ARTICLE: LEGAL REALISM FOR LAWYERS.

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BIO:

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SUMMARY:
... Curiously neglected has been any systematic investigation of the effect of core realist insights on traditional understandings of the lawyer's role. ... Although I conclude that such reforms would yield important gains, the problems caused by indeterminacy are likely to remain so long as legal ethics relies on general, universally applicable rules interpreted from the perspective of maximizing client interest to limit zealous advocacy. ... First, it enables advocates of the traditional model to avoid confronting the potentially troubling implications of the indeterminacy thesis for the boundary claim. ... Can the employee bring a contract action? What about a tort action, perhaps for slander or for wrongful interference with prospective business advantage? Can a claim be made under federal or state antidiscrimination law? What about arguing for a constitutional right to employment? Which of these potentially applicable legal fields the lawyer actually chooses to investigate depends on several factors, including how the client has described the circumstances surrounding the termination and the lawyer's knowledge and intuitive judgment about the "state of the law" in each of these fields. ... Given the institutional, political, and social contexts in which law is practiced, a good faith system of professional regulation is likely to encounter two problems. ...

HIGHLIGHT: In this Article, Professor Wilkins argues that the traditional model of legal ethics is premised on formalist assumptions about the constraining power of legal rules. Specifically, that model assumes that "the bounds of the law" provide objective, consistent, and legitimate restrictions on zealous advocacy. This assumption, however, is inconsistent with the claim, generally associated with legal realism, that law is indeterminate. Although Professor Wilkins concludes that the law is not radically indeterminate from the perspective of the practicing lawyer, there is sufficient truth in the realist claim to undermine both the descriptive and the normative force of the traditional model. Though reform is therefore needed, proposals concentrating solely on rationalizing the current system of professional regulation and those delegating primary responsibility to individual practitioners are neither fully workable or desirable. Instead, Professor Wilkins advocates a "middle-level" approach that tailors ethical rules to relevant contextual differences.

Within the law, I say, therefore, rules guide, but they do not control decision. There is no precedent the judge may not at his need either file down to razor thinness or expand into a bludgeon. Why should you expect the ethics of the game to be different from the game itself?

KARL LLEWELLYN  n1

TEXT:

[*469] Legal realism has dominated American legal education for over half a century. n2 Despite this prominence, discussions about realism have generally been confined to either the abstract realm of legal theory or the often bitter debate over judicial interpretation. Curiously neglected has been any systematic investigation of the effect of core realist insights on traditional understandings of the lawyer's role. This neglect is unfortunate. By failing to explore the implications of the realist critique for prevailing assumptions about the relationship among lawyers, clients,
and the legal system, the traditional model of [*470] legal ethics masks the extent to which lawyers inevitably exercise discretionary power over the substantive content of legal rules. As a result, the model fails to address how this power should be exercised in a manner consistent with the lawyer's public responsibilities as an officer of the legal system. n2

Coming to terms with realism's legacy, however, cannot simply mean that we uncritically transfer what has been learned from the lengthy debate about legal theory and judicial interpretation to professional ethics. Instead, constructing a "realist" understanding of legal ethics requires careful attention to the myriad ways in which insights that may be appropriate for the role of "judge" or "law professor" do not capture our legitimate aspirations for lawyers. In short, we need to understand what legal realism means for lawyers and how legal ethics should respond to that reality.

This Article examines what the realist assertion that law is indeterminate implies for the traditional model of legal ethics. Part I argues that the claim of indeterminacy directly challenges the traditional model's assertion that legal boundaries effectively mediate between a lawyer's private duty to clients and her public commitments to the legal framework. Part II investigates the importance of this claim by examining the extent to which the law is likely to appear indeterminate to the practicing lawyer. I conclude that "lawyer's law" is not radically indeterminate. Nevertheless, there is sufficient truth in the realist claim to undermine the normative foundations of the traditional model.

Part III investigates whether the traditional model can be salvaged by correcting defects in the formal system that contribute to the lawyer's perception of indeterminacy. Although I conclude that such reforms would yield important gains, the problems caused by indeterminacy are likely to remain so long as legal ethics relies on general, universally applicable rules interpreted from the perspective of maximizing client interest to limit zealous advocacy. Therefore, Part IV lays the groundwork for an alternative approach that substantially modifies these key elements of the traditional model. Specifically, I argue that legal ethics should abandon both the normative premise that legal restraints should be interpreted from the perspective of client interest and the structural premise that ethical rules should apply to all lawyers in all contexts. In place of these premises, I suggest a middle-level approach that tailors ethical rules designed to foster a public-spirited view of lawyering to relevant differences in legal practice.

I. LEGAL REALISM'S CHALLENGE TO LEGAL ETHICS

A. The Traditional Model

The traditional model of legal ethics assumes that lawyers have two distinct, though complimentary, sets of responsibilities. On one hand, the lawyer is an advocate for the private interests of particular clients. n3 On the other, she serves as an "officer of the court" with a separate duty of loyalty to the fair and efficient administration of justice. n4 Both these responsibilities are essential to the traditional model's assertion that "[l]awyers play a vital role in the preservation of society." n5 In their private capacity, lawyers enable members of the public to vindicate and protect their legal rights. By tempering this facilitative role with a concomitant duty to preserve the system's integrity, the traditional model promises that the pursuit of private ends will not unduly frustrate public purposes. n6 The command that lawyers should zealously represent their clients' interests "within the bounds of the law" n7 sets the terms under which this tempering is to take place. n8 I call this mediating device the boundary claim.

The argument is familiar. Lawyers should help clients obtain "lawful" objectives only by "legally permissible means," n9 with "lawful" referring both to the limitations generally applicable to all citizens and to the special obligations imposed on lawyers by the rules of professional responsibility. n10 So long as the lawyer honors this obligation, she is privileged not to consider how achieving the client's goals might [*472] damage the legal framework. n11 The law, in short, defines the limits of the lawyer's responsibility to clients.

Using legal boundaries as the mechanism for setting the limits on client service implies three normative claims. First, by limiting zealous advocacy to "the bounds of the law," the traditional model gives the impression that there are identifiable external constraints on lawyer conduct. These constraints are allegedly "objective" in that their content can be established by reference to some authoritative set of textual materials -- statutes, court decisions, administrative regulations, or professional codes of conduct -- that do not depend on the lawyer's personal moral or political judgment. n12

Second, the boundary claim implies that these objective constraints can be consistently applied to all lawyers in all contexts. Thus, the rules of professional conduct are both "general," in that each rule regulates a broad range of conduct, n13 and "universal," in that they are intended to apply to all lawyers. n14 As a result, clients should not have to worry that their lawyer operates under some idiosyncratic understanding of how to balance potentially competing
obligations to clients and to the system. Similarly, each lawyer knows what to expect from other members of the bar: zealous advocacy within the objective, identifiable bounds of the law.

Finally, the constraints on lawyer conduct represented by the boundary claim are "legitimate" in that they flow directly from democratically accountable sources of power. The boundary claim invokes the traditional liberal understanding that individual freedom should be constrained only by sources of authority subject to democratic control. n15 In modern American society, law is the quintessential form of such accountable constraint. n16

This last claim has always fit somewhat uncomfortably with the fact that rules of professional conduct are not the product of democratic decisionmaking. As a result, these rules place few restrictions on lawyer conduct that might interfere with the client's ability to act within generally applicable legal limits. Moreover, the traditional model strongly implies that doubts about the exact contours of the law should be resolved in the client's favor. n17 Together, these two tendencies place client loyalty, or "partisanship," n18 at the center of the lawyer's role. Thus, the traditional model instructs lawyers both to respect legal boundaries and to determine the practical meaning of this command by adopting the perspective of maximizing client interests. Partisan loyalty to clients, therefore, is the starting point for interpreting the bounds of the law.

By invoking these standard rule-of-law values, the traditional model promises a role for lawyers that appropriately balances the rights of individuals against the legitimate demands of civil society. This claim is persuasive only if the substance of the boundary -- "the law" (including the law of professional ethics) -- can fulfill the normative promises implicitly made on its behalf. The idea that legal rules are objective, consistent, and legitimate, however, is precisely what the legal realists denied. To determine whether the traditional model of legal ethics can fulfill its promise to confine partisan zeal within reasonable bounds, therefore, we must investigate the relevance of the realist critique of formal rules for the practicing lawyer.

B. The Realist Critique

The broad outlines of the realist movement are familiar and need only be restated briefly. n19 In the 1920s and 1930s, the realists challenged prevailing understandings about the nature of law and the process of legal reasoning. A central theme of this broad attack on classical legal thought was the claim that law is indeterminate. n20 Given the limitations of deductive logic and analogic reasoning n21 and the existence of vague, internally contradictory premises and rules, n22 the realists argued that it was almost always possible to derive multiple and often inconsistent "legal" answers to particular problems. n23 I call this claim the indeterminacy thesis. n24

[*475] Recently, the validity, importance, and continuing relevance of the indeterminacy thesis has become a hot topic in American legal scholarship. n25 Adopting the position of several original realists, some commentators argue that legal rules rarely, if ever, provide determinate answers. n26 Others claim that the law is only moderately indeterminate. n27 Virtually all this discussion, however, has taken place at the level of abstract legal theory or has centered on the judge's role. n28 Until recently, lawyers and legal ethics were essentially ignored. n29

This omission has two unfortunate consequences. First, it enables advocates of the traditional model to avoid confronting the potentially troubling implications of the indeterminacy thesis for the boundary claim. Specifically, how can an indeterminate boundary provide the objectivity, consistency, and legitimacy promised by the traditional model of legal ethics? If, as some have argued, it is possible to provide a "legal" justification for virtually any action, it is hard to see how the requirement that zealous advocacy must occur within the bounds [*476] of the law meaningfully restrains a lawyer's decisionmaking. But somewhat differently, indeterminacy threatens to collapse the distinction between the lawyer's public responsibility to obey the law and her private responsibility to represent her client effectively.

Second, the focus on judges obscures consideration of the effect institutional roles might have on the practical meaning of indeterminacy. Despite all the attention to the potential for contradictory premises within the law itself, most scholars discussing this topic assume the universality of the legal reasoning process. n30 If it is possible for a law professor to provide "legal" justifications for multiple and contradictory outcomes, judges and lawyers can accomplish the same result. Or, to take the opposite example, if a proper understanding of interpretive method renders the law substantially determinate, any actor in the system can successfully employ the method.

Given the substantial differences among lawyers, judges, and legal academics, however, this universalist assumption seems doubtful. Lawyers and judges do inhabit a common universe. They work with many of the same materials -- statutes, opinions, and regulations -- and attempt to understand many of the same institutions -- courts, legislatures, and regulatory tribunals. Moreover, each sector of the profession tries to influence the other: lawyers seek to persuade judges; judges issue opinions to guide lawyers. In light of these connections, no sector of the profession,
least of all lawyers, can be indifferent to the manner in which other legal actors understand and interpret legal rules. Nevertheless, the many differences between lawyers and other actors in the system highlight the danger of uncritically applying arguments relevant to the indeterminacy debate in academic theory or judicial decisionmaking to the realm of professional ethics.

Two such differences seem particularly important. First, unlike lawyers, judges do not have "clients" in any traditional sense. n31 When the lawyer seeks to determine "the bounds of the law," she does so at the request of a specific client. Moreover, what she has agreed to do for that client is to argue a particular interpretation of disputed legal terms. n32 These differences plausibly affect how the legal boundary will be perceived.

Second, lawyers and judges occupy quite different positions in the hierarchy of adjudication. On the formal level, judges have more official power to change the legal terrain. They can overrule precedent, declare statutes unconstitutional, and substantially influence the development of the official record upon which the merits of the decision will ultimately be reviewed. n33 Lawyers, of course, are denied these formal powers.

Conversely, lawyers have more practical power than judges to manipulate the legal terrain. Lawyers operate in a broader sphere than judges -- they resolve many legal matters that will never go before a judge. n34 Even in contested cases, there are whole areas of conduct outside the judge's attention. n35 As a result, as Sanford Levinson accurately notes, "[t]he advice lawyers feel free to give their clients has far more to do with structuring our legal system than does the legal opining of judges in specific cases." n36

Given these differences in position, authority, and motivation, one might suspect that "lawyer's law" will be different from "judge's law." n37 Assessing the challenge that legal realism presents to legal ethics, therefore, requires that we specifically address how lawyers experience indeterminacy in the law and how that experience either affirms or undermines the boundary claim. To address these issues, we need not resolve the larger jurisprudential debate about whether the law is radically or only marginally indeterminate. n38 Instead, we [*478] must examine how lawyers actually discover and interpret legal rules. With this knowledge, we can then evaluate the traditional model's claim that the bounds of the law meaningfully constrain zealous advocacy.

II. LEGAL REALISM AND THE BOUNDARY CLAIM

A. The Argument for Indeterminacy

The legal realists and their followers marshal three arguments to support the claim that law is largely indeterminate. First, they argue, there are in most cases a number of sources from which a "legal" answer might be derived. Second, legal doctrines contain vague or ambiguous language susceptible to multiple, inconsistent interpretations. Finally, they argue that by shifting the focus of analysis between the general and the particular, it is often possible to alter the perception of the proper application of the law to the facts. Each of these potential sources of ambiguity is relevant to the practicing lawyer.

1. Multiple Theories and Sources. -- Specific legal questions often present lawyers with many potential avenues of investigation. Consider from a lawyer's point of view the simple case of a fired black employee. Several fields of law seem potentially relevant. Can the employee bring a contract action? What about a tort action, perhaps for slander or for wrongful interference with prospective business advantage? Can a claim be made under federal or state antidiscrimination law? What about arguing for a constitutional right to employment? Which of these potentially applicable legal fields the lawyer actually chooses to investigate depends on several factors, including how the client has described the circumstances surrounding the termination and the lawyer's knowledge and intuitive judgment about the "state of the law" in each of these fields. Even after this narrowing process, however, several ways of characterizing the problem are likely to remain available. More important, the "answers" yielded by these potentially applicable legal fields may conflict. n39

Moreover, many areas of the law contain competing, and sometimes conflicting, rules that might be applied to the facts of any case. Tort law prescribes both that those injured at the hands of another be compensated and that a defendant be liable only if he has acted negligently or engaged in certain inherently dangerous activities. n40 Contract law prescribes both that an express exchange of promises precede any legally enforceable agreement, and that those who detrimentally rely on others' promises be entitled to compensation even in the absence of a formal agreement. n41 In any case, a lawyer can appeal to either of these conflicting paradigms as a justification for reaching particular substantive results. n42 A similar argument can be made about that aspect of the legal boundary that focuses directly on the lawyer: the rules of professional conduct. In his seminal statement of realist philosophy, Karl Llewellyn argued that the law of ethics simultaneously claims that a lawyer should believe in the justice of his client's cause and that no
lawyer should be the judge of his client's case. Because these two norms conflict, Llewellyn asserted, a lawyer may always select the one that best fits his preexisting interests. n43 Though much has changed in legal ethics since Llewellyn made this observation, the tension he described continues in the simultaneous existence of the "officer of the court" and "zealous advocacy" paradigms. n44 As a result, a lawyer confronting an ethical dilemma has two arguably contradictory normative frameworks from which to construct a "legal" response. n45

Finally, within any particular field, a vast array of legal materials may be relevant to any given problem. Statutes, legislative history, [*480] judicial decisions from various jurisdictions, constitutional provisions, and scholarly commentary all contain potentially relevant insights. These materials are likely to generate a range of arguments that a thoughtful lawyer might raise in a particular case.

2. Vague and Ambiguous Terms. -- The frequent use of vague, open-ended language adds to the potential for conflict created by the multiplicity of legal authority. Many statutes and other legal rules contain terms like "good faith," "reasonableness," "duress," and "proximate cause." Such general terms are always open to multiple and conflicting interpretation. n46

Again, the rules of professional responsibility provide a potent example. The ABA's Model Code of Professional Responsibility is rife with vague and ambiguous terms. n47 For example, the rules prohibiting conflicts of interest instruct the lawyer not to engage in multiple representation if "the exercise of his independent professional judgment . . . will be or is likely to be adversely affected," without further defining what constitutes such an "adverse effect." n48 Similarly, in litigation, a lawyer may not advance a claim or defense "unwarranted" under existing law or unsupported by a "good faith argument for an extension, modification, or reversal of existing law." n49 Finally, Canon 9 instructs the lawyer to avoid "even the appearance of impropriety." n50

Indeed, the widespread perception that the Code was too vague to give meaningful guidance to lawyers was one of the primary forces motivating the ABA's decision to promulgate new standards of professional conduct. Thus, the resulting Model Rules of Professional Conduct self-consciously attempt to bring more determinacy to the field of professional responsibility by adopting a rule-like structure. n51 Though this shift in structure and tone has eliminated some of the more pervasive ambiguities, n52 vagueness and open-endedness remain. n53 [*481] For example, Model Rule I.I defines competent representation as that amount of "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." n54 Similarly, the Rules provide that in litigation, a lawyer shall not "make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party." n55 As under the Model Code, the meaning of "reasonable" or "diligent" performance continues to be susceptible to multiple and conflicting interpretations. n56

3. Framing and Application. -- Finally, indeterminacy may result from a dispute over the level of generality at which a legal issue should be framed or the manner in which a chosen rule should be applied to a particular case. No rule can determine the scope of its own application. Thus, in determining the bounds of the law, we must always choose whether a given rule should be construed broadly, so as to govern a wide range of conduct, or narrowly, so as to apply only to the facts of a particular case. n57 This choice may in turn rest on the perceived relevance of the rule's underlying legislative purpose. n58

Consider the effect of *Nix v. Whiteside* n59 on a lawyer's decision to reveal her client's intention to commit perjury. In *Nix*, the Supreme Court rejected the claim that a lawyer who successfully dissuaded a client from testifying falsely by threatening to disclose the perjury violated the defendant's sixth amendment right to effective assistance of counsel. n60 The Court broadly intimated that disclosure is the universally proper response to client perjury. n61 As a result, the case can [*482] be cited for the proposition that the underlying purposes of the adversary system require that client perjury be revealed, n62 even when the prevailing view before *Nix* would have considered disclosure inappropriate. n63 However, *Nix* can also be read narrowly to authorize only the threat of disclosure and to be silent as to the permissibility of actual disclosure. n64 That the issue of disclosing client perjury can either be framed broadly, in terms of its effect on the adversary system's underlying purposes, or narrowly, in terms of the specific textual provisions of the codes of professional conduct, undoubtedly contributes to the "great uncertainty" that lawyers face after *Nix*. n65

Uncertainty is not limited to the purely legal elements of adjudication, for every interpretation of a legal rule depends on some underlying conception of the relevant facts. But like the law, the facts are also open to a variety of interpretations. Confronted with the same factual material, various legal actors may easily reach different conclusions about the significance of a series of events. This ambiguity in the factual record further complicates the determination of legal boundaries.
Again, the Supreme Court's application of the rules against client perjury in *Nix* is instructive. The *Nix* attorney's belief that the client intended to commit perjury was based on the fact that shortly before trial the client added an important and previously undisclosed element to his testimony. n66 The Supreme Court strongly intimated that presenting this additional piece of evidence would contravene the requirement against "knowingly us[ing] perjured testimony or false evidence." n67 [*483] But that conclusion is hardly the only credible inference from the facts. As Justice Stevens noted in his opinion concurring in the judgment, "[a] lawyer's certainty that a change in his client's recollection is a harbinger of intended perjury . . . should be tempered by the realization that, after reflection, the most honest witness may recall (or sincerely believe he recalls) details that he previously overlooked." n68 Characterizing a client's addition to her testimony as either intended perjury or honest recollection is likely to be quite controversial in all but the most straightforward cases. n69 For the practicing lawyer, therefore, frequent ambiguity as to the proper characterization of the facts contributes to the problem of indeterminacy.

