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\textbf{WHO ARE YOU TO TELL ME THAT?: ATTORNEY-CLIENT DELIBERATION REGARDING NONLEGAL ISSUES AND THE INTERESTS OF NONCLIENTS}

PETER MARGULIES†

Do lawyers have a duty to counsel their clients about nonlegal issues and nonclient interests? Currently, only vague, subjective standards exist in these areas, and lawyers seem unwilling to discharge these duties on their own initiative. In this Article Professor Peter Margulies proposes specific rules of professional responsibility that would require lawyers to deliberate with their clients regarding both the interests of third-party nonclients and the moral, policy, and psychological consequences of legal action. The author believes that a framework for deliberation with rich and poor clients may lead to less costly, more informal means of dispute resolution with less manipulation of the client.

Nonlegal issues and the interests of nonclients always have been neglected stepchildren of the American legal profession. Lawyers and codes governing lawyers' behavior bow absentmindedly in the direction of counseling clients regarding issues other than legal ones and interests other than the client's. Commentators wax nostalgic about the warm public spirits of attorneys past. However, individual lawyers have been left alone to discern their professional responsibilities in these areas.

The result of this neglect has been a gap in deliberation regarding the moral, policy, and psychological consequences of legal action. This gap has produced a landscape of legalism populated by advocates for rich and poor alike.

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1. The \textit{Model Code of Professional Responsibility} permits the lawyer to counsel the client on nonlegal issues and nonclient issues. See \textit{Model Code of Professional Responsibility} EC 7-8 (1982). The \textit{Code} recommends that the lawyer "should bring to bear ... the fullness of his experience." \textit{Id.} The \textit{Code} also concedes that it is "often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible." \textit{Id.} In addition, the lawyer may "emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions." \textit{Id.} Beyond these encouraging words, the \textit{Code} offers little guidance.

2. See, e.g., Gordon, \textit{The Independence of Lawyers}, 68 B.U.L. REV. 1, 11-16 (1988); Luban, \textit{The Noblesse Oblige Tradition in the Practice of Law}, 41 VAND. L. REV. 717 (1988); Simon, Babbitt v. Brandeis: The Decline of the Professional Ideal, 37 STAN. L. REV. 565 (1985). These articles do not argue that the average practitioner of the turn of the century was more public-minded than contemporary lawyers. These authors do contend, however, that professional ideals, as embodied by the pillars of the profession—Louis Brandeis is the example overwhelmingly cited—encompassed more civic-mindedness than they do now. Cf. Garth, \textit{Independent Professional Power and the Search for a Legal Ideology with a Progressive Bite}, 62 IND. L.J. 183 (1987) (seeking avenues for implementing progressive agenda, with emphasis on income redistribution, through concerted action of contemporary lawyers).
cultivating rights, remedies, and defenses. The cultivation does not necessarily nourish social interests, including the interests of the poor population that supposedly benefits from the possession of legal rights. This Article outlines a modest initiative to introduce or recall deliberation about nonlegal issues and nonclient interests to the attorney-client dialogue.

The Article argues that lawyers have a professional responsibility to counsel their clients on issues of morality, policy, and—in certain situations—psychology. The Article also contends that lawyers have a duty to counsel their clients regarding the effect of legal decisions on nonclients, even though fulfillment of the duty may compromise the private attorney's current obligation to represent her client zealously. Finally, the Article asserts that lawyers will not discharge these suggested duties if left to their own devices. To overcome this problem of compliance, along with the companion problems of vagueness and subjectivity of standards for counseling on nonlegal issues and the interests of nonclients, the Article suggests a number of specific guidelines for use in discharging these duties.

The content of these guidelines, in addition to their specificity, sets this Article's approach apart from other scholarship in professional responsibility. Some commentators endorse the premise that lawyers should advise clients about nonlegal issues and effects on nonclients, although other commentators

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3. "Nonlegal" issues means issues apart from the narrow discussion of whether a client will prevail on a given legal point before a given tribunal and what the client can do to maximize her chances of prevailing. A gray area exists, of course, between such nonlegal issues and issues involving morality and policy that a court or agency may consider as an ingredient of its decisionmaking. The tradition of equity and equitable interpretation, in particular, always has been open to questions beyond those posed by preexisting legal doctrine. See, e.g., Lemon v. Kurtzman, 411 U.S. 192, 200 (1973) ("equitable remedies are a special blend of what is necessary, what is fair, and what is workable" (footnote omitted)); see also Blatt, The History of Statutory Interpretation: A Study in Form and Substance, 6 CARDOZO L. REV. 799, 802-35 (1985) (outlining the historical development of the equitable interpretation of statutes from Blackstone to the present); Marcin, Epieikia: Equitable Lawmaking in the Construction of Statutes, 10 CONN. L. REV. 377 (1978) (outlining the historical development of the equitable interpretation of statutes from the time of the ancient Greeks to the present); Margulies, Stranger and Afraid: Undocumented Workers and Federal Employment Law, 38 DE PAUL L. REV. 553, 614-15 & nn.183-86 (1989) (discussing different incarcerations of equity). Typically, however, courts are free to ignore these nondoctrinal considerations or to employ them in a freewheeling fashion. This absence of a consistent approach accounts for the Article's classification of moral, psychological, and policy issues as nonlegal.

4. "Nonclient" interests are the interests of anyone who is not the immediate client of the lawyer. Nonclients, under this definition, could include people close to the client, such as family members. Here, there is some overlap between nonclients and nonlegal interests. A client may care about the effect a legal decision has on her family, even if that effect is not, strictly speaking, a legal effect related to how a court will look at the client's case, but rather an effect rooted in the personal ties between the client and her family. Nonclients can be identifiable persons, such as the opposite party in litigation or a creditor seeking to recover on a debt owed by the client. Nonclients also can be specific groups in society, such as those persons suffering from mental illness who may at some point require institutionalization to meet their needs, even though one's client as a mental health lawyer might be only one person or class of persons currently institutionalized in a particular facility. The interests of nonclient societal groups might or might not coincide with the long-term interests of one's client. Finally, under this Article's formulation, a nonclient could be society as a whole.

advocate powerful opposing positions. Existing commentary, however, suffers from two flaws. First, commentators leave to lawyers' discretion and prudence the difficult task of what to say to the client to provoke a useful discussion of nonlegal issues and nonclient interests. Second, commentators are content to discuss nonlegal issues and nonclient interests in terms of amorphous invocations of morality and time-honored dichotomies of altruism and greed. This Article endeavors to remedy both flaws. The Article offers concrete guidance on issues of policy and psychology, as well as morality. In addition, the Article treats obligations to consider nonlegal issues and the interests of nonclients as binding even when legal representation, as with representation of the poor, involves an act of altruism. Altruism, according to the Article's thesis, has worth only when deliberation accompanies it. Ultimately, the Article attempts to define a framework for deliberation with rich and poor clients that will lead to less costly, more informal means for resolving disputes. In the process, the Article articulates an approach to counseling that relies less on manipulation of the client.

The Article is in four parts. Part I makes the case for rules governing deliberation about nonlegal issues and nonclient interests. Part II outlines the suggested bases for deliberation about morality, psychology, and policy. Part III explains and justifies these suggestions, and Part IV examines possible criticisms of the model.

I. THE CASE FOR RULES

Every day, lawyers and clients make decisions that do violence to others and create harshness and suffering, through the assertion of positions sanctioned by law. The rich and avaricious use lawyers and legal entitlements to enhance their power, often at the expense of the vulnerable poor and the rest of society.


6. See, e.g., D. BINDER & S. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977) (describing nonjudgmental approach oriented toward expressing empathy with the client's situation); G. HAZARD, ETHICS IN THE PRACTICE OF LAW 147-49 (1976) (urging lawyers to refrain from giving moral or policy advice, but instead to give "peremptory" legal advice if client's proposed action is flagrantly immoral). For a vigorous debate on the propriety of counseling the client about nonlegal issues and nonclient interests, see A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 267-85 (1976) (setting out two opposing views).


8. See Cover, Violence and the Word, 95 YALE L.J. 1601, 1601 (1986) (discussing power of courts to deprive persons of their life, liberty, and property; asserting that "[n]either legal interpretation nor the violence it occasions may be properly understood apart from one another").
To a lesser degree, the assertion of legal rights by the poor and vulnerable may compound the problems of this population, rather than alleviate the difficulties that they face in a complex world. In each case, legal considerations—the prospects of recovery of some kind, be it monetary or injunctive—fail to ensure the vindication of nonlegal or nonclient interests.

Lawyers can deal with these problems. Because the relationship of lawyer and client evolves in a nonpublic setting, lawyers have the flexibility to urge restraint in the pursuit of legally correct positions when heedless assertion of these positions would cause suffering for others or create costs to the public. This flexibility also permits lawyers to respond to individual situations without the inhibitions produced by a need to formulate comprehensive rules. In addition, the ability of lawyers to advocate positions that they face in a complex world. In each case, legal considerations—the prospects of recovery of some kind, be it monetary or injunctive—fail to ensure the vindication of nonlegal or nonclient interests.

9. Public entities such as courts and legislatures must worry that relaxing legal obligations to avoid harsh results in specific cases will encourage the public generally to take advantage by flouting obligations under law. See infra notes 33 & 36 (discussing problem of moral hazard—the promotion of irresponsible or socially undesirable behavior—created when various forms of insurance are available to cushion impact of default on legal, social, or business obligations); cf. Dan-Cohen, Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law, 97 HARV. L. REV. 625, 630-34 (1984) (discussing rules as guides to conduct eviscerated by public knowledge of courts' freedom in departing from rules). An example of this phenomenon can be drawn from the criteria for evictions under landlord-tenant law. Evictions by definition result in harshness and suffering to tenants. They often result in a greater burden on the public, which must pay to provide accommodations to evicted tenants who have become homeless. The visible tragedy and waste of homelessness might create some temptation for courts or legislatures, if tenant influence balanced out the political clout and money of real estate interests, to narrow or even abolish the criteria for eviction. Cf. Lorne, The Corporate and Securities Adviser, the Public Interest, and Professional Ethics, 76 MICH. L. REV. 425, 428-29 (1978) (contrasting appeal of proposed requirement that lawyers disclose client wrongdoing with less visible danger that disclosure requirement will inhibit client communication with attorneys); infra note 23 and accompanying text (discussing impact of salient stimuli, i.e., those facts with strong emotional content or imagery). If tenants were aware of this trend to curb evictions, however, as rational economic actors on a tight budget they might experience some temptation to stop paying rent. This response by tenants would not promote provision of services by landlords and might encourage abandonment of rental properties.

Freedom from eviction in cases of nonpayment of rent is arguably one kind of insurance. Other kinds of less drastic ameliorative measures for tenants, such as increased housing allowances in government benefits, or the provision of lawyers in all eviction cases, infra note 23 and accompanying text (discussing impact of salient stimuli, i.e., those facts with strong emotional content or imagery). If tenants were aware of this trend to curb evictions, however, as rational economic actors on a tight budget they might experience some temptation to stop paying rent. This response by tenants would not promote provision of services by landlords and might encourage abandonment of rental properties.

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tion, lawyers in the exercise of their counseling function are relatively free from problems of resource and revenue scarcity that afflict governments dealing with massive social problems. Moreover, lawyers have access to client information hidden from courts and legislatures.

The advantages of individual lawyers over more public entities such as courts and legislatures contrast with the reluctance of attorneys to exploit these advantages. Lawyers tend to avoid discussion of morality, policy, and psychology. The bar is always ready with a ritual recital of reasons for this reticence: issues of client autonomy, lawyer competence, and the intrinsic uncertainty of nonlegal questions loom large.

These issues are far from frivolous. Their ritual invocation does not, however, inspire faith that the bar has reflected carefully and dispassionately on its role, or has explored fully the reasons for its reluctance to address nonlegal issues and the interests of nonclients. The bar’s failure to deliberate about the sources of this reluctance highlights the need for rules governing the attorney’s role in counseling clients about nonclient interests and nonlegal issues.

that will have the results intended by its drafters. Modifying a rule to accommodate new facts likely will result in other fact patterns being covered or omitted inappropriately. See Fischhoff, For Those Condemned to Study the Past: Heuristics and Biases in Hindsight, in Judgment Under Uncertainty: Heuristics and Biases 335, 339, 345-47 (1982) (hereinafter Judgment Under Uncertainty) (discussing problems created by seeking to adjust rules in reaction to perceived past failures); see also Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685 (1976) (noting that rules are typically either overinclusive, i.e., they include situations which they should not cover, or underinclusive, i.e., they omit situations that they should cover); cf. R. Nisbett & L. Ross, Human Inference: Strategies and Shortcomings of Social Judgment 32-41 (1980) (describing benefits and drawbacks of our use of categories as bases for inference).

11. See supra note 9 (discussing why lawyer counseling of landlord client may be only alternative in jurisdiction unwilling to spend money on lawyers for tenants or on increased housing allowances).

12. Lawyers’ superior access to information makes it much easier for them than for courts or legislatures to respond to the hypothetical of the just claim barred by the statute of limitations. See Infra notes 44-45 and accompanying text. The lawyer for the defendant knows whether the claim is just; her client has told her. She can urge the client to pay some amount to the plaintiff to compensate him for his loss, and to obviate the possibility that the plaintiff without compensation will have the results intended by its drafters. Modifying a rule to accommodate new facts likely will result in other fact patterns being covered or omitted inappropriately. See Fischhoff, For Those Condemned to Study the Past: Heuristics and Biases in Hindsight, in Judgment Under Uncertainty: Heuristics and Biases 335, 339, 345-47 (1982) (hereinafter Judgment Under Uncertainty) (discussing problems created by seeking to adjust rules in reaction to perceived past failures); see also Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685 (1976) (noting that rules are typically either overinclusive, i.e., they include situations which they should not cover, or underinclusive, i.e., they omit situations that they should cover); cf. R. Nisbett & L. Ross, Human Inference: Strategies and Shortcomings of Social Judgment 32-41 (1980) (describing benefits and drawbacks of our use of categories as bases for inference).

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14. See infra note 115; see also Donagan, Justifying Legal Practice in the Adversary System, in The Good Lawyer 123, 126-33 (D. Luban ed. 1983) (examining claim that representing client’s interests despite moral reservations enhances individual autonomy); Rhode, Ethical Perspectives on Legal Practice, 37 Stan. L. Rev. 589, 605-17 (1985) (same).

15. See Rhode, supra note 14, at 617-20 (discussing lawyers’ tendency to avoid questions of morality encountered in legal practice).

