CODE OF SILENCE

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To read the literature on professional responsibility is to inhabit a world focused on what is said explicitly about what it means to be a lawyer: the aspirations of the canons, the commands of the Model Rules of Professional Responsibility, the clarifications of court and ethics opinions, and the guidance of the Restatement. However, it often neglects what is not said: spaces where silence reigns. This Article takes a different approach; it listens to the taciturn.

This Article draws insight from when the bar chooses to be silent in the face of widely known violations of the law of lawyering. Examples of such transgressions are varied. Criminal defense lawyers may barely glance at files before appearing for a client. Big-law firm attorneys routinely use delay, burden, and harassment as tactics against other private adversaries to pursue client goals. Public interest lawyering may prioritize the development of favorable case law and institutional goals over individual client-driven ends. These are not secrets—they are almost truisms.

In probing silence so described, this Article questions the profession's commitments to a uniform code of conduct and adds to the debate on the "standard conception" of lawyering. This inquiry reveals that lawyers have a more nuanced sense of professionalism than what one finds in the rules of professional responsibility; it is one tempered by context, competing duties, alternative regulatory systems, economic realities, and an ongoing commitment to lawyers as stewards of justice.

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INTRODUCTION

Silences can be as revealing as declarations. Meaning can be found in both. Scholarship in legal ethics often focuses on what is said explicitly about what it means to be a lawyer: the aspirations of the canons, the commands of the Model Rules of Professional Responsibility, the clarifications of court and ethics opinions, and the guidance of restatements. It neglects what is not said—spaces where silence reigns. This Article takes a different approach; it listens to the taciturn.

This silence lies in the places where widespread violations of the law of lawyering are clear and known, and the bar does not discipline the attorneys involved. Silence so described is not about undetectable violations or unclear rules. It is about when clear rules are being violated and the bar chooses to do nothing to curtail the practice. It is about the choice not to enforce rules of conduct. Clear, pivotal, uncontroversial rules governing lawyer conduct. Clear, widespread violations of those rules.

To listen to silence, this Article interrogates zones where we would expect cacophony: places where norms of practice openly and routinely flout rules of conduct. With limited exceptions, the law regulating lawyers as written applies generally to all lawyers regardless of practice area or client type.[1] In reality, there are pockets of legal practice where the bar recognizes that the usual rules do not apply as written (or apply differently). Conduct that would be condemned in one practice area is often overlooked in another. Criminal defense lawyers for the indigent often spend far less time communicating with clients and preparing for motions than their private sector colleagues. Big law firms routinely use burden and delay as litigation tactics. Facts from some of the most important public interest lawsuits of the past century remind us that

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[1] Jonathan R. Macey & Geoffrey P. Miller, *Reflections on Professional Responsibility in a Regulatory State*, 63 GEO. WASH. L. REV. 1105 (1995) (noting no difference between the duties of government lawyers and non-government lawyers to the public interest); Dana A. Remus, *Out of Practice: The Twenty-First Century Legal Profession*, 63 DUKE L.J. 1243, 1245 (2014) (noting that the legal profession as a whole has "a single, broadly applicable code of conduct"); Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 385–86 (1994) (noting the ethics codes' "basic approach of considering lawyers' duties to be uniform, whatever role the lawyer plays").

public interest lawyers may prioritize broad public policy concerns over individual client goals.[2] These deviations from professional responsibility rules are not secrets. And yet, this conduct is largely met by silence rather than condemnation, sanctions, or additional regulation.[3]

This Article explains the work this silence is doing. What does the bar's silence in these areas tell us about the profession, its norms, and its values? When we interrogate this silence, it reveals a more complex story than the rules as written about how lawyers conceive of their professional identity, weigh duties to clients, duties to rule of law, and duties to civil society. Rules may appear blind to the identity of the lawyer or client, the practice area, and the economic and societal pressures that surround their relationship, but the lawyers enforcing the rules of practice are not. Silence accomplishes recognition of legal realities where the express rules of professional responsibility would fail. As such, it is an intricate narrative of the bar's conception of lawyers' role in the American legal structure—not purely as technocrats or business persons, but also as broader stewards for the rule of law.

Listening to silence lends new insight into foundational debates in the field of legal ethics (should the rules of lawyering be specialized or not? Is duty owed to clients above all?) and opens new avenues of exploration. Part I outlines the unitary requirements of the law governing lawyers. This is a set of rules that, on its face, generally applies equally to all lawyers and in all areas of practice, regardless of their client base.