4. *Indeterminacy and the Lawyer's Role.* -- Each of the three standard arguments in favor of the indeterminacy thesis is important to lawyers. Their impact, however, is greatly magnified by the traditional model's allegiance to partisanship, which strongly suggests that it is the lawyer's job to uncover and exploit the multiple meanings of legal rules.

The entire reason that the lawyer is engaged in the process of legal interpretation is to facilitate her client's ability to achieve some concrete objective. She has, in other words, a particular purpose for engaging in legal analysis. n70 This purpose will invariably lead her to attempt to discover the subset of plausible legal interpretations that best supports her client's goals, a tendency expressly sanctioned by the rules of professional conduct. n71 When the weight of the relevant legal rules supports her client's objectives, this task will seem sufficiently distant from "the bounds of the law." When the client's aim is novel or controversial, however, the goal of achieving the client's objectives is destined to push the lawyer toward discovering gaps, conflicts, and ambiguities in the relevant legal materials. Partisanship, therefore, encourages lawyers to exploit indeterminacy. n72

[*484] This interaction between legal materials and the lawyer's role creates serious difficulties for the boundary claim. By highlighting the text-specific nature of many legal questions, the indeterminacy thesis has the potential for generating an argumentative nihilism n73 in which any construction of the law is as good as any other and in which there are no restrictions on zealous advocacy. n74 In such a regime, the lawyer's "public" responsibilities as an officer of the court would either collapse into the duty to advance the client's private interests or be relegated to the personal moral and political discretion of individual lawyers. In either case, the objectivity, consistency, and legitimacy promised by the boundary claim would, at the very least, be substantially compromised.

B. The Argument Against Indeterminacy

If the most radical version of the indeterminacy thesis were really true for lawyers, one would expect to find a world with virtually no certainty or predictability about the arguments lawyers make or the advice they give. There would be widespread disagreement about the actual scope of legal boundaries in all but the most routine cases, n75 and lawyers would continually wonder about how to structure transactions so as to avoid future liability.

This is not how most practicing lawyers experience their lives. By all accounts, most lawyers feel quite capable of judging what constitutes a "good" legal argument. n76 In addition, lawyers depend on the [*485] ability to make reasonably accurate predictions about how particular legal disputes will be resolved. These widespread realities suggest that there must be some meaningful constraints on the manner in which lawyers interpret legal rules. Those opposing the indeterminacy thesis offer three explanations: legal culture, prediction, and practicality. Though each of these factors limits the interpretations that any particular lawyer can plausibly advance about a given rule, their overall effect does not support the normative vision of the boundary claim.

1. Legal Culture. -- The claim that legal culture can bring coherence to the process of legal interpretation, often referred to as conventionalism, is premised upon the existence of background rules that instruct lawyers how to choose among apparently contradictory legal commands. n77 Advocates of this position do not dispute that in theory the law frequently offers a range of possible answers to a given legal question. n78 Instead, these theorists maintain that the established customs of lawyers and judges provide satisfactory answers as to how these competing legal commands should be resolved. n79 By "fitting" any new problem into this existing structure, a lawyer will often n80 be able to resolve confidently what might otherwise appear to be novel and difficult legal questions. n81

[*486] Legal culture undoubtedly constrains lawyer conduct. n82 The bar's prevailing norms and practices substantially reduce the number of interpretations that any set of legal materials can plausibly support. In the
hypothetical case of the terminated employee discussed above, n83 the lawyer is unlikely to believe that the firing constituted cruel and unusual punishment under the eighth amendment or that the worker can recover because the employer gave him a dirty look. Though these arguments might theoretically be possible from some external perspective, they are so far outside the current understandings of accepted practice that they are not likely to be seen as relevant. n84 The existence of these shared understandings is one reason so many potential legal disputes never leave the lawyer's office. n85

[*487] This should not be taken to suggest, however, that the existing norms and practices of legal culture will usually produce clear and unambiguous boundaries. The opposite is more likely to be true. Those who advocate conventionalist theories talk as though all lawyers can appeal to a unified normative culture for guidance in sorting out contradictory tendencies in the law. n86 But the divergent realities of practicing lawyers preclude the formation of such a culture. Legal practice is and has always been deeply stratified. n87 Wide disparities exist between the working conditions, experiences, professional status, and economic rewards enjoyed by different lawyers. Lawyers who represent large corporations are different from those who represent individuals. n88 Plaintiffs' lawyers are different from defendants' lawyers. n89 Lawyers in large cities are different from lawyers in small towns. n90 Lawyers who litigate are different from lawyers who primarily negotiate or provide office counseling. n91 As legal practice becomes more specialized and complex, these divisions are likely to increase rather than decrease.

Given these differences, the idea that all 800,000 American lawyers share a common professional culture capable of producing uniform answers to ethical problems strains credibility. Certainly, the fact that every lawyer has attended law school, passed a bar exam, and is subject to some version of the rules of professional conduct fosters common orientation. n92 But to assume that these few common elements are the sole, or even the most important, factors that determine how lawyers make choices about their professional obligations is to ignore the powerful incentives created by clients, colleagues, and institutional structures. n93 Any appeal to "legal culture" in this broad sense, therefore, is likely to be as hopelessly indeterminate as the doctrinal analysis it was designed to replace. n94

To escape this dilemma, one might argue that the relevant touchstone for legal culture is not the American legal profession as a whole, but the subset to which each individual lawyer actually belongs. So restated, the legal culture argument has more bite. Lawyers who practice over a long period in similar institutional settings probably develop common understandings of appropriate behavior. n95 Unfortunately, the norms and practices generated within particular cultural enclaves may undermine rather than support the normative ideals promised by the boundary claim.

Several empirical investigations suggest that the norms, conventions, habits, and understandings of discrete segments of the bar directly contradict the most plausible interpretation of established standards of professional conduct. For example, Abraham Blumberg found that criminal defense lawyers routinely sacrifice their clients' interests to maintain good relations with police, prosecutors, judges, and other state officials with whom they are locked into long-term relationships. n96 Similar examples can be found in civil practice. n97

[*490] Undoubtedly, many lawyers in these communities do not subscribe to such troubling practices. Nevertheless, because those who do can credibly claim that "this is how we do things around here," we should hesitate before uncritically turning to legal culture as the answer to the problems created by legal realism.

2. Prediction. -- The argument that prediction is a complete response to indeterminacy proceeds in three parts. First, legal rules have no practical significance until applied by actual legal decisionmakers. Therefore, predicting the reactions of those officials becomes the key to understanding the requirements of the law. n98 Second, lawyers can often predict the actions of various decisionmakers, even when the rules applicable in the particular situation seem confusing or contradictory. n99 Third, these predictive judgments replicate the normative benefits promised by the boundary claim. n100

There is merit in each of these arguments. Lawyers experience the law through the actions of real persons rather than as abstract deductions from the pages of legal texts. n101 Clients want to know what legal decisionmakers will actually decide about their proposed conduct, not how they should decide based on abstract deduction or interpretation. n102 Moreover, lawyers distinguish good from bad legal [*491] arguments primarily through predicting the responses of other decisionmakers. n103 Prediction is therefore part of the very fabric of legal interpretation. n104

Notwithstanding the obvious importance of predictive judgments in the life of the practicing lawyer, both remaining steps of the analysis are problematic. Ample evidence indicates that lawyers are often unable to predict how decisionmakers will respond to particular problems. Their difficulty springs from three sources. First, in some areas of
the law, the substantive rules are too indeterminate to support reasonable predictions. n105 Second, actual legal outcomes are highly [*492] contingent on the actions of other interested parties. n106 These actions often may be hard to predict, particularly when "the other side" has yet to materialize. Finally, it often may be unclear exactly whose decision the lawyer should be trying to predict. When a specific decisionmaker has already been identified, such as the presiding judge in a litigated case or the head of enforcement in an administrative agency, the question might seem easy. n107 In many cases, however, no decisionmaker will be so identifiable. Should the lawyer then imagine a hypothetical decisionmaker who might address the question -- a reasonable (or perhaps typical) judge or administrator? The more hypothetical the prediction, the less confidence the lawyer will feel in her judgment.

These difficulties raise questions about the normative foundation for substituting prediction for interpretation. Because the task of prediction is intertwined with a lawyer's experiences, the lawyer who engages in this process can no longer claim to be discovering the rule from the objective text. n108 Moreover, there is little reason to suspect that any lawyer's prediction about the application of a given legal norm will always or even usually be shared by a broad cross-section of other practitioners. To the extent that lawyers often differ in their predictions, the promise of consistency is undermined.

Finally, the question of the criteria underlying the predictive judgment raises doubts about the legitimacy of the line that is ultimately drawn. To predict the operation of legal rules, a lawyer must consider the entire range of factors that might bear on actual outcomes, including the difficulty of detecting breaches in rules, the amount of resources committed to enforcement, and the personal biases of decisionmakers. n109 If a lawyer is entitled to consider all these factors in [*493] determining the "bounds of the law," legal restrictions will be more malleable and expansive than the traditional model suggests. n110

This danger is clear with respect to the rules of professional conduct, which tend to be systematically underenforced. n111 Attention directed solely at the likely consequences of a breach of professional ethics would implicitly authorize a wide range of lawyer transgressions (such as suborning perjury, intimidating witnesses, and participating in fraud) on the ground that the formal prohibition has been effectively nullified by the consistent practice of lawyers and judges. n112 Prediction may therefore bring stability to the world of the practicing lawyer. This stability, however, is purchased at least in part by the erosion of the normative foundation of the boundary claim.

3. Practicality. -- Finally, the range of answers generated by any particular lawyer will depend on a host of pragmatic considerations rarely acknowledged by formal theories of interpretation. Creating legal argument takes work. n113 A lawyer must understand the nature of the problem, discover and read the relevant legal materials, and construct a plausible argument. All of this requires initiative, creativity, time, and, above all, money. Indeterminacy is therefore limited by the lawyer's practical desire and ability to engage in the work of legal argument.

For many lawyers, this limitation is likely to be substantial. Habit and routine are defining characteristics of virtually every law practice. n114 Lawyers inhabit a world of standardized contracts, pleading files, checklists, form books, computerized discovery requests, received [*494] wisdom, and longstanding relationships. n115 In such a world, the possibility of employing innovative approaches to routine tasks is rarely even contemplated, and when raised, it is often discarded as unnecessary or disruptive. n116 Therefore, what at first may appear to be the consistent application of settled legal rules is often nothing more than the natural effects of bureaucratic inertia or habit.

Moreover, resource constraints often accentuate the tendency to routinize law practice. The more time the lawyer invests, the more likely it is that she can generate plausible new arguments. n117 And in a system in which legal services are generally distributed through the market, n118 lawyer time means money. Thus, the higher the fee the client can afford, the more elastic the legal boundary will be made to appear. n119 For the practicing lawyer, economics and indeterminacy are inextricably intertwined.

This reality, however, is the antithesis of the normative vision promised by the boundary claim. Far from helping to create a world of objective and consistent limitations on the pursuit of client interest, these practical constraints highlight the extent to which the actual effects of legal boundaries are contingent upon the individual characteristics and fee-generating potential of particular clients and cases. Lawyers representing poor clients are much more likely to depend on [*495] mass-processing techniques that discourage the development of creative legal arguments. n120 Wealthy clients, on the other hand, are likely to receive customized legal services designed to discover and exploit every available opportunity. n121 In addition, these clients have a greater potential to affect directly the formal content of the boundary itself by "play[ing] for rules," n122 either by lobbying for rule changes or by pressing or defending only those cases most likely to generate favorable outcomes. n123 The existence of these economic disparities seriously undermines the traditional model's vision of stable, universally applied normative boundaries. n124
The existence of economic disparities also undermines the claim that whatever boundaries that do result in practice are legitimate, because these restraints can no longer be viewed as solely the product of democratic decisionmaking. A system in which some clients can buy their way out of legal limitations exemplifies the kind of power-driven [*496] regime that the rule of law is supposed to avoid. n125 Given that the constraining effect of legal rules on lawyer conduct is profoundly influenced by the underlying distribution of wealth and power, there is reason to doubt the traditional model's argument that the resulting balance should enjoy a privileged status.

C. Indeterminacy and the Boundary Claim

From the practicing lawyer's perspective, the law is not radically indeterminate. Read against the backdrop of culture, prediction, and practicality, many legal boundaries will appear in particular circumstances both easy to identify and uncontroversial to apply. Consider, for example, the laws against murder or the professional command that a lawyer should not steal from her clients. n126 Those who claim that "[t]he experienced advocate knows that the doctrinal regime is sufficiently complex that there will always be some set of authoritative materials which, through skillful manipulation of the level of specificity and characterization of the facts, he can declare to be 'controlling' of the case at bar” n127 ignore the very real constraints that lawyers, as opposed to law professors, encounter when they construct plausible legal arguments. n128

Real as these constraints are, they do not support the normative vision underlying the boundary claim. The cultural norms of legal practice are often neither objective, in the sense that they can be authoritatively established from some external viewpoint, nor consistently experienced in different lawyering contexts. Though the task [*497] of prediction undoubtedly brings some coherence to these norms, it also introduces its own uncertainties and biases, most of which tend to extend the boundaries of the lawyer's private sphere. Finally, the fact that practical considerations such as time, money, and routine will often constitute the most significant restrictions on the production of plausible legal interpretations is the very antithesis of the rule-of-law values allegedly supported by the boundary claim.

The suspicion that legal realism substantially undermines the normative foundation of the boundary claim is therefore well-founded. Lawyers have both the power and the incentive to manipulate the very boundaries that are supposed to provide an independent source of constraint. Accepting this critique, however, poses a difficult problem for legal ethics. If the "law" does not provide an acceptable way of defining the limits of a lawyer's responsibility to private clients, then how should those limits be set? One answer might be, in the words of Judge Richard Posner, to "turn[] law into something else -- economics perhaps, or some ethical or political doctrine that might yield definite solutions to ethical or political problems.” n129 Indeed, this has been a common response in the larger jurisprudential debate over the challenge of legal realism, n130 and similar approaches have been suggested for legal ethics. n131

These theories, however, implicitly rest on the claim that some other branch of human knowledge -- economics, philosophy, political science -- can produce determinate answers. But that claim is highly [*498] controversial and seems likely to remain so. In the absence of consensus about the foundation or content of moral or political values, the question of what economics, philosophy, or political science requires is likely to be as hotly contested as the process of legal interpretation it was designed to replace. n132

Perhaps because of a general skepticism about the prospect of completely substituting some other form of knowledge for the "law," the current debate over the future course of legal ethics tends to concentrate on reforms that keep the "law" at the center of professional discourse. n133 These proposals generally take two forms. n134 One set of solutions concentrates on curing the gaps, conflicts, and ambiguities in the current system of professional regulation. These proposals accept the traditional model's normative premise that partisan allegiance to clients is a proper starting point for interpreting legal boundaries as well as its structural commitment to universally applicable ethical rules. As a result, they seek to limit zealous advocacy by finetuning the regulatory system.

If fully implemented, these reforms would bring greater coherence to many legal boundaries. But so long as the system remains committed to partisanship and universality, this coherence is likely to be both partial and substantively problematic in some circumstances. Rationalizing the system is only a part of an effective response to the challenge of legal realism.

A full response requires abandoning partisanship as the reference point for interpreting legal boundaries. Therefore, in Part IV, I discuss a second set of proposals replacing partisanship with a general command to uphold the public purposes of legal rules. Though representing an important step, these proposals also cannot be uncritically [*499] accepted because they fail to explain how this new normative commitment should be incorporated into a viable system of professional regulation. This crucial step requires that we return to the kind of systemic responses advocated
by the first set of proposals, but without the limiting assumption that ethical rules should be universally applicable across lawyering contexts.

III. RATIONALIZING THE SYSTEM WITHIN THE FRAMEWORK OF THE TRADITIONAL MODEL

Advocates of the traditional framework propose three kinds of reform: tighter rules, better guidance, and increased enforcement. Each promises to restore some coherence to the boundary claim.

A. Tighter Rules

By far the most common response to the problem of indeterminacy is the call for tighter rules. To the extent such words as "good faith," "reasonableness," and "unwarranted" fail to provide adequate guidance, they should be replaced by terms that permit fewer competing interpretations. Similarly, if multiple sources of authority create the potential for inconsistent "legal" answers, those sources should either be coordinated so that they produce consistent answers or subjected to rules of priority so that the answer produced in one legal field takes precedence over that of the other.

This kind of rationalization would greatly reduce the perception of indeterminacy. For example, replacing the current rule on conflict of interest, which prohibits multiple representation when the lawyer's judgment may be "materially limited," with a flat prohibition on such representation or a comprehensive list of situations in which dual representation is permitted would greatly clarify this area of professional obligation. Similarly, instead of instructing a lawyer not to "obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document . . . having potential evidentiary value," the Model Rules could require that all documents arguably relevant to a pending lawsuit must be preserved intact and forwarded to the opposing party. There is little doubt that the second formulation eliminates much of the ambiguity about when a document relevant to a pending lawsuit must be preserved and disclosed.

Formulating more precise rules could reduce the level of indeterminacy in the system. But this clarity comes at a price. By their very nature, rigid rules are either over- or underinclusive (or both) relative to their intended purposes. Thus, a universal rule against multiple representation prohibits this practice when there is a real danger that one client will receive less than adequate service (for example, representing opposing parties in litigation) and when there will often be no such concern (for example, representing coplaintiffs in a tort case).

