

Values and Value Creation in Public–Private Transactions

*Nestor M. Davidson**

ABSTRACT: Scholars have developed a significant body of literature exploring the work of deal lawyers with the essential insight that attorneys acting as transaction-cost engineers have unique potential to add to the overall value of deals. This value-creation literature has traditionally made two foundational assumptions about the role of the state in transactional law. First, scholars have assumed that regulation is essentially irrelevant to transacting—that from the deal lawyer’s perspective, the government is a factor only to the extent that the state will enforce private agreements. Second, scholars have assumed that private parties uniformly view public policy as a constraint in the realm of compliance—that from the deal lawyer’s perspective, clients are indifferent, if not hostile, to regulatory goals. The first assumption is the subject of recent scholarship convincingly arguing that regulatory arbitrage should be added to the picture of deal lawyers as transaction-cost engineers. The second assumption, however, has gone unchallenged and is the focus of this Article.

Although the value-creation literature envisions a monolithic orientation toward the state, in practice, partnerships that engage the private sector in advancing a variety of public goals represent both a significant sector of the economy and one of the central contemporary approaches to policy by federal, state, and local governments. Deal lawyers are thus increasingly called upon not only to reduce transaction costs and leverage regulatory constraints, but also to manage a complex alignment of interests between private means and public ends. In short, lawyers in public–private transactions perform what this Article calls regulatory translation—transmogrifying the often abstract goals of public policy into the concrete mechanisms of private ordering.

* Associate Professor, University of Colorado Law School. J.D., Columbia Law School, 1997, A.B., Harvard University, 1990. For helpful comments, the author wishes to thank Deborah Cantrell, Scott Cummings, Vic Fleischer, Clare Huntington, Scott Moss, Pierre Schlag, Jim Smith, Phil Weiser, and the participants in the 2007 Workshop on Affordable Housing and Public/Private Partnerships. Charles Swanson and Kelly Kafer provided excellent research assistance.

This Article makes two primary contributions to the literature. First, it identifies an increasingly important transactional context largely ignored by scholars investigating the work of deal lawyers. Second, the Article gives a normative, theoretical grounding for that work, providing a framework that has the potential to enhance the advantages and mute the problems associated with public-private partnerships. Ultimately, lawyers in this context can create value in the broadest sense of the word, and there are lessons in this for deal lawyers in all transactions.

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I. INTRODUCTION

Scholars of the legal profession have long puzzled over the role of lawyers in transactional practice. Unlike the work of litigators, there is nothing inherently law-related about many of the characteristic tasks that deal lawyers undertake. Yet, attorneys command a significant premium for quarterbacking deals, and there must be some reason that clients continue to pay that premium for work that might as easily—and at lower cost—be performed by any number of other professionals.

One answer that has emerged in a robust body of work over the past two-and-a-half decades has focused on the unique potential that lawyers have, not only to memorialize agreements and allocate risks, but also to add fundamentally to the overall value of deals. Lawyers, in this view, have the capacity to structure deals to minimize a variety of ubiquitous transaction costs, including parties' information asymmetries, differential time horizons, and strategic bargaining. This literature envisions lawyers as transactional engineers, creating value for all parties to a deal with the potential not simply to slice the deal pie more favorably for one side or the other, but instead to grow the size of the pie.¹

This value-creation literature, however, has traditionally made two foundational assumptions about the role of the state in transactional law that bear challenge. First, scholars have assumed that the regulatory environment in which transactions occur is a background condition largely irrelevant to the essentially private task facing deal lawyers. As discussed below, Victor

1. The seminal article in the transactional-lawyering value-creation literature was Ronald J. Gilson's *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 243 (1984). In the intervening twenty-five years, scholars have elaborated extensively on Gilson's framework. See, e.g., Edward A. Bernstein, *Law & Economics and the Structure of Value Adding Contracts: A Contract Lawyer's View of the Law & Economics Literature*, 74 OR. L. REV. 189, 190 (1995) [hereinafter Bernstein, *Contract Lawyer*] (exploring legal-system costs in transacting); Lisa Bernstein, *The Silicon Valley Lawyer as Transaction Cost Engineer?*, 74 OR. L. REV. 239, 240 (1995) [hereinafter Bernstein, *Silicon Valley*] (exploring value creation through lawyer "counseling, deal making, matchmaking, gatekeeping and proselytizing"); Karl S. Okamoto, *Reputation and the Value of Lawyers*, 74 OR. L. REV. 15, 17 (1995) (discussing the role of reputation in adding transactional value); Steven L. Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J.L. BUS. & FIN. 486, 487 (2007) [hereinafter Schwarcz, *Explaining*] (empirically testing the value-creation hypothesis); Steven L. Schwarcz, *To Make or to Buy: In-House Lawyering and Value Creation*, 33 J. CORP. L. 497, 500 (2008) (comparing value creation by in-house and outside counsel); George W. Dent, Jr., *Business Lawyers as Enterprise Architects*, 64 BUS. LAW. 279 (2009), available at <http://ssrn.com/abstract=1264063> (seeking to expand Gilson's model to other aspects of business lawyering, including enterprise design). Robert Mnookin and others have added important insights related to strategic behavior in negotiating dynamics. See, e.g., ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 127–55 (2000) (discussing various dynamics of negotiations); Ronald J. Gilson & Robert H. Mnookin, *Foreword: Business Lawyers and Value Creation for Clients*, 74 OR. L. REV. 1, 10–13 (1995) (reviewing strategic-behavior and psychological barriers to transacting). For further discussion, see *infra* Part II.A.

Fleischer and others have begun to upend this assumption, arguing convincingly that engineering *regulatory* costs is as central to the contemporary deal lawyers' role as adding value by responding to transaction costs.²

The second assumption—and the focus of this Article—is that transactions are unilaterally private. In the transactional world envisioned by the traditional value-creation literature, not only is the government little more than a neutral referee, but the state in no way takes an active role in engaging the private sector to advance public goals. This may have been true a generation ago, but in the modern transactional world, public-private partnerships are a significant and growing sector of the economy and have become one of the most important approaches to policy at the federal, state, and local level. Even before the recent wave of massive interventions in the financial sector and other areas of our economy,³ public-sector spending represented nearly a third of the domestic economy,⁴ a singularly vast incursion into what might otherwise be considered the private market. Although much of this spending represents direct government outlays—for employees, direct benefit transfers, and the like—governments at all levels are increasingly relying on private-sector capabilities. Public-private partnerships touch almost every modern policy area, including national security, infrastructure, economic development, energy, social services, and environmental protection. The growing presence of private actors in the public arena is a deeply contested development—sparking a debate that has direct relevance to the work of deal lawyers⁵—but represents a clear trend nonetheless.⁶

2. See *infra* Part II.B.

3. The crisis that by the fall of 2008 had come to grip the global economy spawned a series of responses by the federal government, including notably a multi-trillion-dollar public-private program from the Treasury Department and the Federal Reserve to unlock frozen credit markets, see Edmund L. Andrews & Stephen Labaton, *Bailout Plan: \$2.5 Trillion and a Strong U.S. Hand*, N.Y. TIMES, Feb. 10, 2009, at A1 (discussing a proposed public-private bailout fund). A nearly \$800 billion economic stimulus plan passed in February 2009 also contemplated significant public-sector funding for private-sector initiatives around infrastructure, energy, and many other areas. See Farhana Hossain et al., *The Stimulus Plan: How to Spend \$787 Billion*, N.Y. TIMES, http://projects.nytimes.com/44th_president/stimulus (last visited Mar. 30, 2009).

4. OFFICE OF MGMT. & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT: HISTORICAL TABLES 318 (2008), available at <http://www.gpoaccess.gov/usbudget/fy08/pdf/hist.pdf> (noting that federal and state spending currently represents thirty-two percent of the domestic economy).

5. See *infra* Part III.B.

6. Private-sector involvement in the public arena is an important element of an approach to policy that has been labeled “new governance”—a set of policy tools that emphasize localized and decentralized decisionmaking, market-based methods, and stakeholder empowerment. See generally Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004) (advocating a “Renew Deal,” breaking from traditional models of regulation, administration, and adjudication); Jason M. Solomon, *Law and Governance in the 21st Century Regulatory State*, 86 TEX. L. REV. 819 (2008) (discussing two

Foregrounding public–private partnerships provides a richer description of the actual continuum of contemporary transactional practice. Any given deal can be seen to occupy a point along a spectrum of state involvement—from a paradigm of the purely private transaction where the state is primarily an indifferent referee, to an opposing paradigm of near complete alignment of interests between the private and public sectors, with private dealmaking in regulated environments in between. Either end of this spectrum represents an unrealistic ideal type—the state is almost never neutral, nor is there ever a perfect alignment of public and private interests—but the continuum provides a more accurate picture of the varying roles the state actually takes in transactional law.

Focusing on the largely unexplored region of this transactional spectrum that involves some alignment of public and private interests, this Article asks whether lawyers involved in public–private partnerships do something *different* than their counterparts working in more private-sector-oriented deals. The short answer is yes. What is fundamentally different about deal lawyers in the public–private context is that the “value” they create cannot be divorced from the public-policy goals that the private sector has been engaged to advance. For deal lawyers in public–private partnerships, the programmatic and transactional contexts, as well as their clients’ own mission-driven goals, necessitate a broader perspective on the concept of *value*. Deal lawyers in this context must contend with a challenging double layering, structuring deals to balance economic value creation with essentially non-economic—indeed, often counter-market—transactional goals. Thus, unlike garden-variety private transactions, the end-product of public–private partnerships cannot be captured simply in economic terms, although the underlying economics can be as important as the policy goals that drive the partnership.⁷

Accordingly, beyond structuring for transaction costs and leveraging regulatory constraints, deal lawyers in public–private partnerships must also anticipate myriad challenges posed by engaging the private sector in responding to complex social problems. This function—which this Article

books, LAW AND NEW GOVERNANCE IN THE EU AND THE US (Gráinne de Búrca & Joanne Scott eds., 2006), and LISA HEINZERLING & MARK V. TUSHNET, THE REGULATORY AND ADMINISTRATIVE STATE: MATERIALS, CASES, COMMENTS (2006), and their role in the development of scholarly discussion of the regulatory state).

7. As discussed below, *see infra* Part IV.A, this is not to argue that policy objectives cannot be monetized, although doing so remains controversial in many areas. Clearly, public goals in realms as disparate as health care, education, environmental protection, and criminal justice can be translated into strictly fiscal terms (as is regularly done by economists and policymakers). Cf. Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1557–59, 1578–80 (2002) (discussing and critiquing the process of monetizing policy objectives). Rather, this is simply to make a point—that might seem prosaic at first, but has significant implications—about the goal orientation of entities entering into public–private partnerships.

calls *regulatory translation*—requires structuring private transactions to reflect the oftentimes abstract or conflicting goals of public policy, frequently in political environments, where the ultimate beneficiaries are some segment of the public. Deal lawyers in public–private transactions can create value in much the same way that the traditional transactional-engineering literature has highlighted, but they also have the potential to add value in no small part by translating their clients’ and the government’s policy goals into the practical mechanisms of private ordering. Deals are thus created that would otherwise collapse, and deals are made more valuable in the broadest sense of the word. These lawyers, in short, hold the potential not only to make the pie bigger, but to help bake a very different pie.⁸

In identifying and explaining regulatory translation, this Article seeks to make contributions to two traditionally distinct academic discourses. First, the Article brings to the fore an increasingly important transactional context

8. It is appropriate at the outset to clarify the scope of this discussion. To begin, although the government is often represented in public–private partnerships and government attorneys can be intimately involved in some kinds of public–private transactions, this Article focuses on the work of private-sector rather than public-sector attorneys. This is because the paradigm transaction contemplated in this Article is not between the government and the private sector, as in traditional public contracting, *see infra* Part III.A, but rather, between private parties acting pursuant to a government program.

Next, the kinds of transactions on which this Article focuses are generally handled by private attorneys not acting in a pro bono capacity. Many law firms have developed pro bono transactional practices. *See* Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 123–25 (2004) (discussing law firm pro bono transactional work). This Article, however, focuses on the traditional fee-paying transactional work that makes up the bulk of deal practice in public–private partnerships.

Moreover, scholars have examined the role of transactional lawyers in serving both individual clients in communities in need and causes on behalf of those clients. *See, e.g.*, Susan R. Jones, *Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice*, 4 CLINICAL L. REV. 195, 202–07, 218–23 (1997) (discussing the work of transactional lawyers in supervising law students working in legal clinics and helping clients start small businesses); Ann Southworth, *Business Planning for the Destitute? Lawyers as Facilitators in Civil Rights and Poverty Practice*, 1996 WIS. L. REV. 1121, 1132–40 (reviewing a study of planning projects completed by attorneys). Public-interest-oriented lawyering is certainly an important aspect of transactional practice in public–private partnerships, particularly in certain areas of social-welfare policy, but it represents only a portion of the larger mosaic of lawyer involvement with clients involved in public programs.

Finally, although this Article focuses on lawyers in the transactional context, this is not to minimize other roles that lawyers undertake—beyond litigating—in mediating public policy for private clients, particularly in communities in need. Lawyers can, and do, serve clients through empowerment, education, strategy, and organizing, among other tasks not traditionally associated with lawyers as litigators or lawyers as scriveners. *Cf.* Jennifer Gordon, *The Lawyer Is Not the Protagonist: Community Campaigns, Law, and Social Change*, 95 CAL. L. REV. 2133, 2137–45 (2007) (discussing the role of lawyers in organizing for social change); Austin Sarat & Stuart Scheingold, *What Cause Lawyers Do For, and To, Social Movements: An Introduction*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 1, 1–10 (Austin Sarat & Stuart A. Scheingold eds., 2006) (discussing the increasing variety and complexity of cause lawyering and related lawyer roles). The social impact of lawyering must be understood in light of all these roles, but this Article focuses primarily on what lawyers do in dealmaking.

that has been largely ignored in the literature on value creation. Conversely, the Article likewise brings the descriptive and normative insights of the value-creation literature to the literature on new governance and public-private partnerships. Just as scholars focused on deal lawyers have largely ignored public-private partnerships, scholars exploring the private role in public governance have largely ignored the central and complex role that such lawyers play in that dynamic. The Article accordingly provides theoretical grounding for the role that attorneys play in this context that has the potential to enhance the advantages and mute the concerns associated with public-private partnerships. Ultimately, there are lessons in this perspective for deal lawyers in all transactions.