16. See infra note 48 and accompanying text; see also Donagan, supra note 14, at 130, 132 (describing inevitable differences among personal views of morality); Rhode, supra note 14, at 620-23 (discussing lawyers’ “appeal to agnosticism” with regard to what position best vindicates the public interest); Schwartz, The “New” Legal Ethics and the Administrative Law Bar, in The Good Lawyer, supra note 14, at 236, 242-43 (describing lack of moral consensus on issues involving degree of appropriate regulation engaged in by administrative agencies).
The need for rules stems from defects in the process of lawyer-client interaction.17 The first and most conspicuous defect is that attorneys often have incentives derived from pecuniary or psychic income that submerge the interests of nonclients.18 Many people go into law because they seek status and material wealth.19 The pursuit of such rewards does not necessarily achieve results con-

17. This is a pervasive rationale for rules. See Calabresi & Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 HARV. L. REV. 1089, 1115-24 (1972) (discussing need for rules in situations in which relying on individual decisionmaking would be too costly); infra note 112 (discussing role of government as compensating for atomization born of welter of individual choices, free rider problems, etc.); see also Rhoden, Litigating Life and Death, 102 HARV. L. REV. 375, 419-29 (1988) (rule creating presumption that cessation of treatment is appropriate in right to die cases is necessary to counteract protreatment bias of medical profession); cf. United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938) (justifying judicial review as device for compensating for underrepresentation of certain groups in political process); J. ELY, DEMOCRACY AND DISTRUST (1980) (same). But see R. DWORKIN, A MATTER OF PRINCIPLE 57-69 (1985) (debunking process-based theory as self-defeating flight from difficult task of devising substantive standards and norms). The notion of using rules to correct failures in process is also important in the criminal and quasi-criminal law. See, e.g., Margulies, The "Pandemonium Between the Mad and the Bad:" Procedures for the Commitment and Release of Insanity Acquittees After Jones v. United States, 36 RUTGERS L. REV. 793, 823 n.183 (1984) (asserting that Supreme Court's setting of burden and standard of proof in cases involving commitment of insanity acquittees that disadvantages acquittees is unnecessary and prejudicial since, factfinder at commitment hearing already will be wary of favoring acquittee because of factfinder's knowledge of acquittee's underlying criminal act). See generally Underwood, The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases, 86 YALE L.J. 1299, 1337 (1977) (discussing rationale for burdens of proof and persuasion).

18. In this respect, the public may be getting the lawyers that it deserves. Society rarely judges an attorney to be successful when she protects the interests of society as a whole, unless she also happens to score a killing for her client. Even Louis Brandeis arguably is remembered as an exemplar of the spirit of public service and civic mindedness because he in effect had his cake and ate it, too. Brandeis was successful on behalf of his clients and was well paid for the exercise of his talents. He also was successful as a protector of the public interest. A lawyer without Brandeis' combination of worldly and eleemosynary victories might not be similarly revered. Cf. Luban, supra note 2, at 720 ("To many lawyers Brandeis is still the ideal of what greatness is: worldly success combined with public service.").

19. It is no coincidence that two of the more provocative works about the practice of law in the last 15 years end with the word "money." See G. HAZARD, supra note 6, at 153 ("Then, of course, there is the money."); Kronman, Living in the Law, 54 U. CHI. L. REV. 835, 876 (1987) ("Will it be possible, in the world of law that I fear is growing up around us, to answer someone who asks why he should choose a living in the law or think of it as anything more than a way of passing time and making money?"). It is true that as a normative matter one might be able to formulate other justifications for the practice of law, even without embracing the notion of law as a mode of public service. This venture is at the core of Professor Kronman's enterprise, which isolates cultivation of judgment, defined as the simultaneous application of sympathy and detachment, as the purpose of practicing law. Professor Kronman agrees, however, that as a descriptive matter, prestige and mammon exert a great attraction for prospective lawyers. Kronman, supra, at 838.

Even public interest and legal services lawyers are not necessarily immune from the lure of prestige or income, albeit income of the psychic, rather than pecuniary, variety. Public interest and legal services lawyers may, like other attorneys, view the "big case" as a vehicle for achieving greater recognition both within and without the legal profession. Seeking such recognition, even as a byproduct of securing and protecting the legal rights of clients, may close one's eyes to the societal consequences of legal action. See A. GOULDNER, THE FUTURE OF INTELLECTUALS AND THE RISE OF THE NEW CLASS 18-20 & n.31 (1981). But see Simon, Homo Psychologicus: Notes on a New Legal Formalism, 32 STAN. L. REV. 487 (1980) [hereinafter New Legal Formalism] (describing view that clinical legal educators, often recruited from legal services settings where individual, not systemic advocacy is the norm, are needlessly modest in their aspirations for achieving a better society through law). See generally Simon, Legality, Bureaucracy, and Class in the Welfare System, 92 YALE L.J. 1198, 1240-47 (1983) [hereinafter Legality and Welfare] (positing existence of professional class that celebrates virtues of exercise of discretion by members of class, such as judges and lawyers seeking to reform social institutions, but that defeats itself by denying discretion to and causing alienation among more "proletarian" groups, such as social workers or therapy aides, who work
sistent with the public interest. The client, for her part, may have similar rewards in mind. Short-term realization of these goals may aid the client, but may harm those similarly situated and injure society as a whole. Because neither lawyers nor clients typically experience these injuries immediately, directly, or in a concentrated form, negative effects on nonclients are usually external to the calculations of lawyers and clients. Nonclient and societal interests have little voice in the traditional lawyer-client relationship, save for the whimper, when appropriate, of reference to the client's enlightened self-interest. Because traditional lawyers and clients have little incentive to consider adverse social effects, it should not be surprising that these effects often proliferate as a result of legal action.

Flaws in human inference and judgment reinforce the lack of regard for the public interest in traditional lawyer-client relationships. Lawyers and clients, like other people, tend to believe that one phenomenon causes another when the phenomena share a cosmetic similarity. These cosmetic links are often characteristics with emotional or graphic resonance. Causal connections not high-

more closely with disadvantaged clients). The literature critical of public interest lawyers from the right is less elegant in its analysis than Simon's left critique. See, e.g., The 1984 Federalist Society National Meeting, 8 HARV. J.L. & PUB. POL'Y 225 (1985) (debunking public interest lawyers as officious intermeddlers). However, the mean tone of right attacks should not prevent a discerning public interest lawyer from appreciating the kernel of truth hidden in the mess of ideological pottage. Public interest lawyers, like all other persons, have a web of motivations, perceptions, and scenarios that comprise a basis for their action in the world. Unhurried deliberation about the ultimate consequences of legal action may not be the first priority for all lawyers seeking such action.

20. See Calabresi & Malamed, supra note 17, at 1115-24 (discussing pollution and resulting health and aesthetic harms as externalities in the relationship of operators of polluting plant and plant's customers).

21. See Nelson, supra note 13, at 533 (noting that only 2.4% of respondents in a study of large law firms acknowledged giving advice to clients about "public relations concerns" raised by possible legal action). But cf. I. KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 13-14, 33 (1959) (discussing prudence as capacity to perform actions that benefit others but also ultimately benefit oneself); Fuller & Randall, Professional Responsibility: Report of the Joint Conference, 44 A.B.A. J. 1159, 1161 (1958) (urging lawyers to discuss with clients the "long-run costs" of legally permissible actions that conflict with the spirit or purpose of legal provisions); Gordon, supra note 2, at 28-29 (lawyers often couch negative advice involving moralistic or political judgments in prudential terms, rendering it more amicable to clients). Lawyers' advice about clients' enlightened self-interest can be exceptionally helpful in furthering moral or policy values that this Article articulates, even though such prudential advice ultimately rests on an appeal to the client's self-interest, and is therefore less radically different from traditional advice given by lawyers than is the nonclient-oriented advice outlined in this Article. For example, take the issue of evictions. Suppose, before the dawn of rent control in New York City, that lawyers had advised their landlord clients vigorously that wholesale evictions and exorbitant rent increases would anger the public, and set the stage for rent regulation. This advice, which in retrospect appears accurate, would have aided landlords interested in preserving their ability to set rents without government involvement. It also would have served moral and policy goals by tempering harsh results for indigent tenants and diminishing the need for government action to assist tenants pinched by high housing costs. Even if this Article's nonprudential approach simply sparks more such prudential advice to clients, the Article will have moved lawyer-client deliberation in the right direction.

22. See R. NISBETT & L. ROSS, supra note 10, at 115-22; infra notes 78-79 and accompanying text.

23. The 1988 Presidential election provides a good example of the effect of this tendency to attach disproportionate weight to salient characteristics. Vice-President Bush and his supporters apparently had extraordinary success with commercials that linked Governor Michael Dukakis' furlough program to a rape and attempted murder perpetrated by one furloughed inmate, Willie Horton. The brutal crimes committed by Horton engrained themselves in the public imagination, which also seemed to latch on to the fact, brought home by a photograph in one of the ads, that Horton was
lighted by such salient attributes tend to get lost in the shuffle, whether the attorney's motivation is altruistic or avaricious. From the perspective of policy, these less salient connections can be the most important.

Rules can cope with each of these defects. Formulating sound rules promotes predictability and ease of application. Designing rules that highlight less salient causal connections can compensate for flaws in human inference. Rules also can oblige lawyers and clients to pay heed to harms to the public interest that otherwise would be ignored in the rush toward short-term gains. The knowledge that all parties are subject to such rules would enhance trust among adversaries and highlight the virtues of cooperation. Lawyers could witness the realization of rhetoric touting law as a noble profession.

This Article's own rhetoric about rules also requires realization. The next section sets out suggested rules for deliberation about nonlegal issues and the interests of nonclients.

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24. See infra notes 80-81 and accompanying text (discussing case of institutional reform litigation in area of mental health). Rights, particularly rights to avoid tangible harms such as poor institutional conditions or abusive repossession practices, are often salient because they carry an intense emotional resonance. Other rights, such as those guaranteed by the first amendment, may not have such resonance to everyone, particularly when the exercise of those rights is seen through the faulty human inferential prism as privileging concrete injuries. This may be one reason why juries tend to be so willing to find liability and damages in libel cases, and why constitutional rules governing the standard of liability for libel are necessary. Lack of salience probably also explains the popular view that the rights of criminal defendants embodied in the exclusionary rule are an irremediable obstacle to effective law enforcement. Cf. Kannar, Liberals and Crime, THE NEW REPUBLIC, Dec. 19, 1988, at 19 (discussing practicalities of law enforcement under regime of exclusionary rule). The exclusionary rule's deterrent effect on police misconduct is too general to visualize. By contrast, people have no trouble in visualizing a criminal committing a crime, and then escaping punishment due to the application of rules of constitutional criminal procedure. Cf. R. Nisbett & L. Ross, supra note 10, at 57-58 (subjects in psychology experiment were unduly impressed with single case study of irresponsible and pathologically dependent welfare mother, but were unimpressed by statistical data demonstrating that many families remain on welfare for only a relatively short period of time).

25. See infra note 98 (discussing impact of flaws in inference on tortfeasors' perceptions of policy).

26. See TVA v. Hill, 437 U.S. 153, 187-88 (1978) (the snail darter case) (rejecting "fine utilitarian calculations" regarding relative costs of imperilling species of perch and halting construction of dam in favor of clear rule making species preservation paramount); Albemarle Paper Co. v. Moody, 422 U.S. 405, 413-23 (1975) (discussing importance of rule embodying presumption that back pay is appropriate remedy for employment discrimination); see also Kannar, supra note 24, at 19, 20-23 (discussing virtues of Miranda and exclusionary rules in criminal procedure); Margulies, After Marek, The Deluge: Harmonizing the Interaction Under Rule 68 of Statutes That Do and Do Not Classify Attorney's Fees as "Costs", 73 IOWA L. REV. 413, 427-31, 441-45 (1988) (discussing importance of rules governing relationship between attorney's fee awards and settlement offers). The predictability promoted by rules, however, may sometimes be an illusion. See Simon, Legality and Welfare, supra note 19, at 1224 (discussing "law of conservation of discretion" under which system of rules designed to curb discretion merely moves discretion to another part of the decisionmaking process). The trend toward certainty in criminal sentencing, exemplified by the work of the United States Sentencing Commission, may be an example of the difficulty of eliminating discretion. The absence of discretion in sentencing may simply push discretion forward in time in the criminal justice process, to the stage of drafting an arrest warrant or initially charging a defendant. See, e.g., Burt, Conflict and Trust Between Attorney and Client, 69 GEO. L.J. 1015, 1044 & n.115 (1981). Discretion at these stages of the process is even less reviewable, and therefore potentially more arbitrary and unpredictable, than discretion in sentencing.
II. A MODEL FOR COUNSELING ABOUT NONLEGAL ISSUES AND THE INTERESTS OF NONCLIENTS

The following chart sets out the areas in which broader lawyer-client counseling is appropriate. These guidelines should be part of the Model Code of Professional Responsibility.27

1. Morality:
   a. The action or decision will harm others.
   b. The action or decision involves lying or misleading.
   c. The action or decision violates the norm of equality of all persons.
   d. The action or decision is one that the client would not wish for everyone in society.

2. Psychology:
   a. The action or decision may engender guilt or regret.
   b. The client should seek the services of a mental health professional.

3. Policy:
   a. Unintended consequences
      i. Chilling effect: The action or decision may diminish the availability of goods, services, or information, or may create incentives to impinge on socially important or fundamental interests or relationships.
      ii. Public burden: The action or decision will harm others in a way that ultimately will require a remedy from society at large.
   b. The action or decision will result in a net cost to society if all individuals behave in a like manner. See 1.d. (individuals should act as they would have others act).

The lawyer should have a duty to advise the client to modify her position when these factors apply and should have the right to withdraw if the client disregards that advice,28 so long as withdrawal will not immediately and irrevocably prejudi-

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27. Cf. Leubsdorf, Three Models of Professional Reform, 67 CORNELL L. REV. 1021 (1982) (discussing alternative visions for conceptualizing and implementing professional change). But see Rhode, supra note 14, at 641-42 (counseling against exclusive role for bar in professional reform); Rhode, Why the ABA Bothers: A Functional Perspective on Professional Codes, 59 TEX. L. REV. 689, 719 (1981) (noting that implementing professional reform through professional self-regulation is only one alternative; other alternatives include more direct judicial or executive supervision without reliance on the bar).

28. This option to withdraw should not be available in criminal cases, or other matters, such as commitment proceedings, involving a liberty interest. In these areas, withdrawal might conflict with an individual's right to an attorney under the sixth amendment, or might otherwise compromise protections against arbitrary confinement.

Mention of the distinctive values embodied by liberty interests points up the parallels between this Article's approach and the duties currently imposed on prosecutors. A prosecutor has a duty to see to it that "justice shall be done," even at the cost of losing a case. See Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 802-03 (1987) (quoting Berger v. United States, 295 U.S. 78, 88 (1935)); see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1982) (noting that prosecutor has different responsibility from that of most other advocates); cf. Green, Her Brother's Keeper: The Prosecutor's Responsibility When Defense Counsel Has a Potential Conflict of Interest, AM. J. CRIM. L. 323 (1989) (discussing prosecutor's obligation to disclose and, in certain situations, attempt to remedy defense counsel's conflict of interest). Prosecutors also have a heightened obliga-
dice the client's interests. In many cases, the lawyer's counseling alone, without the threat of withdrawal, will persuade the client. Verbal interchange, even interchange not backed by threats, can be significant for rational beings. In addition, the lawyer and client may have developed a relationship of trust, which the client does not wish to jeopardize. Moreover, seeking other counsel out of impatience with the attorney's advice will consume time and effort, without yielding a clear return, because a new lawyer will be under the same obligation to counsel the client. In other situations, however, counseling alone will not be effective. The lawyer, after making a diligent effort to counsel the client, must decide for herself whether to threaten to withdraw, or actually to withdraw.