Moreover, without altering the underlying assumption of partisanship, every effort to constrain indeterminacy through formal rules will be subject to instrumental manipulation. Recent attempts to prevent the use of perjured testimony provide a compelling example. After much debate, the Model Rules now expressly prohibit a lawyer from introducing testimony he knows to be false, even if that knowledge comes as a result of a confidential client communication. However, it appears that some lawyers use the *Anatomy of a Murder* technique to evade this requirement. Under this technique, the lawyer instructs the client not to tell what actually happened until the lawyer has informed the client of the legal implications of various "hypothetical" stories. The client then picks the best possible story without the attorney "knowing" that perjury is being committed. Although the next move might be to outlaw this particular method of "informing" the client of his legal rights, no system of rules can provide a stable source of constraint so long as the lawyer believes that it is her professional obligation to manipulate existing legal rules to obtain the maximum advantage for her client.

B. Better Guidance

When tighter rules seem either undesirable or ineffective, it might be argued that we need better procedures for informing lawyers how ambiguous or contradictory rules ought to be applied. This solution draws support from both the conventionalist insight that legal culture shapes meaning and the predictive theory of interpretation that relies on authoritative constructions of ambiguous terms to reduce the practical importance of indeterminacy. These ideas are implicit in the efforts of several professional associations to provide guidance to practicing lawyers about how ethics rules should be interpreted in specific cases. This guidance generally takes two forms. The first and by far the most common is the advisory opinion. A committee of a local, state, or national bar association will, upon request, offer an interpretation of how the prevailing rules of professional conduct apply to a specific factual context. These opinions are given to the lawyer making the original request and are published or otherwise made available to other members of the bar. They are also available to disciplinary committees, courts, and other decisionmakers who may be asked to rule on similar questions.
These and other similar means of providing informal advice offer an important mechanism for giving practical content to otherwise ambiguous or contradictory legal rules. By tying this advice to a particular factual context, these opinions mitigate the problems caused by the generality and universality of the norm itself. For example, after the ABA's Committee on Ethics and Professional Responsibility discussed how DR 5-105(D)'s imputed disqualification rule should be applied to a law firm employing a former government attorney, n148 [*502] both courts and commentators perceived that the operative standard had been substantially clarified. n149

There are, however, obvious constraints on the usefulness of this kind of advice. n150 With more than 200 bar associations giving advice, these opinions are quickly becoming an additional source of authority for constructing arguments over contested meaning rather than a definitive source for resolving such arguments. In a world where legal rules are invariably viewed from the perspective of client interest, even clarifying comments can be turned to partisan advantage.

The same fate seems likely to befall the profession's second tutelary response to the problem of indeterminacy: advisory rulemaking. The American Law Institute has embarked on a multi-year project to draft a comprehensive Restatement of the Law Governing Lawyers. n151 Using the familiar format, each section of the Restatement begins with a general statement, which is then fleshed out through a series of illustrations and textual discussion. It is hoped that these examples give content and structure to the purposefully broad general provisions.

Despite the clear importance of this project, n152 the problem of indeterminacy seems likely to persist. The Restatement's tripartite structure of general provision, commentary, and illustrations raises the potential for conflict among the three. n153 Moreover, because the draft retains the general commitment to universality, in many cases the provided example either will be distinguishable from the case the lawyer is considering or will contain vague or ambiguous language [*503] relating to a crucial issue of law or fact. n154 Given the continued commitment to partisanship, lawyers will still have the incentive to exploit this ambiguity.

C. Increased Enforcement

Finally, many assert that we really need better enforcement of existing rules. Closing the gap between the law in action and the law on the books would both allow lawyers to make better predictions and offer an additional forum for elaborating ambiguous legal norms. n155 As with the proposals for tighter rules and better guidance, devoting more resources to enforcement would reduce the indeterminacy in the system. n156 The rules of professional conduct are chronically underenforced. Any effort to upgrade enforcement is likely to sharpen the practical meaning of professional norms.

Recent experience with Federal Rule of Civil Procedure II is instructive. Rule II shares the purpose and language of DR 7-102(A)(2), which was adopted years before the 1983 amendments to rule II. Both provisions prohibit the filing of a claim or defense that is "unwarranted under existing law" unless it is "a good faith argument for the extension, modification, or reversal of existing law." n157 Yet in the more than twenty years since DR 7-102(A)(2) was adopted, there have been virtually no disciplinary proceedings under this provision. As a result, the meaning of such ambiguous terms as "unwarranted," "good faith," and "existing law" remained opaque. Not surprisingly, when practicing lawyers bothered to interpret these restrictions on zealous advocacy before the amendments to rule II, they perennially confined these prescriptions to their narrowest possible scope. n158

[*504] Rule II has significantly altered this picture. Since it was amended, hundreds of reported judicial decisions have interpreted its provisions. n159 As a result of this judicial scrutiny, it is now possible to state at least some of the steps that a lawyer must take to determine whether an argument is "warranted" under "existing law" or by a "good faith" argument to change the prevailing rule. n160 Simply by increasing the level of enforcement, rule II has brought additional clarity to this area of professional regulation. n161

Experience with rule II, however, also demonstrates the limitations of an enforcement-centered response to indeterminacy. First, more enforcement is not the equivalent of uniform or consistent enforcement. Although there has been convergence on some issues, decisionmakers still do not agree as to how rule II should be interpreted. n162 Moreover, to the extent that there has been convergence, it may have resulted from factors such as implicit bias or hostility unrelated to the rule's purported goals. For example, empirical studies have repeatedly demonstrated that rule II sanctions are disproportionately imposed on civil rights plaintiffs and their attorneys. n163 It is unclear whether these skewed results stem from unconscious (or even conscious) bias or from the fact that attorneys in these cases have less opportunity to do the "work" of legal argument. n164 Whatever the cause, the uneven imposition of sanctions...
highlights the extent to which a universal enforcement strategy disproportionately affects those at the lower end of the socioeconomic ladder, thus undermining both consistency and legitimacy. n165

[*505] Finally, without modifying the commitment to partisanship, regulators of lawyers cannot spend enough time and money on enforcement to alter fundamentally the predictive calculus of lawyers. Moreover, what procedures are implemented may quickly become additional weapons for partisan combat. Partisanship and universality therefore undermine each of the three structural responses to indeterminacy. To incorporate the truth about legal realism for lawyers, legal ethics must adopt a new framework for ethical rules.

IV. TOWARD A NEW MODEL OF PROFESSIONAL REGULATION

Presenting a fully developed alternative model of professional regulation that abandons both partisanship and universality is beyond the scope of this Article. The preceding analysis, however, does provide some insight into how that system should be constructed.

A. From Partisanship to Purposivism: Rules and Standards in Professional Regulation

The traditional model of legal ethics instructs the lawyer to view the bounds of the law from the perspective of maximizing client interest. This conception of professional role, however, exacerbates the problem of indeterminacy by encouraging the lawyer to discover doctrinal gaps, conflicts, and ambiguities, and it undermines the utility of structural solutions by encouraging instrumental manipulation of systemic constraints. Therefore, to the extent that allegiance to the public purposes encoded in legal rules continues to be a goal of professional regulation, there must be some modification of the underlying assumption of partisanship.

The claim that lawyers should demonstrate greater allegiance to the public purposes of legal rules, often called "purposivism," is a recurring theme in the literature of professional ethics. As a unifying vision of the professional role, purposivism seeks to reverse the bias inherent in instructing lawyers to discover the limitations on adversarial zeal from within an essentially adversarial framework. Those supporting this vision argue that "zealous advocacy within the bounds of the law" should be replaced by a general command "to assist in carrying out [the] 'essential purposes' or 'social functions' [of the law], or at the very least to refrain from acting so as to subvert and nullify the purposes of the rules." n172

The preceding analysis strongly suggests that purposivist perspectives should be given a higher priority in lawyer decisionmaking. This reformulation of the traditional model's balance between private and public interests is not designed to produce a single, uncontroversial understanding of the "public purposes" in any particular case. Legal realism suggests that this frequently will not be possible, and purposivist lawyering does not promise to eliminate indeterminacy. Instead, purposivist reasoning reverses the traditional model's arguable permission to exploit indeterminacy for the narrow advantage of particular clients.

To argue in favor of purposive lawyering without more, however, neglects the important choices about how to achieve their objective. Those who agree on the goal of purposive advocacy could plausibly advocate two quite different regulatory regimes. The first option consists of relatively narrow rules instructing lawyers how and under what circumstances the interests of clients should be "harmonize[d] . . . with the purposes of the legal framework." n175 These rules might take many forms, but the objective in each case would be to centralize decisionmaking about the meaning of "purposivism."

The second alternative largely abandons the goal of centralization. Instead, this approach would consist of a few general standards designed to allow an individual lawyer maximum discretion to determine the requirements of "purposivist" advocacy case by case. Thus, instead of adopting a rule instructing lawyers always to disclose adverse legal precedents during negotiations, a standards-based approach would tell the lawyer to "take those actions that, considering the relevant circumstances of the particular case, seem most likely to promote justice." n177 If, in the lawyer's estimation, disclosing the adverse material would promote justice, she should do so; if not, she should keep the information secret.

[*508] There is no a priori reason those in favor of role redefinition should cast their proposals in terms of one or the other of these procedural approaches. Recent proposals, however, tend toward advocating standards that allow substantial discretion, thereby placing primary responsibility for the protection of public values on the individual lawyer rather than a structure of rules and procedures. Moreover, these proposals tend to move freely between arguments addressed to individual lawyers and those addressed to officials responsible for creating the regulatory
structure. The presumption is that similar arguments justify the use of discretionary standards in each context.

Conflating these two perspectives, however, is a mistake. From the perspective of the individual lawyer, ethical judgments are inherently case-specific. The lawyer facing an ethical problem must decide what to do in light of the circumstances she actually confronts, not those that the system designer imagined she would confront when creating her role. Whether operating in a rules-based or a discretion-based system, she must ultimately decide if, all things considered, it is best to follow the requirements of her role.

The task confronting the system designer, however, cannot be so narrow. Those charged with articulating ethical norms must also attempt to determine what actions will best accommodate competing obligations to clients and to the system. These judgments, however, cannot be tied to the facts of any particular case. Instead, the system designer must determine which ethical rules and practices will most likely produce appropriate decisions in the greatest number of cases. In reaching this judgment, the system designer must also consider the administrability of the proposed system as well as such process concerns as fairness, efficiency, and predictability. A regulatory regime that produces a large number of substantively correct outcomes may nevertheless properly be condemned at the level of system design if the price paid in terms of these other process values is too high. Finally, system designers cannot be as trusting of the judgments of individual lawyers operating within the system as those lawyers will undoubtedly be of their own conclusions.

In short, system designers must heed the kind of rule-of-law values invoked by the proponents of the traditional model. Though legal realism demonstrates that objectivity, consistency, and legitimacy cannot be guaranteed by the formalism of the boundary claim, system designers can never completely abandon the goal of creating a set of rules and practices that can be predictably understood and fairly enforced. These concerns are likely to be undervalued by individuals attempting to decide how they should act in specific cases.

The point can be seen clearly if we imagine the likely consequences of adopting a system of professional regulation that instructs each lawyer to take only those actions that she believes will help to produce the legally correct outcome in every case, subject only to a broad standard of good faith and minimum competence. From the perspective of individual lawyers operating within this system, established procedures, role definitions, and assumptions about institutional competence should properly be viewed as binding only to the extent that conforming to these requirements actually helps to produce correct outcomes in the case at hand. When following the established practice would frustrate justice in the immediate instance, the lawyer should refuse to do so, regardless of whether the practice serves an important societal purpose generally or in other identifiable cases.

Consider the following example. A legal services lawyer represents a woman who lives "rent free" with a relative. The welfare statute requires that the grant of any recipient living "rent free" be reduced by $150. The client would like the lawyer to help her avoid the statutory reduction without losing her free housing. The lawyer knows that if the client paid $5 in rent to her relative, she could truthfully fail to check the box on her renewal form that inquires whether the recipient is living "rent free." The lawyer believes that the $5 arrangement would violate the clear purpose of the welfare statute, though she could plausibly argue that it does not contravene the letter of the law. However, the lawyer also believes that the statutory requirement that benefits be reduced under these circumstances violate fundamental principles of natural law, conflicts with the basic right to economic survival implicit in the Constitution (though the lawyer realizes that this right has never officially been recognized), and is a proper candidate for judge or jury nullification if an action for its violation were ever to reach the courts. Based on these considerations, the lawyer believes that, properly understood, the law supports the $5 arrangement. Finally, the lawyer believes that due to the large number of cases handled by the welfare department, it is unlikely that the arrangement will ever be questioned. If, on the other hand, the client checks the box indicating that she is living "rent free," her benefits will be automatically reduced. Given these facts and beliefs, should the lawyer assist the client with the $5 arrangement?

From the lawyer's perspective, the decision to assist the client is likely to turn on the weight that the lawyer ascribes to the traditional understanding that lawyers should not generally rely on either natural law or unaccepted interpretations of the Constitution to nullify clear statutory purposes. Though there is no way of knowing how much weight any particular lawyer will accord this factor, its importance is likely to be minimized under a broad discretionary mandate to do justice in the particular case. Even if the lawyer believes that the general division of responsibility among legislatures (to create binding positive law, even if it conflicts with some citizens' view of what is required by natural law), courts (to be the ultimate arbiters of the meaning of the Constitution), and lawyers (not to nullify the judgments of
legislatures and courts) expresses important public policies that ought to be preserved, aiding the client in this case is unlikely to jeopardize those policies. An isolated act of lawyer nullification does not threaten the rule of law. n193

The case looks very different, however, from the perspective of the system designer. If, on one hand, most lawyers would assist clients in circumventing legislative purposes whenever they believed that these directives conflicted with natural law principles or unrecognized constitutional commands, systemic values such as democratic accountability and procedural regularity would be substantially compromised in the aggregate. If, on the other hand, only a few lawyers would engage in such conduct, issues of horizontal equity among competing claimants for limited welfare dollars would be presented. Unlike the individual lawyer attempting to do justice in the particular case, the system designer cannot afford to minimize either concern.

Nor is it likely that a system designer creating a regime of "good faith" discretionary norms could safely rely on ex post enforcement to compel lawyers to give proper weight to the importance of established practices. Given the institutional, political, and social contexts in which law is practiced, a good faith system of professional regulation is likely to encounter two problems. First, it will often be difficult to determine whether a particular lawyer has acted "in good faith." The central lesson of legal realism for lawyers is that there will often be a range of credible interpretations of the meaning of a given legal rule. n194 It will often be difficult to tell ex post whether a lawyer relying on a particular interpretation within this broad spectrum is expressing her true motives for action or instead proposing a clever rationalization. n195 This is particularly true if the lawyer is entitled to argue that her understanding of institutional competence and professional role permits her to nullify positive legal commands that conflict with her interpretation of higher-order principles of natural law or constitutional rights. n196 Given that there will often be substantial economic incentives for lawyers to choose one interpretation of legal merit over another, the danger that bad faith, self-interested choices will be insulated from effective review cautions against adopting a good faith model at the level of system design. n197

Second, even if the system designer could trust most lawyers to exercise their discretion in good faith, a large number of these honest judgments might be substantively unacceptable. There is currently no single, determinate "legal culture" in the United States in anything but the broadest and vaguest sense of the term. n198 Instead, there is a plurality of overlapping and interacting normative communities, each with a semi-autonomous approach to interpretation, conduct, and professional role. As a result, on many questions there will be a broad spectrum of honestly held views about legal merit and how best to achieve it in particular cases. n199 Some of these opinions (for example, a lawyer's honest belief that she should secretly sabotage her client's case whenever she concludes that her client's opponent has the legally better position) will be unacceptable from the perspective of any rational system designer. Others, when viewed in the aggregate, may work to reinforce unjustified inequalities in the system. Empirical evidence indicates that many lawyers -- particularly those representing the powerful -- hold views about legal merit that strikingly resemble the interests of their clients. n200 Given this correlation, a good faith system of regulation may have the unintended effect of perpetuating the practical ability of wealthy clients to dominate the legal system. n201

Finally, both problems in a standards-based regime are likely to be exacerbated by the difficulties inherent in any system of enforcing professional ethics. The current rules of professional conduct are systematically underenforced. n202 Though institutional and attitudinal changes could certainly improve this dismal record, it is hard to imagine an enforcement system able to review and assess more than a tiny fraction of lawyer judgments about legal merit. Most of these judgments will be made in the lawyer's office and will remain unknown to officials, adversaries, and even to clients. Under such circumstances, the flexibility inherent in a discretionary system is unlikely to encourage individual lawyers to conform their conduct to the perceived wishes of system designers. n203

[*514] From the perspective of system design, therefore, a good faith approach to encouraging purposivist advocacy appears quite problematic. The aggregate pattern of individual decisions about legal merit is likely to shortchange important systemic values in a manner that can neither be controlled ex ante nor effectively reviewed ex post. To create a system of professional regulation that effectively incorporates the lessons of legal realism, the shift toward purposivism must take the form of rules.

Legal ethics, therefore, must simultaneously incorporate two ethical perspectives. For individual lawyers, ethical decisionmaking is inevitably a good faith exercise in discretionary judgment. Legal realism demonstrates that lawyers inherently exercise quasi-legislative power in deciding whether a given legal command applies to a particular case. As a result, lawyers cannot completely evade personal moral responsibility for how this power is exercised by appealing to the necessities of either rules or roles. n204 If lawyers are to be held at least partially responsible for substantive outcomes, they must have a corresponding right to reject the formal requirements of rules and roles in situations when
following the official path would produce substantively bad results. Moreover, this right is inherently personal, springing from each lawyer's individual responsibility to refrain from conduct that the lawyer believes to be either illegal or immoral. For the system designer, however, individual discretion is not enough. From her perspective, individual efforts to achieve just outcomes must be limited to advance a system of professional regulation that broadly serves societal goals. Legal ethics, therefore, must incorporate a form of dialectical tension in which individual discretion is acknowledged as both necessary and necessary to constrain. This tension will not always be problemactic. n205 But the system must acknowledge that [*515] there will be situations in which the rules of professional conduct should prohibit lawyers from acting in ways that, from the position of the actor, are legally or morally justified, just as it may be incumbent on the actor to resist these directives. n206

For such a system to work effectively, however, we must abandon the traditional model's commitment to general, universally applicable ethical rules. General limitations on zealous advocacy purporting to bind all lawyers in all contexts create only the illusion of controlling lawyer discretion because they ignore the extent to which that discretion is inevitably reintroduced in interpretation and application. n207 Incorporating legal realism at the level of system design requires an approach to rule-drafting that responds to the manner in which lawyers actually interpret and apply legal rules. Context must replace universality as the touchstone of system design.

