

# Seeing the Forest *and* the Trees: The Proper Role of the Bankruptcy Attorney

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## INTRODUCTION

Everyone seems to be in the business of hating lawyers, or at least jeering at them. Lawyer jokes and cartoons abound.<sup>1</sup> Although some of the humor is well-meaning,<sup>2</sup> much of it hints at the public's disgust with a profession that can unabashedly argue both sides of a question with equal vigor and can show absolutely no interest in considering, let alone resolving, important moral or social issues.<sup>3</sup>

Part of the public's hostility toward lawyers may come from a sense that lawyers are just "hired guns" who fail to consider the long-term implications of how their strategies affect society.<sup>4</sup> This resentment depends, of course, on

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1. This Article is not a plea for written submissions for a future lawyer joke compilation. But, for lawyers, the collective sense of being detested by society comes in part from those times when they have been cornered by cocktail party guests wanting to tell them the latest jokes about their profession. *See, e.g.*, Gail Appleson, *ABA President Says Lawyers Don't Need PR Campaign*, REUTERS, Aug. 11, 1993 (including the American Bar Association ("ABA") president's complaint that "Jay Leno puts America to bed with jokes about us, movie audiences cheer as dinosaurs devour us and beer commercials show rodeo cowboys roping us.").

2. *See, e.g.*, THE NEW YORKER BOOK OF LAWYER CARTOONS (1993). For example, consider this old joke teasing lawyers about their literal-mindedness: A lawyer and her client are driving out in the country, and they see a flock of sheep grazing on a hill. The client says, "Those sheep are well-shorn." The lawyer replies, "At least on the side that we can see."

3. Of course, the public either does not see or does not care to recognize those many lawyers who pursue moral issues every day, both in their practice (such as poverty lawyers) or in their nonworking hours (for example, lawyers who volunteer to help AIDS victims navigate their way through the morass of social benefits programs). The bar organizations are busily trying to correct any misperceptions. *See, e.g.*, Marc Fisher, *Life Without Lawyers? Defenders' Study Says We'd Miss Them, Don't Laugh*, WASH. POST, July 8, 1994, at B1 (including the ABA image consultant's discussion of the ways in which the Association has tried to improve the image of lawyers); Tony Mauro, *Civics Lesson Shows Issues Lawyers Argue*, USA TODAY, July 11, 1994, at 1A (discussing the ABA's attempts to improve the image of lawyers). The fact remains that, in the public eye, lawyers are ranked somewhere slightly above evil scientists and significantly below Mother Teresa. Lawyers themselves are often none too happy with their chosen careers. *See, e.g.*, Judith L. Maute, *Balanced Lives in a Stressful Profession: An Impossible Dream?*, 20 CAP. U. L. REV. 797 (1992) (analyzing the causes for the anomie of modern American lawyers).

4. *See, e.g.*, David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye, Scholer*, 66 S. CAL. L. REV. 1147, 1155, 1167 (1993) (discussing the Office of Thrift Supervision's argument that the Kaye, Scholer lawyers should have been practicing "whole law" that took society's interests into account, not simply the litigation interests of their own client); *see also Developments in the Law—Lawyers' Responsibilities and Lawyers' Responses*, 107 HARV. L. REV. 1547, 1612-13 (1994) (discussing the "whole law" argument).

perspective: the client is usually not the one who complains that his lawyer was taking only the client's interests into account. The losing opponent (or the third party who is indirectly affected by someone else's vindication) is the one who complains. From this larger pool of disgruntled participants in the legal system, a sense emerges that those lawyers who further shortsighted, individual-focused goals are imposing a real cost on society by not taking a more holistic approach.

Yet, a system in which lawyers *only* practiced holistically would not be completely satisfactory either. Not only would clients search in vain for someone to advocate their particular positions, particularly if their positions conflicted with the presumed needs of other players in the system, but the holistic lawyers would have a difficult, if not impossible, time determining with certainty exactly what society's interests were. The holistic lawyers on the left would battle the holistic lawyers on the right, and the simple person-versus-person dispute would be reenacted, albeit on a larger scale.

Lawyers regularly strike happy mediums. Telling a client that he<sup>5</sup> should not continue to dump waste to the extent to which he has become accustomed, even though the regulations might permit such pollution, is a happy medium. So, too, is advising a client to work within a joint custody regime if that regime would be in the child's best interest. What lawyers do not have, however, is a systematic method of determining when and how to practice that happy medium. Ethics rules allow for some leeway in advising the client but, in large part, those rules concentrate on the zealous representation of a client who has already determined his own objectives based on his self-interest. If the client's goals seem too self-serving, a lawyer has little in the way of ethics rules to which she can point and say, "You must consider these extralegal issues in making your decision."<sup>6</sup>

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5. Like so many other writers, I have been struggling with the appropriate use of pronouns—the "he or she" debate. After some thought, I have decided to resolve the quandary by referring to a lawyer as "she" and to any other actor as "he," even though I know that there are male lawyers and female clients out there. Because I am a female lawyer, using "she" to refer to lawyers felt natural to me; because I wanted to give the word "he" some equal time, I made it the nonlawyer default pronoun.

6. "Extralegal" is not exactly the correct term, although it comes fairly close. The term is not correct because the word "legal" already connotes a way in which a society is (at least partially) ordered; therefore, "legal" and "social" are not mutually exclusive domains. The last thing that I would want to do is to create a "legal"/"social" dichotomy. Only if we define "legal" very narrowly, as that set of rules and precedents that gives a client some idea of what current behavior is permissible, does the term "extralegal" begin to capture the sense of being just a small portion of what a client may (or should) consider. I use the term in this more narrow sense.

Failing to keep extralegal interests in mind may be more than just a philosophical ethical dilemma. In some cases, that failure may constitute a crime. Joan Bainbridge Stafford, a deputy U.S. attorney in Chicago, describes several cases in which attorneys have engaged in unethical behavior while arguing that they were just fulfilling their clients' wishes:

[A]t the very least, what was true in each of the cases . . . [both] those resulting in criminal charges and those that did not, was that the attorney did not adequately recognize his obligation to the bankruptcy court and laws.

An attorney is bound to zealously represent his or her client. In the first stages of any bankruptcy, the attorney must even more zealously advocate disclosure and educate the client to the continuing obligations for disclosure which arise when one seeks to obtain the protection of the bankruptcy laws. He cannot afford to be simply an advocate for keeping his client's property. . . .

This Article examines the tension between a lawyer's obligation to represent, with zeal, her client's particular interests and her obligation to others who are affected by her client's decisions.<sup>7</sup> The professional responsibility literature abounds with debates attempting to resolve this conflict between a lawyer's duty of zealous representation and her duty, as an officer of the court, to ensure the fairness of the legal system.<sup>8</sup> I examine this question from the perspective of bankruptcy practice, not because bankruptcy lawyers are the only ones who are faced with this tension,<sup>9</sup> but because bankruptcy law presents one of the best examples of a system in which individual interests sometimes promote and sometimes detract from group interests.<sup>10</sup> Bankruptcy law, then, presents the ideal backdrop for discussing this debate over the lawyer's competing duties. In a bankruptcy case, some

Joan Bainbridge Stafford, "The Slippery Slope": *The Road from Ethical Practice to Attorney Negligence, Contempt or Fraud in Bankruptcy Cases*, in 1993 NATIONAL CONFERENCE OF BANKRUPTCY JUDGES 2-67, 2-69.

7. Several scholars have explored this difficult dilemma in legal ethics: the tension between a lawyer's obligation to represent her client zealously and her obligation to behave as an officer of the court. See, e.g., Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39 (1989); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988); Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951 (1991); Serena Stier, *Legal Ethics: The Integrity Thesis*, 52 OHIO ST. L.J. 551 (1991); Paul L. Haines, Note, *Restraining the Overly Zealous Advocate: Time for Judicial Intervention*, 65 IND. L.J. 445 (1990). The lawyer's obligation as an officer of the court is related to what I refer to as the lawyer's obligation to consider unprotected interests in advising her clients. That obligation is designed to assure that the system of justice does not break down based on one party's unfair advantage. See *infra* part I.B.2.

In reality, this problem is not one of dichotomy (a client's interest versus the interests of others), but one of degree along a continuum. A lawyer could represent her client by fighting vigorously over a small issue in a single representation; she could satisfy her client's long-term interests by strategically sacrificing the short-term ones; or she could *construe* her client's interests to be congruent with society's. See *infra* part I.B.2; see also Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 816 (1984) ("In one sense this moral dialogue is simply part of ascertaining the client's needs.").

Good lawyers are cognizant of all of the needs of their clients, not just the most obvious, short-term needs:

Alzheimer & Gray's [Melanie] Cohen represents financial institutions as secured creditors in large bankruptcies. Very often, she said, lawyers are so used to taking the opposite side, they never try to find out what the bank needs from the deal.

"If people did their homework and found out what the other side needs, maybe they could give the other side what they wanted without giving up anything," Cohen said. For example, the bank's legal position on the loan may not be based on that specific transaction but on its own internal regulatory needs or on its liquidity problems.

*The Fine Art of Negotiation*, BANKRUPTCY CT. DECISIONS WKLY. NEWS AND COMMENT, May 26, 1994, at A11.

8. For a partial bibliography of this topic, see generally Gaetke, *supra* note 7, at 76-82; Gordon, *supra* note 7, at 19-30; Lanctot, *supra* note 7, at 975-1012; Stier, *supra* note 7, at 556-609; Haines, *supra* note 7, at 458-69.

9. I do believe that bankruptcy lawyers are faced with certain unique problems. See generally Nancy B. Rapoport, *Turning and Turning in the Widening Gyre: The Problem of Potential Conflicts of Interest in Bankruptcy*, 26 CONN. L. REV. 913 (1994). Nevertheless, not every problem that a bankruptcy lawyer encounters is unique to bankruptcy law.

10. See John D. Ayer, *How to Think About Bankruptcy Ethics*, 60 AM. BANKR. L.J. 355, 386 (1986) ("My thesis is only this: *if and insofar* as the criticisms [regarding the excessive abstraction and tensions in the Model Code and the Model Rules] are just, there are aspects of bankruptcy practice that will aggravate the resulting problems.") (emphasis in original).

issues will be monitored closely by the bankruptcy court, which acts in some sense as a guardian of otherwise unrepresented interests. Many aspects of the case, though, will be resolved over the telephone or in hallways, with no official watchdog present. The relative degree of zeal that a lawyer may use on behalf of her client may depend on the particular situation, which in turn is created by numerous strategy decisions made by each of the various parties in interest.<sup>11</sup>

Some scholars resolve the debate about the lawyer's competing duties by exhorting lawyers to "do justice."<sup>12</sup> I agree with that resolution in principle, but I also find it too facile. Most of the time, justice is not an absolute concept; rather, it is a balancing act. Asking a lawyer to monitor third parties' interests at the expense of the interests of her own client is not a request that automatically furthers the cause of justice. This Article guides the lawyer in determining when she needs to pay particular attention to interests other than just those of her client.

As part of that guide, this Article highlights a particular facet of bankruptcy practice. For many participants, such as banks, a foray into bankruptcy law is not a one-shot experience. Banks may appear, usually as creditors, in thousands of bankruptcy cases each year. The role of "repeat" players in bankruptcy law makes a study of individual versus group interests even more compelling. For example, the individual interests of "repeat" creditors, along with their group interest as a conglomerate of creditors, create fascinating interactions with the other creditors in their cases and with other noncreditors. In this Article, I do not argue that bankruptcy lawyers should protect only group interests or protect only individual ones; rather, I intend to initiate an inquiry into the method by which attorneys can determine when and whether a group-focused or an individual-focused approach is appropriate.

Part I of this Article examines the issues that a lawyer faces in determining where her duty to her client lies, and then elaborates on the specific difficulties the bankruptcy lawyer faces. Part II takes the first cut at developing a theory for determining at which point, if ever, a bankruptcy lawyer should invoke group values in representing her client. Part III uses scenarios that often arise in bankruptcy cases to illustrate those situations in which a more group-directed focus serves individual interests well, and those situations in which focusing on individual interests does no harm to, and may even promote, group goals.

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11. Cf. Rapoport, *supra* note 9, at 914-25 (arguing that potential conflicts of interest in a given bankruptcy case will often be caused by various parties' particular strategy decisions at any one of a number of points during the case).

12. See William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1090 (1988) (arguing that "[t]he lawyer should take those actions that, considering the relevant circumstances of the particular case, seem most likely to promote justice").

## I. THE FOREST-TREES PROBLEM DEFINED

In coming to grips with my theory of how far lawyers should go in helping clients to consider other interests, I have had to wrestle with (mostly self-inflicted) accusations of having become the ultimate Pollyanna.<sup>13</sup> I want lawyers to remind their clients that long-term interests are not always satisfied by short-term victories and that the clients' own actions may affect others who may not be able to protect themselves. I also want clients to welcome such advice. I do not want lawyers, out of fear for their paychecks or their partnership draws, to provide legal advice that is barely justified by hypertechnical readings of the law,<sup>14</sup> and I do not want clients to dismiss lawyer after lawyer trying to find one who will accede to their selfish ends. I want lawyers to be their clients' consciences, at least when the clients' own consciences and the legal system are not operating to the fullest extent. The next section of this Article helps to identify those occasions on which a lawyer should intervene with extralegal advice.

### *A. The Problem Posed: When Should Lawyers Raise the Issue of Unrepresented Interests with Their Clients?*

When we think about an advocate-based system, we picture two equally skilled lawyers arguing their positions with bombastic rhetoric. Coupled with that scenario, we envision a factfinder who can wade through the rhetoric to find the most correct depiction of the truth and a judge who can balance the parties' interests, consistent with the appropriate rule of law.<sup>15</sup> Not all disputes, however, are resolved by this formal advocacy model.<sup>16</sup> Many are resolved in informal negotiations; others are resolved based on relative bargaining leverage. The more we depart from the formal advocacy model, the less certain we can be that everyone with an interest in the matter is represented.<sup>17</sup>

Consider, for example, the situation in which a corporate debtor owns a halfway house and is in default on its loan to a bank. The loan is secured by the property on which the halfway house is located. The bank may wish to foreclose on the property so that it may sell it and use the proceeds to satisfy

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13. Jiminy Cricket is another metaphor that comes to mind.

14. Or, at the very least, I do not want lawyers to give just that bare advice without commenting on the ramifications of following that advice.

15. See, e.g., Judith L. Maute, *Sporting Theory of Justice: Taming Adversary Zeal with a Logical Sanctions Doctrine*, 20 CONN. L. REV. 7, 13-14 (1987) (describing the traditional assumptions underlying the formal advocacy model).

16. Gordon, *supra* note 7, at 21 (questioning the assumption that some governing body will always be able to monitor and balance the parties' lawyers' zeal in the furtherance of fairness).

17. As Professor Robert Gordon points out, "[L]awyers' routine partisan activity on behalf of clients can—and in reality frequently does—do severe damage to the framework that alone makes their partisan role defensible." Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255, 260 (1990) (footnote omitted); see also Gordon, *supra* note 7, at 20 ("The difficulty with the [liberal advocacy ideal], as its critics have often pointed out, is that it is a recipe for total sabotage of the legal framework.").

the loan. Because the bank is not in the business of running halfway houses, it would want to sell the property as soon as possible. Even the most socially responsible bank cannot guarantee the tenants of the halfway house that the new owner will take good care of them or even that the new owner will continue to operate the property as a halfway house. The debtor is represented by counsel, as is the bank. Who speaks for the tenants?<sup>18</sup>

What about the trustee who is charged with abandoning any property of the estate that drains the estate's resources?<sup>19</sup> If that property is contaminated with toxic waste, then cleaning up the waste is likely to use most, if not all, of the debtor's assets. Abandoning the property does not solve the problem of cleaning up the waste; it merely shifts the problem from the estate to the taxpayers. In advising the trustee, should the lawyer take the taxpayers' interests into account, or are the taxpayers' interests already represented in the case?<sup>20</sup>

Take as a third example the situation in which all of the interested parties may be represented by counsel, but one party wants to take more than it needs: for example, a cash collateral stipulation<sup>21</sup> between the debtor and the secured creditor, which grants the secured creditor a security interest in all previously unencumbered assets. Such a stipulation may benefit the secured creditor, but it disadvantages the unsecured creditors, who were counting on at least some repayment from the unencumbered assets. At a hearing approving the stipulation, the unsecured creditors may be represented by counsel for the creditors' committee generally,<sup>22</sup> or a lawyer for an individual

18. Another example in the foreclosure genre is one that often occurs in reorganizations. A secured creditor may move for relief from the automatic stay to foreclose on an asset on the grounds of lack of adequate protection. See 11 U.S.C. § 362(d)(1) (1988). If the bankruptcy court finds that the debtor cannot provide adequate protection, then the secured creditor will be able to foreclose. What if that asset is necessary to the debtor's business and foreclosing on the asset means that the debtor will be unable to reorganize? From the secured creditor's perspective, the debtor could not justify retaining the asset without providing adequate protection. From the perspective of others associated with the debtor's business, such as the debtor's employees, a failed reorganization may mean that they lose their jobs, which will in turn create ripple effects throughout the local economy. See Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775 (1987) [hereinafter Warren, *Policy*]; Elizabeth Warren, *Bankruptcy Policymaking in an Imperfect World*, 92 MICH. L. REV. 336 (1993) [hereinafter Warren, *Policymaking*]. The Bankruptcy Code inhibits the over-greedy creditor in this situation from single-handedly destroying the debtor's prospects for reorganization. See 11 U.S.C. § 362(d)(2) (1988); *United Savings Assoc. v. Timbers of Inwood Forest*, 484 U.S. 365 (1988). But the creditor's lawyer should not necessarily have to be shown § 362(d)(2) before reconsidering the effect of the creditor's desire to foreclose. Depending on the secured creditor's presence in the local economy, the bank may have some extralegal reason to forestall foreclosure on its collateral. On the other hand, the secured creditor is probably one of many creditors hurt by the debtor's nonpayment of debt. Is foreclosing selfish, or is it just a reflection of the Darwinian notion that only the strongest businesses should survive?

19. See 11 U.S.C. § 554 (1988).

20. See *infra* notes 228-44 and accompanying text.

21. The Bankruptcy Code defines "cash collateral" as "cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents" in which a creditor has a security interest. 11 U.S.C. § 363(a) (1988). Due to the fungible nature of cash collateral (easy to spend and difficult to trace), the Bankruptcy Code provides that the debtor must obtain permission from a creditor to use its cash collateral. *Id.* § 363(c)(2)(A) (1988); see also FED. R. BANKR. P. 4001(d) (Supp. V 1994). Alternatively, the debtor may obtain a court order after notice and a hearing to use the creditor's cash collateral. 11 U.S.C. § 363(c)(2)(B) (1988); see also FED. R. BANKR. P. 4001(b) (Supp. V 1994).

22. See 11 U.S.C. § 1103 (1988).

unsecured creditor may object to the stipulation on behalf of that one creditor. The argument at the hearing will focus on whether the secured creditor is taking more than it needs and on how necessary the stipulation is to the debtor's reorganization efforts. In this scenario, which seems to fit the formal advocacy model, are any interests left unrepresented? If unrepresented interests exist, should attorneys for the represented parties consider those other interests in advising their clients?

My thesis is that the bankruptcy lawyer must remember, just as any other good lawyer should, that she really has two roles to fulfill when she represents her client. She is an advocate, but she is also a counselor, obligated to explore and explain the ramifications of possible strategies to her client. Moreover, she has a duty to the legal system as an officer of the court that she cannot forget.<sup>23</sup> In some situations, the fundamental assumptions that underlie the formal advocacy model break down. Not everyone whose rights will be affected is represented by counsel, and bargaining leverage sometimes triumphs even over those adversaries who are represented by counsel. The good bankruptcy lawyer must therefore walk a fine line between representing her client zealously and permitting her client to abuse the system. To walk that line, the lawyer must ask herself if some interests that will be affected have no voices of their own.

### *B. The Lawyer's Mandate*

Part of the fun of being a lawyer is the fact that everyday practice is far from monotonous. Each day a lawyer may play many different roles: litigator, negotiator, mediator, administrator. Even if her field of practice is very specialized (for example, a securities litigator), her various roles overlap. Litigators often need to counsel their clients, and corporate lawyers draft with an eye toward litigation should a dispute later develop. But because the roles overlap, the ethics rules that govern lawyer behavior send mixed signals about proper lawyer conduct.

Life would be considerably easier for lawyers if those responsible for creating the ethics rules were willing to commit to a fixed position when it comes to representing the client: should lawyers focus on clients' short-term wishes or on their long-term best interests (defined from a specific vantage)?<sup>24</sup> If an ethics rule said, "Thou shalt only give the client purely 'yes' or

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23. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4 (1992), reprinted in STEPHEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS: STATUTES AND STANDARDS 326 (1994) [hereinafter REGULATION OF LAWYERS] (governing attorney misconduct and regulating the type of conduct appropriate for an officer of the court); see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A) (1983), reprinted in REGULATION OF LAWYERS 357 (governing attorney misconduct in general); *id.* DR 9-101 (1983), reprinted in REGULATION OF LAWYERS 433 (regulating the avoidance of the appearance of impropriety); *id.* EC 7-19 to -39 (1983), reprinted in REGULATION OF LAWYERS 412-18 (various Ethical Considerations relating to the lawyer's duty to the adversary system).

24. But from which vantage? The client's economic vantage? The political vantage? Even the choice of the appropriate vantage is bound to be extremely fuzzy. As Professors Robert Kagan and Robert Rosen explain:

'no' advice in describing the legal environment and shalt not ask the client probing questions," at least lawyers would know that their professional behavior was so simply circumscribed. But the ethics rules do not define the role of lawyers so narrowly. In some sense, lawyers' ethics rules are context-based: they view a lawyer as a litigator, *or* a counselor, *or* a government employee, *or* some other characteristic that does not vary during the course of the specific representation.<sup>25</sup> Lawyers then take their cues from the ethics rules that fit their role at a given time. The first question necessarily is whether their choice of roles is an "either-or" decision. Nowhere is this dichotomy more apparent than in questioning whether, in representing clients in particular situations, lawyers must choose between being *either* advocates *or* counselors.<sup>26</sup>

### 1. Advocate *or* Counselor?

The ethics rules governing practice within a particular jurisdiction can come from many sources, but most are patterned after either the Model Code of Professional Responsibility ("Model Code") or the Model Rules of Professional Conduct ("Model Rules").<sup>27</sup> Although both the Model Code and the Model Rules recognize that lawyers play different roles in representing their

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Indeed, it is hard for a lawyer to know what is "right" or "socially responsible" when assessing whether his client should yield to a particular claim under antitrust, securities, foreign trade, or regulatory laws.

Given the imponderable value conflicts and factual issues at stake in such matters, the lawyers' retreat to the agnostic, client-serving conduit role is understandable.

Robert A. Kagan & Robert E. Rosen, *On the Social Significance of Large Law Firm Practice*, 37 STAN. L. REV. 399, 437 (1985) (footnote omitted).

25. See Wilkins, *supra* note 4, at 1153. Of course, this is not to say that lawyers cannot be litigators in one situation and counselors in another. Obviously, the dichotomy of the advocate/counselor roles is not absolute. Litigators can counsel their clients as to the wisdom of taking a particular position or course of action; counselors can behave as advocates for their clients' interests. Just because the dichotomy is not absolute, however, does not mean that it is meaningless. The most common ethics rules, though, do not really address the situation in which a lawyer has to be both litigator and counselor at once. *Id.* at 1155-56; see also Ayer, *supra* note 10, at 384 (remarking that the two primary criticisms of the Model Code and the Model Rules are that both are too abstract and too litigation-oriented); cf. Lawrence E. Mitchell, *Professional Responsibility and the Close Corporation: Toward a Realistic Ethic*, 74 CORNELL L. REV. 466, 481 (1989) (commenting that neither the Model Rules nor the Model Code pays a great deal of attention to the role of the corporate lawyer, and that the corporate lawyer's role is quite different from the litigator's role).

26. Professor Ayer has observed that all of the ABA versions of ethics rules create (or at least reinforce) a tension between a lawyer's obligations to her client and her obligations to "the system." Ayer, *supra* note 10, at 385. The ABA's Section of Legal Education and Admissions to the Bar has recognized that law schools must put forth more effort in training their students to recognize these twin obligations. See AMERICAN BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter NARROWING THE GAP].

27. Currently, 37 states have enacted some version of the more recent Model Rules, and most of the other states use some version of the earlier Model Code or a hybrid of the two. See Lawyers' Manual on Professional Conduct (ABA/BNA) ¶¶ 01:3-01:4 (1994).



clients, the precepts and the underlying assumptions of these ethics rules focus primarily on the role of the lawyer as advocate.<sup>28</sup>

The lawyer as advocate concentrates on presenting the client's case in the light most favorable to the client's interests<sup>29</sup> and has more of a descriptive role<sup>30</sup> than a prescriptive one. The lawyer as counselor, on the other hand, has the prescriptive role: she has the opportunity to interject some normative advice in dealing with the client. But the extent to which even she may give normative advice, as that precept is expressed most explicitly in Model Rule 2.1,<sup>31</sup> is unclear.<sup>32</sup>

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28. See Wilkins, *supra* note 4, at 1152; see also Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 672 (1978); James M. Altman, *Modern Litigators and Lawyer-Statesmen*, 103 YALE L.J. 1031, 1062-63 n.147 (1994) (reviewing ANTHONY T. KRONMAN, *THE LOST LAWYER* (1993)).