The regime described above may raise questions even for those who acknowledge that advising a client on nonlegal issues and the interests of non-

tion to disclose certain kinds of information to their adversaries, particularly information that tends to exculpate the defendant, mitigate the severity of the alleged offense, or otherwise justify a reduction in punishment. See Model Code of Professional Responsibility DR 7-103(B) (1982). This Article's argument would support granting civil attorneys discretion to withdraw from representation if their clients refused to permit them to disclose, in the interests of justice, information damaging to their clients' case. It would not support mandating such disclosure in instances in which current professional regulations and discovery rules do not create a duty to disclose.

29. This kind of prejudice could involve, for example, the pendency of a trial or a procedural deadline, such as the need to answer a complaint, with a preclusive effect. See also Freedman, supra note 5, at 333 (urging that lawyer should have the right to withdraw "if withdrawal can be accomplished without significant harm to the client's interests").

30. See The Consultative Process, supra note 10, at 414-23 (discussing value of consulting parties affected by a given governmental decision, even when governmental agency is not obliged to defer to views of those consulted); Private Ordering, supra note 10, at 680 (asserting that "verbal behavior" of parties is not a mere mask for expression of bargaining power, but is an important factor in its own right).

31. See Private Ordering, supra note 10, at 662-63 (discussing mediating role of party's affiliates and allies) (citing P. Gulliver, Social Control in an African Society 235-36 (1963) (noting importance of continuing relationships as force moderating intensity of disputes among Arusha of northern Tanzania)).

32. Some lawyers may be tempted to ignore or discount this obligation. See G. Hazard, supra note 6, at 146 (noting possibility of Gresham's law phenomenon in which lawyers willing to forgo counseling clients about moral concerns will get the bulk of client business, driving out more conscientious practitioners). Enforcement, therefore, becomes a major issue. While it would be naive to assume that enforcement will be easy, two methods may hold promise, albeit promise purchased at the risk of inroads into attorney-client confidentiality. One approach would be to require lawyers to fill out an affidavit disclosing the extent of their counseling efforts. The affidavit could be couched in hypothetical terms, to avoid revealing client confidences. Another device might be to permit a limited deposition of the lawyer, or to permit limited questioning of the client, again in hypothetical terms, regarding the extent of counseling. Neglect of the counseling function would trigger sanctions against the attorney.

33. The legitimacy of granting the lawyer such an option is discussed infra note 45. This Article makes withdrawal an option, not an obligation, because of concerns about preserving individual autonomy, and because of the moral hazard problems that an obligation might create. See supra note 9; infra note 36 (discussing moral hazard). Barring any attorney from helping a client with a legally valid claim or defense would impinge on autonomy interests, because it would leave individuals without recourse save for pro se representation. If lawyers can choose for themselves whether to withdraw, the client at least has the opportunity to secure legal counsel. Mandating withdrawal would promote moral hazard in a way that the eviction example presented illustrates. See supra note 9. If tenants or attorneys for tenants knew that landlords' lawyers were obliged to withdraw from the representation of landlords seeking eviction of tenants, tenants would have much less incentive to pay their rent. Tenants without this form of insurance against nonpayment are more likely to seek to meet their obligations under their lease, as long as the landlord meets her responsibilities.
clients constitutes a professional responsibility. The next section of the Article undertakes to explain and justify this counseling regime.

III. JUSTIFYING AND EXPLAINING THE COUNSELING RULES

A. Morality

Morality speaks to norms that we accept, often intuitively, as guides to conduct in society. Prohibitions on hurting others gratuitously, lying or misleading, or treating others as inferior to oneself or to other groups in society constitute examples of such norms. So do the maxims to treat others as you would have them treat you and to act only in a manner that one would deem appropriate for all other persons.

The proposed ethical guidelines set out above embody these norms. The table sets out a very rough, and almost surely not exhaustive, compilation of moral triggers. The conditions in the table are triggers, not precepts, because they should prompt dialogue between lawyer and client, not necessarily resolve the issue of the ultimate appropriateness of a proposed action.

The first moral concern is whether the action of the client or lawyer would hurt third parties. Needlessly causing hurt or pain is viewed prototypically as immoral. Is this view correct? The criterion for testing the validity of each basis for moral dialogue derives from Kant's formulation of the categorical imperative. Under this formulation, which corresponds to the fourth moral basis for counseling in our table, persons should act only according to those commands that the actor would apply to all persons. This formulation ensures that moral rules reflect persons' status as interdependent beings, not islands of will and inclination.

The Kantian, or contractarian, formulation proves the validity of the first basis for counseling, the preference against the infliction of pain on others. Few people, apart from masochists, wish to suffer from the needless infliction of pain. Most people would heartily embrace a rule stipulating that others should not

34. See, e.g., B. GERT, THE MORAL RULES 86 (1973) (identifying first five moral rules, including "Don't cause pain."). Pain can include physical discomfort, sorrow, and anxiety. Id. at 81, 84-85. Cf. C. GILLIGAN, IN A DIFFERENT VOICE 149, 165 & 174 (1982) (actions which hurt others are only justified when they are necessary to discharge responsibility toward oneself or others).

35. See I. KANT, supra note 21, at 39-59; J. RAWLS, A THEORY OF JUSTICE 132-33 (1971). Of course, a Nietzschean would counter that a person with a sufficiently strong will could inflict pain, but avoid the reciprocal infliction of pain by others. See F. NIETZSCHE, THE BIRTH OF TRAGEDY AND THE GENEALOGY OF MORALS (1956). Nietzsche would assert that individual will was the sole referent for questions of appropriate attitude and behavior. Each individual knows her will, and can act on it, if she is free from fear of the oppressive customs and shibboleths that timid people call morality. Any notion of a higher law is nonsense. Under this formulation, even discussing morality as more than a sociological artifact is a waste of time. This argument is hard to answer in moral terms, because it does not speak the language of moral philosophy. See B. GERT, supra note 34, at 8-10 (discussing conclusory character of assumptions undergirding Kantian morality perspective). Moreover, students of strategic behavior would observe that persons are susceptible to the suspicion that others plan to cheat. Cheaters can inflict pain with the knowledge that many people will not reciprocate, because of the force of the moral rule. Persons who suspect others of planning to cheat may inflict pain first, as a preemptive measure. These suspicions create the prisoner's dilemma. See infra notes 101-06 and accompanying text.
inflict pain on them. The corollary of this rule is that people should refrain from inflicting pain on others.

The classic example of the just debt defeated by the statute of limitations or the statute of frauds illustrates the operation of this trigger mechanism. Suppose that the debtor, now rich, can easily afford to repay the loan. The creditor, on the other hand, now poor, desperately needs the loan repaid to avoid dependence on public assistance. Under these circumstances, refusal to repay the loan would inflict needless suffering on the creditor. The lawyer, according to the view of professional responsibility advanced in this Article, is under an obligation to point out to the client that invocation of the statute of frauds or statute of limitations to bar the creditor’s claim would cause suffering, while paying the claim, in light of the debtor’s current prosperity, would not have a comparable bite. If, after discussion of the issue, the client refused to waive her defenses, the lawyer could withdraw from representation of the client.

Kant’s formulation of the categorical imperative supports this result. Few people would want another person to decline to pay an admittedly just debt to them, if the debtor had the requisite resources and the creditor was in need. People have little moral basis for refusing to act as they would have others act toward them.

The other moral trigger mechanisms set out in the table work in much the same manner. Lying, misleading, or failing to disclose is immoral because it heightens the risk that a person will suffer harm needlessly or simply because such harm is in the immediate self-interest of another. Certain exceptions obtain, as when the lie plausibly benefits the target or when the lie is apparent. Misleading in other cases, however, can cause great human suffering. In most circumstances, people do not like to be lied to—therefore, they should not tell lies.

The third prescription set out in the table is the norm of equality. Here, too, the categorical imperative operates. People generally wish to be treated the same as others. People generally do not want others to use them for those

36. The only argument for such a result would be that the debtor believed that he had a duty to be aware of and comply with legal formalities such as the statute of frauds or limitations. See Kennedy, supra note 10 (critically assessing importance of form as vehicle for teaching self-reliance); Kennedy, Legal Formality, 2 J. LEGAL STUD. 351 (1973) (same). There is some basis for reluctance to help people who have the knowledge with which to help themselves comply with formalities, but are too indolent to use this knowledge. If we help such individuals too readily, and the availability of help is well publicized, we risk providing further incentives to indolence. See R. Epstein, supra note 10, at 320 (problem of moral hazard); Kaplow, An Economic Analysis of Legal Transitions, 99 HARV. L. REV. 509, 537-41 (1986) (same).

37. See Matthew 7:12 (Golden Rule).

38. See B. Gert, supra note 34, at 103-04 (discussing status of “Don’t Deceive” as moral rule).

39. See S. Bok, LYING 57-72 (1978); B. Gert, supra note 34, at 104 (discussing white lies).

40. See, e.g., Simon, Ethical Discretion in Lawyering, 101 HARV. L. REV. 1083, 1098-99 (1988). Professor Simon describes a “well-known scenario” used to illustrate the human suffering that may result from misleading others. In this scenario, an indigent plaintiff and defendant had contributed to the accident. The insurance company’s lawyer deals with the plaintiff’s lawyer without correcting the plaintiff’s lawyer as to his mistaken belief that a recent statute abolishing the contributory negligence defense would apply retroactively to this case. Id.
others’ private designs. In light of this preference, people should treat others equally.

A variation on the statute of limitations hypothetical illustrates the dynamics of counseling clients about the equality norm. Suppose an ex-employee of a corporation has a valid race discrimination claim. Because the employee did not timely file his claim with the relevant government agency, however, the claim is now time-barred. The employer concedes to his attorney that the claim is valid. Furthermore, the employer reveals that the employee, even though he did not file the claim, communicated with the employer by telephone and in a letter that he wished to make this claim. The equality norm ordinarily would require the employer to refrain from the discrimination that gave rise to the claim, and to redress any discrimination that had occurred. Under the principles advanced in this Article, the lawyer would be obliged to discuss with the employer why the norm of equality, under the circumstances, was not trumped by operation of the statute of limitations, regardless of the statute’s legal force and effect, and why, therefore, the employer still owed the employee redress.

41. See I. Kant, supra note 21, at 47-49 (discussing need to treat others as ends in themselves, rather than means).


43. I am grateful to Howard Lesnick for pointing out to me that the client in such a case might not make such a disclosure to his attorney, and that the attorney might not wish to complicate her own situation by seeking such an admission. Cf. G. Hazard, supra note 6, at 130-31 (citing Traver, Anatomy of a Murder (1958)) (lawyer may shape information elicited from client by telling client, prior to eliciting information, that certain facts would lead to liability).

44. See J. Rawls, supra note 35, at 100-01 (egalitarian conception of justice states the principle that undeserved inequalities, which presumably include those caused by discrimination on the basis of race, require redress).

45. If the employer refused to offer some compensation to the victim of discrimination, the lawyer, under this Article’s approach, would have the right to withdraw. See supra notes 28-29 and accompanying text (discussing circumstances under which attorney should be able to withdraw).

A regime that permits an attorney to withdraw from a case before a tribunal because a valid legal position creates unpalatable moral consequences appears to conflict with the legitimacy of legal institutions and undermine notions of legislative primacy in the making of law. Lawyers making such judgments will be substituting their own perspective for the perspective of society, which has not prohibited the act in question. How can the lawyer in effect legislate norms that the legislature has failed to impose?

This argument is less persuasive than it sounds. A purposive interpretation of the statute of limitations demonstrates the defects of the argument. Cf. Simon, supra note 40, at 1102-07 (comparing purposive approach with formal approach). The statute of limitations is designed to accomplish two purposes: 1) to permit repose after a reasonable period of time has passed, and 2) to guard against the intrusion of the judicial system in the adjudication of stale claims, with their difficulties of proof and invitation to concocted testimony. See, e.g., Grossman, Statutes of Limitations and the Conflict of Laws: Modern Analysis, 1980 Ariz. St. L.J. 1, 9-10; Twerski & Mayer, Toward a Pragmatic Solution of Choice-of-Law Problems—At the Interface of Substance and Procedure, 74 Nw. U.L. Rev. 781, 797 n.44 (1979); Note, Limitation Borrowing in Federal Courts, 77 Mich. L. Rev. 1127, 1128-29 (1979). Deference to the statute of limitations in the example described above vindicates neither of these goals. First, the employer always has been aware of the employee’s claim, because the employee has communicated with him. Second, the stale claims rationale is inapplicable because the client, and his attorney, know that the claim is a just one. While a court may have to wrestle with problems of proof if the client declines to acknowledge the justness of the claim, the client’s lawyer has no such problem. The legislature cannot reach this kind of instance, because reaching it would require attorney disclosure of the kind that might frustrate the goal of complete
These prescriptions are not problem free. They skirt over impingements on a client's autonomy and offer no conclusive answers to difficult moral questions that involve a clash of norms. In addition, implementing these prescriptions may overemphasize the need for lawyers to discern individual clients' states of mind, thereby setting the scene for invidious judgments based not on morality, but instead on ethnic or socioeconomic stereotypes or other dubious criteria.

communication between attorney and client, or would require client disclosure that would be impossible to verify, since it would involve difficult inquiries into the client's state of mind, or would involve drafting legislative categories of such precision that the costs of such legislation would exceed any possible benefits. The costs facing the attorney, in contrast, are much lower. But see infra note 48 (discussing state of mind problems).

46. See infra note 115 (discussing compromises in client autonomy wrought by the model put forward in Article).

47. One illustration of a clash of norms might be the frequently discussed hypothetical of the mother who wishes to disinherit her son because the son refused to fight in Vietnam. See, e.g., Cox, The Conditions of Independence for the Legal Profession, in ABA Tort and Insurance Practice Section, The Lawyer's Professional Independence: Present Threats, Future Challenges 23, 59-60 (1984) [hereinafter The Lawyer's Professional Independence]; Wasserman, Lawyers as Professionals: Some Moral Issues, 5 Hum. Rts. 1, 7, 10 (1975). On the one hand, one could argue that the war in Vietnam was an immoral war, and that, therefore, the son was correct in refusing to fight. Arguably, then, the mother was morally incorrect in penalizing the son for his moral stance. As Schneyer notes, however, one also might believe that morality dictated that the mother have a certain amount of discretion in deciding how to dispose of her property. See, e.g., Schneyer, Moral Philosophy's Standard Misconception of Legal Ethics, 1984 Wis. L. Rev. 1529, 1563. Under this view, considerations of individual autonomy might permit the mother to accomplish her design consistent with moral precepts. If one was less inclined to view autonomy as a separate justification for decisions, however, the mother's action might be considered immoral. A different hypothetical, say, one positing a testator who wished to leave all of her money to the American Nazi Party, might raise this issue in even bolder relief. One might also believe that the son's conduct amounted to a betrayal of his country and that it therefore was immoral. Developing a consensus on such a situation may be difficult, or impossible. This state of affairs does not demonstrate the futility of counseling on moral issues and situations; it may, however, demonstrate that there are no "right answers" for this case. That is not to say, however, that there are no right questions. Counseling can help focus on those points of inquiry.