B. From Universality to Context: Middle-Level Principles and the Integration of Ideology and Structure

The importance of taking context into account is clear when we reexamine how lawyers actually interpret and apply legal rules. I have argued that three factors tend to constrain a lawyer's perception of the range of plausible interpretations of a legal boundary: culture, prediction, and practicality. Each of these limitations is affected by contextual factors that tend to be overlooked by the traditional model's general, universal rules. Because legal culture differs across practice types, general commands addressed to all lawyers can acquire unintended, even perverse meanings. n208 Similarly, contextual factors will [*516] affect the constraining power of predictive judgments about the actions of legal officials. When lawyers argue in court, for example, they are much more likely to feel constrained by predictive judgments than when they advise clients about conduct that they consider likely to escape official scrutiny. Finally, practical constraints such as time, resources, and habit tend to weigh disproportionately on lawyers representing those who cannot afford to pay for the work of legal argument. Contextual factors thus threaten the effectiveness of all these systemic responses. Ignoring this fact increases the danger that whatever ethical rules are adopted will be irrelevant to the actual process of lawyer decisionmaking or will produce unintended consequences when applied across different situations. n209

To argue in favor of context, however, is not an invitation to adopt a purely case-by-case approach to professional ethics. Such a discretionary approach underserves important values that must be a part of any viable system of professional regulation. Instead, legal ethics must develop a set of "middle-level principles" n210 that both isolate and respond to relevant differences in social and institutional context while providing a structural foundation for widespread compliance in the areas where they apply. n211

This is a difficult task. At best, a "middle-level" approach can aspire to only partial success, because every generalization will exclude some arguably relevant contextual factor while allowing some room for interpretation at the point of application. n212 Two additional problems demand special attention. First, a middle-level approach must specify which of the many arguably relevant contextual factors should be taken into account at the level of rules and for what purposes. Second, consumers of the system -- lawyers, judges, bar officials -- [*517] must be able to determine with reasonable certainty which rules apply to what conduct. Both definitional and jurisdictional questions appear particularly difficult in this field.

A vast number of differences among lawyers might be considered relevant to the task of developing middle-level rules. These factors can loosely be grouped into five broad categories. The first three -- task (for example, litigation versus counseling), subject matter (for example, civil versus criminal), and status (for example, plaintiff versus defendant) -- highlight differences in the roles that lawyers play and the procedural and substantive contexts in which they are asked to play them. The final two -- lawyer (for example, sole practitioner versus large firm) and client (for example, individual versus corporate) -- refer to differences among those performing and consuming legal services. Each of these broad categories appears relevant to the task of constructing middle-level rules of professional conduct. Task, subject matter, and, to a lesser extent, status distinctions have become standard features of both the current system n213 and several leading proposals for reform. n214 Though currently less common, a strong argument can be made that lawyer and client characteristics are also relevant. n215
[*518] But the fact that on some occasions these factors may be relevant tells us little about how they should be included in any particular middle-level rule. For example, even if we accept the common argument that criminal defense lawyers should be able to "fight dirtier" than other lawyers, n216 we must still decide whether that special permissiveness applies when the defendant is a large corporation and the lawyer uses the Anatomy of a Murder technique to advise employees how to respond to government questioning. In such cases, the policies underlying one set of distinctions (criminal defendants should be entitled to every available resource to combat the government's overwhelming power) conflict with others that will also be implicated by the decision (lawyers for powerful clients should be constrained more than other lawyers because of their greater ability to exploit the system in ways that frustrate its underlying purposes). Producing a set of middle-level rules that effectively addresses these and other similar clashes between competing regulatory objectives requires that we discover far more than we currently know about contemporary legal institutions and structures. n217

Moreover, even assuming the five categories can be harmonized into a coherent set of middle-level rules, ambiguity and confusion is likely to be reintroduced when the rule is applied. A complex system of specific rules inevitably generates "jurisdictional" disputes over which rule should apply in borderline cases. n218 The problem seems likely to be particularly acute in this context. Distinguishing various tasks, subject matters, or characteristics of lawyers or clients will often be difficult. n219 In addition, some lawyers will be able to structure [*519] their conduct so as to take advantage of favorable rules. Thus, if client distinctions are deemed relevant, a lawyer representing both a corporation and its employees might purport to employ all her aggressive tactics for her individual clients. n220

A middle-level approach to professional ethics, therefore, entails difficult problems of definition and application. Despite these obstacles, however, such an approach remains the best hope for constructing a system of professional regulation that incorporates the truth about legal realism for lawyers while maintaining a commitment to systemic values. Moreover, when applied to some areas of legal practice, the concerns expressed above seem either absent or overstated. By examining how a middle-level approach might operate in one of these areas, we can begin to understand how to handle more complex cases.

C. A Middle-Level Approach to Regulating Tax Advice

Each of the five contextual categories defines a separate axis dividing the American legal profession. Though analytically distinct, these axes are often related. Divisions among lawyers according to tasks, subject matters, status, professional organization, and clients tend to occur in predictable patterns that are both overlapping and mutually reinforcing. For example, lawyers who represent corporate clients tend to work in large firms and spend most of their time performing a few highly specialized tasks in particular fields of law. n221 On the other hand, lawyers who litigate divorces tend to practice alone or in small firms and exclusively represent individuals. n222 Given this clustering effect, it is possible to identify areas of legal practice in which the definitional and jurisdictional problems just discussed can be minimized.

Tax practice is such an area. Because tax law is both complex and highly regulated, lawyers tend to specialize in this area. n223 Although there are substantial differences within the tax bar on both the "lawyer" and the "client" axes discussed above, n224 there is nevertheless [*520] substantial continuity in the kinds of tasks that these lawyers generally perform for their clients. n225 These lawyers' common characteristics define an area of legal practice with unique problems for professional regulation. Middle-level rules addressed to these problems therefore seem appropriate.

Current problems in tax practice underscore the need for more contextual rules. One important and relatively distinct task performed by tax lawyers is giving advice about the preparation of tax returns. The standard criterion for determining the limits of such advice is a straightforward application of the boundary claim; lawyers may "freely urge the statement of positions most favorable to the client just as long as there is reasonable basis for these positions." n226 This application of the basic boundary standard in the context of a "complex, ambiguous and frequently changing body of law" n227 and a regulatory environment that seldom reviews any position n228 has produced predictable results. n229 As the ABA task force designed to study the [*521] problem concluded, by 1985 the phrase "reasonable basis" came to be understood by many practitioners as "support[ing] the use of any colorable claim on a tax return or . . . justify[ing] exploitation of the lottery of the tax return audit selection process." n230

General rules premised on the framework of the boundary claim have thus proved ineffective. What is needed is set of narrower rules that acknowledge the distinctive problems presented by this form of legal advice. A series of recent proposals offered by the Internal Revenue Service indicates some of the steps that might be taken to accomplish this objective. In an effort to revitalize the tax bar's commitment to the public purposes of the tax system, the Service
has proposed that lawyers advise clients to take only those positions for which there is "substantial authority." n231
Though not requiring that the position would more likely than not withstand challenge, n232 the substantial authority
standard would in effect require lawyers to certify that the likelihood of success is significantly greater than one in
three. n233 Moreover, the Service has also narrowly specified the legal materials upon which a lawyer can rely in
supporting her claim to substantial authority n234 and has committed to publish no less than once a year "a list of
positions for which the IRS believes there is no [*522] substantial authority and which affect a significant number of
taxpayers." n235 Finally, the Service has escalated its enforcement efforts and has asserted the right to disbar from
practice before the Service those attorneys who violate the new standard.

Collectively, these proposals represent an attempt to create rules of professional conduct that respond to the
realities of tax practice. The new rules would make both normative and structural changes to accomplish this goal. The
move from reasonable basis to substantial authority acknowledges that extreme partisanship is inappropriate when the
"other side" will lose by default in ninety-eight percent of the cases. In this relatively discrete area of practice, lawyers
must expressly work to uphold the public purposes of the tax system. This normative change is supported by a series of
structural initiatives designed to use prediction as a means of limiting the range of plausible legal arguments upon which
lawyers will be willing to base their advice. Finally, by elaborating the meaning of "substantial authority" through both
supplemental rulemaking and enforcement proceedings, the Service hopes to instill this new norm into the legal culture
tax practitioners.

Clearly, there are difficulties with this approach. Even a relatively narrow set of legal materials can be used to
support a broad range of plausible positions. And in a world where enforcement resources are inherently limited,
predictive judgments about probable success are also subject to manipulation. In the absence of further structural
changes, there is a real danger that the use of "substantial authority" as a mechanism for requiring purposivist advocacy
in this area will befall the same fate as the "reasonable basis" standard it was designed to replace. n236 Nevertheless,
the character of these proposals represents a step in the right direction. By stripping the presumption that ethical rules
must be both general and universal, the proposals can focus on the actual problems encountered by lawyers and
regulators.

This same philosophy, however, must govern any effort to extend these regulatory initiatives to other contexts. The
particular approach to purposivist advocacy suggested by the Service's proposals is premised on a specific confluence of
the five categories of contextual distinctions. Even within tax practice, if one of those factors changed, the proper
middle-level accommodation might be quite different. For example, something like the reasonable basis standard may
be appropriate in the context of tax litigation. Moreover, once we change subject matters, the Service's approach may
be even more problematic. [*523] Although there are some heavily regulated, highly specialized fields of legal
practice in which the Service's proposals might be appropriate, n237 this is clearly not the case in others. Thus, a quite
different case would be presented if a state welfare department vigorously began disbarring attorneys on the ground
that they were neglecting their duty to control the costs of the welfare system. Unlike the tax situation, lawyers and clients
in this area are likely to face severe practical constraints on producing plausible arguments to support their positions.
To burden further these already disadvantaged clients with the threat of sanctions seems unlikely to promote systemic
commitments to equality and fair treatment. n238 The strength of a middle-level approach is that tax practice and
welfare practice do not necessarily have to be treated alike.

V. CONCLUSION

A middle-level approach to professional ethics, like any system of rules, cannot by itself guarantee that lawyers will
actually incorporate purposivism into their daily activities. n239 The success of any system of ethical rules ultimately
lies in the hands of the men and women who must balance the requirements of purposive advocacy against the other
factors, such as the demands of clients or conscience, that influence their deliberative choices. Nevertheless, by
abandoning the formalism of the boundary claim, a middle-level approach does attempt to provide meaningful support
for individual lawyers to construct that balance in ways that further legal purposes.

If legal ethics is to place real restrictions on zealous advocacy, those restraints must be given a privileged position
in lawyer decisionmaking. [*524] At a minimum, this requires that partisan zeal cannot be made the stand from which
the lawyer interprets the rules of professional conduct. But simply urging or even instructing lawyers to heed the public
purposes of legal rules is not enough. To have any significant effect, rules implementing this general principle must
respond to the manner in which lawyers actually experience the bounds of the law. The truth about legal realism for
lawyers mandates that legal ethics acknowledge the discretion that lawyers have to shape the substantive content of
legal rules and the manner in which that power is shaped by social and institutional context. Legal ethics owes the profession and society a credible account of how that discretion should be exercised.

FOOTNOTES:

n1 K. LLEWELLYN, THE BRAMBLE BUSH 180 (1930) (emphasis in original).

n2 For a thorough discussion of legal realism's effect on contemporary jurisprudential theories, see Singer, Legal Realism Now, 76 CALIF. L. REV. 467 (1988).

n3 See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.3 comment (1983) [hereinafter MODEL RULES] (stating that an attorney must "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf"); Patterson, Legal Ethics and the Lawyer's Duty of Loyalty, 29 EMORY L.J. 909 (1980) (discussing a lawyer's duty to clients).


n5 MODEL RULES, supra note 3, preamble, para. 12.

n6 See M. DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY 143 (1986) ("The invocation of counsel as officer of the court is designed to . . . forestall the transformation of privately managed litigation into a melee of self-seeking.").

n7 MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1980) [hereinafter MODEL CODE] ("A Lawyer Should Represent a Client Zealously Within the Bounds of the Law.").

n8 In addition to the boundary claim, the traditional model also calls on lawyers to mediate this tension by devoting a portion of their time to working to improve the fairness of the legal system. See, e.g., MODEL CODE, supra note 7, EC 8-1 ("[L]awyers should participate in proposing and supporting legislation and programs to improve the system, without regard to the general interests or desires of clients, . . ."). Thus, the lawyer is conceived as having both a "private" role, in which she zealously pursues client interests, and a "public" role, in which she works to repair damage produced by her "private" actions. See Gordon, The Independence of Lawyers, 68 B.U.L. REV. 1, 22-23 (1988) (calling this "schizoid lawyering"). Within the "private" sphere, however, lawyers are still expected to support public purposes to the extent that those purposes are incorporated in legal rules. This Article focuses on this balancing of public and private interests during the course of client representation.

n9 MODEL CODE, supra note 7, EC 7-1; see also id. EC 7-4 ("The advocate may urge any permissible construction of the law favorable to [the] client," but may not "assert[] a position in litigation that is frivolous."); id. EC 7-5 ("A lawyer may continue in the representation of his client even though his client has elected to pursue a course of conduct contrary to the advice of the lawyer. . . . A lawyer should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment therefor.").

n10 See MODEL CODE, supra note 7, EC 7-1 ("[T]he bounds of the law . . . includes Disciplinary Rules and enforceable professional regulations.").
n11 See C. FRIED, RIGHT AND WRONG 192 (1978) (arguing that as long as a lawyer contains his advocacy strictly within the limits of the law, he is immune from moral criticism even if his actions work an injustice, because "the legal system which authorizes both the injustice . . . and the formal gesture for working it insulates him from personal moral responsibility"). The traditional model does encourage lawyers to talk to their clients about the range of considerations falling outside the bounds of the law. The significance to be attached to these considerations, however, is expressly left to the sole discretion of the client. See MODEL CODE, supra note 7, EC 7-8 (noting that though a lawyer is free to offer advice based on moral as well as legal considerations, "[i]n the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself"). Thus, the traditional model uses "law" as a means of delineating the moral, social, and political judgments that the lawyer is required to consider when giving advice to the client and those that need be considered only if both the lawyer and the client find them compelling.

n12 See Pepper, The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities, 1986 AM. B. FOUND. RES. J. 613, 618 (arguing that using legal boundaries to establish the limits of the lawyer's obligation to her clients prevents "the citizenry [from being subjected] to the happenstance of the moral judgment of the particular lawyer to whom each has access").

n13 See, e.g., MODEL RULES, supra note 3, Rule 3.3(a)(1) ("A lawyer shall not knowingly make a false statement of fact or law to a tribunal."); id. Rule 3.4 ("A lawyer shall not unlawfully obstruct another party's access to evidence. . .").

n14 See id. preliminary statement ("[T]he Disciplinary Rules should be uniformly applied to all lawyers, regardless of the nature of their professional activity."). As Marc Galanter argues, ",[t]here is . . . in American law (that is, in the higher reaches of the system where the learned tradition is propounded) an unrelenting stress on the virtues of uniformity and universality and a pervasive distaste for particularism, compromise, and discretion." Galanter, Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change, 9 LAW & SOC'Y REV. 95, 147 (1974) (citation omitted); see also Minow & Spelman, In Context, 63 S. CAL. L. REV. 1597, 1630 (1990) (discussing the difference between "generality" and "universality").

n15 See MODEL CODE, supra note 7, EC 7-1 ("In our government of laws and not of men, each member of our society is entitled to have his conduct judged and regulated in accordance with the law. . .").

n16 See e.g., Gordon, supra note 8, at 17 ("Law, in secular modern societies, is one of the most important sources of universal norms."); Rhode, Ethical Perspectives on Legal Practice, 37 STAN. L. REV. 589, 602 (1985) (discussing and critiquing the traditional model's claim that "[p]ublicly accountable officials, not privately appointed Platonic guardians," should determine the limits on client goals). See generally T. PARSONS, A Sociologist Looks at the Legal Profession, in ESSAYS IN SOCIOLOGICAL THEORY 370, 370-85 (1954).

n17 The rules of professional conduct generally support the view that all doubts should be resolved in favor of furthering the best interest of the client. See, e.g., MODEL CODE, supra note 7, DR 7-101(A)(1) ("A lawyer shall not intentionally fail to seek the lawful objectives of his client through reasonably available means. . ."); id. EC 7-4 ("The advocate may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail."); id. EC 7-5 ("[T]he lawyer] may continue in the representation of his client even though his client has elected to pursue a course of conduct contrary to the advice of the lawyer. . ."); MODEL RULES, supra note 3, Rule 3.1 comment
("[An] action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail."). But see MODEL CODE, supra note 7, DR 7-101(B)(2) ("[A] lawyer may refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal.").


n19 There is almost as much controversy about the origins and content of the original realist movement as there is about whether the claims made by this group of scholars has any continuing relevance for contemporary debates about law and legal theory. See, e.g., L. KALMAN, LEGAL REALISM AT YALE, 1927-1960, at 3-44 (1986); Hull, Reconstructing the Origins of Realistic Jurisprudence: A Prequel to the Llewellyn-Pound Exchange over Legal Realism, 1989 DUKE L.J. 1302, 1305-06 (arguing that many current accounts misunderstand the genesis of the realist movement); Singer, supra note 2 (criticizing Kalman's characterization of legal realism). I am concerned only with the broad outlines of the story, about which there is a strong consensus.

n20 In concentrating on the "indeterminacy thesis," I do not mean to ignore the manner in which the critique of formalism was, for many of the original realists and their contemporary followers and critics, closely connected to ideas about positivism, pragmatism, the use of social science, and a substantive vision about political and moral reality. To the contrary, when discussing possible responses to the problems caused by indeterminacy, I draw heavily upon these and other realist insights. Nevertheless, I believe it is important to separate these interconnected ideas to understand the challenge that each poses to the traditional model of legal ethics.

n21 On the indeterminacy of deductive logic and analogic reasoning, see Cohen, Modern Ethics and the Law, 4 BROOKLYN L. REV. 33, 43-44 (1934).


n23 See Singer, supra note 2, at 470 (summarizing legal realist arguments that the law is vague and that conflicting precedents exist); Cook, The Paradoxes of Legal Science (Book Review), 38 YALE L.J. 406 (1929); W. Fisher, The Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights 3-7 (n.d.) (unpublished manuscript on file at the Harvard Law School Library).

n24 For a helpful compilation of some of the most important works by legal realists during this period, see Singer, supra note 2, at 476 n.40. The realist attack took several forms, and not every realist subscribed to each specific variation. See M. Horwitz, Reinterpreting Legal Realism (Oct. 5, 1989) (unpublished manuscript on file at the Harvard Law School Library).