Part II outlines three specific examples of silence as earlier defined: a failure to discipline in the face of widely known rules violations. These instances juxtapose the premise of a unitary, ethical body with professional responsibility as practiced, but which silence shows is context specific. It explores areas of legal practice where gaps exist between the rules and the practice: institutionally induced limitations on competence and diligence in indigent criminal defense practice, burden,

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2 *See infra* Section II.C.

3 This piece fits into broader discussions regarding the interplay and limitations of strict compliance with formalistic law. *See* Jessica Bulman-Pozen & David E. Pozen, *Uncivil Obedience*, 115 COLUM. L. REV. 809 (2015) (discussing the use of conscientious strict compliance with the law as a means of drawing attention to unjust law).

delay and conflicts issues in large scale private practice, and imperfect client autonomy and communication in public interest representation.

Part III probes why misconduct in these areas exists, examining limitations on lawyer autonomy, economic pressures, and correlations with alternative regulatory structures. The Article concludes by evaluating silence. It recognizes that it is tempting to advocate for full enforcement, to seek to eradicate the unsaid. However, silence allows the bar to work with a nuance and pragmatism that currently eludes direct codification. Thus, the best solution, to the extent one views the code of silence as problematic, is not to rewrite the positive code but to develop and augment the common law of lawyering. This type of law has the flexibility and gradations needed to reflect the professions' actual commitments to fairness, equity and the public good—as well as fidelity to clients and their causes of action.

The silence of the bar in these areas reveals that lawyers do not practice under a single code of conduct, but many practice-specific codes based on assessments of the particular issues involved in lawyering in each area. This practice-specific norm indicates complex relationships with clients and the law. It reveals that lawyers as a group are ambivalent about client-centricity as a generalized matter. Silence indicates that lawyers can—and do—at times prioritize the good of clients (as a group) over the client (specifically) and at minimum have no interest in uniform applicability of rules to all types of clients (paying or not). Moreover, it is not only the nature of conduct that leads the bar to punish lawyers; it is also the power of lawyers within the structure of the bar that impacts self-regulation. These norms of practice, unlike the rules as written, recognize lawyers and clients as real parties that face practical, financial, and political constraints. Thus, silence considers client and institutional resources while recognizing lawyers as having a unique role in developing and implementing the law itself.

I. A BRIEF HISTORY OF A UNITARY CODE OF CONDUCT

Not unlike the rules of civil procedure, rules of professional conduct are written to be both transpersonal and transsubstantive.[4] The unitary view they present is a set of rules that, on their face, are equally, generally applicable to all lawyers, in all practice areas, regardless of the clientele.[5] Over time, scholarly calls for formal adoption of specialized rules of conduct have persisted.[6] However, such arguments have thus far failed to gain substantial explicit traction in the law governing lawyer conduct.[7] And yet, as a practical matter, regulatory silence indicates that specialization is pervasive.

A. *A Code for all Lawyers: The ABA and Birth of Modern Professional Regulation*

The first attempt at creating a national conduct standard for lawyers was the American Bar Association's (ABA) 1908 Canons of Professional Ethics (Canons).[8] This brief nine-page document proved to

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4 *See generally*; David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 B.Y.U. L. REV. 1191, 1250 (discussing how transsubstantivity, the idea that law should work similarly across subject matter areas, is a prudential principle rather than purely procedural); Roger Michalski, *Trans-Personal Procedures*, 47 CONN. L. REV. 321 (2014) (outlining and interrogating the norm that civil procedures apply to all parties and type of litigants equally).

5 *See* STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 11 (10th ed. 2014) ("A jurisdiction's rules apply to all lawyers admitted in it mostly without regard to their practice settings or the nature of their clients.").

6 *See infra* Section I.B.

7 While the Model Rules of Professional Conduct, as adopted, espouse a unitary view of the profession and reject wholesale specialization in ethical norms, some practice-specific caveats do exist. S*ee, e.g.*, MODEL RULES OF PROF'L CONDUCT r. 3.8 (AM. BAR ASS'N 2016) ("Special Responsibilities of a Prosecutor"); *id.* at r. 1.11 ("Special Conflicts of Interest for Former & Current Government Officers & Employees"); *id.* at r. 1.2(a) (requiring that, in representing a criminal defendant, a lawyer must abide by the defendant's decisions whether to plead guilty, waive a jury trial, or testify).

