 24, 2019), <https://medium.com/coinmonks/the-price-of-trusting-god-71f126467c82> [<https://perma.cc/4XEY-WWL4>].

72. *Id.*

73. *Id.*

74. *See id.* (highlighting corporate and financial inequality by showing that “banks and corporations are offered money at much cheaper rates than to ordinary people”).

75. Three thousand years ago on a battlefield in ancient Palestine, a shepherd boy defeated a mighty warrior with nothing more than a stone and a sling. *David and Goliath Bible Story Study Guide*, LEARN RELIGION, <https://www.learnreligions.com/david-and-goliath-700211> [<https://perma.cc/3BSB-NV86>]. *See* Alyson Shontell, *There’s a Convincing Theory That Goliath, Not David, Was Actually The Underdog*, BUSINESS INSIDER (Jun. 17, 2014, 2:06 PM), <https://www.businessinsider.com/malcolm-gladwell-goliath-was-the-underdog-not-david-2014-6> [<https://perma.cc/2B26-9X4A>] (suggesting “David and Goliath is ‘a metaphor for improbable victories,’ [Malcolm] Gladwell explained. . . ‘Why do we call David an underdog? Well, we call him an underdog because he’s a kid, a little kid, and Goliath is this big, strong giant.’”)

76. *Whistleblower*, BLACK’S LAW DICTIONARY 1913 (11th ed. 2019).

that has occurred, is ongoing, or is about to occur. The information provided must lead to a successful SEC action resulting in an order of monetary sanctions exceeding \$1 million.”<sup>77</sup> Essentially, whistleblowers are to white-collar crime what informants or “snitches” are to the world of blue-collar crime. One of the most important differences is that the vast majority of whistleblowers are not criminals, but rather people of high moral character who are exasperated by the immoral and illegal actions of their employers and decide to act on the basis of their ethical leadership.<sup>78</sup> Conversely, informants in the blue-collar crime world are often criminals who wish to negotiate protection or a lighter sentence with the authorities in exchange for information about their “employer.”<sup>79</sup>

The documentary focuses on whistleblower Matthew Lee, who in 2007 was working as a senior accounting executive at Lehman Brothers, and raised the alarm when he noticed some terrifying number-crunching going on.<sup>80</sup> Lehman Brothers then swiftly fired Lee, and while there was no direct evidence that Lee was fired because of his memo, the circumstances were certainly suspicious, leading Lee to believe that Wall Street had blacklisted him.<sup>81</sup> The documentary is compelling in recounting the personal stories of people like Lee and other whistleblowers who have encountered a difficult path since ratting out their employer. Specifically, Lee expressed he had been crushed by his industry and found himself seeking justice that he realized he probably would never get.<sup>82</sup> So, he sold his house, decided “to hell with everyone else” and now travels around Australia on his motorbike.<sup>83</sup> Thus, in a world where it’s often easier to keep one’s head below the parapet and live a comfortable life, the film exemplified how much willpower it takes to stand up to those with money and power. One

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77. *Office of the Whistleblower, Frequently Asked Questions*, U.S. SEC. AND EXCH. COMM’N, <https://www.sec.gov/whistleblower/frequently-asked-questions#faq-2> [<https://perma.cc/M38A-Y7NA>].

78. Doug Casey, *Doug Casey on the Difference Between a Whistleblower and a Rat*, INTERNATIONAL MAN, <https://internationalman.com/articles/doug-casey-on-the-difference-between-a-whistleblower-and-a-rat/> [<https://perma.cc/2VTB-TY49>] (“A whistleblower is a good thing *only* when he exposes government corruption. The government is a special case, because it is by nature a coercive organization. It’s intrinsically dangerous and needs to be kept under control any way possible. In this context, a whistleblower is a well-intentioned snitch. A lot like an assassin would normally be a bad thing—but when his objective is a nasty dictator, he’s transformed into a good thing.”).

79. *Id.*

80. INSIDE LEHMAN BROTHERS, *supra* note 39.

81. *Id.*

82. *Id.*

83. *Id.*

situation the documentary fails to explain is why the recipients of a letter from a senior vice president detailing the potentially dodgy accounting did not act. This failure to act is left as both a suggestive and rhetorical question for the viewers. Lehman's C-Suite executives put those letters in the back of a drawer, knowing that even if they suffered consequences, when it was all over, they would still probably be financially secure—well off, even.<sup>84</sup> When it is no longer possible to do wrong and stay rich, the Lehman story will lose its luster. But not today.

The documentary also presents the story of Oliver Budde, a former in-house counsel (associate general counsel) with Lehman Brothers who appears to be both a good guy and a moral lawyer.<sup>85</sup> Oliver Budde refused to play the role of “Chief Loophole Officer” through a technical interpretation of the law of the rules and, instead, decided to become a whistleblower.<sup>86</sup> His story of moral bravery goes against all the negative stereotypes of corporate lawyers.

During his time with the bank, Budde noticed Lehman was failing to disclose the sizable unvested stock options it previously granted to its Chairman and CEO, Dick Fuld, as part of his compensation package. Despite Budde's internal protests, the brass at Lehman Brothers refused to disclose the grants in their annual filings and chose instead to rely on a small legal loophole that arguably allowed them to skirt the disclosure requirements of the Securities Exchange Act of 1934. Not wanting to become complicit in Lehman's scheme, Budde resigned from the investment bank in 2005. A few years later, however, the SEC closed the disclosure loophole Lehman Brothers had been exploiting. . . . When Budde opened the March 2008 proxy Lehman Brothers filed with the SEC, he was appalled to see the investment bank was still hiding Dick Fuld's stock options, to the tune of \$264 million. Budde decided that he had seen enough; it was time to the blow the whistle on his former employer. He contacted the Securities and Exchange Commission five times between April and September of 2008 (the month Lehman collapsed), outlining Lehman's scheme of nondisclosure, naming names, and providing the calculated amounts of Fuld's hidden compensation. Lehman's house of cards came crashing down in September of 2008. As of May 2014, Oliver Budde still had not heard from anyone at the SEC about his allegations. The conscious decision not to disclose such clearly material information to investors via filings with the SEC appears to be a clear violation of several

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84. *Id.*

85. *Id.*

86. *Id.*

federal securities laws, including § 302 of SOX . . . . If the SEC listened to Budde, they would have had a much easier time assessing the mens rea, or willful intent, of these bad actors, so as to exercise their discretion in deciding whether to make a criminal referral to DOJ. Indeed, had Oliver Budde's whistleblowing been heard and acted upon, [federal] prosecutors may have been able to criminally prosecute the Lehman Brothers's executives responsible for failing to make such disclosures.<sup>87</sup>

The SEC, conceptualized as the "Wall Street Police" by Oliver Budde, chose to ignore his credible statement, rendering futile his lawyer conceived warning of stock option-reporting shenanigans before bankruptcy ensued.<sup>88</sup> Budde's moral courage is thus analogous to the role of lawyers as gatekeepers of integrity. That said, he now runs his own law firm that specializes in representing corporate whistleblowers like himself. His life experience certainly makes him the ideal lawyer to represent his clients with both a compassionate and strategic perspective.

Director Jennifer Deschamps offers a contrast to those whistleblowers she speaks to from the New York investment bank's upper ranks—white men who were ignored or fired—and the lower-ranking ones who reported fraud in the mortgage subsidiaries of Lehman Brothers—black and Latina women who claim to have faced direct forms of intimidation and even sexual harassment.<sup>89</sup> This is not subtle, but it works. *Inside Lehman Brothers* reminds us that the ever-present intersection of race, gender, and social status comes to play even for whistleblowers. The documentary begins on a powerful note by showing the dichotomous situation of Sylvia Vega-Sutfin, former account executive (2004–2005) in a subsidiary of Lehman Brothers which offered subprime mortgage loans with higher interest rates to those who had trouble maintaining a repayment schedule.<sup>90</sup> Sylvia, like many others, saw early warning signs of the dangers of subprime mortgages and tried to ring the alarm.<sup>91</sup> Instead of being heard, she was subjected to harassment when she attempted to expose the bank's corrupt lending practices.<sup>92</sup> Today, Sylvia Vega-Sutfin still lives in fear of her former employer—so much fear that she lives in her house in the forest with a gun

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87. Zales, *supra* note 46, at 183–84 (footnotes omitted).

88. INSIDE LEHMAN BROTHERS, *supra* note 39.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

and practices martial arts.<sup>93</sup> The director presents her duality of living in fear while also displaying the strength and defiance that explain her decision to become a whistleblower.<sup>94</sup> This powerful illustration (hopefully) allows viewers to come to an understanding of the traumatic shock most whistleblowers must confront, while at the same time leaving the door open to our imagination and conspiracy theories—is Lehman an evil corporation that operates as a criminal organization ready to kill “snitches”? Sylvia mentions in the documentary that she first naively believed that her “job was to help people to fulfill the American dream. To have a home where a family can be happy. Kids can lounge on the couch, being able to have outrageous birthday parties. That’s the American dream for me.”<sup>95</sup> What seems to have hurt her the most is the stark realization that she played a role in destroying the American dream.

The documentary also presents the likable Linda Weekes, an African American woman and former underwriter at BNC Mortgage in Sacramento, a Lehman’s subsidiary, as one of its main players.<sup>96</sup> She explains how she foolishly believed herself to be a custodian of corporate integrity by stating, “I always consider myself like an FBI agent because I think it is my job to make sure, number one, that the information that they have indicated in their documentation, I’ve verified that that is accurate.”<sup>97</sup> Of course her initial naiveté quickly turned to the disheartening realization that Lehman was in fact a corrupted organization.

After Linda discovered fraud in a number of files from brokers, she contacted Sylvia and requested an urgent meeting; in the documentary Sylvia referred to the brokers as her clients.<sup>98</sup> When Sylvia reviewed one of the files, she discovered a gentleman, who claimed he worked at Kentucky Fried Chicken (which he did), was listed as earning \$7,000 per week in his mortgage application.<sup>99</sup> Sylvia tried to take some action, but she quickly learned the corporation perpetuated this culture of fraud:

And so I went back, went to that mortgage company as a courtesy, to let them know that they needed to have quality control. What I did not know is that

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93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

someone in our office had contacted them, and said, all you need to do is change the broker. I thought, you know, I'm not going to allow this to happen, because this man clearly knows he's come there committing fraud. And he thinks he can just put paint over the top and get pre-approved and be doing the same thing. So at that time, I got an email sent to me that was not supposed to come to me. And what the email said is that we need to keep this company going because I have all these loans that need to fund. And so, this was a corporate approval of them committing fraud. I realized that the entire corporation was corrupt. And they don't want me to know about it.<sup>100</sup>

Sylvia's video testimony is one of the most crucial in the documentary because she explains the specific fraudulent mortgage and lending practices of these financial institutions in approving loans to nearly anyone with little regard to their creditworthiness and how this ultimately caused the financial system to fall like a house of cards.<sup>101</sup>

The documentary goes on to show the women whistleblowers discussing the alleged abuse and harassment they have suffered at the hands of their employers.<sup>102</sup> The women employees filed a suit against the company, and, in the documentary, their lawyer explained "[t]hey have a claim for wrongful termination. It's based upon the fact that they were whistleblowers, that they were protected by law because they were complaining about illegal behavior in the workplace."<sup>103</sup> Their claims are for \$27 million, and their lawyer believes "[t]hey're worth every dime of that because these women's lives have been ruined by this. And how much money is it worth to have your life ruined? To stand up for what you believe in and what's right?"<sup>104</sup> The question is: will justice be served? The documentary casts doubt since Lehman is now gone and bankrupted.<sup>105</sup> But Lehman, as we know, was

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100. *Id.*

101. See Zales, *supra* note 46, at 169–70 (explaining the fraudulent mortgage and lending practices that led to the 2008 global financial crisis).

102. INSIDE LEHMAN BROTHERS, *supra* note 39.

103. *Id.* (interviewing Gary Gwilliam, attorney for at least some of the women featured in the documentary).