29. Here's the rub. Lawyers must struggle to determine how broadly to define their client's interests. Should they include extralegal factors in that definition? As Professor Jonathan Hyman points out, defining the concept of client "benefit" need not involve a purely financial analysis:

[T]he very act of carrying out a negotiation in the multidimensional fashion can change the content of "benefit" for the client. The client may obtain less money than the fiduciary method would produce, but more overall benefit. The very process of working towards an agreement in the multidimensional manner may enhance the relative value that the client sees in his other, nonfinancial interests, such as having the other side pay him serious attention, obtaining some recognition or respect from the other side, or simply feeling good by having been able to put a dispute behind him. The process of solving the problem can become part of the solution.

Jonathan M. Hyman, *Trial Advocacy and Methods of Negotiation: Can Good Trial Advocates Be Wise Negotiators?*, 34 UCLA L. REV. 863, 894-95 (1987); see also Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 731-32 (1987) (noting that the Model Code and the Model Rules both authorize the provision of extralegal advice, possibly out of a sense of paternalism designed to protect the client); *infra* part 1.B.2.

30. The Model Code views the litigator's role through the lenses of Canon 7 (zealous representation) and Canon 5 (independent professional judgment), with a nod in Ethical Consideration 8-5 to the lawyer's prohibition from defrauding a tribunal. See also MODEL RULES OF PROFESSIONAL CONDUCT Rules 3.1-3.9 (1992), reprinted in REGULATION OF LAWYERS, *supra* note 23, at 168-214. For the rules governing the role of lawyer as counselor, see *id.* Rules 2.1-2.3 (1992), reprinted in REGULATION OF LAWYERS, *supra* note 23, at 154-68. The Model Code does not contain a separate set of disciplinary rules for the lawyer as counselor, although various of its Ethical Considerations address that issue. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-7 to 5-10 (1983), reprinted in REGULATION OF LAWYERS, *supra* note 23, at 154-68, 392-93; *id.* EC 5-15, 5-17 (1983), reprinted in REGULATION OF LAWYERS, *supra* note 23, at 394-95; *id.* DR 5-105(B), 5-102, 5-103 (1983), reprinted in REGULATION OF LAWYERS, *supra* note 23, at 399-400; *id.* EC 7-3 to 7-5 (1983), reprinted in REGULATION OF LAWYERS, *supra* note 23, at 406-08; see also William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 82-83 (observing that although the Model Code tries to separate the roles of advocate and counselor, the distinction collapses because the Code places the ultimate decision of what legal actions to take with the client, whether the lawyer represents the client as advocate or as counselor).

31. The Model Code has "no direct counterpart" to Model Rule 2.1, although the Model Code's Disciplinary Rule 5-107(B) (providing that a lawyer has free rein in rendering legal advice, unencumbered by anyone else's constraints) and Ethical Consideration 7-8 (stating that advice can include non-legal considerations) both touch on this issue. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-107(B), EC 7-8 (1983), reprinted in REGULATION OF LAWYERS, *supra* note 23, at 154-55.

32. What happens if the client does not wish to follow the lawyer's extralegal advice? According to Model Rule 1.16(b), the lawyer may withdraw from representation as long as "withdrawal can be accomplished without material adverse effect on the interests of the client." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b) (1992), reprinted in REGULATION OF LAWYERS, *supra* note 23, at 138; see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(C) (1983), reprinted in REGULATION OF LAWYERS, *supra* note 23, at 380 (permitting withdrawal under certain circumstances,

Model Rule 2.1 provides that "[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations[,] such as moral, economic, social and political factors, that may be relevant to the client's situation."<sup>33</sup> The Comments to Model Rule 2.1 recognize that a counselor has a duty to convey to the client all of the factors relevant to the client's decision.<sup>34</sup> According to those Comments, that duty depends in part on the relative legal sophistication of the client: the more sophisticated the client, the less the lawyer is obligated to impart extralegal advice.<sup>35</sup> Advocates, on the other hand, do not generally have the same

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but those circumstances are severely constrained). Comment 7 to Model Rule 1.16 indicates that "[t]he lawyer . . . may withdraw where the client insists on a repugnant or imprudent objective." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16 cmt. 7, reprinted in REGULATION OF LAWYERS, *supra* note 23, at 140. The Model Code's EC 2-32, however, indicates that "[a] decision by a lawyer to withdraw should be made only on the basis of compelling circumstances." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-32 (1983), reprinted in REGULATION OF LAWYERS, *supra* note 23, at 369. To the extent that the lawyer can construe the applicable ethics rules to permit withdrawal in situations where the client does not want to take extralegal views into account, withdrawal can be a powerful tool. See Ellmann, *supra* note 29, at 717, 722-26 (noting that the threat of withdrawal has a significant coercive effect, although lawyers use that threat only in rare circumstances due to the way that the ethics rules are drafted). Ellmann argues that lawyers manipulate their clients by more subtle means much more often than they threaten to withdraw from representation. *Id.* at 726-33. The lesser manipulative action may be due to the implication of misconstruing the ethics rules on withdrawal: if the lawyer has withdrawn for an inappropriate reason, she could be liable for disciplinary action. Neither the Model Rules nor the Model Code explicitly permits withdrawal in situations where the moral views of the client and the lawyer are simply in conflict, with no "right" or "wrong" view. See Gordon, *supra* note 17, at 279 (explaining that under the ethics rules, lawyers "have no positive duty to urge compliance [with government regulations] or to go beyond 'purely technical advice' if that is all the client wants") (footnotes omitted). This lack of explicit permission to force the client to consider extralegal issues, in turn, hamstring the lawyer who wants to withdraw in such circumstances. Vague permissive authority to withdraw, without specific ethics rules enumerating extralegal disputes as a legitimate reason to withdraw, will be of small comfort to many lawyers. Gordon captures the flavor of the lawyer's dilemma:

Unless lawyers possess exceptional force of individual character, mere motivation [to think about the effect of actions on society as a whole], though indispensable, is not enough. Neither is exhortation enough. To have any real force, the norms of independent practice need to be authoritatively declared and promoted, acted upon by powerful lawyers, and institutionalized in elite legal practice.

Gordon, *supra* note 7, at 33.

Under the ethics rules, withdrawal may not be a viable option when the lawyer and the client disagree on extralegal considerations. Currently, the more common approach probably is to refuse the representation at its onset or to carve out the scope of the representation. But even carving out the scope of the representation is not always a useful solution. Most lawyers cannot anticipate all of the possible extralegal clashes that might ensue during a given representation. Therefore, even "scope" letters (purporting to leave open the possibility that the lawyer may withdraw from representation if a client-lawyer disagreement on extralegal issues later arises) may not suffice to protect the lawyer who has undertaken a representation and who wishes to press an extralegal issue in the context of the representation. I find neither withdrawal nor limitations in scope sufficient from an ethics point of view and would prefer, instead, to make the lawyer's duty to consider extralegal interests, in certain circumstances, more explicit.

33. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1992), reprinted in REGULATION OF LAWYERS, *supra* note 23, at 154.

34. See *id.* Rule 2.1 cmts. 2-4, reprinted in REGULATION OF LAWYERS, *supra* note 23, at 154-55.

35. As Comment 2 to Rule 2.1 explains:

Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely

freedom to raise extralegal considerations that counselors do.<sup>36</sup> Their job is instead to focus on prevailing in the dispute at hand, not on planning to avoid future disputes.

How solid, though, are these role distinctions? To be sure, there *are* differences between the two roles. The classic characterization of an advocate depicts her as taking the facts as the client gives them to her, but using her powers of persuasion to convince a tribunal that her client's position has the greater merit. The same classic school would paint the counselor as helping the client choose among several paths to create a future set of facts.<sup>37</sup> Often, the setting in which the roles are played out explains the difference between the two roles. Litigators have a tribunal available to sit in judgment and determine if their zealous advocacy has gone too far astray from the "truth." Counselors, on the other hand, have to play both advocate and tribunal

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technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

*Id.* Rule 2.1 cmt. 2, reprinted in REGULATION OF LAWYERS, *supra* note 23, at 154. Comment 3 also describes the sliding scale of the extent of extralegal advice. *Id.* Rule 2.1 cmt. 3, reprinted in REGULATION OF LAWYERS, *supra* note 23, at 154. The time for initiating the discussion of extralegal matters, however, is not well-defined: "[A] lawyer *may* initiate advice to a client when doing so appears to be in the client's interest." *Id.* Rule 2.1 cmt. 5, reprinted in REGULATION OF LAWYERS, *supra* note 23, at 155 (emphasis added).

Not everyone agrees with this sliding scale framework. It is not always true that legally unsophisticated clients are more in need of extralegal advice than are more experienced clients. As Professor Jennifer Brown points out, the sliding scale could just as easily work the other way around, with the more sophisticated clients having *more* capacity to consider extralegal advice than would the unsophisticated ones. See Jennifer G. Brown, *Rethinking "The Practice of Law"*, 41 EMORY L.J. 451, 464 n.58 (1992). Absent a more discerning manner for deciding when a client should hear extralegal advice, it would be better to have a general rule that provides for extralegal advice in all situations so that the lawyer does not have to make a judgment call as to her client's level of sophistication.

36. See Altman, *supra* note 28, at 1064. Professor Altman observes that one of the paramount principles of the litigator, that of the lawyer's nonaccountability for her client's objectives, is exacerbated by the exigencies of large law firm practice, although some public interest lawyers have been able to function within, and not apart from, the interests of the clients that they serve. *Id.* at 1064-65, 1069-70.

37. For a lucid discussion of the differences and similarities between the two roles, see Hyman, *supra* note 29. Hyman makes a strong case for what he terms a "multidimensional" approach to lawyering. *Id.* at 895. This approach is based in part on his perception of the classically accorded strengths and limitations of both the litigator and the counselor roles. *Id.* at 863-77, 921-23.

Part of his work includes an in-depth comparison of the two roles to test the hypothesis that the roles are mutually exclusive. He contrasts (1) the ways in which the roles develop facts (the advocate's set of "true facts" versus a more open-ended approach), *id.* at 897-905; (2) the ways in which the roles construe the applicable legal theory (developing a winning theory versus looking at the whole picture from various points of view), *id.* at 905-10; (3) the extent to which the two roles capitalize on procedure to push their position (*e.g.*, discovery, evidence issues), *id.* at 910-14; (4) the extent to which the two roles use psychological means to generate excess stress, *id.* at 914-15; (5) the extent to which the two roles focus on a single goal, as opposed to letting the goals develop as the information about all of the issues and interests develops, *id.* at 915-16; (6) the extent to which the solution tracks established legal rights, as opposed to other innovative solutions that might alter those rights, *id.* at 916-18; and (7) the extent to which the lawyer acts as the technician or as the extralegal counselor, *id.* at 918-20. Not all of these comparisons hit the mark each and every time, but they make for a good start in fleshing out the doctrinal distinction between the roles of advocate and counselor.

because no third party is there to inject a sense of fair play into the private deliberations between lawyer and client.<sup>38</sup>

Professor Murray Schwartz suggests one of the best analogies describing the difference between the two roles:

Should these expectations of lawyer behavior change when the arbiter is removed? A simple parallel may be found in an athletic contest such as a basketball game. When a game is formally refereed, our expectations of the players and coaches are very different than in a "pick-up" game. In the refereed contest it is the referee's job to spot the fouls, to interpret and apply the rules, and to decide who has won. We therefore expect the coaches and players to argue, to the extent permitted, those positions which are in their own best interests. The pick-up game, on the other hand, requires self-policing, since by definition there is no referee. If each team is adamant in adhering to its position in any controversy, the game cannot proceed. The teams and coaches must, therefore, exercise more restraint in the pick-up game than in the refereed contest.<sup>39</sup>

But the roles of the advocate and the counselor also share many characteristics.<sup>40</sup> Both roles require, among other things, an ability to use precise language in drafting documents, a clear understanding of the personalities of the various players, and a solid understanding of the client's own (expressed) needs. Litigators are not *always* in court; sometimes they plot strategy. Business lawyers are not *always* in conference rooms; sometimes they plan litigation.<sup>41</sup> Why then, do lawyers, especially those hired to litigate a case or "do" a particular deal, feel so constrained to fit within a particular role when interacting with their clients?

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38. Professor Murray Schwartz calls for separate ethics rules for advocates and nonadvocates precisely because of the absence of an impartial tribunal in the nonadvocate's world. Schwartz, *supra* note 28, at 671, 685-86, 690-97. Schwartz would like to see rules for the nonadvocate lawyer that prevent her from using the scorched-earth tactics of a litigator and that hold the nonadvocate lawyer morally accountable for the actions she takes on behalf of her client. *See id.* at 671. The advocate uses this principle of nonaccountability—of not being responsible for the client's objectives—in order to facilitate her zealous representation. *See id.* at 691. By holding the nonadvocate to different standards from those of the advocate, the absence of the tribunal in the nonadvocate's world is, at least theoretically, counterbalanced by the nonadvocate's self-monitoring of her actions.

39. *Id.* at 678; *see supra* note 25 and accompanying text. Another way of looking at the difference between the two roles is by studying the point at which the client has veto power over a more group-oriented (rather than client-oriented) focus. The advocate, in her zealous representation of the client, needs to ask the client's permission before embarking on a more group-focused plan, whereas the counselor, if she wishes, may start thinking about the issues in a group-focused way until the client tells her to concentrate on just his own interests. *See Hyman, supra* note 29, at 865, 876-77; *see also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 cmt. 4, *reprinted in* REGULATION OF LAWYERS, *supra* note 23, at 155 (allowing a counselor to initiate giving extralegal advice to the client); *cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1983), *reprinted in* REGULATION OF LAWYERS, *supra* note 23, at 409 (reminding the advocate that "[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"); Altman, *supra* note 28, at 1063.

40. Those commonalities that Hyman has found include: (1) a need to pay careful attention to the facts; (2) a need to understand not just what the parties are saying, but *how* they are saying it, and *why*; and (3) a need to create a way of thinking about the problem so that the structure of the analysis suggests the appropriate solution. Hyman, *supra* note 29, at 920.

41. *Cf.* Monroe H. Freedman, *Professionalism in the American Adversary System*, 41 EMORY L.J. 467, 469 (1992) ("[A]ll lawyers, and not just the advocate in the courtroom, necessarily function in the adversary system.").

We know that the ethics rules permit lawyers to give more than just legal advice. Ethics theory praises the lawyer who “refers not only to specific rules of black-letter law, but also to general principles of equity, fair dealing, and public policy in dealing with inchoate or potential legal problems.”<sup>42</sup> But the practice is often far different from the theory. For example, many lawyers in large law firms assiduously create complex tax avoidance arrangements, but to what end?

A good deal of “tax work” can be construed primarily as the restructuring of corporate transactions, fund transfers, and accounting methods solely to exploit legal loopholes—all entirely ethical conduct—but without any real concern for fundamentals of financial or economic efficiency. Consider also the countless hours spent by large firm lawyers on corporate takeover battles. The legal issues involved often seem to have become unhinged from serious issues of public policy and fairness. In these areas, the practice of law becomes a complex, advantage-seeking game, in which the lawyers’ goal is to outsmart the actual or potential opposition. The lawyers’ personal rewards come from the challenge of competition and the sense of being clever, and not from furthering justice or economic efficiency.<sup>43</sup>

Part of the difference between theory and practice may be caused by the ethics rules themselves, which tend to group decisions into the categories of “legal” and “business.”<sup>44</sup> The former is the purview of the lawyer, and the

42. Kagan & Rosen, *supra* note 24, at 410 (footnote omitted).

43. *Id.* at 421 (footnotes omitted).

44. Even the term “business advice” does not necessarily include advice on social or ethical issues. As Professor Robert Nelson discovered in a study involving lawyers in large law firms:

By far the leading reason for giving nonlegal advice (mentioned by 43.8% of respondents) is that a business decision is involved. . . . Very few of the responses suggest broader moral or social concerns. Only 2.4% of the respondents mentioned giving advice to address “public relations concerns,” the category that would seem to come the closest to concern for the public interest. These responses make clear that lawyers and clients typically come together on business, investment, or fairly narrow legal problems, and it is on those kinds of questions that lawyers and clients most often engage in open discussion. . . . When lawyers advise clients in a practical vein, questions of the greater good seldom arise.

Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503, 533-34 (1985); see also Stewart Macaulay, *Control, Influence, and Attitudes: A Comment on Nelson*, 37 STAN. L. REV. 553, 555-56 (1985) (listing several examples and one counterexample of lawyers using a scorched-earth litigation strategy without considering any larger social or moral values). But see Gordon, *supra* note 7, at 25 & n.78 (arguing that many clients want their lawyers to provide them with extralegal advice). Gordon explains, however, that many lawyers have not yet incorporated the concept of providing extralegal advice into their own personae:

The ideology of purposive lawyering [lawyering in such a way as to reconcile society’s interest in a fair legal system with the client’s own interests] has in one form or another prevailed among elite lawyers of this country since its inception—at least in their ceremonial rhetoric. But it has always had to compete with the advocacy ideal and with a view far less public-spirited than that ideal. That is, many lawyers (especially business lawyers) believe they have no special obligations toward or special capacity to recognize the public interest, that they are and should be business people whose sole task is to serve their clients’ interests. . . . This view, in short, challenges the image of lawyers as “republican” citizens having public duties with an image of them as private “liberal” individuals, contracting like every other market actor for their services.

*Id.* at 24 (footnotes omitted).

latter is the purview of the client.<sup>45</sup> That division is artificial. At the extremes, one can separate the concepts. Whether Wendy's International should make hamburgers or build bridges is a business decision, not a legal one; on the other hand, whether Wendy's should apply for a patent for the machine that turns out square-shaped hamburgers is a legal decision. At the margins, though, the legal and the extralegal blend together. For example, whether Wendy's should build a store on a site that formerly housed a chemical processing plant raises both business and legal concerns.

The various Wendy's hypotheticals demonstrate that the ethics rules make the separation of "business" advice from "legal" advice too facile a dichotomy. As a result, lawyers are not just uncomfortable with giving extralegal advice; many actually feel that giving extralegal advice is the antithesis of their job descriptions.<sup>46</sup>

Another explanation, beyond the possibility that the ethics rules are the primary cause of the cognitive dissonance between aspiration and practice, is that the market itself may have broken down. Clients are too busy pursuing short-term objectives to consider long-term goals,<sup>47</sup> and the last thing that they want to hear from their lawyers is that they should rethink their short-term objectives. At the same time, their lawyers prefer not to rock the boat and jeopardize a potentially lucrative practice by raising disconcerting moral questions.<sup>48</sup> Even if the client were inclined to provide information regarding long-term goals or to hear about extralegal considerations, the lightning speed at which many business decisions are made prevents the slow, reflective

45. See Kagan & Rosen, *supra* note 24, at 429.

46. See *id.* at 435-37 (stating that many of the lawyers interviewed by the authors felt that their role was to be "morally neutral"). But see *id.* at 439 (detailing lawyers' examples of some instances in which their advice went beyond the merely legal and their descriptions of a "sense of satisfaction" that came with giving that extralegal advice); Warren Lehman, *The Pursuit of a Client's Interest*, 77 MICH. L. REV. 1078, 1082 (1979) (arguing that "every lawyer has at some time dissuaded a client from some wasteful or destructive pursuit. . . . The occasions may be few, but they are sufficient to demonstrate that the simple instrumentalist view does not describe a necessary reality.").

The sad commentary is that the lawyers in the Kagan & Rosen study found their giving of extralegal advice to be the exception to the norm. Kagan and Rosen speculate that the structure of the large law firm does little to encourage moral discourse between lawyer and client. See Kagan & Rosen, *supra* note 24, at 440. The pressure from inside counsel to behave as lawyers-businesspeople, with outside counsel providing just legal expertise, exacerbates this problem. See *id.* at 441.

47. See generally Jeffrey N. Gordon, *Institutions as Relational Investors: A New Look at Cumulative Voting*, 94 COLUM. L. REV. 124, 125-26 (1994) (explaining the decrease in hostile takeovers); John Pound, *Beyond Takeovers: Politics Comes to Corporate Control*, HARV. BUS. REV., Mar.-Apr. 1992, at 83; William Taylor, *Crime? Greed? Big Ideas? What Were the 80's About?*, HARV. BUS. REV., Jan.-Feb. 1992, at 32; Otis Port et al., *Quality: Small and Midsize Companies Seize the Challenge—Not a Moment Too Soon*, BUS. WK., Nov. 30, 1992, at 66. As Professor Aleta Estreicher observes:

Managers may . . . sell valuable assets or abort investment projects that have little effect on current earnings and are undervalued by shareholders. Such actions may boost earnings but, had a longer horizon permitted projected long-term yields to materialize, shareholders would in fact have obtained a far greater return on their investments. The liquidity perspective of shareholders, as exacerbated by takeover threats, fuels this myopic process.

Aleta G. Estreicher, *Beyond Agency Costs: Managing the Corporation for the Long Term*, 45 RUTGERS L. REV. 513, 538 (1993) (footnotes omitted).

48. Lehman, *supra* note 46, at 1082.

atmosphere that should accompany extralegal deliberation.<sup>49</sup> At the heart of this market failure is the view, jointly held by client and lawyer, of lawyer-as-troubleshooting-technician, and not lawyer-as-overall-advisor.

Perhaps, though, the fault does not stem from client pressure to concentrate on purely technical matters. Lawyers who resist thinking of the larger social context when they go into practice might be “born” that way in law school. Law professors spend a fair amount of time incorporating the values of professionalism<sup>50</sup> in their classes, but students quite naturally also want to hear about the nuts and bolts of what lawyers *do*, especially as they plan to be *doing* whatever that is in approximately three years from the time they begin law school.<sup>51</sup> Being sentient humans, law students recognize that not every decision involves distributive justice or ethical dilemmas. From that recognition, many law students might extrapolate the view that *no* decision involves those issues. Meanwhile, law teachers can, all too easily, slough off the hard distributive questions by simply claiming them to be “business decisions” when the alternative—a full normative discussion—would take up too much class time.

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49. Kagan & Rosen, *supra* note 24, at 440-41.

50. See NARROWING THE GAP, *supra* note 26, at 4-8. A professional is much more than a simple technician. Kagan and Rosen decry the short-sighted view of lawyers as mere providers of technical legal services:

The professional does not simply take the task as given to him. . . . [T]hird-party and collective interests are significantly affected by the client's law-related decisions and directives. Hence corporate lawyers who pass up opportunities to act as influential and independent counselors, because corporate managers have not asked them to do so, would seem to be forsaking an important aspect of professionalism.

Kagan & Rosen, *supra* note 24, at 440 (footnotes omitted).

51. See generally John D. Ayer, *So Near to Cleveland, So Far From God: An Essay on the Ethnography of Bankruptcy*, 61 U. CIN. L. REV. 407, 408 (1992) (“[L]aw is one post-graduate discipline where the students are not training to do the same job as their teachers.”); Randy F. Kandel, *Foreword—Whither the Legal Whale: Interdisciplinarity and the Socialization of Professional Identity*, 27 LOY. L.A. L. REV. 9, 17 n.16 (1993) (“The gap between what law professors do and teach and what law students need to learn to be practitioners is both a recurrent and misunderstood concern.”); Gary S. Laser, *Educating for Professional Competence in the Twenty-First Century: Educational Reform at Chicago-Kent College of Law*, 68 CHI.-KENT L. REV. 243, 268-69 (1992) (discussing the contempt that classical legal education had for the “trade school” mentality); C. Joseph Nuesse, *Histories—The Thrust of Legal Education at the Catholic University of America, 1895-1954*, 35 CATH. U. L. REV. 33, 42 (1985) (comparing early legal education to trade schools); Rudolf B. Sehlesinger, *The Cornell Law School's Birth and Its March to Greatness: A Rambling Centennial Tribute*, 73 CORNELL L. REV. 1262, 1265 (1988) (“Everybody knows how those objectives were implemented at Harvard, where Eliot, within the first year of his presidency, hired Christopher Columbus Langdell as law dean and commissioned him to transform what was then an insignificant legal trade school into a true university law school.”); David S. Sokolow, *From Kurosawa to (Duncan) Kennedy: The Lessons of Rashomon for Current Legal Education*, 1991 WIS. L. REV. 969, 982 n.52 (“According to one pair of commentators, most professional law professors oppose skills training on the ground that they ‘are not running a trade school.’”) (quoting Edward J. Devitt & Helen P. Roland, *Why Don't Law Schools Teach Law Students How to Try Lawsuits?*, 13 WM. MITCHELL L. REV. 445, 457 (1987)); *Clinical Legal Education: Reflections on the Past Fifteen Years and Aspirations for the Future (Panel Discussion)*, 36 CATH. U. L. REV. 337 (1987) (discussing the feeling of many law students that, after three years of law school, they are woefully unprepared for practice); Christopher T. Matthews, Note, *Sketches for a New Law School*, 40 HASTINGS L.J. 1095, 1095 (1989) (“[B]y teaching only how to think, and not how to do, [law school] denigrates the profession it serves.”).

Legal education issues aside, the pressure to keep so-called business decisions separate from legal decisions has established a false dichotomy between the lawyer's roles as hired gun and as wise counselor. The time has come to collapse that dichotomy and develop a system in which good lawyers can do both at once.