8 *See generally* CANONS OF PROF'L ETHICS (AM. BAR ASS'N 1908), *reprinted in* 33 ANN. REP. A.B.A. 575 (1908); The State of Alabama's code (one of the few at the time), along with an influential essay by George Sharswood, were the primary sources drawn from for drafting the Canons. Susan D. Carle, *Lawyers' Duty to Do Justice: A New Look at the 1908 Canons*, 24 LAW & SOC. INQUIRY 1, 9 (1999) (relaying how the drafters of the Canons consulted Sharswood and

be broadly influential. While state bars were under no obligation to adopt the Canons, they nonetheless soon implemented them nationwide.[9] Drafted partially in response to increasing perceptions of commercialization in lawyering,[10] the Canons "expressed the viewpoint of an economically advantaged social stratum distinguished by its intellectual accomplishment, attachment to the business community, and preoccupation with civic political affairs."[11] The Canons were not practice-specific. Instead, they were written to apply to all lawyers[12] and discussed professional conduct in broad terms.[13]

As time passed, the bar and the public became frustrated with the limitations of the Canons, both in terms of content and format.[14] After years of discussion, in 1964 the ABA convened the Wright Commission to propose amendments to the existing Canons.[15] The product of this commission's work was a complete overhaul: a shift to a statute-like system in the Model Code of Professional Responsibility (Model

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the Alabama state code); *Final Report of the Committee on Code of Professional Ethics*, 33 ANN. REP. A.B.A. 567, 568 (1908) (noting that Sharswood's essay was circulated along with the draft Canons to membership).

9 *See* David R. Papke, *The Legal Profession and Its Ethical Responsibilities: A History*, *in* ETHICS AND THE LEGAL PROFESSION 29, 39 (Michael Davis & Frederick A. Elliston eds., 1986) (noting how three-fourths of all states had adopted the Canons by the beginning of World War I).

10 Carle, *supra* note 8, at 7–8 (noting that "law journals at the turn of the century were replete with articles lamenting growing 'commercialism' in law practice").

11 Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1250 (1991).

12 The broad applicability of the rules was despite (or perhaps because of) the fact that the ABA's contemporaneous membership policies excluded many. In 1908, membership in the ABA was by invitation only and therefore limited to well-connected practitioners. *See* JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 43–130 (1976) (arguing that the drafting of the Canons was designed to exclude women and minorities).

13 *See generally* CANONS OF PROF'L ETHICS Canon 1 (1908), *reprinted in* 33 ANN. REP. A.B.A. 575 (1908) (describing, for example, "the duty of the lawyer to maintain towards the court a respectful attitude").

14 The Canons were viewed as too general and lacking in clarity as well as being substantively limiting in terms of client development. *See* Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1160–61 (1958) (noting a lack of "specific detail and pragmatic grounding").

15 Edward L. Wright, *The Code of Professional Responsibility: Its History and Objectives*, 24 ARK. L. REV. 1, 5 (1970) ("A completely changed document was not envisioned . . . ."); 89 ANN. REP. A.B.A. 381 (1964).

Code).[16] The Model Code made certain substantive departures from the Canons, but it continued the Canon's legacy of one code of conduct applied to all lawyers.[17] Its most notable contribution was to change the format of self-governance from the aspirational to the legalistic. The Model Code broke down professional conduct guidance into two tiers: binding disciplinary rules (knows as DRs) that set a floor of permissible conduct, while "ethical considerations" (ECs) were non-binding guidance. These DRs and ECs did not differentiate between practice areas, client types, or the employment structures in which lawyers practiced.

While this transition to a code structure has been lasting, the Model Code itself was short-lived. The early 1970s Watergate scandals and related threat of direct government oversight prompted the ABA to form the Kutak Commission.[18] After extensive inquiry, what emerged in the early 1980s is the basis for the current ABA rules, the Model Rules of Professional Conduct (Model Rules).[19] While the Model Rules dispelled with homages to ethics, chucking the aspirational ECs in favor of Rules with interpretive comments, it remained faithful to the uniform rule structure for all lawyers, clients, and practice structures.[20] While the Model Rules have been modified several times since their adoption, most notably in 2002 in response to the Enron fraud scandals and in 2010 as part of a comprehensive Ethics 20/20 review, their core structure and purpose remains unchanged.[21]

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16 Substantively, the Code's notable changes included allowing lawyers to work on a contingency fee basis, as well as facilitating compliance with First Amendment developments recognizing attorney advertisement as protected commercial speech. *See generally* MODEL CODE OF PROF'L RESPONSIBILITY (AM. BAR ASS'N 1969).

17 *Id.*

18 *See* GILLERS, *supra* note 5, at 9 (discussing the relationship between Watergate and the Kutak Commissions revisions of the rules and the addition of required legal ethics courses at ABA accredited law schools).