The Article is organized as follows. Part II reviews the literature on value creation in transactional law and particularly the emerging emphasis in that literature on the work of deal lawyers in arbitrating regulatory constraints. Part III turns to the increasingly important realm of public-private partnerships in a continuum of state involvement in transactional law, noting the significant debates that such private-sector involvement has raised. Part IV then argues that transactional lawyers in public-private partnerships have potential to add value in a multitude of ways by translating public-policy goals into the hard work of real-world dealmaking, as noted, through the task of regulatory translation. Recognizing perennial challenges that the value-creation literature has faced in proving its insights, this Part also offers a concrete case study to illustrate regulatory translation in practice. Finally, Parts V and VI consider some normative challenges to this role for deal lawyers and, conversely, some significant benefits that might flow from recognizing and enhancing the work of lawyers in public-private deals.

II. VALUE CREATION IN TRANSACTIONAL LAWYERING

Nearly twenty-five years ago, Ronald Gilson famously asked, “What do business lawyers *really* do?”⁹ Gilson’s answer was that business lawyers increase the overall value of deals by structuring transactions to minimize information asymmetries, find mutual gain in responding to parties’ differential expectations, and likewise engineer a variety of other transaction costs.¹⁰ Scholars have developed a substantial literature to refine and expand this model, particularly for environments where regulatory constraints drive deal structure, but Gilson’s essential insight remains influential—transactional lawyers at their best have unique potential to “make the pie grow larger rather than merely to help to carve it up.”¹¹

9. Gilson, *supra* note 1, at 241.

10. *Id.* at 255.

11. *Id.* at 308.

In order to frame an analysis of deal lawyers' work in public-private partnerships, this Part reviews the insights at the core of the traditional value-creation literature and then discusses the contemporary regulatory direction to which that literature has turned.

A. VALUE CREATION TRADITIONALLY UNDERSTOOD

Lawyers stand at the heart of commercial transactions of any significant value, serving a wide range of practical roles—business and legal negotiator, document drafter, information gatherer, coordinator, as well as, of course, *lawyer*. In all of these capacities, it is fair to ask whether—and how—lawyers benefit the transaction and why other professionals, or clients themselves, could not as easily or more efficiently perform the same, often quite costly, tasks.¹²

In tackling these questions, three visions of deal lawyers can be distilled from the literature.¹³ The most banal picture is perhaps that of deal lawyers as scribes, whose essential task is to make sure that the contractual terms of their clients' agreements are captured and enforceable. In this capacity, there is little that deal lawyers do that could not be done by anyone skilled enough to fill in a standard form; putting attorneys in this role can be seen as both a barrier to dealmaking and little more than an unwarranted cost. As Gilson noted, lawyers viewed in this light are often seen as more of a hindrance than a help—at worst, “deal killers whose continual raising of obstacles . . . ultimately causes transactions to collapse under their own weight.”¹⁴

A more complex, but still incomplete, account envisions the deal lawyer as the professional best able to identify and allocate transactional risk.¹⁵ In this capacity, deal lawyers zealously seek to minimize their clients' risk exposure by offloading as much risk as possible on the other parties to the deal and manage other professionals to identify and quantify such risks. Lawyers in this mode are characteristically oriented toward negotiating and

12. Gilson argued that to assess the value that a lawyer may add to a transaction, one must examine the transaction as a whole, rather than in terms of the gains that any one client might achieve through redistribution of static value. *See id.* at 245.

13. Although much of the work of business lawyers is not transactional, such as structuring entities and advising on compliance and corporate “housekeeping” matters, *see Dent, supra* note 1, at 295–309, this discussion focuses on deal lawyering.

14. Gilson, *supra* note 1, at 242. In a vivid example of the regard with which deal lawyers are sometimes held, Victor Fleischer relates a recent description of deal lawyers circulating on the Internet as “monkey f***ing scribe[s].” Victor Fleischer, *The MasterCard IPO: Protecting the Priceless Brand*, 12 HARV. NEGOT. L. REV. 137, 139 (2007) (quoting Posting of Victor Fleischer to The Conglomerate, http://www.theconglomerate.org/2006/03/monkey_scribes.html (Mar. 7, 2006)).

15. *See* ROBIN PAUL MALLOY & JAMES CHARLES SMITH, REAL ESTATE TRANSACTIONS: PROBLEMS, CASES, AND MATERIALS 13–14 (3d ed. 2007) (“To a large extent the lawyer is hired to identify and manage the wide assortment of risk that can and should be anticipated in a particular transaction.”).

memorializing deals in ways that parallel the adversarial clash of litigation, with no quarter given and no quarter asked.

Gilson, however, offered a third vision of what deal lawyers do.¹⁶ Gilson began with the proposition that in the absence of transaction costs, parties would reach agreement—they would price the asset that is the subject of a deal and, by extension, concur on the other material terms of the transaction—with perfect information.¹⁷ In this transactional environment, there would be no need for lawyers or any other third-party intermediaries.¹⁸

In the real world, of course, transaction costs are pervasive. Parties have different time horizons and expectations about the future, for example, as well as significantly different information about the inputs to the transaction and ability and incentives to gather that information. To these barriers, Robert Mnookin and others have added the reality that parties can behave irrationally in negotiating and tend to bring incentives to any transaction to act strategically, undermining the potential for mutual gain.¹⁹

It is in the gap between the unreal assumption of perfect transacting by rationally acting parties and the transaction-cost-filled world of imperfect information and strategic behavior that lawyers have the potential to add value.²⁰ Business lawyers serve, in Gilson's term, as "transaction-cost engineers," devising mechanisms through which market imperfections—primarily heterogeneous expectations and information-cost failures—can be unearthed and addressed.²¹ Lawyer-facilitated cooperative bargaining thus has the potential to create more valuable transactions by solving transactional failures to save deals that would otherwise collapse, lowering the overall cost of a deal and shifting the focus of negotiations away from

16. See Gilson, *supra* note 1, at 253–56 (discussing the role of business lawyers as "transaction cost engineers"). As Mark Suchman has argued, the orientation of much of the value-creation literature toward transaction-cost economics risks paints an overly narrow picture of the dynamics of deal lawyering. See Mark C. Suchman, *Transaction Costs: A Comment on Sociology and Economics*, 74 OR. L. REV. 257, 260–72 (1995) (discussing cultural norms, power relations, and path dependency as alternative explanatory variables absent from primarily economic accounts of business lawyering). To draw on the framework that Gilson and his successors have laid out is not to suggest that it provides the only, or even necessarily a complete, description of the work of transactional attorneys.

17. Gilson derived this transaction-cost-free baseline from the financing concept of the Capital Asset Pricing Model, which assumes that the price of an asset will costlessly reflect future income. The model accordingly presumes that capital assets will be priced based on market forces operating with perfect information, a counterfactual assumption that would make the cost of any third-party intermediary a loss to the transacting parties. See Gilson, *supra* note 1, at 251 (discussing the transaction costs of hiring a lawyer).

18. Indeed, as Gilson argued, under these assumptions, "fees charged by business lawyers would," by definition, "decrease the net value of the transaction." *Id.*

19. See MNOOKIN ET AL., *supra* note 1, at 127–55 (reviewing strategic-behavior and psychological barriers to transacting); Gilson & Mnookin, *supra* note 1, at 10–13 (same).

20. Gilson & Mnookin, *supra* note 1, at 7–8.

21. Gilson, *supra* note 1, at 255.

potentially destructive distributional bargaining that engenders mistrust and opportunism.

Gilson illustrated the value-creation function for deal lawyers through provisions in a standard acquisition agreement.²² Thus, for example, a contingent-price arrangement that transforms expected returns into certain returns can alleviate the challenge that investors have heterogeneous expectations about the future risk and return of an asset.²³ Similarly, an earnout provision that constrains opportunistic behavior by tying purchase price to future events can alleviate a mismatch in the time frame over which investors measure risk and return.²⁴ Finally, Gilson describes a variety of representations, warranties, indemnifications, and legal opinions as tools to respond to information-cost problems.²⁵

There is an important empirical question that suggests a note of caution in taking too rosy a view of the description that Gilson and his successors offer of deal-lawyer value creation. That question involves the *relative* value to a client of the gains from value-creating lawyering versus the distributional consequences to that client from participating in the kind of cooperative behavior that Gilson highlights. In other words, if the increase in the size of the pie yields less than the benefits to keeping a larger slice of a smaller pie, then a client has every incentive to act strategically or otherwise add to total costs—short of killing a deal—to capture that relative advantage.²⁶ This empirical question remains unanswered,²⁷ but it is hard to deny at least the potential for transactional dynamics that reflect the optimistic role for deal lawyers that Gilson and his successors have identified.²⁸

For present purposes it is sufficient that the value-creation literature highlights a practical framework for understanding a function that deal

22. See *id.* at 257–62 (reviewing the role of the business lawyer in the acquisition process).

23. *Id.* at 264.

24. *Id.* at 266.

25. *Id.* at 267–93.

26. Cf. Bernstein, *Contract Lawyer*, *supra* note 1, at 195 (observing that practicing lawyers “who are properly concerned only with the well being of their clients, frequently fail to understand that a reduction in joint costs can benefit their client perhaps because, in practice, many actions that increase the value of a transaction as a whole decrease the value of a transaction to one of the parties”).

27. See *infra* Part IV.B for further discussion of the empirical challenges attendant to proving value creation.

28. In this vein, David Driesen and Shubha Ghosh argue that there is another side to the role of transaction costs in dealmaking that Gilson’s framework ignores. Driesen and Ghosh point out that transaction costs may have corresponding benefits, and that structuring transactions single-mindedly to minimize transaction costs ignores this side of the ledger. See David M. Driesen & Shubha Ghosh, *The Functions of Transaction Costs: Rethinking Transaction Cost Minimization in a World of Friction*, 47 ARIZ. L. REV. 61, 88 (2005). This is a valuable perspective, but to identify value from reducing transaction costs is not to argue that this should be the only role—or even the most normatively attractive role—for deal lawyers to play.

lawyers can—although by no means always will²⁹—serve in structuring to reduce strategic behavior and increase the realm of mutual gain. These are practical skills, however, that are not limited to adding value solely from transaction-cost barriers.

B. BEYOND NEUTRALITY TO THE STATE: REGULATORY “CRAFTSMANSHIP”

The vision of lawyers as transaction-cost engineers that emerged from the value-creation literature has from the outset made a foundational assumption about the role of regulation in transactional law. That assumption is that the state is essentially a neutral referee, standing functionally outside the private arena and largely indifferent to the content or results of private bargaining. Indeed, Gilson dismissed the potential for value creation from what he described as “manipulation of a regulatory system,”³⁰ arguing that most business lawyers operate “in a world in which regulation has made few inroads.”³¹ To Gilson, the “critical rule of law is that a court will enforce whatever the lawyer writes.”³²

As Edward Bernstein has pointed out, the assumption that private lawyers can ignore what he called “legal system” costs is unrealistic.³³ In practice, any party seeking to enforce an agreement must contend with the cost of enforcement and the risk that the legal system may interpret an agreement in a way that is contrary to what one or the other party contemplated at the time of contracting.³⁴ This injects some measure of uncertainty to Gilson’s minimalist vision of the state as a transactional referee.³⁵

29. See, e.g., Jonathan C. Lipson, *Price, Path & Pride: Third-Party Closing Opinion Practice Among U.S. Lawyers (A Preliminary Investigation)*, 3 BERKELEY BUS. L.J. 59, 113–24 (2005) (providing contrasting explanations of value creation in the context of third-party closing-opinion practice).

30. Gilson, *supra* note 1, at 244.

31. *Id.* at 247.

32. *Id.*

33. See Bernstein, *Contract Lawyer*, *supra* note 1, at 198 (stating that Gilson’s assumption that courts will enforce whatever the lawyer writes represents the hypothetical world and ignores the costs of the legal system in the real world); see also Bernstein, *Silicon Valley*, *supra* note 1, at 243 n.22 (stating that the enforcement of a contract can be “costly and inherently uncertain”).

34. See Bernstein, *Contract Lawyer*, *supra* note 1, at 198 (“[E]ach party faces the prospect of delay, litigation costs, and the risk that a court may not interpret the contract or calculate damages in the manner anticipated when the contract was signed . . .”).

35. It remains open to debate the extent to which contract drafters place litigation risks at the center of their work. Compare Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814, 818 (2006) (outlining a “theory of contract design that anticipates the enforcement of contracts by adversarial litigation”), with Schwarcz, *Explaining*, *supra* note 1, at 497 (presenting empirical research to suggest that the primary role for transactional attorneys is to “provide a roadmap for the parties to follow in their ongoing relationship” and only “secondarily to minimize the potential for ex post litigation”).

An even more fundamental challenge to this neutral-state view, however, is the proposition, put forth by Victor Fleischer, that in the modern transactional world, managing regulatory constraints may be as important, if not more important, an element of the value lawyers can add as non-regulatory transaction costs.³⁶ The paradigm of the private client largely indifferent to regulation, if it ever was predominant, is now more of the exception than the rule. And in our regulatory world, even the most seemingly mundane private transaction takes place under regulatory constraints with potential regulatory consequences.

Fleischer argues that lawyers therefore undertake what he calls “regulatory craftsmanship,” in which lawyers engage in the “skillful practice of massaging the formal structure of a deal to improve its regulatory treatment without unduly altering the economics of the deal.”³⁷ This craftsmanship can be seen in tax arbitrage and in attempts to seek more favorable—or less protective, from the regulator’s perspective—oversight treatment.³⁸

Fleischer’s description echoes what David Schizer has identified in the tax-planning context as “frictions,” which are constraints on transactional structure that derive from accounting rules, securities regulation, and other legal or regulatory regimes.³⁹ Schizer has argued that tax planners are more or less successful in working around targeted tax laws depending, in no small measure, on the effect of these non-tax constraints.⁴⁰ In contemporary transactional practice beyond the tax arena, these kinds of frictions are a ubiquitous reflection of the modern regulatory state and can derive from any number of forms of regulation.⁴¹

Gain in this world of regulatory constraints can be derived directly from the financial advantage to transacting parties that comes from, for example, tax planning. As Fleischer describes it, dealmaking thus “shift[s] value away from the government (in the form of taxes) so that more money can be

36. See, e.g., Schwarcz, *Explaining*, *supra* note 1, at 491 n.35 (discussing Fleischer’s conception of regulatory-cost engineering); Victor Fleischer, *Regulatory Craftsmanship* (unpublished manuscript, on file with the author) (discussing the importance of managing regulatory constraints).