104. *Id.*

105. One technical detail the documentary fails to explain is whether Lehman Brothers, as a parent company, can be held liable for all the actions of its subsidiaries. My answer is influenced by the Foreign Corrupt Practices Act (FCPA), imposing direct or indirect liability on parent companies for their subsidiaries' actions resulting in a violation. See *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, U.S. SEC. AND EXCH. COMM'N 27 (Nov. 14, 2012), <https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf> [<https://perma.cc/6Z23-E62K>] (explaining principles of corporate liability for anti-bribery violations as a parent company's direct liability or its liability under agency principles, for bribes its subsidiary paid).

not alone in its corruption, as “Bank of America lied about billions in bonuses[ ]” and “Goldman Sachs failed to tell clients how it put together the born-to-lose toxic mortgage deals it was selling.”<sup>106</sup> Yet not one of them has faced time behind bars.<sup>107</sup>

In response to the rampant corruption plaguing the financial industry, and specifically, the disastrous effects from the 2008 financial crisis, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank,” “Dodd-Frank Act,” or “the Act”) on July 21, 2010.<sup>108</sup> The main objectives of the Act’s enactment were to identify and respond to the causes of the 2008 financial crisis and “to promote ‘the financial stability of the United States by *improving accountability and transparency* in the financial system, to end “too big to fail,” to protect the American taxpayer by ending bailouts, [and] *to protect consumers* from abusive financial services practices.”<sup>109</sup> Dodd-Frank’s key strategic goal is to encourage whistleblowers to report securities law violations to facilitate investigations and prosecutions.<sup>110</sup> In an effort to entice potential whistleblowers, the law “directs that the Commission pay awards . . . to whistleblowers who voluntarily provide the Commission with original information about a violation of the securities laws that leads to the successful enforcement of a covered judicial or administrative action.”<sup>111</sup>

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106. Matt Taibbi, *Why Isn't Wall Street in Jail?*, ROLLING STONES (Feb. 16, 2011), <https://www.rollingstone.com/politics/politics-news/why-isnt-wall-street-in-jail-179414/> [<https://perma.cc/K56A-69P5>].

107. *Id.* (“Not a single executive who ran the companies that cooked up and cashed in on the phony financial boom—an industrywide scam that involved the mass sale of mismarked, fraudulent mortgage-backed securities—has ever been convicted.”).

108. Keith Goodwin, *Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010*, FED. RESRV. HIST. (July 21, 2010), <https://www.federalreservehistory.org/essays/dodd-frank-act> [<https://perma.cc/6QDN-LQGG>].

109. Ian A. Engoron, Note, *A Novel Approach to Defining “Whistleblower” in Dodd-Frank*, 23 FORDHAM J. CORP. & FIN. L. 257, 267 (2017) (emphasis added) (footnote omitted) (quoting Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010)).

110. *See Zales*, *supra* note 46, at 180–82 (asserting whistleblowing is a key solution, but that the regulatory and prosecutorial framework is insufficient).

111. *See Whistleblower Program Rules*, U.S. SEC. AND EXCH. COMM’N (Sept. 23, 2020), <https://www.sec.gov/rules/final/2020/34-89963.pdf> [<https://perma.cc/R34Y-CQDN>] (“Original information provided by whistleblowers has led to enforcement actions in which the Commission has obtained more than \$2.5 billion in financial remedies, including more than \$1.4 billion in disgorgement of ill-gotten gains and interest, of which almost \$750 million has been or is scheduled to be returned to harmed investors.”).

These monetary incentives and other protections,<sup>112</sup> the Act claims, will encourage employees to report violations and protect employees who come forward and break the vow of silence in the workplace.<sup>113</sup> Despite monetary incentives and other protections, the documentary shows that relying on whistleblowers is not a realistic solution—prosecutors need more independence and more regulatory tools. One such tool, \*ISO 37002, which emerged in July of 2021, offers the new standard for whistleblower management systems.<sup>114</sup> It aims to provide guidance for implementing, managing, evaluating, maintaining, and improving robust and effective whistleblower management systems.<sup>115</sup> While the standard is still in its infancy, the International Organization for Standardization (ISO) hopes that by issuing a global standard in this space, it will pave the way for how organizations can run effective whistleblower programs.<sup>116</sup> After all, a global standard makes it more accepted and uniform.

While much of the blame of the financial crisis, thus far, has focused on bank and corporate management, lawyers—individuals seemingly championed for their morality—also played a pivotal role in the economic calamity. In turning to the role of lawyers, the documentary discusses the independence of federal prosecutors through the concept of a “revolving

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112. *See id.* (offering the protection of anonymity with rule 21F-7, the Commission states it will not disclose information that could reasonably be expected to reveal the identity of the whistleblower, except under certain circumstances); Dan Mangan, *SEC Whistleblower Payouts Top \$1 Billion Total as Securities Watchdog Announces Near-Record Award*, CNBC (Sept. 15, 2021, 5:04 PM), <https://www.cnbc.com/2021/09/15/sec-whistleblower-payouts-top-1-billion-financial-regulator-says.html> [<https://perma.cc/4JHQ-JG2S>] (“The SEC by law does not disclose the identity of whistleblowers or information that could lead to revealing their identity.”).

113. *See generally Whistleblower Program Rules*, U.S. SEC. AND EXCH. COMM’N (Sept. 23, 2020), <https://www.sec.gov/rules/final/2020/34-89963.pdf> [<https://perma.cc/R34Y-CQDN>] (discussing the protections the Act employs to “continue to encourage individuals to come forward”).

114. ISO 37002:2021(en): *Whistleblowing Management Systems—Guidelines*, ISO, <https://www.iso.org/obp/ui/#iso:std:iso:37002:ed-1:v1:en> [<https://perma.cc/W5R3-TYQ3>].

115. *See id.* (offering support and protection to whistleblowers and other interested parties involved, ensuring that reports of wrongdoing are dealt with in a proper and timely manner, and improving organizational culture and governance). This Article explains the importance of whistleblowers (who are moral heroes), but reiterates the importance of an effective whistleblower management program for an organization to support whistleblowers by complying with ISO 37002 standards.

116. *See id.* (“This document provides guidance to organizations for establishing, implementing, maintaining and improving a whistleblowing management system . . . .”)



door.”<sup>117</sup> Oliver Budde adequately summarizes the “revolving door” issue as one source of lack of accountability on Wall Street:

The top people at the SEC or at the Department of Justice, well they were making millions of dollars, defending Wall Street banks are working inside of Wall Street banks before they became the so-called police. Okay. Why on earth would we expect them to go against their friends? And they almost always then go back and work for wall street when they are done. Within the beginning of 2009, Obama was elected and so he brought in his new people at the SEC. You have a director, the boss, the top boss, the CEO of the SEC, if you will. And then there is something called the director of enforcement. And so he’s in charge of doing the investigations. The guy that they put in was a lawyer from Deutsche Bank, and Deutsche Bank is one of the biggest banks involved in the crisis. Okay. And furthermore, Deutsche Bank is one of the banks that was most involved with Lehman Brothers. And then we expect him as the director of enforcement at the SEC to now go and investigate Repo 105. This is never going to happen. Never gonna happen.<sup>118</sup>

Budde is essentially explaining how in American politics, the “revolving door” is a movement of personnel between roles as legislators and regulators, on one hand, and members of the industries affected by the legislation and regulation, on the other.<sup>119</sup> This tool has long been regarded an advantageous instrument of regulatory capture. “[I]n order to secure a post-government position in the private sector, the theory goes, regulators must bend the rules to curry favor with their prospective employers.”<sup>120</sup>

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117. See Kevin L. Young et al., *Beyond the Revolving Door: Advocacy Behavior and Social Distance to Financial Regulators*, 19 BUS. AND POL. 327, 333 (2017) (asserting on basis of data analysis that the financial system’s independence is closely tied to regulatory agencies). *But see* Wentong Zheng, *The Revolving Door*, 90 NOTRE DAME L. REV. 1265, 1265 (2015) (“A growing body of empirical literature, however, either finds no conclusive evidence of a capture effect or finds evidence of an opposite effect that the revolving door indeed results in more aggressive, not less aggressive, regulatory actions. To account for these incongruous results, scholars have formulated and tested a new ‘human-capital’ theory positing that revolving-door regulators have incentives to be more aggressive toward the regulated industry as a way of signaling their qualifications to prospective industry employers.”).

118. INSIDE LEHMAN BROTHERS, *supra* note 39.

119. See Zheng, *supra* note 117, at 1266 (footnote omitted) (“Since the beginning of President Obama’s second term, several high-level government officials have walked through the proverbial door in both directions. Mary Jo White, a litigator who spent the last decade defending Wall Street banks and executives at the law firm Debevoise & Plimpton LLP, was confirmed as the new chairwoman of the Securities and Exchange Commission (SEC).”).

120. *Id.* at 1267 (footnote omitted).

The undertaking though, has had a profound impact on the law, so much so that special structures have been put in place to mitigate its effects.<sup>121</sup> Among the most enduring of concerns is the “risk of regulators being captured by industry interests.”<sup>122</sup> Thus, as we can see, such conflicts of interest are not just apparent (perceived) for the public, but they also amount to real (actual) and future (potential) conflicts for federal prosecutors.<sup>123</sup> The documentary therefore clarifies that legislative reforms are needed to deal with conflicts of interest for federal prosecutors in order to close the revolving door.<sup>124</sup>

An additional cause of the financial crisis of 2008 is this idea of systematic inequality in the United States—that different rules apply to different players. America was premised on the idea that “all men are created equal” with the right to “life, liberty, and the pursuit of happiness,”<sup>125</sup> yet the idea that every American has an equal opportunity to move up in life is mere fiction. There is no longer an “American dream” with the trickle down of prosperity from the rich to all social classes, nor social mobility. The rich are getting richer, and the poor are getting poorer. The pain is omnipresent and has risen from the struggles of American workers on Main Street to the biggest companies on Wall Street. The United States is undergoing an existential crisis that is causing even the dirty word “socialism” to start ringing in many Americans’ ears.<sup>126</sup>

In addition to legislative regulation, one way to combat this vast inequality is through whistleblowers within a particular institution or sector who can assist with investigations and prosecutions. Specifically, they can assist in

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121. *Id.*

122. *Id.* (footnote omitted) (“Discussions of regulatory capture and its impact on the regulatory process permeate scholarly literatures in law, political science, and economics.”).

123. See Cecilia Wang, *Stop That Revolving Door: Analysis of the Appropriate Application of the Cooling-off Period beyond Senior Government Employees*, 15 CARDOZO PUB. L. POL’Y & ETHICS J. 297, 297 (2017) (“[A] period of one or two years in which a former public sector employee is prohibited from representing matters involving or appearing before his former agency of employment—exists as a means of regulating immediate departures from public to private sector law enforcement.”).

124. See INSIDE LEHMAN BROTHERS, *supra* note 39 (“Why on earth would we expect [top officials at the SEC] to go against their friends [associated with financial institutions]?”).

125. David Kamp, *Rethinking the American Dream*, VANITY FAIR (Mar. 5, 2009), <https://www.vanityfair.com/culture/2009/04/american-dream200904> [https://perma.cc/3XRN-M2ZX].

126. See Gary Younge, *Socialism Used to Be a Dirty Word. Is America Now Ready to Embrace It?*, GUARDIAN (Sept. 6, 2019), <https://www.theguardian.com/us-news/2019/sep/06/socialism-used-to-be-a-dirty-word-is-america-now-ready-to-embrace-the-ideology> [https://perma.cc/Q6Q4-46DG] (providing poll numbers regarding rising popularity of socialism in America).

establishing evidence of *actus reus* (the objective element of the alleged financial crime or misconduct) and especially *mens rea*—mental element of a person’s intention to commit a crime, or knowledge that one’s action, omission, or willful blindness would result in a crime).<sup>127</sup> The fact that nobody was prosecuted for their hand in the 2008 financial crisis “is ‘consistent with what many people were worried about during the crisis, that different rules would be applied to different players. It goes to the whole perception that Wall Street was taken care of, and Main Street was not.’”<sup>128</sup> Whistleblowers will not come forward if they know there is a limited chance that alleged wrongdoers will be prosecuted and brought to justice. If we translate this to blue-collar crime, informants will not be willing to go up against drug dealers or dangerous criminals if they know the crime will not be prosecuted; the risk to the informant, should justice take a back seat, appears to be much steeper than the reward.<sup>129</sup>

Financial incentives have proven effective in motivating whistleblowers to detect and report fraud to the relevant authorities.<sup>130</sup> In a recent study, researchers at the University of Toronto found the presence of “a strong monetary incentive to blow the whistle does motivate people with information to come forward.”<sup>131</sup> However, one strong argument against financial incentives is that this could create a climate of terror where employees wait for the moment to turn against their employers. One author even suggests this will create an infestation of “rats” on Wall Street and financial markets.<sup>132</sup> I argue this assertion is false and biased. Research shows that contrary to popular belief, most whistleblowers are loyal to their organization’s compliance officers and internal compliance programs *before*

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127. Zales, *supra* note 46, at 179.

128. *Id.* (citing Gretchen Morgenson & Louis Story, *In Financial Crisis, No Prosecutions of Top Figures*, N.Y. TIMES (Apr. 14, 2011), <https://www.nytimes.com/2011/04/14/business/14prosecute.html> [<https://perma.cc/VY3W-WTWR>]).