19 *Id.*

20 The most notable exception to this is a single rule devoted to the particular role of prosecutors, whose constitutional duties are mirrored in the self-regulatory rules of conduct. MODEL RULES OF PROF'L CONDUCT r. 3.8 (AM. BAR ASS'N 2016).

21 *Id.* at r. 1.6(b)3 & 4 (adopted in 2002 to create exceptions to the duty of confidentiality that would have allowed disclosure of the Enron facts); *ABA Commission on Ethics 20/20*, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/committees_commissions/aba-commission-on--ethics-20-20/thank_you [https://perma.cc/29VK-W2RC] (last visited Apr. 18, 2019) (listing modifications arising out of the Ethics 20/20 commission,

The preamble to the Model Rules, "A Lawyer's Responsibilities," makes clear a commitment to treating all lawyers under the code interchangeably.[22] Each paragraph outlines duties that lawyers—all lawyers—owe to their clients, to the courts, to the rule of law, and as public citizens.[23] The preamble closes by defining the role of all lawyers as universal, a "vital role in the preservation of society."[24] Under the Model Rules, all lawyers serve the same core purpose and the rules allow lawyers to navigate the balance between their duties to clients, courts, rule of law, and their moral selves.[25]

The rules that emerged were also distinctly client-centric in nature.[26] The code devoted the vast majority of its rules to outlining duties to clients in painstaking detail.[27] Thus, the positive law of lawyering today places tantamount emphasis on duties to clients.[28] This model holds that, within the bounds of the law, "the lawyer should do everything for the client that the client would do for himself if he had

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including modifying various rules regarding technology, rules of multijurisdictional practice, and choice of law).

22 MODEL RULES OF PROF'L CONDUCT, PREAMBLE: A LAWYER'S RESPONSIBILITY (AM. BAR ASS'N 2016).

23 *Id.*

24 *Id.*

25 "The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship." *Id.*

26 Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1, 6 (2003) ("[T]he professional ideal endorsed by the rules of professional conduct envisions a lawyer willing to diligently represent a client irrespective of any personal, moral, or ideological affinity between them."); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 36 (describing the neutrality principle as one of the bedrocks of the "ideology of advocacy" which trains lawyers to focus on client interest).

27 *See, e.g.*, MODEL RULES OF PROF'L CONDUCT r. 1.1–1.18, 2.1.

28 Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369, 370–71, 373 (2006) (noting client-centricity as the "most prevalent theory of lawyering taught in law school clinics"); Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 3 (2005) (noting that the zealous advocacy model is "arguably the 'dominant' one among United States lawyers"). A client-centric model may take on many forms, including the "entire devotion" principle, Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 18 (1951), or "neutral partisanship," which is known more pejoratively as the "hired gun" mentality. RICHARD ABEL, AMERICAN LAWYERS 247 (1989) ("Lawyers are hired guns: they know they are, their clients demand that they be, and the public sees them that way.").

the lawyer's skill and knowledge."[29] A client-centric view is often encapsulated in the form of a neutral partisanship that requires that lawyers engage in the "single-minded pursuit of the client's objectives" without exercising moral judgment or acquiring moral accountability for those objectives.[30] Some have argued that this model of lawyering is morally desirable, as lawyers who morally vet clients' ends will usurp clients' rights, exercise unjustified moral sway, and undermine the value in rule of law.[31] This is a storied debate with critics countering that the "standard" conceptions' indifference to the substance of a client's claims or the context in which claims are wielded may undermine justice itself and morality, and perpetuate inequity.[32]

B. *The Long Crusade for a Specialized Code of Conduct*

Despite consistent external reaffirmations of a one-code-fits-all ethos, critiques against a generalized code of professional conduct are longstanding and ongoing.[33]

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29 Roger C. Cramton, *Professionalism, Legal Services and Lawyer Competency*, *in* AM. BAR ASS'N, JUSTICE FOR A GENERATION 144, 149 (1985).

30 TIM DARE, THE COUNSEL OF ROGUES?: A DEFENCE OF THE STANDARD CONCEPTION OF THE LAWYER'S ROLE 5 (2009); Norman W. Spaulding, *The Rule of Law in Action: A Defense of Adversary System Values*, 93 CORNELL L. REV. 1377, 1378 (2008) (defining role morality as the idea, much maligned by legal ethicists, that lawyers should receive some degree of immunity from the general requirements of conscience on account of their distinctive social role).

31 Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613 (using the term "amoral lawyering model" due to the distance of the lawyer's moral accountability for client outcomes); *see also* Spaulding, *Reinterpreting Professional Identity*, *supra* note 26.

32 Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 81–82 (1980); DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 67–68 (2000).