37. Fleischer, *supra* note 36 (manuscript at 25).

38. As discussed below, evaluating this kind of regulatory arbitrage normatively poses interesting questions about the role and value of regulation more generally. See *infra* text accompanying notes 44–46.

39. See David M. Schizer, *Frictions as a Constraint on Tax Planning*, 101 COLUM. L. REV. 1312, 1317–18 (2001) (describing “frictions” as “constraints on tax planning external to the tax law”).

40. See *id.* at 1319–39 (offering guidance on which tax reforms are easily avoidable and which are not).

41. Fleischer’s examination of the role of the deal lawyer also builds on Frank Partnoy’s concept of regulatory arbitrage, which Partnoy describes as “financial transactions designed specifically to reduce costs or capture profit opportunities created by differential regulations or laws.” Frank Partnoy, *Financial Derivatives and the Costs of Regulatory Arbitrage*, 22 J. CORP. L. 211, 227 (1997); see also Fleischer, *supra* note 36 (manuscript at 7) (discussing Partnoy).

divided amongst” the private transacting parties.⁴² Value can likewise be added by the reduced cost or competitive advantage to be gained from avoidance of regulatory oversight, streamlined regulatory approval, or more privately advantageous regulatory treatment of various other aspects of a transaction. The more unsettled the regulatory arena, moreover, the higher premium a law firm can charge to help clients navigate—and gain value from managing—regulatory constraints.⁴³

Fleischer acknowledges that this descriptive claim raises potentially challenging normative implications.⁴⁴ Regulatory craftsmanship can pit private benefit against social cost—indeed in the paradigm case of tax planning, it is designed to do just that. Evaluating whether this occurs in any particular instance of regulatory craftsmanship or regulatory arbitrage invites serious questions about the relevant normative baseline. Any public policy can potentially be seen in a positive light—as welfare-enhancing or as making society more just or equal, depending on your vocabulary. But, most policy goals are contested and can be seen in more critical perspective. One person’s preservation of wetlands is another’s trampling of property rights. In the context of regulatory constraints on transactional structure, one investor’s consumer protection is another entrepreneur’s unnecessarily intrusive SEC oversight. Other examples are easy to imagine.

A deal lawyer engaged in regulatory craftsmanship may accordingly reduce social welfare as often as enhance it, depending on whether the given regulatory constraint (or tax liability) is welfare-enhancing or not.⁴⁵ As with the empirics of Gilson’s traditional value-creation theory,⁴⁶ it remains an open question whether regulatory craftsmanship adds “value” in a way that should be embraced or discouraged in any particular context.

42. Fleischer, *supra* note 36 (manuscript at 26).

43. *Id.* (manuscript at 27–28). Fleischer calls this the “regulatory frontier” and argues that the ability to practice at this frontier increasingly divides elite law firms from firms that approach transactions as a commodity practice. *Id.* (manuscript at 27). This also gives law firms a comparative advantage, Fleischer argues, over other professionals, because the varied regulatory expertise required to close complex transactions—from ERISA to environmental compliance to tax structuring and many others—requires lawyers to stand at the center of the deal. *Id.* (manuscript at 29–31).

It is beyond the scope of this Article, but worth investigating further what impact legal-market pressures have on firms that specialize in various aspects of public-private transactional law. Given the varied contexts in which public-private partnerships arise—with the profile of firms involved ranging from the largest global firms to single practitioners—it is harder to generalize about market advantages in this context.

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

45. *Cf.* William E. Kovacic, *Law, Economics, and the Reinvention of Public Administration: Using Relational Agreements to Reduce the Cost of Procurement Regulation and Other Forms of Government Intervention in the Economy*, 50 ADMIN. L. REV. 141, 144–48 (1998) (discussing the determinants of potentially inefficient regulation).

46. *See infra* Part IV.B.

Fundamentally, however, deal structuring to respond to regulatory incentives—and the work of ensuring compliance with regulatory requirements, which is discussed more later⁴⁷—assumes an orientation on the part of the client toward public policy that ranges somewhere from indifference to hostility. In other words, adding the regulatory state to the transactional matrix appropriately situates much modern deal work in a context in which the state is, in some sense, at the bargaining table.⁴⁸ But this emerging perspective assumes, as a practical matter, a fundamental conflict between the state and the actual parties to the transaction. In practice, however, the alignment of public and private interests is much more complex—a subject to which we now turn.

III. TRANSACTIONAL LAW IN A PUBLIC–PRIVATE CONTEXT

As noted at the outset, public involvement in the private sector through spending and regulatory bargains is a vast and growing arena.⁴⁹ This government-influenced sector of the domestic economy generates a realm of dealmaking that paradigmatically involves private parties oriented either by mission or by public incentives toward public goals, with some resulting alignment of public and private objectives. Transactional law in this public–private context bears a family resemblance to its more private-sector counterparts but varies in important ways. This Part accordingly describes the transactional context of what are often labeled public–private partnerships. It then outlines the ongoing practical and normative debate about the larger question of privatization in which these partnerships are situated.

A. *THE MISSING VARIABLE: THE ALIGNMENT OF PUBLIC AND PRIVATE INTERESTS*

It is possible to conceptualize the role of the state in transactional practice along a private–public spectrum. One hypothetical end of this spectrum would be “purely private” transactions that involve private parties largely indifferent to public policy and concerned only with the extent to which the state will or will not enforce their bargains. This is Gilson’s paradigm case. The spectrum would then move along to a central core of private transactions that take place in the shadow of the modern regulatory state, which is Fleischer’s paradigm case. It would then shift to a context in which private and public goals are in some alignment—the paradigm type of deal that this Article examines. At the other end of the spectrum would be

47. See *infra* Part IV.A.2.d.

48. Cf. Fleischer, *supra* note 36 (manuscript at 26) (discussing the government as a virtual third party in transactions).

49. See *supra* text accompanying notes 4–7. Indeed, all indications are that the government’s response to the current economic crisis signals a decided shift toward increasingly direct involvement in the private sector. See *supra* note 3.

housing, both nonprofit and, to a lesser (although growing) extent, for-profit entities have often served as the primary vehicles for federal, state, and local governments to serve communities and individuals in need. The use of public-private partnerships is increasing as governments at all levels are caught between demand for public services and limited political will to expand the role of government in providing those services.⁵⁴

In practice, these public-private partnerships take a great variety of forms. They can, at times, involve some government agency essentially going out to the market to purchase a relevant good or service for the public. Medicare, food stamps, and other public benefits can be conceptualized this way, although the reality is more complex. Often, however, the government engages the private sector through direct or indirect subsidies or regulatory benefits. These can range from tax credits that leverage private involvement to bargains involving favorable regulatory treatment in exchange for what are presumably (although by no means assuredly) greater public benefits.

Some entities in these public-private partnerships, primarily in the nonprofit sector, are motivated by the same policy goals that define the relevant program—providing housing to low-income residents, for example, or promoting alternative energy. These entities are more “mission-driven,” in that a central aspect of their motivation for entering into any transaction is an underlying set of organizational goals that transcend financial return. Indeed, the nonprofit sector has become increasingly entrepreneurial, and social entrepreneurs are bringing dealmaking sensibilities to areas of policy that were once considered hidebound.⁵⁵

But in responding to public incentives, private parties may have an alignment of interests with the relevant policy goals at issue for reasons that might be entirely divorced from any internal corporate culture or individual preference. Thus, a telecommunications company may agree to provide universal service in exchange for certain regulatory benefits, or a private developer may enter into a community-benefits agreement in exchange for being able to build a project. In this context, the private party may be a reluctant participant, and one can legitimately question the potential negative secondary effects that this kind of regulatory bargaining creates for

society); LESTER M. SALAMON, *PARTNERS IN PUBLIC SERVICE: GOVERNMENT-NONPROFIT RELATIONS IN THE MODERN WELFARE STATE* (1995) (advocating stronger relationships between private, nonprofit organizations and the state).

54. See MINOW, *supra* note 53, at 3 (describing the increasing mixture of public-private partnerships across many fields). Privatization and public-private partnerships are as much a part of the international experience as they are a central feature of domestic policy. For a helpful discussion, see generally *THE CHALLENGE OF PUBLIC-PRIVATE PARTNERSHIPS: LEARNING FROM INTERNATIONAL EXPERIENCE* (Graeme Hodge & Carsten Greve eds., 2005).

55. Social venture capital, for example, involves double- or multiple-bottom-line investing predicated on achieving financial return and social benefits.

the government.⁵⁶ As a practical matter, however, these kinds of regulatory bargains are ubiquitous, and in taking the bargain, it becomes in the interest of the private party to advance the relevant public goal.⁵⁷ This Article contemplates an array of transactions that involve more willing participants, but many of the attorney role consequences that flow from representing private clients advancing public goals arise regardless of the reasons why clients get involved in public-private partnerships.

Two important points, then, emerge from this discussion. First, that the alignment of interests is a spectrum and not a hard dichotomy between neutrality (or even hostility) to regulatory goals and warm embrace of public policy.⁵⁸ Second, and more importantly, many transactions in the modern context involve lawyers working with private clients to help solve challenging social problems.

B. TRANSACTIONAL LAW AND THE CRITIQUE OF PRIVATIZATION

To discuss public-private partnerships as a descriptive matter inevitably raises a deeply contested debate about the merits of privatization. Labels matter in this context, and to employ the term “public-private partnership,” with its perhaps benign connotation of cooperation and collaboration, is not to disavow the negative normative connotations that “privatization” evokes. Although the paradigm envisioned in this Article varies from some of the more controversial examples of privatization,⁵⁹ it is nonetheless important to

56. Scholars have highlighted the risks associated with public entities in some sense “selling” regulatory privileges in exchange for public benefits, including skewed regulatory priorities and the potential for outright corruption. See, e.g., ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* 303–04, 308–09, 331 (3d ed. 2005) (noting the risks of dealmaking and incentive zoning and exploring zoning corruption); Jerold S. Kayden, *Market-Based Regulatory Approaches: A Comparative Discussion of Environmental and Land Use Techniques in the United States*, 19 B.C. ENVTL. AFF. L. REV. 565, 568–69 (1992) (defining incentive zoning); Judith Welch Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C. L. REV. 957, 959–60 (1987) (identifying the benefits and perils of government land-use “dealing”). These concerns are not trivial, but part of a larger discourse on the merits and risks of privatization discussed in Part III.B.

57. As with the risks that this program structuring poses for public incentives, there are corresponding hazards on the private side, with the ever-present danger that private parties acting to advance public goals without their own role motivation may shirk or act strategically to undermine the goals they have been engaged to advance. Again, this is best addressed in terms of the general debate on privatization. See *infra* Part III.B.

58. The alignment of interests between various participants in public-private partnerships outlined here assumes, of course, an alignment of interests and incentives between attorney and client. That attorney-client alignment does not always hold true. See William H. Simon, *The Market for Bad Legal Advice: Academic Professional Responsibility Consulting as an Example*, 60 STAN. L. REV. 1555, 1556–66 (2008) (discussing the recent problem of lawyers giving clients “bad legal advice because the clients want[] it”). Although important, the ethical implications of attorney conflicts of interest are beyond the scope of this Article.

59. To many, privatization is more controversial when responsibility for a traditionally public function is shifted entirely to the private sector. Here, in contrast, the public and private

acknowledge significant, and serious, concerns about the engagement of the private sector in the provision of public services under any label.⁶⁰

To oversimplify a rich and diverse discourse, skeptics of privatization generally raise three related concerns. Such skeptics see private-sector involvement in public programs as undermining public accountability by diffusing power to the private sector with inadequate mechanisms for public oversight. A closely related critique is a concern with what some perceive as an inherent conflict of interest that arises when private entities provide public services. Others question privatization on the ground that involving the private sector might undermine the quality—and fundamentally public nature—of the services provided. From this arises a more abstract concern about the risk of “hollowing out” the government with the concomitant risk of undermining the rule of law.

On the other side of the debate, proponents of greater private involvement primarily tout its potential benefits of enhancing the efficiency of public services. Proponents also point to the potential that this mode of governance has to draw on the experience and capacities of a more pluralistic array of service providers. Public–private partnerships and privatization more generally reflect an emerging convergence between traditional policy goals and alternative regulatory approaches that can be roughly grouped under the heading of “new governance.”⁶¹ This convergence emphasizes decentralized decisionmaking, flexible “bottom-up” policy solutions, and an increased role for market or private-sector tools.⁶²

The debate on privatization, unresolved and perhaps irresolvable, plays out on both instrumental and normative levels and raises empirical questions that remain contested.⁶³ Whatever the ultimate merits of arguments on both sides,⁶⁴ it is undeniable that governments at all levels are

sectors work together. Moreover, acknowledging that labels are not terms of art in this context, as deployed in this Article, public–private partnerships also vary from traditional public contracting in that the ultimate recipient of the relevant good or service is not the government itself, but instead, the public.

60. See Nestor M. Davidson, *Relational Contracts in the Privatization of Social Welfare: The Case of Housing*, 24 YALE L. & POL'Y REV. 263, 269–76 (2006) (discussing the debate over privatization).

61. See *supra* note 6.

62. See, e.g., Scott L. Cummings, *Mobilization Lawyering: Community Economic Development in the Figueroa Corridor*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 8, at 302, 304–07 (discussing the emergence of public–private partnerships in community economic development as part of a larger contemporary shift toward localized, market-based governance that leverages private resources and emphasizes community empowerment); Lobel, *supra* note 6, at 343 (“The legal field is at a critical moment of renewal and reinvention.”).