n25 For a small sampling of only the most recent literature in this somewhat vituperative debate, see Fuller, Playing Without a Full Deck: Scientific Realism and the Cognitive Limits of Legal Theory, 97 YALE L.J. 549 (1988); Schauer, Formalism, 97 YALE L.J. 509 (1988); Singer, The Player and the Cards: Nihilism and Legal Theory, 94 YALE L.J. 1, 9-25 (1984); and Stick, Can Nihilism Be Pragmatic?, 100 HARV. L. REV. 332 (1986).
n26 This position is most commonly associated with the critical legal studies movement. See, e.g., M.
KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 3-4, 13 (1987); Dalton, An Essay in the
Deconstruction of Contract Doctrine, 94 YALE L.J. 997, 1006-07 (1985); Frug, The Ideology of Bureaucracy in

n27 See, e.g., Kress, Legal Indeterminacy, 77 CALIF. L. REV. 283, 295-96 (1989) (arguing that the law is
only "moderately indeterminate"). Some scholars have gone so far as to embrace, albeit tentatively, the label
"formalism" to describe their belief in the relative determinacy of law. See, e.g., Schauer, supra note 25, at 544-
48 (arguing for a "presumptive" allegiance to formal rules). But see Weinreb, Legal Formalism: On the
Immanent Rationality of Law, 97 YALE L.J. 949, 1008-09 (1988) (arguing that formalism does not require
determinacy).

n28 See, e.g., R. DWORKIN, LAW'S EMPIRE (1986) (discussing judicial decisionmaking in the face of
indeterminacy); Hutchinson, Democracy and Determinacy: An Essay on Legal Interpretation, 43 U. MIAMI L.
REV. 541 (1989); Kennedy, Freedom and Constraint in Adjudication: A Critical Phenomenology, 36 J. LEGAL

n29 To the extent that lawyers are mentioned at all in this literature, they are simply lumped in as part of the
undifferentiated "legal culture" in which judicial decisions are made. See, e.g., Singer, supra note 25, at 19-25;
Stick, supra note 25, at 354-58. One notable exception to this trend has been Sanford Levinson, who has
repeatedly chastised other theorists for putting forward a jurisprudence of "law without lawyers." Levinson,
What Do Lawyers Know (And What Do They Do With Their Knowledge)?: Comments on Schauer and Moore,
58 S. CAL. L. REV. 441, 454 (1985) (criticizing Michael Moore's jurisprudential theory for the "absolute
incomprehension it generates about what it is that lawyers, as opposed to judges, do in their professional lives"
(emphasis in original)); see also Levinson, Frivolous Cases: Do Lawyers Really Know Anything At All?, 24
cannot possibly explain the ordinary reality of the practicing lawyer."). My primary purpose is to begin to flesh
out what Levinson has referred to as a "jurisprudence of lawyering." Id. at 362.

n30 This assumption parallels the preference for general, universally applicable rules. See supra p. 472.

n31 Arguably the judge's "clients" are the litigants in the case, the public interest, the will of the legislature,
or the rule of law itself. Whatever value there might be in characterizing the judicial role in this fashion, it
clearly implies something quite different from the relationship between lawyer and client. See Yackle, Choosing
Judges make law, to be sure, but they do not vindicate the perceived aggregate preferences of the electorate; they
do not serve as surrogates for a majority of citizens who, if asked, might decide cases by a nose count."
(emphasis in original)).

n32 See White, The Ethics of Argument: Plato's Gorgias and the Modern Lawyer, 50 U. CHI. L. REV. 849,
872 (1983) ("For it is the function of the lawyer, like the rhetorician, to persuade about the just and the unjust,
about the expedient and the inexpedient. . . . Moreover, the lawyer always speaks in the service of someone else
whose interests he represents. . . .").

n33 Each of these formal powers increases with the ladder of decisionmaking. Obviously, the Supreme
Court has much more power to alter the legal landscape than a district judge, who must justify her decision in
terms likely to be accepted by appellate judges. See Kennedy, supra note 28, at 527 (discussing how the threat
of being overruled is a constraining force on judicial interpretation).
As has been often noted, most disputes are never litigated. See, e.g., Galanter, Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. REV. 4, 26-34 (1983).


Levinson, Frivolous Cases, supra note 29, at 366; see also Shapiro, On the Regrettable Decline of Law French: Or Shapiro Jettet le Brickbat, 90 YALE L.J. 1198, 1201 (1981) (“[L]aw is not what judges say in the reports but what lawyers say -- to one another and to clients -- in their offices.”).

On one level this will quite literally be true. In addition to their obligations under traditional legal doctrines, lawyers are governed by a separate set of professional norms to which judges in their official capacity are not bound.

Nor does the analysis in this Article require a resolution of the question whether legal discourse is essentially "rational" or "political." Compare Singer, supra note 25, at 57-59 (arguing that legal doctrine cannot provide rational outcomes) with Stick, supra note 25, at 345-52 (arguing that properly construed, legal doctrine is rational) and Kress, supra note 27, at 322-28 (arguing that political argument is also rational and when included in legal argument does not destroy the rationality of the law). Regardless of the importance of these questions to jurisprudential analysis, they bear little relevance to the task confronting lawyers. To pursue the interests of their clients, lawyers must think rationally about the legal system even if the system itself is not susceptible to rational justification. For example, the task of predicting the actions of legal decisionmakers involves understanding the ways in which those actions are the product of both rational and irrational forces.

Duncan Kennedy provides one example of this effect in the judicial context. In discussing how a judge might decide whether to permit striking union bus workers to interfere with the employer's ability to operate the buses with replacement drivers, Kennedy points out that even though it might be relatively settled in labor law that an employer has the right to utilize the means of production during a strike, it might also be the case that employees have a protected first amendment right to engage in picketing. See Kennedy, supra note 28, at 523-25. From the perspective of the union's lawyer, the fact that the first amendment might be interpreted to cover the workers' actions provides a potential basis for argument even if no court has yet applied the first amendment to similar actions.


Professor Christopher Edley makes a similar argument about the field of administrative law. This field, according to Edley, contains a "trichotomy" of paradigms ("adjudicatory fairness," "science," and "politics"), each of which offers an extensive set of positive and negative norms that can be invoked to justify or condemn judicial overruling of administrative decisionmaking. As a result, lawyers have an expansive set of materials from which to construct plausible legal arguments. See C. EDLEY, ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 83-86 (1990).
n43 See K. LLEWELLYN, supra note I, at 178-80.

n44 As Theodore Schneyer concludes, "legal ethics has no paradigm, only some fragmentary conceptions of the lawyer's role vying inconclusively for dominance." Schneyer, Moral Philosophy's Standard Misconception of Legal Ethics, 1984 WIS. L. REV. 1529, 1568-69.

n45 The principle of partisanship partially resolves this tension by giving "zealous advocacy" priority over the lawyer's other duties. This resolution, however, undermines the normative foundations of the boundary claim.

n46 "Prototypically, a vague, ambiguous, or simply opaque linguistic formulation of the relevant rule generates a hard case." Schauer, Easy Cases, 58 S. CAL. L. REV. 399, 415 (1985); see also Altman, Legal Realism, Critical Legal Studies, and Dworkin, 15 PHIL. & PUB. AFF. 205, 208 (1986); Singer, supra note 2, at 470. For an argument along these lines by one of the original realists, see Cohen, supra note 22, at 809-821, 838-42.


n48 MODEL CODE, supra note 7, DR 5-105(A).

n49 Id. DR 7-102(A)(2).

n50 Id. DR 9-101.

n51 See Hazard, Legal Ethics: Legal Rules and Professional Aspirations, 30 CLEV. ST. L. REV. 571, 574 (1982) (praising the Model Rules for providing a "black letter rule" of the "lawyer's legal obligations"). Among other changes, the Model Rules abandoned the nonbinding Ethical Considerations that constituted the bulk of the Model Code.

n52 For example, DR 7-102(B)(I) of the Model Code instructed a lawyer to reveal client perjury "except when the information is protected as a privileged communication." It was unclear whether this rule nullified a lawyer's discretion to disclose his client's criminal intentions (for example, intent to perjure), a discretion expressly recognized in DR 4-101(C)(3). See A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 173-77 (3d ed. 1989). Model Rule 3.3 eliminates this ambiguity by making the duty to disclose mandatory. See id. at 197.


n54 MODEL RULES, supra note 3, Rule I.I
n55 Id. Rule 3.4(d).

n56 See Abel, Why Does the ABA Promulgate Ethical Rules?, 59 TEX. L. REV. 639, 642 (1981) (claiming that the "Model Rules are drafted with an amorphousness and ambiguity that render them virtually meaningless").

n57 See Singer, supra note 2, at 470; Tribe & Dorf, Levels of Generality in the Definition of Rights, 57 U. CHI. L. REV. 1057 (1990) (noting that the more abstractly one states a right, the more likely it is that the right will be protected). For an expression of this argument by one of the original realists, see K. LLEWELLYN, supra note 1, at 73-76.

n58 See Simon, Ethical Discretion in Lawyering, 101 HARV. L. REV. 1083, 1087 (1988) (arguing that the field of legal ethics is characterized by three sets of "recurring tensions": substance versus procedure, purpose versus form, and broad versus narrow framing).


n60 See id. at 171.

n61 See id. at 168-69 (indicating that lawyers have a "special duty . . . to prevent and disclose frauds upon the court"); see also A. KAUFMAN, supra note 52, at 191 (noting that Nix was "strongly suggestive" of the proper response to client perjury).

n62 Indeed, the Nix majority expressly invokes these purposes when it draws an analogy between client perjury and threatening or tampering with witnesses. In either case, counsel's "assistance or silence" undermines "a key component of a system of justice, dedicated to the search for truth." Nix, 475 U.S. at 174.

n63 In states that have adopted the 1974 amendment to DR 7-102(B)(1) of the Model Code, a lawyer is arguably precluded from revealing the perjury if the attorney's belief that the testimony is false is based solely on "confidential client information." See A. KAUFMAN, supra note 52, at 173-77 (discussing the 1974 amendments to MODEL CODE, supra note 7, DR 7-102(B)(1)). If this rule had been applied in Nix, disclosure would probably have been inappropriate.

n64 See Nix, 475 U.S. at 191 (Stevens, J., concurring in the judgment) (explaining that "the post-trial review of a lawyer's pretrial threat to expose perjury that had not yet been committed -- and, indeed, may have been prevented by the threat -- is by no means the same as review of the way in which such a threat may actually have been carried out").

n65 A. KAUFMAN, supra note 52, at 191 (explaining that "[i]n a state with Model Code 7-102(B)(1) in its amended form lawyers practicing in a federal district court that has [adopted the] rule surely face great uncertainty" after Nix).
n66 See Nix, 475 U.S. at 160-61 ("Until shortly before trial, Whiteside consistently stated . . . that he had not actually seen a gun. . . . About a week before trial, . . . Whiteside for the first time told [his lawyer] that he had seen something 'metallic' in [the victim's] hand.").

n67 Id. at 167 (quoting MODEL CODE, supra note 7, DR 7-102(A)(4)).

n68 Id. at 190-91 (Stevens, J., concurring in the judgment).

n69 As Andrew Kaufman notes:

[M]any different definitions [of the term "known"] are possible that would expand or contract the number of situations when a lawyer is required to make a disclosure. For example, does a lawyer ever "know" about a client's false testimony . . . if . . . the client has not admitted perjury and has not suddenly changed the story under circumstances when the only realistic explanation is that perjury is involved?

A. KAUFMAN, supra note 52, at 192.

n70 See Kennedy, supra note 28, at 526 (discussing how the interpreter's purpose affects her perception of the law).

n71 See supra p. 473.

n72 See D. LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 48 (1988) (arguing that the lawyer's duty to pursue client interests zealously "seems to require lawyers to devote their professional energies to ensuring that laws violate the generality requirement whenever it is in their client's interest that they do so").

n73 "Nihilism" has become a popular term in American legal scholarship. See Fiss, Objectivity and Interpretation, 34 STAN. L. REV. 739, 741 (1982); Singer, supra note 25, at 3-4; Stick, supra note 25, at 332-34. There is considerable controversy about what is actually meant by the term. See Singer, supra note 25, at 3-4 & nn.5-8. I intend only to invoke its broadest outline. By argumentative nihilism I mean a regime in which it would be impossible for anyone to claim that any legal argument was better than any other legal argument.

n74 Sanford Levinson captures this danger when he states:

It is for these reasons, among others, that I have argued that the central source of so-called legal nihilism, a topic much written about these days, is the behavior (and supporting ideology) of the practicing bar. For it is there -- and not merely in the abstract writings of legal academics -- that one will discover the genuinely important emphasis on the inherent indeterminacies within the law and the concomitant ability to distinguish practically any case or construe practically any statute in a way that will count at least as a "good faith argument for the extension, modification or reversal of existing law."

Levinson, Frivolous Cases, supra note 29, at 368 (emphasis in original) (footnote omitted).

n75 Indeed, if the most thorough indeterminacy critique accurately characterized the world of the practicing lawyer, there would be no such thing as a routine case. See, e.g., Peller, The Metaphysics of American Law, 73 CALIF. L. REV. 1152, 1174 (1985) (arguing that the constitutional requirement that the President be at least 35 years old, see U.S. CONST. art. II, § 1, can be made ambiguous if it is recognized that its underlying purpose is to ensure emotional and psychological maturity rather than mere chronological age).
n76 See, e.g., Stick, supra note 25, at 354 (arguing that "the profession is confident" about "whether particular legal arguments are good or bad and about how a judge is likely to rule").

n77 See, e.g., id. at 355-58 & n.94 (arguing that "legal culture, conventions, and common sense" make "the law as practiced" generally predictable); see also Fiss, Conventionalism, 58 S. CAL. L. REV. 177, 184-91 (1985) (arguing that "disciplining rules" do constrain decisionmakers, even though they must be interpreted). This set of background cultural norms is sometimes analogized to the rules of grammar. When people speak grammatically correct English, they rarely think about the rules underlying their choice of words. Similarly, those advocating conventionalism maintain that an analogous set of background understandings informs the interpretive decisions of lawyers and judges. See Stick, supra note 25, at 349; Wellman, Practical Reasoning and Judicial Justification: Toward an Adequate Theory, 57 U. COLO. L. REV. 45, 50 (1985).

n78 Thus, conventionalists often assert that their position is fully consistent with the fundamental insights of legal realism. See, e.g., Stick, supra note 25, at 349 & n.61 (claiming that his theory of legal reasoning is compatible with that advocated by Karl Llewellyn).

n79 Some authorities claim that the actual functioning of the legal system proves this proposition. See S. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 95-96 (1985) (claiming that there is coherence to the process of legal interpretation because lawyers and judges generally agree as to how particular cases should be resolved); see also Newman, Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values, 72 CALIF. L. REV. 200, 204 (1984) (arguing that the absence of a dissent in 96% of appellate decisions issued by federal courts shows that the law is internally coherent). But see J. HOWARD, COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM 193 (1981) (pointing out that a judge might choose not to write a dissent for reasons having nothing to do with the determinacy of the applicable law).

n80 Conventionalist theorists do not contend that existing cultural practices will always provide determinate answers. See, e.g., Stick, supra note 25, at 358 (contending that it is an "empirical question" whether legal culture will always enable lawyers to predict the difference between good and bad legal arguments).

n81 A lawyer "fits" a new problem into the existing structure by choosing the interpretation most consistent with other judgments the lawyer believes to be true. See Kress, Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions, 72 CALIF. L. REV. 369, 369 (1984) ("Coherence and holistic theories of truth maintain that a proposition is true if it fits sufficiently well with other propositions held to be true.").

The argument that relatively stable and defensible judgments can be produced by fitting new situations into existing practices and commitments has a long and distinguished philosophical pedigree. See, e.g., R. DWORKIN, TAKING RIGHTS SERIOUSLY 150-68 (1977); J. RAWLS, A THEORY OF JUSTICE (1971). Recently, legal scholars have increasingly turned to these theories for the purpose of constructing an internally coherent account of judicial decisionmaking. Owen Fiss has been a leading proponent of this view. See, e.g., Fiss, supra note 77, at 183-96; Fiss, The Death of the Law?, 72 CORNELL L. REV. 1 (1986); Fiss, supra note 73, at 744-45. Not surprisingly, many of these advocates have uncritically assumed that such theories apply equally to both lawyers and judges, because they share a common legal culture. See, e.g., Fiss, supra note 77, at 188; Stick, supra note 25, at 354-55.

n82 See, e.g., Fiss, supra note 77, at 184-91; Kress, supra note 27, at 324-25; Singer, supra note 25, at 19-25; Stick, supra note 25, at 354-58.
n83 See supra p. 478.

n84 As Joseph Singer argues:

[A]n existing structure of legal argumentation orients thought according to a predictable scheme.

... [T]hat orientation of thought limits the number and variety of perceived ways to resolve conflicts. As long as we think of labor law as a set of rules and institutions to govern collective bargaining between unions and employers, we are unlikely to consider the remedy of employee ownership of large enterprises. As long as we think of torts as involving a choice between strict liability and negligence, we are unlikely to consider adopting universal health and accident insurance coupled with regulatory control of harmful behavior.

Singer, supra note 25, at 21.

n85 Frederick Schauer argues that a vast number of legal events -- paying taxes before April 15, stopping at stop signs, and filing offering documents with the Securities and Exchange Commission -- follow from the unproblematic application of "tolerably clear" legal norms. Schauer, supra note 46, at 412-14. As Schauer admits, the reason such cases seem easy is that we have a shared background of understandings that makes it possible for us to determine immediately what the law requires. See id. at 418-19; see also Kress, supra note 27, at 297 ("The overwhelming majority of individuals' actions give rise to determinate legal consequences."); Solum, On the Indeterminacy Crisis: Critiquing Critical Dogma, 54 U. CHI. L. REV. 462, 494-95 (1987) (arguing that legal norms easily resolve many legal cases before any party takes formal action).