33 More than two decades ago, David Wilkins underscored the importance of context in resolving professional responsibility questions. *See* David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 515–19 (1990); David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye, Scholer*, 66 S. CAL. L. REV. 1145 (1993); *see also* David B. Wilkins, *Some Realism About Legal Realism for Lawyers*, *in* LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT 25, 40 (Leslie C. Levin & Lynn Mather eds., 2012). There is now a robust body of literature reflecting an academic consensus around Wilkins's insight that "context counts." *See, e.g.*, Leslie C. Levin & Lynn Mather, *Epilogue*, *in* LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT, *supra*, at 365, 370; James Gray Pope, *Two Faces, Two Ethics: Labor Union Lawyers and the Emerging Doctrine of Entity Ethics*, 68 OR. L. REV. 1, 54 (1989);

One of the first concerted challenges to the unitary code norm came in a 1978 report from the Annual Chief Justice Earl Warren Conference on "Ethics and Advocacy."[34] In that report, the conferees argued that "it is practically impossible to incorporate into a single document standards applicable to all lawyers in all situations," and "the discussants favored the enactment of specific subcodes."[35] The report goes on to observe distinctions between large law firms, which have retainers, and personal injury or civil rights lawyers that work on a case-by-case basis. As such, the committee was concerned that:

> [t]he former is far more likely to have a higher income and, thereby, the time and wherewithal to be active in professional associations and other groups. . . . [S]tandards of conduct should reflect the type of work of the lawyer, the kind of client with whom he deals, and the lawyer-client relationship. . . . Such differing standards would take into account the vast disparity in resources between the two types of clients.[36]

A litany of scholarly articles followed and continue to this day, arguing for various reasons that practice-specific codes of conduct are needed.[37] The rallying cry to differentiate between criminal law practice and civil practice has been the most pronounced and critiqued.[38] But

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Rebecca Roiphe, *The Ethics of Willful Ignorance*, 24 GEO. J. LEGAL ETHICS 187, 191 (2011); Ann Southworth, *Collective Representation for the Disadvantaged: Variations in Problems of Accountability*, 67 FORDHAM L. REV. 2449, 2449–50 (1999); Eli Wald, *Resizing the Rules of Professional Conduct*, 27 GEO. J. LEGAL ETHICS 227, 282–83 (2014).

34 ANNUAL CHIEF JUSTICE EARL WARREN CONFERENCE, ETHICS & ADVOCACY: FINAL REPORT 10 (sponsored by the Roscoe Pound—Am. Trial Lawyers Found., 1978) (noting "nearly unanimous approval" for the recommendation that the Code of Professional Responsibility "be redrafted to incorporate standards of conduct applicable to specialty fields within the practice of law").

35 *Id.*

36 *Id.* at 11. *See also* JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 319 (1982) (discussing how there are two hemispheres in the legal profession with smaller practices focused on individuals and large practices focusing on organizational clients).

37 *See* Fred C. Zacharias, *Reconceptualizing Ethical Roles*, 65 GEO. WASH. L. REV. 169, 190 n.96 (1997) ("[C]ommentators have proposed the adoption of specialized codes of conduct covering lawyers engaged in particular areas of practice.") (citing examples).

38 David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729 (1993); William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703 (1993); Kim Taylor-

this civil/criminal dichotomy reflects only the broadest possible splicing of professional duties. Some have argued that certain practice areas, like corporate law or bankruptcy, require their own rules, because general rules are a poor fit for their statutory complexity.[39] In the area of national security law, scholars have noted the need for reforms in legal ethics in the absence of other constraints on state power.[40] Other scholars have recognized the important role additional rules might play in prioritizing duties in situations where clients are particularly disenfranchised or vulnerable.[41] Still others have identified how changing practice styles such as collaborative lawyering models and in house counseling roles are poor fits for existing self-regulatory structures.[42]

Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419, 2464–65 (1996) (discussing conflicts of interest in public defender offices). Most recently, Bruce Green followed this long tradition, advocating for a specialized code for capital defense lawyers. *See* Bruce A. Green, *Should There Be a Specialized Ethics Code for Death-Penalty Defense Lawyers?*, 29 GEO. J. LEGAL ETHICS 527, 530–31 (2016).

39 Nancy B. Rapoport, *Our House, Our Rules: The Need for a Uniform Code of Bankruptcy Ethics*, 6 AM. BANKR. INST. L. REV. 45 (1998) (advocating for special rules for bankruptcy lawyers); Stanley Sporkin, *The Need for Separate Codes of Professional Conduct for the Various Specialties*, 7 GEO. J. LEGAL ETHICS 149 (1993) (advocating specialized ethics codes in fields such as corporate and securities practice).