63. See Davidson, *supra* note 60, at 270–71 & n.35 (discussing the empirical debate about privatization).

64. As Jody Freeman has argued, however, efficiency and accountability perspectives have more in common than the at-times heated rhetoric in the debate on privatization might

increasingly drawing on the private sector to deliver public services and that, particularly in the arena of social-welfare policy, such engagement is firmly entrenched.⁶⁵

The debate, however, has concrete implications for considering the role of lawyers in public–private transactions. The fact that there is rarely a perfect alignment of interests, even when there is a nominal commitment on the part of private-sector entities to public goals, raises familiar principal–agent problems.⁶⁶ The greater the misalignment of interests, the more accountability is undermined, increased oversight is required, and the greater the potential for public–private partnerships to fail. It is well beyond the scope of this Article to resolve the myriad of challenging questions this potential misalignment raises. From a legal-profession perspective, however, it is important to recognize the tension that this misalignment raises for deal lawyers. The potential misalignment of interests conversely creates an opportunity for attorneys to manage, rather than exacerbate, such conflict.

As the spectrum discussion above makes clear, there are many contexts in which private parties' own goals serve as mitigating influences on this conflict. There are entities and individuals who are either motivated by the same policy goals that animate the programs in which they engage or programs that are structured to align public and private incentives. In the former category, the realm of mission-driven nonprofit entities receiving public subsidies, it is not unheard of for private parties to be even more committed to the relevant policy goals than the agencies funding them. But even for entities involved in regulatory bargains or more prosaic public–private partnerships, the structure of many modern subsidies—in housing, energy, infrastructure, and other areas—ties private benefit to advancing the relevant public goal. In a variety of interesting ways, this aligns the interests of private parties who choose to seek those subsidies with the regulatory goals of the programs in which they are engaged, directly implicating deal lawyering.

This is not to accept, uncritically, all aspects of privatization or public–private partnerships in particular, but simply to place the debate in the context of making the best of what these partnerships may have to offer through an understanding of the role of transactional lawyering in maximizing their value. Deal lawyers in public–private partnerships have the

suggest. See Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1310–14 (2003) (reconciling the economic perspective on privatization with the public-law perspective).

65. One perennial shortcoming in the discourse on privatization is an inattention to the particular context in which the private sector is engaging with public governance. The privatization of military operations or prisons raises distinctly different—and in many ways more troubling—questions about the rule of law and the problem of accountability than does the privatization of municipal waste treatment.

66. See Davidson, *supra* note 60, at 276–79 (discussing agency problems in privatization).

potential to engineer transactions to maximize the efficiency gains that might come from engaging the private sector, minimize the accountability costs, and ultimately—and most importantly—help all parties, including the beneficiaries of public–private partnerships, achieve the most “valuable” outcome.⁶⁷

IV. VALUES AND VALUE CREATION

Given the complexity of public–private transactions and the orientation of clients toward public goals, the work—and the potential for value creation—facing private deal lawyers differs in important ways from what is required of their pure private-sector counterparts. Attorneys in this context can add value not just by transaction-cost engineering or regulatory craftsmanship, but also by serving as the critical mediating bridge between the government and the private sector. The “value” a transactional lawyer can create in public–private transactions thus comes through what this Article calls *regulatory translation*—transmogrifying the often abstract goals of public policy into the concrete mechanisms of private ordering.

This Part explores two primary ways in which lawyering in the public–private context differs from lawyering in more private-oriented deals. First, the idea of value must account for the social impact of transactions—a more pluralistic and complex “bottom line” than typical client objectives in the unmediated private sector. Second, while lawyers may deploy their skills in ways that parallel both transaction-cost engineering and regulatory craftsmanship, they must do so in ways that account for an alignment of interests, however imperfect, between private parties and the state. This Part then illustrates these dynamics with a discussion of affordable-housing deals as a paradigm example.

A. REGULATORY TRANSLATION BY DEAL LAWYERS

Gilson’s most compelling insight was that lawyers encountering barriers to reaching agreements can craft practical solutions from the ordinary dross

67. In the context of programs that ameliorate conditions that might generate demand for broader social change, it is a well-founded critique of lawyering that the potential exists for such lawyering to undermine the very causes it seeks to serve. Cf. Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399, 455–56 (2001) (discussing the limitations of community economic development to “challenge the structural determinants of poverty” and the risk that such local work “diminishes the importance of large-scale, coordinated social change strategies”). How one responds to this concern has much to do with how one evaluates the potential likelihood of fundamental, rather than incremental, social change and the advantages and disadvantages of serving communities in need regardless of the pace (or, in recent decades, direction) of that change. These are difficult questions and are beyond the scope of this Article. For now, it must suffice to recognize that governments at all levels are investing resources—inadequate by most lights, but hardly trivial—in engaging the private sector to serve those in need, and that model of social welfare is likely to continue for the foreseeable future.

of contractual language to bridge mistrust, mitigate information failures, and otherwise solve problems the parties themselves may not have perceived. In the public–private context, lawyers also apply these transactional-engineering techniques, but do so to deal with variables that are uncommon in the purely private arena. In particular, they apply these tools to solve a different set of potential failures that arise from regulatory complexity, the opaqueness of public policy, and tensions between public goals and private ordering.

1. Public Policy and the Provision of Public Goods
as Transactional Variables

Public–private partnerships involve objectives that might be very difficult to commodify in traditional market terms or that might run counter to what would otherwise inform a market term for the asset in question. If transaction-cost engineering is an exercise in moving a deal closer to hypothetical perfect market conditions, then changing the predicate goal from market benchmarks to a deal orientation that is shaped by the interaction of market forces and public policy correspondingly changes the role of the lawyer in adding value. The mechanics of the task may be similar, with lawyers identifying opportunities and challenges from the differential information and expectations of the parties. But in public–private transactions, those differences reflect potential transactional failures arising from the mismatch between the different sectors from which the partners approach the transaction.

Primary elements of any public–private partnership that bear on the work of deal lawyers are the centrality of public policy as a transactional variable, the way public subsidies change private risk profiles, and the consequences that flow from having the public as the ultimate beneficiary of the deal. These factors fracture the vision of the end-product of deal work as value in the sole sense of a clients' financial gain and necessitate unpacking in greater detail.

a. Non-Market and Counter-Market Transactional Objectives

Many, if not most, public–private partnerships take place in the shadow of clear market failure. Scholars tend to think of market failure as a rationale (or, for some, *the* rationale) for regulation,⁶⁸ but market failure can also give rise to incentive programs and regulatory bargains. Thus, the public sector incentivizes the private sector to produce, in public–private partnerships, exactly those goods and services that the market itself is not producing or cannot produce—below-market-rate rental housing, for

68. See STEPHEN BREYER, REGULATION AND ITS REFORM 15–35 (1982) (discussing rationales for regulation and comparing market-failure versus non-market-failure justifications).

example, or the preservation of open space in the midst of urban density.⁶⁹ Public goods may have private analogues, and the line between public and private is never easy to draw, but the structure of deals that involve public subsidies or regulatory bargains will tend to place objectives in the mix that run counter to market forces.

Moreover, beyond intervening where markets have failed, many public-private transactions encourage the private sector to achieve ends that are notably—and appropriately—largely outside the ordinary market. Redistribution, for example, is an aspect of many social services, as is maintaining a social safety net for vulnerable populations. Some goals at the heart of public-private partnerships are even further removed from the traditional realm of private transacting. As noted, this might involve environmental protection, alternative energy, public safety, or even more abstract policy objectives like community involvement or family stability. Again, this is not to argue that even the most abstract policy goal cannot be monetized, although it is reasonable to question whether doing so is appropriate in many areas of policy.⁷⁰ It is rather to recognize that public-private partnerships put market actors into contexts traditionally defined by non-market mechanisms and transfers.

“Value” thus takes on a much broader meaning in public-private partnerships than simply maximizing a transaction’s overall return. Value in even the most mundane private deal can include more than lowering direct and indirect costs and can even, as Steven Schwarcz has speculated, arise through intangibles such as increased client confidence and reduced client anxiety.⁷¹ But in public-private partnerships, there are inevitably multiple values and multiple ways of considering value. Private attorneys face the task of translating those variables into concrete mechanisms through which private parties can allocate their risks and order their relationships.

b. Altered Risk Profiles

A second factor in many public-private transactions is that the presence of public subsidies alters private parties’ risk profiles. Risk is inevitable in any deal and is factored into the return in any well-structured transaction. Many elements of typical subsidy programs, however, seek to minimize the possibility of failure and maximize the long-term stability of the public

69. Defining “public goods” in terms that are consistent with traditional economic understandings can be a challenging task, *see, e.g.*, JAMES M. BUCHANAN, *THE DEMAND AND SUPPLY OF PUBLIC GOODS* 49–50 (1968), but it is not necessary to delve into that conundrum to recognize that there are categories of goods and services that the government either directly provides or incentivizes the private sector to provide. *See* DONAHUE, *supra* note 52, at 7 fig.1.1 (discussing the variables that inform the matrix of public provision and public payment for public goods).

70. *See supra* note 7.

71. Schwarcz, *Explaining, supra* note 1, at 489.

benefit. Some subsidies are explicitly designed to serve this insurance function, but a secondary consequence of many other public interventions is that the government becomes invested in the outcome of private transacting in a way that makes failure less acceptable.

Public investment in this context thus means that certain risks become less acceptable or must be managed differently than in purely private transactions. Accordingly, deal lawyers must translate that fact into mechanisms for ensuring the long-term viability of projects—and ideally—the long-term commitment on the part of the government to support that viability. Some scholars have criticized this aspect of the public provision of goods and services, decrying a lack of market discipline and the perception that buffering public-service providers from the creative destruction of the market undermines efficiency.⁷² However, there is a strong argument that many public goods and services are defined by their very insularity from market risk, which may in fact be an advantage of public investment in private transactions, bringing stability and appropriate buffering to otherwise unmediated market forces. Regardless, it remains a reality that the general public has a low tolerance for allowing the fruits of public investment to be subject to ordinary market risks.

c. The Public as Beneficiaries

A third notable feature of public–private partnerships is the role of the public as the recipient of the particular good or service—whether in social services, infrastructure, public safety, or any of the myriad other areas of public–private engagement. Although many market transactions take place in the shadow of the consumer, in public–private partnerships, the public, as the beneficiary of the final product, brings stakeholders to the table and adds political considerations to the mix. These stakeholders and considerations, in turn, shape the expectations and risk allocations of the participants.

The final recipients of public benefits are rarely directly represented in public–private transactions.⁷³ This can be for pragmatic reasons—beneficiaries may be the public in some diffused sense, for example in the environmental-protection context, or specific beneficiaries may not be identified until a project is complete. There are proxies, however, that bear

72. See E.S. SAVAS, PRIVATIZATION AND PUBLIC-PRIVATE PARTNERSHIPS 111–12 (2000) (discussing the reasons for dissatisfaction and recurrent problems with government activities); see also DONAHUE, *supra* note 52, at 51 (comparing the attenuation of ownership in public undertakings to the more concentrated organization of private companies).

73. This representational problem, and the broader problem of engaging diverse stakeholders, remains a point of vulnerability for new governance. See Lisa T. Alexander, *Stakeholder Participation in New Governance: Lessons from Chicago's Public Housing Reform Experiment*, 17 GEO. J. ON POVERTY L. & POL'Y (forthcoming 2009) (discussing new governance's effect on public and private collaboration).

directly on transactional structure. Thus, for example, the basic incentive structure the government creates may serve as that proxy—if this structure produces more alternative energy or affordable housing, the general, undifferentiated interests of the public represented in the government’s policies are served. However, there may be more specific mechanisms that bring recipient interests into a deal, such as enforcement mechanisms, explicit third-party rights, and proxy representation through community groups, advocates, or others.⁷⁴

Because public involvement in public–private partnerships tends to raise political considerations, lawyers must structure deals to moderate the impact of such considerations.⁷⁵ Politics—in this context manifested primarily as the potential that a program may change for reasons not endogenous to the program itself—as a transactional variable raises uncertainty not entirely unlike other areas of uncertainty, and can be amenable to explicit risk allocation. In this situation, there is potential for Gilson-like value creation in that deals that might collapse for fear of political change or that might give rise to inefficient hedging in the face of potential change can go forward through the kinds of risk-allocation mechanisms that private lawyers deploy in any number of other contexts.⁷⁶

74. Were recipients more often directly represented in public–private transactions, it might bring into sharper focus the interests of the ultimate beneficiaries. *Id.* However, there is not always going to be a perfect alignment of interests between the “public,” represented by public–policy tradeoffs instantiated in any given program design, and the specific members of the public to whom a program is directed. For example, a low-income tenant may disagree with what a sponsoring agency thinks is the best way to approach tenure or subsidy issues. Discerning the appropriate line between recipient involvement and policy discretion is a recurring concern.

75. This is not to argue that political considerations—a category of interests that are hard to define—are inherently illegitimate or inappropriate to factor into the implementation of public subsidy programs. There are positive and negative aspects to factoring in public participation, and it is hard in many situations to separate beneficial involvement from naked rent seeking. The practical problem, however, is how to translate the potential for policy changes into a long-term set of mutual obligations. Conversely, accountability on the part of the provider is equally fundamental.

Politics are manifest in public–private partnerships in more clearly negative ways—steering contracts to personal contacts or other types of outright corruption, for example. Officials wisely managing subsidy programs can, in a variety of ways, attempt to insulate their programs from this kind of political interference, but the risks such involvement poses are hardly trivial.

76. Parties can allocate political risk as they allocate any other risk. To preview the example of affordable housing that this Article discusses in detail below, *see infra* Part IV.B.2 (presenting the affordable-housing example), investors in Low Income Housing Tax Credit transactions can and do bargain for guarantees relating to issues like the nonrenewal of particular subsidies. *See Oversight of HUD and Its Fiscal Year 2009 Budget: Hearing Before the S. Comm. on Banking, Housing, & Urban Affairs*, 100th Cong. (2008) (statement of Hector Pinero, Related Management Company), *excerpted at* http://www.taxcreditcoalition.org/uploads/post_pdfs/Background_of_Sect_8_Shortfall.pdf (discussing non-renewal risk that investors face in developments with project-based Section 8 subsidies).