48. Under this Article's model, for example, bias still can play a role in assessing the impact and relevance to the model's prescriptions of particular client decisions. If, for instance, the question is the honesty of the client's position, bias can influence the lawyer's perception of the honesty of the client. Racial, ethnic, or socioeconomic stereotypes can result in an invidiously lowered estimate of the client's honesty. Similar concerns apply whenever a judgment about morality depends on an assessment of a client's state of mind. Questions about state of mind are often central to issues of morality. See, e.g., Aristotle, supra note 42, at 169 (those who do their duty because of ulterior motives, not for duty's own sake, are not just); I. Kant, supra note 21, at 9-33 (completely moral actions comprise only those taken because of the good will of the actor, defined as the actor's complete lack of self-interest). State of mind questions also are often central to issues of law. One example of this is the variation in the treatment of homicide in the criminal law, depending on the state of mind (mens rea) of the actor. See, e.g., United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972); Margulies, supra note 17; Perlin, The Supreme Court, the Mentally Disabled Criminal Defendant, and Symbolic Values: Random Decisions, Hidden Rationales, or "Doctrinal Abyss?", 29 Ariz. L. Rev. 1 (1987); see also Washington v. Davis, 426 U.S. 229 (1976) (requiring of intent for violations of the equal protection clause).

Such questions are notoriously difficult because by definition they deal with subjective evidence. The law tends to resolve these issues by allowing their consideration by the maximum possible number of factfinders. For example, a defendant typically can secure a jury to decide on her state of mind. See Harlow v. Fitzgerald, 457 U.S. 800 (1982) (reducing role of intent in damages suits against government officials in their personal capacity, to permit more expeditious dismissal of meritless suits). Presumably, the presence of multiple factfinders will help correct for the biases and mistaken inferences bound to develop in such amorphous inquiries. See, e.g., Kornhauser & Sager, Unpacking the Court, 96 Yale L. J. 82 (1986) (arguing that increasing number of adjudicators will
Because of the perils of an approach keyed to subjective factors such as the client's state of mind, the attorney should focus on more objective factors, such as whether someone would be hurt by the client's decision, or whether someone would be treated as unequal. Framing issues in this manner downplays the role of state of mind.\textsuperscript{49}

B. Psychology

The segue from discussion of state of mind to consideration of the lawyer's obligation to counsel the client about the client's present and future psychological well-being seems natural. Consideration of this issue has a different focus than discussion of the lawyer's obligation to counsel the client about morality. Each involves nonlegal interests. Counseling about psychology, however, unlike counseling on morality, centers on the client, not on the impact of client actions on nonclients.

The model advanced in this Article yields two rules regarding client psychology. First, the lawyer must discuss with the client the possibility that the acts or decisions of the client will yield feelings of guilt, remorse, or regret. Second, the lawyer should urge the client to seek professional mental health counseling services if the client seems to need such services.

Both of these rules, particularly the first, already may be observed informally by many attorneys. Consider, for instance, the hypothetical of the mother who wishes to disinherit her son because of the son's refusal to fight in Vietnam. Archibald Cox has argued that many lawyers will not perfunctorily draft the papers necessary to disinherit the son.\textsuperscript{50} Instead, Cox argues, many lawyers will engage the mother in a discussion of how this decision, if the mother could look back on it after it became irrevocable—after her death—would prompt feelings generally increase accuracy and consistency of decisions); cf. R. Nisbett & L. Ross, supra note 10, at 266-67 (increasing number of persons making judgments together typically will reduce impact of biases and inappropriate inferential schemas). But see D. Mueller, Public Choice (1979) (arguing that shifting coalitions within decisionmaking group create inconsistencies in results); Easterbrook, Ways of Criticizing the Court, 95 Harv. L. Rev. 802 (1982) (same); Farber & Frickey, The Jurisprudence of Public Choice, 65 Tex. L. Rev. 873 (1987) (same). See generally Bryant, Models of Joint Work (unpublished manuscript on file with the author) (discussing characteristics of collaborative enterprise). The solitary lawyer, sitting in her office, is arguably a poor substitute for this safety in numbers. Moreover, a lawyer lacks training in psychology or other disciplines that could help in conducting an inquiry into an individual's state of mind.

Arguably, newer disciplines, such as kinesics or proxemics—the study of body language—can permit us a wider view into the state of mind of an individual. But the interpretation of body language can be invidious when it is conducted by an untrained person. See, e.g., Garcia v. Heckler, 589 F. Supp. 121 (S.D.N.Y. 1984) ("sit and squirm" test rejected; apparent lack of acute physical discomfort of benefits claimant appearing before administrative law judge is not significant factor in assessing merits of claim). But see Schwartz, The Zeal of the Civil Advocate, in The Good Lawyer, supra note 14, at 150 (assuming that lawyer is in fact well situated, by virtue of intimate relationship with client, to make assessments about a client's state of mind); Wolfram, A Lawyer's Duty to Represent Clients, Repugnant and Otherwise, in THE GOOD LAWYER, supra note 14, at 214, 232-33 (same).

\textsuperscript{49} The question of honesty is more difficult to separate from the issue of state of mind and intention. By including in this category actions that have the effect of misleading others, however, regardless of why these actions were taken, the emphasis moves away from the intent of the misleading party.

\textsuperscript{50} See Cox, supra note 47, at 60.
of regret over her harsh treatment of her offspring.\textsuperscript{51}

Advice about the likelihood of regret ultimately may paint a more complete picture of client wants than what a strictly legal analysis could produce.\textsuperscript{52} While the mother initially may react with hostility to the lawyer's counsel, she subsequently may decide that a less drastic alternative to disinheritance, such as talking to the son, will ventilate and clarify her feelings sufficiently.

This approach may be more effective and less difficult for the lawyer than counseling the client about morality. Furthermore, it does not involve as clear a judgment on the lawyer's part regarding the appropriateness of the client's behavior. The lawyer can present guilt, remorse, and regret as positive phenomena experienced in the world.\textsuperscript{53} The more neutral\textsuperscript{54} character of such counseling may create less client resistance and resentment than a judgmental stance of the lawyer toward the client's morality.\textsuperscript{55}

Neutral advice also has a down side, however: it lets the lawyer off the hook. Instead of grappling with knotty moral issues, the lawyer can seek refuge in the comfortable plumb of pop psychology.\textsuperscript{56} Discernment about moral obligations can give way to generalizations that condone irresponsible behavior. If the problem with immoral behavior is not that it is immoral, but that it causes guilt, the solution may be to stop feeling guilty, not to stop acting immorally.\textsuperscript{57} Because there is some merit to this criticism, the psychological approach can never supplant moral counseling.

The second rule on psychological issues, which requires counseling the client about the need to seek professional mental health services, involves assuming the judgmental stance that counseling about the presence of guilt can avoid. Instead of telling the client that the client is like everyone else in her capacity to experience guilt, the lawyer tells the client here\textsuperscript{58} that she is different. This advice can provoke denial and resentment.

The principal justification for giving advice about the client's need for mental health services is that such advice ultimately may lead to greater happi-

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\textsuperscript{51} See id.


\textsuperscript{53} See, e.g., S. Freud, The Ego and the Id 24-25 (J. Strachey rev. ed. 1962) (discussing guilt as a by-product of the development of human sexuality); B. Gert, supra note 34, at 205-07 (discussing the operation and nature of the "conscience"); J. Rawls, supra note 35, at 474-76 (discussing the relationship of guilt to a person's sense of justice). Literature also has provided memorable examples of the power of guilt. See, e.g., F. Dostoevski, Crime and Punishment (1858) (guilt of a murderer over his crime led to hysteria, apprehension by the authorities, and ultimately to insight and inner peace); E.A. Poe, The Tell-Tale Heart (1843) (murderer reifies his guilt, making it into a thing that ultimately leads to his discovery).

\textsuperscript{54} Cf. D. Binder & S. Price, supra note 6, at 211-17 (discussing nonjudgmental means of conveying to client the need for client to see a mental health professional).

\textsuperscript{55} See id.

\textsuperscript{56} See New Legal Formalism, supra note 19 (criticizing the glibness and trivialization lurking in a psychological approach). While such an approach need not be so pat, the risk exists.

\textsuperscript{57} Id. at 506-20.

\textsuperscript{58} Examples of cases in which such counseling might be necessary include commitment and divorce proceedings. In each case, the client may benefit from the clarification about goals, objectives, and points of view that psychological counseling can provide.
ness and less risk of harm for the client and others. In extreme cases, a client may starve herself or do other damage because of the presence of psychopathology. Absent psychopathology, however, the client might make different choices about her behavior. This assumption justifies the paternalism inherent in advice to seek mental health treatment. Moreover, if the client, without treatment, might harm others, then seeking to abate this risk with advice to obtain treatment does not constitute paternalism. Concern for others is an independent justification for advice, regardless of the best interests or considered values of the client. In either event, giving advice to seek treatment is worth the resentment it might provoke.

Another justification for the lawyer's providing counseling in this area is that the lawyer may be the only person in a position to perform this function. The client may not have a family. Alternatively, the family may be part of the client's psychological problem, and thus may suffer from the same denial that the client experiences. Furthermore, a psychologist, psychiatrist, or other mental health professional may not be immediately available. Here, the lawyer's responsibility is to advise the client to seek the services of a mental health professional, and, if necessary, to arrange the provision of such services upon the client's consent.

A final justification for attorney advice about seeking mental health treatment is that giving the advice, and receiving an expression of anger from the client, creates a more comprehensive exchange between lawyer and client. Sharing sentiment and information in anger can be a cathartic experience. This kind of exchange may lead ultimately to a relationship of greater trust and worth.

Despite its utility, however, important caveats attach to the lawyer's responsibility in this area. The lawyer must never interpret mere intransigence or apparently unwise decisionmaking (such as a refusal by the client to accept a settlement that the lawyer regards as being in the client's best interest) as triggering her obligation to counsel the client on the value of mental health services. Moreover, if the receipt of mental health services could have adverse legal consequences to the client, for example, if it could lead to the client's involuntary commitment to a psychiatric institution, then the lawyer must disclose these

60. See D. Luban, supra note 7, at 346 n.12 (“overriding someone's unconsidered wishes in the name of her own better-considered values is justifiable”); Luban, Paternalism and the Legal Profession, 1981 Wis. L. Rev. 454, 467-74 (same).
61. The client initially may scorn such attention. In this situation, the lawyer may wish to take refuge again in a less threatening neutrality by connecting the receipt of mental health services to progress in the client's case. See D. Binder & S. Price, supra note 6, at 211-23.
62. Cf. Dinerstein, supra note 52, at 6-9 (urging expanded dialogue); Pepper, supra note 5, at 630-31 (describing wide-ranging “moral dialogue” between lawyer and client); Simon, supra note 5, at 52-60 (criticizing lawyers' practice of imputing narrow ends, such as maximization of wealth or avoidance of confinement, to client).
63. Cf. Aristotle, supra note 42, at 218-21 (knowledge of character of another, not mere show of “signs of friendship,” is necessary for friendship's development); infra note 127 and accompanying text (ventilating doubts and hidden interests is therapeutic for lawyer-client relationship).
risks to the client when the lawyer first recommends recourse to professional help.

Counseling about psychological elements inevitably affects nonclient interests and policy, even if its primary focus is on the client. A client who needs and receives mental health services will create fewer burdens for her family, friends, and neighbors. Moreover, timely receipt of treatment may obviate the need for more costly and intrusive interventions at a later stage. The next subsection examines policy issues in a broader canvas.

C. Policy

The following discussion of policy overlaps in part with the previous discussion of morality. The division between the two categories is often artificial. Many arguments that lend themselves to articulation in moral terms also find a voice in the language of policy. Acknowledging this kinship, however, should not obscure the substantial differences between these two perspectives.

One important distinction between policy and morality is that policy does not concern the actor's state of mind. The crucial arena for policy is the effect of a given decision in the real world. Creating means for coping with those effects, regardless of the level of intention of the relevant actor or actors, is the goal of policy. Moreover, policy, because it does not focus on state of mind, has a broader amplitude than morality. Policy can examine the indirect effects of an action, as well as consequences that flow directly from the actor. Policy also deals readily with aggregates of people and things. It is free from the narrow focus on individuals that characterizes prototypical moral discussions.

Counseling must emphasize two strands of policy. The first strand deals with the unintended consequences of litigation. The second concerns the imperative, stated slightly differently in the section on morality, that persons behave as they would have others behave. Both strands are vital in tying together client decisions and nonclient interests.

1. Advice to the Client About The Unintended Consequences of Legal Action

One of the more distressing attributes of legal action is that its conse-

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65. Cf. W. James, Pragmatism 42 (1970) ("[t]he pragmatic method . . . is to try to interpret each notion by tracing its respective practical consequences"). The legal realists sought to anchor the study of law in pragmatic concerns. See Holmes, The Path of the Law, 10 HARV. L. REV. 457, 460-62 (1897) (arguing that consideration of law should begin with effect of legal rules on conduct of real world actors).

66. See generally O.W. Holmes, The Common Law (1881) (urging withering away of mentalist models of law contingent on discovering the intent of the actor).
quences tend to seem more certain and delimited than they turn out to be.\textsuperscript{67} This is particularly true when one considers consequences for the public at large, in addition to consequences for the client or identifiable third parties. The difficulty of determining in advance consequences for the public\textsuperscript{68} has led at least one commentator to abjure such prognostications and concentrate on consequences to identifiable individuals.\textsuperscript{69} This choice to abstain is poignant, because legal action that initially appears benign, or at least neutral, ultimately can injure society.

Injury to the public weal from legal action has two major sources. One source is the chilling effect that legal action can exert on social enterprises that the legal action exposes to heightened restrictions or risks. The second source is the burden on the public created when legal actions or decisions result in uncompensated harms to persons who ultimately turn to society for assistance. This subsection discusses these phenomena in turn.

\subsection*{a. Chilling Effect}

The assertion of legal rights may restrict or inhibit socially worthwhile activities and relationships. This chilling effect arises when two conditions are present. First, the legal action must impose actual or potential costs on activities. Second, exit from these activities must be feasible.

The best known example of this phenomenon, and the source of its label “chilling effect,” is the operation of libel law. The standard for proving libel in the United States is quite onerous, particularly if the plaintiff is a public figure.\textsuperscript{70} The rationale for such a high standard is that a less onerous test would chill the ardor of the media, as well as individuals, in discussing, debating, and conveying information about the events of the day. If the costs of conveying such information became too steep, the media simply would exit by not conveying information that could trigger such costs. Newspapers and news broadcasts would become one huge “Living Section.” Public enlightenment about issues other than movies, food, and home improvements would plummet.

The applicability of the chilling effect problem goes beyond libel law.\textsuperscript{71} One

\textsuperscript{67} Cf. \textsc{Aristotle}, supra note 42, at 152-53 (“practical wisdom” is important because “matters of action admit of being caused by things other than they are”); \textsc{D. Luban}, supra note 7, at 350 (citing uncertainty about consequences as one factor that should temper lawyers’ resort to their own political views as guide to litigation program); \textsc{Thucydides}, History of the Peloponnesian War *1.138 (future contains “hidden possibilities for good or evil”), cited in Neumann, On Teaching the Process of Strategy 1, 1-2 (unpublished paper delivered at the Second UCLA-Warwick International Clinical Conference, Sept. 1989).