129. It is common sense to think in terms of blue-collar crime when we discuss white-collar crime.

130. See *supra* notes 114–119 and accompanying text.

131. Alexander Dyck et al., *Who Blows the Whistle on Corporate Fraud?*, 65 J. OF FIN. 2213, 2215 (2010).

132. See Matt A. Vega, *Beyond Incentives: Making Corporate Whistleblowing Moral in the New Era of Dodd-Frank Act* “Bounty Hunting”, 45 CONN. L. REV. 483, 491–92 (2012) (describing the historical view of whistleblowers as rats and its impact on whistleblower policies including incentives). For instance, consider how American federal legislators saw reward programs for whistleblowers as both a “Snitch Program” and the “Reward for Rats Program.” *Id.* at 491.

going to the federal authorities.<sup>133</sup> In practice, as featured in the documentary, most whistleblowers report internally according to internal procedures before filing a formal complaint with the federal government.<sup>134</sup> This demonstrates their corporate loyalty, because internal reporting from whistleblowers is not always required, nor taken.<sup>135</sup> Yet, some government officials believe the reward amounts currently available to prospective whistleblowers may not be enough to induce current Wall Streeters to take the risk of blowing the whistle, especially given the influence of institutional allegiance and the financial costs of speaking out. Nonetheless, whistleblowing is seen as one of the most effective ways of detecting fraud, which, in the process, bridges the inequality gap. In the healthcare industry, for example, more than forty percent of fraud detection occurs because of tips from whistleblowing employees.<sup>136</sup> Thus, the role of whistleblowing in fraud detection should not be underestimated.

One of the main reasons whistleblowing has been so successful in exposing instances of fraud is that whistleblowers are often insiders with access to information not otherwise available to prosecutors. Whistleblowers often possess the cutting-edge technical knowledge and know-how that authorities do not possess, which allows them to better identify potential fraud and other violations much earlier than would otherwise be possible. For example, it is publicly known that federal authorities often use reformed hackers to investigate cybercrimes because hackers' special knowledge is often not possessed by law enforcement. Similarly, in the financial fraud context, these insiders often have legal, financial, and accounting training and acumen that allows them to comprehend, synthesize, and evaluate information that directly, or indirectly, points to fraud.<sup>137</sup> This financial and legal know-how allows

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133. See Claire Sylvia & Emily Stabile, *Rethinking Compliance: The Role of Whistleblowers*, 84 UNIV. CIN. L. REV. 451, 456 (2016) (providing data on whistleblowers loyalty to employers through the use of internal reporting first).

134. See *id.* at 451 (“Research shows that most whistleblowers report fraud internally first, typically turning to external sources only when internal compliance has failed. That whistleblowers do report internally should not be surprising given the pull of institutional loyalty and the extraordinary personal and financial costs of speaking out.”).

135. See *id.* at 454 (noting how the Dodd-Frank Act does not contain a provision requiring whistleblowers to report violations internally prior to submitting violations to the Government).

136. Dyck et al., *supra* note 131, at 2215.

137. See Zales, *supra* note 46, at 179 (arguing that working extensively with whistleblowers can help establish mens rea through their unique knowledge and experience).

whistleblowers within financial institutions to decipher between criminally fraudulent transactions and overly complex, yet, lawful ones.

So why, in the case of the 2008 financial crisis, were the whistleblowers that came forward not effective? And how, given the \$22 trillion cost of the financial crisis to the global economy, did (basically) the entirety of Wall Street go unpunished?<sup>138</sup> I argue, more effective use of whistleblowers—many of whom are lawyers, accountants, or market participants with significant financial acumen—might have significantly changed this result. The often-cited rationale for the enforcement response by regulators and prosecutors to the global financial crisis is that it is just too difficult to prove Wall Street executives acted with the requisite criminal *mens rea* in violating the federal securities laws.<sup>139</sup> As such, I argue whistleblowers can step in and play the necessary role of keeping any organization honest, and especially add value when blowing the whistle on wrongdoing committed by governmental organizations. Furthermore, creating financial incentives for federal government employees to become whistleblowers could greatly increase the instances of whistleblowing. Finally, whistleblowing also sees great value in the public sector—after all, paying substantial monetary awards to whistleblowers not only compensates whistleblowers for reputational damages, but it also incentivizes whistleblowing. Thus, both the private and public sectors understand and appreciate the value of whistleblowers.

As discussed previously, my examination of this documentary as a filmmaker receives its inspiration by the well-known Biblical parable of David and Goliath. The film *Inside Lehman Brothers* illustrates that capitalism is a sacrosanct value in America by discussing how the motto “In God We Trust” was historically placed on American dollars largely because of the increased Christian religious sentiment of the republic.<sup>140</sup> The idea was to create a beautiful divine dollar, “to which no possible citizen could object.”<sup>141</sup> This banknote illustrates today’s American core Judeo-Christian ethics of “God, Liberty, Law.”<sup>142</sup> Therefore, my reference to David and

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138. See *supra* note 110 and accompanying text.

139. See Zales, *supra* note 46, at 173–75 (suggesting risk adverse federal prosecutors “were no longer attracted to the idea of prosecuting white-collar crimes if evidence as to the defendant’s intentions—their *mens rea*—was seemingly lacking up front”).

140. U.S. DEPT. TREAS., *supra* note 73.

141. *Id.*

142. *Id.*

Goliath has both a religious and secular meaning to identify the film's main argument and purpose.

First, the religious meaning is key. My law and MBA students often forget business ethics is largely influenced by religion.<sup>143</sup> However, empirical research shows religiosity is not a conclusive predictor of ethical awareness among business professionals.<sup>144</sup> The film cleverly recovers "religion's prophetic voice for business ethics."<sup>145</sup> Can we argue that modern western business ethics neglects the ethical virtuosity of its religious traditions? Or that western business ethics revolves around exploitation, colonization, and genocide, as asserted in the tough, provocative, and well-researched HBO documentary series *Exterminate All the Brutes*.<sup>146</sup> The series' director, Raoul Peck suggests: "It's not knowledge we lack. What is missing is the courage to understand what we know and to draw conclusions."<sup>147</sup> This statement advocates that ethics education has little impact if it is not combined with an intrinsic desire to act to change our policies and laws.<sup>148</sup> For instance, consider the capitalistic business world the American economy is premised in. For a long time, it would seem, Americans took comfort in the fact that their version of capitalism was not only the most dynamic and productive economic system in the world, but it lifted billions of people out of poverty and offered more hope to the hopeless than any other economic system. In reality, this broad and all-encompassing idealization of

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143. See Richard T. De George, *Theological Ethics and Business Ethics*, 5 J. BUS. ETHICS 421, 426–27 (1986) (discussing the contribution of religion and theologians to business ethics and suggesting that there does not appear to be a separate field of theological business ethics antithetical to the philosophical approach).

144. But see Justin G. Longenecker et al., *Religious Intensity, Evangelical Christianity, and Business Ethics: An Empirical Study*, 55 J. BUS. ETHICS 373, 378 (2004) ("[I]his study provides evidence of a significant religious factor in business ethical decision-making").

145. Cf. Martin Calkins, *Recovering Religion's Prophetic Voice for Business Ethics*, 23 J. BUS. ETHICS 339, 348 (2000) ("To see itself as just an applied philosophy or social science overly narrows business ethics and that to rectify this problem . . . business ethics ought to reclaim unabashedly its religious traditions").

146. Richard Brody, "Exterminate All the Brutes," *Reviewed: A Vast, Agonizing History of White Supremacy*, NEW YORKER (Apr. 9, 2021), <https://www.newyorker.com/culture/the-front-row/exterminate-all-the-brutes-reviewed-a-vast-agonizing-history-of-white-supremacy> [https://perma.cc/6AP9-G7EQ].

147. *Id.*

148. See Charles Fombrun & Christopher Foss, *Business Ethics: Corporate Responses to Scandal*, 7 CORP. REPUTATION REV. 284, 284 (2004) (explaining how ethical leadership in corporations must be established by the combination of "(1) the infusion of ethical principles in corporate cultures, (2) the appointment of 'Chief Ethics Officers', and (3) the adoption of strict ethical guidelines and codes of conduct").

“capitalism” has been whittled down year by year to favor only a small oligarchy, the rich. This is particularly relevant in the U.S. housing scheme, and even more so for minorities. As shown in the film, black Americans received loans without due diligence and verification.<sup>149</sup> Further, the American Civil Liberties Union (ACLU) concluded that black Americans were predatorily targeted by banks before the crisis.<sup>150</sup> Thus, a big part of the reason that the recession hit black Americans so hard was that it gutted home values and home ownership is a much more significant part of the group’s overall wealth. And while the 2008 financial crisis was hard on all Americans, the African American community, who were already the most economically and financially vulnerable segment of the population, is still suffering the consequences from the collapse.<sup>151</sup> This means the racial wealth gap “slant” that existed before the crisis is even greater today.<sup>152</sup> In that regard, *Inside Lehman Brothers* offers a surprisingly personal look, through a strong human and spiritual experience, at how one company orchestrated its own demise and left millions of Americans homeless through sheer, unchecked greed.

The story of David versus Goliath is imagery commonly used to describe the nature of battle between underdogs and their giant competitors. Thus, it is particularly relevant and can assist us in understanding the players in the Lehman Brothers catastrophe. In the documentary, Goliath—the behemoth “champion” of the Philistines—is former CEO of Lehman Brothers, Dick Fuld, and David—the young shepherd—is the brave

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149. Loans with precarious and unfavorable terms relate to the subprime lending rush which preceded the housing crisis. See Christopher J. Curfman & John Kandrak, *The costs and benefits of liquidity regulations: Lessons from an idle monetary policy tool*, 41 FINANCE AND ECONOMICS DISCUSSION SERIES 1, 8 (2019) (“The exceptionally high default rates of subprime adjustable-rate mortgages may be due in part to the relatively poor risk attributes of these loans.”).

150. Sam Thielman, *Black Americans unfairly targeted by banks before housing crisis, says ACLU*, GUARDIAN (June 23, 2015), <https://www.theguardian.com/business/2015/jun/23/black-americans-housing-crisis-sub-prime-loan> [https://perma.cc/LBG3-RYA2].

151. Vincent Adejumo, *African Americans’ economic setbacks from the Great Recession are ongoing—and could be repeated*, CONVERSATION (Feb. 5, 2019, 6:40 AM), <https://theconversation.com/african-americans-economic-setbacks-from-the-great-recession-are-ongoing-and-could-be-repeated-109612> [https://perma.cc/ED3F-8E3Z].

152. See Gillian B. White, *The Recession’s Racial Slant*, ATLANTIC (June 24, 2015), <https://www.theatlantic.com/business/archive/2015/06/black-recession-housing-race/396725/> [https://perma.cc/2JN7-4WQ5] (“[A] report from the ACLU says that black families will continue to suffer the effects of this disproportionately for decades to come: By 2031, white household wealth will be 31 percent below what it would’ve been had the recession never happened. . . . For black households, wealth will be 40 percent lower, which will leave black families about \$98,000 poorer than if the recession hadn’t taken place.”).

whistleblowers trying to defeat this giant corporation. Thus, Fuld emerges as the chief villain in the film. Despite his role, Fuld never suffered serious harm as a result of Lehman's bankruptcy. Conversely, the whistleblowers are presented as the savior. They acted as selfless martyrs at the expense of their careers. Therefore, while Fuld, the "Gorilla of Wall Street," won the legal battle (he did lose a fortune, but seems to be doing just fine), he lost the moral battle. The reverse is of course true of whistleblowers; they are the legal losers but the spiritual and moral winners of the battle. This idea is further emphasized when Matthew Lee mentions that he sleeps at peace knowing he did the right thing,<sup>153</sup> while Dick Fuld's greed and opulence is exposed by his hundreds of millions of dollars in bank accounts and mansions.<sup>154</sup> The film skillfully shows this dichotomy. While Wall Street villains, such as Dick Fuld, may possess riches in terms of vanity and materiality, whistleblowers are rich in their ethical decision-making, having saved their souls from the greed of Wall Street.<sup>155</sup> After all, the Bible states: "[w]hoever oppresses the poor to increase his own wealth, or gives to the rich, will only come to poverty."<sup>156</sup> This Bible verse supposes that the story of "David and Goliath" means a prolonged struggle of good versus evil; it is not a single battle but instead a long and continuing one. In that regard, the film gives hope that there will always be people willing to stand up against tyrannical corporate power.