2. Tools and Tasks

To turn from deal variables to structuring tools, private lawyers, as a practical matter, can deploy a variety of mechanisms to translate policy goals—both abstract and concrete—into the terms of private contract: risk allocation, information management, and the basic structures of reciprocal obligation over time. Private lawyers deploy these tools, however, to solve different kinds of information-cost and expectation-related failures than those found in private-sector deals with no state involvement.

a. Cooperative Bargaining in the Shadow of the State

In public–private partnerships, conflicts between private incentives and public goals are inevitable,⁷⁷ as conflicts arise in any transactional environment. However, just as lawyers can orient their approach toward dealmaking to emphasize the potential for value creation in what Gilson called cooperative bargaining,⁷⁸ transactional lawyers in public–private transactions can add value by anticipating such conflicts and structuring the framework of the parties’ interaction to emphasize the alignment of interests over points of conflict. The potential for such structuring in public–private partnerships is at least as pervasive as in purely private-sector deals, although the involvement of the state and the public generally can make aligning long-term interests particularly challenging.

Strategic behavior in this context arises not only from the traditional grounds for gamesmanship in dealmaking but also from factors endemic to public–private partnerships, such as the potential volatility of public policy and the opaqueness of regulatory requirements. Each of these grounds for potential strategic behavior, pace Gilson, carries with it a concomitant opportunity for value creation, as deal lawyers build information and reputational mechanisms into deal structure and allocate risks to facilitate cooperative orientation toward policy goals.

b. Layers of Translation in Practice

As attorneys structure deals to take into account various public programs, the tasks they undertake that are unique to the nature of public–private partnerships range from the straightforward to the more creative. Perhaps most straightforward is the basic work of identifying regulatory requirements and ensuring that those requirements are met. This is akin to traditional compliance work, although as discussed below,⁷⁹ differences arise due to client orientation or incentives related to the underlying regulatory goals at issue.

77. See *supra* text accompanying notes 66–67.

78. Gilson, *supra* note 1, at 282 n.109.

79. See *infra* Part IV.A.2.d.

Deal lawyers engaged in regulatory translation, however, can add value in the interstices of regulatory ambiguity, finding creative ways to advance what are often poorly articulated policy goals.⁸⁰ If a program calls for a hard output—*X* number of medical procedures provided to the public or *Y* megawatts of renewable energy generated—there may be little room to vary the underlying goal, but even in that context, there are likely to be any number of micro-level structuring decisions that go into reaching that goal. Thus, even where there is significant overlap in orientation between private parties and public goals at a macro level, there may be conflicts to manage in implementation.⁸¹

Even more creativity and potential for adding value arises where attorneys take on the entrepreneurial role of structuring a program beyond the narrow goal of meeting regulatory requirements. This is akin to what private lawyers do when they act as matchmakers and proselytizers in business.⁸² Here, however, the entrepreneurship relates to public policy and not business innovation, although in public–private partnerships there is considerable potential for overlap between the two. Thus, lawyers not only represent clients in individual deals, but also help to advocate for policy changes, form organizations to advance relevant policy, and build on their deal experience to feed back into program-system design.⁸³

c. Managing Regulatory Complexity

The ubiquity of regulation is an aspect of the modern administrative state that has an impact across the spectrum of transactional law. The government is far from a unitary entity, and any given transaction may unfold subject to environmental, securities, antitrust, consumer-protection, and other regulatory regimes, not to mention more specialized regulation that can include everything from local land use to the alphabet soup of industry- or sector-specific federal agencies.⁸⁴

80. Regulatory translation can take place regardless of the “subjective” orientation of the client to the relevant policy goals. *See supra* Part III.A. However, where a client is neutral with respect to the goal of institutional motivation, the incentives for attorney creativity or structuring to go beyond minimal conformity to public-law strictures may be muted.

81. Moreover, it is not uncommon for individual transactions to have multiple private parties who do not share a common outlook on the given program involved. *See infra* Part IV.B. This can give rise to an additional “translation” task for lawyers in mediating not only between the private sector and the state but also between mission-driven entities and more economically oriented entities involved in a deal.

82. *See* Bernstein, *Silicon Valley*, *supra* note 1, at 245–51 (discussing the role that lawyers play in venture-capital-financing transactions).

83. On balance, this kind of policy-innovation role is likely ultimately a positive contribution for lawyers, but there are grounds for some caution. *See infra* Part V.

84. *See* Fleischer, *supra* note 36 (manuscript at 25–27) (discussing the state’s involvement in transactional deals).

However, this fragmentation of the government takes on even more transactional importance in public-private partnerships, where one regulatory program—say, a tax incentive—may not fit well or at all with another applicable program. As Michael Diamond argued, regulatory goals often clash and can be incommensurate in their details—what Diamond called competing goods.⁸⁵ Diamond focused on housing policy, but this is a practical problem that stretches across many public-private transactions. Thus, a federal agency may be promoting alternative energy by subsidizing wind farms while a state wildlife agency has to respond to the impact this might have on migratory birds and a county might have to approve the siting and layout of the project.

Where private lawyers in the compliance context may have a comparative market advantage in managing this regulatory complexity,⁸⁶ it is a much more essential element of regulatory translation to add value by solving the practical problems that these regulatory overlaps create. It is the responsibility of the private party involved, ultimately, to manage potentially conflicting regulatory regimes. The lawyer is the indispensable party in that process.⁸⁷

d. Craftsmanship and Compliance Compared

Returning to the alignments-of-interests spectrum,⁸⁸ regulatory translation can be contrasted with two distinct aspects of transactional interaction with public law. First, business lawyers regularly undertake regulatory compliance, both in deals and in the ordinary course of counseling their clients.⁸⁹ Compliance focuses on ensuring that regulated

85. See generally Michael Diamond, *Affordable Housing and the Conflict of Competing Goods: A Policy Dilemma*, in AFFORDABLE HOUSING AND PUBLIC-PRIVATE TRANSACTIONS (forthcoming 2009) (on file with the Iowa Law Review) (discussing the conflict between different housing goals).

86. See Fleischer, *supra* note 36 (manuscript at 5) (discussing law firm market advantage in managing regulatory complexity).

87. It bears noting that transactional complexity is not only a function of the bureaucratic (in a neutral sense of the word) tendencies of the administrative state, but also it arises from the increasing sophistication of clients and the multiple constituencies involved in most modern deals. The vision of transactional law as the realm of two parties sitting across the negotiating table hardly describes deals that may involve constituencies as varied as regulators, unions, lenders, consumer groups, customers, and others. Recognizing that complexity raises its own transaction costs allows an extension of Gilson's analysis to the value that can come from managing that complexity. This is not a skill that is inherent to lawyers, of course. Other professionals have more direct training in management, but there is something in the "quarterbacking" of deals that gives attorneys a comparative advantage in finding the value of managing complexity. See *id.* (manuscript at 29–31) (discussing the role of "quarterbacking" deals).

88. See *supra* Part III.A.

89. See Dent, *supra* note 1, at 297–98 (discussing non-transactional business-related legal work); cf. David Dana, *Environmental Lawyers and the Public Service Model of Lawyering*, 74 OR. L. REV. 57, 70–77 (1995) (exploring conflicts inherent in responding to regulatory demands).

entities operate within regulatory constraints—familiar work not only for environmental or securities lawyers, but almost all business lawyers in the modern context.

The primary difference between this compliance work and the work of regulatory translation that this Article describes is the orientation of the project and of the client. The essential task of compliance work is to find the most efficient avenue to meet the minimal requirements set by law. There might be incentives for regulated entities to go beyond those minimal requirements, for example, to signal customers, to build regulatory goodwill, or to repair reputational problems.⁹⁰ However, those motivations are not at the core of how most regulated industries respond to regulatory requirements, and for traditional profit-motivated industries, likely represent lost value.

Regulatory translation likewise differs from regulatory arbitrage, primarily in terms of the alignment of interests and the goals that the parties seek to achieve. Where private entities are seeking to advance the public goals of whatever program in which they are engaged, there is less of an inherent conflict between the requirements of public policy and the private value of a transaction—and there may be a real alignment between the value the private client is seeking and dictates of public policy.

On one level, regulatory translation draws upon the same skill set and insights as compliance and regulatory craftsmanship. Lawyers in each of these roles engage with the complex strictures imposed by public law and have to understand how various regulatory frictions affect deal structure and their clients' goals. The difference in the regulatory translation context is the baseline assumption of regulatory stricture as friction. Put simply, where a client's interests are aligned (however imperfectly) with public goals, a regulatory framework provides a potential source of value creation in an affirmative sense. The deal lawyer's engineering task is not to minimize the costs associated with regulation, but rather to maximize the public benefits associated with the relevant program.

In the end, this is not to suggest that the model of regulatory translation this Article identifies is inherently limited to public–private transactions. Skilled attorneys in regulated environments almost always mediate between their clients and the state. The critical difference—a difference perhaps in degree more than in kind—is that, in public–private deals, that mediation takes place in a transactional setting where the kind of engineering that Gilson identified can be applied to enhance “value” in a way that advances policy goals as well as financial gain.

90. Dana, *supra* note 89, at 75 (discussing signaling to regulatory agencies); *cf.* Victor Fleischer, *Brand New Deal: The Branding Effect of Corporate Deal Structures*, 104 MICH. L. REV. 1581, 1628–37 (2006) (analyzing the consumer-signaling effect of corporate deal structures).

B. TESTING VALUE CREATION: THE LIMITS OF EMPIRICISM
AND ALTERNATIVE METRICS

To give some concrete grounding to this relatively abstract discussion, affordable housing offers a fruitful paradigm of public-private partnerships.⁹¹ This Part thus outlines the characteristics of typical affordable-housing deals as they relate to value creation by deal lawyers and then tackles the challenges of demonstrating that value creation empirically.

1. Affordable-Housing Deals as Paradigm Examples

On the supply side, governments at all levels have engaged the private sector to develop and operate housing that is affordable at below-market-rate rents or that is available for sale on an income-restricted basis.⁹² Various public agencies, at all levels of government, dedicate tens of billions of dollars in direct and indirect subsidies to the development and preservation of affordable housing every year,⁹³ and the stock of privately owned, publicly subsidized housing in the United States currently stands at more than two million units.⁹⁴

Affordable-housing deals resemble traditional private real-estate transactions in many respects, but the requirements attached to the public subsidies involved introduce some notable complications. In housing, policy goals include not just providing safe and decent below-market-rate shelter, which would be challenging enough, but also giving residents voice and stability, providing a locus for other social services, creating economic

91. Cf. Tim Iglesias, *Our Pluralist Housing Ethics and the Struggle for Affordability*, 42 WAKE FOREST L. REV. 511, 589 (2007) (describing the “progressive” vision of affordable housing). Affordable housing shares some characteristics with other areas of public-private partnerships, including urban renewal and infrastructure, as well as other areas of social-welfare policy. Housing, however, is a particularly fruitful area on which to focus given the heavily-transaction-oriented nature of the practice. Any example drawn from the world of social-welfare policy is likely to have some disconnection with examples from areas not as explicitly directed toward ameliorating poverty. From a functional lawyering perspective, these differences are generally going to be questions of emphasis and degree, rather than of kind.

92. Affordable housing is subsidized on the supply side directly through grants and loans and other subsidies and indirectly through the tax code; on the demand side, housing is typically subsidized through vouchers. The kinds of affordable-housing transactions this Article examines primarily involve supply-side subsidies.

93. See U.S. DEP’T OF HOUS. & URBAN DEV., FY 2007 BUDGET SUMMARY 13–16 (2007), available at <http://www.hud.gov/about/budget/fy07/fy07budget.pdf> (outlining the U.S. Department of Housing and Urban Development’s discretionary spending by program for 2005, 2006, and 2007); Novogradac & Co., Affordable Hous. Res. Ctr., Low-Income Housing Tax Credit: 2007 Federal Tax Credit Information by State, http://www.novoco.com/low_income_housing/lihtc/federal_lihtc_2007.php (last visited Feb. 26, 2009) (listing the allocation of low-income-housing tax credits by state for 2007).

94. MILLENNIAL HOUS. COMM’N, MEETING OUR NATION’S HOUSING CHALLENGES 25 (2002).

opportunity, and mitigating the impacts of the concentration of poverty, among other objectives.⁹⁵

Just as in traditional real estate, affordable-housing deals generally involve the development of a new building or the acquisition of an existing asset, and the bulk of contemporary programs, at least at the national level, focus on multifamily rental projects.⁹⁶ The players are familiar as well—they include the owner of land or the existing project, the developer or acquirer, and the web of financial participants on the debt and equity sides.

It is in the category of financial participation that the public side of the public–private partnership enters most clearly. In housing partnerships, it is the private sector that develops, owns, and operates the housing, but at least some portion of the financing is public. Subsidies can take the form of grants or loans, waivers of fee requirements and other soft subsidies, or, increasingly, through the indirect subsidy of tax credits for equity investors in Low Income Housing Tax Credit (“LIHTC”) transactions.⁹⁷ Affordable-housing projects today almost always require multiple subsidies, and the further down the income scale (and hence less able to support operating costs) the target population the subsidy is to serve, the greater the number of subsidy streams generally required. Each subsidy stream comes with its own particular goals—in terms of development structure, clientele to be served, time horizon, and other variables—and particular set of generally highly detailed regulations and related requirements. Add subsidy streams from local, state, and federal agencies, and the complications and required coordination correspondingly multiply.

Just as the basic affordable-housing transaction is more than a particularly complex real-estate deal, the private entities—both for-profit and nonprofit—that get involved in this sector of the housing market can have notably different characteristics than traditional businesses. To return to the spectrum of the alignment of public and private interests,⁹⁸ participants in typical affordable-housing transactions range from mission-

95. See generally ALEX F. SCHWARTZ, HOUSING POLICY IN THE UNITED STATES: AN INTRODUCTION (2006).

96. Single-family housing, particularly on the for-sale side, is also a part of affordable-housing policy; however, despite the veneration of this sector of the market by policymakers, homeownership is untenable for many of those served by core affordable-housing programs. Accordingly, the core of affordable-housing policy focuses more on rental housing.