\textsuperscript{68} Determining anything in advance—that is, making a prediction—is notoriously difficult. See, e.g., \textsc{R. Nisbett & L. Ross}, supra note 10, at 139-66; Kahneman & Tversky, On the Psychology of Prediction, in \textsc{Judgment Under Uncertainty}, supra note 10, at 48-68; see also Margulies, supra note 17, at 823 n.183 (difficulty of predicting individuals’ dangerous behavior).

\textsuperscript{69} See \textsc{Morris}, supra note 5, at 791-94.


\textsuperscript{71} Many tort claims or aggregations of claims work in a similar fashion. Medical malpractice cases constitute a visible, albeit controversial, example. The prospect of large, unpredictable damage awards has helped raise insurance costs to a point at which doctors assert that they cannot afford to remain in practice. While the exact extent of the doctors’ plight, and how much of it is self-inflicted or derived from insurance company investment decisions, is debatable, it is hard to assert that mal-
pertinent example focuses on the rights of the institutionalized mentally disabled. These rights, typically based on the due process clause, include cleanliness of surroundings, adequate staffing, avoidance of overcrowding, protection against brutality, adequate medical care, elimination of inappropriate use of especially confining treatment techniques such as seclusion and physical restraints, and other indicia of a decent, safe, and humane institutional environment for the mentally ill. Few goals seem more self-evidently worthwhile. The path to this goal, however, contains some pitfalls.

The pitfalls derive from pervasive failures of human inference, which afflict the altruist and the apostle of mammon alike. People draw inferences and make judgments according to certain heuristics and biases that serve them in good stead in much of everyday life, but that can also lead them astray. For exam-

practice suits and awards help the situation, or encourage doctors to continue their work. The imposition of new costs on medical practice segues into a search for exits. Because no law commands that physicians stay in the practice of medicine, some doctors apparently are leaving practice, or at least relocating to jurisdictions that doctors perceive as more friendly. This phenomenon raises the cost and reduces the availability of medical care for everyone. Cf. Law, A Consumer Perspective on Medical Malpractice, 49 LAW & CONTEMP. PROBS. 305, 308 (1986) (arguing that costs of medical malpractice liability are not unreasonable if prospect of liability enhances quality of medical care). But see Benedict & Saks, The Regulation of Professional Behavior: Electroconvulsive Therapy in Massachusetts, J. PSYCHIATRY & L. 247 (1987) (presenting results of study which indicated that fear of malpractice liability had little impact on procedures employed by psychiatrists who prescribed and administered electroconvulsive therapy).

Other examples without the controversy built into the malpractice crisis are plentiful. See DeShaney v. Winnebago County Dept. of Social Serv., 812 F.2d 298, 304 (7th Cir. 1987) (Posner, J.) (declining to hold state liable for failing to intervene to halt child abuse by removing child from home; court asserted that liability would force state to choose between liability to the child for failing to remove her, and liability to the parents for erroneously removing her), aff'd, 109 S. Ct. 998 (1989); Nally v. Grace Community Church of the Valley, 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97 (1988) (rejecting liability for pastoral counseling, on ground, inter alia, that liability would hinder clergy in giving advice), cert. denied, 109 S. Ct. 1644 (1989); see also Michelman, supra note 64, at 1208-13 (discussing utilitarian account of virtues of property rights which posits that people exposed to arbitrary and unpredictable governmental taking of private property will be discouraged from engaging in productive work); White, The Abolition of Self-Help Repossession: The Poor Pay Even More, 1973 Wis. L. REV. 503 (arguing that imposition of procedural safeguards on repossession of consumer goods purchased on installment credit makes credit more difficult to obtain); cf. Baumol, Medicare Folly: Capping Doctors' Fees, N.Y. Times, Dec. 27, 1988, § A, at 21, col. 2 (arguing that cap on doctors' fees would discourage treatment of Medicare patients). See generally A. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970) (analyzing different responses to entities' decline).

The concept of chilling effect is not new. It comprises at least part of the rationale for certain evidentiary rules, such as the attorney-client privilege and the bar on admitting evidence of subsequent repairs. Each legal era seems to find new uses for the notion, without ever rationalizing its overall impact on legal decisionmaking.


people, people draw inferences about causation on the basis of the representativeness of particular events and conditions, that is, the extent to which these events or conditions resemble each other. Points of resemblance between persons, conditions, and events are likely to be salient characteristics, which are graphic, easy to visualize, and have emotional resonance.  

Salient and representative characteristics coalesce to form stereotypes and causal scenarios. For example, people often perceive those with mental disabilities as dangerous. Images from history and culture vividly depict persons with mental disabilities as "wild beasts" contorted by unseen demons. These salient images stay in our memory. The representativeness heuristic plays a role because it makes intuitive sense to match these images of disorder with acts of disorder and violence. Yet, intuition to the contrary, persons with mental disabilities on the whole are no more dangerous than the general population.

These scenarios inhibit our ability to consider a full spectrum of information. Causal scenarios are very difficult to diffuse, even when contrary evidence presents itself. In addition, the availability of scenarios of causation, and the promiscuity with which we apply them, contrasts with our reluctance to consider information diagnostically. We more readily view an event as a cause of another event than as a symptom. The result of these defects in judgment is that people draw the wrong conclusions about causation in the first instance and then perpetuate their errors.

Mental health litigation illustrates the operation of failures of inference. Poor institutional conditions are a salient characteristic. It is easy to visualize psychiatric patients or residents of facilities for developmentally disabled and mentally retarded persons as suffering because of dirty surroundings; crowded wards; and scarce, harried, indifferent, or brutal staff. These conditions inspire a strong emotional reaction, as figures as diverse as Senator Robert F. Kennedy and Geraldo Rivera discovered some time ago.

The representativeness heuristic dictates that if these conditions are bad for


74. See R. NISBETT & L. ROSS, supra note 10, at 122-30; Saks & Kidd, supra note 73, at 137.

75. See Saks & Kidd, supra note 73, at 133.


77. See Saks & Kidd, supra note 73, at 13; supra note 68 (mentioning difficulty of predicting dangerousness).


the mentally disabled persons affected, they also must be bad for all mentally
disabled persons, and for society as a whole. The causal schema that develops
from this inference holds that eliminating such appalling conditions will, in and
of itself, improve the lot of the public and of the mentally disabled. Having a
court decree the creation and maintenance of a more humane environment
seems like the logical solution to the problem.

The difficulty with this solution is that it fails to take into account new
problems caused by the chilling effect of mandated improvements in institutional
conditions—problems bypassed by the causal schema described above. The sali-
ence of poor conditions and the representativeness of improvements as an em-
blem of reform obscure the feasibility of exit for the agency that must implement
such improvements. In this situation, the state often may exit by simply admit-
ting fewer people into institutions. Admitting fewer people reduces over-
crowding, one of the conditions targeted in institutional reform litigation.
Reducing admissions, however, also deprives people of access to psychiatric care
and increases the mentally ill homeless population. The rise in this population
helps neither the mentally ill nor society.

His TIMES 445 (1978) (quoting Kennedy's testimony about a state developmental center before a
House committee).

81. See Torrey, supra note 59, at 157. There is some evidence that certain advocates for the
rights of the institutionalized mentally disabled sought better institutional conditions at least in part
because these advocates believed that states would rather close institutions than foot the bill for
reforming them. For these advocates, closing institutions that they regarded as irremediably flawed
was distinctly in the public interest. See Rhoden, The Limits of Liberty: Deinstitutionalization,

One does not have to resort to paternalism to discern the holes in the argument of advocates
untroubled by reductions in inpatient admissions. Paternalism provides the basis for the view that
some nondangerous people, under certain circumstances, are better served in institutions than in the
community, even if these people want to forgo treatment. Cf. supra notes 59-60 and accompanying
text (discussing paternalist justification for lawyer advising client to seek mental health treatment).
Reductions in admissions, however, tend to fall disproportionately on voluntary patients who ac-
tively seek inpatient care. Involuntary patients often are admitted in any case, because they are
perceived as dangerous and indeed, are sometimes referred by the criminal justice system. If rising
costs force reductions in beds, while the flow of involuntary patients remains constant or increases,
voluntary patients are squeezed out.

A poignant element of this situation is that voluntary patients often have no voice in institu-
tional reform litigation. Because, in theory, voluntary patients can leave the hospital at will, they
often cannot assert a liberty interest under the due process clause in seeking reform of institutional
conditions. The result is that advocacy and adjudication proceeds with little consideration of their
interests. This Article's approach would ensure more equitable treatment for these hapless persons.

82. See Torrey, supra note 59, at 156-59. Other factors include the psychiatric community's
erstwhile overconfidence in the efficacy of psychotropic drugs that purport to treat the symptoms
of mental illness, the lack of follow-up on discharged patients, the costs imposed by collective bargain-
ing agreements with institutional staff, and the lack of adequate housing in the community. On this
last point, see Margulies, supra note 80, at 362-63.

Another kind of exit involves what one could call a "shell game" played by the state between
institutions. In this game, the state takes resources needed to satisfy mandates of improved condi-
tions at one facility from other facilities not under mandates. In New York City, this game appar-
ently has resulted in resources being diverted to Manhattan Psychiatric Center, a facility that,
pursuant to a consent decree must make extensive improvements, from Creedmoor and Kingsboro
Psychiatric Centers, located in Queens and Brooklyn, respectively, which are not under similar obli-
gations. See Monitoring Conditions at Kingsboro P.C., QUALITY OF CARE NEWSLETTER OF THE
NEW YORK STATE COMMISSION ON QUALITY OF CARE, February-March 1989 at 11 (New York
State had to declare formal State of Emergency at Kingsboro to effect improvements at the facility).
The author's experience as an advocate for institutionalized persons with mental disabilities, as well
The lawyer's duty in such a context is to counsel the client regarding the chilling effect of litigation establishing or implementing the client's right to improved institutional conditions on the availability of inpatient care. A rule or guideline is needed to trigger discussion of the chilling effect, because flaws in human inference will cloak the effect in the ordinary interaction between lawyer as consultation with other advocates from New York and other jurisdictions, supports this observation.

Residential services for developmentally disabled and mentally retarded persons also are distorted by exit strategies. The trend in recent years, prompted at least in part by institutional reform litigation, has been to close large institutions or developmental centers such as Willowbrook. Because of the shortage of beds in appropriate institutions, persons with mental retardation whose families cannot care for them end up on general medical wards in public hospitals, see Daley, Disabled Foster-Care Youths Kept in New York Hospitals, N.Y. Times, Apr. 11, 1989, § A, at 1, col. 4, or in substandard community facilities that replicate the squalor of discredited institutions, see Daley, 20 Retarded Children Shunted To Squallid Foster-Care Home, N.Y. Times, Mar. 29, 1989, § A, at 1, col. 1. Neither the state nor advocates for the disabled have thus far developed a more comprehensive response. The challenge is a compelling one.

83. At this point, the reader may ask: "Who is the client, anyway, given the possibility that a patient at a state psychiatric facility may not have the capacity to make competent decisions?" There are a number of replies to this question. First, many jurisdictions now provide that mere presence in a psychiatric hospital, even if that presence is the result of involuntary commitment, does not give rise to a presumption of incompetence. See, e.g., N.Y. MENTAL HYG. LAW § 33.01 (McKinney 1988). Mental illness is so compartmentalized that an individual for whom hospitalization is essential may retain the ability to make choices in certain areas, such as litigation, even though she cannot understand the need for inpatient psychiatric treatment. This writer's experience with psychiatric patients confirmed, at least anecdotally, that patients with resoundingly poor judgment on some subjects nevertheless could make common-sense decisions, for example, about whether to drop a request for a commitment hearing in exchange for the treatment staff's promise to grant the patient privileges. Patients were also more than equal to the tasks of keeping track of appointments in court and following the details of their case. Courts have held that, because of this compartmentalization phenomenon, the involuntarily committed retain the right to vote. See, e.g., Manhattan State Citizens' Group v. Bass, 524 F. Supp. 1270, 1275 (S.D.N.Y. 1981). In some instances, an individual's cognitive capacities may be so impaired that she cannot communicate effectively with her attorney. The rules of professional responsibility have addressed this problem. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14(b) (Proposed Final Draft 1981) (citing client's inability to communicate, as well as client's inability to "exercise judgment"); cf. Perlin & Sadoff, Ethical Issues in the Representation of Individuals in the Commitment Process, 45 LAW & CONTEMP. PROBS. 161, 179-80 (Summer 1982) (discussing ambiguity in Model Rules' treatment of flaws in client's judgment as basis for lawyer's second-guessing client); Tremblay, On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client, 1987 UTAH L. REV. 515, 559-67, 577-583 (arguing that when communication with the client is still possible, lawyer should seek to persuade client of conspicuously correct course of action, rather than seeking appointment of a guardian). In such situations, a guardian or guardian ad litem is necessary. See N.Y. MENTAL HYG. LAW § 77.09 (McKinney 1988). The lawyer can counsel the guardian or guardian ad litem about the dangers of the chilling effect. In addition, a lawsuit may include a next friend of the patient or patients, who can undertake to advise the patient and make certain decisions on the client's behalf. The next friend may be an organization of parents or relatives of patients.

There is also some truth to the observation that in many law reform cases, the "real" client, defined as the person who originates the suit and makes decisions about the propriety of settlement versus continuing litigation, is really the lawyer herself. See Bell, Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, 85 YALE L.J. 470 (1976); Chayes, The Role of the Judge in Public Law Litigation, 89 HARV. L. REV. 1281 (1976); cf. Grosberg, Class Actions and Client-Centered Decisionmaking, 40 SYR. L. REV. 709 (1989) (arguing that lawyers in class actions have responsibility to seek to communicate with representative sample of class members). This situation does not obviate the need for counseling on the chilling effect syndrome or on other matters. Indeed, given the venerable adage that anyone who represents herself has a fool for a client, counseling would seem to be even more vital in such a context. The lawyer should consider the chilling effect syndrome when the lawyer is really driving the case, at least as much as in other settings. In a multilawyer office, one attorney can be designated as the official counselor. This attorney can counsel her colleagues on the chilling effect syndrome.
and client. The promotion of homelessness and the proliferation of gaps in adequate placements for mentally disabled persons are not representative consequences of attempts to improve institutional care. Detecting the connection between these consequences and institutional reform litigation therefore requires that lawyer and client think diagnostically—backward from phenomena to causes—rather than causally—forward from causes to effects. Patterns of human inference discourage diagnostic thinking. In addition, the compelling and emotionally charged scenario of rights creation will obscure disadvantages to the rights implementation process, such as the chilling effects syndrome. A rule or guideline will compensate for these defects.

The discussion of the chilling effect that a rule or guideline facilitates need not extinguish hope of progress in improving institutional conditions. A variety of options present themselves for consideration. These options involve the legal process, alternative dispute resolution, and self-help for victims of injustice.

One option is to seek to close the exit that frustrates attempts at reform. In the context of institutional conditions, this can be accomplished by barring hos-

84. See supra text accompanying note 79; cf. R. Nisbett & L. Ross, supra note 10, at 91-93 (people tend to overassess degree of correlation between conditions because they consider only instances in which condition A in fact occurs in tandem with condition B, while ignoring cases in which condition A is not associated with condition B). In the mental health setting, condition A is an improvement in institutional conditions, while condition B is an improvement in the lives of the mentally disabled. The lawyer sees inpatients every day whose lives are better because of institutional improvements, i.e., cases in which condition A is associated with condition B. The lawyer, however, does not see the people outside who are refused admission, those cases in which conditions A and B do not go together. Of course, the attorney, like everyone else, sees homeless persons. Making the connection between homelessness and the higher cost of institutional care yielded by institutional improvements, however, requires viewing homelessness as a symptom. Such a perspective calls for precisely the kind of diagnostic thinking that intuition disfavors.