## 2. Advocate *and* Counselor?

More and more people are calling for lawyers to behave as something other than mere hired guns. Within this movement, the question is not whether lawyers should provide extralegal advice, but what guidelines there should be for providing such advice.<sup>52</sup> The types of extralegal advice that lawyers could give fall along a continuum:

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Providing extralegal advice based only on the perceived long-term interests of the client	Providing extralegal advice based on the perceived interests of the client and the lawyer's own moral values	Providing extralegal advice based on the perceived interests of others not directly represented in the matter
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The more conservative/traditional view forms the left boundary of the continuum; the more radical view forms the right boundary. As the lawyer moves from left to right on the continuum, her role becomes much more difficult; although it may be possible for a lawyer to ascertain a client's long-term goals, philosophers and politicians have always struggled with defining society's interests.<sup>53</sup>

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52. As Professor David Luban puts it:

In brief, "client counseling" is an abbreviation for a morally activist vision of lawyering in which lawyers take it upon themselves to judge and shape client projects. This is in sharp conflict with the ethic of client loyalty, which combines extreme partisanship on behalf of the client with moral neutrality toward the client's ends and projects. It is often suggested that neutrality is indispensable, that a lawyer cannot be held morally accountable for her client's nefarious schemes. . . .

In fact, however, the principle of neutrality has come under vigorous attack in recent years, and in my view is completely discredited. . . .

David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 VAND. L. REV. 717, 738 (1988).

53. Another way to express the differences in lawyering styles is Professor Judith Maute's distinction between paternalistic and instrumentalist lawyers. Judith L. Maute, *Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct*, 17 U.C. DAVIS L. REV. 1049, 1050 (1984). The principle of nonaccountability drives the instrumentalist lawyers: the lawyers do the clients' bidding as a "gun for hire" without attempting to examine the client's extralegal concerns (let alone society's concerns). *Id.* at 1059. The paternalistic lawyer, on the other hand, abrogates the client's decision-making responsibility by calling all of the client's shots herself. *Id.* at 1058. If we were to try to locate either the instrumentalist or the paternalistic lawyers along my continuum, we could not. The instrumentalist lawyer eschews any responsibility for advising clients about extralegal issues (and would therefore fall off the left-hand side of the continuum). The paternalistic lawyer does not consult with her client at all and thus does not belong anywhere on the continuum. Like Maute, I feel the need



a. The Easiest Fit: Lawyering to Achieve the Client's Long-Term Objectives

Those ascribing to the view represented by the left-hand side of the continuum<sup>54</sup> sometimes describe the lawyer as a sort of legal psychotherapist: divining not just what the client says he wants but what the client subconsciously really wants.<sup>55</sup> The lawyer-as-psychotherapist model also contemplates that the lawyer will caution the client when the client is planning a short-term strategy that will result in long-term losses.<sup>56</sup> Whether or not all scholars on this side of the continuum agree with the psychotherapy model, all of them recognize that not every short-term tactic of the client furthers the client's long-term strategy, and that the lawyer's job is to ferret out those hidden needs in order to effectuate the client's true interests.<sup>57</sup> This side of the continuum, though, does not require the lawyer to evaluate her client's long-term goals specifically in light of the interests of others.<sup>58</sup> The lawyer still serves as the client's instrument and has no independent moral responsibility for the client's actions.<sup>59</sup>

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for an intermediate style of lawyering. Her image of a "collaborative joint venture," *id.* at 1059, 1066-69, is the type of interaction that I have in mind.

54. The remainder of part I.B.2 discusses the ideas of various scholars whose views on lawyer behavior represent certain points on the continuum. Grouping those scholars into particular camps of thought is a little inexact, and, to my knowledge, none of these scholars have elected to be associated with any given camp.

55. As Professor Deborah Rhode explains:

[M]any issues on which clients seek assistance inescapably require normative assessment. Client objectives are often multiple or indeterminate, and are shaped in part through dialogue with counsel. Analyzing potential liability or the merits of particular strategies will often demand more than "technical" judgments, and lawyers' own moral intuitions cannot help but color their decisions. To pretend otherwise misconceives an integral part of attorneys' counseling function. Particularly where clients' true "interests" are not self-evident, one of lawyers' greatest potential contributions lies in persuading individuals to act in conformity with their most socially enlightened instincts.

Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 623 (1985). Professor Menkel-Meadow makes a similar observation:

[U]nearthling a greater number of the actual needs of the parties will create more possible solutions because not all needs will be mutually exclusive [and therefore], because not all individuals value the same things in the same way, the exploitation of differential or complementary needs will produce a wider variety of solutions which more closely meet the parties' needs.

Menkel-Meadow, *supra* note 7, at 795 (footnote omitted).

56. See Peter Margulies, "Who Are You to Tell Me That?": Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients, 68 N.C. L. REV. 213, 221, 227-30 (1990) (asserting that lawyers should discuss the potential psychological effects of a proposed client action when that action could create a feeling of guilt or regret in the client or when the client himself needs psychological help).

57. See, e.g., Menkel-Meadow, *supra* note 7, at 793-94.

58. This assertion is true unless, of course, the lawyer *redefines* the client's legal interests to include such other interests.

59. This theory of nonaccountability is the first of what Professor William Simon describes as the four basic principles of his "Ideology of Advocacy." "Nonaccountability" is, in Simon's terminology, "neutrality"—the lawyer's detachment from the client's goals. The other three cornerstones of Simon's Ideology of Advocacy include the following: (1) partisanship (zealous representation); (2) procedural justice (the supremacy of the system of procedural rules over the results obtained); and (3) professionalism (separating legal specialists from the general public). Simon, *supra* note 30, at 36-38; see also

This broader view of lawyering to accommodate the client's long-term interests is an extension of the traditional view of lawyer-as-hired-gun. Under that more traditional view, the lawyer passed no judgment as to her client's desires or motives and simply went about the business of representing the client zealously. In turn, the lawyer was protected from allegations of immorality by the principle of nonaccountability, which held that as long as the lawyer was acting within legal bounds, the client's moral foibles were not imputed to the lawyer.

The principle of nonaccountability has a long history in advocacy theory.<sup>60</sup> Ask any criminal defense lawyer at a cocktail party why she persists in defending the guilty, and she will say something on the order of: "Because no one is free if the state is allowed to ride roughshod over people's rights." The justification that the lawyer is keeping the system honest by using every legal means at her disposal to represent her client zealously, under the watchful eye of an attentive tribunal, works best (if at all) in the criminal context.<sup>61</sup> In the civil context, the idea behind the principle of nonaccountability is that the formal advocacy model achieves justice when each side does its utmost to present its best case and the tribunal sitting in judgment ferrets out the truth, which is typically somewhere between the two parties' positions. Therefore, a lawyer in a civil action can bring an opposing party to tears as part of a zealous representation of her own client, and the lawyer's action, which would bring remonstrances in a social situation, are just part of the job in a legal setting.

As Professor Stephen Pepper explains the underpinnings of the nonaccountability principle,

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DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 50 (1988) ("It is to [the law of procedure] that the lawyer owes her primary allegiance, and, as it happens, it directs her to follow the principle of partisanship and the principle of nonaccountability."). Luban describes this principle of nonaccountability:

[T]he principle of nonaccountability is much broader than the claim that lawyers are not accountable to that particular moral obligation: it claims that, in representing a client, a lawyer is not accountable to any ordinary moral obligation that would constrain the means used or ends achieved in the representation.

This should remind us that very often what we find troubling about the behavior of lawyers is not that they are bending the law, but rather that in the course of representing a client they are committing other moral wrongs: helping the bad guys win or using means that are morally troubling.

*Id.* at 52. Luban, however, does not hold that the principle of nonaccountability is some form of neo-Platonic ideal. In fact, he argues throughout his book that this principle is false. *See, e.g., id.* at 56. In particular, Luban argues that, at best, the nonaccountability principle could only hold true (if ever) in an adversarial context and not in a counseling context. *Id.* at 57.

60. *See, e.g.,* Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3 (1951); Monroe H. Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U. L. REV. 191 (1978); Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613; Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665 (1994).

61. *See* Rhode, *supra* note 60, at 667-73 (describing the assumptions upon which the traditional "neutral partisanship" theory of advocacy rests).

Our first premise is that law is intended to be a public good which increases autonomy. The second premise is that increasing individual autonomy is morally good. The third step is that in a highly legalized society such as ours, autonomy is often dependent upon access to the law. . . . And while access to law—to the creation and use of a corporation, to knowledge of how much overtime one has to pay or is entitled to receive—is formally available to all, in reality it is available only through a lawyer. . . . Thus the resulting conclusion: First-class citizenship is frequently dependent upon the assistance of a lawyer. If the conduct which the lawyer facilitates is above the floor of the intolerable—is not unlawful—then this line of thought suggests that what the lawyer does is a social good.<sup>62</sup>

Pepper goes on to finish the link between individual autonomy and lawyer amorality: that having the lawyer interpose her judgment for that of the client would cut off non-lawyers' access to the law.<sup>63</sup>

There are many practitioners and academics who hold fast to the principle of nonaccountability. But several theorists (and I am one of them) find its underlying premises questionable at best and its conclusion shaky. For one thing, even if we favor unfettered autonomy of clients, providing clients with more information about the effect of their decisions—on themselves and on others—only facilitates their ability to make truly autonomous choices. In addition, ceding to the client the sole responsibility of making decisions of questionable morality robs the lawyer of her own autonomy as a moral actor. At the very least, then, the left-hand side of the continuum represents the beginning of a more meaningful dialogue between lawyer and client.

#### b. The Middle Ground: Lawyering to Accommodate Both the Client's Interests and the Lawyer's Own Interests

The middle part of the continuum adds a new twist to the lawyer's role: the lawyer must independently evaluate the client's actions and objectives in light of the lawyer's own ethical views. This obligation has both a practical and a philosophical genesis. The practical reason is straightforward: because lawyers are human, their views of right and wrong will color anything they do.<sup>64</sup> The

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62. Pepper, *supra* note 60, at 617 (footnotes omitted).

63. *Id.* at 617-18.

64. Specifically, Rhode asserts:

[I]ndividuals cannot market their loyalty, avert their eyes to the consequences, and pretend they have not made a normative decision. . . . To decline to take a moral stance is in itself a moral stance and requires justification as such. Thus the critical question is not by what right do lawyers impose their views, but by what right do they evade the responsibility of all individuals to evaluate the normative implications of their acts? Alternatively, by what right do clients circumscribe counsels' ethical duty?

Rhode, *supra* note 55, at 623; *see also* Gordon, *supra* note 7, at 73 (responding to the argument that lawyers should not interject their own moral theories when advising their clients by arguing, instead, that lawyers have an independent obligation as "licensed fiduciaries for the public interest, charged with encouraging compliance with legal norms," and that even if lawyers have no special duty to interject their own moral views, they have no special exemption from so doing either). Various lawyers have rejected the cognitive dissonance engendered by pretending that their own views of right and wrong do not matter. In comments at the beginning and end of a recent issue of the *American Bar Association*

philosophical reason is related to the practical one: pretending that lawyers do *not* have moral opinions is disingenuous and unfair.<sup>65</sup>

Several scholars have articulated a view of lawyering that encourages lawyers to bring their own principles to bear when they advise clients. Professor William Simon proposes a theory of nonprofessional advocacy in which the lawyer is not merely the hired gun of the client. For Simon, "the problems of advocacy [should] be treated as a matter of *personal* ethics."<sup>66</sup> The lawyer should not fall back on the excuse that "it's not *my* decision" to avoid having to address hard ethical questions; instead, she must recognize her own ethics and the ethics of her client, and she must determine how both sets of ethics relate to the issue at hand. As Simon recognizes, there is no such thing as a standard client with standard ethical views.<sup>67</sup> By forcing the lawyer and the client to discuss ethical considerations explicitly, the lawyer respects the client's individualism, and social norms receive their due.<sup>68</sup> Other scholars have endorsed this approach as being the very *least* that a good lawyer should do.<sup>69</sup>

Professor Stephen Ellmann, among others, wants even more. Instead of a philosophical dialogue in which both lawyer and client present their views as to the proposed ethics of a given action and then part ways if their ethical principles disagree, Ellmann envisions the type of interaction in which the

*Journal*, lawyers called for more of a link between lawyering and responsibility. See George E. Bushnell, Jr., *To Move the Nation Forward*, A.B.A. J., Sept. 1994, at 8 (including the ABA president's call for lawyers to take a leadership role in solving the country's problems); David R. Fine, *Law of the Nursery*, A.B.A. J., Sept. 1994, at 96 (asserting that lawyers must "view the law as John Locke viewed it, as a social contract into which we enter to avoid disorder, to provide certainty, and to maximize individual rights").

65. Rhode, *supra* note 55, at 622 ("That one is not paid to make such [normative] judgments does not generally operate as a moral excuse. The same is true for virtually every vocation outside the clergy.").

66. Simon, *supra* note 30, at 131 (emphasis in original).

67. See, e.g., *id.* at 52-53; see also Wilkins, *supra* note 5, at 1153.

68. See Simon, *supra* note 30, at 130-44.

69. For example, Menkel-Meadow has observed that the current ethics rules may hamstring this ethics-focused process by requiring a lawyer to represent her client zealously. Menkel-Meadow, *supra* note 7, at 814. Even if a lawyer does evaluate a proposed action in light of how that action could affect others besides her client, the lawyer must then consider the effect that *not* pursuing the action zealously could have on her obligations to her own client. *Id.* Menkel-Meadow suggests, in line with a proposal made by Murray Schwartz, that lawyers try a more problem-solving approach when giving advice. That approach would involve taking into account the parties' underlying needs, brainstorming creative solutions, and, at least for some lawyers, evaluating the inherent fairness of those solutions. *Id.* at 801-17. Menkel-Meadow states:

[L]awyer and client might simply ask each other what, if any, detrimental effect their solution has on themselves, the other party, third parties, or the larger society. No current rule requires the lawyer or her client to act on such a dialogue. However, in considering whether the negotiation problem has been solved in a way which meets the underlying objectives of the parties, asking such questions might prevent clients and lawyers from seeking objectives that they ought not or do not want.

*Id.* at 815 (footnotes omitted).

Should the lawyer and the client disagree over whether to take the proposed action, then even under current ethics rules, the lawyer has the option of withdrawing from the representation. *Id.* at 815-16.

lawyer attempts to persuade the client to agree with the lawyer's ethics.<sup>70</sup> He recognizes that the more lawyers press their own ethical views on their clients, the less autonomy the clients have; however, at the same time, he feels a real need for lawyers to provide more than just rote analysis of legal principles.<sup>71</sup> Simon, Menkel-Meadow, and Ellmann all represent a philosophy that urges the lawyer to assume some real responsibility for the client's actions; they differ primarily in the extent to which the lawyer should impose her ethics on those of her client.

### c. The Hard Line: Lawyering to Protect Unrepresented Interests

It is one thing to say to a client: "In my view, I don't think that what you want to do is right." It is another to say: "You must rethink your actions in light of what they are doing to others (or to a particular social goal)."<sup>72</sup> Some lawyers are reluctant to take the latter approach, possibly due to an unusual attack of modesty; after all, who are *they* to impose their views of social interests on others? But the fact remains that *someone* has to take that first stand against bad acts, and lawyers are no less qualified than anyone else to do so.<sup>73</sup> Numerous scholars have expressed the need for lawyers to shoulder their share of social responsibility.<sup>74</sup>

70. Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 GEO. L.J. 2665, 2709 (1993) ("Declining to rank client autonomy as automatically superior to other moral concerns, the caring lawyer could properly feel that she should try to reshape her client's decisionmaking rather than permit him to make a putatively independent, but uncaring, choice."). *But see* Ellmann, *supra* note 29, at 727-28 (suggesting that lawyers should avoid manipulative techniques when they provide clients with the information necessary for the clients to exercise their decision-making authority as autonomous entities). Still, Ellmann acknowledges that some clients prefer to use less than full information in making their decisions. *Id.* at 728-33. And he knows full well the power that lawyers may exercise over their clients. *See id.* at 719. Unlike Menkel-Meadow, who feels that the current ethics rules constrain a lawyer from taking such proactive measures, *see supra* note 69, Ellmann believes that the current rules do permit such interaction, although they of course do not mandate it. *See* Ellmann, *supra*, at 2709.

71. Ellmann, *supra* note 70, at 2710.

72. Actually, the two positions are not that far apart. In the first scenario, the lawyer is acting as the client's general moral conscience. In the second, the lawyer is using her own ethics to mandate how her client should behave, given the particular effect of the client's proposed action on other interests.

73. Rhode explains:

Presumably, few lawyers are unaware of the inherent limitations in democratic procedures and regulatory solutions. Time lags in acquiring information and designing appropriate correctives are inevitable, and attorneys with access to confidential studies may often be more knowledgeable about injurious conduct far sooner than politicians or administrative officials. Even where problems are apparent, the costs of regulation may seem excessive, or interest group pressures and inadequate enforcement resources may prevent socially optimal resolutions. As long as disparities of wealth, knowledge, and power affect both the agenda and outcome of political debate, statutory solutions will imperfectly reflect societal values. . . . Nonetheless, the bar's adversarial premise equates justice with the mechanical application of these standards.

Rhode, *supra* note 55, at 602-03 (footnotes omitted).

74. *See, e.g.*, Ellmann, *supra* note 70, at 2674; Hyman, *supra* note 29, at 877 (setting forth four possible reasons for preferring a more global approach to giving advice: first, the process of reaching agreement may be more efficient if a greater number of interests are considered; second, the results may also be more efficient; third, as the parties or issues increase in number or complexity, a more global approach may be more appropriate; and fourth, working together to resolve conflict in a "win-win" manner may be an independent good); Menkel-Meadow, *supra* note 7, at 816 ("[A]s Fisher and Ury suggest, meeting needs may be secondary to achieving just and objective results.") (citing ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 84-98 (1981)).

One of the most prominent scholars to advocate this position is Professor Deborah Rhode. Rhode argues that, although lawyers may have no claim to being ethics experts, they must take some responsibility—at least when acting to assist their clients—for their role in their clients' decisions.<sup>75</sup> Most ethical positions have equally compelling opposite positions, but that fact alone should not cause lawyers to refrain from taking stands.<sup>76</sup> From Rhode's perspective, failing to take a stand does not make the lawyer a neutral party. Instead, it makes the lawyer a participant in the client's effort to avoid having to make a decision based on ethical principles. Rhode hopes to circumvent the situation in which the lawyer thinks that the ethics decision is the client's responsibility, and the client thinks that any action the lawyer does not prohibit is at least morally neutral.<sup>77</sup> That type of synergistic interaction between lawyer and client only helps to perpetuate amorality.

Rhode believes that lawyers can do much more for their clients. By helping the client to isolate and resolve ethical considerations, the lawyer operates as a bridge between the client's short-term goals and society's long-term needs.<sup>78</sup> Although the current ethics rules may be construed to permit a lawyer to withdraw if she disapproves of her client's objectives, Professor Rhode sees this option as more of a sword than a shield. She contends that a client would be loathe to retain a new lawyer if his current lawyer threatened to withdraw. Having gotten the client's attention with the threat, the lawyer may get down to the business of addressing the ethical issues at hand.<sup>79</sup> Because the lawyer's

75. Rhode, *supra* note 55, at 644. Rhode writes:

Under conventional ethical theories, moral responsibility depends on a variety of factors, including the significance of harm and the agent's degree of involvement, knowledge, and capacity to affect action. Nor does it follow that counsel must endorse a client's every objective or course of conduct before providing representation. Whether particular forms of assistance are defensible depends not only on the specific acts involved but also on their social and economic contexts, and on the principles at issue.

*Id.*

76. *Id.* at 623 (“To concede the indeterminacy of ethical analysis is not to establish its futility. On factual questions, lawyers frequently express convictions despite the possibility of error or uncertainty.”).

77. *Id.* at 625.

78. *Id.* For example, within the business context, Rhode argues:

To be sure, lawyers have no special expertise in assessing such costs. But their distance from organizational incentive structures may at least permit a more disinterested perspective than that of corporate officers. By exploring the moral consequences of a client's contemplated actions, counsel may broaden the agenda of decisionmaking. Conversely, by declining that role, lawyers may compound the deflection of responsibility that too often characterizes organizational behavior. Clients can justify asocial action on the ground that counsel have pronounced it not unlawful, while counsel can rationalize their participation by deferring to client autonomy.

*Id.*

79. Rhode explains:

Indeed, it is frequently asserted that lawyers ought not to withdraw from representation under these circumstances, given the risk that they would be replaced by those with less refined sensibilities, thereby insulating the client from conscientious advice.

That argument is highly seductive; it elevates expedience to ethics. But the potential for self-delusion remains considerable. If the issues are truly significant, an individual who is prepared to express, but not to act on, moral convictions has limited influence. Surely in some cases, where the sunk costs of representation are substantial, the prospect of counsel's withdrawal will prompt the client to a more reflective inquiry than would otherwise ensue.

*Id.* at 625-26 (footnotes omitted).

interests are not identical with those of the client, the lawyer can give the type of disinterested advice that the client needs to be able to consider society's long-term interests.<sup>80</sup>

Rhode's work defines the parameters of the debate by urging lawyers to take, and act on, a moral perspective when giving advice. In an exploration of how broad this counseling role could be, Peter Margulies gives shape to Rhode's theory by suggesting that attorneys bring to bear issues of morality, psychology, and policy in counseling their clients.<sup>81</sup> Margulies argues that lawyers should bring morals into the picture whenever the client's proposed action involves causing harm to others, lying, or creating unequal treatment, or whenever the proposed action would violate a sort of Rawlsian<sup>82</sup> ideal of social ordering.<sup>83</sup> He also urges lawyers to discuss the policy implications of a proposed client action whenever that action might create unintended, adverse consequences for society as a whole.<sup>84</sup>

My sympathies lie with the direction that Rhode and Margulies have taken, but I am uncomfortable with how their theories might be played out. Taking an ethical stand does not equate to taking the *right* ethical stand. A racist lawyer is not likely to provide her client with nonracist ethical guidelines. And even two lawyers who have the "right" ethical perspective may not come to the same conclusion on an issue. For almost every moral position, there is an equal and opposite position. Not every person feels guilt or regret from the same stimuli, and policy decisions are difficult precisely because they call for compromise among several valid points of view.

Nevertheless, these types of proposals are moving in the proper direction. I would not, however, take the debate over the proper role of the lawyer as far as some do. I would instead give the lawyer a less "social engineering" type of role. If social policies have already been articulated *and* if the lawyer's own ethical precepts comport with those policies, then the lawyer should be obligated to raise those considerations with her client—at least

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80. Not all lawyers can fit within Rhode's model of a group of disinterested professionals. For example, is it really true that inside counsel can safely separate the company's business interests from its ethical ones? And, for that matter, how many associates at a law firm in danger of losing its client base are truly disinterested?

Other commentators have questioned Rhode's theory that increased lawyer involvement in the ethics of the client's decisions would actually decrease unethical client activity. *See, e.g.,* Murray L. Schwartz, *Comment*, 37 STAN. L. REV. 653, 657 (1985) ("[G]iven the heterogeneity of the American bar, the uncertain claim lawyers have to moral superiority over clients, and the absence of unequivocal moral solutions to the dilemmas faced by lawyers, I doubt that immoral client activity would significantly decrease were the ideology of all lawyers to change.").

81. Margulies, *supra* note 56, at 221.

82. *Cf.* JOHN RAWLS, A THEORY OF JUSTICE 11-17 (1971) (introducing the concept of the "original position": the situation in which a society composed of members who do not know what their roles in the society will be go about developing the rules that will govern that society). For an interesting application of Rawls' theory to bankruptcy law, see Robert K. Rasmussen, *An Essay on Optimal Bankruptcy Rules and Social Justice*, 1994 U. ILL. L. REV. 1.

83. Margulies, *supra* note 56, at 221-27.

84. *Id.* at 221, 230-44.

when the lawyer knows that unrepresented interests will be affected by the client's decision.<sup>85</sup>

My theory, then, wrestles with the particular question of what a lawyer should do when her client's objectives could adversely affect an identifiable, unrepresented interest.<sup>86</sup> Bankruptcy law provides a fertile environment for studying this situation.<sup>87</sup> For example, a client may want to abandon some property that has been contaminated with toxic waste. The client's strategy in such a situation could affect his own interests, those of his creditors, and those of his neighbors.<sup>88</sup> Or a client might want to file for bankruptcy protection under chapter 13, which discharges debts incurred for "willful and malicious injury by the debtor,"<sup>89</sup> even though society has an interest in deterring that type of wrongful conduct.<sup>90</sup> In Part III, I will explore the interplay among some of the other interests that intersect bankruptcy policy. First, however, I will look at bankruptcy policy to understand just what it is that lawyers practicing bankruptcy law are really trying to achieve.<sup>91</sup>

85. If I were placing my theory on my own continuum, it would fall somewhere between the middle and the right-hand side. I would like to see a lawyer speak up when her client's wishes conflict with the lawyer's own already-formed views about right and wrong. I find it more difficult to say that a lawyer has an obligation to *create* her own views about any social policy, although I do think that the profession should encourage that level of philosophical self-inquiry. It would be nice if lawyers, who have so much power in society, would spend some time thinking about policy issues. I am, however, downright uncomfortable contending that a lawyer must resolve disputes over social policies. All she need impart to her client is the sense that society is debating the policy, along with her own perspective on the debate.

86. Obliging the lawyer to be a watchdog for interests other than those of her client can be a dangerous requirement. Would the failure to act as a watchdog rise to the level of a sanctionable offense? Could the lawyer's state disciplinary organization punish her for looking out only for her own client's interests? Such a result would make most lawyers very queasy about practicing law. There are, however, discrete situations in which the watchdog role makes sense in terms of reinforcing the social fabric that justifies the existence of law. *See infra* part II.