97. For good overviews of various subsidy mechanisms at all levels of government, see generally Rick Judd & Barbara E. Kautz, *Local Government Financing Powers and Sources of Funding*, in THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT 287, 287–328 (Tim Iglesias & Rochelle E. Lento eds., 2005) (discussing local governments’ authority in relation to funding); Rochelle E. Lento, *Federal Sources of Financing*, in THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT, *supra*, at 215, 215–58 (discussing the different sources of federal funding available); Peter Salsich, *State Sources of Housing Finance*, in THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT, *supra*, at 259, 259–86 (discussing states’ involvement in providing funding for low-income residents).

98. See *supra* Part III.A.

driven nonprofit developers deeply committed to the essential public goals at stake to investors largely indifferent to anything but the economic returns represented by the subsidy.⁹⁹ To use a phrase that is common in housing deals, the “brain damage”—the level of complexity one must overcome and master for any given outcome—is great and the margins often thin, so participants justify involvement in this arena for reasons of goal orientation, to exploit a market niche, or some combination thereof.

Private parties involved in housing illustrate this variety of goal orientation. At one end, for example, certain LIHTC investors seek the credits purely for the economic advantage (a dollar-for-dollar income-tax reduction) that the program offers, and are entirely indifferent to the use of their equity funds, except from a compliance perspective. As with many housing programs, the government-created incentive structure aligns—or is at least designed to align—the transactional goals of the private entities and the relevant public policies. Thus, for LIHTC investors, despite their possible indifference to affordable-housing policy, ensuring that such housing is built and operated by the private developers according to the strictures of the program is critical to achieving the *economic* goals driving the investors. The rules are created by legislation and regulation, and investors’ returns are driven by ensuring compliance with those rules.

At the other end of the spectrum are the myriad nonprofit housing providers whose mission is to provide affordable housing and often related services. These entities range from the smallest community-based church group with a handful of units to sophisticated national nonprofit entities that have emerged in the past two decades to manage portfolios in the thousands of units. For all of these entities—even largely indifferent investors—the “deal” involves more than simply the economics, and the threshold decision to participate in any public–private partnership reflects at least some understanding of the public goals involved.¹⁰⁰

99. It is open to question the extent to which any private entity, at least in the for-profit arena, is driven purely by economic considerations, but it is hard to deny that economic considerations constitute the predominant (if not overriding) organizing principles for most for-profit entities.

100. Another variable in client orientation can be reluctant participation, which arises primarily in the context of regulatory bargains. Inclusionary zoning is a good example of this. In inclusionary zoning, a regulatory benefit—typically some development permission—is granted in exchange for the inclusion of affordable housing in the project or fees in lieu of such dedications. One can compare an affordable-housing development by a nonprofit provider to inclusionary zoning. In the former case, a mission-driven entity calls on public subsidies to create a new asset that directly advances the goal of providing shelter for those unable to afford market-rate housing. In the latter case, the same number of units of housing may be created, serving the exact same recipients, but the orientation of the provider is different: private developers tend to view inclusionary housing (and any number of other public benefits granted in exchange for development rights) as transaction costs in the purest sense. Thus, the physical product may look the same in each deal, but the orientation of the transaction—and the role of the lawyer—may take on a different cast.

Affordable-housing deals illustrate that goal orientation is complex and one need not assume any particular normative perspective on the relevant public purposes to identify an alignment of interests. The critical point is that such an alignment may occur regardless of the “subjective” orientation of the individuals behind the entities involved. In that situation, although a deal may be entirely between two (or more) private parties, the deal lawyer representing any given party has an additional realm in which to perform the kind of engineering that Gilson identified. For Gilson, the value added by deal lawyers centers on bridging information gaps and other barriers to transacting, and the same role can be played in adding value for parties whose transactional goals include advancing public policies.

2. Traces of Value Creation in Public–Private Transactions

The example of affordable housing provides a framework within which to respond to a perennial challenge in the transactional-lawyering literature. That challenge is demonstrating that deal lawyers do, in fact, engineer transaction and regulatory costs in ways that enhance the overall value of the transaction. It is difficult, if not impossible, of course, to prove the value that transactional lawyers add (can you imagine the control group?).¹⁰¹

Steven Schwarcz has attempted to tackle this problem through surveys of attorneys and their clients. Schwarcz asked not whether lawyers add value, but rather if they do, in what way. Schwarcz parses the theoretical grounds for transactional lawyers to create value by minimizing the risk of post-contracting litigation, providing reputational intermediation, and providing client privilege and confidentiality as distinct ways of understanding value creation in addition to the transaction-cost and regulatory-arbitrage grounds identified by Gilson and Fleischer.¹⁰² Schwarcz’s findings are revealing about attorney and client attitudes toward the value that lawyers provide,¹⁰³ but there are limitations to an empirical approach to value creation that relies on opinion data. It may be that perceptions of value creation and actual value creation align, but it is also possible that there is a missing theoretical understanding of attorney role identity and work that undermines such perceptions.

Gilson offered both a more direct and, on some level, more anecdotal solution to this empirical challenge, pointing out that at least some evidence of the dynamics of value creation that he hypothesized is discernable in

101. See Gilson, *supra* note 1, at 247–48 (discussing measurement problems in assessing lawyer value creation).

102. Schwarcz, *Explaining*, *supra* note 1, at 491.

103. For example, Schwarcz finds that lawyers and clients regard minimizing ex post litigation as a primary goal for deal lawyers, *id.* at 496, that there is only weak support for Gilson’s vision of transaction-cost engineering, *id.* at 498, and that there is strong support for value creation through the reduction of regulatory costs, *id.* at 500.

actual deal documents.¹⁰⁴ Gilson thus highlighted a number of examples in a typical asset-purchase agreement that demonstrated how lawyers in practice engineer transaction costs, citing earnout provisions, representations, warranties, indemnifications, and legal opinions as tools to manage expectations and information costs.¹⁰⁵ This latter approach may be a more productive approach, although it is not perfect.¹⁰⁶

Just as Gilson sought evidence of value creation in the interstices of standard asset-purchase documents, so regulatory translation can be seen to play out in the ordinary language of the deal documents that frame public-private transactions.¹⁰⁷ To return to the paradigm of housing as a concrete case study, and in particular tax-credit transactions, one can see evidence of regulatory translation in some of the more common provisions of many affordable-housing deals. For typical clients, these provisions involve translating what can often be difficult and, in the context of multiple subsidy streams, conflicting regulatory requirements into obligations that are understandable and that can be framed in terms of the allocation of risk between the parties.

*a. Tax-Credit Recapture Guarantees as Time-Horizon
and Regulatory Balancing Tools*

Federal law structures the LIHTC program to place on investors over a period of fifteen years the risk that the project will not meet regulatory requirements. If the project falls out of compliance, or the Internal Revenue Service discovers a prior noncompliance, investors face recapture of tax benefits by the IRS plus interest—a potentially draconian penalty.¹⁰⁸ In

104. Gilson began with the proposition that the persistence of business lawyering is some indication that lawyers add value. Mark Suchman has challenged this predicate assumption, arguing that the persistent centrality of deal lawyers is at least as consistent with “its taken-for-grantedness, normative endorsement and ritualization” that might “reflect a local equilibrium that might be resistant to change, but not be globally optimal.” Suchman, *supra* note 16, at 272–73. These are valuable nuances to add to Gilson’s framework, but they are not necessarily inconsistent with the proposition that deal lawyers nonetheless may be worth, at least some of the time, what they command in the market.

105. See generally Gilson, *supra* note 1, at 256–93 (analyzing a typical acquisition agreement and the role that business lawyers play in creating value in such transactions); *supra* Part II.A (discussing Gilson’s examples).

106. Fleischer takes a third tack, pointing to deal structures, firm self-reporting of value, and qualitative data in the form of attorney interviews to undergird his argument. See *supra* Part II.B.

107. It is important as well to acknowledge that attempting to discern traces of value creation, however defined, in the residue of deal structures risks ignoring the larger context in which transactions occur. Lisa Bernstein has argued that beyond “the terms of the parties’ written agreements,” certain transactional contexts, such as Silicon Valley, may allow for value creation through roles other than transactional engineer. Bernstein, *Silicon Valley*, *supra* note 1, at 253. Context is obviously equally important for the specialized practice areas in which public-private partnerships take place.

108. See I.R.C. § 42(j) (2000).

practice, however, investors tend to be passive participants in partnerships or limited liability companies controlled by developers who are responsible for the day-to-day activities (such as certifying the income level of tenants) required to maintain regulatory compliance.

In LIHTC deals, therefore, it is typical to see elaborate provisions for guarantee payments by developers to investors in the case of recapture or similar adverse tax events. These provisions manage the differential horizon and incentives facing tax-credit investors (often passive entities with little interest in actively intervening over the life of a project), tax-credit developers, and owners. These provisions also creatively solve an element of uncertainty arising from the potential for policy changes.

However, the IRS has suggested constraints on nonprofit developers' ability to offer strong indemnities to for-profit investors, even when the nonprofit developers are in the service of providing affordable housing, an acceptable charitable mission.¹⁰⁹ This directly raises an example of Diamond's competing goods—the imperatives of prudent nonprofit governance on the one hand clashing with a subsidy structure predicated on private-investor return on the other. Deal lawyers have had to structure around this clash.

One common resulting structure caps the exposure of the nonprofit developer to the economic value coming from the deal—translating the developer fee, in essence, into a source for investor protection. This gives investors some protection and aligns the interests of the developer and investor over the period of risk while protecting the ongoing viability of the nonprofit entity. This kind of creative structure bears a family resemblance to the kinds of mechanisms that Gilson highlighted as solving heterogeneous-expectation problems in private transactions, but deal lawyers in the housing context must mold those solutions to the realities of the programs at issue.

b. Accounting for Accountability

Also typical in housing deals are provisions that require notification of the government and governmental approval at key turning points in the life of a project, reserve regulatory authority to the government, or impose relatively open-ended “quality” standards on the housing.¹¹⁰ Oversight mechanisms balance private flexibility with the need to protect the core public benefit at issue, both in terms of maintaining affordability but also in terms of preserving the physical asset itself. Quality or similar open-ended

109. See Roberta L. Rubin & Jonathan Klein, *Nonprofit Guaranties in Tax Credit Transactions: A New Era?*, 15 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 314, 318 (2006) (discussing an internal IRS memorandum that set forth criteria for evaluating a tax-exempt organization's involvement in a LIHTC transaction).

110. See Davidson, *supra* note 60, at 288–93 (discussing contractual provisions in affordable-housing transactions).

obligations on the nature of management recognize the risk of opportunism and, at the same time, acknowledge the challenge of specifying with any level of detail the variety and complexity of obligations that housing deals can entail.

Returning to the issue of risk profiles, from the government's perspective, one distinctive element of housing as a public-private product is the relatively durable nature of the asset involved. When a public subsidy incentivizes the private sector to generate affordable housing or to convert a housing asset previously serving market-rate tenants, the time-horizon of the public commitment is measured in decades, if not longer. This can be true of public-private partnerships in the infrastructure arena and other examples involving hard assets, but is generally less true compared to other areas of social welfare. This extended public commitment, which has proven controversial for private providers at times,¹¹¹ creates incentives and practical problems that intertwine the government and the private sector into long-term, on-going interactions that have to be understood—and accounted for in deal structuring—from the outset.

c. Allocating for Political Risk

As noted, deal lawyers have to structure to account for the possibility that political priorities change over time and that programmatic requirements correspondingly shift. One example of this in the housing context is the problem of so-called appropriation risk. Often an important aspect of the financial viability of a given development is a form of project-based rental subsidy. However, project-based Section 8 subsidies, a common form of operating assistance for housing, are typically limited by the proposition that Congress must appropriate funds for the subsidy on an annual basis. Congress has never failed to renew the subsidy, but the risk nonetheless exists that an important aspect of the financial viability of a project rests on political grounds. Lawyers manage this risk—again a question of heterogeneous information and expectation between public and private actors—by a variety of means, including guarantees and indemnifications, salvaging transactions, and adding value through regulatory translation.

111. A notable area of recent policy development and litigation involves the problem of time-limited affordability requirements. Many housing programs make an explicit bargain with the private sector: utilize public subsidies to develop housing that will be below market for a period of time—thirty years, for example, in many LIHTC transactions—at which point you will be able to take the building to market-rate housing. Congress and HUD have attempted, in a variety of ways, to mitigate the impact of this initial bargain (with owners resisting some of these attempts), and ever-longer affordability periods are becoming common, but this remains a controversial aspect of contemporary housing policy.

d. Responding to Third-Party Interests

Finally, housing transactions often feature provisions that cover third-party rights, primarily for tenants. These provisions can include everything from basic tenancy protection—defining when and under what conditions owners can cease renting to tenants—to tenant organizational rights to certain option rights or rights of first refusal. Functionally, these third-party rights can be understood as mechanisms to define the obligations of owners in a way that balances their expectations with the need for tenant involvement and security. From a value-creation perspective, however, these kinds of provisions highlight the challenges (and opportunities) for deal structuring raised by what is essentially proxy representation for the ultimate recipients of the projects created.

These examples by no means exhaust the universe of provisions in housing deals that set forth a framework and the terms of engagement for long-term, public-private interactions, but they do give a concrete sampling of regulatory translation in action. Each of these typical provisions, in the end, represents a solution to a potential transacting barrier to the various public and private interests involved in reaching an outcome that is not only mutually beneficial, but advances the relevant regulatory goals. Because lawyers are capable of rendering these interests in the terms of private agreement, even with provisions that are, at times, open ended, they create deals and make them more “valuable” in the broadest sense of the word.