40 Peter Margulies, *True Believers at Law: National Security Agendas, the Regulation of Lawyers, and the Separation of Powers*, 68 MD. L. REV. 1, 8 (2008) (advocating specialized ethics rules for national security lawyers).

41 Richard E. Crouch, *The Matter of Bombers: Unfair Tactics and the Problem of Defining Unethical Behavior in Divorce Litigation*, 20 FAM. L.Q. 413, 435–38 (1986) (discussing possibility of specialized codes in family law); David R. Katner, *The Ethical Struggle of Usurping Juvenile Client Autonomy by Raising Competency in Delinquency and Criminal Cases*, 16 S. CAL. INTERDISC. L.J. 293, 323 (2007) (advocating for a special rule for representing juveniles); Stephen Pepper, *Three Dichotomies in Lawyer's Ethics (with Particular Attention to the Corporation as Client)*, 28 GEO. J. LEGAL ETHICS 4 (2015) (discussing the particular allegiances of lawyers to individual clients and particularly wealthy entity clients); Jan Ellen 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, 1153 (1994) (suggesting an ethics rule for multidisciplinary practice by elder law attorneys).

42 Christopher M. Fairman, *Why We Still Need a Model Rule for Collaborative Law: A Reply to Professor Lande*, 22 OHIO ST. J. ON DISP. RESOL. 707 (2007) (advocating special rules for collaborative lawyering); Remus, *supra* note 1, at 1245.

Despite these varied and thoughtful arguments in favor of specialized codes of conduct, no state bar has adopted one.[43] The bar remains committed on paper to a transpersonal and transsubstantive code of legal ethics to regulate lawyer conduct.[44] It is the silence between these rules and reality that belies this apparent simplicity.

II. THE CODE'S LIMIT: SHIPS IN THE SEA OF SILENCE

Transparency dictates that reasonable parties would expect uniform condemnation of breaches of core duties to clients. If clients are the center of the universe, and all lawyers (who are not prosecutors) are held to the same standards, then it is hardly a leap of faith to expect subjective concerns like the employment context, the type of client, the subject of the underlying legal claim, and funding structures to play no part in the inquiry.

Enter reality. Part II contrasts the premise of a client-centric unitary ethical code with legal ethics as practiced. It explores three examples of legal practice where there is a rift between the rules and the practice: (1) indigent criminal defense, (2) use of burden and delay in big law practice, and (3) blurred client autonomy and communication in public interest representation. Each of these areas provides an example of a practice area where core duties generally ascribed to lawyers are often breached, sometimes openly so. Still, these breaches are typically met with silence from the bar. Here, norms of practice contrast with norms on the books if for no other reason than that they *are* practice specific. But the contrast goes far beyond that, taking into account the power of attorneys to make choices, the regulatory context of practice, and client power.

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43 That said, statutes and constitutional law impose context specific additional requirements beyond those instituted by the bar. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.); Dodd Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (outlining specific duties in the financial services context); Brady v. Maryland, 373 U.S. 83 (1963) (outlining duties owed by prosecutors).

44 Again, the notable exception here is for rules regarding prosecutorial misconduct. *See generally* MODEL RULES OF PROF'L CONDUCT r. 3.8 (AM. BAR ASS'N 2018); sources cited *supra* note 8.

Up until this point, legal ethics' story renders the identity of the lawyer invisible as a transsubstantive rule-based professional code of conduct focused on duties to generic clients. This Section begins the process of exploring where those expectations break down. In the following illustrative, non-exhaustive contexts, core professional duties are routinely violated in some practices, while policed in others. Here, non-compliance with self-regulation often functions as its own institutional norm;[45] one that is itself reinforced by the structure and expectations of the workplace.[46]

A. *Criminal Defense: Life in the Trenches*

Perhaps nowhere is the disconnect between the rules of conduct and realities of practice so stark as in the context of indigent criminal defense. Public defender's offices often labor under crushing workloads.[47] This is not a new or covert phenomenon. These large caseloads impact public defenders' abilities to be competent, diligent, and communicative by rendering them unable to meet regularly with

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45 New Institutionalism conceptualizes institutions not as specific groups of people or physical places, but as dynamic sets of formal and informal rules. B. GUY PETERS, INSTITUTIONAL THEORY IN POLITICAL SCIENCE: THE 'NEW INSTITUTIONALISM' 2–3, 7–8 (1999); Paul J. DiMaggio & Walter W. Powell, *Introduction* to THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 1, 2–3 (Walter W. Powell & Paul J. DiMaggio eds., 1991).