It is important to emphasize, however, that this is only one reason people do not pursue claims. Most people with legal claims never get to a lawyer's office. See Trubek, Sarat, Felstiner, Kritzer & Grossman, The Costs of Ordinary Litigation, 31 UCLA L. REV. 72, 87 (1983) (noting that only about 10% of all claims are ever brought to lawyers). Moreover, there are many reasons a lawyer may decide not to pursue a matter that have nothing to do with even the most expansive notion of an interpretive culture. See Felstiner, Abel & Sarat, The Emergence and Transformation of Disputes, 15 LAW & SOC'Y REV. 631, 645-46 (1980).

n86 See, e.g., Stick, supra note 25, at 355 & n.94 (suggesting that lawyers "really do share conventions, common sense, and legal culture"). The analogy to grammar so frequently used to support arguments about the power of legal culture conjures up precisely that image.


n88 As Heinz and Laumann demonstrated in their pioneering study of the Chicago bar, lawyers representing corporate interests work in larger firms, make more money, have greater professional status and occupational mobility, and have fundamentally different relations with clients, colleagues, and the officers of the state than do lawyers representing individual clients. See J. HEINZ & E. LAUMANN, supra note 87, at 319-24; see also Green, The Gross Legal Product: "How Much Justice Can You Afford?, " in VERDICTS ON LAWYERS 63, 64-65 (R. Nader & M. Green eds. 1976) ("[T]here are two distinct legal professions in the United States today. Large corporate law firms . . . generate vast fees and lush incomes. . . . [S]olo practitioners or small-firm lawyers in small towns -- those who handle personal [matters] -- have moderate incomes.").
n89 See D. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? 146-48 (1974) (discussing the differences between the lawyer-client relationship in personal injury practice and the same relationship in corporate defense practice). Perhaps the biggest difference is that plaintiffs' lawyers are generally paid a contingent fee, whereas defendants' lawyers are paid by the hour. See generally Johnson, Lawyers' Choice: A Theoretical Appraisal of Litigation Investment Decisions, 15 LAW & SOC'Y REV. 567 (1980) (discussing the differences between "fee-for-service" lawyers and "contingent-fee" lawyers).


n92 Even at this level of generality there are important differences. Each state has its own bar exam, bar association, and rules of professional conduct. See C. WOLFRAM, MODERN LEGAL ETHICS 50 (1986) (discussing the increasing balkanization of professional regulation). Less than one half of all lawyers belong to the American Bar Association. See R. ABEL, AMERICAN LAWYERS 208 (1989). And, as anyone who has had any exposure to American legal education (particularly during the last 20 years) can attest, what is actually taught in law school varies tremendously by school and by professor. The existing system for defining and reinforcing legal culture, therefore, bears little resemblance to the concerted efforts by teachers, employers, advertisers, and governmental officials to inculcate the rules of grammar.

n93 I have argued elsewhere that these "embedded" sources of control exert a powerful influence over lawyer decisionmaking. See D. Wilkins, Reconstructing Professional Autonomy (Aug. 1989) (unpublished manuscript on file at the Harvard Law School Library); see also J. CARLIN, LAWYERS' ETHICS: A SURVEY OF THE NEW YORK CITY BAR (1966) (discussing the importance of client pressures and collegial interactions); J. HEINZ & E. LAUMANN, supra note 87, at 36-83, 140, 312 (discussing the importance of client pressure); R. Nelson & D. Trubek, Arenas of Professionalism: The Professional Ideologies of Lawyers in Collective and Workplace Contexts 34-58 (Aug. 7, 1990) (unpublished manuscript on file at the Harvard Law School Library) (discussing the importance of workplace organization).

n94 Austin Sarat has demonstrated that even lawyers who practice within a relatively insular legal community sometimes ascribe radically different meanings to the same professional norm. After interviewing several lawyers practicing in a small New England town about a particular action taken by one member of the local bar, Sarat concluded that two distinct and largely contradictory interpretations of the lawyer's action existed simultaneously among two groups of lawyers in the small legal community. See A. Sarat, Ideologies of Professionalism: Conflict and Change Among Small Town Lawyers 12-26 (July 19, 1989) (unpublished manuscript on file at the Harvard Law School Library). Moreover, each side of this interpretive split justified its vision of professional obligation in exactly the same terms. They (and those like them) were acting "professionally"; the others were not. See id. at 26-50. Clearly, an appeal to "community standards" or "legal culture" in this instance would produce little in the way of meaningful guidance about how this conflict should be resolved.

n95 See M. LARSON, THE RISE OF PROFESSIONALISM 228 (1977) ("[T]he concrete reference group of the individual professional is more likely to be a specific group of colleagues than the profession at large."); C. WOLFRAM, supra note 92, at 22 ("The most widely effective form of regulation of lawyers . . . [is] the
network of informal sanctions that are brought to bear against lawyers who offend accepted norms of professional behavior."). This is another example of the power that informal cultural norms exert in all aspects of our lives. See Galanter, Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law, 19 J. LEGAL PLURALISM 1, 17-27 (1981); Moore, Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Object of Study, 7 LAW & SOC'Y REV. 719, 720-29 (1973). The fact that these norms are largely hidden from view only adds to their power. See L. FULLER, THE MORALITY OF LAW 234 (1969) ("[C]ustomary law plays an important, though usually silent role . . . in the interpretation of written law. . . . [C]ustomary law will always enter into any practical realization of the ideal of legality.").

n96 See Blumberg, The Practice of Law as Confidence Game: Organizational Cooptation of a Profession, 1 LAW & SOC'Y REV. 15, 24 (1967). Such conduct seems clearly prohibited by the relevant rules of professional conduct. See MODEL CODE, supra note 7, DR 7-101(A)(1) ("A lawyer shall not intentionally . . . fail to seek the lawful objectives of his client through reasonably available means permitted by law. . . ."). Recent evidence appears to confirm Blumberg's findings. For example, Kenneth Mann has documented the ways in which the community of lawyers defending white-collar criminals systematically engage in practices that appear to violate the rules of professional conduct. See K. MANN, DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK 243-48 (1985). According to Mann, criminal defense lawyers routinely "stonewall" investigations, id. at 171, advise clients about how to circumvent legal rules, see id. at 244-47, and refuse to interfere with their client's intention to commit future crimes, see id. at 115; see also Moore, Disqualification of an Attorney Representing Multiple Witnesses Before a Grand Jury: Legal Ethics and the Stonewall Defense, 27 UCLA L. REV. 1 (1979) (discussing similar tactics by attorneys representing witnesses before a grand jury).

n97 Jerome Carlin has argued that one of the most important factors influencing an attorney's understanding of professional norms is the "ethical climate" in his or her firm. J. CARLIN, supra note 93, at 96-97. According to Carlin's data, lawyers in "newer offices" were more likely to generate a "permissive" atmosphere, in which lawyers facing similar problems provide mutual support for the decision to violate ethical norms. Id. at 107-09. Given the increasing competition among sole practitioners and small-firm lawyers, this trend does not bode well for the development of an appropriate "legal culture" for these practitioners. See D. ROSENTHAL, supra note 89, at 106-16 (detailing the ways in which plaintiffs' personal injury lawyers routinely deviate from stated norms).

At the opposite end of the scale, Wayne Brazil describes a litigation culture, populated mainly by lawyers from the nation's leading law firms, in which the most blatant forms of harassment and apparent abuse of discovery rules are considered to be simply part of the way the game is played. See Brazil, Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery, 1980 AM. B. FOUND. RES. J. 217, 230-35; see also L. LIEBMAN & P. HEYMANN, THE SOCIAL RESPONSIBILITIES OF LAWYERS 106-35 (1988) (describing how the lawyers in the Conoco takeover filed an arguably frivolous piece of litigation solely for the purpose of derailing the proposed tender offer); Rhode, supra note 16, at 597-98, 628 (documenting instances of discovery abuse).

n98 See K. LLEWELLYN, supra note 1, at 3 ("[W]hat . . . officials do about disputes is . . . the law itself." (emphasis omitted)). The argument builds on Holmes' famous aphorism that "[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Holmes, The Path of the Law, 10 HARV. L. REV. 456, 461 (1897).

n99 Even Karl Llewellyn believed that the law is sufficiently predictable "for skilled craftsmen to make usable and valuable judgements about likelihoods." K. LLEWELLYN, THE COMMON LAW TRADITION 4 (1960).
n100 From inside the process of legal argument, predictive judgments about the actions of officials will be felt as real and identifiable external constraints on lawyer conduct. Moreover, to the extent that these judgments are widely shared, the resulting constraint will be consistently felt by all lawyers. Finally, where the actions of official decisionmakers such as judges, administrative officials, and bureaucrats are what is being predicted, one can plausibly argue that resulting restrictions are legitimate in the sense that they are the product of democratic decisionmaking.

n101 As David Luban states:

Lawyers do not deal with abstract inferential relations between propositions in books -- they deal with judges, tax officials, police officers, clerks of court, registrars of deeds, the third-in-command of the Securities and Exchange Commission legal department, the mayor's administrative assistant. In a lawyer's worklife, every legal concept and proposition is automatically operationalized. . . .

D. LUBAN, supra note 72, at 19.

n102 Sarat and Felstiner's experience with divorce clients is instructive. Almost from the beginning, these clients are told that the resolution of their cases may bear little relation to what the formal rules might seem to require:

The message to the client is that it is the judge, not the rules, that really counts. What the judge will accept, what the judge will do is the crucial issue in the divorce process. With respect to property settlements, Massachusetts clients are reminded that since all agreements require judicial approval there is, in effect, "nothing binding about them. The judge will do what he wants with it." Another lawyer explained that in dividing the marital property, "the judge can do with it as he chooses to do." Still another lawyer informed his client of what he called the "immense amount of power and authority" which judges exercise and suggested that the particular judge who would be hearing his case would use that power "pretty much as he deems fit."

Sarat & Felstiner, Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office, 98 YALE L.J. 1663, 1674 (1989); see also Vagts, Legal Opinions in Quantitative Terms: The Lawyer as Haruspex or Bookie?, 34 BUS. LAW. 421, 422 (1979) (noting that the client is primarily interested in opinions of the "authorities with power over the situation").

n103 See Nelken, Sanctions Under Amended Federal Rule 11 -- Some "Chilling" Problems in the Struggle Between Compensation and Punishment, 74 GEO. L.J. 1313, 1341-42 (1986) (noting the fluidity of the prevailing understanding of what constitutes a valid legal argument). In this context arguments about legal culture and prediction are mutually reinforcing.

n104 In this respect, the argument that prediction constrains interpretation has more relevance for lawyers than for judges. David Luban argues that the realist claim that law is prediction is logically impossible as a method of judicial decisionmaking. Luban contends that a judge employing prediction as the sole method of determining the requirements of the law in a given instance would be forced to predict how she herself would answer the very question she is attempting to decide. Because by definition any answer that she gives to this question will be the right answer, the prediction thesis cannot explain how judges actually reach one legal conclusion as opposed to another. The argument concludes that because judges do make such assessments, they must reason from the "law on the books" and the realist claim that law is prediction is therefore false. D. LUBAN, supra note 72, at 22-24.

Whatever force this argument has in the judicial context, it has little bite when applied to lawyers. Unlike judges, lawyers are not attempting to predict their own decisions. Instead, the lawyer attempts to predict how others will respond to various legal questions. Though this process undoubtedly requires the lawyer to follow the judge's reasoning process, it also mandates consideration of additional factors, some of which the judge may not even be aware he is considering, but which nevertheless will bear on the decision actually reached. This, of
course, is simply another example of how lawyers and judges perceive legal rules differently. See Levinson, *Frivolous Cases*, supra note 29, at 363 ("Justice Holmes's predictive theory of law makes perfectly good sense once one realizes that Holmes was not talking to judges about their law but rather to law students -- future lawyers -- about theirs." (emphasis in original)).

n105 *See* Erlanger, Chambliss & Melli, *Participation and Flexibility in Informal Processes*, 21 LAW & SOC'TY REV. 585, 599 (1987) (arguing that lawyers have a difficult time predicting how judges will apply such vague standards as "the best interest of the child"); Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, LAW & CONTEMP. PROBS., Summer 1975, at 226, 256 (discussing the "inherent indeterminacy of the best-interests standard").

n106 Cf. Erlanger, Chambliss & Melli, *supra* note 105, at 599 ("Many [divorce] lawyers also stress that their settlement strategy in any given case depends heavily on who is representing the other spouse.").

n107 Even here, however, it is not so clear that the first-level decisionmaker is the appropriate reference point; after all, that person's actions could be overturned on appeal. Does this mean the question in every case is the action of the highest official who might conceivably review the case?

n108 *See* Erlanger, Chambliss & Melli, *supra* note 105, at 599 ("[T]o the extent that formal endowments exist, they are subject to attorneys' interpretations, which potentially alters the entitlements created by the law. . . . [T]he shadow of the law is being cast by the lawyers, who declare their expectations of judicial behavior. . . .").

n109 *See* Sarat & Felstiner, *supra* note 102, at 1676-79 (discussing how lawyers emphasize the specific idiosyncrasies and prejudices of the particular judge involved in a divorce case and how that phenomenon strongly "suggests that the inattentiveness, insensitivity, and incompetence of judges must be taken into account in deciding how to process cases").

n110 Consider the following example borrowed from Stephen Pepper. An industrial client consults a lawyer to determine what "the law" requires with respect to the discharge of a certain chemical into public waterways. The lawyer knows that the Environmental Protection Agency has recently enacted a standard limiting such emissions to 0.5 grams per liter of effluent. The lawyer also knows, however, that due to limited enforcement resources, the EPA is unable to monitor for discharge levels below 0.75 grams per liter. Moreover, given limited prosecutorial resources, even detected violations under 1.0 grams per liter are dismissed with a simple warning. As a matter of interpretation, the legal rule hardly seems indeterminate. Nevertheless, a purely predictive judgment would place the "bounds of the law" at the limits of enforcement. Therefore, if the lawyer takes this claim seriously, she should be willing to help the client to design an effluent system that would discharge anything less than 1.0 grams per liter. Pepper appears to believe that this is an acceptable result. *See* Pepper, *supra* note 12, at 627-28.

n111 *See* Abel, *supra* note 56, at 648-49 (noting that "study after study has shown that the current rules of professional conduct are not enforced"); see also R. ABEL, *supra* note 92, at 143-50 (reaffirming this conclusion based on more recent statistics).

n112 *See* R. ABEL, *supra* note 92, at 143-44 (linking the low level of enforcement to ignorance and failure to internalize ethical norms relating to disclosure, fraud, and client misconduct).
n113 See Kennedy, supra note 28, at 526-28 (discussing the concept of legal work).

n114 See J. HEINZ & E. LAUMANN, supra note 87, at 128 ("In the practice of law -- as on the assembly line and in many other sorts of work -- an almost inevitable consequence of the division of labor has been a routinization of tasks for most of the workers.").


n116 For example, even the revolution in procedure represented by the adoption of the Federal Rules of Civil Procedure "did not change the habits of lawyers and judges, and the old Code pleading attitudes persisted for some time after the rules were adopted in 1938." R. MARCUS, M. REDISH & E. SHERMAN, CIVIL PROCEDURE: A MODERN APPROACH 119 (1989).

n117 See J. HEINZ & E. LAUMANN, supra note 87, at 63 ("[T]he discovery of a unique issue is likely to be a function of the amount of time that lawyers devote to a case and, thus, of the amount of money that the client spends on lawyers.")

n118 Not all legal services are distributed through the market. See generally Cramton, Crisis in Legal Services for the Poor, 26 VILL. L. REV. 521 (1981) (emphasizing the importance of legal aid for the poor). Moreover, a substantial amount of legal services are performed under a contingent fee agreement. See Coffee, Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions, 86 COLUM. L. REV. 669, 670 n.2 (1986). The existence of these alternative sources of payment relocates but does not remove the limitation on how much time an attorney will be able to invest in the work of legal argument. Instead of being measured by the client's ability to pay, as in the standard fee-for-service case, the relevant constraint would be the lawyer's opportunity cost. See Johnson, supra note 89, at 575-77.

n119 Sarat and Felstiner's research on divorce confirms the importance that lawyers ascribe to the effect of underlying distributions of wealth and power on legal outcomes. As they explain:

[M]oney, clients are advised, is the chief determinant of legal results. Legal rights are "absolute" to the extent that clients "want to invest the time, effort, energy and money" necessary to assert or defend them, but, at the same time, clients are often advised that they cannot afford to do so. As a result, lawyers suggest that clients should settle for less than the client initially perceives as fair.

Sarat & Felstiner, supra note 102, at 1682.

n120 As Carlin and Howard noted a quarter century ago:

The quality of service rendered poorer clients is . . . affected by the non-repeating character of the matters they typically bring to lawyers (such as divorce, criminal, personal injury): this combined with the small fees encourages a mass processing of cases. As a result, only a limited amount of time and interest is usually expended on any one case -- there is little or no incentive to treat it except as an isolated piece of legal business. Moreover, there is ordinarily no desire to go much beyond the case as the client presents it, and such cases are only accepted when there is a clear-cut cause of action; i.e., when they fit into convenient legal categories and promise a fairly certain return.

n121 See J. HEINZ & E. LAUMANN, supra note 87, at 129 ("[T]he depth of the clients' pockets determines, in important part, the complexity of the legal issues with which their lawyers will be permitted to deal. . . .").

n122 Galanter, supra note 14, at 100. Galanter details a number of other strategic advantages held by repeat players, including, inter alia, the ability to build a record, economies of scale, expertise, long-term relationships with decisionmakers, risk neutrality, knowledge of and the ability to exploit institutional limitations, and better qualified lawyers who are themselves better able to employ optimizing strategies. When added together, this list points to "layers of advantages enjoyed by different (but largely overlapping) classes of 'haves' -- advantages which interlock, reinforcing and shielding one another." Id. at 124.

n123 See Rothstein, The Myth of Sisyphus: Legal Services Efforts on Behalf of the Poor, 7 U. MICH. J.L. REF. 493, 501 (1974) ("The large volume litigant is able to achieve the most favorable forum; emphasize different issues in different courts; take advantage of differences in procedure among various courts; . . . compromise unpromising cases; . . . stall some cases and push others; and create rule conflicts in lower courts."); see also S. MACAULAY, LAW AND THE BALANCE OF POWER 99-101 (1966) (discussing how the big three automakers were able to influence the construction of franchise legislation by their superior ability to manipulate the litigation system).

n124 See Galanter, supra note 14, at 147-48. Galanter argues that this divergence between the "universalism at the symbolic level and diversity and particularism at the operating level" actually supports the formal system by accommodating social diversity and normative pluralism without incurring the cost of abandoning cherished notions of unity, public authority, and individualism. Id. at 148. Although I do not disagree that this kind of covert dualism can serve an important legitimating function, its ability to do so depends in part upon concealing the gap between formal ideals and practical reality.

n125 See Gordon, Corporate Law Practice as a Public Calling, 49 MD. L. REV. 255, 259 (1990) ("Clients who can afford to pay for such skills can rapidly exhaust adversaries who cannot, and thus turn the legal system into a device for evading the very rules it is designed to enforce, or worse, into a medium for extortion and oppression of the weak by the strong.").

n126 This, of course, is not to deny that even relatively clear legal rules cannot raise difficult questions of application. Could a doctor be convicted of murder for failing to save the life of a fetus removed from the mother's womb during the course of a legal abortion? Is a lawyer who donates the annual interest from his client security trust fund to a legal services organization pursuant to a local bar rule guilty of misappropriating client funds? The fact that applying any rule to a novel set of facts may raise difficult questions of interpretation, however, should not obscure the equally important reality that in many cases the rule's application will not seem controversial.


n128 As Andrew Kaufman has noted:
I think most practicing lawyers know that there is a great deal of law -- statutes, doctrine -- that goes to inform our judgment about possibilities. We teachers are so caught up in the frontier questions that we sometimes see more chaos and manipulability than there really is. The lawyer who tells the client, "Do what you want; it is all indeterminate and manipulable," does the client no favor.