87. I was particularly heartened to read Menkel-Meadow's observation concerning how bankruptcy lawyers can apply her problem-solving approach to giving advice:

The mechanism for reorganizations under the Bankruptcy Act, for example, demonstrates the need to consider ways of preserving the bankrupt entity's operation so that the pie can be increased for the benefit of the creditors, debtors, and third parties. Thus, what may appear to be a limited pie requiring competitive negotiation on division can yield to creative problem solving in cases where deferral of division or some other problem-solving device benefits all the parties at a later date.

Menkel-Meadow, *supra* note 7, at 832 (footnotes omitted).

88. For cases discussing the various legal issues raised by abandoning contaminated estate property, see *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 474 U.S. 494 (1986); *Baker & Drake, Inc. v. Public Serv. Comm'n (In re Baker & Drake, Inc.)*, 35 F.3d 1348 (9th Cir. 1994); *South Chicago Disposal, Inc. v. LTV Steel Co. (In re Chateaugay Corp.)*, 130 B.R. 162 (S.D.N.Y. 1991).

89. 11 U.S.C. §§ 523(a)(6), 1328(a) (1988 & Supp. V 1993).

90. The injured person also has an interest in deterring such conduct.

91. My personal favorite clash is between two bankruptcy policies: bankruptcy's desire for a fair distribution of assets among unsecured creditors versus the desire to help the debtor get a fresh start. The more "fresh" the start, the less there is available to distribute to unsecured creditors. For an in-depth articulation of the goals of bankruptcy law, see *infra* part I.C.



### C. The Purpose(s) of Bankruptcy Law

Ask several bankruptcy lawyers what the purpose of bankruptcy law is, and you will get a different answer from every one you meet. Lawyers who primarily represent individual debtors will talk about the debtor's "fresh start." Corporate lawyers will talk about the difference between going-concern value and liquidation value. Creditors' lawyers will talk about equitable distribution of assets. No one can point to the language in the Bankruptcy Code ("the Code")<sup>92</sup> or its legislative history<sup>93</sup> and say: "Here is the one true purpose of the Code," because there *is* no one true purpose—or at least none that Congress has spelled out in bold letters.<sup>94</sup> Various theorists have wrestled with the question of the Code's purpose, and the debate has created two primary camps: the Baird/Jackson camp<sup>95</sup> and the Warren camp.<sup>96</sup>

#### 1. A Content-Neutral System for Collective Creditor Action?

Dean Douglas Baird and Yale University President Thomas Jackson have articulated a theory of bankruptcy law that has two main principles:

92. 11 U.S.C. §§ 101-1330 (1988 & Supp. V 1993).

93. For a primer on how to read the Code's legislative history, see Kenneth N. Klee, *Legislative History of the New Bankruptcy Code*, 54 AM. BANKR. L.J. 275 (1980).

94. *But see infra* note 120 (discussing the purpose of the Code by referring to its legislative history).

95. For a partial overview of the scholarship of Dean Baird and Yale University President Jackson, see Douglas G. Baird & Thomas H. Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 U. CHI. L. REV. 97 (1984) [hereinafter Baird & Jackson, *Corporate Reorganizations*]; Douglas G. Baird & Thomas H. Jackson, *Fraudulent Conveyance Law and Its Proper Domain*, 38 VAND. L. REV. 829 (1985); Douglas G. Baird & Thomas H. Jackson, *Kovacs and Toxic Wastes in Bankruptcy*, 36 STAN. L. REV. 1199 (1984); Thomas H. Jackson, *Avoiding Powers in Bankruptcy*, 36 STAN. L. REV. 725 (1984); Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393 (1985) [hereinafter Jackson, *Fresh-Start*]; Thomas H. Jackson, *Of Liquidation, Continuation, and Delay: An Analysis of Bankruptcy Policy and Nonbankruptcy Rules*, 60 AM. BANKR. L.J. 399 (1986) [hereinafter Jackson, *Analysis*]; Thomas H. Jackson, *Statutory Liens and Constructive Trusts in Bankruptcy: Undoing the Confusion*, 61 AM. BANKR. L.J. 287 (1987).

96. For a partial review of Warren's scholarship, see Teresa A. Sullivan et al., *Folklore and Facts: A Preliminary Report from the Consumer Bankruptcy Project*, 60 AM. BANKR. L.J. 293 (1986); Teresa A. Sullivan et al., *Limiting Access to Bankruptcy Discharge: An Analysis of the Creditors' Data*, 1983 WIS. L. REV. 1091; Elizabeth Warren, *Formal and Operative Rules Under Common Law and Code*, 30 UCLA L. REV. 898 (1983); Elizabeth Warren, *Reducing Bankruptcy Protection for Consumers: A Response*, 72 GEO. L.J. 1333 (1984); Elizabeth Warren, *The Untenable Case for Repeal of Chapter 11*, 102 YALE L.J. 437 (1992).

In the recent bankruptcy symposium published by the *Washington University Law Quarterly*, John D. Ayer describes the dichotomy of the two camps as the difference between the "clarifiers" (the law-and-economics theorists) and the "complicators" (the bankruptcy-law-as-multifaceted-policy theorists). John D. Ayer, *Through Chapter 11 with Gun or Camera, But Probably Not Both: A Field Guide*, 72 WASH. U. L.Q. 883 (1994). Of course, there are intermediate positions. *Cf.* Warren, *Policy-making, supra* note 18, at 337 nn.3-4 (listing some of the members of the two camps, not all of whom adopt either camp's theory wholeheartedly); Richard V. Butler & Scott M. Gilpatric, *A Re-Examination of the Purposes and Goals of Bankruptcy*, 2 AM. BANKR. INST. L. REV. 269 (1994) (analyzing the Baird/Jackson and Warren theories). But, for purposes of this Article, dealing with the two extremes is sufficient.

bankruptcy is designed to maximize the value of the debtor's estate,<sup>97</sup> and bankruptcy law entitlements, in general, should not differ from state law entitlements.<sup>98</sup> The first principle addresses the reason for having a system other than a state-law first-come, first-served "grab" system. The second principle addresses the problem that differing sets of entitlements would cause: that of creating false incentives for people to enter the bankruptcy system when bankruptcy is an inefficient means of resolving their economic difficulties.

In the Baird/Jackson world, bankruptcy law is a debt collection system, not a set of policies involving distributive justice that must, in turn, be balanced against other policies.<sup>99</sup> It is designed to keep impatient and shortsighted creditors from grabbing valuable assets from the debtor's estate; such behavior would reduce the overall value of the estate and diminish the debtor's ability to reorganize.<sup>100</sup> In a sense, then, bankruptcy protects creditors from themselves and concentrates on maximizing the value of the estate so that all who have rights in that estate can receive the largest possible payout.

Bankruptcy is really designed for situations in which there is a fight among multiple parties.<sup>101</sup> If the debtor is embroiled in a dispute with only a single creditor, the time and expense of a bankruptcy proceeding is not cost-effective.<sup>102</sup> The bankruptcy system is useful in administering multi-asset,

97. The debtor's estate essentially consists of all legal and equitable rights that the debtor had as of the date of the filing of the bankruptcy petition. 11 U.S.C. § 541(a) (1988). The Supreme Court has indicated that maximization of estate value is at least one of the goals of bankruptcy law. See *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 353-54 (1985). In holding that a chapter 7 trustee has the power to waive the debtor-corporation's attorney-client privilege, the *Weintraub* Court explained that value maximization is "an important goal of the bankruptcy laws"; therefore, the trustee needed to have the authority to waive the corporation's privilege in order to root out improper conduct by the corporation's prior managers. *Id.* For an interesting discussion of the *Weintraub* case, see Donald P. Board, *Retooling "A Bankruptcy Machine That Would Go of Itself"*, 72 B.U. L. REV. 243, 268 (1987) (reviewing DOUGLAS G. BAIRD & THOMAS H. JACKSON, *CASES, PROBLEMS, AND MATERIALS ON BANKRUPTCY* (2d ed. 1990)).

98. See, e.g., Baird & Jackson, *Corporate Reorganizations*, *supra* note 95, at 129.

99. THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 1-6 (1986). According to Jackson, bankruptcy law should be concerned only with the issue of how to maximize asset value, not with the issue of how to distribute that value among creditors. *Id.* at 24.

100. Baird and Jackson are not the only scholars who have recognized the problem of the grab rule. See, e.g., Theodore Eisenberg, *A Bankruptcy Machine that Would Go of Itself*, 39 STAN. L. REV. 1519, 1520 (1987) (reviewing JACKSON, *supra* note 99); Warren, *Policymaking*, *supra* note 18, at 351 (stating that bankruptcy law reduces the problem of the grab rule by minimizing the advantages that creditors might receive in dismantling the business piecemeal). Warren illustrates her point about how bankruptcy law circumvents the grab rule by noting the effect that preference law may have in persuading creditors not to act during the preference period and noting the effect of the automatic stay, which may preserve the going-concern value of a business by leaving the assets in the debtor's hands. Warren, *Policymaking*, *supra* note 18, at 350, 351 n.37.

101. See Warren, *Policy*, *supra* note 18, at 785; Warren, *Policymaking*, *supra* note 18, at 345-46.

102. See, e.g., *In re McBride Estates, Ltd.*, 154 B.R. 339, 343 (Bankr. N.D. Fla. 1993) (imposing Bankruptcy Rule 9011 sanctions—which are equivalent to Federal Rule of Civil Procedure 11 sanctions—against a debtor who filed a bankruptcy petition in bad faith after making findings that, among other things, the debtor's financial troubles involved a dispute between the debtor and one creditor and the dispute could have been resolved in state court). Several courts have discussed factors that will lead them to conclude that a bankruptcy petition has been filed in bad faith and should therefore be dismissed. See, e.g., *In re Clinton Fields, Inc.*, 168 B.R. 265, 268-69 (Bankr. M.D. Ga. 1994); *Mueller v. Sparklet Devices, Inc.* (*In re Sparklet Devices, Inc.*), 154 B.R. 544, 547 (Bankr. E.D.

multi-creditor bankruptcies. Among other things, the Code automatically stays each creditor from repossessing its collateral or suing the debtor in a distant forum,<sup>103</sup> and it enables the debtor to concentrate its efforts on restructuring and reorganizing.<sup>104</sup> In the Baird/Jackson world, bankruptcy law is not designed to tinker with social policy. It serves as a debt collection system and nothing more.

The absence of social tinkering is the key to the Baird/Jackson theory.<sup>105</sup> According to Baird and Jackson, not everyone belongs in the bankruptcy system.<sup>106</sup> Depending on the size and nature of the particular debtor-creditor dispute,<sup>107</sup> some debtors are better off resolving their problems in the state law system. For Baird and Jackson, a method is necessary to segregate

Mo. 1993); *In re Grieshop*, 63 B.R. 657, 663 (N.D. Ind. 1986). As Baird explains,

We live in a world in which there are multiple avenues of enforcement for every substantive right. One avenue is provided under ordinary rules of debt collection; another, under the aegis of bankruptcy law. To justify this state of affairs, one must explain why more than one avenue of enforcement is called for. An additional avenue of enforcement creates special costs and, accordingly, deserves close scrutiny—quite apart from the interests being served or the people being protected.

Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV. 815, 825 (1987).

103. The automatic stay provided by § 362(a) operates immediately upon the filing of a petition and stays most actions against the debtor and its estate. Section 362(d) provides for relief from the automatic stay in specific circumstances.

104. Or, if the debtor is an individual, the Code's automatic stay provision also helps the debtor get a fresh start. For Baird, corporate bankruptcies showcase the best reasons for having a separate bankruptcy system:

As far as corporations are concerned, bankruptcy law is a procedure in which the actions of those with rights to the assets of a firm are stayed and the affairs of the firm are sorted out in an orderly way. Two characteristics of this procedure are crucial for present purposes: (1) it is an alternative avenue for vindicating legal rights, in the sense that those with rights to the debtor's assets could, in the absence of the stay, vindicate them elsewhere (albeit perhaps less effectively); and (2) it involves the rights of more than a single player.

Baird, *supra* note 102, at 824. Congress and the courts have long recognized the benefits of the "breathing room" created by the Code's automatic stay. *See, e.g.*, *B.F. Goodrich Employees Fed. Credit Union v. Patterson* (*In re Patterson*), 967 F.2d 505, 512 n.9 (11th Cir. 1992); *Baker v. Latham Sparrowbush Assoc.* (*In re Cohoes Indus. Terminal*), 931 F.2d 222, 228 (2d Cir. 1991); *Cinema Serv. Corp. v. Edbee Corp.*, 774 F.2d 584, 586 (3d Cir. 1985); *Baldwin-United Corp. v. Named Defendants* (*In re Baldwin-United Corp.*), 48 B.R. 901, 902-03 (Bankr. S.D. Ohio 1985) (citing the legislative history of § 362 in H.R. REP. NO. 595, 95th Cong., 1st Sess. 340-42 (1977) and S. REP. NO. 989, 95th Cong., 2d Sess. 49-51 (1978)) (stating that the automatic stay is designed to give the debtor some breathing room).

105. Actually, this statement is a tad overbroad. *See* Baird, *supra* note 102, at 827-28 (clarifying that he and Jackson do not object to differences between the bankruptcy and nonbankruptcy systems but "only to unnecessary differences") (emphasis in original). For consumer debtors, the Baird/Jackson theory may allow for a little more social tinkering than it does with corporate debtors. If the theory's general rule is that the bankruptcy system should not create false incentives that encourage inefficient bankruptcy filings, the corollary is that, sometimes, nonbankruptcy policy trumps bankruptcy policy. Therefore, the social tinkering that comes with the nonbankruptcy policy may find itself imported into the Code. Consumer cases are a prime target for social tinkering. After all, humans—not corporations—are the ones who actually cast votes for Congress.

106. Virtually every court that has addressed this issue agrees with Baird and Jackson. *See, e.g.*, cases cited *supra* note 102.

107. Two of the most important factors are the number of creditors involved and the amount of going-concern value that a reorganization could capture. *See, e.g.*, cases cited *supra* note 104; *see also* *Finney v. Smith*, 141 B.R. 94, 103 (E.D. Va. 1992) (holding that a bankruptcy court may deny a debtor's motion to convert from chapter 7 to chapter 11 when, among other things, proceeding in chapter 11 would be "objectively futile"), *aff'd as modified*, 992 F.2d 43 (4th Cir. 1993).

efficient bankruptcies from inefficient ones, and that method is through the elimination of "perverse incentives"<sup>108</sup> for filing bankruptcy petitions.<sup>109</sup> If the rights of the parties within the bankruptcy system do not differ from those outside the system, then debtors will opt to file for bankruptcy protection only when the state system does not meet their needs. For example, in a simple one-debtor, one-creditor dispute, the state system would probably suffice to adjudicate rights and distribute assets. But in a multi-creditor dispute, the state grab rule would tend to dissipate assets in the rush to judgment and the national bankruptcy system would therefore be a better choice.<sup>110</sup>

Obviously, the rules inside and outside bankruptcy do differ. For instance, outside the bankruptcy system, a creditor can foreclose on collateral without having to justify its decision to other creditors.<sup>111</sup> If all parties' rights were identical both in and out of bankruptcy, a separate bankruptcy system would be pointless. Baird and Jackson argue, however, that entities that should not use the bankruptcy system would not be inclined to seek its protection as long as the Code does not create false incentives—in other words, as long as "at a minimum, the relative *value* of particular nonbankruptcy entitlements [is protected] instead of the rights themselves."<sup>112</sup>

108. Perverse, or false, incentives are those encouraging undesirable or inefficient behavior. Baird, *supra* note 102, at 817.

109. JACKSON, *supra* note 99, at 21-27. The principle of avoiding false incentives is not absolute. Sometimes one must change nonbankruptcy rights in the bankruptcy system because leaving the nonbankruptcy rights untouched would detract from the collectivist goal of bankruptcy law (for example, by letting a creditor take away a valuable asset at an inopportune time). *Id.* at 28; *see also* Baird, *supra* note 102, at 827-28.

One theme of the Baird/Jackson theory is that of refusing to tinker with the Code in order to change substantive rights. Baird and Jackson prefer that Congress change the substantive rights in nonbankruptcy law rather than within the bankruptcy system. *See* JACKSON, *supra* note 99, at 25-26. This theory would avoid the sort of special interest protectionism that the Code provides on more than an occasional basis. *See, e.g.*, 11 U.S.C. § 362(b)(6) (Supp. V 1993) (exempting setoffs in repurchase agreements from the automatic stay); 11 U.S.C. § 507(a)(5) (1988) (granting priorities for grain merchants and United States fishermen). I am a little troubled by this NIMBY (Not In My Back Yard) argument, at least with respect to social tinkering done by the Federal Government. To the extent that Congress has the power to change entitlements, it has to put those changes somewhere. No matter where it puts them, they will be reflected in *some* sort of special interest legislation.

110. Jackson and Baird are not alone in this view, either. Several other scholars have discussed the strategic behavior that occurs when rules in bankruptcy differ from state law rules. *See, e.g.*, Warren, *Policymaking*, *supra* note 18, at 348-50 (characterizing bankruptcy law as a way of reducing state law strategic behavior by the creditors and the debtor). Warren points out, however, that the Code itself (or even simple general litigation tactics) may sometimes also foster strategic behavior. *Id.* at 349-50.

111. *See, e.g.*, CAL. CIV. CODE ANN. §§ 2899-2924h (West 1993 & Supp. 1995); OHIO REV. CODE ANN. §§ 2323.07-2329.01 (Baldwin 1994); TEXAS PROP. CODE ANN. § 51.001-51.002 (West 1984 & Supp. 1995).

112. JACKSON, *supra* note 99, at 20. As Baird explains,

Legal rights should turn as little as possible on the forum in which one person or another seeks to vindicate them. Whenever we must have a legal rule to distribute losses in bankruptcy, we must also have a legal rule that distributes the same loss outside of bankruptcy. All Jackson and I advocate is that these two rules be the same.

Baird, *supra* note 102, at 822 (footnote omitted); *see also id.* at 825 ("The differences in the [bankruptcy and nonbankruptcy] avenues should stem from the reason for having separate avenues and not from anything else."); Board, *supra* note 97, at 251-52 (describing the Baird/Jackson theory's reluctance to change the relative priorities of creditors unless "the proposed change in entitlements [is] necessary to preserve the integrity and viability of the collective proceeding").

The Baird/Jackson theory is elegant and is the benchmark against which all other theories about the purposes of bankruptcy law are compared.<sup>113</sup> But the theory has its critics—many of whom reject the idea that bankruptcy law does not—and should not—have intentional social or distributional goals.<sup>114</sup>

113. See Board, *supra* note 97, at 266 (proposing to consider the Baird/Jackson view as “presenting not a theory, but rather a procedure for *generating* theories”; “[w]hether or not one accepts all the resulting theories, the procedure itself has value”) (emphasis in original). The sheer power of the Baird/Jackson theory in the academic community reminds me of the car advertisement a few years ago that asked people why so many other car manufacturers felt the need to compare their cars to this particular manufacturer’s models.

Not everyone agrees with me that much of post-Baird/Jackson bankruptcy theory is a reaction to the theory itself. For a good argument that many other scholars have approached bankruptcy law in ways that were not pure reactions to the Baird/Jackson theory, see Ayer, *supra* note 51, at 435-49.

114. See, e.g., Board, *supra* note 97, at 251; Eisenberg, *supra* note 100, at 1533 (“Jackson’s analysis of fraudulent conveyance law reflects a larger problem in bankruptcy scholarship. This book and the rest of bankruptcy scholarship make little effort to place bankruptcy law in its social context.”); *supra* notes 94-113 and accompanying text; *infra* notes 116-33 and accompanying text.

Other critics object to the way that the Baird/Jackson theory deals with false incentives. As Professor David Gray Carlson points out, bankruptcy law is not the only debt collection system that has the option of defeating grab law. Receiverships and assignments for the benefit of creditors, both of which are available under state law, serve the same purpose. Carlson argues that, because both “grab law” and “creditor equality” principles exist under state law, Baird and Jackson cannot claim that the state system is the only grab law system and the bankruptcy system is the only creditor equality system. Each system has elements of the other. David G. Carlson, *Philosophy in Bankruptcy*, 85 MICH. L. REV. 1341, 1346 (1987) (reviewing JACKSON, *supra* note 99); see also *id.* at 1347 (“On the basis of practice, the numbers strongly suggest that creditor inequality is the essence of bankruptcy.”) (emphasis in original).

Carlson questions other Baird/Jackson assumptions, including the assumption that bankruptcy creates value by virtue of protecting assets from the piecemeal dismantling by individual creditors. *Id.* at 1354-55. For Carlson, the “[f]ederalization of state debtor-creditor law has to be justified by principles that are closer to the logic of diversity jurisdiction than to the logic of profit maximization.” *Id.* at 1348. Furthermore, Carlson disagrees with the Baird/Jackson depiction of bankruptcy law as neutral:

The history of debtor-creditor law is filled with examples in which state law changed in order to conform with bankruptcy rules. That is, not only is bankruptcy neutrality a bad strategy for reform, but the evidence shows that state courts and legislatures are capable of responding to the stimulus of a bankruptcy rule. Why does it follow that bankruptcy courts must be neutral, when state courts and state legislatures have the power to neutralize a bankruptcy rule by conforming state law to it?

*Id.* at 1381 (footnote omitted). Carlson notes:

With plenty of incentives for unpaid creditors to prefer bankruptcy—voidable preference law, priorities, and the like—creditors do not seem to be reacting in the way Jackson predicts. It seems that *debtors* are practically the only people deciding whether bankruptcy is a good thing [because “a vast majority” of bankruptcy petitions are voluntary ones].

*Id.* at 1384-85 (emphasis in original); see also James W. Bowers, *Groping and Coping in the Shadow of Murphy’s Law: Bankruptcy Theory and the Elementary Economics of Failure*, 88 MICH. L. REV. 2097, 2110 n.44 (1990). This observation regarding which group of players actually initiates a bankruptcy case highlights one of the most important developments in bankruptcy scholarship: the use of empirical studies to describe actual bankruptcy practice. For some excellent examples of the use of empirical studies in bankruptcy scholarship, see TERESA A. SULLIVAN ET AL., *AS WE FORGIVE OUR DEBTORS* (1989); Lynn M. LoPucki, *The Debtor in Full Control—Systems Failure Under Chapter 11 of the Bankruptcy Code?*, 57 AM. BANKR. L.J. 99 (1983) (first installment); Lynn M. LoPucki, *The Debtor in Full Control—Systems Failure Under Chapter 11 of the Bankruptcy Code?*, 57 AM. BANKR. L.J. 247 (1983) (second installment); Lynn M. LoPucki, *The Demographics of Bankruptcy Practice*, 63 AM. BANKR. L.J. 289 (1989); Lynn M. LoPucki, *A General Theory of the Dynamics of the State Remedies/Bankruptcy System*, 1982 WIS. L. REV. 311; Lynn M. LoPucki, *Strange Visions in a Strange World: A Reply to Professors Bradley and Rosenzweig*, 91 MICH. L. REV. 79 (1992); Lynn M. LoPucki & William C. Whitford, *Bargaining over Equity’s Share in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 139 U. PA. L. REV. 125 (1990); Lynn M. LoPucki & William C. Whitford, *Patterns in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 78 CORNELL L. REV.

For Baird and Jackson, though, the beauty of the Code lies in its pristine, focused search for efficient wealth maximization.<sup>115</sup>

With some regret—because I truly admire the development and exposition of such a unified theory—I recognize that my theory of lawyering does not dovetail with the Baird/Jackson theory of bankruptcy policy. But if bankruptcy law does not tolerate social tinkering, then a bankruptcy lawyer has no right to suggest such tinkering to her client when giving bankruptcy advice. In the Baird/Jackson world, the social decisions that order people's rights within the bankruptcy system have already been made outside the system. A bankruptcy lawyer who wants to counsel her client to change that social ordering must do so outside the bankruptcy arena as well.

## 2. A Complex System of Legal, Moral, and Market Rules?

In contrast to the stark landscape painted by Baird and Jackson, other scholars—notably Professor Elizabeth Warren—see bankruptcy law as a more complex interweaving of competing principles.<sup>116</sup> Warren views bankruptcy policy<sup>117</sup> as involving distributive justice questions—“an attempt to reckon with a debtor's multiple defaults and to distribute the consequences among a number of different actors.”<sup>118</sup> Like the Baird/Jackson theory, Warren's theory considers bankruptcy law to be “a collection scheme [that] necessarily

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597 (1993); Lynn M. LoPucki & William C. Whitford, *Preemptive Cram Down*, 65 AM. BANKR. L.J. 625 (1991); Lynn M. LoPucki & William C. Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 1991 WIS. L. REV. 11.

115. Bowers, *supra* note 114, at 2103 (“[T]here is an underlying normative criterion which justifies bankruptcy equality, to wit: wealth maximization.”). Professor Bowers, however, disagrees that wealth maximization is the appropriate criterion:

The proponents of pro rata bankruptcy distribution erred by mistakenly assuming that debtors will fail to maximize the value of their portfolios so that a collective system is necessary to maximize it for them and their creditors. Their analysis goes astray for another simple reason: it is focussed on optimizing the wrong variable. The “common-pool” analysis is premised on the unspoken assumption that if the market value of the debtor's estate is maximized everything will be hunky dory. Efficient bankruptcy policy would seek not to maximize the value of debtors' estates, but rather to minimize bankruptcy losses.