46 The rules of new institutionalism manifest through behaviors, customs, symbols, patterns of thought, or conventional wisdom. New Institutionalism posits that, whatever form they take, these rules frame (or supersede) conscious decision-making and structure human interactions. JAMES G. MARCH & JOHAN P. OLSEN, REDISCOVERING INSTITUTIONS: THE ORGANIZATIONAL BASIS OF POLITICS 21–23 (1989); WENDELL GORDON, INSTITUTIONAL ECONOMICS 16 (1980) (noting that "the essence of the institution is the commonly held behavior pattern"); Thráinn Eggertsson, *A Note on the Economics of Institutions*, *in* EMPIRICAL STUDIES IN INSTITUTIONAL CHANGE 6, 6–7 (Lee J. Alston et al. eds., 1996).

47 Derwyn Bunton, *When the Public Defender Says, 'I Can't Help'*, N.Y. TIMES (Feb. 19, 2016), https://www.nytimes.com/2016/02/19/opinion/when-the-public-defender-says-i-cant-help.html [https://perma.cc/MGB4-FRVQ] ("Many public defenders are unable to visit clients, file motions in a timely manner or conduct the necessary investigations. In fact, our workload is now twice the standard recommended by the American Bar Association."); Debbie Elliott, Morning Edition, *Need a Public Defender in New Orleans? Get in Line*, NAT'L PUB. RADIO (Feb. 4, 2016), https://www.npr.org/2016/02/04/465452920/in-new-orleans-court-appointed-lawyers-turning-away-suspects [https://perma.cc/M62B-AJ3P] (quoting New Orleans's Deputy District Defender Jee Park discussing evidentiary issues attaching to a lack of resources to handle the city's indigent caseload after a million-dollar shortfall).

clients, preserve evidence, conduct needed fact development, and engage in effective motion practice.[48] Here, also new attorneys are charged with handling large numbers of complex cases, often with little supervision.[49]

Thus, the institutional environment where lawyers are meant to provide the constitutional right to counsel is rife with ethical landmines.[50] Here, as elsewhere, the law governing lawyers should set a baseline of expectations for what constitutes adequate (not exemplary) professional legal services. However, in indigent criminal defense, it is an open secret that workloads are so excessive that duties central to the fiduciary role of lawyers (competence, diligence, and communication) are institutionally compromised.[51]

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48 Bunton, *supra* note 47; Richard A. Oppel. Jr. & Jugal K. Patel, *One Lawyer, One Day, 194 Felony Cases*, N.Y. TIMES (Jan. 31, 2019), https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html?mtrref=www.google.com [https://perma.cc/RX9R-7WT5] (discussing a public defender who "would have needed almost 10,000 hours, or five work-years, to handle the 194 felony cases he had on that April day alone, not to mention the dozens more he would be assigned that year"); NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 19 & n.48 (2011) (noting that "in the field of indigent defense even a public confession of ethical violations due to excessive caseloads does not lead either to public outcry or discipline"). The ABA noted in a 2006 formal opinion that "excessive workloads present issues for both those who represent indigent defendants and the lawyers who supervise them." ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-441, at 2 (May 13, 2006).

49 LEFSTEIN, *supra* note 48, at 56.

50 RUBIN BROWN LLP & STANDING COMM. ON LEGAL AID & INDIGENT DEFENSE, ABA, THE MISSOURI PROJECT: A STUDY OF THE MISSOURI PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS 5 (2014) ("Excessive workloads result in insufficient time available to provide reasonably effective assistance of counsel to all clients.").

51 ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENSE, THE LOUISIANA PROJECT: A STUDY OF THE LOUISIANA PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS 2 (2017), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_louisiana_project_report.pdf [https://perma.cc/RVS6-NZ8K] (the study revealed that the state public defender's office only had the capacity to competently represent 21% of the cases being brought, leaving a deficit of over 1,400 lawyers in the state system); ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENSE, EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS (2009), https://www.in.gov/publicdefender/files/ABA%20Eight%20GuidelinesMay2010.pdf [https://perma.cc/GK5P-HPWP].