n130 In contemporary jurisprudence, two such responses have risen to prominence. The first, commonly referred to as law and economics, seeks to use principles of "efficiency" or "wealth maximization" to guide legal decisionmaking. Judge Posner has been the theorist in this tradition most interested in relating economic analysis to the larger questions of jurisprudential theory. See, e.g., Posner, Conventionalism: The Key to an Autonomous Discipline?, 38 U. TORONTO L.J. 333, 333-35, 337 (1988); Posner, The Decline of Law as an Autonomous Discipline: 1962-1987, 100 HARV. L. REV. 761, 766-68 (1987). The second, generally called rights theory, invokes principles of moral theory as guides for measuring and construing the law. A diverse array of theorists have, at one time or another, pursued this agenda. See, e.g., B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980); R. DWORKIN, supra note 81; R. NOZICK, ANARCHY, STATE, AND UTOPIA (1974); J. RAWLS, supra note 81. The popularity of these theories reflects the general trend toward a more interdisciplinary approach to the study of law and legal institutions. See Minow, Law Turning Outward, TELOS, Fall 1987, at 79; Hutchinson, supra note 28, at 544-45.

n131 For the most part, these theories place morality at the center of professional obligation. See, e.g., A. GOLDMAN, THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS 90-155 (1980); D. LUBAN, supra note 72; Donagan, Justifying Legal Practice in the Adversary System, in THE GOOD LAWYER 123 (D. Luban ed. 1983); Postema, Self-Image, Integrity, and Professional Responsibility, in THE GOOD LAWYER, supra, at 286; Wasserstrom, Lawyers as Professionals: Some Moral Issues, 5 HUM. RTS. 1 (1975). Economic theory, however, has also been suggested as a means of grounding professional obligation. See, e.g., Coffee, supra note 118, at 676-77; Kaplow & Shavell, Legal Advice About Information to Present in Litigation: Its Effects and Social Desirability, 102 HARV. L. REV. 567 (1989).

n132 Even Judge Posner, who has consistently argued for the priority of a principle of wealth maximization, appears to recognize the force of this point. See R. POSNER, supra note 129, at 126 ("[A] fragmented political and ethical discourse will no more yield determinate outcomes than legal reasoning will."). This is not to contend, however, that morality, economics, and political science are irrelevant to the process of reformulating legal ethics to respond to the challenge of legal realism.

n133 The traditional model assumed that lawyers are bound by generally applicable legal rules as well as the rules of professional responsibility. Therefore, it is possible to respond to legal realism by modifying these generally applicable legal norms. See Special Comm. on the Lawyer's Role in Tax Practice, Ass'n of the Bar of the City of New York, The Lawyer's Role in Tax Practice, 36 TAX LAW. 865, 884 (1983) (urging tightening of the substantive tax rules as a response to the ethical problems of tax lawyers). These proposals however, raise concerns that go far beyond how legal ethics should respond to the challenge of legal realism. I therefore limit the analysis in the remainder of this Article to reforms that are directly addressed to lawyers.

n134 See Loder, Tighter Rules of Professional Conduct: Saltwater for Thirst?, 1 GEO. J. LEGAL ETHICS 311, 311 (1987) (noting that recent criticisms of the traditional model of legal ethics advocate either adopting clearer and more enforceable rules or reforming role obligations to reflect moral commitments).

n136 The supremacy clause, see U.S. CONST. art. VI, cl. 2, is the classic example of this sort of meta-rule.

n137 MODEL RULES, supra note 3, Rule 1.7(b).

n138 Id. Rule 3.4(a).

n139 Indeed, as Singer argues, if indeterminacy were the only issue, the entire problem could be solved by reducing all legal rules to one: the plaintiff always loses. See Singer, supra note 25, at 11.


n141 See MODEL RULES, supra note 3, Rule 3.3(a)(4)-(b).

n142 See J. VOELKER, ANATOMY OF A MURDER (1958).

n143 See Applegate, Witness Preparation, 68 TEX. L. REV. 277, 301-04 (1989) (noting that the Anatomy of a Murder technique is arguably legal under existing ethical rules and concluding that "[g]iven the pressures on lawyers to represent their clients successfully, doubts are at least as likely to be resolved in favor of zealoussness as strict truthfulness"); see also M. FREEDMAN, LAWYER'S ETHICS IN AN ADVERSARY SYSTEM 68-75 (1975) (arguing that because clients will inevitably attempt to shape their testimony to their own advantage, the lawyer should help the client ensure that this process reflects the client's true self-interest seen from the vantage point of the legal rules that will probably be applied).

n144 See Gordon, supra note 125, at 258-60 (arguing that no system of rules can survive without lawyers sometimes placing allegiance to the legal framework above client interest).

n145 Bar associations have provided ethics opinions since the early part of this century. See Boston, Practical Activities in Legal Ethics, 62 U. PA. L. REV. 103, 111 (1913) (observing that the New York County Lawyers' Association began issuing advisory opinions in 1912). As of 1980, more than 80% of all statewide associations and 23% of all local associations issued advisory opinions. See Finman & Schneyer, The Role of Bar Association Ethics Opinions in Regulating Lawyer Conduct: A Critique of the Work of the ABA Committee on Ethics & Professional Responsibility, 29 UCLA L. REV. 67, 69 n.4 (1981).

n146 By far the most important of these advisory opinions are those issued by the American Bar Association's Committee on Ethics and Professional Responsibility and published in the American Bar Association Journal. See Finman & Schneyer, supra note 145, at 71 (stating that these opinions are distributed to "approximately half the practicing bar in the United States" and are "frequently cited by courts and . . . by state and local ethics committees, and in treatises and law school casebooks" (footnote omitted)).
n147 See id. at 83-88 (citing numerous instances in which disciplinary committees, regulatory agencies, and courts have relied on opinions by the ABA Committee on Ethics and Professional Responsibility).

n148 See MODEL CODE, supra note 7, DR 5-105(D) ("If a lawyer is required to decline employment or withdraw from employment under a Disciplinary Rule, no partner or associate, or any other lawyer associated with him or his firm may accept or continue such employment.").


n150 By their very nature, the Committee's opinions are both tentative and nonbinding and thus generally open to revision or contradiction. See R. ABEL, supra note 92, at 157 ("[E]thical opinions were binding on disciplinary authorities in only five out of thirty-three states."); Comment, The State Advisory Opinion in Perspective, 44 FORDHAM L. REV. 81, 82 & n.8 (1975). Even when the opinions do bind bar counsel, they cannot bind courts or other authorities that may ultimately pass on the question discussed in the opinion.


n152 Putting to one side the insightful substantive suggestions that have been (and doubtless will continue to be) made as part of this effort, the mere fact that the Restatement centralizes for the first time all aspects of a lawyer's professional responsibility is a significant accomplishment in itself.

n153 See, e.g., A. KAUFMAN, supra note 52, at 212-13 (noting conflicts in the Model Rules between the language of the general provisions and their accompanying commentary).

n154 For example, the ALI draft provides two illustrations of the rule which permits a lawyer to disclose confidential information to the extent necessary to defend herself against a charge of wrongdoing. See Council Draft No. 2, supra note 151, § 116, at 82. The first example involves a lawyer who discovers that the Securities and Exchange Commission is about to sue her for securities law violations in connection with her work on behalf of a client. The illustration concludes that the lawyer is entitled to disclose confidential information to the government for the purpose of exonerating herself. No mention is made of notifying the client prior to making the disclosure. The second illustration, by contrast, as well as commentary from a different section of the draft, seems to require that "the lawyer must if feasible inform the client that the lawyer is contemplating making . . . a disclosure." Id. at 90. Given that there is no indication why it was not "feasible" to inform the client in the first case, the illustration clarifies much less than it first appears.

n156 I have elsewhere defended at length the importance of increased enforcement for the development and elaboration of professional norms. See D. Wilkins, supra note 93.

n157 FED. R. CIV. P. II; cf. MODEL CODE, supra note 7, DR 7-102(A)(2) "[A] lawyer shall not . . . knowingly advance a claim or defense that is unwarranted under existing law . . . [or cannot] be supported by a good faith argument for an extension, modification, or reversal of existing law.").

n158 It has often been said that for many lawyers, the only limitation on zealous advocacy was the "straight face" test. If a lawyer could "make a statement" to the judge (or to the opponent) with a straight face, it was justified. D. LUBAN, supra note 72, at 16.

n159 See AM. BAR ASS'N, SANCTIONS: RULE II AND OTHER POWERS I (1987) [hereinafter RULE II SANCTIONS] (noting that as of 1987 there had been approximately 564 reported cases and numerous unreported cases interpreting the rule).

n160 FED. R. CIV. P. II, see also RULE II SANCTIONS, supra note 159, at I (culling from published opinions a catalog of acceptable and unacceptable lawyer conduct under such headings as "Reasonable Inquiry," "Improper Purpose," and "Frivolous or Groundless Papers"). Such a catalog would never have been possible before the adoption of the amended rule.

n161 By placing this enforcement tool in the hands of judges as opposed to private lawyers or even bar officials, rule II has fleshed out the practical meaning of these norms in a manner that places a greater emphasis on public commitments. For an extensive discussion of this phenomenon, see D. Wilkins, supra note 93.

n162 See, e.g., S. KASSIN, AN EMPIRICAL STUDY OF RULE II SANCTIONS 17-20 (1985) (presenting evidence indicating that judges disagree about the proper application of the amended rule); Burbank, The Transformation of American Civil Procedure: The Example of Rule II, 137 U. PA. L. REV. 1925, 1930 (1989) (observing that "there is a conflict between or among circuits on practically every important question of interpretation and policy under the Rule").

n163 See, e.g., Burbank, supra note 162, at 1938.

n164 See id. at 1951.

n165 For a thoughtful discussion of the many ways that universal procedural norms enacted in the name of efficiency systematically disadvantage the poor and racial minorities, see Yamamoto, Efficiency's Threat to the Value of Accessible Courts for Minorities, 25 HARV. C.R.-C.L. L. REV. 341 (1990).

n166 See Gordon, supra note 8, at 20 ("If clients really . . . treated all legal rules simply as the prices of misconduct discounted by the probability of their enforcement -- and kept consiglieri on the payroll to drive up the costs of detection and enforcement, the rich clients alone could rapidly exhaust the resources of most public agencies and civil adversaries.").
n167 See D. LUBAN, supra note 72, at 51 (arguing that rule II "has been used frivolously as a litigation weapon"); see also Indianapolis Colts v. Mayor & City Council of Baltimore, 775 F.2d 177 (7th Cir. 1975) (imposing rule II sanctions for the frivolous use of rule II).

n168 Although it is not logically required that lawyers have such a role, "it turns out that it is very difficult to manage" even the most skeletal legal system "without some notion that lawyers must be committed to helping to maintain the legal framework." Gordon, supra note 8, at 17.


n170 See, e.g., Gordon, supra note 8, at 23 (advocating purposivist lawyering); see also Garth, Independent Professional Power and the Search for a Legal Ideology with a Progressive Bite, 62 IND. L.J. 183, 214 (1986) (discussing alternative methods of combining professional rules and social commitments and their limitations). This theme relates to, but can be distinguished from, the claim that lawyers should conform their conduct to the dictates of common morality independent of the requirements of law. See supra note 131 (discussing the argument that morality should replace law as the boundary between acceptable and unacceptable conduct). William Simon, for example, is quite adamant about distinguishing his approach from what he refers to as the "specious" characterization of proposals advocating a reduction in the level of partisanship as substituting morality for law. Simon, supra note 58, at 1114-15, 1119-20. Other theorists, such as David Luban, appear to argue for both positions. Compare D. LUBAN, supra note 72, at 18-20 (arguing that lawyers should not manipulate the law in ways that defeat its "purpose or spirit") with id. at 49 (linking the previous argument "to a moral commitment not to undermine the generality of the law").

n171 The claim that lawyers should pay more attention to the distributive consequences of their actions has important roots in realist thought. Many of the original realists linked the choice of legal rules to the overall social distribution of wealth and power and urged judges and legislatures to take corrective action. See, e.g., Cohen, supra note 22, at 842 (urging that judges "frankly assess the conflicting human values that are opposed in every controversy, appraise the social importance of the precedents to which each claim appeals, [and] open the courtroom to all evidence that will bring light to this delicate practical task of social adjustment"); Hale, Bargaining, Duress and Economic Liberty, 43 COLUM. L. REV. 603, 628 (1943) (asserting that legal limitations should be placed on the bargaining power of the economically advantaged to enable the "economically weak" to attain greater freedom of contract); Hale, Law Making by Unofficial Minorities, 20 COLUM. L. REV. 451, 455 (1920) (arguing that the distribution of wealth results from the "relative power . . . of various individuals and groups" which in turn "is derived from the law's . . . blind and haphazard distribution of favors and burdens"). See generally Singer, supra note 2, at 477-94 (summarizing the realist critique of the position that economic advantage is the product of a self-regulating market independent of legal control). Given this heritage, it is not surprising that some current proponents of purposive advocacy have expressly linked their proposals to legal realism. See, e.g., Simon, supra note 58, at 1125 (linking the discretionary approach to the "twin lessons of legal realism").

n172 Gordon, supra note 8, at 23.

n173 Although purposivism has always been a part of legal ethics, it has often been equated with allegiance to the boundary claim. See id. at 24 (arguing that purposivism has always had to compete with partisanship and the even less public-spirited "market model" of the lawyer's role). This tension simply reflects the competing paradigms incorporated in the current system of professional regulation. See supra p. 479.
n174 There will be occasions, however, when the policies underlying a given rule are clearer than the words themselves. Take, for example, the *Anatomy of a Murder* tactic. One can make a plausible claim that this tactic is not expressly forbidden by the relevant rules against "knowingly" assisting in client perjury. See *supra* p. 500. It would be much harder, however, for a lawyer using this tactic to claim that he was not undermining the purposes of the perjury rules by tacitly helping the client to present false testimony.

n175 Gordon, *supra* note 8, at 23.

n176 The rules might specify what actions should be taken in particular circumstances -- for example, disclose all adverse facts and legal precedent during negotiations, see Rubin, *A Causerie on Lawyers' Ethics in Negotiation, 35 L.A. L. REV. 577, 592 (1975)* (arguing in favor of broad disclosure during negotiation), or never plead the statute of limitations if your client has informed you that the underlying claim is valid, see 2 D. HOFFMAN, A COURSE OF LEGAL STUDIES 754 (2d ed. 1836) ("I will never plead the Statute of Limitations . . . if my client is conscious he owes the debt . . ."). On the other hand, these rules might address questions of interpretation: do not assert any position unless you can cite three cases from the controlling jurisdiction that support your position or unless you certify in writing that you believe your position has a better than 50% chance of being upheld if challenged in a specified court of competent jurisdiction. I consider this later type of rule below. See *infra* pp. 521-22.

n177 Simon, *supra* note 58, at 1090.

n178 Over the years, both rules-based and standards-based proposals have been made. The most prominent example of a rules-based approach to purposivist lawyering is Judge Marvin Frankel's proposals for truth-focused advocacy. See Frankel, *The Search for Truth: An Umpireal View, 123 U. P.A. L. REV. 1031, 1052-59 (1975)*. William Simon is the most prominent proponent of standards in this context. See Simon, *supra* note 58, at 1090-1119.

n179 Along with Simon, David Luban's model of moral activism stresses the importance of allowing individual lawyers to determine whether generally accepted role obligations should be followed in particular cases. See D. LUBAN, *supra* note 72, at 128-47 (describing the "fourfold root of sufficient reasoning" that individual lawyers should use in deciding whether to take particular actions on behalf of clients).

n180 See, e.g., Simon, *supra* note 58, at 1084 (noting that "throughout most of the discussion I do not distinguish between ethical analysis relevant to a regulatory body promulgating rules of professional conduct and analysis relevant to an individual lawyer operating within the limits of promulgated rules"); see also D. LUBAN, *supra* note 72, at 138-39 (arguing that the "fourfold root structure" is equally useful to both individual lawyers and legislators). Both Simon and Luban acknowledge that the two perspectives may diverge. See Simon, *supra* note 58, at 1133 ("A regulatory authority might conclude that in one or more areas only categorical norms would be practically enforceable."; see also D. LUBAN, *supra* note 72, at 158 ("I do not wish to decide whether a rule should require or merely permit a lawyer to forego morally objectionable tactics."). Nevertheless, both express a strong preference for a regulatory structure that confers substantial discretion to individual lawyers. See Simon, *supra* note 58, at 1132 (expressing the general view that disciplinary rules should establish only "rebuttable presumptions" governed by a general standard of "good faith [and] minimal competence"); see also D. LUBAN, *supra* note 72, at 159 (suggesting that rules should generally "allow lawyers to forego immoral tactics or the pursuit of unjust ends without withdrawing, even if their clients insist that they use these tactics or pursue these ends").
This form of reasoning is strikingly similar to the claim discussed above that legal realism has the same meaning for lawyers as it does for judges. See supra pp. 475-76. Indeed, Simon makes both claims simultaneously. See infra note 203.

My thinking about the differing perspectives of individuals and system designers was greatly influenced by A. Applbaum, Administrative Ethics from the Inside Out: Agent-Relative Reasons and Adversary Roles 19-21 (1989) (unpublished manuscript on file at the Harvard Law School Library), which argues that moral reasons sufficient to justify action from the perspective of system designers may not be sufficient to justify actions by specific individuals.