Second, the secular meaning of my analogy is that David's victory over Goliath was strategic and not by chance. David's approach of hitting Goliath with a stone from a sling was a brilliant plan of attack to target the giant's weakness.<sup>157</sup> Comparatively, the film is a reflective exercise to study how whistleblowers, as custodians of integrity, could win and hold accountable giant corporations, such as Lehman Brothers, for their corporate misconduct and fraud. As a former collegiate football player, sports analogies can be helpful when referring to the dominating

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153. INSIDE LEHMAN BROTHERS, *supra* note 39 (demonstrating the modesty and financial struggles of some whistleblowers).

154. *Id.*

155. *Id.*

156. *Proverbs 22:16* (ESV), BIBLEGATEWAY, <https://www.biblegateway.com/passage/?search=Proverbs+22%3A16&version=ESV> [<https://perma.cc/T4VJ-YM7W>].

157. *Was David vs. Goliath Duel a Miracle or Just Hormones?*, CHICAGO TRIBUNE (Feb. 17, 2000), <https://www.chicagotribune.com/news/ct-xpm-2000-02-17-0002180240-story.html> (stating "Goliath, who the Old Testament indicates was about 10 feet tall, suffered from a pituitary gland disease called acromegaly" which leads to a person growing extremely tall—but also often leads to double-vision and severe nearsightedness).



corporation and the individual, seemingly weaker, whistleblower. The mental strength and strategic mindset of the underdog, typically the lesser team, against a giant corporation, typically the favored team, is what can lead to a victory. Malcolm Gladwell discusses this idea in his TEDTalk entitled “The Unheard Story of David and Goliath.”<sup>158</sup> *Inside Lehman Brothers*, he suggests, exposes that while whistleblowers are the spiritual and moral victors, they are rarely the real winners in our material world.<sup>159</sup> Today, they are still injured and struggling with the consequences of their decision to battle Goliath.<sup>160</sup> In this sense, the film exposes the regulatory weaknesses of our capitalist system and ineffectiveness of corporate whistleblowing to prevent global financial crises.<sup>161</sup> As such, this film is the perfect visual case study to reflect on the regulatory reforms necessary to empower whistleblowers as the underdogs and custodians of corporate integrity.

IV. THE FILM DEPICTS RICHARD SEVERIN FULD JR.—  
AMERICAN BANKER BEST KNOWN AS THE FINAL CHAIRMAN AND CHIEF  
EXECUTIVE OFFICER OF LEHMAN BROTHERS UNTIL 2008—AS A VILLAIN  
IN THIS STORY. WHAT CAN WE LEARN FROM THIS FILM DEPICTION?

*“Did you ever expect a corporation to have a conscience, when it has no soul to be  
damned, and no body to be kicked?”*<sup>162</sup>

—Edward, First Baron Thurlow, 1731–1806

Can we say that Dick Fuld, a “one percent[er],” is the villain of the story? Or is he merely the product of an ill and not properly regulated system that allows American corporations to become weapons for the interests of a

158. Malcolm Gladwell, *The unheard story of David and Goliath*, YOUTUBE (Sept. 30, 2013), <https://www.youtube.com/watch?v=ziGD7vQOwl8&list=LLTvwCdX-oXqpgIE3CJcanQ1g&index=773> [<https://perma.cc/F6FB-TM7S>].

159. INSIDE LEHMAN BROTHERS, *supra* note 39.

160. *Wall Street- Lehman Brothers—A Whistleblowers Nightmare*, INSIDER EXCLUSIVE, <https://insiderexclusive.com/wall-street-lehman-brothers-a-whistleblowers-nightmare/> [<https://perma.cc/VAH2-MC9L>] (explaining how “[e]ach of them was told to look the other way, and then was subjected to retaliation and harassment that was designed to force them to quit[,]” and “[e]ventually, each of them was forced to leave their employment.”).

161. *Id.*

162. *Edward, Lord Thurlow 1731–1806*, OXFORD REFERENCE, <https://www.oxfordreference.com/view/10.1093/acref/9780191826719.001.0001/q-oro-ed4-00010943> [<https://perma.cc/ZB29-NJRU>].

small financial elite?<sup>163</sup> Like Baron Thurlow questioned in the 18<sup>th</sup> century, when we gave life to corporations and gave them the legal status of a person, “did [we] ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?”<sup>164</sup> Corporations are not people. Yet, they have been given such a status.<sup>165</sup> The first principle of corporate law and governance is that for-profit corporations are legal entities with their own legal interests and identities, separate and distinct from those of their shareholders.<sup>166</sup> Thus, the very purpose of the corporation as a legal form is to create a separate legal entity, “distinct in its legal interests and existence from those who contribute capital to it,” with limited liability in the service of maximizing shareholder profit and value.<sup>167</sup> As such, I argue that the cure for this is more corporate personhood which can ultimately lead to more democracy within corporations.<sup>168</sup> This increased personhood will have two facets: 1) more personal accountability for the directors and senior officers of the corporations—personal liability for officials and “directing minds,” such as Dick Fuld, when such individuals have so much authority in the corporation that the person can be considered the “alter ego” or “soul” of the corporation; and 2) “more participation in corporate governance by workers, communities, consumers, and shareholders.”<sup>169</sup>

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163. See Larry E. Ribstein, *Imagining Wall Street*, 1 VA. L. & BUS. REV. 165, 198 (2006) (presenting anticapitalist views of Wall Street when Oliver Stone’s fictional character Gordon Gekko says, “[t]he richest one percent of this country owns half our country’s wealth;” “I create nothing; I own;” and “you’re not naïve enough to think we’re living in a democracy are you, Buddy? It’s the free market.”)

164. *Edward, Lord Thurlow 1731–1806*, *supra* note 162.

165. *Northwestern Nat Life Ins. Co. v. Riggs*, 203 U.S. 243 (1906) (holding corporations are, for legal purposes, “persons”).

166. Kent Greenfield, *If Corporations Are People, They Should Act Like It*, ATLANTIC (Feb. 1, 2015), <https://www.theatlantic.com/politics/archive/2015/02/if-corporations-are-people-they-should-act-like-it/385034/> [https://perma.cc/TXB9-PNDY].

167. Kent Greenwood & Daniel A. Rubens, *Corporate Personhood and the Putative First Amendment Right to Discriminate*, BOSTON COLLEGE LAW SCHOOL LEGAL STUDIES, Research Paper No. 560 at 1, 7 (2021) (suggesting such “separateness” means that shareholders are not held liable for corporate debts).

168. “Corporate personhood” realizes an idea in which the corporation has a legal identity distinct from its shareholders. *Id.*

169. *Id.* (“The cure for this is more democracy within businesses—more participation in corporate governance by workers, communities, shareholders, and consumers. If corporations were more democratic, their participation in the nation’s political debate would be of little concern.”); see Saule T. Omarova, *Bankers, Bureaucrats, and Guardians: Toward Tripartism in Financial Services Regulation* 37 CORNELL L. FAC. PUBL’N 621, 638 (asserting “meaningful public participation in the process of regulating systemic risk associated with financial innovation” is needed to avoid continuing to “relying on bankers and bureaucrats as the only viable guardians of the common good.”).

Hence, one thing we can take away from the film's depiction of Dick Fuld as the supposed "villain" is that while flawed, he is likely not the real monster. In order to conceptualize this idea, take the famed horror film, *Frankenstein*.<sup>170</sup> The film, based on a stage adaptation of author Mary Shelley's 1818 novel *Frankenstein; or The Modern Prometheus*, sees Dr. Frankenstein, in his attempt to play God and creator, pieces together a being from corpses and gives it life.<sup>171</sup> He succeeds in his morbid experimentation, giving life to his own creature (often called the Frankenstein monster, or simply "Frankenstein"), who later turns against him.<sup>172</sup> Indeed, Dr. Frankenstein later regrets playing God through his creation, as he inadvertently endangers his own life and the lives of his family, friends, and community when the creature seeks revenge against him.<sup>173</sup> In this sense, we, the American public, did the same by creating the corporation as a legal person in our unorthodox scientific experiment.

Recently, criticism of corporations center on the idea that corporate greed is "destroying the moral fabric of America[,]"<sup>174</sup> and further, that corporate entities are pathological on account of their pursuit of profit and power, whatever the environmental or social cost.<sup>175</sup> In the influential documentaries—*The Corporation: The Pathological Pursuit of Profit and Power* and *The New Corporation: The Unfortunately Necessary Sequel*—the organizational behavior of a typical profit-oriented multinational corporation is compared to the profile of a sociopath.<sup>176</sup> The behavioral resemblances appear to be troubling—"[s]elf-interested, manipulative, avowedly asocial, self-aggrandising, unable to accept responsibility for its own actions or feel

170. FRANKENSTEIN (Universal Pictures 1931).

171. Lee Pfeiffer, *Frankenstein*, ENCYCLOPEDIA BRITANNICA (Mar. 6, 2019), <https://www.britannica.com/topic/Frankenstein-film-by-Whale> [<https://perma.cc/TUV6-9QWE>].

172. *Id.*

173. *Id.*

174. TRANSCRIPT: *Bernie Sanders meets with the Daily News Editorial Board, April 1, 2016*, Daily News (Apr. 4, 2016, 4:17 PM), <https://www.nydailynews.com/opinion/transcript-bernie-sanders-meets-news-editorial-board-article-1.2588306> [<https://perma.cc/QB7B-8YUP>].

175. See generally Steve Denning, *What's Wrong With Big Business?*, FORBES (Apr. 11, 2016, 1:29 PM), <https://www.forbes.com/sites/stevedenning/2016/04/11/is-big-business-destroying-the-fabric-of-america/?sh=50f0f9005d22> [<https://perma.cc/6ZYB-FZNF>] (describing the widespread criticism of corporate entities from a variety of individuals and institutions).

176. See *The New Corporation*, NEW CORPORATION, <https://thenewcorporation.movie/> [<https://perma.cc/G3VX-FJUR>] ("The Corporation (2003) examined an institution within society and diagnosed it as psychopath. With The New Corporation co-directors Joel Bakan and Jennifer Abbott are back with their lightning-rod of a sequel that reveals a world now fully remade in the corporation's image, perilously close to losing democracy.").

remorse—as a person, the corporation would probably qualify as a full-blown psychopath.”<sup>177</sup> My point here is that Dick Fuld could be rightfully vilified as a sociopath leading a corporation as portrayed in the documentary, but our current legal system is constructed on the principle that a corporation is a fictitious person with sociopathic behavioral traits. As such, the film clearly demonstrates the dangers of limited liability within the corporate form. It illustrates the negative consequences of no personal accountability for corporate individuals and offers the reflection that if souls are not damned—and bodies not kicked—more global financial crises will occur. *Inside Lehman Brothers* shows that “Wall Street megabanks aren’t just too big to fail, they’re increasingly too big to jail.”<sup>178</sup> In Lehman’s case, it failed, went bankrupt, and caused a nuclear cataclysm with its sudden and unexpected fall. Why then didn’t any Wall Street people go to jail after the financial crisis?<sup>179</sup>

*Inside Lehman Brothers* shows that the character and integrity of people have a direct influence on the organizational behavior (psychological processes and structures) and corporate culture of the company. Effective corporate governance relies on effective ethical codes that must be communicated in organizations and assimilated into their cultures.<sup>180</sup> Moreover, effective corporate governance first and foremost relies on people leading the corporation. The managerial tone set at the top of the corporate entity is not theoretical, it is real and applicable to all aspects of business ethics for organizations. As such, the moral competencies of

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177. Simon Caulkin, *Portrait of a Corporate Psychopath*, *GUARDIAN* (Oct. 23, 2004), <https://www.theguardian.com/business/2004/oct/24/politics.money> [https://perma.cc/FH7R-3U NN].

178. Arthur E. Wilmarth Jr., *Turning a Blind Eye: Why Washington Keeps Giving in to Wall Street*, 81 *UNIV. CIN. L. REV.* 1283, 1379 (2013).

179. *See id.* at 1446 (“Wall Street’s political machine has thus far succeeded in watering down Dodd-Frank’s statutory language and in undermining the implementation of those provisions that survived the legislative gauntlet.”).