V. THE PROBLEMATICS OF REGULATORY TRANSLATION:
ATTORNEY ROLES AND INHERENT CONFLICTS

To this point, the discussion of the lawyer’s role in public-private partnerships has largely staked out a descriptive claim that attorneys serving clients involved in public programs who are in some alignment with the goals of those programs can serve an important role in translating that policy into private agreement. As noted, there is a basic empirical question underlying that descriptive claim: Does the work of regulatory translation create value in the way this Article theorizes? It is impossible to resolve this question definitively, although traces of this value creation in examples of public-private transactions can be found in practice.¹¹²

At this juncture, however, this descriptive claim also raises the normative question whether lawyers *should* act as translators in this way, or whether they should approach their role uniformly regardless of the context. Moreover, there are negative, as well as positive, consequences that

112. It is also fair to ask the predicate empirical question whether deal lawyers in public-private transactions act in the way this Article outlines. On this, again it would be difficult to evaluate in any depth, but it is safe to hazard a tentative claim that lawyers, at least some of the time, embrace that role, although there is value in doing so more self-consciously, as the Article discusses below. See *infra* Part VI.A.

might flow from relying on the private bar to act in this public-regarding capacity. This Part explores both concerns.

A. *DIFFERENTIATING ATTORNEY ROLES*

A well-rehearsed general tension runs through the discourse on legal ethics and lawyering between prevailing models of zealous advocacy and alternative visions of attorney identity that would impose independent ethical or moral duties beyond client goals.¹¹³ This raises what Katherine Kruse describes as “the gap between what is legally permitted and what is just.”¹¹⁴ Scholars, thus, periodically extol the potential for lawyers to act as statesmen¹¹⁵ and leaders,¹¹⁶ with a concomitant responsibility for acting in the public interest. Just as regularly, scholars counter with arguments for the value of lawyers as service providers¹¹⁷ with ethics grounded in the tradition of the wise and confidential counselor.¹¹⁸

The deal-lawyering context replicates this broader attorney role tension, especially for attorneys operating in regulation-influenced transactional contexts. David Dana has identified in this context a conflict between what he labels as the “client-service” model and the “public-service” model.¹¹⁹ Dana argues that for lawyers drawn to practice in arenas infused with public policy, a number of forces conspire to give primacy to client service over the often vague and complex demands of any modern regulatory system. Taking the realm of environmental compliance as an example, Dana highlights the client-service gravitational pull of a number of forces. These forces include the ease with which lawyers can find “loopholes” in complex regulatory regimes, the tremendous volume and attendant practical difficulty of following regulation, the increasing legal sophistication of clients who seek to limit regulatory costs, and the limited incentives that such clients have to go beyond minimal (or even sub-minimal) compliance.¹²⁰

113. See, e.g., Sharon Dolovich, *Ethical Lawyering and the Possibility of Integrity*, 70 *FORDHAM L. REV.* 1629, 1629–30 (2002) (summarizing the debate).

114. Katherine R. Kruse, *Lawyers, Justice, and the Challenge of Moral Pluralism*, 90 *MINN. L. REV.* 389, 389 (2005).

115. See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 11–162 (1993) (discussing a standard of professional ideals for lawyers).

116. See Ben W. Heineman, Jr., *Lawyers as Leaders*, 116 *YALE L.J. POCKET PART* 266, 266–70 (2007), <http://thepocketpart.org/2007/2/16/heineman.html> (arguing that lawyers should aspire to be “wise leaders”).

117. See, e.g., Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 *U. COLO. L. REV.* 1, 2, 6–7 (2003) (“[T]he lawyer’s role is grounded in a logic of service . . .”).

118. See Daniel Markovits, *In Praise of the Supporting Cast*, 116 *YALE L.J. POCKET PART* 272, 277–78 (2007), <http://thepocketpart.org/2007/2/16/markovits.html> (describing the lawyer’s professional role as counsel).

119. See Dana, *supra* note 89, at 58–62 (discussing the different lawyering models).

120. *Id.* at 70–77.

Echoing Dana's concerns with lawyer–client incentive structures, Victor Fleischer examined the structural pressures on modern law firms doing regulatory work. Fleischer argues that competition for the premium fees available to firms operating at the “regulatory frontier”—areas of greatest regulatory uncertainty—creates incentives to approach regulatory constraints from the perspective most favorable to clients, regardless of the policy goals involved or the orientation of the individual lawyer.¹²¹

The intractable debate about proper attorney role orientation may be sharpest where there is a clear conflict between what the “public interest”—as indeterminate as that might be—and a private client's interest might separately dictate. The spectrum of the alignment of interests in public–private partnerships, however, complicates this conflict by identifying contexts in which societal demands—represented by the collective priorities embodied in public policy—and client interests are not necessarily in conflict. Again, whether as a question of the mission-driven orientation of many entities that enter public–private partnership or as a function of program design that aligns public goals and private incentives, in many examples of public–private partnerships an attorney zealously operating in a client-service role is at the same time operating in a public-service role.

This does, however, raise the question of the amount of latitude that attorneys might have to act in a more public-regarding manner and whether the alignment of interests that can arise in public–private partnerships makes a difference. In other words, are lawyers—particularly business lawyers—inevitably creatures of their professional context, structurally oriented to advancing client goals narrowly defined as a function of professional competition? Or, are lawyers sufficiently autonomous to transcend the professional context and make individual choices about their role—including which clients to choose, how to interact with those clients when attorney and client policy preferences conflict, and how active a role to take in centering policy goals in the transaction? That these conflicts are likely to arise seems to be one implication of the dynamics that Dana highlights. It may be true that the incentives run against contextual, reflective lawyering that balances client interests with the larger public implications of a transaction. But attorney autonomy is not easily dismissed, and attorney latitude may be more a question of degree than a hard line between individual choice and client prerogatives.¹²²

121. See Fleischer, *supra* note 36 (manuscript at 33–34) (describing pressure on lawyers to “read the relevant regulations in a manner that favors their client”).

122. Cf. Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503, 504–05 (1985) (arguing that although lawyers in large firms privilege autonomy in conceptualizing legal institutions and attorney–client relations, in practice, client-centered advocacy is the norm and lawyers “rarely experience serious disagreement with the broader implications of a client's proposed course of conduct”).

Assuming that some attorneys can either transcend structural pressures or operate in an environment in which goal conflicts do not predominate, there is the separate question whether it is appropriate for the orientation of transactional lawyers to vary from context to context. Should an attorney representing a business in an ordinary deal with another business act any differently than a lawyer involved in a functionally similar, but public-private, deal?

On one level, the answer must be no. Legal ethics at least begin with a basic universalism.¹²³ To suggest that there is some kind of more public-regarding role for lawyers where their clients are advancing public programs is to risk denigrating the standards to which lawyers are generally held. But on another level, differentiation may be appropriate where the public aspects of a given transaction are a direct outcome—rather than potential consequence—of a client's decision to engage in a public-private transaction. To highlight the ability of deal lawyers to advance public goals in public-private transactions is not to denigrate other lawyering perspectives, but it is worth isolating this context nonetheless.

B. REGULATORY TRANSLATION AND THE CULTURE OF LEGALISM

Gilson's vision of attorneys as transaction-cost engineers clearly carries a normative gloss—deals take place that would otherwise collapse and value is added in an absolute sense that would not be true but for the largely creative work of deal-lawyer structuring. Fleischer's recognition that the value to be gained in deal structuring in the contemporary regulatory environment can be seen as a transfer from the state to private clients is a less positive story; although as discussed, there is an empirical question about the nature of public intervention that is at least contestable.¹²⁴

Placing the legal profession at the center of public policy through the work of regulatory translation in public-private partnerships, however, can raise other concerns. Particularly, this role may create perverse institutional incentives for the public sector, may represent a barrier to entry for other professionals to serve in this capacity, and can raise legitimate questions about the distributional consequences of relying on the private bar for this function.

1. Perverse Incentives in Problem Solving

Identifying the centrality of lawyers in translating the complex regulatory structures that dominate public-private transactions raises

123. This universalism is not without critics. See Dolovich, *supra* note 113, at 1639–46 (discussing contextual legal ethics); Kruse, *supra* note 114, at 426–33 (same).

124. See *supra* text accompanying notes 44–46.

concerns about the effect of such lawyering on this policy approach.¹²⁵ It may be that legalism itself—the structure of legal norms and the contemporary culture of the law as a form of governance—generates the very problems that lawyers are then called upon to solve.¹²⁶ The role of the attorney here, in other words, may reflect a politically constructed by-product of the culture of legalism, and it is a fair point to acknowledge that lawyers who help clients solve the very complexity the legal system creates are in some sense complicit in creating those problems.¹²⁷

To identify what can be a salutary role for transactional lawyers in public–private partnerships is not, however, to endorse an unmitigated embrace of the proliferation of regulatory complexity. As discussed below,¹²⁸ there are advantages to regulatory transparency, and the state certainly has a responsibility to reduce the need for regulatory translation. It may be that having an able and creative transactional bar ready (for the appropriate price) to step in and untangle complex regulatory and subsidy regimes reduces the incentive for agencies to act transparently and in the most efficient manner.

But there is a genuine—and genuinely unavoidable—complexity that the multiple-bottom-line pluralism of value in public–private transactions entails. A certain degree of regulatory complexity is necessary to achieve the complex goals that run throughout modern public policy. While engaging the private sector raises additional levels of complexity, the comparative costs and benefits of that added complexity pose an empirical question for which the contemporary literature as yet supplies no answer.¹²⁹ Choosing to engage the private sector unavoidably raises transaction costs for public projects. Given how steeped in law those particular complexities are, putting lawyers in the foreground is unavoidable. Thus, whatever the balance that can be discerned in ordinary private transactions, the law-related

125. Gilson identifies, for example, the barriers to transacting that come from information asymmetry as a concern. See Gilson, *supra* note 1, at 280. Others have suggested that an element of transacting culture that heightens mistrust may have to do with the business world “lawyering up.” Cf. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 60–61, 65–67 (1963) (discussing the attitude of individuals in business toward the role of lawyers and the settlement of disputes).

126. Cf. Robert A. Kagan, *Do Lawyers Cause Adversarial Legalism? A Preliminary Inquiry*, 19 LAW & SOC. INQUIRY 1, 15–21 (1994) (discussing the role that lawyers play in shaping a culture of “adversarial legalism”).

127. Cf. Gilson, *supra* note 1, at 246–47 (“[L]awyers are often the source of much of the current regulatory jungle confronting those doing business. From this perspective, a client may be less than grateful for salvation from the very problems the savior originally created.”).

128. See *infra* Part VI.B.

129. Are the additional costs of complexity inherent in public–private approaches to policy outweighed by the additional benefits such partnerships provide? Proponents and opponents can cite competing statistics about comparative institutional advantage for private and public providers, and the theoretical debate is exhaustive, but the underlying question remains unanswered. See *supra* Part III.B.

complexities that arise in the interface between public policy and private transactions require skilled lawyering to manage.¹³⁰

A closely related concern is that privileging the ability of lawyers to add value through regulatory translation might simply be a shield for attorney rent seeking. Mark Suchman has argued, for example, that the behaviors that Gilson identifies with value creation might instead be functions of cultural or market barriers to entry. To Suchman, then, the complexity of modern transactional practice suggests the possibility that “lawyers earn their pay primarily as touts and bouncers for the prevailing legal regime.”¹³¹ Lisa Bernstein has questioned Suchman’s hypothesis, noting that the value that might arise from counseling, matchmaking, gatekeeping, and similar non-legal roles lawyers can play.¹³² But empirically, it is difficult to disentangle how much of the deal-lawyer role is a function of professional self-protection and how much is a question of marginal value to the client. Perhaps the most salient response to this concern is that to the extent that business lawyers and clients identify this conflict, there may be ways to mute the potential for mischief it represents. We will return to the argument for transparency in this aspect of the attorney–client relationship below.¹³³

2. Who Bears the Cost?

Assuming that regulatory translation can add value to deals in the way that this Article argues, a final concern arises over the question of whether private clients should bear what is, in some sense, a *public* cost. In working to translate regulatory requirements for private clients, lawyers could be seen as shifting value from the private sector to the government and undermining public incentives for transparency and consistency. In regulatory arbitrage, the value added to the transacting parties comes directly or indirectly from reducing the cost of some public intervention. In paradigm examples of regulatory translation, however, the direction of benefits is less obvious. In some instances, clients may benefit from advancing public goals, given their mission orientation or the incentive structure of a program. In other cases, private attorneys are essentially charging private parties to reduce costs imposed by the public sector in a way that is arguably a public benefit.¹³⁴

130. This would be true for both regulatory craftsmanship and for regulatory translation, but the “value” added in the latter context advances relevant policy goals rather than seeking to create private value by arbitraging their limitations.

131. Suchman, *supra* note 16, at 267.

132. Bernstein, *Silicon Valley*, *supra* note 1, at 245–51.

133. See *infra* Part VI.A.

134. The same question would not arise when lawyers are creating value through regulatory craftsmanship because, by definition, any gain to the client is a cost to the state (again setting aside the normative questions that this raises). In regulatory translation, there is the possibility of gain to the client and gain to the state, and in that situation, it may be that the state is, in some sense, free riding on the private sector’s engagement of private lawyers.

One answer may come from client orientation to public policy. Where a client is dedicated to the relevant goals in a given policy area, the benefit they gain from creative lawyering inheres as much to the private client as it does to the government or the public beneficiaries. Of course, some portion of private parties engaged in public-private partnerships do so less from their own motivations and more from the relevant public incentives. In those cases (and perhaps more generally), it may be an implicit element of the relevant subsidy that private parties bear the cost of the attendant complexity. This remains a non-trivial concern nonetheless.

Ultimately, there is a potential salutary normative point for transactional lawyering that these various concerns highlight. Given that the public sector is increasingly engaging the private sector to advance public goals, is there a constructive role for deal lawyers to play—and to understand themselves to be playing—that maximizes the value, broadly speaking, of such partnerships? I think on balance the answer is yes, but cautiously so.

VI. IMPLICATIONS

As noted at the outset, this Article seeks to bridge two discourses that rarely intersect. By and large, scholars focused on the work of transactional lawyers have made assumptions about the potential alignment of interests between the private and public sectors that are increasingly unrealistic in modern practice. Conversely, scholars focused on public-private partnerships and the broader questions posed by privatization have generally ignored the role of transactional lawyers who stand at the threshold of so much public-private interaction. This Part accordingly explores the implications of this intersection in two directions—for the value-creation literature and for the various parties involved in public-private partnerships.