A psychological explanation of the public interest lawyer’s single-mindedness distinct from the cognitive model invoked here relies on analysis of the motivation of public interest advocates. See Bell, supra note 83, at 493, 504-05, 511 (discussing conflict between idealistic motives of advocates of desegregation and practical concerns of parents about insuring better education, with or without formal racial balance, for their children); see also Breger, Accountability and the Adjudication of the Public Interest, 8 Harv. J.L. & Pub. Pol’y 349 (1985) (arguing that public interest lawyers and clients have divergent agendas and that lawyers may hold to their agenda out of interest in preserving ability to exercise power without accountability); Rhoden, supra note 81 (focusing on divergent agendas in context of mental health litigation); cf. supra note 19 (discussing extent to which need for recognition may influence public interest lawyers’ choices of cases and strategy). The analysis of motives arguably is less manageable and reliable and more cumbersome as an explanatory tool than the analysis of flaws in general human inference employed in this Article. Analysis of motivation rests on examination of individual states of mind. Such analysis is prone to the influence of the analyst’s bias. See supra note 49. Moreover, an analysis focusing on motivation cannot explain studies which appear to demonstrate that flaws in inference yield perceptions counter to self-interest in certain situations. See R. Nisbett & L. Ross, supra note 10, at 232 (citing study indicating that in some contexts people “hold themselves more responsible for failures than for successes”); Ross & Anderson, Shortcomings in the Attribution Process: On the Origins and Maintenance of Erroneous Social Assessments, in Judgment Under Uncertainty, supra note 10, at 129, 134 (same).

86. A lawyer, whatever her intellect and education, is no less vulnerable than the client to such flaws in inference. Cf. Kahneman & Tversky, On the Psychology of Prediction, in Judgment Under Uncertainty, supra note 10, at 48, 68 (describing failures of graduate students participating in experiment that tested capacity for inference); Saks & Kidd, supra note 73, at 131 (citing literature on inferential errors committed by, inter alia, psychiatrists, engineers, and bankers).
pitals from refusing admission to demonstrably needy applicants for treatment.\(^7\) This step will oblige the state both to upgrade institutional conditions and to serve the entire needy population.\(^8\) In addition, advocates for institutional reform can continue to litigate over institutional conditions, but can settle based on more oblique remedies. Instead of pressing for more inpatient staff or fewer admissions—measures that encourage exit—advocates can seek enhanced funding for on-site advocacy, a greater role for watchdog groups that monitor facilities and engage in cooperative problem-solving with little cost,\(^9\) and more

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\(^7\) In some situations, exits involving denial of care to those seeking care can be controlled and minimized. This is true if the particular jurisdiction provides, as a matter of state law, that all people have at least a right to minimally adequate subsistence and to minimally adequate treatment. Lawsuits in New York have encountered some success in establishing such a right under the New York Constitution, as well as under statutes. See McCain v. Koch, 70 N.Y.2d 109, 511 N.E.2d 62, 517 N.Y.S.2d 918 (1987); Klostermann v. Cuomo, 61 N.Y.2d 525, 463 N.E.2d 588, 475 N.Y.S.2d 247, on remand, 126 Misc. 2d 247, 481 N.Y.S.2d 580 (N.Y. Sup. Ct. 1984). The problem is that coordination has been limited between those seeking better institutional conditions in psychiatric hospitals and those seeking to close these exits from the obligation to improve conditions. Gaps in time between litigation on the right to adequate institutional conditions and on the right to subsistence and community services have left many needy people without care.

To some extent, the lack of communication may be attributable to differences of culture and ideology between lawyers and advocates for better institutional conditions and for subsistence services, respectively. Lawyers at the Coalition for the Homeless in New York City who seek subsistence rights for the homeless involving receipt of services such as housing coupled with counseling, not cash benefits, are often proud throwbacks to a social work orientation. Cf. D. Rothman & S. Rothman, supra note 80, at 51-52 (describing change in perspective after the civil rights movement from viewing disadvantaged populations as objects of paternalism to viewing them as individuals bearing rights); Koh Peters, Concrete Strategies for Managing Ethically-Based Conflicts Between Children's Lawyers and Consulting Social Workers Who Serve the Same Client 10 CHILDREN'S LEGAL RTS. J. 15 (1989) (contrasting traditional role of lawyer to advocate in accordance with client wishes, with role of social worker to act in accordance with perceived "best interests" of client); Legality and Welfare, supra note 19, at 1214-15 (describing social work world view as paternalistic in its conditioning receipt of benefits on acceptance of services). By contrast, a civil liberties perspective often characterizes lawyers seeking improvements in institutional conditions or the closing of institutions. The paternalistic motives and assumptions of some subsistence services lawyers have often conflicted with the assumptions of lawyers seeking improvements in institutional conditions. See Rhoden, supra note 81, at 407 (discussing some civil liberties advocates' resistance to suits seeking services for mentally disabled persons). This conflict has sometimes made communication and cooperation difficult.

\(^8\) Advocates fighting racial discrimination long have had to contend with exit problems, see Bell, supra note 83, at 474-77, although these problems are different in the context of racial discrimination because exit is triggered not by increased costs, but instead by ignorance, fear, and hatred. Courts have sometimes rejected attempts by integration advocates to close exits. See, e.g., Milliken v. Bradley, 418 U.S. 717 (1974) (rejecting interdistrict remedies designed to counter white flight and demographic changes in central cities by embracing entire metropolitan area). One controversial solution to the problem of exit in this area yielding conflicting signals from the courts has been to cut back on minority access to goods and services used jointly with the white population. Under the "tipping point" theory, the presence of too many minorities will ultimately frustrate integration, by causing white flight. Some entities have restricted minority access to certain schools or housing developments in the hope of convincing whites to remain. Courts have had mixed reactions to such programs. Cf. COLUMBIA LAW SCHOOL EDUCATION LAW PROJECT, PROMOTING INTEGRATION IN THE NEW YORK CITY HIGH SCHOOLS (1987) (concluding that efforts to limit minority use of certain educational programs do not significantly enhance integration, but do materially impair access to quality education for minority students). Compare Parents' Ass'n of Andrew Jackson High School v. Ambach, 598 F.2d 705 (2d Cir. 1979) (approving school's use of restrictions on black enrollment on ground that restrictions were genuine attempt to preserve integration), remanded for further factfinding, 738 F.2d 574 (1984), with United States v. Starrett City, 840 F.2d 1096 (2d Cir.) (striking down restrictions on percentage of black residents in apartment complex), cert. denied, 109 S. Ct. 376 (1988).

\(^9\) See Report Offers Praise and Criticism for State's Community Residence Programs for Mentally Ill Persons, QUALITY OF CARE, NEWSLETTER OF THE NEW YORK STATE COMMISSION ON
support for independent legal and social work agencies dealing with the needs of mentally disabled persons in the community. Advocates also can engage in individualized advocacy, including carefully selected damages actions.90

Nonlegal alternatives—including the option of self-help—are also promising. Oppressed people can band together, perhaps with the assistance of advocates, legal or otherwise, and establish support networks.91 These networks can educate and act without the inflexibility of legalistic models of rights and entitlements.92 For example, self-help networks can organize boycotts of merchants who engage in employment discrimination or abusive credit or repossession practices.93 In other cases, alternative dispute resolution mechanisms such as mediation and arbitration,94 or even the homely writing of letters, filing of ad-

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90. See, e.g., A Misdiaognosed Deaf Man's Ordeal, N.Y. Times, Dec. 11, 1988, § I, at 81, col. 1 (describing victory in tort suit brought by deaf man misdiagnosed as being mentally retarded). Misclassification cases may not promote exit from provision of institutional care, even with significant damages awards, because the state may avoid future exposure through means less drastic than exit. In misclassification cases, less drastic means may include simply providing hearing exams for all residents of developmental centers.


92. Cf. Alfieri, The Antimonies of Poverty Law and a Theory of Dialogic Empowerment, 16 N.Y.L. REV. L. & SOC. CHANGE 659 (1989) (arguing that reliance on legal system can sap will of oppressed people, instead of acting as catalyst); Legality and Welfare, supra note 19, at 1200-67 (arguing that legalistic model fosters alienation and fails to meet human needs). Perhaps the toughest endorsement of self-help comes from Malcolm X, who praised the person "who feels that he'll get farther by standing on his own feet and doing something for himself towards solving his own problem, instead of accusing you of creating the problem and then, at the same time, depending upon you to do something to solve the problem." MALCOLM X, THE LAST SPEECHES 28 (1989).


94. See, e.g., Edwards, ALTERNATIVE DISPUTE RESOLUTION: PANACEA OR ANATHHEMA?, 99 HARV. L. REV. 668 (1986) (discussing pros and cons of trend toward alternative dispute resolution and devices
ministrative complaints, and use of the telephone, can be effective in gaining
appropriate results for a client without the adverse effects produced by systemic
litigation.95

The promise of these alternative approaches is enhanced when lawyers for
the opposing party, be it state, merchant, or tortfeasor, can counsel their client
through methods that emphasize the policy benefits of helping those with legiti-
mate grievances.96 The next subsection discusses this aspect of counseling.

b. Public Burdens

It would be peculiar, as well as violative of moral notions of equality, if
lawyers directed counseling about policy solely toward those poor, disadvan-
taged, and vulnerable persons who typically seek law reform. Under the model
advanced in this Article, the rich and powerful receive counsel about moral is-

sues; counseling about the public burden created by practices of the rich and
powerful supplements counseling about morality.

Actions and decisions create a burden on the public in the following man-
ner. Suppose a pedestrian is injured through the negligent actions of a motorist.
Ordinarily, the victim of such negligence would have a cause of action against
the person who caused his injuries. Suppose, however, that the victim loses his
cause of action, for example, because his suit was not timely. The law will not
oblige the tortfeasor to compensate the victim. Yet, the victim still has expenses,
including medical bills, to pay. In addition, the nature and severity of the inju-
ries may require constant care for the victim. If the victim is indigent, or other-
wise lacks resources, the public, through government, becomes the provider of
last resort. Government and the taxpayers, as well as competing candidates for
governmental assistance who have a relatively smaller pie of resources to rely
upon because of the need to aid this particular victim, assume the burden other-
wise shouldered by the tortfeasor.97
The tortfeasor's lawyer should discuss with the client these negative policy implications of avoiding responsibility. The discussion should be reinforced, as usual, by the lawyer's ability to withdraw if she disapproves of the moral or policy consequences of the client's decisions. This ability precipitates the negotiation between lawyer and client alluded to earlier in the Article. Ideally, the client, after negotiation with his lawyer, and perhaps after the lawyer has discussed this matter with the victim's lawyer, agrees that paying some nontoken amount in compensation is the solution for both moral and policy reasons. Remedial action eliminates or minimizes the public burden effect.

This advice and discussion is useful even if the victim has preserved his cause of action. In that event, recognizing the public burden caused by an uncompensated wrong can help resolve the prisoner's dilemma problem often caused by litigation.

2. Dealing With the Public Choice Problems Created by Opportunities for Litigation

Litigation typically involves more than one party, at least in an adversarial system such as our own. Whenever more than one party participates in a process, possibilities for gamesmanship and strategic behavior are plentiful.

98. Discussion should be required because cognitive flaws affect tortfeasors' perception of the public burden effect. A tortfeasor who avoids liability because of the statute of limitations can plug this development into a readily available scenario. See supra notes 22-25 & 78-79 and accompanying text (discussing cognitive psychologists' study of the formation of schemas and scenarios based on characteristics with graphic or emotional content). That scenario depicts the situation in terms of the tortfeasor's escape from oppression at the hands of an unforgiving plaintiff. Discerning the burden assumed by the public as a result of the tortfeasor's default may entail the kind of diagnostic thinking that cannot insinuate itself into this story. Therefore, without some guide for attorney-client deliberation, the public burden effect may not be considered.


101. See generally D. MUELLER, supra note 48, at 11-18 (describing differences in cooperative behavior between large and small communities); Ackerman, Elliott & Millian, Toward a Theory of Statutory Evolution: The Federalization of Environmental Law, 1 J.L. ECON. & ORGANIZATION 313, 321-29 (1985) (discussing prisoner's dilemma game as applied to passage of federal environmental legislation); Easterbrook, supra note 48, at 806 (pressure to settle influences the attributes of cases resolved before Supreme Court); Farber & Frickey, supra note 48 (regarding whether legislature can effectively deliberate about public policy); Kornhauser & Sager, supra note 48 (focusing attention on
Each party has an opportunity to trick or bluff the other into a vulnerable position. If the parties eschewed tricks and games, however, and simply cooperated with each other to realize mutual goals, in all likelihood they would achieve greater total benefits.\textsuperscript{102}

Cooperation involves three steps on uncertain ground. First, as in our discussion of the categorical imperative regarding moral actions, parties must realize that they cannot get what they want solely by strength of will. Second, and even more difficult, they must acknowledge that the limits of will are also apparent to their adversary. Third, they must appreciate that different sets of parties, involved in different disputes or processes, may ignore the first two steps and achieve short-run individual gains, but only at a long-run cost to society as a whole.

Litigation embodies the forces set up against cooperation. Parties tend to feel that they can get what they want, at the expense of the other party to a dispute, by bluffing\textsuperscript{103} or by taking the dispute to final adjudication by a third-party decisionmaker.\textsuperscript{104} This state of mind tends to maximize costs to the parties, in aggregate, and to society.\textsuperscript{105} In addition, even if particular parties are interested in cooperation, the cultural pervasiveness of litigation as a form of dispute resolution\textsuperscript{106} forces parties to consider individual advantage and down-


103. See, e.g., Margulies, \textit{supra} note 26, at 426 n.83 (defendants who know that under Federal Rule of Civil Procedure 68 a plaintiff who rejects a rule 68 offer and subsequently recovers an amount less than or equal to the offer will forfeit post-offer attorney's fees may make intentionally low offer to bluff plaintiff's lawyer into settlement); Miller, \textit{An Economic Analysis of Rule 68}, 15 J. LEGAL STUD. 93, 111-12 (1986) (rule shifts range of settlement to favor defendant, thus defendant will offer lower settlement); Priest, \textit{Regulating the Content and Volume of Litigation: An Economic Analysis}, 1 SUP. CT. ECON. REV. 163, 170-71 (1982) (defendant's offer lower because of decrease in cost of litigation); Rowe, \textit{Predicting the Effects of Attorney Fee Shifting}, LAW & CONTEMP. PROBS., at 139, 166-68 Winter 1984 (fee shifting device will operate as disincentive and parties will be less likely to settle).