*Id.* at 2143.

116. The colloquy in the *University of Chicago Law Review* between Baird and Warren exemplifies the debate between the two camps of bankruptcy scholars. See Baird, *supra* note 102; Warren, *Policy*, *supra* note 18. There are several scholars in the Warren camp. See, e.g., Eisenberg, *supra* note 100, at 1535 (“[S]ome interweaving of social reality with axiom-based analysis would enhance the corpus of bankruptcy scholarship.”).

117. Warren's theories primarily focus on business bankruptcies because consumer bankruptcies bring to bear many more issues involving social policy. See Warren, *Polymaking*, *supra* note 18, at 341; cf. SULLIVAN ET AL., *supra* note 114 (providing a comprehensive empirical study of consumer bankruptcies). She acknowledges, however, that keeping businesses and individuals entirely separate is impossible and that doing so does not take into account the many differences between large and small businesses. See Warren, *Polymaking*, *supra* note 18, at 342.

118. Warren, *Policy*, *supra* note 18, at 777. In her view, bankruptcy law is part of the continuum of contract law: it is society's way of balancing strict enforcement of promises with considerations of fairness and excuse. *Id.* at 778-80. According to Warren, bankruptcy law has four primary goals: “(1) to enhance the value of the failing debtor; (2) to distribute value according to multiple normative principles; (3) to internalize the costs of the business failure to the parties dealing with the debtor; and (4) to create reliance on private monitoring.” Warren, *Polymaking*, *supra* note 18, at 344.

depends on other legal rules for the determination of substantive rights underlying bankruptcy claims."<sup>119</sup> But even though bankruptcy law is a collection mechanism, it is a mechanism with a purpose or, in fact, several purposes:

[T]he Bankruptcy Code tackles a wide variety of other distributional issues as well. Some rights are destroyed in bankruptcy, and some are preserved. Priority distributions reorder the competing interests of employees, taxing authorities, fishermen, and farmers. Landlords and business partners receive special treatment. Parties to executory contracts hold an identified place in the bankruptcy pecking order. The beneficiaries of state statutory liens find their rights reordered in bankruptcy. Ordinary course creditors and creditors making contemporaneous exchanges discover that their positions differ from other unsecured creditors. Creditors lending to consumers are distinguished from creditors lending to businesses. Banks with setoff rights are treated differently from banks not in a setoff position. This list is suggestive rather than definitive, but it serves to show that the Bankruptcy Code is concerned with making hard choices about which creditors belong where in a financial hierarchy. These are choices about distribution and redistribution, and they are not controlled by state law.<sup>120</sup>

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119. Warren, *Policy*, *supra* note 18, at 781. Warren points out, though, that state collection law also needs underlying state law rules to determine substantive rights; it, too, is "only [a] collection system[]." *Id.* The difference between the bankruptcy and state collection systems lies in their underlying philosophies about the payment of claims: state law assumes that all creditors will be paid (although it assigns creditors priorities in terms of collecting payment); bankruptcy law assumes that there will not be sufficient assets to go around and provides a mechanism for the discharge of debt. *Id.* at 784-85. Unlike the state law system, which looks at debt collection from a debtor versus one-creditor-at-a-time vantage, the bankruptcy system sees debt collection as a fight among creditors. *Id.* at 785; *see also* Warren, *Policymaking*, *supra* note 18, at 345-46. Bankruptcy law simultaneously balances the transaction costs of resolving multiple disputes with the cost savings of collective action. *Id.* at 348 ("Perhaps no part of the legal system is more cognizant of the transaction costs of collection and dispute resolution than the bankruptcy system, and surely no system is so conspicuously directed toward cost reduction."). The bankruptcy system also has additional advantages. Among these is the Code's requirement that the debtor provide truthful information about finances and the Code's restrictions on the debtor-in-possession's ability to branch out into new ventures without first obtaining permission from the court or from creditors. *Id.* at 346-48. With respect to the description of how the bankruptcy system works (as opposed to why it exists or what else it should be doing), Warren's camp is not so different from the Baird/Jackson camp. JACKSON, *supra* note 99; Baird, *supra* note 102.

120. Warren, *Policy*, *supra* note 18, at 786 (footnote omitted); *cf. supra* note 108 and accompanying text. Because bankruptcy law focuses on fights among creditors for the debtor's sparse assets, it is much better equipped than nonbankruptcy law to handle unmatured claims. Under state law, by the time that the claims matured, the money to pay the claims would be long gone. *See* Warren, *Policy*, *supra* note 18, at 786; *see also infra* notes 192-95. Warren has found many indications of Congress' broad intent in designing the Code to achieve certain distributive goals. Warren, *Policy*, *supra* note 18, at 788 ("Congress intended bankruptcy law to address concerns broader than the immediate problems of debtors and their identified creditors; [the legislative history] indicate[s] clear recognition of the larger implications of a debtor's widespread default and the consequences of permitting a few creditors to force a business to close."); *see also* Warren, *Policymaking*, *supra* note 18, at 353.

The goal is equality among equally situated creditors,<sup>121</sup> but in order to achieve certain distributional ideals, the Code permits certain departures from this equality principle.<sup>122</sup> In Warren's view, bankruptcy law can count among its advantages the capacity for protecting those persons who are not necessarily creditors but who are nonetheless affected by a debtor's bankruptcy.<sup>123</sup> By trying to preserve going-concern value (and by trying to preserve the going concerns themselves through reorganization), bankruptcy keeps the economy going for those dealing less directly with the debtor:<sup>124</sup>

Congress—whether out of a crass concern about reelection or a superior view of the deeper social implications of business failure in a highly integrated society—accepted the idea that bankruptcy serves to protect interests that have no other protection. The older employee, the regular customer, the dependent supplier, and the local community are important; and bankruptcy attends to many of their concerns, regardless of whether they have rights recognized at state law.<sup>125</sup>

Warren depicts bankruptcy law as a somewhat messy collection system that attempts to accomplish several (sometimes conflicting) goals at once. Among these, two of the most important goals are maximizing the value of the estate and minimizing externality effects.<sup>126</sup>

121. Bowers, *supra* note 114, at 2101 (reviewing the traditional reasons why theorists claim that the principal policy of bankruptcy law is equal treatment for similarly situated creditors). Bowers, however, points out that, in fact, the Code does not always treat equally situated creditors equally. *See id.* at 2102 ("Reorganization plans can sort creditors into fluid and differing classes for the purposes of treating them differently."). Moreover, as Bowers points out, if the creditors truly *were* equal, there would be no need to mandate equal treatment. Equal treatment would be automatic. Instead, the Code treats some creditors equally when they are at least marginally unequal (and vice versa). *Id.*

122. Warren enumerates several principles that have justified a departure from the "equity is equality" general rule: (1) accommodating various parties' relative abilities to spread the risk of default (for example, she observes that banks are more effective risk-spreaders than are employees); (2) encouraging investment in riskier businesses (if companies could not reorganize, investors would be less likely to invest in risky ventures); (3) discouraging the dismantling of the business in the troubled period immediately before bankruptcy and encouraging the preservation of the business during the same period; (4) decreasing the effect of timing issues (for example, when the claimant can bring suit) so that similarly situated creditors with different time lines (for example, asbestosis victims) can be treated similarly; (5) making the owners of the business rather than the creditors bear the risk of loss; and (6) protecting established commercial rules to the extent possible. Warren, *Policymaking, supra* note 18, at 357-59; *see also* Bowers, *supra* note 114, at 2101-02.

123. Warren, *Policy, supra* note 18, at 787-88; *see also* Warren, *Policymaking, supra* note 18, at 355-56 (observing that the Code's protection of those who are neither debtors nor creditors—but who are indirectly affected by a debtor's bankruptcy—is limited to provisions that attempt to keep the debtor's business alive as long as possible).

124. Warren, *Policy, supra* note 18, at 787-88; *see also* Warren, *Policymaking, supra* note 18, at 355 ("The choice to make bankruptcy 'rehabilitative' represents a desire to protect these parties along with the debtor and creditors who are more directly affected.").

125. Warren, *Policy, supra* note 18, at 788; *see also* Warren, *Policymaking, supra* note 18, at 355 n.45 (quoting congressional statements that discuss the intended community effects of bankruptcies).

126. If the parties involved in a dispute are the only ones affected by the dispute, then there are no externality effects from the dispute. But when the resolution of the dispute affects a third party, and the third party has no opportunity to affect the outcome, then a cost has been externalized. For example, tossing some garbage onto one's own property does not create externality problems, but tossing that garbage into the river on one's own property creates externality problems when the garbage floats onto other people's property. *See* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 49-55 (4th ed. 1992); Ronald H. Coase, *The Problem of Social Cost*, 3 *J.L. & ECON.* 1 (1960). In bankruptcy cases, displaced



Just as Baird and Jackson have their critics, Warren has hers. In an extremely enjoyable interchange between Baird and Warren,<sup>127</sup> Baird protests the multiplicity of goals that Warren enunciates. Instead, he calls for more attention to the problems of false incentives and forum shopping among collection systems,<sup>128</sup> and rejects the idea that the Code either does or should have distributive purposes.<sup>129</sup> The plain landscape of the Baird/Jackson theory provides a dramatic contrast to the Baroque tapestry described by Warren.

Add to this discussion of the purpose of the Bankruptcy Code my theory of lawyering in a way that monitors unprotected interests, and you will get differing views as to the proper role of lawyers within the bankruptcy system. The proper role depends on whose theory you adopt. A bankruptcy lawyer who chooses to follow Warren's model of the Code has a more difficult job than does the Baird/Jackson bankruptcy lawyer. The Baird/Jackson lawyer does not spend her time thinking about whether unrepresented interests will be affected by her client's decisions; if any such evaluation to be made, it must be made outside of bankruptcy considerations. Either some nonbankruptcy social policy has already resolved the issue, or social theorists must come up with a solution. The Baird/Jackson lawyer will choose to be true to the purpose of the bankruptcy system rather than to see the system destroyed by other social goals muddying the waters.<sup>130</sup> The Warren lawyer, on the other hand, will view bankruptcy law as just another form of social engineering, no more important than any other social goal. When unrepresented

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employees and others counting on the debtor's new products to supply their own businesses provide two examples of externalities. According to Warren, "Bankruptcy restricts externalization of costs in three key ways: (1) it provides priority repayment of debt to the public fisc ahead of most other creditors; (2) it maintains a largely self-supporting implementation system; and (3) it insulates Congress from pressure to fund bailouts for individual business failures." Warren, *Policymaking*, *supra* note 18, at 361.

127. See *supra* note 116 (referring to the colloquy between Baird and Warren in the *University of Chicago Law Review*).

128. See, e.g., Baird, *supra* note 102, at 818, 823-25.

129. Specifically, Baird argues:

Whether a firm continues to manufacture a particular product or even stays in business is an issue utterly distinct from the question of who owns the firm's assets. Thus, in a world in which all assertions of ownership rights are stayed (as they are in bankruptcy), how much a particular owner gets should have *nothing* to do with how a firm's assets are used or whether it stays in business. To assert, as Warren does, that a creditor may need to sacrifice some of its ownership interest so that the firm might survive takes issue with most of what has been written about corporate finance over the last three decades. Warren argues that the legislative history of the Bankruptcy Code shows that some legislators embraced the idea that limiting the rights of creditors may increase a firm's chances of reorganizing successfully. I could dispute whether that is a fair reading of the legislative history, but this is quite beside the point. Limiting the rights of creditors either affects a firm's chance of surviving or it does not. The truth of the proposition is completely independent of what Congress may or may not have thought; the proposition must stand or fall on its own. If Warren wants to rely on it, she should at least acknowledge the body of authority that goes the other way.

*Id.* at 820 (emphasis in original); see also *id.* at 830 ("A bankruptcy judge takes [the rights of noncreditors] into account only when there is a dispute between those with legally cognizable claims.").

130. Of course, if the client's decision will affect the policies of wealth maximization and avoidance of perverse incentives, then the Baird/Jackson bankruptcy lawyer must decide where she stands. Should she be true to her client's wishes even if they run contrary to the purposes of the Code, or should she try to reconcile the two? And, if she chooses to try to reconcile the two, how assertive can she be?

interests need to be protected, or at least considered, within the bankruptcy context, then the Warren lawyer has to spend some time thinking about how her client's actions will affect those interests.<sup>131</sup>

### 3. Safe Passage Between the Two Camps: Why Both Theories Work

Given these two extremes, what is a bankruptcy lawyer to do when she advises her client? Both the Baird/Jackson theory and the Warren theory have their appeal. The Baird/Jackson theory uses the tropes of wealth maximization and avoidance of false incentives to explain the workings of the Bankruptcy Code. On the other hand, the Warren theory focuses on reduction of externality effects and on distributive justice issues. Both theories acknowledge that the Code has certain collectivist purposes that state law cannot fulfill. Other scholars see the Code as pulsing between rules and standards, between favoring fresh starts and favoring creditor recovery.<sup>132</sup> Everyone wants to find a purpose for the bankruptcy system, even though that purpose may be difficult, if not impossible, to articulate.<sup>133</sup>

If scholars disagree on what purpose the Code serves, at least they generally concur with the Code's use of a collective approach to marshal assets and pay creditors.<sup>134</sup> Bankruptcy lawyers must concentrate on that collective approach. If the Code operates to accomplish collectively what might not be done as well in a single-dispute-at-a-time system, then bankruptcy lawyers have a duty to articulate that collectivist bias when giving advice to their

131. Such ambiguity will not bother a lawyer who adopts Warren's theory of bankruptcy law. Such a lawyer will be quite comfortable with seeing the world as a conglomeration of conflicting goals.

132. See Robert Weisberg, *Commercial Morality, the Merchant Character, and the History of the Voidable Preference*, 39 STAN. L. REV. 3 (1986). Professor Weisberg contends that the purpose of bankruptcy law has always been in a state of flux. See *id.* at 5.

133. As to the complexity of the Code, Bowers has noted:

[M]ost unsecured creditors left in bankruptcies are treated "equally." They all receive zero. Simple "equality" may justify pro rata distributions, but it also justifies dividing the estate per capita, equalizing the percentage of total wealth lost by each creditor, and a host of other possible formulae which possess an attribute of formal "equality." Choosing among equality formulae is impossible without pointing to normative standards other than "equality" itself. Consequently, bankruptcy's pro rata formula cannot be explained by a desire for simple "equality." The formula must instead be justified by a wish to foster some other unarticulated underlying norm, but we are left in the dark about what that norm is. While we remain in the dark, bankruptcy policy is incomprehensible. If, on conventional grounds, we do not know why it exists or how it can be justified, it is difficult to know whether or not bankruptcy law is working. It is also difficult to justify any proposals to change it.

Bowers, *supra* note 114, at 2103 (emphasis in original) (footnote omitted); cf. Ayer, *supra* note 10, at 364-65 ("'Bankruptcy' is, at least, a scheme for collecting the property of the debtor; for distributing 'equally' among creditors; for protecting 'going-concern' values; for giving the debtor a discharge.") (footnotes omitted).

134. See, e.g., Bowers, *supra* note 114, at 2103-04 ("Understanding bankruptcy law thus means understanding why and when collective proceedings are appropriate."); Carlson, *supra* note 114, at 1356 n.43 ("Bankruptcy . . . becomes the primary (but not the only) institution designed to force creditors to share with other creditors."). Bowers, though, questions the efficacy of bankruptcy's collectivist approach. He believes that debtors are more efficient liquidators of their estates than are creditors, and that bankruptcy law may therefore not be particularly useful. Bowers, *supra* note 114, at 2141.

clients.<sup>135</sup> If unrepresented interests cause the collectivist purpose to be less than well-served,<sup>136</sup> then the lawyer needs to take those unrepresented interests into account when advising her client. The difficulty, of course, lies in how that collectivist approach should be communicated to the client. Part III of this Article reviews a variety of situations involving the interplay of competing interests—some well-represented and some not—and examines when and how the lawyer should interject her group-focused views.

## II. RETHINKING THE FOREST-TREES PROBLEM

Lawyers are in a quandary. They feel bound by the requirement to represent clients zealously,<sup>137</sup> and they fear alienating their clients by offering them too much nonlegal advice.<sup>138</sup> At the same time, though, lawyers know that they cannot blithely assume that zealous representation alone will ensure a fair result for all concerned. When a particular situation resembles the formal advocacy model, then perhaps such an assumption is well-founded. But as more and more unrepresented interests find their way into the picture, lawyers must recognize that the failure of the formal advocacy model forces them to think seriously about the type of advice they should give their clients.

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135. This job, however, is far from easy. As Ayer explains,

[B]ankruptcy aggravates some difficulties that are in any event present in the official pronouncements. I do not mean to suggest that "bankruptcy ethics" are qualitatively different from "ethics" in the profession (or the world) at large; or that bankruptcy lawyers are any less (or more) ethical than anyone else. I want to suggest only that the structure of bankruptcy practice aggravates what is, in any event, a difficult task—that is, the lawyer's obligation to behave in an ethically responsible manner.

Ayer, *supra* note 10, at 384 (footnote omitted).

136. For example, what if employees in a chapter 11 reorganization do not lobby successfully for their own committee? *Cf.* 11 U.S.C. § 1102 (1988) (providing that the court may appoint additional creditors' committees and equity security holders' committees). Who then will speak on their behalf if the company decides to increase automation and lay off some workers? Will the interests of creditors or equity security holders take into account the effect of that decision on those workers? Will *not* taking that effect into account affect the general collectivist goal? These are the types of questions that a bankruptcy lawyer should ask herself.

137. See MODEL RULES OF PROFESSIONAL CONDUCT Rules 3.1-3.5 (1992), reprinted in REGULATION OF LAWYERS, *supra* note 23, at 168-96; MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1983), reprinted in REGULATION OF LAWYERS, *supra* note 23, at 405; *id.* DR 7-101, 7-102 (983), reprinted in REGULATION OF LAWYERS, *supra* note 23, at 419-20.

138. There is nothing wrong with zealous representation in and of itself, so long as zealousness does not take the form of vicious incivility. But zealous representation cannot stand alone, and a lawyer does have the obligation to give dispassionate advice that encompasses more than just short-term tactics. See *supra* notes 29-51 and accompanying text. The pit-bull style of counseling does little good in the long run. For an interesting example of how clients' pursuit of their short-term interests can lead to the destruction of their long-term interests, see Eric J. McFadden, *The Collapse of Tin: Restructuring a Failed Commodity Agreement*, 80 AM. J. OF INT'L LAW 811 (1986). For an analysis of the effect of a client's selfish behavior on others in the context of "elderlaw," see Jan E. Rein, *Clients with Destructive and Socially Harmful Choices—What's an Attorney to Do?: Within and Beyond the Competency Construct*, 62 FORDHAM L. REV. 1101 (1994).

### A. When to Think About the Big Picture

Recall my continuum of lawyering models, which described the degree to which lawyers could raise extralegal considerations with their clients.<sup>139</sup> The more conservative lawyers on the left side of the continuum<sup>140</sup> would take unrepresented interests into account only when those interests affected the client's own long-term interests. The more radical lawyers on the far right-hand side of my continuum<sup>141</sup> would argue that lawyers should always think about the big picture—about the effects of their advice on everyone concerned, not just the client.<sup>142</sup> If we were to phrase the question of how and when to consider unrepresented interests in terms of law and economics theory, we might argue that lawyers should factor in big-picture considerations whenever the expected long-term gain of considering others' interests would benefit the client more than would any short-term, self-focused victory.<sup>143</sup> But that postulation does not capture the full reason to consider unrepresented interests: there is a real, if unquantifiable, cost to society when those affected by a decision do not have a say in the decision-making process.<sup>144</sup>

#### 1. First-Order Considerations

The best way for a lawyer to get a feel for when to think about the big picture is to set out that one situation in which thinking about the big picture is unnecessary: when all interests are represented, and everyone with a stake in the outcome has the opportunity to be heard. In such a situation, the formal advocacy model may work quite well, and zealous representation alone may

139. See *supra* part I.B.2.

140. See *supra* part I.B.2.a.

141. See *supra* part I.B.2.c.

142. For example, Dean Joseph D. Harbaugh of the T.C. Williams School of Law has called for lawyers to engage in problem-solving, rather than adversarial, behavior. See *The Fine Art of Negotiating*, *supra* note 7, at A11-A12 (“In problem-solving negotiation, the lawyer sits back and says: ‘What are the needs, interests and values of all the parties?’ Then he or she tries to see how they fit together and brainstorm to meet those needs.”) (quoting Harbaugh).

A lawyer in the middle of the continuum would likely consider unrepresented interests when those interests resonated with the lawyer's own values (which might not be already represented in the case).

143. Cf. JACKSON, *supra* note 99, at 18 (suggesting that “sometimes people behave in a self-interested way and would be better off as a group if required to work together”).

144. See generally John H. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) (discussing due process); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980) (discussing due process); see also Mathews v. Eldridge, 424 U.S. 319, 333 (1986) (“A fundamental requirement of due process is ‘the opportunity to be heard.’”) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring) (“[The] Court . . . recognizes that the right to be heard . . . is a principle basic to our society.”).

Professor Karen Gross makes much the same argument, using feminist economic theory to argue that players in a bankruptcy case should take more than their own interests into account. See Karen Gross, *Taking Community Interests into Account in Bankruptcy: An Essay*, 72 WASH. U. L.Q. 1031, 1035-48 (1994).

carry the day.<sup>145</sup> Theoretically, then, the lawyer could ask herself, at the beginning of a legal matter, whether the matter squarely fits the formal advocacy model. If it does, then any big-picture considerations are unnecessary.<sup>146</sup>

## 2. Second-Order Considerations

Once a situation moves away from the prototypical formal advocacy model, the lawyer must begin taking into account unrepresented interests when she advises her client. Whether she takes the more conservative tack of incorporating the unrepresented interests into her own client's long-term interests, or the more radical tack of treating the unrepresented interests as having needs of their own to meet (apart from the needs of her client), the act of pretending that those interests do not exist is not just sophistry. Such pretense is an utter rejection of the lawyer's responsibility to society.<sup>147</sup>

### a. The Conservative Approach: How Taking into Account Unrepresented Interests Serves the Lawyer's Own Client Well

Even conservative lawyers would agree that they should (and do) consider the big picture in certain circumstances. Certainly, thinking about the big picture makes sense whenever the client is a repeat player in the system and must therefore face the same interests in a variety of situations. For example, consider a bank that is a creditor in hundreds of bankruptcy cases each year. Because the bankruptcy bar is not very large,<sup>148</sup> the lawyers who represent the debtor or other creditors will soon get a feel for the bank's customary posture in bankruptcy cases. If the bank behaves like a team player, the bankruptcy bar will tend to deal with it as a team player. If the bank plays hardball, the bankruptcy bar will tend to do the same.<sup>149</sup> A bank's lawyer can easily set forth the pros and cons of cooperating as part of a long-term strategy.<sup>150</sup> If the lawyer hesitates to give her bank client such "extralegal"

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145. Or will it? The formal advocacy model does not work when there is no tribunal to monitor the client's decisions, such as when a party sizes up its own negotiating posture prior to a preliminary negotiation of some sort. Nor does the formal advocacy model work when litigation is not intended. For example, when a company decides to market a given product (such as Ozone-Be-Gone), then there may be a problem with assumptions about the efficacy of the formal advocacy model, even if all interested parties could be represented in any eventual litigation. The problem is that no one is there, at the time that the business decision is made, to suggest to the company that a less harmful product should be marketed instead.

146. According to the formal advocacy model, even if the other side's lawyer is incompetent, the tribunal can adjust to take that fact into account.

147. See *supra* part I.B.2.

148. Cf. Rapoport, *supra* note 9, at 928 (discussing the composition of the bankruptcy bar).

149. See Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 520 (1994).

150. To be fair, a client can be a repeat player in the system and have something to gain from a reputation of always playing hardball. For example, certain companies have a policy of not settling lawsuits. As a result, other players in the system know that if a matter reaches the litigation stage, it will become very expensive for all concerned. Cf. *People: Drawing Attention*, DALLAS MORNING NEWS, Feb.

advice because she is afraid that the bank will accuse her of not providing zealous representation, she can point to the bank's status as a repeat player and explain that zealousness *requires* her to take into account the client's own long-term interests.<sup>151</sup>

Even when the client is not a repeat player in the system, considering unrepresented interests may still be a good idea. If the client's business operates in the same local economy as the debtor's business, and the client's proposed strategy in dealing with the debtor might cause the local economy to deteriorate rapidly, then the client should think twice before he inadvertently harms his own business. "Cutting one's own nose off to spite one's face" is an aphorism as appropriate for adults as it is for children.

b. The More Radical Approach: How Taking into Account Unrepresented Interests Helps Both the Client and the Lawyer

For years, many lawyers have expressed dissatisfaction with both their careers and the legal profession in general.<sup>152</sup> Instead of the romanticized

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19, 1993, at A2 (including a Disney spokesperson's intimation that the company would try to prevent a tattoo artist from adding any more Disney images to his or other persons' bodies); *Cafe Owner Settles in McDonald's Case*, S.F. CHRON., May 14, 1994, at A21 (noting that McDonald's lawyers told an entrepreneur named McCaughey—who owned a coffee house named, aptly enough, McCoffee—that the company owned the copyright to the appellation "Mc"); Bill Husted, *Money Bringing Limits to Computer Bulletin Boards*, ATLANTA CONST., Aug. 19, 1994, at C3 (stating that Disney is one of several companies threatening to get tough on local computer bulletin boards that provide access to scanned images); Mike Penner, *Eisner Rules Anonymous Roost*, L.A. TIMES, June 25, 1993, at C1 (citing instances that demonstrate Disney's protective attitude toward its "I'm going to Disneyland" and "I'm going to Disney World" slogans); Mitchell Smyth, *Custer Loses Again: His Name Comes off Montana Battlefield*, TORONTO STAR, June 29, 1991, at H2 (reporting that Disney has filed more than 200 lawsuits against retailers and distributors in California and Oregon who have allegedly counterfeited Disney merchandise). Considering the effect of a client's proposed strategy on unrepresented interests is not the same thing as forcing the client to cave in to those interests.