180. *See* Betsey Stevens & Scott Buechler, *An Analysis of the Lehman Brothers Code of Ethics and the Role It Played in the Firm*, 10 *J. OF LEADERSHIP, ACCOUNTABILITY & ETHICS* 43, 43 (2013) (“Corporate ethical codes are documents designed for internal and external audiences which state the major philosophical values embraced by an organization. Effective codes define the responsibilities of the organization to stakeholders, outline expected conduct for employees and set the ethical parameters of the organization by articulating what is acceptable and what is not. . . . They have the ability to transform organizational cultures and function best when communicated effectively and culturally embedded in the organization; otherwise they remain as separate documents that are often seen as external to the company’s mission and purpose.”).

corporate leaders are essential.<sup>181</sup> Research in the field of corporate governance explains that “[m]arket realities, including accepted business models, cognitive limitations, and heuristics, as well as personality traits of corporate actors, all combine to create a corporate culture[ ]” and influence market conditions.<sup>182</sup> Again, it is possible to say that “[t]his corporate culture is an important institutional influence on corporate behavior—an influence distinct and perhaps more important than the influence of government standards, policies, and actions.”<sup>183</sup> The documentary thus shows that personality traits of powerful CEOs, like Dick Fuld, trigger emotional responses that affect not only the corporate culture, but also, influence responses to Wall Street market conditions.

With all this said, does our response to the question change? Is Dick Fuld the villain *and* is Wall Street simply full of bad people who are greedy and acting out of vanity? Perhaps, but this would appear to be an oversimplification of *Inside Lehman Brothers* and the reality on Wall Street, as exposed in the book *Why They do It* by Professor Soltes.<sup>184</sup> Soltes suggests “[t]hrough numerous laboratory experiments, researchers [in the fields of psychology and behavioral ethics] have demonstrated that individuals [in the American financial industry] are more likely to engage in dishonest acts than they themselves believe (i.e.,] people believe that they are more honest than they turn out to be in practice).”<sup>185</sup> As a result, “[t]he considerable amount of misconduct that arises but goes largely unsanctioned by public agencies raises the question of the most effective regulatory and enforcement strategy to reduce corporate malfeasance.”<sup>186</sup> Dick Fuld and his partners in crime might be *some* of the villains in the story, but the federal regulators are also equally responsible for the Lehman Brothers scandal. In this sense, the problem does not only exist in the private sector but also in the public

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181. See Sunnie Giles, *The Most Important Leadership Competencies, According to Leaders Around the World*, HBR (Mar. 15, 2016), <https://hbr.org/2016/03/the-most-important-leadership-competencies-according-to-leaders-around-the-world> [<https://perma.cc/W9Q9-JMSH>] (describing a study in which 67% of respondents voted high ethical and moral standards as a necessary leadership competency).

182. Vincent Di Lorenzo, *Corporate Wrongdoing: Interactions of Legal Mandates and Corporate Culture*, 36 REV. BANKING & FIN. L. 207, 238 (2016).

183. *Id.* at 238–39.

184. Eugene Soltes, a professor at Harvard Business School, was one of my main subject matter experts for my first film *Collared*. He also acted as one of my main subject matter experts for the online accredited CLE course I researched and developed based on the film *Inside Lehman Brothers*.

185. Eugene Soltes, *The Frequency of Corporate Misconduct: Public Enforcement Versus Private Reality*, 26 J. FIN. CRIME 923, 930 (2019).

186. *Id.* at 932.

sector. As such, the documentary shows: first, we need profound legislative corporate law reforms on the legal status of corporations with more personal liability for the officials and the “directing mind” of the corporation—a.k.a. the “soul” of the organization; and second, more independence, prosecutorial power, and courage from federal regulators to go after and jail the souls of the corporation for their wrongdoings.<sup>187</sup> If regulators really intend to tackle this legal problem, they have the power to do so by making their proposed laws clear and concise to all citizens and by closing all loopholes.

V. CHIEF LOOPHOLE OFFICER OR CHIEF LEGAL OFFICER:  
WHAT IS THE ROLE OF LAWYERS IN LEHMAN'S WITH REPO 105?

We were pushing hard on legal questions and on accounting questions, to do things that to most reasonable people would seem illegal, but we would find a way to tell ourselves it was legal. But as time went on, I kept having these sort of troubling moments of wait a second. Is that really what I think it is? Are we really doing what that looks like we're doing and I started raising questions. One of my bosses just told me Look, these guys are here to just to make money. Not being a Boy Scout, stop thinking. They want to save the world. They want to treat everybody with respect. No, they're here to make money.<sup>188</sup>

—Oliver Budde, former associate general counsel at Lehman Brothers

The failure of Lehman Brothers and the financial crisis that followed raised questions of the adequacy of the accounting practices used by investment banking institutions to account for their mortgage transactions which made their financial statements appear better than they actually were. For example, something referred to as “Repo 105” transactions were increasingly employed by Lehman in 2007 and 2008.<sup>189</sup> The audit, led by Anton Valukas, revealed Lehman Brothers' use of this legal and accounting loophole.<sup>190</sup> This loophole allowed Lehman Brothers to hide its financial

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187. INSIDE LEHMAN BROTHERS, *supra* note 39.

188. *Id.*

189. Agatha E. Jeffers, *How Lehman Brothers Used Repo 105 to Manipulate Their Financial Statements*, 9 J. OF LEADERSHIP, ACCOUNTABILITY & ETHICS 44, 45 (2011).

190. Chun-Chia (Amy) Chang et al., *A Loophole in Financial Accounting: A Detailed Analysis of Repo 105*, 27 J. APPLIED BUS. RES. 33, 33 (2011); *see id.* at 44 (“Soon after it demise, the news of Lehman's use of Repo 105 came to light.”).

liabilities before filing a quarterly report with the SEC.<sup>191</sup> “U.S. auditing standards require that auditors demand expert legal evidence in relation to complex structures that claim to place assets beyond the control of the company.”<sup>192</sup> Thus, a “Repo 105 true sale accounting was not, therefore, possible without a legal opinion which stated that under English law the Repo 105s involved a true sale of the assets.”<sup>193</sup> When giving their opinion, “lawyers are expected to exhibit ‘judge-like’ qualities of independence and neutrality.”<sup>194</sup> Therefore, in corporate governance a lawyer’s “legal opinion has a function beyond informing the client about the applicable law.”<sup>195</sup>

A legal opinion provides for the client or a third party—for example, as in the case of Repo 105s, an auditor—external and independent verification of a legal position. Without it the client or the third party would not be able to act—to sign off on an accounting treatment or to rate a security. An opinion is more tangible, concrete and, for the capital markets, more meaningful than the mere provision of written or oral advice.<sup>196</sup>

Also, if the legal opinion was the product of a reputable and respected law firm, it would have more weight.<sup>197</sup>

*Inside Lehman Brothers* shows that lawyers, to a large extent, were also the cause of this scandal.<sup>198</sup> The Hollywood proverb, “[w]ith great power

191. *See id.* (“The questionable accounting technique, known as Repo 105, allowed Lehman Brothers to temporarily appear healthier in the eyes of its investors, creditors, and other interested parties.”); Chun-Chia (Amy) Chang et al., *supra* note 190, at 33. (“By reporting repos as sales of assets, Lehman was able to remove these toxic assets (e.g., subprime mortgage loans) from its books and use the cash received to reduce its liabilities.”).

192. David Kershaw & Richard Moorhead, *Consequential Responsibility for Client Wrongs: Lehman Brothers and the Regulation of the Legal Profession*, 76 MOD. L. REV. 26, 40 (2013) (footnote omitted).

193. *Id.*

194. *Id.* (footnote omitted).

195. *Id.*

196. *Id.* (footnote omitted).

197. *See id.* (footnote omitted) (“As the law firm as a whole signs and stands behind it, the opinion is viewed as being more independent and, therefore, more reliable than the mere provision of advice by a single partner.”).

198. *See id.* at 27 (“Clearly lawyers did not cause the collapse of Lehman, but Linklaters, a London headquartered corporate law firm, provided advice and a legal opinion which was an important component in enabling Lehman to implement suspect accounting practices.”). “The high-profile failure of Lehman Brothers provides a unique opportunity to explore these questions in the context of the provision of a legal opinion by a magic circle law firm—a legal opinion which, although as a matter of law was accurate, was a necessary precursor to an accounting treatment by Lehman Brothers which was described by the Lehman’s Bankruptcy Examiner as ‘balance sheet manipulation.’” *Id.* at 26.

comes great responsibility”—popularized by the film *Spider-Man*<sup>199</sup>—captures this notion. In today's highly interconnected world, individuals have both more responsibility and agency. Yet, at the same time, individuals often rely on the acts and omissions of others. *Inside Lehman Brothers* demonstrates how corporate lawyers seemingly overlooked this responsibility when they failed to foresee or act on critical correlations that might have prevented, or at least mitigated, the crisis.<sup>200</sup> In other words, lawyers, Wall Street employees, and financial giants alike appear to believe this simple, yet wise adage, does not apply to them.

The Forbes article, *It's OK to Hate Lawyers*, suggests “[p]eople hate lawyers because they represent the interests of people and corporations without really caring who they are, what they did, what harm they caused, or, how culpable they are.”<sup>201</sup> The hate for lawyers appears to relate back a long-lasting question in legal ethics: is it the ethical obligation of a transactional lawyer to act as the gatekeeper of integrity or to act on behalf of his client? Here, I think it is important to remind our readership that corporate lawyers are not agents of the government working for the public interest and welfare.<sup>202</sup> It is a bit simplistic to say that, but one must understand and appreciate the lawyer-entrepreneur model. If the lawyer is to survive and thrive in the legal industry, a client-centric orientation and a natural allegiance to the client is required. Simply put, whoever pays the lawyer's bills will have a large impact on their ethical orientation. Especially today, as competition is strong. If one corporate lawyer is not willing to give a compliant legal opinion that lacks ethics but can be justified by a technical loophole, another may be willing to do so.

Clients hire, pay, and supervise their lawyers. Therefore, the lawyer-client relationship is essentially based on a transaction where the corporate lawyer is not the master, but too often the puppet. This transactional relationship is an important obstacle to the professional, ethical independence required for a corporate lawyer to play the role of gatekeeper. It is necessary to know who will pay his fees and supervise him to determine the feasibility of him acting as a gatekeeper. The natural allegiances of the lawyer-client relationship create a structural conflict for the in-house lawyer who must

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199. SPIDER-MAN (Columbia Pictures 2002).

200. INSIDE LEHMAN BROTHERS, *supra* note 39.

201. Victoria Pynchon, *It's OK to Hate Lawyers*, FORBES (Jan. 18, 2013, 2:30 PM), <https://www.forbes.com/sites/shenegotiates/2013/01/18/its-ok-to-hate-lawyers/?sh=3f5e15b25694> [<https://perma.cc/LK6H-XG65>].

202. *See id.* (“We’re not a public service . . .”).



serve the interests of the corporation, as embodied by the interests of the shareholders.<sup>203</sup> One may presume the purpose of the corporate lawyer's legal advice is too often the short-term maximization of profit at any cost. As a result, corporate lawyers can be compared to loaded guns.

To avoid this analogy, one may promote a "virtue ethics approach to moral dilemmas,"<sup>204</sup> but this approach is not practical. Lawyers are not employees of the government or the public, but rather of regular folks who also need to pay their bills. As such, the role of the lawyer-entrepreneur must be considered in legal ethics.<sup>205</sup> Even physicians, with their renowned Hippocratic Oath,<sup>206</sup> appear to be facing the same problem. They "oftentimes face intractable situations of dual loyalties and competing obligations."<sup>207</sup> The physician-entrepreneur model is also important to consider and appreciate when we talk about ethics for physicians.<sup>208</sup> As soon as money is intertwined with an ethical obligation for a professional, there will be ethical tensions and problems with his deontological obligations. For example, should we let a physician who prescribed bad

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203. The American Bar Association's Model Rules of Professional Conduct, . . . give substance to the lawyer's gatekeeper role primarily through two rules. The first is Model Rule 1.13, which identifies the "client" in the representation of an organization, including corporations. . . . The second rule defining a lawyer's role as gatekeeper is Model Rule 1.2(d), which restricts lawyers from knowingly assisting their clients in certain wrongful conduct. Rutheford B. Campbell, Jr. & Eugene R. Gaetke, *The Ethical Obligation of Transactional Lawyers to Act as Gatekeepers*, 56 RUTGERS L. REV. 9, 15–16 (2003) (footnotes omitted).

204. P. Gardiner, *A Virtue Ethics Approach to Moral Dilemmas in Medicine*, 29 J. OF MEDICAL ETHICS 297, 297 (2003) ("Virtue ethics is a framework that focuses on the character of the moral agent rather than the rightness of an action.").

205. *Cf.* Roiphe, *supra* note 23, at 653 (tracing how professionalism—which previously required lawyers to suppress their own self-interest in order to ascertain and pursue the public good—became synonymous with delivery of services in the 1970s).