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n183 See Frankel, Book Review, 43 U. CHI. L. REV. 874, 880 (1976) (arguing that "[l]awyers face many [ethical] issues of a subtle or highly exceptional character" that require careful attention to the facts of the particular case).

n184 As David Wasserman argues:

Once the legislator has done her best, her job is complete. In contrast, the role agent still must decide whether to perform the morally dissonant acts required of her. The fact that her role was designed to keep such acts to a minimum will not help her decide; all that matters is the good or evil she will now achieve by conforming or breaking with that role.


n185 Even those who argue that lawyer discretion should be tightly constrained concede that conscientious objection at the point of application is always an option, even in the face of a rigid rule. See Pepper, supra note 12, at 632-33. Nevertheless, a standards-based approach to professional ethics certainly invites the individual decisionmaker to pay even more attention to the facts of the particular case.

n186 See A. Applbaum, supra note 182, at 20 (arguing that individuals must always act based on reasons that are sufficient given the unique position that they occupy at the moment of decision).

n187 See generally Rawls, Two Concepts of Rules, 64 PHIL. REV. 3 (1955) (arguing that social institutions must be justified by their long-term benefits and not by their ability to generate appropriate results in a particular case).

n188 See D. LUBAN, supra note 72, at 118 (discussing the importance of social policies such as predictability and regularity).

n189 See A. Applbaum, supra note 182, at 27 ("I trust myself to do what is good from where I stand more than another can trust me to do what is good from some other stand.").

n190 This is close, though perhaps not identical, to the system proposed by Simon. See Simon, supra note 58, at 1090.
n191 See id. at 1097-98 (arguing that under his approach, a lawyer should treat the requirements of procedural regularity, institutional competence, and professional role as "weak presumptions" that should be abandoned when they will not produce legally correct outcomes in the case at hand).

n192 The example is adapted from Simon. See id. at 1098.

n193 See Wasserman, supra note 184, at 399 (arguing in response to Luban's proposal that lawyers refrain from conduct violating common morality that "[w]hile it may seriously compromise the adequacy of criminal defense if every criminal attorney were to reveal her client's confidences . . . the impact of this decision on the 'institutional task' of adversary criminal defense would be negligible" (emphasis in original)).

n194 See supra Part II, pp. 478-99.

n195 See A. GOLDMAN, supra note 131, at 150 (noting that a system that depends on lawyers to act based on their own good faith moral judgment cannot be enforced "in its full generality since lawyers can always claim that their moral perception did in fact guide their action"). This will not always be the case. Sometimes, the record will conclusively demonstrate that the lawyer did not make a good faith attempt to produce a legally correct result despite her ability to create a plausible justification for what she did. For example, in the welfare case, there may be evidence that the lawyer has taken kickbacks from her client or that she has written an article repudiating the view that natural law or rejected constitutional interpretations are legitimate grounds for refusing to obey positive law.

n196 The analogy that is sometimes drawn between the current use of discretionary norms in the area of common law malpractice and the kind of standards-based system of professional regulation discussed in text is therefore inapt. See Simon, supra note 58, at 1127 (making this analogy). Although the negligence standard currently used in malpractice cases (did the lawyer act in good faith and with ordinary care?) is defined in general terms, the substance of what is being protected is fixed. Malpractice actions protect clients from substandard performance by their lawyers. Questions of institutional competence and professional role are therefore not open to debate. The lawyer cannot, for example, defend on the ground that although she failed to follow the client's instructions, she believes in good faith that lawyers are not required to do so in situations in which adhering to the normal role obligation would lead to a result that was contrary to the lawyer's view of natural law. This kind of role-related or institutional competence defense is sanctioned by the system discussed in the text. Allowing these arguments, however, transforms a "good faith" standard from an effective tool for encouraging individual lawyers to conform their conduct to both the letter and the spirit of the rules, as it is in the malpractice area, into a device used by lawyers to evade those responsibilities.

n197 As Deborah Rhode has noted, "[u]nder prevailing practices, competitive disadvantage too often attends socially desirable conduct." Rhode, supra note 16, at 641. As a result, "few attorneys could be expected" to act according to individual ethical assessments "unless virtually all were compelled to do so," something a standards-based system cannot guarantee. Osiel, Lawyers as Monopolists, Aristocrats, and Entrepreneurs (Book Review), 103 HARV. L. REV. 2009, 2016 (1990).

n198 See supra pp. 487-88.

n199 Even Simon acknowledges that lawyers may "differ widely" about the proper approach to ethical questions. Simon, supra note 58, at 1122.
n200 See Nelson, Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm, 37 STAN. L. REV. 503, 520 (1985) (concluding that although lawyers in large firms "may not be a mere extension of [their] corporate clients, the moderate views of this elite are quite compatible with the maintenance of their clients' favorable position in society").

n201 The only situation in which it seems likely that lawyers will feel routinely free to contradict the wishes of their clients is when the client is powerless, uninformed, or otherwise unable to protect his own interests. These, however, are precisely the clients who most need the protection by professional codes of conduct.

n202 See supra p. 493.

n203 See Kennedy, Form and Substance in Private Law Adjudication, 89 HARV. L. REV. 1685, 1706-07 (1976) (arguing that broad standards can lead to increased compliance in situations in which the costs of monitoring are low or nonexistent). Thus, the analogy to the discretionary power given to judges is unpersuasive. See Simon, supra note 58, at 1091 (analogizing his approach to legal ethics to the discretionary authority given to judges and prosecutors). In each of these areas there exists a fairly sophisticated set of institutions designed to ensure that the judgments of these other actors are exercised within reasonable bounds. Judges are generally required to act in public, provide interested parties with opportunities to present arguments, and decide on the record; they are expected to write opinions that can be reviewed on appeal and in the court of public opinion. See, e.g., Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 592 (1980) (Brennan, J., concurring) ("[P]ublic access to court proceedings is one of the numerous 'checks and balances' of our system, because contemporaneous review in the form of public opinion is an effective restraint on possible abuse of judicial power." (quoting In re Oliver, 333 U.S. 257, 270 (1948)); Minow & Spelman, Passion for Justice, 10 CARDOZO L. REV. 37, 50 n.55 (1988) ("Even when judges are not elected, some call for public accountability also accompanies the usual list of judicial tasks."). Although the promise of accountability and review is often more apparent than real, see Resnik, Managerial Judges, 96 HARV. L. REV. 374, 403-13 (1982) (arguing that judges often act in private and off the record in pretrial conferences and settlement negotiations), our acceptance of discretionary judgment in these areas cannot be separated from the institutional checks and balances within which it is supposed to be exercised.

n204 See, e.g., D. LUBAN, supra note 72, at 154-55 (arguing that lawyers are morally accountable for both the means used and the ends achieved).

n205 For example, even under the traditional model, a lawyer may decline employment on the ground that she believes that the client's cause is unlawful or immoral. See Fried, The Lawyer as Friend, 85 YALE L.J. 1060, 1078 (1976) (defending the lawyer's right to decline employment for any reason). Resignation is also possible. See MODEL RULES, supra note 3, Rule 1.16(b)(3) (allowing a lawyer to resign if the client "insists upon pursuing an objective that the lawyer considers repugnant or imprudent").

n206 See A. Applbaum, supra note 182, at 36 (arguing that "we should expect to encounter situations where, from an impartial standpoint, a policy of restricted deliberation and role-differentiation is for the best, but the actors who are to perform in such roles do not have good enough moral reasons to do so"). This too is not without precedent. The traditional model instructs lawyers in their "public" capacity as law reformers to remedy defects in the law that they are expected to exploit in their "private" representation of clients. Unlike the "schizoid" objectives of the traditional model, however, in this case both individual lawyers and system designers are pursuing the same goal: good faith judgments about what actions will, all things considered, best
support the goals of purposive lawyering. The resulting difference is simply a function of the differences in perspective.

n207 See Galanter, supra note 14, at 147 (arguing that generality at the level of formal rules inevitably produces "diversity and particularity at the operative level").

n208 For example, the universal prohibition against soliciting clients may be given a very different construction by plaintiffs' personal injury lawyers, who might contend that traveling to the scene of a mass disaster and proclaiming one's willingness to represent anyone needing assistance does not violate the rule, and by defense lawyers working for large law firms, who might conclude that the above actions are prohibited but also believe that sending glossy prospectuses of their firms to potential clients is not forbidden.

n209 Arguably, both of these fates have befallen the current rules of professional conduct. See, e.g., Nelson, supra note 200, at 543-44 (noting the increasing divergence between the stated commitment to autonomy from clients and the reality of lawyers' lives in large firms); Rhode, Class Conflicts in Class Actions, 34 STAN. L. REV. 1183, 1183 (1982) (arguing that the conflict rules provide little guidance to lawyers representing large and diffuse class actions); Yamamoto, supra note 165 (arguing that procedural reforms designed to discourage frivolous litigation may have the unintended effect of disadvantaging poor and minority claimants).

n210 I borrow the phrase from Dennis Thompson, who advocates a similar approach in the field of political ethics. See D. THOMPSON, POLITICAL ETHICS AND PUBLIC OFFICE 8 (1987).

n211 See Minow & Spelman, supra note 14, at 1630-31 ("When a rule specifies a context, it does not undermine the commitment to universal application to the context specified; it merely identifies the situations to be covered by the rule.").

n212 See, e.g., Finman & Schneyer, supra note 145, at 76 (arguing that ambiguity in the law of professional responsibility is "probably unavoidable," because "[a]ny code comprehensively addressing the issues of lawyers' professional responsibility must rely heavily on sound interpretation").

n213 Several provisions in the Model Rules turn on whether the lawyer is performing tasks connected with counseling or with advocacy. See, e.g., MODEL RULES, supra note 3, Rule 3.3(a)(3) (stating that in proceedings before a tribunal, a lawyer must disclose adverse precedent). Similarly, Model Rule 3.1 draws a subject-matter distinction between defense lawyers in criminal cases, who are entitled to force the government to establish its proof even though there is no nonfrivolous basis for doing so, and defense lawyers in civil cases, who must take only nonfrivolous positions. Finally, Model Rule 3.8 details special rules applying only to those with the status of "prosecutor."

The argument for acknowledging these distinctions starts from the fundamental premise of the adversary system: optimal legal outcomes are produced by the clash of partisan advocates before a neutral decisionmaker on a level playing field. To the extent that certain tasks (such as regulatory counseling, where there is no adversary or neutral decisionmaker present), subject matter (such as criminal law, where the playing field is acknowledged not to be level), and statuses (such as public prosecutors, for whom the adversary model fails to take into account the extraordinary public power of the role) do not conform to this model, special corrective rules are required.
n214 See, e.g., D. LUBAN, supra note 72, at 63 (distinguishing a "civil suit paradigm" and a "criminal defense paradigm").

n215 Distinctions based directly on lawyer or client characteristics are not unheard of in current practice. See, e.g., MODEL RULES, supra note 3, Rule 1.14 (providing special rules for those representing a client under a disability); cf. In re Primus, 436 U.S. 412, 422 (1978) (distinguishing lawyers, such as those working for the ACLU, who engage in litigation as a form of political activity from those working solely for pecuniary gain for the purpose of applying the rules against solicitation). A strong argument can be made, however, that these factors should receive more attention. Several comprehensive studies of the legal profession have concluded that client distinctions are the most important factor in determining a given lawyer's status, work, and professional commitments. See sources cited supra note 88. Similarly, there is growing evidence of a widening gap between the work experiences of lawyers who work in large, multi-city megafirms and those who practice alone or in small informal groupings. See supra note 88. Given their effect on lawyer decisionmaking, these contextual factors must become part of the regulatory process.

n216 D. LUBAN, supra note 72, at 156.

n217 See, e.g., Rhode, supra note 16, at 591 (arguing that the study of legal ethics requires exploration of both ideological and institutional context); Osiel, supra note 197, at 2011 (arguing that "current proposals for the reform of legal ethics cry out for sociological inquiry"). See generally Rosen, The Inside Counsel Movement, Professional Judgment and Organizational Representation, 64 IND. L.J. 479, 536-50 (1989) (discussing the importance of both institutional structures and ideological commitments to the ethical responsibilities of corporate counsel).

n218 Kennedy, supra note 203, at 1690 (describing the "jurisdictional" problems created by particular rules regulating different aspects of a problem).

n219 For example, is a lawyer who advises her client about how to present testimony at a public hearing before a government regulatory commission engaged in "litigation" or "counseling"? Is a lawyer whose client is being sued by a group of private plaintiffs for securities fraud governed by the "civil" or the "criminal" paradigm if the plaintiffs are cooperating with the government and the statute of limitations for criminal charges has not run? Is a lawyer temporarily working in the neighborhood legal services clinic of a large multi-city law firm governed by the rules applicable to "elite" or "non-elite" lawyers? A system of middle-level contextual rules must develop mechanisms for efficiently resolving these kinds of jurisdictional disputes; at the same time, such a system must not become so complex that lawyers who simultaneously occupy more than one relevant context cannot understand or follow the rules.

n220 Similarly, a regulatory system that acknowledges status distinctions would be subject to manipulation by parties such as retailers and other trade creditors who often have the option of being either plaintiffs or defendants. A middle-level approach must protect against this kind of instrumental manipulation.

n221 See J. HEINZ & E. LAUMANN, supra note 87, at 324.

n222 See id. at 114.
n223 See id. at 51-52 (arguing that "business tax . . . is probably the field that is most likely to be practiced within a separate, specialized department. . . . [P]ersonal tax -- like business tax -- appears to be a separate specialty that does not have a great affinity for any other field. . . .").

n224 Heinz and Laumann argue that the tax bar is divided into two relatively separate spheres: a "business tax" sphere, in which the lawyers tend to practice in firms larger than 10 lawyers or in corporate counsel offices, and a "personal tax" sphere, in which the lawyers typically practice either alone or in very small firms. Id. at 442-43.

n225 See B. WOLFMAN & J. HOLDEN, ETHICAL PROBLEMS IN FEDERAL TAX PRACTICE 2-4 (1985) (describing the tasks performed by tax lawyers in terms of four principle areas: compliance, controversy, planning, and tax policy).

n226 ABA Comm. on Professional Ethics, Formal Op. 314, reprinted in 51 A.B.A. J. 671, 671-72 (1965). In 1985, responding in part to the problems discussed in the text, the ABA modified this standard to require that a lawyer may only advise positions favorable to his client if he has a "good faith belief that the position is warranted in existing law or can be supported by a good faith argument for an extension, modification, or reversal of existing law." ABA Comm. on Ethics and Professional Responsibility, Formal Op. 85-352, reprinted in A.B.A. J., Nov. 1985, at 151, 151 [hereinafter Opinion 85-352]. Although this change is likely to have some positive effect, knowledgeable observers contend that it fails adequately to ensure that the lawyer complies with her public responsibilities. See, e.g., Harris, Resolving Questionable Positions on a Client's Federal Tax Return: An Analysis of the Revised Section 6694(a) Standard, 47 TAX NOTES 971, 974-75 (1990); Note, Formal Opinion 352: Professional Integrity and the Tax Audit Lottery, 1 GEO. J. LEGAL ETHICS 411, 423-25 (1987); B. Wolfman, Letter to IRS Director Leslie S. Shapiro, reprinted in 34 TAX NOTES 832, 833 (1987). Given that the new standard fails to specify what grounds would support the lawyer's claim of "good faith," these criticisms seem justified. See Levinson, Frivolous Cases, supra note 29, at 365-66 (noting that a "good faith" belief need not be grounded on any particular kind of authority). A task force report accompanying the new guidelines does indicate, however, that in order to meet the new standard, the lawyer must believe that there is "some realistic possibility of success if the matter is litigated." Opinion 85-352, supra, at 151.

n227 Harris, supra note 226, at 971; see also Eustice, Tax Complexity and the Tax Practitioner, 45 TAX L. REV. 7, 11-17 (1989) (discussing reasons for the tax system's complexity).

n228 Less than 2% of all tax returns are audited. See Harris, supra note 226, at 975 (noting that approximately 1.09% of individual returns filed in 1987 were audited). Even in the unlikely event a return is audited, the agent might not discover the disputed transaction. See Eustice, supra note 227, at 18.

n229 These results demonstrate one of the principal weaknesses of the use of advisory opinions. By viewing its task as simply interpreting how the universal norms embodied in the Canons should be applied to tax practice, the ABA Committee originally considering this question was unable to escape the basic framework of those rules -- a framework that systematically views legal advice from an adversarial perspective. As a result, Opinion 314 assumed "that the filing of a return is properly characterized as a submission in an adversarial proceeding, not unlike the filing of a brief or pleading in a civil case," despite the fact that in 98% of the cases the "other side" will never appear. Harris, supra note 226, at 975. Starting from this premise virtually assures that an appropriate balance will not be struck. See Falk, Tax Ethics, Legal Ethics, and Real Ethics: A Critique of ABA Formal Opinion 85-352, 39 TAX LAW. 643, 648-49 (1986) (criticizing the view that filing a tax return is part of an adversarial process); Note, supra note 226, at 427 (stating that filing a tax return does not place the taxpayer and the government in adversarial roles).
n230 ABA Report of the Special Task Force on Formal Op. 85-352, reprinted in 39 TAX LAW. 633, 638 (1986); see also B. WOLFMAN & J. HOLDEN, supra note 225, at 59 (arguing that the reasonable basis standard created an "audit lottery in which taxpayers who adopt aggressive -- doubtful, albeit reasonable -- positions rely for success not so much on their conviction that they will be able to prevail on the merits if challenged as on their firm knowledge that they have a 98% chance of never being challenged").

n231 See Notice of Proposed Rulemaking, 51 Fed. Reg. 29, 113 (1986) (proposing the new rule to be codified at 31 C.F.R. part 10). If a taxpayer insists on taking a position that is not supported by substantial authority, it must be disclosed on the return.

n232 See B. Wolfman, supra note 226, at 833 (distinguishing between "substantial authority" and "proper treatment," which requires a belief that it is more likely than not that the position would be upheld if challenged).

n233 Cf. Harris, supra note 226, at 972 (arguing that the substantial basis standard would be a significant improvement over the "realistic possibility of success" standard of Opinion 85-352, which sets the standard somewhere between 10% and 33%).

n234 See id. at 973 n. 12 ("[A]uthority is defined . . . to include only the following materials: provisions of the Internal Revenue Code and other statutes, Treasury Regulations . . ., court cases, administrative pronouncements . . ., tax treaties and related regulations, and Congressional intent as reflected in committee reports made by one of a bill's managers prior to enactment."). Specifically excluded are such commonly relied-upon sources as law review articles, opinion letters, and private letter rulings. See Holden, New Professional Standards in the Tax Marketplace: Opinions 314, 346 and Circular 230, 4 VA. TAX REV. 209, 239 (1985).

n235 Harris, supra note 226, at 974 n. 18.

n236 Several structural changes are possible. Lawyers could, for example, be made to put their opinions in writing and be required to reveal them if the client is audited. Or perhaps there could be random audits of lawyer advice, much in the same way that clients are themselves audited.

n237 Securities practice is the most obvious example. See J. HEINZ & E. LAUMANN, supra note 87, at 104-06 (describing the imputed characteristics of fields of law practice for securities lawyers and tax lawyers); LeDuc, An Evaluation of Recent Taxpayer Compliance Legislation and Future Options, 20 TAX NOTES 115, 122 (1983) (comparing efforts to regulate securities lawyers and tax lawyers).

n238 This does not mean that all of the proposals discussed in the tax context are necessarily irrelevant in the welfare context. The fact that the client is poor does not mean that the rules of professional ethics should allow lawyers to exploit indeterminacy for the purpose of frustrating the public purposes underlying the system. For example, a rational system of ethical rules probably should prohibit welfare lawyers from relying on either natural law principles or unaccepted interpretations of the Constitution to counsel their clients to take action that contravenes statutory purposes and is likely to evade review.

n239 As Galanter has perceptively argued:
Rule change is in itself likely to have little effect because the system is so constructed that changes in the rules can be filtered out unless accompanied by changes at other levels. . . . The system has the capacity to change a great deal at the level of rules without corresponding changes in everyday patterns of practice or distribution of tangible advantages.

Galanter, supra note 14, at 149.