151. Take as another example the debtor who files one bankruptcy petition after another—a repeat player of another sort. Bankruptcy-savvy writers refer to successive filings with such monikers as "chapter 20" (filing a chapter 13 petition after filing a chapter 7 petition, ostensibly to discharge debts in chapter 13 that would not be dischargeable in chapter 7). See 11 U.S.C. §§ 523, 727, 1328 (1988); BRIAN A. BLUM, *BANKRUPTCY AND DEBTOR/CREDITOR: EXAMPLES AND EXPLANATIONS* 460 (1993). Like the proverbial boy who cried wolf, the debtor who makes several successive filings will soon find an utter lack of creditor support. See, e.g., *Bankruptcy Three-Peat for Braniff Airline*, SAN JOSE MERCURY NEWS, Aug. 8, 1991, at D1; *Braniff Continues Frequent Filer Ways in Bankruptcy Court*, SACRAMENTO BEE, Aug. 8, 1991, at D3; Tom Stieghorst, *Braniff Again Files Bankruptcy: Airline Seeks Protection for 3rd Time in a Decade*, FT. LAUDERDALE SUN-SENTINEL, Aug. 8, 1991, at D1. The lawyer faced with a client's desire to file yet another bankruptcy petition should have a duty to question whether repeated filings are in anyone's best interest, including the client's. Does the client want to file a new petition to discharge previously nondischargeable debts or to make pre-petition claims out of potential administrative claims? Sometimes successive filings make sense; often, though, the filings represent the "terminal euphoria" of many debtors. See *In re Little Creek Dev. Co.*, 779 F.2d 1068, 1073 (5th Cir. 1986) (discussing the debtor's "terminal euphoria"); *In re Lakeside I. Corp.*, 104 B.R. 468, 470-71 (Bankr. M.D. Fla. 1989); Elizabeth Warren, *A Theory of Absolute Priority*, 1991 ANN. SURV. OF AM. LAW 9 (referring to the "terminal euphoria" problem).

152. See *supra* note 3 and accompanying text; see also William Charland, *Some Lawyers Leaving Law for Careers in Other Fields*, ROCKY MTN. NEWS, June 5, 1994, at 3C; Colin Covert, *Grim Reality Has Lawyers Looking for New Career*, ARIZ. REPUBLIC, July 25, 1994, at E1; Kathleen Pender, *Career Advice for Starting over After a Layoff*, S.F. CHRON., Sept. 23, 1991, at B1; Shelly Phillips, *Lawyers Who Want Out*, PHILA. INQUIRER, June 8, 1993, at F1.

version of lawyering depicted in novels and movies—where the lawyer steps in to save the day, forcing people to behave justly<sup>153</sup>—the real lawyer may see her job as merely one that moves money from one ledger to another. Worse, she may see her job as requiring her to take advantage of opponents represented by less-skilled (or less-well-funded) lawyers, or she may feel that she has trampled on some third party's rights in her zeal to achieve her client's objectives. Especially in the bankruptcy system, where one person's gain is often at another's expense, the bankruptcy lawyer may come to resent the professional requirement of zealous representation for what it costs her personally. There are, however, ways to deal with this problem. Recognizing the lawyer's own interest in fair play is an important first step. A lawyer who is uncomfortable with a victory over the defenseless is likely to feel better if she can discuss with her client how to address the needs of the defenseless. Even if the client does not want to consider those other needs, the lawyer has at least made the system somewhat more equitable through her efforts.<sup>154</sup>

Think back to the example of the lawyer with a bank client that is a repeat player in the system. What if the lawyer wants to protect not only the bank's long-term interests, but also the interests of all those whom the bank's behavior will affect? With the current ethics rules in place, she is on fairly tenuous ground. Nothing in those rules permits her to force her views on her client, although she can try to withdraw from representation if the client does not accept her views.<sup>155</sup> Her best bet is to attempt to persuade her client that acting in everyone's best interest furthers the bank's own goals. She can point to the value of a better reputation within the bankruptcy community as one positive effect of cooperation.<sup>156</sup> She can also stress relevant psychological or moral considerations.<sup>157</sup> To the extent that her arguments persuade the client to act in everyone's best interests, the lawyer will be able to reconcile her views of the appropriateness of the client's behavior with the client's actual behavior. Although the ethics rules do not mandate this type of counseling, they do not prohibit it.

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153. For examples of literature in which the lawyer is portrayed as a hero, see JOHN GRISHAM, *THE FIRM* (1991), and HARPER LEE, *TO KILL A MOCKINGBIRD* (1960). For examples of scholarly discussions of portrayals of lawyers as heroes, see Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up to be Tax Lawyers*, 13 VA. TAX REV. 517 (1994); Maute, *Balanced Lives*, *supra* note 3, at 801 (discussing the Atticus Finch "prototype for the altruist American lawyer"); and Thomas L. Shaffer, *On Being a Professional Elder*, 62 NOTRE DAME L. REV. 624 (1987).

154. And, of course, the lawyer need not stop at raising such issues with her clients. She can withdraw if she feels strongly about her client's treatment of the unrepresented. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16, *reprinted in* REGULATION OF LAWYERS, *supra* note 23, at 138-47; *id.* Rule 2.2(c) (1992), *reprinted in* REGULATION OF LAWYERS, *supra* note 23, at 158; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110 (1983), *reprinted in* REGULATION OF LAWYERS, *supra* note 23, at 380-82.

155. See *supra* notes 32, 66-84, and accompanying text.

156. See *supra* notes 54-59 and accompanying text.

157. See *supra* notes 66-84 and accompanying text.

### c. The Most Radical Approach: The Bankruptcy Lawyer As Social Conscience and Group Facilitator

To advocate consideration of unrepresented interests when advising a client is a significant departure from the obligation to represent one's client zealously. For the most part, though, the legal system is not designed to account for unrepresented interests, and lawyers—who in some sense rely on the system's integrity to justify the enforcement of legal decisions<sup>158</sup>—bear some responsibility to navigate the uncharted waters of accounting for those unrepresented interests. Even if the lawyer's reaction to dealing with unrepresented interests is to *find* counsel for those interests, that act helps to legitimate the legal system. If the unrepresented interests cannot be located or are simply not well-defined, then the lawyer still has an obligation, in counseling her own client, to explain that the system's normal assumptions have broken down. The lawyer's obligation to her client is important, but her obligation to the legal system as a whole must not be discounted either.

### 3. How Should a Lawyer Take into Account Unrepresented Interests?

It is all well and good to say that a lawyer should take into account unrepresented interests when advising her own client. It is more difficult, however, to spell out exactly how a lawyer should accomplish such a feat.<sup>159</sup> In one sense, the lawyer can determine whether unrepresented interests exist by playing a sort of numbers game: she can ask herself if everyone who might be affected by her client's actions is represented by counsel. If the answer to this question is "yes," she can charge ahead with her zealous representation.<sup>160</sup> If the answer is "no," then she can ask if some other means of accounting for the unrepresented interests is in place, such as legislation designed to protect those interests. If the less direct means of protecting those interests is available, the lawyer is probably still on safe ground in concentrating on her own client's interests. If the answer to this second question is

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158. Although a discussion of social philosophy is beyond the scope of this Article, revisiting such scholarship is important. For some suggested sources for reexamining social philosophy, see LUBAN, *supra* note 59, at 31-49; Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151 (1985); Margaret J. Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781 (1989); Michel Rosenfeld, *Substantive Equality and Equal Opportunity: A Jurisprudential Appraisal*, 74 CAL. L. REV. 1687 (1986); and Laurie Stearns, Comment, *Copy Wrong: Plagiarism, Process, Property, and the Law*, 80 CAL. L. REV. 513 (1992).

159. This feat is far from easy to accomplish. It requires the lawyer to act diligently and to take upon herself the obligation to think about more than just the law. As a professional, perhaps a lawyer can content herself with knowing as much as she can about her particular field; after all, just keeping up to date with recently published cases takes considerable effort. Nevertheless, a lawyer is not only a professional but also a person—and a well-educated one at that. For no other reason than the fact that hashing through complex moral issues is something that well-educated people should continue to do all their lives, lawyers should not shy away from making the effort.

160. I will leave for another day (and another article) the question of whether representation alone is sufficient or whether some adjustment must take into account the opposing counsel's skill or the client's own bargaining leverage.



“no,” then the lawyer must recognize that the playing field is not level. The formal advocacy model has failed, and the lawyer must take that failure into account when she advises her client.<sup>161</sup>

### *B. The Slippery Slope: The Drawbacks of Giving Extralegal Advice*

Once we say that lawyers should take into account unrepresented interests, we start down the proverbial slippery slope. Although lawyers might be able to provide some moral guidance for their clients' decisions, they certainly do not corner the market on moral superiority.<sup>162</sup> The repercussions of giving extralegal advice might take several forms, not all of them good.

#### 1. Inconsistent Advice and Loss of Client Confidence

When lawyers adhere to a policy of providing only legal advice, their advice is likely to be fairly uniform.<sup>163</sup> Even though most legal advice consists of shades of grey, many of the starting points from which lawyers develop their advice—the “black-letter law”—are considered common ground. Lawyers know, by and large, whether an exchange constitutes valid consideration. They do not all agree, however, on whether social policy supports making the exchange in the first place.<sup>164</sup> The more lawyers depart from

161. For example, assume that the debtor's lawyer has the option of claiming an exemption for the debtor and that the justification for claiming that exemption is marginal. Zealous advocacy suggests that the debtor's lawyer should claim the exemption anyway and let the court decide whether the exemption is appropriate. Any exemption that the debtor claims reduces the recovery for general unsecured creditors. The debtor's lawyer must ask herself if everyone affected by the debtor's strategy has the opportunity to be heard. The trustee has the right to object to the debtor's claimed exemptions. 11 U.S.C. § 522(l) (1988). Consequently, the unsecured creditors' interests are represented. See Taylor v. Freeland & Kronz, 112 S. Ct. 1644 (1992).

162. As to the expertise of professionals on ethics, Professor Post notes:

I doubt whether such judgments can be made the subject of professional expertise. Certainly “general principles of equity, fair dealing, and public policy” are not susceptible to privileged “professional” insight. They pose instead general issues of right and wrong, of tact and judgment, that are open to the perception of professional and nonprofessional alike. This does not mean that they are issues without answers, only that there is no particular reason to trust an expert's answer.

Robert C. Post, *On Professional Prerogatives*, 37 STAN. L. REV. 459, 463 (1985).

163. Post observes:

The difficult and important question that [Kagan and Rosen] raise[] is whether the values of autonomy and influence, as defined by Kagan and Rosen, can or should serve as the basis for a professional ethos. Recall that the very *raison d'être* of a profession is its claim to special expertise. Lawyers claim to know the law, and it is upon this claim that their status as professionals rests. For Kagan and Rosen's position to be accepted, it must be established that lawyers can claim a similar expertise with respect to matters of business, social, and ethical judgment. Kagan and Rosen's position appears to be that lawyers should be encouraged to express such judgments in their professional capacity, and that clients should attend to such judgments as they would to the advice of a professional.

*Id.* (footnotes omitted).

164. One of the best examples is that of surrogate motherhood contracts. Lawyers would feel relatively comfortable debating whether the surrogate motherhood contract was based on adequate consideration. Their conclusion, whether the answer was “yes” or “no,” would draw from established

their area of expertise, the less likely they are to provide consistent advice to their clients.<sup>165</sup>

Is lack of consistency a bad thing? Lawyers accept some inconsistency even in providing legal advice.<sup>166</sup> By permitting that legal advice to include extralegal factors, though, the inconsistency will increase dramatically. If the inconsistency leads to a decrease in some clients' faith in that advice, then the extralegal advice will fall on deaf ears. Those clients will prefer the lawyers who "stick to the law."

One solution is for the lawyer to structure her advice, to the extent she can, by dividing it into legal and extralegal components. The advantage of bifurcating her advice is that her credibility in terms of providing consistent legal advice<sup>167</sup> remains high. The disadvantage is that, by separating the two components, the lawyer signals that the extralegal advice is not as important as the legal advice. Nevertheless, the lawyer would at least take the first step of providing the extralegal advice.

## 2. Usurpation of the Client's Duty to Make Moral Inquiries

As Professor Robert Post observes, the more that ethics becomes the prerogative of lawyers, the less likely it is that clients will take the burden of moral inquiry upon themselves.<sup>168</sup> After all, the clients will assume that the "experts" are handling the ethical concerns. If Post's prediction is correct, then the buck-passing with regard to protecting unrepresented interests becomes just once more removed. Instead of both the lawyer and the client thinking that the other one is making the ethical decisions (which results in neither one thinking about those issues), the client gives the lawyer *carte blanche* to "handle" those issues for the client.<sup>169</sup>

legal principles. But any discussion of whether surrogate motherhood is a proper subject for a legally enforceable contract goes far beyond legal principles, and the yes/no split of lawyers' opinions would quickly splinter into a multifactional debate.

165. Moreover, the more lawyers depart from their area of expertise, the less reason clients have to follow their advice. See, e.g., Post, *supra* note 162, at 464 n.24 ("There is always a question, however, whether a trusting client can distinguish advice based upon professional expertise and advice based upon a lawyer's exercise of autonomy and desire for influence.")

166. That is why, for example, there are plaintiffs and defendants: each party's version relies on the same set of facts, but there are two different opinions about the legal implication of those facts.

167. As in, "Gee, that's what the other ten lawyers that I consulted said, too."

168. Post questions the desirability of shifting the burden of moral inquiry from clients to lawyers: I doubt whether it would be desirable to commit such issues to expert resolution. . . . [T]he professionalization of knowledge has its costs. Inquiry that becomes the subject of expert prerogative tends to become depoliticized, which means that it slips from the arena of public discussion, and its roots in ethics and public policy fade from public awareness. . . . I, for one, would think it very unfortunate if lawyers were to be perceived as "experts" in matters involving business, social, or ethical judgments, so that members of the public would feel incompetent to challenge such judgments or to perceive and debate the values that underlie them.

Post, *supra* note 162, at 463-64 (footnotes omitted).

169. Passing the buck is bad. But to the extent that *someone* is now thinking about the moral issues, instead of having a situation in which each person assumes that the other is thinking about them (which results in *no one* thinking about them), that reallocation of ethical responsibility represents an

Post's concerns are well-taken, but lawyers can bring the clients back into the decision-making process.<sup>170</sup> By bifurcating their advice into legal and extralegal concerns, lawyers can do what they do best: focus the client's inquiry on the matters needing the client's attention. If a lawyer tells her client that he must consider the effect of his actions on others, the onus is then on the client to decide what to do about those other interests. When lawyers define the client's interests to include the effect of the client's actions on others, then the client may start thinking of his interests in those broader terms.

### 3. One for All and All for One: Universal Ethical Lawyering

Professor Mark Osiel has suggested that a system that required lawyers to take extralegal issues into account would need the full commitment of all lawyers. In his view, such a requirement is like a system of universal health coverage: it depends on 100% participation to be completely effective.<sup>171</sup> Without 100% participation, clients who truly do not wish to consider the ethical issues raised by their legal strategies will flock to those lawyers for

improvement over the present state of affairs. Professor Robert Gordon spells out how far the current formal advocacy model can go in terms of usurping the client's own moral decisions:

If clients, including those who prefer to be law-abiding even when nobody is likely to know when they are not, habitually consult lawyers who *recommend* only the most literal forms of compliance and widen every loophole far enough to drive a truck through, the lawyers will end up effectively frustrating the purposes of their clients as well as the legal rules.

Gordon, *supra* note 7, at 20-21 (emphasis in original).

170. Ellmann suggests that lawyers should give clients more autonomy in the decision-making process and that the way to ensure such autonomy is to make sure that lawyers' advice to clients is complete:

I also suggest that people make decisions most competently when three conditions are met: first, they are aware that a decision is to be made and that they are entitled to make it; second, they know the choices open to them and comprehend the extent and the likelihood of the costs and benefits of the various alternatives; and, third, they are acting with as full an understanding of their own values and emotional needs as possible. To interfere with any of these prerequisites to clients' "vigilant" or "fully competent" decisionmaking concerning their legal options is manipulative. As a breach of the principle that clients are entitled to choose for themselves, such manipulation requires justification.

Ellmann, *supra* note 29, at 727-28 (footnote omitted). The justification to which Ellmann refers is client-based: some clients will want to make some decisions using a decision-making framework that uses less than full information. *Id.* at 728-33. Ellmann urges the lawyer to present clients with "not only assistance in the collating of relevant considerations bearing on a decision but also 'the fullness of [her] experience,' including her sense of the moral factors bearing on the client's decision." *Id.* at 761 (footnote omitted) (quoting MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1980)).

Responding to Ellmann's article, Professor John Morris provides even stronger support for the argument that attorneys should consider third parties' interests in advising their own clients. See John K. Morris, *Power and Responsibility Among Lawyers and Clients: Comment on Ellmann's Lawyers and Clients*, 34 UCLA L. REV. 781, 785-94 (1987). Furthermore, Morris observes that both the context in which the lawyer gives advice (for example, litigation or negotiation, civil or criminal) and the type of client who receives the advice (in terms of level of sophistication and power) can dramatically affect the propriety of giving advice based on the effect of the client's decision on others. *Id.* at 794-800.

171. Mark J. Osiel, *Lawyers as Monopolists, Aristocrats, and Entrepreneurs*, 103 HARV. L. REV. 2009, 2016 (1989) (reviewing LAWYERS IN SOCIETY (Richard L. Abel et al. eds., 1988-1989)).

whom “ethics” is just a word between “etherize” and “ethion” in the dictionary.<sup>172</sup>

I disagree. Assume that some lawyers would welcome the opportunity to provide extralegal advice and that some lawyers would abhor the idea. Those clients who derive some economic or moral benefit from expanding their decision-making calculus would gravitate toward the lawyers who provide extralegal advice. Those clients who want their lawyers to concentrate on pure legal advice would find lawyers who would do just that. I have a sufficiently optimistic view of humanity to believe that many clients would welcome the extralegal advice.<sup>173</sup>

#### 4. Denying Clients Access to the System

One thing that lawyers forget is that clients are often not thrilled to see them. Clients rarely retain lawyers on happy occasions.<sup>174</sup> They retain lawyers because they do not know (and perhaps do not want to learn) how to navigate the Byzantine system of statutes, case law, regulations, and lore that constitute lawyers’ stock-in-trade. Lawyers represent access to “the system.” Some critics of my proposal would argue that, when lawyers interject their own views as to the propriety of their clients’ desires, they block the clients’ access to the legal system in a sort of “play by my rules or don’t play at all” scenario. In some sense, a lawyer who interjects her own views *is* adding another level of supervision and delay. But that supervision and delay is not necessarily fatal to the client’s purposes. For one thing, if the lawyer’s advice is good, the supervision and delay can further the client’s overall interests. If, however, the client truly does not want to consider other unrepresented interests, nothing prevents the client from discharging the lawyer and looking elsewhere for representation.<sup>175</sup>

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172. WEBSTER’S II NEW RIVERSIDE UNIVERSITY DICTIONARY 445 (Houghton Mifflin Co. 1988). Osiel has also raised serious questions about the effectiveness of universal ethical lawyering: [F]ew attorneys could be expected to adhere to the model proposed [by William Simon and Robert Gordon] unless virtually all were compelled to do so—a far more decisive departure from the existing regime than the proposal itself defends. Without such a change, the isolated practitioner would have to engage in public deception, concealing her discretionary practices from her clients.

Osiel, *supra* note 171, at 2016. Taking this analysis a step further, though, even if 100% of lawyers participated, that participation by no means would ensure that the ethics the lawyers would espouse would be “good” ethics. Although lawyers are no worse at thinking about ethics than other members of society, they may be no better, either.

173. Even if not all clients decide that they appreciate the extralegal advice, some (possibly many) clients will expand their definition of self-interest to include the effects of their legal strategies on others, resulting in a net gain to society. “To save one person is to save the entire world.” See MISHNAH & TOSEFTA, TRACTATE SANHEDRIN 79 (Herbert Danby trans., 1919). For discussions of the related concept of “*tikkun olam*” (“repairing the world”), see, for example, Earl Kaplan, *Sermon on How Social Activism Goes Hand in Hand with Spirituality*, L.A. TIMES, Mar. 14, 1994, at B4; Merri Rosenberg, *Volunteers “Repair the World,”* N.Y. TIMES, Mar. 13, 1994, § 13 (Westchester Wkly.), at 4.

174. Except, for example, instances involving the occasional house purchase or inheritance issue.

175. It is true that not every client has the resources to conduct an all-out lawyer search to find a lawyer whose views comport with those of the client, and that some clients will therefore find access to the legal system curtailed by lawyers who interject their own views regarding the client’s proposed

### III. THE FOREST-TREES PROBLEM IN ACTION

Now that I have defined a lawyer's duty to include the consideration of unrepresented interests when advising her client, I shall apply that theory to some issues that occur in bankruptcy cases. The various roles of bankruptcy lawyers shift both between issues and within issues:<sup>176</sup> bankruptcy lawyers litigate; they draft business plans and documents; they negotiate in hallways and on the telephone; they wheedle and cajole and mollify. And they do many of these things simultaneously, all with their clients' interests in mind. Foremost among the tasks that bankruptcy lawyers perform is that of balancing the many interests that a bankruptcy case implicates. I first discuss the ways in which a bankruptcy case itself resolves other bankruptcy-related interests; then, I move beyond the consideration of bankruptcy-related interests alone to the question of how a bankruptcy lawyer should act when bankruptcy policy clashes with other social policies.

#### *A. When Saving the Trees Causes the Forest to Thrive: Situations in Which All of the Interests Are Represented*

Sometimes a bankruptcy lawyer does not need to be particularly cognizant of society's needs in order to effectuate them. Under some circumstances, the structure of the Code itself protects society's interests.

#### 1. Discharge

Scholars have given various explanations for why the Code permits some debtors to discharge certain debts.<sup>177</sup> Obviously, discharge helps the debtor

actions. That is an unfortunate by-product of my theory, and I do not mean to minimize it. Yet, I still believe that the benefits of lawyering to protect unrepresented interests outweigh the disadvantages. I also believe that, as more and more lawyers adopt my theory, a market will develop that will make it easier for clients to identify lawyers with particular ethical outlooks. Such a market development would, of course, also be a problem: eventually some clients who wanted to do immoral things would find lawyers some more than willing to help them. But that problem occurs even today.

176. John Ayer captures the sense of why bankruptcy practice differs from other types of practice:

An oddity about bankruptcy is that it doesn't fit either the original, or the modified, model [of ethics rules], very well. Bankruptcy includes both litigation and non-litigation elements, but in a curious mix. A bankruptcy "case" is a kind of administrative proceeding that may, or may not, include litigation. Thus litigation in bankruptcy tends, for good or ill, to be less formal than litigation elsewhere. On the other hand, negotiation and counseling in bankruptcy tend, much more than in general civil litigation, to be carried on under the aegis of the court. Bankruptcy is thus at once less and more "litigious" than an ordinary civil case.

Ayer, *supra* note 10, at 392. Ayer also explains how bankruptcy differs from other types of litigation, both in terms of notice-giving and the activity level of the judge in the case. *See id.* at 392-98.

177. *See, e.g.,* Adam J. Hirsch, *Inheritance and Bankruptcy: The Meaning of the "Fresh Start"*, 45 HASTINGS L.J. 175, 202-08 & nn.87-100 (1994) (describing the numerous ways in which the theory of discharge can be analyzed); Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047, 1069 (1987) ("Once the normative, ethical, and psychological factors are set aside, only the rehabilitative purpose . . . remains as a meaningful goal of discharge.")

The idea behind discharge of an individual debtor's debts is that the debtor can receive a fresh start only to the extent that he is not encumbered by the same crushing debt burden that precipitated the

get a fresh start; without a discharge, the debtor would never escape the spectre of crushing debt that led to the bankruptcy filing. But some would argue that the debtor's fresh start also benefits society. Two primary reasons have been advanced: first, that the concomitant transaction costs eclipse the economic benefit of chasing someone down for the *nth* penny, and second, that society benefits morally from bestowing a sense of forgiveness upon the righteous but unfortunate debtor.<sup>178</sup>

Douglas Baird describes discharge as being a balancing of creditor rights and debtor relief. To make a debt collection system work, creditors must believe that the state can coerce payment when necessary; at the same time, debtors need protection from overreaching creditors.<sup>179</sup> As Baird explains, "The current system works in large part because filing a bankruptcy petition imposes costs even on the individual who has no nonexempt assets."<sup>180</sup> These costs include the social stigma that accompanies an admission that one cannot pay creditors and the tightening of credit availability.<sup>181</sup> The right to a discharge is considered important enough that debtors may not waive it, although they may choose to pay back creditors out of a sense of moral obligation.<sup>182</sup>

bankruptcy. Most of the unsecured debt that is not satisfied by payments made during the bankruptcy case is discharged when the case is over, and the creditors holding still-unpaid unsecured debt may not pursue the debtor on the still-unpaid amounts. See 11 U.S.C. §§ 727, 1328. Not all pre-petition debts are dischargeable. See 11 U.S.C. §§ 523, 1328. Secured debt is, of course, satisfied by the value of the collateral securing the debt. See 11 U.S.C. § 506 (1988). In corporate chapter 11 cases, the pre-plan confirmation debts are converted, by a sort of novation, into debts assumed under the confirmed plan of reorganization, and creditors may only sue on the obligations undertaken by the plan if a default later occurs. See 11 U.S.C. § 1141.