206. See June M. McKoy et al., *Is Ethics for Sale? . . . Juggling Law and Ethics in Managed Care*, 8 DEPAUL J. HEALTH CARE L. 559, 560 (2005) ("The advent of managed care is commonly portrayed as improperly supplanting the principle that physicians consider the interests of individual patients above all else to a perfectly functional and consistent 2,000 year-old Hippocratic ethic.").

207. *Id.* Money and medicine are indivisible and often irreconcilable. See Eli Y. Adashi, *Money and Medicine: Indivisible and Irreconcilable*, 17 AM. MED. ASS'N J. ETHICS 780, 781 (2015) (asserting that medicine and money become further entangled when the role of the physician-entrepreneur is considered).

208. [T]here is a substantial overlap between the elements of professional formation in the legal and medical profession: (1) internalization of deep responsibility to the person served; (2) a commitment to excellence at the competencies needed to serve well; (3) moral reasoning; (4) understanding of interpersonal relationships; (4) adherence to ethical codes; (5) integrity; and (6) responsibility to the community and public good. Neil Hamilton & Sarah Schaefer, *What Legal Education Can Learn from Medical Education About Competency-Based Learning Outcomes Including Those Related to Professional Formation and Professionalism*, 29 GEO. J. LEGAL ETHICS 399, 433 (2016).

drugs to his patient which caused the patient's death to continue to practice? We certainly hope not. Similarly, regarding bar associations as regulatory bodies, should we allow a corporate attorney, like Lehman's, who caused great harm to a society, the ability to continue to practice?<sup>209</sup> Again, we hope not. Of course, in a perfect world, legal and accounting opinions would be ethical and provide cautions of their consequences. However, lawyers and accountants are not gatekeepers, nor should they be expected to be. Instead, they are "encouraged to exploit every loophole in the rules, take advantage of every one of their opponents' tactical mistakes or oversights, and stretch every legal or factual interpretation to favor their clients."<sup>210</sup> Consider this: when you visit your tax advisor or accountant, do you ask him or her, "Please make sure that I pay the maximum amount of taxes for the benefit of my society and community?" Or do you say, "Please make sure I get all my tax breaks and benefits in accordance with the law?"<sup>211</sup> My point here is that a lawyer is usually not the bad guy or, to take the words of Holmes, not the "Bad Man."<sup>212</sup> Instead, I argue, as Holmes did in *The Path of the Law*, that too often lawyers operate in a world where their clients care little for ethics or lofty conceptions of natural law and instead care simply about a narrow conception of the law that will allow

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209. The legal opinion provided to Lehman allowed for its bankruptcy and death. See Kershaw & Moorhead, *supra* note 192, at 27 (describing how Lehman's executives sought a particular legal opinion which furthered a predetermined course of action).

210. Christine Parker, *A Critical Morality for Lawyers: Four Approaches to Lawyers' Ethics*, 30 MONASH U. L. REV. 49, 60 (2004) (quoting Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 10 (1988)). This is ethically justified because as long as the lawyers for all parties in any action or matter act adversarially in the narrow interests of their own client, it is said that the legal system will make sure the right outcome ensues. Indeed, the adversarial advocate believes that for lawyers to act otherwise—that is, to judge potential clients before they have had their day in court—would be a presumptuous denial of justice to anyone who wants to use the legal system. *Id.*

211. The manufactur[ing] of factual indeterminacy in furtherance of tax avoidance activity constitutes potentially unethical attorney conduct. The structuring of facts toward tax avoidance is not merely the rendering of legal advice as contemplated by the Model Code of Professional Conduct, and instead may assist the Holmesian "bad man" client toward conduct that is normatively prohibited under tax laws. Bret N. Bogenschneider, *Professional Ethics for the Tax Lawyer to the Holmesian "Bad Man"*, 49 CREIGHTON L. REV. 775, 775 (2016).

212. See David Luban, *The Bad Man and the Good Lawyer: A Centennial Essay on Holmes's The Path of the Law*, 72 N.Y.U. L. REV. 1547, 1574 (1997) (criticizing Holmes's theory for neglecting to mention the lawyer-client relationship is not limited to advice but includes advocacy); see also Marco Jimenez, *Finding the Good in Holmes's Bad Man*, 79 FORDHAM L. REV. 2069, 2113–14 (2011) (footnotes omitted) (asserting Holmes's "bad man cannot be influenced by morality, he is by nature a rational animal, and can be influenced by the threat of sanctions."). "The bad man, in short, is the calculating man[.]" and can be influenced by the legal, financial, and reputational consequences of a legal risk. *Id.*

them to stay out of jail and avoid costly damages.<sup>213</sup> So why then would a lawyer, who is an agent for their client, care about ethics? Mathew Lee, a former Lehman senior vice president who enjoyed a rich income and prominent status in the financial world, explains this notion in the documentary, stating:

How do you make as much money as possible by getting where no one's gone before. And you have to dream up legal ways of making a lot of money. That to a lot of people who have ethical moral standards may seem quite illegal. But if there's no law, it's not illegal. So do it because you're gonna make some money. Investment banks operate in that fashion.<sup>214</sup>

As a reflection on the *Inside Lehman Brothers* film, I propose three creative solutions to ensure that Chief Legal Officers (CLO) become gatekeepers of integrity in corporations instead of the Chief Loophole Officers. First, government lawmakers must be responsible if they create loopholes because it is possible to prevent loopholes with strict liability.<sup>215</sup> For instance, the U.K. Bribery Act's (UKBA) "Failure of commercial organisations to prevent bribery" is the best known example of this concept and provides a potential solution.<sup>216</sup> Prior to 2010, United Kingdom (UK) bribery laws were considered inadequate with regards to combatting corporate commercial bribery.<sup>217</sup> This was evidenced in the UK's failure to prosecute a single

213. See Symposium, *The Path of the Law*, 78 B.U. L. REV. 699, 700 (1998) ("You can see very plainly that a bad man has as much reason as a good one for wishing to avoid an encounter with the public force, and therefore you can see the practical importance of the distinction between morality and law."); see also Richard W. Painter, *The Moral Interdependence of Corporate Lawyers and Their Clients*, 67 S. CAL. L. REV. 507, 554–55 (1994) (emphasizing the falsehood held by lawyers that they are "independent" from their clients in that they are not morally responsible for their clients' actions).

214. INSIDE LEHMAN BROTHERS, *supra* note 39.

215. "[S]trict liability is liability *without wrongdoing*. A defendant subject to strict liability must pay damages irrespective of whether she has met, or failed to meet, an applicable standard of conduct. Action that causes harm is all that is required." John C.P. Goldberg & Benjamin C. Zipursky, *The Strict Liability in Fault and the Fault in Strict Liability*, 85 FORDHAM L. REV. 743, 745 (2016).

216. Bribery Act 2010, c. 23, § 7 (U.K.) (providing guidance on what constitutes bribery and associated affirmative defenses therein under the laws of the United Kingdom); see David Kirk, *Criminalising Bad Bankers*, 76 J. CRIM. L. 439, 440–441 (2012) (arguing in favor of a form of strict liability offense similar to "s. 7 of the Bribery Act 2010 and the Money Laundering Regulations 2007," to hold criminal bankers accountable).

217. Anneka Randhawa & Lucy Rogers, *Reflections on the UK Bribery Act (Part I)*, WHITE & CASE (June 14, 2021), <https://www.whitecase.com/publications/alert/reflections-uk-bribery-act-part-i> [<https://perma.cc/VWP2-DUUM>]; see *What Is The Bribery Act 2010?*, DELTANET, <https://www.deltanet.com/compliance/anti-bribery-corruption/faqs/what-is-the-bribery-act-2010> [<https://perma.cc/V772-RATI>] ("The Prevention of Corruption Act 1916 was regarded by the Secretary of State for

case of bribery against a company.<sup>218</sup> “However, the UKBA’s section 7 offense circumvented this issue by criminalising the failure of commercial organizations to prevent bribery by associated persons.”<sup>219</sup> Thus, the question then becomes, whether United States corporate governance law should consider risk-taking that could systemically harm the public under the strict liability of “Failure to Prevent” like in the UKBA.<sup>220</sup> On one hand, “corporate risk-taking is certainly economically necessary and often desirable.”<sup>221</sup> However, my opinion is that, drawing from the UKBA, we should introduce a strict liability corporate offence for failing to prevent risk-taking decisions that could systemically harm the public “by persons associated with relevant commercial organisations (the Failure to Prevent Offence).”<sup>222</sup>

The UK Ministry of Justice Guidance (UKBA Guidance), issued in March 2011, lays out six principles intended to inform a commercial organization’s approach for establishing adequate procedures.<sup>223</sup> Focusing on active and effective procedures, rather than paper policies, I have revised these six principles to make them applicable to Lehman’s story, and added the “Failure to Prevent Offence” provision to combat excessive risk-taking on Wall Street that could cause harm to the public:

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Justice in 2009, as old and anachronistic. Therefore, it was widely agreed that a new legislative force was needed.”)

218. See Randhawa & Rogers, *supra* note 217 (“Historically, UK prosecutors have struggled to secure convictions against corporations and this has been attributed in large part to the requirement to prove wrongdoing by the directing mind and will of a company under the traditional ‘identification principle[.]’”).

219. *Id.* The Act stipulates that failure to prevent bribery is a strict liability offense applicable only to relevant commercial organizations, i.e., corporate directors and officers such as board members, CEOs, COOs, CFOs and CLOs. “[A] bribe paid anywhere in the world by a commercial organization’s ‘associated person’ with the intention of benefiting the organization (even without its knowledge) will cause the organization to commit an offence, and the only defense is that it had in place ‘adequate procedures’ to prevent bribery.” *Summary of the UK Bribery Act 2010*, NORTON ROSE FULBRIGHT (May 2020), <https://www.nortonrosefulbright.com/en-us/knowledge/publications/b0080606/summary-of-the-uk-bribery-act-2010-may-2020> [https://perma.cc/HBQ7-49CS].

220. Bribery Act 2010, c. 23, § 7 (U.K.).

221. See Steven L. Schwarcz, *Misalignment: Corporate Risk-Taking and Public Duty*, 92 NOTRE DAME L. REV. 1, 23 (2016) (quoting Gabriel Jimenez et al., *How Does Competition Impact Bank Risk-Taking?* (Fed. Reserve Bank of S.F. Working Paper Series No. 2007-23, 2007), <http://www.frbsf.org/economic-research/publications/working-papers/2007/wp7-23bk.pdf> [https://perma.cc/14SZ-6SA4]).

222. *Summary of the UK Bribery Act 2010*, *supra* note 219.

223. Lawrence J. Trautman & Joanna Kimbell, *Bribery and Corruption: The COSO Framework, FCPA, and U.K. Bribery Act*, 30 FLA. J. INT’L L. 191, 218 (2018).

1. **Implementing a smart, corporate compliance management framework with proportionate risk procedures:** The goal here, in practice, is to build a smart, corporate compliance management framework that is not too cumbersome or red-taped. What is needed is a practical framework that considers the importance of realizing that in business practice, risk is not solely about threats but also about opportunities. The risk management framework must encourage decision-making oriented towards smart risks that make sense and do not have unacceptable ethical and reputational consequences for shareholders and the public/stakeholders;
2. **Securing top-level commitment for an ethical tone-at-the-top:** Any corporate compliance management framework promoting ethics in business relies on individuals and their ethical leadership. Senior managers must, therefore, be personally involved and dedicated to promoting a culture of integrity. This means that an ethics management culture combines a concern for the law with an emphasis on managerial responsibility for ethical behavior. This approach allows lawyers to consider the ethical and reputational consequences of their legal advice rather than focusing on finding technical loopholes. For example, in practice, this means not doing what the Lehman Brothers did, and avoiding using technical loopholes such as Repo 105;
3. **Conducting a meaningful risk assessment:** Corporate lawyers and other experts, such as accountants, need to assess the risks not only from a technical dimension with their legal or accounting expertise, but also for the practical consequences. They must consider the corporate, financial, and ethical consequences for shareholders and the reputational consequences of the legal or accounting risk for making a specific decision, such as using Repo 105. This will help foster more reasonable risk-taking decisions that take into account a sustainable perspective and not just a short-term, profit-maximizing view that can lead to bankruptcy and harm to employees, investors, and the general public;
4. **Conducting due diligence for both shareholders and stakeholders:** Ensuring procedures are in place to monitor for potential risks to shareholders, risks for stakeholders, risk to employees, and risks to agents and third parties;

5. **Fostering stakeholder-centric communication and investor engagement:** Ensuring the compliance framework, including the code of ethics and organizational policies for managing the risks of corporate corruption, are well communicated both internally and externally. Good communication means committing to your ethical obligations. Put differently, a person who always says he or she wants to be honest but consistently acts dishonestly will lose all credibility. This communicative engagement means you must walk what you talk. Investors are involved because they are directly affected by the decisions the corporation makes, and they can influence the implementation of its decisions. Conversely, stakeholders (e.g., government, taxpayers, and employees) are also directly affected by the company's decisions and can influence their implementation. Thus, communication is as essential to investors as it is to stakeholders; and
6. **Performing continuous monitoring and reviewing the smart corporate compliance management framework:** Nothing is static. It is an iterative process that requires constant improvement and long-term commitment. You must be willing to revise and improve. It is not only a technical commitment to revise your bureaucratic procedures, but also a moral commitment to want to do better, to improve. This is the basis of ethical leadership.