104. See R. Posner, \textit{Economic Analysis of Law} § 21.5, at 524 (3d ed. 1986) (parties will litigate only if optimistic about the outcome); Rowe, \textit{supra} note 103, at 156 n.71 (probability of shift in fees compared with probability of winning adds another element of disagreement between parties); Shavell, \textit{Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs}, 11 J. LEGAL STUD. 55, 56-57 (1982) (whether plaintiff decides to go to trial depends upon his evaluation of chances of winning). This devotion to strategic behavior in litigation may be a distinctly American phenomenon, from which even our supposed cousins, the British, depart. See Alexander, \textit{The History of the Law as an Independent Profession and the Present English System}, in \textit{The Lawyer's Professional Independence}, \textit{supra} note 47, at 1, 16-17 (describing cooperative attitude about discovery manifested by English attorneys). Indeed, even in America, some leading advocates may attach more importance to cooperation and less importance to gamesmanship. See, e.g., Friend, \textit{The Verdict on Arthur Liman}, ESQUIRE, Jan. 1989, at 67, 74 (according to his partner, one noted litigator believes that "you get more in the long run by being candid").

105. Social costs include the chilling effect and public burden problems discussed \textit{supra} notes 70-100 and accompanying text, as well as the cost of using courts. See Shavell, \textit{supra} note 104, at 71 (social costs include public administration expenses resulting from operation of courts, as well as legal costs for litigants).

plays the social benefits of cooperation. Social benefits are minimal if only the few and eccentric seek to produce them. They are contingent on aggregate effects that require the assent and participation of masses of combatants in disparate disputes. When this assent is lacking, it seems futile to be a pioneer.

This subsection examines the lawyer’s obligation to counsel the client, and herself, regarding both of these problems. The first part of the subsection deals with the role of counseling in developing trust between parties to a particular dispute, and in ensuring that a settlement is not skewed unfairly toward one of the disputants. The second part deals with counseling regarding a party’s relationship with every other similarly positioned party—every other plaintiff or defendant—in society, and with the need to act for society’s benefit even if all others similarly situated act only for themselves.

a. Policy Counseling as Benefitting Both Parties to a Specific Dispute

The two principal areas of counseling about policy identified in this Article—the chilling effect and public burden problems—tend, as the Article has indicated, to apply mainly to plaintiffs and defendants, respectively. In a given dispute, overzealous action by the plaintiff may trigger a chilling effect on the worthwhile, as well as wrongful, activities of defendants. Callous behavior by the defendant may result in the public being obliged to provide resources to an aggrieved or disadvantaged plaintiff while the defendant escapes her own obligation. If the parties understood this complementary relationship between their respective policy problems, they could, if they wished to consider the public interest—and if their lawyers counseled them to do so—work together to achieve a result that minimized both effects. Unfortunately, cooperation in the real world faces certain basic obstacles.

A central difficulty with gaining acknowledgment of and action on each of these problems from the plaintiff and defendant (or prospective plaintiff and defendant) in a particular dispute is that each party will worry about being played for a patsy if the other party chooses to view the dispute solely in terms of naked self-interest. Mental health policy furnishes an illustration of the situation. Patients and their advocates desire better institutional conditions. They are unwilling to mediate or moderate their desires without some concession and acknowledgment of their interests by the state. This is true even if patients and advocates understand that insisting on better institutional conditions will, at some point, promote the state’s exit from the mental health business.

By the same token, the state and its advocates may be unwilling to give the patients everything that the patients desire. This is true even though the state understands that if it declines to improve conditions, it will not only inflict harm
on others and arguably treat patients without the regard that morality suggests 
one must show to equals, but also will promote a waste of human resources 
because of the languishing of patients who could engage in productive work if 
conditions were improved. The state's intransigence guarantees, therefore, that 
the public will continue to foot the bill for institutionalization of these patients. 
Moreover, the state's exit option—refusing care to the mentally disabled outside 
of institutions and limiting admission to those institutions—also creates a bur-
den on the public. Persons denied admittance to state institutions become a 
burden on their families. If, as is often the case, families are uninterested, 
intransigent, or incapable, these persons become a burden on other levels of gov-
ernment, which must deal with their problems because of the state's default.107

Despite these costs, the state may well want to extract some concessions 
from patient advocates, in the form of lowered expectations of better conditions, 
before it will agree to act in a way that will reduce these public burdens. Law-
yers on both sides must effectively counsel their clients about the policy costs of 
intransigence. Effective counseling on both sides will create the appropriate en-
vironment for agreement. Ineffective or haphazard counseling on the part of 
either side will make an agreement difficult to reach.

b. Counseling About Each Party's Relationship to a Society That May 
Not Seem to Follow This Article's Policy Prescriptions

Law reform in the institutional context discussed above, like the simplest 
individual tort suit, also encounters obstacles to acting on policy from another 
quarter: the perception that other people in society similarly situated to the 
client will do better because they will ignore the dictates of sound policy and act 
only for themselves.108 Patients or their advocates, for example, are likely to 
read reports of similar disputes elsewhere. If patients seem to receive all or most 
of what they want in those disputes, with the accompanying risk of chilling ef-
fects on hospital admissions, then it may seem unavailing and quixotic for pa-
tients in the instant dispute to give up a chance at similar improvements.109

The answer to this conundrum is, of course, that some party must be first.

107. An example is the problem of homelessness. Any manner of coping with homelessness— 
establishing shelters or longer-term housing, seeking to enforce vagrancy statutes, but see Papachris-
tou v. Jacksonville, 405 U.S. 156 (1972) (striking down vagrancy statute as impermissibly vague), 
"Greyhounding" the homeless by giving them a one-way bus ticket out of town, or leaving homeless 
people unassisted on the street, which encourages panhandling and, occasionally, harassment of 
passersby—involves use of public resources or imposition of costs on the public.

108. See R. Epstein, supra note 10, at 216-18 (discussing common pool problems created when 
people can undertake to secure individual advantage at expense of group); Calabresi & Melamed, 
supra note 17, at 1106-10 (describing costs of arriving at collective decision to buy and sell property 
consisting of many individually owned parcels); Michelman, supra note 64, at 1214 n.99 (formulat-
ing concept of "settlement costs," that is, costs created by bargaining over just compensation for 
land condemned by the government).

This problem is magnified in the case of an individual tort suit. In such a case, there are mil-
lions of other parties in other suits, not merely dozens, scores, or even hundreds, as in the case of 
institutional reform suits across the United States. The marginal impact of decisions in one tort case 
likely will be miniscule. But see Easterbrook, Foreword: The Court and the Economic System, 98 

109. This is especially true because there is no easy way to coordinate and control the actions of
If all parties in all suits seek to free ride on the policy harm done by everyone else, the harm will persist in perpetuity. Requiring, not merely permitting, lawyers to counsel their clients that they must be willing to be pioneers is an initial step toward eliminating or minimizing policy costs. Requiring lawyers to perform this counseling function serves the same purpose as government action in any case of market failure: it compensates for the fact that large numbers of parties cannot economically agree among themselves on the optimal course of action for coping with social problems.

IV. CRITICISMS

A. Client Alienation

The above discussion has demonstrated that the virtues of this Article's approach are substantial—more cooperation, more moral actions and decisions, fewer psychological and policy costs. However, the approach also has pitfalls. The most obvious criticism of the model advanced in this Article is that the model will alienate clients and thereby strain the attorney-client relationship. There is clearly some intuitive rightness to this point. Geoffrey Hazard urges lawyers to forgo advice of a nonlegal character precisely because he notes that a client may react indignantly when he perceives that his lawyer, who is supposed to be in his corner, is judging him.

This alienation could have unfortunate consequences. First, clients might become less willing to share confidences with their lawyers, out of fear of being judged as lacking moral or policy sense. Second, clients might seek to bypass lawyers altogether. A client could exclude lawyers from the "loop" of client decisionmaking, by going bare—that is, without legal advice—or by consulting others who perform certain advisory functions analogous to those performed by lawyers without the annoying professional responsibilities that this Article's

all patients in every such dispute. See supra note 108. Therefore, the decisions of the patients and their advocates in a given case will have only a marginal effect. Id.

If we depart from the realm of policy and reenter that of morality, we can classify as "resentment" the feelings of those observing the gains achieved by parties to other disputes who decline to cooperate and instead seek every last advantage. These other parties, by hypothesis, have cheated. Similarly situated observers may experience resentment at the gains achieved, particularly because these gains come ultimately at the expense of everyone else. Cf. J. Rawls, supra note 35, at 533 (discussing resentment as moral feeling and comparing it to envy, which does not derive from a reaction to other's wrongs, but rather only from a perception of the disparity between the goods possessed by others and those possessed by the observer).

110. The free ride is also taken on the public's subsidy of the justice system itself. See Shavell, supra note 104, at 59.

111. This is as true for individual tort suits as it is for institutional litigation. The tort suits, in aggregate, have an impact at least equal to, if not greater than, the impact of institutional cases. The attitude explored here is much like the attitude evinced by nonvoters. Nonvoters typically reason that their vote will not make a difference. See Farber & Frickey, supra note 48, at 907. Again, if everyone felt this way, an electoral system would be unable to function. The system works, even in part, because about half of the people still care enough to vote.

112. See Calabresi & Melamed, supra note 17, at 1115-24 (discussing market failure manifested by pollution produced by factory, when neither factory nor customers of factory pay for costs of pollution).

113. See G. Hazard, supra note 6, at 147-48. Cf. Friend, supra note 104, at 69-70 (famed litigator displays in his office the words of Isaiah: "Fear thou not, for I am with thee.").
model would impose on attorneys.114

These objections ultimately fail to persuade because of two factors: the nature of the lawyer's role and the paucity of effective exits from recourse to lawyers by clients. Clients go to lawyers because they have questions or problems. Effective managing of those problems requires candor with one's lawyer. The possibility of unwelcome moral or policy advice115 from the lawyer does not

114. Consultants might be one source of such advice. Indeed, many law firms currently have affiliated consulting services to deal with economic problems experienced by their clients. See Jones, The Challenge of Change: The Practice of Law in the Year 2000, 41 VAND. L. REV. 683, 688-92 (1988). If implementation of this Article's model yielded a chilling effect on clients' interest in turning to lawyers, arguably consulting firms could fill the vacuum.

115. The use of the word "unwelcome" implies that the client will resent the lawyer's counsel outside of strictly legal areas. There is some psychological truth to the idea that clients want and expect their lawyer to focus on their problems, rather than venturing into commentary on the ills of third parties or society in general. See D. BINDER & S. PRICE, supra note 6, at 173 (client wants lawyer to empathize with client's difficulties). A comment on the Model Rules of Professional Conduct permits a client to shut off the flow of nonlegal advice, if the client is "experienced in legal matters." ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT 110 (1987). Under this Article's approach, the client does not have that power.

The client's lack of ability to shut off the socially concerned attorney is not free of costs. Making the right to receive advice on nonclient interests inalienable compromises the client's autonomy. When the client must listen and discuss moral, psychological, and policy issues with her lawyer, she loses the ability to do something else with her time. Moreover, if she actually must bargain with the attorney over the social effects of legal decisions, on pain of the lawyer withdrawing from the case, her autonomy interest endures further strain. Cf. B. SPINOZA, ETHICS (1677), discussed in Luban, Paternalism and the Legal Profession, 1981 WIS. L. REV. 454, 461-66 (true autonomy involves consideration of values, not just short-term interests); Ellmann, Lawyers and Clients, 34 UCLA L. REV. 717 (1987) (asserting that true autonomy involves not just the client's inclinations, but also an opportunity to make decisions in light of all possibly relevant information); Simon, supra note 5, at 52-61 (in name of client autonomy, lawyers impute legalistic ends to clients that may diverge from clients' own goals). See generally M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM (1975) (positing lawyer's role as morally good because traditional conception of allegiance to client safeguards client autonomy); Fried, The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation, 85 YALE L.J. 1060 (1976) (same); supra notes 35-37 and accompanying text (discussing categorical imperatives).

The counseling required under this Article's approach is not only meant to vindicate the client's decisionmaking capacity, but is also intended to benefit society. This benefit accrues even if the client in fact experiences some reduction in autonomy. Within certain boundaries, under this Article's approach, the infringement of individual prerogatives on behalf of group norms is permissible. See Calabresi & Melamed, supra note 17, at 1111-15 (discussing society's interest in outlawing slavery even if, in theory, an individual could make completely knowing and voluntary decision to enslave himself for a price); see also supra notes 10-13 & 46 and accompanying texts (describing how nonpublic deliberation by lawyers and clients can yield results that public entities like legislatures and courts would reach if transaction costs did not impede these entities' flexibility); cf. Kennedy, Cost-Benefit Analysis of Entitlement Problems: A Critique, 33 STAN. L. REV. 387 (1981) (discussing indeterminacy and the fundamentally political, subjective character of group tastes and preferences that might override individual choices).

Of course, one might disagree with some of the areas of counseling, particularly in the policy realm, set out in this Article. The policy recommendations clearly do have a particular political perspective. They assume some kind of market economy and political conditions roughly congruent with those of a liberal democracy. Those impatient with such a regime might quarrel profoundly with the recommendations made in this Article regarding policy. See, e.g., R. UNGER, KNOWLEDGE AND POLITICS (1975) (arguing discarding of liberalism in favor of communitarian ethos of shared values); Abel, Why Does the ABA Promulgate Ethical Rules?, 59 TEX. L. REV. 639 (1981) (arguing that the ABA's rules are unable to resolve the problems inherent in liberalism); New Legal Formalism, supra note 19 (arguing that legal professionalism should be abandoned if the value of individuality is to be taken seriously); cf. Frankel, Why Does Professor Abel Work at a Useless Task?, 59 TEX. L. REV. 723, 729 (1981) (expressing doubts about the feasibility of a radical departure from the liberal capitalist model in the United States).
change the need for or advantage of candor. Moreover, because of the nature of rules governing the practice of law, parties concerned about the legal consequences of actions or decisions must turn to lawyers as virtually the "only game in town." Unless the various levels and units of government charged with monitoring or enforcing the law wither away, or substantive rights and remedies shrink to the point at which private parties have no incentive to invoke the law to combat a perceived wrong, the need for legal advice and assistance is likely to remain constant or to expand. Exits for disgruntled clients are limited. Clients will have to tolerate counseling on the interests of nonclients if they wish to secure the benefits that lawyers bring.

116. The advantage of candor might be reduced if lawyers were required to counsel clients not only about the moral and policy consequences of legal decisions, but also to disclose all actions of clients that might conflict with moral or policy norms. Compare Lynch, The Lawyer As Informant, 1986 DUKE L.J. 491, 521-23, 527-32 (arguing that requiring disclosure of wrongdoing in various contexts can damage interpersonal relationships) with Frankel, The Search for Truth: An Umpireal View, 123 U. PA. L. REV. 1031 (1975) (advancing model based on lawyers' disclosure of all relevant facts to court). Such a requirement would eviscerate the attorney-client privilege. See Freedman, Judge Frankel's Search for Truth, 123 U. PA. L. REV. 1060 (1975); Uviller, The Advocate, The Truth, and Judicial Hackles: A Reaction to Judge Frankel's Idea, 123 U. PA. L. REV. 1067, 1071-74 (1975). Loss of the attorney-client privilege might deter clients from seeking legal advice, especially if the price of disclosure of the client's actions would be civil or criminal sanctions, or even the disapproval of the community. The chilling effect of such sanctions might make a client undertake resolution of her legal problems on her own. This Article, however, does not suggest such a radical step.

117. See Abel, supra note 115, at 653-67 (asserting that the regulation of the legal profession is designed, in large part, to stifle competition).