178. Ayer writes:

[B]y 1898, the stated purpose of the discharge had changed. Thus it has been conventional since 1898 to say that the purpose of the discharge is to give the debtor a "fresh start." Several observations are in order about the "fresh start." First, the "fresh start" is not *one* policy, but at least *two*. Originally, the fresh start was justified on the proposition that it benefitted *society*. More often, it is justified on the proposition that it benefits the *debtor*. Second, *neither* of these fresh start policies is identical with the notion that the debtor is free to choose not to pay his debts. The "benefit to society" justification says no more than that society gets a benefit from the discharge sufficient to compensate it for whatever costs it may incur. The "benefit to the debtor" policy says it is desirable that the debtor be free of the *legal* obligation to pay; it says nothing at all about any *moral* obligation that he may bear.

Ayer, *supra* note 10, at 368-69 (emphasis in original) (footnotes omitted); see also JACKSON, *supra* note 99, at 225-32 (discussing two partial justifications of risk allocation and societal safety nets); Warren, *Policy*, *supra* note 18, *passim*.

179. DOUGLAS G. BAIRD, *THE ELEMENTS OF BANKRUPTCY* 24-25 (1992). Debtor protections other than discharge exist, both in the state and federal debt collection systems. For example, the availability of exemptions and the restrictions on how much creditors may garnish each leave the debtor with a bit of a fresh start. *Id.* at 25-27.

180. *Id.* at 28.

181. *Id.* Of course, the threats of stigma and credit unavailability do not deter everyone. *Id.* at 29.

182. See 11 U.S.C. § 523 (dealing with reaffirmation); BAIRD, *supra* note 179, at 30-32. Professor Ayer notes:

So far, this discussion of policies underlying the discharge seems to say little that either supports or contradicts the notion that there may be an independent moral obligation to pay one's debts. Rather, the policy discussion seems irrelevant to the issue. This in itself is a kind of support [for the concept of discharge], of course: it seems to suggest that the legal issue is independent of, and thus not in conflict with, the supposed moral obligation. In any event, the

Discharge—along with exemption rules and restrictions on garnishment—generally operates to oil the financial (and possibly the moral) functioning of society by balancing creditors' and debtors' needs, even without lawyers for the two groups having to focus on what level of debt repayment is best for society. A creditor's lawyer can pursue debt collection knowing that, at least in the case of individual debtors, she cannot overreach and prevent a debtor from earning a livelihood. The debtor's lawyer will argue against any overreaching by a creditor, and the bankruptcy court will resolve the dispute.<sup>183</sup> A debtor's lawyer can put her client on the road to a fresh start without worrying too much that credit will become less available to other borrowers based on the debtor's failure to pay the discharged debt.<sup>184</sup> Even in this "everyone for himself" situation, society's interests are, for the most part, served.

## 2. Plan Confirmation

Chapter 11 plans of reorganization<sup>185</sup> truly capture the essence of bankruptcy law. A successful plan turns a failing company around and provides creditors with going-concern value. Although some chapter 11 plans do not

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fact is that the reasons for granting the discharge seem to have little to do with the question whether it is permissible not to pay one's debts.

Ayer, *supra* note 10, at 371.

183. The more interesting question is whether a creditor's lawyer can subtly encourage the debtor to reaffirm a debt without violating the automatic stay authorized by § 362. See, e.g., *In re Brady*, 171 B.R. 635 (Bankr. N.D. Ind. 1994); *Jefferson v. G. Fox (In re Jefferson)*, 144 B.R. 620 (Bankr. D.R.I. 1992); *In re Flynn*, 143 B.R. 798 (Bankr. D.R.I. 1992). If the lawyer may do so, *should* she?

Reaffirmations of debt are governed by § 524 of the Code. In general, reaffirming otherwise dischargeable debt is not a good idea because the reaffirmation leaves the debtor with less than a full fresh start. But especially in chapter 7 liquidation cases, which leave debtors with very little in the way of assets, reaffirmation of a needed asset may in fact facilitate the fresh start. Creditors are not allowed to collect on discharged debts. See 11 U.S.C. §§ 362(a), 524(a)(2) (1988). Therefore, the interesting question is whether a creditor who initiates the debtor's reaffirmation of debt that would otherwise be discharged has acted improperly.

On the one hand, persuading the debtor to reaffirm the debt undercuts the balance of power that the fresh start is supposed to provide. On the other hand, refusing to attempt to persuade the debtor might be perceived as disloyalty to the lawyer's own client. At first glance, my theory of lawyering to monitor unprotected interests seems to suggest that the creditor's lawyer may charge ahead with any behavior short of a stay violation, because the debtor is represented by his own counsel. But what about the difference in bargaining power of the two parties? If the debtor wants to keep the asset, he must reaffirm the debt or redeem it pursuant to § 722; the creditor has the upper hand in this situation because the terms of the reaffirmation agreement must satisfy the creditor. It is one thing to say that the Code has already balanced the social policies of debt repayment and debt forgiveness and that, therefore, the bankruptcy lawyer does not need to repeat that balancing. It is another to say that differences in leverage do not matter. The question of compensating for differences in leverage is a difficult one, and I do not intend to resolve it in this Article.

184. Because discharge exists, creditors already factor the risk of discharge into their cost of lending funds. See BAIRD, *supra* note 179, at 29; see also Jackson, *Fresh-Start*, *supra* note 95, at 1422 ("To be sure, Creditor will pass at least some of the additional costs back to Debtor in the form of higher charges . . .").

185. In discussing plans of reorganization, I limit my analysis to chapter 11 plans because the plans of chapter 12 and 13 cases do not involve the same issues of voting and negotiating that chapter 11 plans do. See 11 U.S.C. §§ 1121, 1123-1125, 1129 (1988); *cf. id.* §§ 1221-1222, 1225, 1321-1322, 1325 (1988 & Supp. V 1993).

garner much interest among creditors, either because the stakes are relatively low (small chapter 11 cases) or because the creditors were already lined up before the case began (prepackaged chapter 11 cases), most plans are the subject of much hope and speculation. If a bankruptcy court confirms a plan, one of two events has occurred: all of the impaired classes have voted to accept the plan,<sup>186</sup> or at least one impaired class has voted to accept the plan and the court has found that the plan does not discriminate unfairly against, and is fair and equitable with respect to, each of the dissenting impaired classes.<sup>187</sup>

Why would a member of an impaired class vote to accept a plan? By definition, a member of an impaired class is being offered something other than that to which it was entitled under nonbankruptcy law. The member is not being bullied to vote to accept the plan,<sup>188</sup> so presumably that member is betting on the prospect that it will receive more from the debtor as a going concern than it would from liquidation of the debtor's assets.<sup>189</sup> This decision is made purely from each claimant's self-interest, but if enough members make the same choice, the debtor survives.<sup>190</sup>

Even the negotiations surrounding the drafting of the plan smack of self-interest. Creditors may decide to make concessions, but they do so in the context of betting on a greater recovery through reorganization than through

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186. 11 U.S.C. § 1129(a). A class of claims is impaired if its legal, equitable, or contractual rights are altered. *Id.* § 1124. Only impaired classes may vote to accept or reject the plan of reorganization. *Id.* § 1126(f) (1988). An impaired class of claims has voted to accept the plan if at least two-thirds in amount and more than one-half in number of those voting have accepted the plan. *Id.* § 1126(c) (1988). An impaired class of interests has voted to accept the plan if at least two-thirds in amount of those voting have accepted the plan. *Id.* § 1126(d) (1988).

187. *Id.* § 1129(b)(1) (the "cramdown" provision). "Fair and equitable" is a term of art. In general, "fair and equitable" is a buzz phrase for the "absolute priority rule." For a good discussion of that rule, see John D. Ayer, *Rethinking Absolute Priority After Ahlers*, 87 MICH. L. REV. 963, 965-99 (1989).

188. The Code is very particular about the solicitation of votes. See 11 U.S.C. §§ 1125, 1127(c) (1988).

189. That bet could be well off the mark. See, e.g., JACKSON, *supra* note 99, at 189 (noting the tendency of secured creditors to want to foreclose and liquidate right away and the inclination of general unsecured creditors to be overly optimistic about the likelihood of a successful reorganization).

190. A plan may be confirmed under the cramdown provisions if one impaired class has accepted the plan and the plan meets all of the other confirmation requirements of § 1129(a). 11 U.S.C. § 1129(b)(1). Nevertheless, confirmation means that the court has determined that creditors are at least no worse off under the plan than they would be under a chapter 7 liquidation and, usually, that no old equity holders will retain any interest unless the creditors are being paid in full. See 11 U.S.C. § 1129(a), (b); cf. Kenneth N. Klee, *Cram Down II*, 64 AM. BANKR. L.J. 229 (1990) (proposing that the new value exception is an uncodified aspect of the "fair and equitable" requirement); Mark E. MacDonald et al., *Confirmation by Cramdown Through the New Value Exception in Single Asset Cases*, 1 AM. BANKR. INST. L. REV. 65 (1993) (discussing the mandatory bargaining aspect of the new value exception in single asset cases); Ralph A. Peebles, *Staying In: Chapter 11, Close Corporations and the Absolute Priority Rule*, 63 AM. BANKR. L.J. 65 (1989) (discussing the problems of valuation and manipulation with the new value exception in cases involving close corporations); Julie L. Friedberg, Comment, *Wanted Dead or Alive: The New Value Exception to the Absolute Priority Rule*, 66 TEMP. L. REV. 893 (1993) (concluding that the new value exception is useful in small business reorganizations); Salvatore G. Gangemi & Stephen Bordanaro, Note, *The New Value Exception: Square Peg in a Round Hole*, 1 AM. BANKR. INST. L. REV. 173 (1993) (focusing on why the new value exception should not apply to single asset reorganizations).



liquidation. By the time that the reorganization reaches the confirmation stage, self-interest does not, for the most part, stymie the process.<sup>191</sup>

Such a sweeping statement has exceptions, though. All interests are not always represented in the plan confirmation process. For example, employees of the business have a vote only if they hold a claim against the estate and if that claim is impaired. Does a bankruptcy lawyer need to take their unrepresented interests into account? The answer may depend on whether the employees have some mechanism for bargaining with the potential new owner of the business. Even though the Code does not give the employees a specific right to be heard, if other mechanisms are in place, then the bankruptcy lawyers representing non-employees do not need to consider the employees' separate interests. But in a small business, there may be no other mechanisms through which the employees may speak. In such a situation, bankruptcy lawyers should pay attention to the needs of the unrepresented employees. Taking care of the employees' needs may be in the best interests of the other players in the bankruptcy case, and a lawyer can define her role to include that of advising her client in a way that averts labor unrest.

### 3. Preserving Assets for the Benefit of the Entire Group

Bankruptcy law, by its very nature, can sometimes provide a unique opportunity for representing otherwise unrepresented interests. The mass tort field provides the best example of this kind of interaction. When a product, such as the Dalkon Shield,<sup>192</sup> harms a great many people, those victims can sue the manufacturer. Without a collective system for distributing the manufacturer's assets, the first victims who discovered their injuries and then sued (and won) could potentially take all of the manufacturer's assets, leaving those with later-discovered injuries without meaningful recourse.<sup>193</sup> Tort law

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191. This, of course, is an overstatement. For one thing, strategic voting may force a plan into cramdown mode in order to squeeze concessions from the plan proponent. In addition, if the accepting classes are not willing to consider taking a little less in exchange for recovering going-concern value, then the reorganization will not work.

192. The Dalkon Shield was a form of intrauterine birth control device. See RICHARD B. SOBOLEW, *BENDING THE LAW: THE STORY OF THE DALCON SHIELD BANKRUPTCY I* (1991).

193. For example, in the Dalkon Shield litigation, the first tort victim received an award of \$10,000 in compensatory damages and \$75,000 in punitive damages. *Id.* at 13. That first victim's trial began in December, 1974. *Id.* at 12. By 1975, there were about 100 cases pending. *Id.* at 14. By 1979, 3000 cases had been filed, with settlements averaging \$11,000. *Id.* The judgments then began to increase exponentially: one case in mid-1979 netted \$550,000 in compensatory damages and \$6.2 million in punitive damages. In early 1980, one court awarded \$600,000 to the plaintiff, and another plaintiff received a \$1.3 million settlement. *Id.* at 14-15. More cases were filed in 1980 than were resolved. *Id.* at 15. In March, 1983, one plaintiff won \$1.75 million in damages, including \$1.5 million for punitive damages. *Id.* at 17. By October, 1984, the manufacturer of the Dalkon Shield, A.H. Robins, had paid over \$260 million in damages or settlement costs, and 10 new lawsuits a day were being initiated. *Id.* at 23. On August 21, 1985, A.H. Robins filed a chapter 11 petition "to protect the company's economic vitality against those who would destroy it for the benefit of a few." Francine Schwadel, *Robins Files for Protection of Chapter 11*, WALL ST. J., Aug. 22, 1985, at A3 (quoting Claiborne Robins, Jr.).

Other mass tort defendants have also used the bankruptcy system as a way of staying off a first-come, first-served approach to the distribution of the company's assets. See SOBOLEW, *supra* note 192, at 57 (describing the bankruptcy of the Johns-Manville Corporation). In the Johns-Manville work-out case,

is designed to place the injured party in the position in which he would have been had the injury not occurred.<sup>194</sup> In a first-come, first-served system of debt collection, tort law's purpose (that of fully compensating injury) would be achieved for only a few of the victims of mass torts.<sup>195</sup> With the bankruptcy system, however, a rule that provides for a more orderly distribution of assets replaces the nonbankruptcy grab rule. Although it is unlikely that all of the victims will receive full compensation from the bankruptcy estate, the very nature of the way claims are treated in bankruptcy makes it *more* likely that all of the victims will receive some compensation in the bankruptcy case—a more equitable result. Whenever a lawyer can reassure herself that the system provides for complete representation, she is on solid ground in concentrating on representing her own client's interests.

*B. When Saving the Trees Kills the Forest: Situations in Which Certain Interests Are Not Represented*

I do not mean to argue that bankruptcy law is the embodiment of the invisible hand<sup>196</sup> and that, as long as creditors look after their own interests, the debtor and society at large will be better off. In fact, the opposite is true. Bankruptcy presents all sorts of opportunities for a few spoilsports to ruin things for everyone, and by everyone, I do not mean just the debtor and its creditors.

Before the confirmation stage, a creditor's self-interest can easily destroy the debtor's chances of reorganization. Think of how many opportunities a creditor has to adopt the "grab rule" mentality as the bankruptcy case progresses. Two of the best examples occur in cash collateral and post-petition financing situations.

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the bankruptcy reorganization established a trust fund from which asbestosis victims could claim their damages. *See id.* A similar type of trust was established in the A.H. Robins bankruptcy. *See id.* at 287-325. Neither of the trusts has performed well. *See* John D. Ayer, *Down Bankruptcy Lane*, 90 MICH. L. REV. 1584, 1596 (1992).

194. *See generally* GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 26 (1970) ("[T]he principal function of accident law is to reduce the sum of the costs of accidents and the costs of avoiding accidents."); W. PAGE KEETON ET AL., *PROSSER AND KEETON ON TORTS* 7 (5th ed. 1984) (stating that tort law is designed to compensate the victim for his damages); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 176 (1986) ("Maintaining the credibility of the tort system requires that if a defendant is found liable, he must pay damages at least as great as [the victim's losses].").

195. Ayer, *supra* note 193, at 1595-96.

196. *Cf.* ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 423 (Edwin Cannan ed., 1937) (1776).

## 1. Cash Collateral Stipulations

When the debtor and a secured creditor negotiate a cash collateral stipulation,<sup>197</sup> each is aiming for different goals. The debtor wants to remove the hammerlock that the creditor has on its funds. The creditor does not want its traceable proceeds to disappear;<sup>198</sup> in other words, it does not want to become an unsecured creditor if the debtor decides to spend the cash collateral in untraceable ways. The secured creditor has most of the bargaining leverage in this situation, and debtors have been known to agree to nearly any protections that secured creditors have proposed in exchange for easy access to the cash.<sup>199</sup> Sometimes, both the debtor and the secured creditor will lose sight of just why the debtor is reorganizing in the first place. Neither has any particular incentive to remember the unsecured creditors, who have the most to gain from a successful reorganization. Every extra piece of collateral that the secured creditor grabs reduces the potential for recovery by the unsecured creditors. Placing dibs on too much at the beginning may well doom the reorganization.<sup>200</sup> Faced with such a possibility, the lawyer for the secured creditor should, at the very least, counsel her client that early greediness may leave the estate barren later in the case.

## 2. Post-Petition Financing

The same skewed perspective can occur in negotiating post-petition financing.<sup>201</sup> The debtor needs funds to run its business after a bankruptcy petition has been filed, and the creditor who is willing to advance those funds needs some protection against any tendency of the debtor toward profligacy.<sup>202</sup> But if the balance struck between the debtor and the financing creditor ties up assets that might have been used to generate a successful reorganization, then no one benefits.

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197. For a definition of cash collateral and an explanation of the circumstances under which it may be used, see *supra* note 21.

198. See 11 U.S.C. § 552 (1988).

199. The debtor is not wholly without leverage, though. If the creditor tries to grab too much (for instance, by making the debtor adhere to a budget that does not include any discretionary funds available for emergencies), that creditor may be leaving itself open to a lender liability suit if something goes wrong.

200. Although, theoretically, a fully secured and adequately protected creditor is neutral between reorganization and foreclosure, the delay between a possible foreclosure and the day that someone pulls the plug on a failing reorganization is in fact quite costly to the creditor. See *Crocker Nat'l Bank v. American Mariner Indus. (In re American Mariner Indus.)*, 734 F.2d 426 (9th Cir. 1984), *overruled by United Savings Ass'n v. Timbers of Inwood Forest Ass'n*, 484 U.S. 365 (1988).

201. See JACKSON, *supra* note 99, at 167-69 (noting that, with post-petition financing, the unsecured creditors are really the ones who should benefit most, at least in situations in which the debtor is insolvent; therefore, they should be calling the shots, not the debtor).

202. Depending on what type of deal the debtor and the creditor strike, the creditor may have an administrative claim for the post-petition financing, see 11 U.S.C. § 364(c)(1) (1988), a claim secured by heretofore unencumbered assets, see *id.* § 364(c)(2), a junior lien on already encumbered assets, see *id.* § 364(c)(3), or a senior lien priming already existing liens, see *id.* § 364(d)(1); see also *id.* § 507(b).

How could attorneys for the debtor and the creditor take other interests into account in the post-petition financing situation? Recall the continuum of attorney advising styles that I proposed earlier in this Article.<sup>203</sup> One possibility is for the creditor's attorney to define her client's interests as being more long-term (preserving the reorganization) than short-term (improving this month's balance sheet) and for the debtor's attorney to have the same long-term interests at heart (preserving the reorganization instead of just improving this month's cash flow). Redefining the goal means that the creditor will not try to grab so much protection that it increases the chance that the reorganization will fail, and the debtor will not give away so much protection that the unsecured creditors find themselves left out in the cold. Even if the attorneys do no more than take their clients' long-term interests into account, all of those entities that would profit from a successful reorganization will benefit.<sup>204</sup>

### 3. "After you, my dear Alphonse": The Complicating Factor of Being a Repeat Player in the System

All of this juggling and balancing of interests in bankruptcy law goes on against the backdrop of facing the same kinds of issues over and over. Bankruptcy lawyers are a close-knit group. They see each other in case after case. They argue the same kinds of issues in front of judges who usually know them, at least by reputation. They draft plans of reorganization based in part on experience with the law and in part on experience with some of the parties involved in the particular case. The question of what bankruptcy lawyers should do in advising their clients on bankruptcy issues therefore comes with a side question: how will their advice in this one instance affect their clients in later matters?

#### a. Lawyers As Repeat Players

A recent study of lawyer behavior, conducted by Professors Ronald Gilson and Robert Mnookin,<sup>205</sup> uses the classic "prisoner's dilemma" model<sup>206</sup> to

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203. See *supra* part I.B.2.

204. The attorney could also add her own views of the ethics involved when advising her client. If taking  $x$  amount of collateral would protect her client's needs and taking  $x+1$  would be overreaching, she should tell her client as much. That extra increment represents assets that others could use and that her client does not need. A final possibility is for the attorney to start from a group-focused perspective and then work backwards to see what her client could accept. This type of advice would involve examining the pros and cons of various financing scenarios and focusing on which one benefitted the most members of the group, including her client—a Pareto optimal solution. The drawback with this last scenario is that the lawyer will sacrifice some "zealousness" in favor of a better group result. But, viewed another way, an excess of zeal would pose a greater long-term risk of the reorganization's failure, and that result would not help her client, either.

205. See Gilson & Mnookin, *supra* note 149.

206. In the prisoner's dilemma, two prisoners accused of the same crime are placed in separate rooms. Each is asked to cooperate (*i.e.*, rat on the other prisoner) in exchange for a reduced sentence. If neither prisoner rats on the other, neither is convicted. If both prisoners rat on each other, they both

study whether cooperative or confrontational behavior by lawyers facilitates efficient dispute resolution. If the players in a prisoner's dilemma see the situation as a one-shot deal, they do not cooperate. Gilson and Mnookin suggest that litigation might better be viewed as a multi-round game, with each skirmish (such as a discovery dispute) constituting a separate round.<sup>207</sup> As long as there is a chance that the players might have to cooperate with each other more than once, with no finite point after which cooperation is unnecessary, the players might opt to avoid the prisoner's dilemma and cooperate with each other for a more optimal result.<sup>208</sup> To the extent that the players wanted to opt out of the prisoner's dilemma, the demand for lawyers with a reputation for cooperation would be at a premium.<sup>209</sup>

Gilson and Mnookin compared two types of practice, commercial litigation and divorce law, which involve quite different degrees of "contentiousness." They found commercial litigation to be much nastier than divorce practice for two reasons. The financial incentives for non-cooperation in some commercial litigation encouraged some "gladiator" lawyers to opt out of a cooperative system,<sup>210</sup> and the relatively large size of the commercial litigation bar decreased the effect of any penalties for non-cooperative behavior.<sup>211</sup> The more lawyers there are within a given practice area, the fewer chances there will be for repeat interactions and the less need there will be for cooperation. Family law, with its small bar and large amount of repeat business,<sup>212</sup> depended heavily on reputation and consequently valued cooperative behavior considerably more than did the commercial litigation bar.<sup>213</sup> Gilson and Mnookin propose four factors that seem to influence whether lawyers in a particular practice area tend to cooperate: the size of the relevant legal community,<sup>214</sup> the types of incentives that lawyers receive (for example,

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go to jail. If only one prisoner becomes a stool pigeon and rats on the other prisoner, then the stool pigeon goes free and the other prisoner is convicted. Cooperation produces the best result, but because neither prisoner knows whether the other one will cooperate, both prisoners rat on each other and both go to jail. For a more sophisticated explanation of the prisoner's dilemma, see *id.* at 514-15 & n.15. The prisoner's dilemma is just one small aspect of game theory, but it is one that resonates quite well in law. See, e.g., Maute, *supra* note 15 (applying game theory to the ethics of litigation practice).

207. *Id.* at 520-22.

208. *Id.*

209. *Id.* at 525-27.

210. *Id.* at 535-37.

211. *Id.* at 537-41.

212. *Id.* at 543 ("Family law practice tends to be both localized and specialized.").

213. *Id.* at 543-46.

214. Specifically, Gilson and Mnookin state:

In his 1980 study of civil discovery in Chicago, Wayne Brazil reported that his interviews reflected the importance of the size of the legal community on lawyer conduct. When "regulars"—i.e., specialists in a given area who saw "themselves as forming a loose, informal fraternity of specialist peers"—litigated against one another, discovery was less likely to be burdened with tactical jockeying, harassment, evasion, and other forms of resistance to disclosure than when the other party was inexperienced or unfamiliar with established practitioners in the field. Among the explanations offered by Brazil is that these Chicago "regulars" constitute a community, not unlike that of small town lawyers, in which "social and professional pressures" constrain and shape behavior. Moreover, because they expect to have significant social and professional contact in the future, opposing counsel know they will have "opportunities to retaliate for any perceived mistreatment by a fellow lawyer."

what type of fee structure they use and what criteria are used for promotions),<sup>215</sup> how difficult it is to ascertain cooperative behavior from the other side,<sup>216</sup> and how the legal culture in the relevant market views cooperative behavior.<sup>217</sup> The pressure *not* to cooperate also came from the ethics rules that concentrate on zealous representation: the rules' restrictions on withdrawal from representation and the allocation of decision-making power between lawyer and client tended to force lawyers to sacrifice long-term interests for short-term tactical victories.<sup>218</sup> Gilson and Mnookin concluded:

Theory suggests that a reputational market would operate most effectively when the size of the legal community is comparatively small. The actions of lawyers can then be well publicized, and lawyers can expect to face each other repeatedly in the future. Thus our analysis at least suggests why small-town lawyers may be less prone to exacerbate disputes with one another than are big-city lawyers, and also why one might expect to see a greater degree of cooperation within certain specialties than within the general community of attorneys.<sup>219</sup>

Thus, to the extent that bankruptcy lawyers form the kind of cohesive closed group that matrimonial lawyers do,<sup>220</sup> one would expect rational bankruptcy lawyers as a group to behave cooperatively a fair amount of the time.<sup>221</sup>

*Id.* at 547 (footnotes omitted) (quoting Wayne D. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 217, 240-42).