I argue that a new provision of the "Failure to Prevent Offence," based on the UKBA, should be created in federal corporate laws to combat the type of excessive risk-taking on Wall Street that harms the public, such as in the Lehman case. Admittedly, such thinking might be idealistic, but the global COVID-19 pandemic has emphasized the importance of our national security interests and collective welfare. Therefore, such law is a necessary enforcement action designed to protect our national security interests and welfare against globally catastrophic events, such as Lehman's bankruptcy which led to a global financial crisis.<sup>224</sup>

A second creative solution to mitigate the risk of CLOs becoming Chief Loophole Officers is to require banks and financial institutions to have

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224. Lehman Brothers had a sham paper corporate compliance program only used for concealing or deflecting liability. See Stevens & Buechler, *supra* note 183, at 43 ("The study revealed that the culture at Lehman was not tied to the code and it did not play a significant role in the organization").

independent audit committees selecting, compensating, and supervising the CLO and in-house corporate lawyers.<sup>225</sup> In this regard, an emphasis must be put upon diligently selecting the corporate lawyers based upon their moral compass and ethical leadership abilities. These committees are an excellent alternative to better defend and represent the interests of shareholders and stakeholders because they are independent of the corporation. This requirement could be met by the companies themselves through a change in their corporate governance structure, but would likely only be incorporated through federal regulatory action. It could also be enforced through sanctions, or even better, through incentives such as tax credits, because, ultimately, it is always the taxpayers who must bail out Wall Street.<sup>226</sup>

Third, superior professional regulations should be enforced to rebuild the public's trust in lawyering and the essential role of lawyers in our society.<sup>227</sup> Bar associations across the world need to better regulate the "grey areas," as law is defined as neither black nor white but as a shade of grey. Additionally, new professional regulations need to be imposed to ensure lawyers are mindful of these grey ethical areas when defending their client's interests. Legal opinions, such as Repo 105 in Lehman's case, I argue, should be subject to disbarment for corporate lawyers who provide them. This, in effect, would make it very difficult for a corporation to shop around and find a lawyer and/or law firm willing to leverage unethical loopholes that can cause harm to society.

## VI. FILM'S LEGACY AND WHAT HAVE WE LEARNED FROM LEHMAN'S BANKRUPTCY?

*Inside Lehman Brothers* is the picture-perfect case study to discuss corporate compliance, corporate misconduct, whistleblowing, and ethical decision-

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225. See Campbell & Gaetke, *supra* note 203, at 70–71 (“[A]s a matter of corporate governance, lawyers for a corporation should be selected, compensated, and supervised by independent audit committees.”).

226. See Matt Taibbi, *Secrets and Lies of the Bailout*, ROLLING STONES (Jan. 4, 2013, 9:25 PM), <https://www.rollingstone.com/politics/politics-news/secrets-and-lies-of-the-bailout-113270/> [<https://perma.cc/PV8X-AS42>] (suggesting the idea that the taxpayer was stepping in only temporarily to prop up the economy was a lie, and what we actually ended up doing was “committing American taxpayers to permanent, blind support of an ungovernable, unregulatable, hyperconcentrated new financial system that exacerbates the greed and inequality that caused the crash . . .”).

227. See Campbell & Gaetke, *supra* note 203, at 55–56 (“What is needed is a standard that reaches both incompetent and evasive lawyers, and this requires an objective criterion rooted firmly in a reasonableness or negligence standard.”).

making in practice. I start my analysis with an infamous quote from the former CEO of Lehman Brothers, Dick Fuld, that illustrates the pathological culture of Wall Street—a culture of privileged white men acting and behaving like frat boys: “I agree we need some help—but the [BROs] always wins!!”<sup>228</sup> This statement is one of the most evocative of the toxic corporate culture at Lehman Brothers. Of course, in 2008, we all could see how much “the BROs” won as they tasted bitter bankruptcy.

In terms of corporate compliance, the film illustrates a toxic tone-at-the-top<sup>229</sup> and a lethal culture of machismo competition. Research in the field of white-collar crime shows that a culture of ultra-competition is a greater predictor for the likelihood of committing corporate misconduct and crime than greed.<sup>230</sup> In other words, vanity is often more dangerous than greed.<sup>231</sup> In concrete, a culture of ultra-competition leads to excessive risk-taking as illustrated in Lehman’s story—something that was all too prevalent on Wall Street leading up to the 2008 global financial crisis. What we have learned from the documentary is that a corporate culture, similar to a drug, can be toxic, contagious, and addictive:

[Y]ou are on your toes. You’re watching your back. You had to do the best. There was just a certain vibrancy all the time. But I enjoyed that. It’s difficult to describe an electric feeling but I’d never felt so intense all day, as I did at

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228. See La Roche, *supra* note 41 (quoting an email from Dick Fuld, former Lehman Brothers CEO, to David Goldfarb, former Chief Strategy officer for Lehman Brothers); see also Jake Zamansky, *The Chickens Come Home to Roost for Standard & Poor’s*, FORBES (Feb. 5, 2013, 6:39 PM), <https://www.forbes.com/sites/jakezamansky/2013/02/05/the-chickens-come-home-to-roost-for-standard-poors-2/?sh=92f1890375fc> [<https://perma.cc/RVM5-JFEJ>] (capturing the bitter reality of the situation when, in an email sent by a Standard & Poor’s employee prior to the financial crisis, the employee wrote, “[I]et’s hope we are all wealthy and retired by the time this house of card[s] falters.”)

229. See Fabiana Lacerca-Allen, *Next-Level Compliance: What Every Board Member Should Know*, 10 INT’L IN-HOUSE COUNS. J., AUTUMN 1, 4 (2016) (explaining the crucial role leaders play in establishing the culture of compliance); ASS’N CERTIFIED FRAUD EXAM’RS, TONE AT THE TOP: HOW MANAGEMENT CAN PREVENT FRAUD IN THE WORKPLACE 1, [https://www.acfe.com/uploadedFiles/ACFE\\_Website/Content/documents/ton-at-the-top-research.pdf](https://www.acfe.com/uploadedFiles/ACFE_Website/Content/documents/ton-at-the-top-research.pdf) [<https://perma.cc/HKK9-ATTQ>] (“When those in top positions set the wrong, unethical example by committing fraud, their employees will take heed and follow in their bosses’ fraudulent footsteps, creating an entire culture of workplace fraud.”).

230. See James William Coleman, *Toward an Integrated Theory of White-Collar Crime*, 93 AM. J. SOCIO. 406, 417 (1987) (“Moreover, the key components of the culture of competition in motivating the white-collar criminal—the desire for wealth and success and the fear of failure—have, if anything, grown stronger in the 20th century.”).

231. See *id.*



Lehman Brothers. It sounds crazy, but actually was good. Because it's like a drug. Another drug we were on.<sup>232</sup>

The documentary goes on to show that the culture of “bros or frat boys” still prevails on Wall Street. One source of this poisonous frat culture is the lack of diversity on Wall Street, as today, it is still predominantly run by white males who often come from privileged backgrounds.<sup>233</sup> Therefore, the need for diversity in corporate boardrooms to dismantle the “bro culture” in Wall Street and corporate America is clear.<sup>234</sup> Research shows that diversity improves ethical leadership in an organization.<sup>235</sup> In this sense, a company must always think in terms of stakeholder engagement, because without public trust—especially for a company trading on the stock exchange—nothing can be sustainable and optimal for its operations.<sup>236</sup> A company must think about all its stakeholders, including investors, employees, consumers, and regulators. In the current context of deep social and racial divides in American society and around the world, it is crucial that companies think in terms of human rights and human dignity. Based on my understanding of the documentary, I do not believe that Lehman Brothers took into consideration the human consequences of their actions even once.

Diversity is also needed in the corporate structure. Consider George Floyd's murder in Minneapolis in 2020. While there always seems to be *some* emphasis on anti-racism, Floyd's murder ignited the “largest racial justice protests in the United States since the Civil Rights Movement.”<sup>237</sup> And this

232. INSIDE LEHMAN BROTHERS, *supra* note 39.

233. Emma Graham, *Wall Street is under pressure over its lack of diversity*, CNBC (July 2, 2020), <https://www.cnbc.com/2020/07/02/wall-street-is-under-pressure-over-its-lack-of-diversity.html> [<https://perma.cc/7ZWN-WZV7>] (“Wall Street has long been an industry dominated by [w]hite males. At Goldman Sachs, just 2.7 percent of executives, senior officials and managers are Black. At Citi, 2 percent of executives and senior managers are Black.”).

234. *Cf.* Steven A. Ramirez, *Diversity and Ethics: Toward an Objective Business Compliance Function*, 49 LOY. U. CHI. L.J. 581, 595–601 (2018) (asserting that diversity is a strategic advantage for compliance and ethics).

235. *Id.*

236. See Neil Jeffrey, *Stakeholder Engagement: A Road Map to Meaningful Engagement: #2 in the Doughty Centre 'How to do Corporate Responsibility' Series*, DOUGHTY CENTRE, CRANFIELD SCHOOL OF MANAGEMENT, at 3 (July 2019), <https://www.fundacionseres.org/lists/informes/attachments/1118/stakeholder%20engagement.pdf> [<https://perma.cc/GU4K-M4FM>] (“An organisation cannot be serious about Corporate Responsibility unless it is serious about stakeholder engagement—and vice versa.”).

237. Jason Silverstein, *The global impact of George Floyd: How Black Lives Matter protests shaped movements around the world*, CBS NEWS (June 4, 2021, 7:39 PM), <https://www.cbsnews.com/news/george-floyd-black-lives-matter-impact/> [<https://perma.cc/8HSE-2R46>].

time, the movement appears to have gone far beyond simply protesting in the street—“[t]he outpouring of rage and empathy that followed shook the foundations of Corporate America in unprecedented ways[.]”<sup>238</sup> In fact, “Floyd’s murder changed Black Lives Matter from a controversial social justice undertaking to an almost ubiquitous corporate mantra seemingly overnight. Fortune 1000 companies poured billions of dollars into programs designed to address systemic racism and committed to fulfilling quantifiable racial hiring quotas after decades of resisting them.”<sup>239</sup> Thus, anti-racism has been accentuated by the murder of George Floyd and Black Lives Matter (BLM). In line with this shift, a company must represent the demographics and cultural diversity of its customers, and of its country in general. This allows the company to have a social conscience and to better understand the differences in socio-cultural and ethical sensitivities created by these segments of the population. In short, it aids them in acting more ethically. Diversity is something that must be managed actively, not passively, in order to reap the benefits. For example, instead of it being a risk, diversity becomes a strategic advantage. Further, cultural and racial diversity in senior management or in a board of directors allows room for differing opinions and options to optimize the performance of the company at both managerial and ethical levels. For this reason, requiring a corporate diversity disclosure mandate on the businesses traded on the stock exchange is something that exists in many countries, such as Canada.<sup>240</sup>

In terms of corporate misconduct, the film illustrates that there is virtually zero accountability, as Dick Fuld and Wall Street executives were never charged with anything whatsoever.<sup>241</sup> Is our justice system incapable of

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238. Chauncey Alcorn, *George Floyd’s death was a wake-up call for Corporate America. Here’s what has—and hasn’t—changed*, CNN BUSINESS (Oct. 7, 2021), <https://www.cnn.com/2021/05/25/business/corporate-america-anti-racism-spending/index.html> [<https://perma.cc/NS6N-RJ2Q>].

239. *Id.*

240. Jennifer Jeffrey et al., *Canada is first jurisdiction worldwide to require diversity disclosure beyond gender; Diversity disclosure rules will apply to federally incorporated public companies effective Jan. 1, 2020* (Jul. 30, 2019), <https://www.osler.com/en/resources/regulations/2019/canada-is-first-jurisdiction-worldwide-to-require-diversity-disclosure-beyond-gender-diversity-disc> [<https://perma.cc/LVC2-KX9W>] (“Effective January 1, 2020, corporations governed by the *Canada Business Corporations Act* (CBCA) with publicly traded securities will be required to provide shareholders with information on the corporation’s policies and practices related to diversity on the board of directors and within senior management. . .”).