118. Another related drawback that the approach advanced in this Article could yield is the exit of lawyers themselves, or the diversion of those otherwise interested in studying law, because of the burdens of moral and policy judgment that the approach entails. See, e.g., G. HAZARD, supra note 6, at 147 (quoting an unnamed participant in symposium on professional responsibility as asking, with reference to counseling the client about policy and morality, "Who the hell are you to tell him what he ought to do?"). Those who enter the law to escape the need for moral and policy judgments and comfort themselves with the seeming neutrality and positivist, "just the facts" patina of advocacy, see Simon, supra note 5, at 39-42, could be scared off by an emphasis on moral and policy values. Cf. Friend, supra note 104, at 69-70 (drawing distinction between litigator Arthur Liman's practice, which is oriented toward representation of commercial clients, his family life, and occasional spells as a member of or counsel for various government investigatory bodies, such as the Senate Iran-Contra Committee and the New York State Attica Commission). Some might view the apparent neutrality of the law as a benefit. Cf. Kennedy, supra note 10, at 777 (faith placed in judicial neutrality would be misplaced); Singer, The Player and the Cards: Nihilism and Legal Theory, 94 YALE L.J. 1, 45 (1984) (notion of judicial neutrality is both supported and rejected by the concepts of determinacy and objectivity); Simon, supra note 5, at 36 (pervasive "ideology of advocacy" rationalizes lawyers' refusal to be bound by norms that he considers binding on others; fundamental to this "ideology" is the prescription that the lawyer remain detached from the purposes of his client); New Legal Formalism, supra note 19, at 553 (the law is, in fact, political); cf. Alieri, supra note 92, at 660-65 (law is not neutral but instead embodies principles of status quo, particularly belief in capitalism and liberal democratic values). Under this view, law's neutrality is a kind of refuge from the irking necessity of moral choices that characterizes much of the rest of life. Cf. J.P. SARTRE, BEING AND NOTHINGNESS 533-56 (1956) (arguing that persons must accept responsibility for choices in the world). Arguably, the neutrality of law complements, rather than conflicts with, the need for such choices in other aspects of existence. But see Kronman, supra note 19, at 863-73 (practice of law is good in and of itself precisely because it develops capacity for judgment). An even more conspicuous reason to fear the exit of lawyers if the model put forward in this Article were adopted would be the possible loss of income that lawyers might experience. Many lawyers might be reluctant to charge clients for the nonlegal advice suggested here. Many clients might be unwilling to pay. The result could be that lawyers would end up donating counseling time, as a kind of pro bono project. While many lawyers do pro bono work, see, e.g., D. ROTHMAN & S. ROTHMAN, supra note 80, at 325, 331, 333 (describing the pro bono participation of law firm in endeavor to improve conditions at Willowbrook, an institution for the mentally retarded), many lawyers resent attempts
B. Manipulation of Clients

Another criticism of the approach taken in this Article is that it would promote greater manipulation of clients by lawyers.\textsuperscript{119} This criticism has bite, however, only if one equates manipulation with influence.\textsuperscript{120} Under this Article's approach, some lawyers will have to adopt a more activist and comprehensive mode of counseling focusing on nonlegal and nonclient interests. Clearly, these lawyers may enjoy increased influence over a client.\textsuperscript{121} Such influence, however, could produce positive effects on the attorney-client relationship, supplementing positive effects for third parties and for society. These improved effects on relationships between lawyers and clients would contrast with the
damage done to those relationships by the manipulation traditionally practiced by the legal profession.

Manipulation, as this Article defines it, and as the legal profession has redefined it, is distinct from influence. Manipulation is the process through which a lawyer invokes pretenses or neglects to disclose material facts to persuade the client to decide on a specific course of action. Influence is the process by which the lawyer uses the expression of sincere concerns, possibly coupled with the open application of leverage in the form of a threat to withdraw from representation, to shape a client's decisions. Both manipulation and influence compromise the client's autonomy to some degree, but influence is healthy for the attorney-client relationship because it eschews the pretense that typifies manipulation.

The core pretense of traditional legal practice is that, absent any conflicts between the interests of specific clients, the attorney generally will have no interests that conflict with those of a client in any particular matter. Actually, the attorney often faces generic conflicts between zealously representing a given client and conducting a viable law practice. The lawyer who works too hard on one client's case risks forfeiting his investment in other cases. This trade-off is stark in a high volume practice. To cope with the conflict, the lawyer to manipulate the client into agreeing to settle when the lawyer believes additional work will cost the lawyer more than he will gain from the incremental increase in recovery that the additional work would produce.

The classic case of manipulation in legal practice involves persuading a client to settle a case by assuring him that settlement is the only course of action that makes legal sense and that benefits the client. In some cases, however, settlement at a given point will not maximize the client's recovery, even though it may not work a palpable injustice. The client could reject certain settlement offers with minimal risk of losing the entire case. Accepting such an offer possibly could prevent the client from winning much more at trial, even if the likelihood of a higher award is sufficiently small to discourage the attorney, because she must front the cost of continued work on the matter.

Settling in this situation is in the attorney's best interest, but not the cli-

122. For discussion of specific conflicts between clients' interests, see G. HAZARD, supra note 6, at 69-86. See also United States v. Truglio, 493 F.2d 574, 579 (4th Cir. 1974) (discussing possible conflicts precipitated by same lawyer's representation of multiple defendants in one case); Alschuler, The Defense Attorney's Role in Plea Bargaining, 84 YALE L.J. 1179, 1210-11 (1975) (same); Green, supra note 28 (same); Green, "Through a Glass, Darkly: How the Court sees Motions to Disqualify Criminal Defense Lawyers, 89 COLUM. L. REV. 1201 (1989) (same).

123. See D. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? 95-99 (1974); Alfieri, supra note 92, at 685-86; Alschuler, supra note 122, at 1210-24; Blumberg, The Practice of Law as Confidence Game: Organizational Cooptation of a Profession, LAW & SOC'Y REV., June 1967, at 15; Schneyer, supra note 47, at 1544-45. The lawyer also risks forfeiting or prejudicing the interests of the other clients. Avoiding such prejudice is itself a moral or policy good that the lawyer must bring to the attention of each of his clients. A utilitarian analysis, at least, would suggest that achieving passable results for many clients is superior to achieving an optimal result for one client and failing miserably in helping others. See Bentham, Introduction to the Principles of Morals and Legislation, in J.S. MILL, UTILITARIANISM AND OTHER WRITINGS 33-77 (1974) (proposing principle that achieving happiness for many outweighs needs of few); see also supra note 121 (discussing why lawyer's pressure on poor client to settle will not work injustice on client).

124. See Burt, supra note 26, at 1021.
ent's. It seems doubtful, however, that many attorneys will be sufficiently scrupulous to explain that the attorney's interest in settling at the offered amount exceeds that of the client, resulting in a conflict of interest that should affect the way the client views the attorney's advice. Because of the potency of modes of persuasion centering on the client's interests, the lawyer may be able to persuade the client to settle.

The approach taken in this Article would require disclosure of and counseling about such generic conflicts. This counseling would open the client's eyes to the mixed allegiances of the lawyer instead of permitting the lawyer to phrase options seductively in terms of the best interests of the client. The emphasis required under this Article's approach on nonlegal and nonclient interests in settlement would reduce the role of seductive invocation of client self-interest by the lawyer. Instead of encouraging the client's corrosive suspicion that the lawyer has an agenda besides the client's, the approach taken in this Article would mandate full discussion of that agenda, clearing the way for a more open, honest, and wide-ranging dialogue between attorney and client.

C. Rules Versus Discretion

Critics of this Article's model who are satisfied by these answers to problems of client alienation and lawyer manipulation may nonetheless have lingering doubts about other aspects of a model based on rules. Commentators possessing these doubts have advanced the arguments that making lawyers follow rules is somehow undignified, out of keeping with the spirit of duty to society that underlies the rules, a crutch that discourages development of true lawyerly judgment, or just plain out of date.

125. See Ellmann, supra note 115, at 733-53 (discussing client-centered approach of D. Binder & S. Price, supra note 6).

126. Reference to the client may not be the only manner of manipulation. Cf. Rhode Island v. Innis, 446 U.S. 291 (1980) (incriminating statement by suspect not involuntary under fifth amendment when police officers persuade suspect to identify location of gun used in crime by discussing among themselves, in suspect's presence, possibility that gun left on the street could be picked up accidentally by a disabled child at a school nearby).

127. This is particularly true if, as Professor Burt suggests, clients listen to attorneys' legal advice with a nagging sense of distrust which the client may never acknowledge to the lawyer, but which can color the client's subsequent perception of the relationship. See Burt, supra note 26, at 1019-20.

128. The notion that rules reduce professionals to undignified and meaningless recitation of legal jargon manifests itself in the occasional comparison of rules governing attorneys and clients to Miranda warnings. See, e.g., Legality and Welfare, supra note 19, at 1231-32; The Role of Rules, supra note 7, at 1011-12; cf. Johnson v. Hall, 605 F.2d 577, 581-82 (1st Cir. 1979) (asserting that defendant with criminal record had absorbed knowledge of Miranda rights sufficiently from past experience to make voluntary inculpatory statement without Miranda warnings in instant prosecution); Simon, supra note 5, at 57 n.65, 88-89 (hypothesizing that clients imbibe knowledge of Miranda and other rights through adversarial ethos of American legal culture).

129. See Cox, supra note 47, at 62-63; Shaffer, The Legal Ethics of Radical Individualism, 65 Tex. L. Rev. 963, 973 (1987) ("authors . . . of [the Model Rules of Professional Conduct] have rooted out both the language and the discipline of ethical reasoning").

130. See Kronman, supra note 19, at 874-76 (expressing fears about pervasiveness in contemporary society of forces of Weberian rationalization, which value certainty and predictability above exercise of Aristotelian practical wisdom).

131. William Simon has argued that rules in professional responsibility should give way to the
These criticisms, while not entirely lacking in substance, do not rebut the case for rules. The notion that rules are out of keeping with the altruistic perspective that lawyers should adopt merges with the idea that rules are beneath the dignity of lawyers. The answer to both cavils is essentially the same: rules are necessary precisely because altruism and dignity have failed to demonstrate that rules are unnecessary. Altruism and dignity do not readily adapt themselves to the market arrangements governing most legal practice. Even if they did, flaws in inference and perception still might create pervasive social costs. Establishing rules sacrifices some superficial measure of dignity to promote what philosophers see as an important attribute of a dignified life—the capacity to deliberate about human problems and potential.

A body of rules need not be a crutch that discourages development of independent lawyerly judgment. Indeed, a virtue of using rules in counseling a client about nonlegal and nonclient interests is that rules tend to focus debate in areas in which discussion has been vague and amorphous. A soupçon of precision may promote crystallized consideration of values and situations in this setting, which traditionally has received little concrete attention.

It is also difficult to see such deliberation as obsolete. If deliberation and the use of practical judgment sometimes seem outmoded and redolent of the gentility of earlier eras, it is because rules have in some areas preempted the field. This development, for better or worse, hardly demonstrates that rules themselves are outdated. The real choice may be not between establishing rules or letting lawyers discover pathways to the public interest on their own, but be-

discretionary interpretive approach that he views as more characteristic of modern judicial decision making. See Simon, supra note 40, at 1119-23 (citing rejection of plain meaning rule and adoption of purposive interpretation in Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889) as model for modern understanding of judicial role). Elsewhere, however, Simon has contrasted this discretionary approach with modern approaches to administration of public benefit programs, which tend to rely on rules and routines. See Legality and Welfare, supra note 19.

132. Market failure is the primary justification for the imposition of rules. See Leubsdorf, supra note 27, at 1035-45 (describing premises, operation, and problems of “public utility” model of professional reform).

133. See ARISTOTLE, supra note 48, at 164-73 (discussing importance of practical wisdom and its status as a virtue); Kronman, supra note 19 (applying Aristotelian idea of practical wisdom to practice of law).


between shaping rules that encourage discovery of those pathways or permitting the rules of the market and human inference to continue to govern in their own careless fashion.

V. Conclusion

The legal profession has always presented itself as dedicated to public service. Often, however, such dedication is suppressed by market forces or confounded by cognitive heuristics and biases. This Article suggests some ground rules for discussing the public good and the good of identifiable third parties with clients. These rules should reduce the manipulation of clients by lawyers, which currently characterizes many attorney-client relationships. The promise of this approach is that it may precipitate discussion, debate, and deliberation within the profession, among clients, between attorneys and clients, and in society about the role of lawyers and the consequences of legal actions and decisions. Deliberation on these issues has been viewed since the birth of the Republic as a special province of lawyers. Indeed, commentators often have cited deliberation as a central end of a republican form of government. The ability to deliberate effectively is defined here as the ability to practice simultaneously sympathy for a client’s cause and detachment from that cause. This is essential to the individual practice and cultivation of practical judgment. Effective deliberation will minimize the unforeseen harm that may flow from the possible triumph of the client’s cause.

The problem with these paeans to deliberation, as applied to the practice of law and interaction with clients, is that they describe an ideal of excellence, rather than prescribing any route for reaching the ideal. Lawyers imbibe a positivist, just-the-facts attitude from their daily work with drafting, counseling, negotiation, or coping with imminent or anticipated problems of proof in an adversary system. The description of excellence becomes an object on a mantelpiece, to be admired and gazed at nostalgically, rather than a basis for action in the world.

This Article offers one blueprint for deliberation. Obliging a client to consider, for instance, whether the harm her action visits upon others is justified by a larger gain to society, precipitates debate about the larger canvas painted by

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136. The discussion can take many forms, depending on the temperament of the lawyer and the client. For models of dialogue between lawyer and client, see Alfieri, supra note 92, at 698-703 (urging lawyer to discuss with client sociopolitical and class context of legal disputes); Neumann, A Preliminary Inquiry Into the Art of Critique, 40 Hastings L.J. 725 (1989) (modeling Socratic dialogue between teacher and student that may be adapted to other purposes).

137. See THE FEDERALIST No. 35, at 220 (A. Hamilton) (Wesleyan University Press ed. 1961) ("With regard to the learned professions, ... they truly form no distinct interest in society ... and according to their situations and talents will be indiscriminately the objects of the confidence and choice of each other and of other parts of the community."); A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 242-54 (1956); Gordon, supra note 2, at 14-16; Luban, supra note 2, at 718-20.


139. See supra note 133 and accompanying text (citing views of Aristotle and modern gloss of Kronman).
individual decisions. Deliberation about the chilling effect or public burden created by assertion of a legal right accomplishes the same purpose.

While this Article encourages deliberation, it does not advocate the wholesale relinquishing of legal rights or any other substantive outcome of such deliberation. In this sense the Article's approach sports all of the traditional weaknesses of a process-based model rooted in liberal or republican notions of dialogue. Those sufficiently confident to espouse a more substantive vision may not find satisfaction in this model. Their perspectives are vital, however, in formulating other bases for deliberation to supplement or substitute for those advanced here. This deliberation may shed some light on the goals all envision for the legal process.

140. See B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 349-78 (1980) (describing furtherance of dialogue as ultimate desideratum of liberalism); see also Sunstein, supra note 138, at 30 (discussing republican values); cf. R. UNGER, supra note 115, at 6-7 (criticizing liberalism as sub rosa ratification of substantive values underlying status quo).