215. *Id.* at 548.

216. *Id.* at 548-49.

217. *Id.* at 549 ("In California, for example, the dominant culture among matrimonial lawyers in some communities is much more adversarial than in other communities that are much larger."); *see also id.* at 549-50.

218. *Id.* at 550-57.

219. *Id.* at 565.

220. In an earlier article, I observed that family law practice and bankruptcy law practice have much more in common than one might expect. *See* Rapoport, *supra* note 9, at 972-75.

221. *See* F. Regis Noel, *A History of the Bankruptcy Clause of the Constitution of the United States of America 179 (1920)* (unpublished Ph.D. dissertation, Catholic University of America) (observing that, even during the time of the very first Bankruptcy Act, there was a sense that "rings control the bankruptcy administration and bankruptcy affairs in so many localities—rings which exercise their power with the same evil effect as do the political rings in the field of politics") (quoting DAILY TRADE REC., June 12, 1916); *see also* Lynn M. LoPucki, *The Trouble with Chapter 11*, 1993 WIS. L. REV. 729, 731-32 (arguing that case delays account for most chapter 11 bankruptcy problems); Teresa A. Sullivan et al., *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 HARV. J.L. & PUB. POL'Y, 800, 848-99 (1994) (noting how bankruptcy lawyers develop a local legal culture). Of course, that cooperative behavior depends in part on the factors that Professors Gilson and Mnookin have isolated. *See supra* text accompanying notes 205-19.

At least in terms of anecdotal evidence, bankruptcy lawyers are cognizant of the advantages of cooperative behavior:

Every bankruptcy professional interviewed for this article stressed the importance of the "give" in the give-and-take of negotiation. "The best deal, in my opinion, is when you leave something on the table so that the other side retains something from the transaction . . . especially his or her dignity," [Melanie] Cohen said. . . .

. . . . Perhaps [Alex D.] Moglia summed it up best when he said: "Negotiate with people by trying to ask of them no more than you would want asked of yourself. To devastate the other side has neither logical nor ethical justification."

*The Fine Art of Negotiation, supra* note 7, at A12.

### b. Clients As Repeat Players

Bankruptcy lawyers are not the only ones who operate as repeat players in the bankruptcy system. Some clients are also repeat players<sup>222</sup> and, as such, have special long-term interests to consider. Their reputations are important. Do they tend to bluff? If so, other players—including lawyers, judges, and creditors—will not take their threats seriously. Do they tend to overreach at the beginning of the case? Then other players will pay particular attention to the early issues in the case, such as cash collateral stipulations. When bankruptcy lawyers think about strategy, they must take this extra factor into account.

I am not claiming that clients do not understand the ramifications of being repeat players. Of course they do. The problem with ignoring these ramifications typically occurs, however, when the client must engage in several different levels of decision-making. If the client's chief executive officer is also the person calling the shots in bankruptcy cases, then chances are good that the client will integrate into its business decisions the fact that it will see (and be seen by) the same players in future cases. If, though, the person with day-to-day decision-making authority in bankruptcy cases is someone other than the client's chief executive officer (or other top decision-maker), then it is probable that the two people will have disparate goals and very different attitudes about "playing along" in the bankruptcy case at hand.

### C. *When Worlds Collide: Bankruptcy Law Versus Other Social Policies*

Sometimes bankruptcy law itself creates a clash of interests, such as the clash between the debtor's fresh start and the creditors' desire to maximize the value of assets available for repayment. At other times, however, the clash is between bankruptcy policy and other social policies that interact with it.<sup>223</sup> How do bankruptcy lawyers resolve such conflicts? The inquiry still must begin with the question of whether there are any interests that are unrepresented. If nonbankruptcy policy has created entitlements and provided a mechanism for protecting them, then the bankruptcy lawyer need only ascertain that those other interests are represented. If, however, the holders of the entitlements have no mechanism for enforcing their entitlements within the bankruptcy system,<sup>224</sup> then the bankruptcy lawyer must alert her client to

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222. In general, certain types of creditors, such as banks, are more likely than debtors to be repeat players. On the other hand, there are those Braniffs of the world that seem to make a hobby of being in bankruptcy. See *supra* note 151.

223. Cf. Warren, *Policymaking*, *supra* note 18, at 338 ("[B]efore commentators propose any sweeping changes or policymakers take seriously any suggestions to scrap the [bankruptcy] system, they must consider the impact of such proposals on a number of competing normative goals.").

224. Mechanisms for protecting the entitlements may not exist—and for two reasons: first, the legislature may not have determined who has a right of action; second, the holders of the entitlements may not have the funds to press their claims in the bankruptcy case.

that fact.<sup>225</sup> To get a feel for how this interplay among interests might work, consider two examples: the clash between bankruptcy law and environmental law, and the clash between bankruptcy law and crime control policies.

### 1. Environmental Cleanups

Law would be much easier to understand if those who drafted the laws agreed on all of the principles of distributive justice that their laws would affect and if they drafted each law with an eye toward how the new law would affect every other law. Of course, such careful planning almost never occurs. But occasionally, lawmakers do weigh the pros and cons of competing policies and are capable of providing guidance on which policy is trump when conflicts arise.<sup>226</sup>

In general, though, Congress throws ideas about social policy around as if it were strewing flowers and does not bother to weigh the relative merit of competing principles. Of the numerous examples, the most glaring is the clash between bankruptcy law and environmental issues.<sup>227</sup> In some ways, both policies are collectivist in nature. Bankruptcy policy seeks to maximize the value of the estate and payoffs to creditors, with a resulting net gain to society,<sup>228</sup> and environmental policy seeks to clean up toxic waste and

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225. This is a traditional "Here There Be Tygers" situation, with only the lawyer's intelligence and conscience for guidance and company. Cf. Robert W. Gordon, *Introduction to Symposium on the Corporate Law Firm*, 37 STAN. L. REV. 271, 276 (1985) (commenting that little is understood about the law firm as a social institution).

226. For example, Congress is not always shy about spelling out when bankruptcy courts should defer to other fora. See *Gary Aircraft Corp. v. United States* (*In re Gary Aircraft Corp.*), 698 F.2d 775, 784-85 (5th Cir.) (holding that the bankruptcy court should have deferred to the Board of Contract Appeals with respect to a dispute over a government contract), *cert. denied*, 464 U.S. 820 (1983); cf. *Official Comm. of Unsecured Creditors v. Columbia Gas Systems* (*In re Columbia Gas Systems*), 997 F.2d 1039 (3d Cir. 1993) (Nygaard, J., concurring in part and dissenting in part) ("[The Code] creates a set of procedures by which a debtor's property is divided, but which does not create substantive property rights."), *cert. denied*, 114 S. Ct. 1050 (1994).

227. Debra L. Baker, *Bankruptcy—The Last Environmental Loophole?*, 34 S. TEX. L. REV. 379, 387 (1993). Professor Baker states:

The conflict between these objectives is apparent when courts must determine whether and under what circumstances a bankruptcy debtor obtains the "fresh start" which Congress intended under the Bankruptcy Code, as opposed to being forced to remediate or pay for remediation of environmentally impacted sites for which the debtor is deemed responsible under CERCLA.

*Id.* (footnotes omitted).

228. See *supra* part I.C.; see also *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 474 U.S. 494, 516 (1986) (Rehnquist, J., dissenting) ("What the Court fails to appreciate is that respondents' interest in these cases lies not just in protecting public health and safety but also in protecting the public fisc.").



conserve resources, also for the good of society.<sup>229</sup> But when the two policies intersect, the unprotected interests often fall by the wayside.<sup>230</sup>

One of the principal problems caused by the intersection of the two policies is whether cleanup costs, which can easily run into the millions of dollars,<sup>231</sup> should be considered a "claim" against the estate and, if so, as what kind of claim it should be classified.<sup>232</sup> The Code defines "claim" very broadly,<sup>233</sup> and an obligation to clean up toxic waste found on estate property easily fits within this definition. If the claim arose before the filing

229. Among other purposes, Congress enacted CERCLA (the Comprehensive Environmental Response, Compensation, and Liability Act of 1980), to facilitate the cleanup of toxic waste. 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993); see also Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 2 (1982) (arguing that CERCLA helps to authorize the cleanup of old hazardous waste sites and to promote the avoidance of new spills to further the "protection of health and the environment").

230. See James K. McBain, Note, *Environmental Impediments to Bankruptcy Reorganizations*, 68 IND. L.J. 233, 233 (1992) ("With the cost of [environmental] reclamation running extremely high, many corporations are now seeking to avoid the burdens of cleanup by using bankruptcy as a shield from mounting environmental obligations."); see also *id.* at 245 ("Courts have walked a tightrope between the competing policies of the automatic stay and the environmental laws."). As David Topol has observed, the one-thing-at-a-time approach with which courts resolve clashes between bankruptcy law and environmental law "ignores the fundamental question underlying the cases: who is going to pay the costs of cleaning up the environment?" David H. Topol, *Hazardous Waste and Bankruptcy: Confronting the Unmasked Questions*, 13 VA. ENVTL. L.J. 185, 186 (1994). For an excellent analysis of the relationship between the Code's automatic stay and environmental policy, see Kathryn R. Heidt, *The Automatic Stay in Environmental Bankruptcies*, 67 AM. BANKR. L.J. 69 (1993).

231. See Topol, *supra* note 230, at 185 ("[C]leanup costs at individual waste sites often exceed[] forty million dollars.").

232. Consider, also, the concept of abandonment in bankruptcy. The trustee may abandon property "that is burdensome to the estate or that is of inconsequential value and benefit to the estate." 11 U.S.C. § 554(a). The idea behind abandonment is that the value of the estate will be maximized, thereby increasing the amount available for payment of unsecured claims, if the trustee is allowed to exclude from the estate any property that consumes more resources than it generates. What could be more burdensome than polluted property that is too expensive to clean up? According to the Supreme Court, though, the trustee in bankruptcy does not have the unbridled authority to abandon contaminated property in violation of state public health and safety laws. See *Midlantic*, 474 U.S. at 507. In the case of abandonment, the social goal of remediation trumped the goal of maximizing the return to unsecured creditors. *Id.* The *Midlantic* dissent vehemently disagreed with the majority's restrictions on the trustee's power to abandon property:

This language [in § 554], absolute in its terms, suggests that a trustee's power to abandon is limited only by considerations of the property's value to the estate. It makes no mention of other factors to be balanced or weighed and permits no easy inference that Congress was concerned about state environmental regulations.

*Id.* at 509 (Rehnquist, J., dissenting) (footnote omitted). Indeed, the dissent did not even attempt to balance the competing policies, stating instead that "[f]orcing the trustee to expend estate assets to clean up the sites would plainly be contrary to the purposes of the Code." *Id.* at 514-15.

233. The Code defines a "claim" as a

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured . . . .

11 U.S.C. § 101(5) (Supp. V 1993).

of the bankruptcy petition,<sup>234</sup> then the claim could be liquidated and paid out of estate funds, and any remaining unpaid portion of the claim could be discharged.<sup>235</sup> If the claim arose post-petition, it could be considered an administrative expense (an "actual, necessary cost[.] . . . of preserving the estate")<sup>236</sup> and could be paid before general unsecured claims were paid.<sup>237</sup> Depending on whether the applicable state law creates a lien on property to satisfy cleanup costs, the cleanup claim might instead be considered a secured claim,<sup>238</sup> in which case it would have to be satisfied (up to the value of the collateral)<sup>239</sup> before any unsecured claims were paid.<sup>240</sup>

To see how all of these different possibilities for treating the claim of cleanup costs would play out, imagine a cleanup claim of \$1 million. If the claim had the status of a secured claim, then the debtor would sell the property and would use the first proceeds of the sale to satisfy the lien, thereby decreasing the funds available to satisfy the claims of unsecured creditors. If the claim were considered an administrative expense, then it would be satisfied from unencumbered funds before any general unsecured creditors could be paid at all. Thus, if there were only \$750,000 in unencumbered funds, general unsecured creditors would receive nothing. If, on the other hand, the claim were considered a garden-variety pre-petition unsecured

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234. Determining when such a claim arises is not easy. Depending on how one views the situation (and possibly depending on how one wants to control the outcome in terms of who pays what), the claim could arise the moment that the first contaminant invades the property, or it could arise only upon issuance of a nonappealable cleanup order. See Heidt, *supra* note 230, at 109-10. The issuance of cleanup orders also complicates the determination of when a claim arises. If the pollution occurs pre-petition and the Environmental Protection Agency issues a cleanup order pre-petition, the claim for the remediation is a pre-petition claim. If the pollution and the cleanup order occur post-petition, then any remediation would be an administrative claim. If the two events straddle the petition date, however, is the resulting remediation a pre-petition or a post-petition claim? According to the Court of Appeals for the Ninth Circuit, pre-petition polluting may give rise to a dischargeable pre-petition claim for cleanup, even if the cleanup order is not issued until after the petition has been filed. California Dep't of Health Servs. v. Jensen (*In re Jensen*), 995 F.2d 925, 931 (9th Cir. 1993).

235. If liquidation of the claim would "unduly delay the administration of the [bankruptcy] case," the bankruptcy court may estimate the claim for purposes of allowance. 11 U.S.C. § 502(c) (1988). For a discussion of how the claims estimation proceeding would apply to cleanups, see McBain, *supra* note 230, at 240-58.

236. 11 U.S.C. § 503(b)(1)(A) (1988).

237. *Id.* § 507(a)(1); see McBain, *supra* note 230, at 241-44. The effect of classification as an administrative claim is significant:

Classifying environmental obligations as administrative expenses would doom many reorganizations. Few debtors with environmental liabilities would be able to pay off the obligations in cash at the time of confirmation as required under the Code for administrative expenses. The result would be "sudden death" for otherwise viable debtors with environmental liabilities. But classification of CERCLA obligations as general unsecured claims fails to recognize the important policies guiding the environmental laws. The current approach is confused and provides little guidance for parties to a reorganization.

*Id.* at 244 (footnotes omitted).

238. See 11 U.S.C. § 506(a).

239. *Id.*

240. If the value of the collateral were less than the amount of the lien, the state might have a deficiency claim for the balance of the cleanup costs. That deficiency claim would be unsecured and therefore would be paid along with other general unsecured claims. *Id.* §§ 506(a), 507.

claim, it would be paid pro-rata, and any unpaid portion would be discharged.<sup>241</sup> In this last situation, someone would then have to bear the unpaid portion of the claim, and that "someone" would be the taxpayers. Because resolving the issue of how a cleanup claim is classified for bankruptcy purposes directly affects who ultimately bears the costs of cleanup,<sup>242</sup> the attorneys involved in the bankruptcy case need to pay some attention to the needs of the taxpayers.<sup>243</sup> Waiting until the "secured/administrative/unsecured" issue is decided is too late to protect the interests of the taxpayers. If a representative of the state government may speak on the taxpayers' behalf at the claim classification stage, however, then all interests are represented, and the attorneys may proceed with business as usual.<sup>244</sup>

## 2. Crime Control

Cleaning up the environment is not the only issue of universal concern. Bankruptcy law and criminal law also intersect in a number of places, and one of the most intriguing is that of asset forfeiture. When someone is caught in a drug bust, who is entitled to the assets seized—the government or the unsecured creditors of the alleged criminal—and how does a bankruptcy lawyer walk the line between being a zealous advocate and a guardian of society?

*In re Goff*<sup>245</sup> provides a good answer to these questions.<sup>246</sup> The main

241. In one particular case, the Supreme Court held that the debtor's cleanup bill (in essence, an injunction to pay money) is dischargeable, at least under the limited circumstances of that case. *Ohio v. Kovacs*, 469 U.S. 274, 283 (1985). Although the cleanup costs were dischargeable, any negative injunctions ("don't keep polluting") were not. *See id.* at 283 ("[Ohio] secured a negative injunction order to cease polluting . . . [as well as] an affirmative order to clean up the site."). In a concurring opinion, Justice O'Connor pointed out that the State of Ohio could have protected itself by securing cleanup costs with a lien on the property. *Id.* at 285-86 (O'Connor, J., concurring). The Second Circuit has held that response costs for pre-petition releases are dischargeable pre-petition claims and that injunctions not to pollute in the future are nondischargeable because they are not "claims." *United States v. LTV Corp. (In re Chateaugay Corp.)*, 944 F.2d 997, 1005 (2d Cir. 1991). Post-petition or pre-petition releases, if assessed post-petition, receive an administrative priority. *Id.* at 1009-10.

242. *See Heidt, supra* note 230, at 107-26; Daniel Klerman, *Earth First? CERCLA Reimbursement Claims and Bankruptcy*, 58 U. CHI. L. REV. 795, 803-10, 821-22 (1991); McBain, *supra* note 230, at 237-40.

243. Warren, *Policymaking, supra* note 18, at 363. Specifically, Professor Warren notes:

The issue of protecting the public purse continues to evolve. As more businesses fail while owing the government huge sums for the cleanup of their environmental messes, and as more troubled companies try to subsidize the costs of operating their underfunded pension plans with money from federal insurance programs, the possibility of shifting costs from the private to the public domain moves beyond the issues dealt with in current tax laws. Courts are struggling over questions about the discharge of cleanup liabilities and the priority repayment of pension obligations.

*Id.* (footnote omitted).

244. Jackson believes that the answer to the problem of dealing with environmental issues in bankruptcy is to preserve whatever nonbankruptcy attributes exist. If something needs to be changed, it is the nonbankruptcy attribute. Nothing prevents Congress or the states from making remediation a higher priority. *See Jackson, Analysis, supra* note 95, at 417-23, 428; *see also Kovacs*, 469 U.S. at 286 (O'Connor, J., concurring) ("[A] State may protect its interest in the enforcement of its environmental laws by giving cleanup judgments the status of statutory liens or secured claims.").

245. *Goff v. Oklahoma (In re Goff)*, 159 B.R. 33 (Bankr. N.D. Okla. 1993).

246. The facts of *Goff*, explained in detail by the court, can be briefly stated as follows: The debtor filed a voluntary chapter 13 petition in June, 1990. Her chapter 13 plan was confirmed in the fall of

question in *Goff* was whether the government or the unsecured creditors were entitled to assets forfeited under the drug laws. The bankruptcy court found that the government's post-petition forfeiture action violated the automatic stay because it was "intended to punish Goff and/or to make money for the Bureau."<sup>247</sup> But instead of taking the usual route of *voiding* the Bureau's action, the court held that, due to Goff's failure to advise the Bureau of her bankruptcy case(s), equity "demand[ed] that the Bureau's forfeiture action be treated as valid, even though subject to stay."<sup>248</sup>

The court then had to decide whether the stay should be modified in favor of the Bureau, because, as the bankruptcy court recognized, "now Goff is bankrupt; and there are other interests to consider besides hers and the Bureau's."<sup>249</sup> The bankruptcy court had to make a difficult choice. If it permitted the forfeiture, fewer assets would be available for Goff's creditors.<sup>250</sup> If it prohibited the forfeiture, then the goal of using forfeiture as a crime deterrent would have been thwarted.<sup>251</sup> The court solved the problem

1990. She failed to make several payments and moved to modify her plan to account for her arrearages. In her schedules, Goff claimed to own, free and clear of liens, approximately 34 acres of land, on which she lived in a mobile home. On April 15, 1992, agents of the Oklahoma State Bureau of Narcotics and Dangerous Drugs Control searched her home and seized a large supply of drugs and firearms. Goff agreed to cooperate with the Bureau and entered into an "Agreement to Cooperate" in April, 1992. In August, 1992, the Bureau filed a "Notice of Seizure and Forfeiture" in the district court, in which the Bureau sought the mobile home and part of the real property as forfeit under various drug laws. Goff responded that the forfeiture violated the "Agreement to Cooperate." Sometime in late 1992, her lawyer (actually, for a variety of reasons, Goff had more than one lawyer) notified the Bureau's lawyer that there was a pending bankruptcy proceeding.

During this hullabaloo, Goff continued to miss payments on her chapter 13 plan. Her first case was dismissed, but she filed a second chapter 13 petition on the afternoon of the first case's dismissal. In the second case, Goff's schedules reported the mobile home as an asset but reported only the amount of land that was involved in the seizure dispute. Goff filed a statement declaring that she had sought bankruptcy protection to retain her home and her land, but she did not cross-reference the Bureau dispute. Her second chapter 13 plan was confirmed in February, 1993. After her plan was confirmed, her attorney filed a notice of automatic stay in the forfeiture proceeding. *Id.* at 35-38.

247. *Id.* at 41.

248. *Id.* at 40.

249. *Id.* at 41.

250. Specifically, the court stated:

In the present case, the Bureau purports to punish Goff, but in fact the Bureau punishes Goff's other creditors. Goff must have a home. If she loses her land and her trailer, she must find somewhere else to live, and will probably have to buy or rent a new domicile. . . . The extra money that Goff must pay for purchase or rent of a new domicile will be money that should have been paid to her general creditors under her Ch. 13 plan. . . . [I]n the end it is not only Goff herself but her general creditors who will be hurt by the Bureau's seizure of Goff's property. These creditors are not criminals. They are innocent, taxpaying citizens, who do not deserve to be victimized by their own State government.

*Id.* at 42.

251. In analyzing the situation, the court stated:

The problem is how to reconcile these interests. If the Court cancels the State's forfeiture action, the Court uses its equity powers to help a criminal escape punishment for her crime. If the Court lets the State forfeit debtor's property, the Court punishes debtor's creditors for crimes they did not commit.

The solution is to channel the Bureau's forfeiture action, so that its effect falls on Goff alone. As an action *in rem*, the Bureau's civil forfeiture action cannot be discharged in bankruptcy . . . . When Goff's Ch. 13 case is concluded and the automatic stay comes to an end, . . . the Bureau can complete its forfeiture of Goff's property. By then, Goff's other

in grand Solomonic style: it remanded the case to permit the Bureau to proceed on the action in state court, although the enforcement of the action would be delayed until Goff's chapter 13 discharge was granted.<sup>252</sup>

The *Goff* court used the type of analytical thinking that I suggest bankruptcy lawyers should use whenever multiple interests are involved: check to see if all of the interests are represented. If they are, then the chances are good that either a fight among lawyers or a decision from a tribunal will balance all of the affected interests. If all interests are not represented, however, the bankruptcy lawyer must raise the issue of those interests with her client. For example, counsel for the creditors' committee might remind the committee members that they are both creditors and citizens, and she might explain how the failure to enforce the forfeiture laws could have long-term implications for the creditors in their noncreditor roles.<sup>253</sup>

### CONCLUSION

Historically, lawyers have served the role of the people's conscience.<sup>254</sup> Only relatively recently have lawyers abdicated that role in favor of a safer position as providers of purely legal advice.<sup>255</sup> This world is well rid of the model of lawyering that calls for the lawyer, in all of her superior wisdom, to make every decision for her client. Nonetheless, lawyers still need to act as moral compasses. Currently, too many decisions are passed down the line, and principled decisions that affect a group of unrepresented interests are among the first to be jettisoned.

Bankruptcy lawyers have a special interest in providing advice that takes group goals into account. Bankruptcy law is a group-focused system. People are inclined to cooperate in that system when the value of cooperation exceeds the value of selfishness. Bankruptcy lawyers, then, need to capitalize on the existence of that incentive to cooperate. When the system provides for representation of all affected interests, either directly in the Bankruptcy Code or indirectly through other social policies, there is no harm done if a lawyer focuses on the zealous representation of her client. It is foolish to think, however, that all affected interests are always represented. When the

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creditors will already have been paid as much as they will ever get. The Bureau can then take Goff's property without hurting anyone but Goff.

*Id.* (italics in original).

252. *Id.* at 42-43.

253. Of course, if Congress wanted to resolve how forfeited assets are to be treated in bankruptcy, it could do so. For one thing, it could choose to make forfeiture claims nondischargeable. I do not express any opinion as to the constitutionality or other validity of forfeiture laws, but to the extent that Congress wants to make the effect of those laws clear, it should specify how assets forfeited under the criminal laws should be treated in bankruptcy cases.

254. Cf. Anthony T. Kronman, *Living in the Law*, 54 U. CHI. L. REV. 835, 866 (1987) ("I do not mean that lawyers function as their clients' conscience, passing moral sentence on their goals and plans . . . [but] that clients often come to lawyers with confused or conflicting ends and that it is frequently part of a lawyer's job to help the client see what it is that he wishes to do and to decide whether, on reflection, he really wants to do it."); see also Altman, *supra* note 28, at 1032 n.3.

255. See Kronman, *supra* note 254; Altman, *supra* note 28.

assumptions of the formal advocacy model break down, lawyers mock the legal system by acting as though those assumptions are part of some immutable truth. To resurrect the system's overall legitimacy, lawyers must remember that their advice to clients can indirectly affect nonclients as well. Their duty to the profession requires them to act accordingly.