241. INSIDE LEHMAN BROTHERS, *supra* note 39. See Michael Winston, *Why have no CEOs been punished for the financial crisis?*, HILL (Dec. 8, 2016, 6:10 PM), <https://thehill.com/blogs/pundits-blog/finance/309544-why-have-no-ceos-been-punished-for-the-financial-crisis> [<https://perma.cc/Q6LW-S3Q3>] (“The biggest banks—JPMorgan Chase, Bank of America, Citibank, Deutsche Bank and

pressing these cases to their rightful conclusion? Or just unwilling? No accountability is dangerous for the fabric of the American society and goes against all democratic principles founded on a rule of law society where no one should be above the law—not even Wall Streeters. Thus, as a result of these failures to keep corporations accountable, the banks are unafraid, unpunished and unapologetic, and no longer hope for support of their corrupt behavior. They expect it.

Regarding whistleblowing in practice, the film illustrates that despite potential financial rewards, whistleblowing is extremely hard and taxing. The documentary shows that the consequences of whistleblowing in white-collar crimes can be analogized to whistleblowing in blue-collar crime, meaning “snitches get stitches.”<sup>242</sup> While whistleblowing laws are important, they do little to incentivize whistleblowers’ actions beyond the altruistic and ethical leadership motive that may be inherent in the beliefs of the whistleblowers. Instead, the laws should adequately protect and compensate whistleblowers for the harms they face when they decide to blow the whistle.

In terms of ethical decision-making in practice, the film illustrates that we need to look past Dick Fuld, the *supposed* villain, and instead introduce meaningful reforms of corporate law and governance. Professional regulatory sanctions for lawyers and accountants who have been complicit in wrongdoing should also be implemented. The documentary shows that corporations have been weaponized, and that legal and business professionals using this weapon need to be better regulated. Oliver Budde said he never imagined that Lehman Brothers would take the world down the way it did.<sup>243</sup> In response to this, my question becomes, if Lehman and other giants on Wall Street brought the world down, as claimed by Budde, who is more powerful today, states or corporations?<sup>244</sup> The answer may

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recently, Wells Fargo—were accused of fraud and contributing to financial decline not seen since the great depression, but hold no accountability.”).

242. See Meghan Casserly, *When Snitches Get Stitches: Physical Violence As Workplace Retaliation On The Rise*, FORBES (Sep 21, 2012 10:24 AM), <https://www.forbes.com/sites/meghancasserly/2012/09/21/when-snitches-get-stitches-physical-violence-as-workplace-retaliation-on-the-rise/?sh=79910fb31ffa> [https://perma.cc/52TM-ERRY] (“A new report from the Ethics Resource Center shows that physical violence at work as retaliation against whistle blowing is on the rise. Since 2009, the percentage of people who’ve reported misconduct at work and were victims of physical harm jumped more than 25%.”).

243. INSIDE LEHMAN BROTHERS, *supra* note 39.

244. See Milan Babic et al., *Who Is More Powerful—States or Corporations?*, CONVERSATION (July 10, 2018, 11:14 AM), <https://theconversation.com/who-is-more-powerful-states-or-corporatio>

not be as simple as one or the other, as we now live in an era where the interplay between state and corporate power shapes the reality of international relations more than ever. *Inside Lehman Brothers* makes us realize that powerful corporations like Lehman Brothers can indeed take the world down the just as it did in 2008. In this sense, the power of the state did not disappear with globalization, but it transformed. “It now competes with corporations for influence and political power.”<sup>245</sup> Thus, our world is more interconnected than ever, and the excesses of Wall Street have global consequences for humanity.<sup>246</sup>

One area the documentary does not discuss is the small corporate oligarchy. Today, our markets are dominated by a small corporate oligarchy. And, in addition to the abuses and excesses of a multinational financial giant during the financial crisis, the COVID-19 crisis has also created a climate of instability and caused many bankruptcies, which promote the hegemony of big business—especially Big Tech—and disadvantage small businesses. Prior to the pandemic, small businesses were considered the “backbone of the economy.”<sup>247</sup> But despite providing the economy with an overwhelming number of benefits, small businesses do not recoup the same government support as large corporations. Small businesses do not receive the same tax breaks that are provided for large corporations, they do not receive the same local and state incentives for things like production facilities, or research and development, nor are they equipped to navigate the convoluted area of law that is bankruptcy. Conversely, as with Lehman Brothers, similar to the 2008 bailout packages which funneled hundreds of billions to Wall Street and padded executives already-cushy pay packages, the CARES act, intended to go to those small businesses in need, has disproportionately gone to the wealthiest corporations and individuals. And further, large companies can navigate bankruptcy laws and courts better than small and medium-sized companies.<sup>248</sup> Finally, the bankruptcy courts

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ns-99616 [https://perma.cc/V3RC-SZUS] (arguing “that globalisation has brought about a global structure in which state power is not the exclusive governing principle anymore”).

245. *Id.*

246. *See* Zales, *supra* note 46, at 168 (discussing the harm of Lehman’s fall and Wall Street excess on American and global stability).

247. *See* *Small Businesses Are the Backbone of the Economy*, BETTER ACCOUNTING (Aug. 11, 2020), <https://betteraccounting.com/small-businesses-are-the-backbone-of-the-economy/> [https://perma.cc/J92J-C69G] (“99 percent of all businesses in the United States are small businesses.”).

248. *See* DAVID SKEEL, BANKRUPTCY AND THE CORONAVIRUS: PART II 3 (2020) (discussing the possible fallout of the COVID-19 crisis on small business and bankruptcy filings).

in the COVID-19 crisis are clogged and the long delays make it even more difficult for small businesses to recover.<sup>249</sup>

Another topic the documentary failed to address is the role of anti-trust laws. The pandemic gave way for Big Tech companies such as Amazon, Netflix, Facebook, and Google to grow even more gigantesque. What will be the role of anti-trust legislation in light of the pandemic? Anti-trust law enforcement seems a story of the past, as the anti-competition and unethical behaviors are increasingly concentrated not in the banking field but in the Big Tech field. The most lucrative market is no longer about investing money in real estate and stocks but about our personal data. This means that corporations use our daily life habits to better influence and control us. This is the basis for the development of artificial intelligence without which data cannot develop—we are now aiming for a data-driven economy. So, the story of Lehman Brothers is a story both of our past and of our present, but we must think about the future and see how Amazon, Facebook or Google will be able to cause global crises as Lehman Brothers did. This is something that we are aware of, but there is very little action. The documentary discusses Lehman Brothers and the other Wall Street financial giants that came to cause a global financial crisis.<sup>250</sup> I believe that we also need to keep an eye on Big Tech because they have the potential to create not only a financial crisis but also a socio-political crisis impacting all our democratic institutions, particularly with the emergence of artificial intelligence.

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249. *See id.* (“Bankruptcy filings also are likely to increase dramatically, as consumers and businesses seek either to restructure their debt or to turn over their assets to the court and leave their current obligations behind.”).

250. INSIDE LEHMAN BROTHERS, *supra* note 39.

## VII. EPILOGUE

*Inside Lehman Brothers*, Jennifer Deschamps' documentary, is an excellent case study for applied business and legal ethics learning.<sup>251</sup> As a lawyer-filmmaker, I have seen the educational and transformational power of this documentary in action. We presented the CLE course I researched based on *Inside Lehman Brothers* at the Bank of Canada (equivalent to the Federal Reserve Bank which is the central banking system of the United States). The film allowed for an advanced and passionate discussion on ethics and whistleblowing within their organization. CLE programs such as *Inside Lehman Brothers* were available to members of the Canadian Bar Association (CBA), sister organization of the American Bar Association (ABA).<sup>252</sup> *Inside Lehman Brothers* is offered by Chartered Professional Accountants (CPA) Canada—one of the largest accounting organizations in North America with more than 220k members—to launch a series titled, *The Importance of Ethics: UDocs Video Series*.<sup>253</sup> This docuseries features two of my films (*Collared* and *The Ai Taxman*) and Jennifer Dischamps' *Inside Lehman Brothers*. The objective is to offer a fresh perspective on the importance of ethics for business and accounting professionals founded on visual legal advocacy. So far, the feedback has been excellent and confirms that storytelling based on a collection of short documentary films presented as engaging case studies based on real-life events is excellent for learning ethics.

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251. As a professor of ethics, I argue in favor of applied legal ethics as the practical application of moral considerations with respect to real-world legal solutions offered to clients. I am a proponent of Dr. Gentile, who has researched and developed Giving Voice to Values (GVV). GVV is an action-oriented model, similar to a training program for professional athletes, which is why it appeals to me as a former college football athlete. GVV helps to build our muscles for ethical leadership. It relies on our skills, our mental strength, our dedication, and in general our practice as for sports. See generally Mary C. Gentile, *Giving Voice to Values: An Action-Oriented Approach to Values-Driven Leadership*, 79 S.A.M. ADVANCED MGMT. J. 42, 43 (2014) (exploring how one approach to integrating ethics and leadership has been used in educational settings across the globe). I had the pleasure of meeting Mary at an academic conference when she was a professor at Harvard. For a video on her research in the field of ethics, see <https://www.youtube.com/watch?v=Xqf1lj0Jdco>. See also Joshua P. Davis, *Teaching Values—The Center for Applied Legal Ethics*, 36 U.S.F. L. REV. 593, 593 (2002) (reflecting on how to educate law students about ethics through applied legal ethics).

252. *Inside Lehman Brothers: A Case Study in Compliance, Corporate Misconduct, Whistleblowing and Ethical Decision Making* is no longer available on this platform. See *UDocs: CBA at the Movies*, CANADIAN BAR ASS'N, <https://www.cba.org/Professional-Development/UDocs> [<https://perma.cc/5UWT-8SNL>].

253. *The Importance of Ethics: UDocs Video Series*, CPA, <https://www.cpacanada.ca/en/career-and-professional-development/webinars/leadership-management/business-ethics/importance-of-ethics-udocs-videos> [<https://perma.cc/K3EF-9DDL>].

The research and development of the online course based on *Inside Lehman Brothers* has allowed me to develop a relationship with Oliver Budde, who came to speak to my students. My objective is to make a short documentary on Oliver Budde to discuss his experience as an insider, whistleblower in the Wall Street financial world, and as a lawyer for whistleblowers like him.

In academia, I had the opportunity to present *Inside Lehman Brothers* to students in the mandatory course on Corporate Governance and Ethics that I am teaching for the EMBA, MBA and JD-MBA programs at the University of Ottawa. Oliver Budde's presentation in my class was supposed to last one hour, but it lasted more than two because my students asked so many questions after watching the documentary. They felt privileged to have an ethical lawyer and brave whistleblower share his lived experience with them. I received a lot of positive feedback. Many of my students mentioned that their experience in my course was one of the most memorable for their program. This is not only flattering, but also encouraging. New research explains why students forget—and what an educator, such as myself, can do about it.<sup>254</sup> Namely, research in the field of neuroscience has begun to suggest that the brain is actually designed to forget.<sup>255</sup> Thus, this research demonstrates the importance of strategies for retaining knowledge and ensuring the sustainability of learning that makes information stick in our brains.<sup>256</sup> The research concludes that the purpose of memory is primarily to make decisions and not to store information. The evidence for this research is the existence of cognitive biases such as racial or gender bias as discussed at the beginning of this Article. These cognitive biases are erroneous mental shortcuts that we use to facilitate our decision-making in this complex and often much too chaotic world.<sup>257</sup> So, my approach is also a way to help them memorize, in order to apply in practice, the things they are going to learn on the basis of the documentary and its characters as “law as lived experience.”

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254. Youki Terada, *Why Students Forget—and What You Can Do about It*, EDUTOPIA (Sept. 20, 2017), <https://www.edutopia.org/article/why-students-forget-and-what-you-can-do-about-it> [<https://perma.cc/TA2U-PTVZ>].

255. *Id.*

256. See Blake A. Richards & Paul W. Frankland, *The Persistence and Transience of Memory*, 94 NEURON 1071, 1071 (2017) (proposing that the interaction between two memory processes is responsible for the optimization of “memory-guided decision-making in changing and noisy environments”).

257. See *id.* at 1080 (asserting the goal of memory is not just to store information accurately but to “optimize decision-making” in chaotic, quickly changing environments).

In conclusion, documentaries such *Inside Lehman Brothers* have the power to move things because they are keeping our real world on the camera and the focus on real problems at a time when we are increasingly feeling disconnected from the parts of our society on which we all depend.