A. *UNDERSTANDING THE INTERMEDIARY*

The vision this Article presents of deal lawyers in public-private partnerships is certainly something of an ideal type. As a descriptive matter, it is impossible (or at least impractical) to discern empirically how most lawyers in practice see their own role in this context. Where and under what conditions regulatory translation shades into the more adversarial work of regulatory arbitrage is rarely going to be sharp. It is hard to deny, however, that some sectors of the private bar see their role when representing clients in public-private partnerships as broader than simply advancing client interests, narrowly defined. Regardless of the empirics of this role identity, however, there is value in clearly identifying the role and advantages in embracing that role.

1. Embracing the Translator's Task

Understanding the value that deal lawyers can create through regulatory translation can give lawyers a new perspective to approach the task with better awareness of the comparative advantage they bring to deals. One of Gilson's goals in positing a theory of value creation for transactional lawyers was to highlight the competition that lawyers face from other professionals and potential market participants. As Gilson noted, there is nothing traditional or inherently "legal" about the type of transaction-cost engineering that he identified, and other professions could just as easily step in to add the same value.¹³⁵

This assumption, however, has much less force in the kind of regulatory environments in which public-private partnerships unfold. Because of the involvement of the government—involvement that is most often expressed through complex *legal* language—there is no escaping the centrality of lawyers to what, in other contexts, would tend to be non-legal aspects of a transaction. In this way, lawyers are not just leveraging their capability to understand and render comprehensible the mass of governmental requirements and constraints attached to most subsidies (as much as can be done) to take on additional tasks as drafters or negotiators or the like. Lawyers are instead adding unique value by operating simultaneously in the world of private transactional structures and public policies expressed through regulatory language.¹³⁶

Another aspect of economies of scope available for deal lawyers in public-private partnerships is that lawyers can add value for clients as they leverage the experience of working on one challenging regulation-driven transaction to other such transactions. It is hardly cost-effective for most participants in many of the areas of policy at the heart of public-private partnerships—arenas that often involve confronting daunting social challenges with severe resource constraints—to invest in the information necessary to understand evolving regulatory requirements that may represent only a marginal risk in any given deal. Lawyers who specialize in various areas of public-private interaction, by contrast, can and do develop expertise, the costs of which can be spread across multiple clients. More so

135. Gilson, *supra* note 1, at 295. Gilson noted that economies of scope—the ability efficiently to apply the same investment to more than one outcome—should give lawyers an advantage in performing the non-legal aspects of transaction structuring, such as drafting, valuation, and due diligence. *Id.* at 298. But this comparative advantage is not necessarily grounded in deal lawyers' expertise as *lawyers*.

136. Housing provides many examples of other professionals who play prominent roles in instantiating policy goals. Accountants, for example, are active players, as are bond specialists, financial advisors, deal consultants, title companies, insurers, and others. As in more private-oriented transactions, much of the work of deal lawyers involves coordinating other professionals, but the centrality of regulation—legal strictures—gives greater justification for this otherwise non-legal lawyer-coordinating function.

than economies of scope in the purely private context, this has the potential to create a store of knowledge that reduces the costs for participants and diffuses best practices.

Recognizing this inevitable market niche, however, does not mean that lawyers should exploit that advantage to capture more value from a transaction than they add or than other potential participants might more efficiently provide. If a client or a less costly third-party professional can play a role more efficiently than deal lawyers now do, it is incumbent upon deal lawyers to cede that role. They should do so not out of some altruistic regard for their clients (although that should not be dismissed), but rather because the overall value to clients—and to the public—can be increased by more targeted specialization.¹³⁷

If, as the value-creation literature suggests, transactional attorneys can overcome barriers that clients may not understand or appreciate to maximize the value of mutually beneficial exchange, there may be grounds for a more sanguine view of the potential for similar unearthing of hidden value in public-private transactions.

2. Reorienting Client Perspectives

An important insight to be gleaned from the spectrum of alignments to the state is that attorney identification with client goals poses challenges beyond the public-private transactional context. Although exploring a rich variety of micro-goals, particularly as regulatory-cost engineering comes to the fore, the traditional literature on value creation has had an ultimately reductionist perspective on the macro-orientation of transactional law.

137. One curious cultural aspect that marks transactional lawyering in at least some areas of public-private transacting is that attorneys seem open to sharing knowledge, document forms, and experience working with the various agencies involved. The members of the American Bar Association's listserv for affordable-housing and community-development law, for example, regularly engage in ongoing discussions of arcane regulatory questions, and an ethos seems to prevail that focuses on mutual support. Lawyers share insights and provide detailed feedback on regulatory interpretation (and the extent to which such interpretation has been accepted by agencies and market participants). This is an anecdotal impression, to be sure, and there are certainly other areas of legal practice where lawyers offer each other continuing legal education, and regulatory and other legal knowledge is considered something of a common stock. One can speculate that this is because attorneys see reciprocal advantage to be gained from this exchange of knowledge, but it is at least possible that this ethos has developed because of an awareness among housing deal lawyers that there is an important aspect of their work that is much closer to David Dana's public-service model than the kinds of conflicts Dana associated with the client-service model in heavily regulated sectors of the economy. Dana argued that where regulatory constraints were clear and draconian, there would be no conflict between what client service and public service would demand of a lawyer. Dana, *supra* note 89, at 59-60. Dana rightly pointed out that this is rarely, if ever, the case. *See id.* (discussing the real world of ambiguous and inconsistent regulation that raises the conflict between models of lawyering). But in public-private partnerships, it may be that the very complexity of relevant regulations creates a culture of mutual support among attorneys aware of the public orientation of their work.

Clients are assumed to seek value solely in terms of monetizable increments of gain, regardless of any other metrics.

This is not to deny the vast heartland of transactional law in which clients are, by and large, driven by ordinary business concerns. But, it is still important to complicate this vision by recognizing that not only are there non-traditional ways of creating traditional value,¹³⁸ there are also more private clients who might have a broader vision of value than is often assumed in the literature.

If, as the value-creation literature highlights, lawyers are only worth their added value, then their use must be justified and even more so in transactions that revolve around the deployment of scarce public resources. Anecdotally, critiques of transactional lawyering as adding unjustified costs ring as true, if not more so, for clients in public-private transactions as in traditional dealmaking, especially where transactions exist on narrow margins and subsidies are perennially limited.

Understanding the value that transactional lawyers add to public-private transactions thus has implications for clients. For example, this perspective can lead clients to develop in-house expertise where appropriate, as many players in the housing arena have done. This perspective can also lead clients to be less reluctant to engage attorneys when the necessity for regulatory translation is most acute. Therefore, separating out and recognizing the value added in regulatory translation sharpens the client's decisional matrix about engaging lawyers.

Moreover, given the potential for attorneys to develop regulatory expertise that transcends any given client, participants in public-private partnerships understand the cost savings that such leveraging might provide. Again, this raises an empirical question about the relative cost and benefit of that repeat-transactional role for attorneys, but there is at least some evidence in the context of regulatory arbitrage that clients recognize that lawyers can add this value.¹³⁹ There is no reason to believe that the same function cannot be brought to the fore in transactional contexts where there is more of an alignment of public and private interests.

One aspect of client attitudes toward deal lawyers in public-private partnerships may stem from the connection between the need for regulatory translation and the concomitant provision of the lawyers' services.¹⁴⁰ This concern is appropriate, but somewhat misplaced. Regulatory complexity is an inevitable cost of involvement in public-private partnerships, and the question is how best to manage that complexity.

138. See generally Fleischer, *supra* note 90 (discussing brand image as a factor in corporate deal structures).

139. See Fleischer, *supra* note 36 (manuscript at 26–27) (discussing the premium that firms command for performing regulatory work and the legal-market context in which lawyers can obtain a premium for that expertise).

140. See *supra* Part V.B.

B. RE-ENGINEERING PUBLIC-PRIVATE PARTNERSHIPS

To return, finally, to the debate about privatization,¹⁴¹ regulatory translation has the potential to advance the benefits of engaging the private sector in public policy and to mitigate some of its downsides. For private clients, transactional lawyers can apply the same kinds of value-creation techniques to public-policy goals. For the government, however, being able to engage a private transactional bar capable of engineering private transactions to advance public goals greatly expands the reach and range of public-private partnerships.

1. Maximizing the Value of Engaging the Private Sector

If deal lawyers can structure private incentives to bring them in line with public goals, as this Article has argued, the process can help the government achieve its goals through the language of private law in a way that can be hard for agencies steeped in policy to manage effectively. This is not to suggest that policymakers or government attorneys necessarily lack sophistication about their private counterparts, but rather, that transactional attorneys who operate in both worlds can add value to the public.

Considering the problems of privatization, if private-sector involvement in public policy is to be measured by the extent to which it enhances the efficiency of public-sector goals while not undermining the accountability of public oversight, it is through the basic mechanics of private agreement that this dynamic plays out. One function of regulatory translation, then, is potentially to enhance efficiency given the alignment of public and private interests. Of course, the devil is in the details and lawyers may miss the mark, but as an aspiration, connecting a pluralistic vision of value creation by deal lawyers to the potential to enhance efficiency foregrounds a role for lawyers that has largely been absent in discussions of privatization.

The risk of losing accountability in shifting more responsibility to the private sector is a more complex question, as it is the arena where public and private interests are most likely to diverge. But, however the government chooses to structure its oversight, it is in the realm of private ordering that such oversight takes on meaning. This inevitably places lawyers in the middle of actuating the mechanisms of oversight. In public-private partnerships, and privatization more generally, it is not enough for the state to issue a command and hope that the private sector responds—there are complex, intertwined relationships that can develop over the long run that can make any unilateral oversight subject to any number of practical difficulties. This places a burden on the government side of the equation to manage the articulation and measurement of goals carefully, recognizing that there are costs as well as benefits to oversight. It also suggests a

141. *See supra* Part III.B.

potentially positive role for lawyers in bringing a variety of practical tools to questions of oversight.¹⁴²

2. Government Cooperation in Regulatory Translation

Given that governments at all levels find it in the public interest to engage the private sector in serving the public, there may be more that agencies can do to facilitate the regulatory-translation function of deal lawyering. The Department of Housing and Urban Development (“HUD”), for example, has attempted in recent years to foster what former HUD General Counsel Keith Gottfried described as regulatory transparency in its dealings with the housing bar.¹⁴³ More can be done by all agencies involved in public-private partnerships to make the implementation of public programs through the medium of private transactional law more transparent, regardless of the content of the regulatory requirements the government finds necessary for the public interest.

Agencies in general can understand that public-private partnerships cannot simply involve the imposition of public goals on private participants, no matter how willing or enthusiastic those participants may be. There are direct costs to regulatory complexity, and those costs are not borne exclusively (or even primarily in some cases) by the private entities that serve the public in these partnerships. Given the types of assets often involved in public-private transactions—such as infrastructure, housing, and other facilities—initial deal structures have long-term effects. This means that government entities, no less than their private counterparts, have to pay careful attention to asset management over time. It is through the obligations that lawyers craft to align long-term incentives and interests that the public interest is advanced.

Moreover, returning to the role of private deal-lawyer economies of scope, it is unlikely to be in the government’s interest to undertake the work of matching general regulatory goals to the vast array of specifically situated private entities engaged in advancing those goals. Translation by lawyers in the context of specific transactions—information that can be taken to scale by those lawyers—seems an appropriate intermediate solution.

142. It might seem like an inherent conflict to represent a private client subject to oversight in a public-private transaction and in any way to assist in public oversight; yet, in practice, there may be more of an alignment of interests than at first appears. There is a political dynamic of reaction to failure in privatization—a kind of ratcheting effect—that undermines what makes public-private partnerships potentially advantageous to both sides. To the extent that skillful eliciting of issues can avoid the ratcheting effect—such as private benchmarks and the consequences of failure—“value” is added to a public-private transaction in a similar overall net-benefit manner as Gilson identified for purely private transaction-cost reductions.

143. See Keith E. Gottfried, Gen. Counsel, U.S. Dep’t of Hous. & Urban Dev., Remarks at the National Settlement Services Summit (June 14, 2006), available at <http://www.hud.gov/offices/ogc/gottfriedrefresh/remarksofkgottfriedatsettlementsservicesummit.pdf> (discussing regulatory transparency).

In the end, both sides in public–private partnerships have to recognize the consequences of interrelating between two cultures. The world of public subsidies is grounded in budget cycles, public scrutiny, political risk, and changing policy priorities. The world of private dealmaking is grounded in risk allocation, information management, and other tools of private bargaining. Deal lawyers are uniquely situated to play a mediating role between these two worlds.

VII. CONCLUSION

This Article brings to the fore an important transactional dynamic ignored in the extensive literature on value creation by deal lawyers. Understanding the role that transactional lawyers play in public–private partnerships has the potential to shed light on how best to harvest the fruits of this increasingly important aspect of public policy. This is not to endorse the engagement of the private sector without an appropriate awareness of the potential pitfalls that such engagement may entail. Rather, it is to recognize that if a public entity has made the threshold decision to partner with the private sector, it is often the largely unheralded work of private deal lawyers translating policy goals into the mechanisms of private ordering that makes these partnerships work.

A “regulatory translation” perspective on the role of lawyers in public–private transactions can help lawyers, their clients, and the public sector obtain value—in the broadest sense of the word—out of these partnerships. Just as lawyers in purely private transactions can recognize hidden barriers—and hidden opportunities for mutual gain—lawyers in public–private transactions can craft deal structures and the relationships that flow from them in ways that enhance the overall benefits sought by the transaction. It is perhaps a modest role for lawyers to play; yet, given how infused the basic vocabulary of public–private partnerships is with the language of law, it is a role that private lawyers are uniquely suited to play.

Ultimately, there is a larger lesson for all deal lawyers: craft matters beyond the four corners of the deal. There are third parties who bear at least some of the costs and share some of the benefits of even the most narrowly bilateral agreement, and there are larger public concerns in every transaction. Whether the demands of client orientation or the latitude a lawyer has in any given deal allow an attorney to weigh those concerns fully, the larger public context matters. Deal lawyers can—and it is admittedly only ever a possibility—act to balance a multitude of values in the ideal role of adding value.