1. Duties to Clients: Professional Responsibility 101

ABA Model Rule 1.1 defines a baseline of competence as, "requir[ing] the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[52] Competent representation, "includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake."[53]

The ABA Model Rules also require a lawyer to "act with reasonable diligence and promptness in representing a client."[54] This is explained in requiring that "[a] lawyer's work load must be controlled so that each matter can be handled competently."[55] ABA Criminal Justice standards also reiterate a commitment to diligence: "under no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial."[56]

The duty of communication is also extensive and requires seeking consent where needed, consultation about means of representation, an ongoing duty to keep the client reasonably informed, and to explain matters in a way that allows client to make informed decisions.[57] This includes not only the prompt communication of settlement or plea offers,[58] but imparting "sufficient information to participate intelligently in decisions . . . in litigation a lawyer should explain the generally strategy and prospects of success."[59]

There is no ambiguity whether, as a matter of the law of lawyering, these duties apply equally to all lawyers, including lawyers representing

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52 MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2018).

53 *Id.* r. 1.1 cmt. 5.

54 *Id.* r. 1.3.

55 *Id.* r. 1.3 cmt. 2.

56 CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION Standard 4-6.1(b) (AM. BAR ASS'N 4th ed. 2015).

57 MODEL RULES OF PROF'L CONDUCT r. 1.4.

58 *Id.* r. 1.4 cmt. 2.

59 *Id.* r. 1.4 cmt. 5.

indigent defendants.[60] In *Polk County v. Dodson*, the Supreme Court held:

> State decisions may determine the quality of his law library or the size of his caseload. But a defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior. Held to the same standards of competence and integrity as a private lawyer . . . a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client.[61]

More recently, the ABA reiterated in a 2006 Formal Opinion that all lawyers, including public defenders and those appointed to represent the indigent in criminal matters, are required to provide diligent and competent representation.[62] The Opinion goes on to require lawyers to withdraw when they cannot provide competent and diligent service.[63] The Opinion aligns with other ethics opinions recognizing no exceptions to the blanket one size fits all requirements of lawyering for those engaged in indigent representation.[64] State bars considering the

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60 *In re* Edward S., 92 Cal. Rptr. 3d 725, 746 (2009) (noting that the duties of "public defenders and other publicly funded attorneys who represent indigent persons charged with crimes are no different from those of privately retained counsel").

61 454 U.S. 312, 321 (1981).

62 ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-441, at 1 (May 13, 2006) (stating that indigent criminal defense lawyers are subject to competency requirements); *see also id.* at 8 ("In the final analysis, however, each client is entitled to competent and diligent representation.").

63 *Id.* at 1; *see also id.* at 4 (citing duties pursuant to rule 1.16(a) barring representation and allowing withdrawal where "representation will result in violations of the rules of conduct"). That said, the Opinion does not offer a plausible solution for how to offer competent representation where the court refuses to grant permission to withdraw, stating only that if "that permission has been denied, the lawyer much take all feasible steps to assure that the client receives competent representation." *Id.* at 5.

64 *Id.* at 3 & n.9 (citing ABA formal and informal opinions, including ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 347, at 1 (Dec. 1, 1981), *in* FORMAL AND INFORMAL ETHICS OPINIONS, FORMAL OPINIONS 316-348, INFORMAL OPINIONS 1285-1485, at 139 (ABA 1985) (noting duties owed clients include sufficient preparation)); *see also* ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 96-399 (Jan. 18, 1996) (discussing ethical obligations of lawyers whose employers receive funds from legal services corporation to existing and future clients).

issue have issued similar opinions stating that duties of competence and diligence equally amongst different lawyers.[65]

ABA Formal Opinions have confirmed the role supervising lawyers play in safeguarding these norms of conduct, stating that "the supervisor must monitor the workloads of subordinate lawyers to ensure that the workload of each lawyer is appropriate."[66] Where inappropriate, supervisors are advised that they "should take whatever additional steps are necessary to ensure that the subordinate lawyer is able to meet her ethical obligations."[67] According to these ethics opinions, failure to remedy such situations could lead to direct discipline upon the supervising attorney.[68] However, such threatened disciplinary action has not materialized—neither against supervisors nor those who were supervised.[69]

2. Criminal Defense: Where Scarcity is the Norm

"*We've basically gone about the process of establishing systemic and ongoing violation of the Rules of Professional Conduct . . . [w]e've all known about this.*"

—Stephen Hanlon, National Association for Public Defense[70]

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65 Va. Legal Ethics Op. 1798 (Aug. 3, 2004); S.C. Bar Ethics Adv. Op. 04-12 (Nov. 12, 2004) (stating that all lawyers including public defenders must manage caseloads to avoid violations of professional conduct rules).

66 ABA Formal Op. 06-441, at 5 (enumerating steps that a supervisor could take would be to transfer non-managerial responsibilities or cases to other employees or lawyers).

67 *Id.* at 7.

68 *Id.* at 8 ("[Under rule 5.1(c)], [i]f a supervisor knows that a subordinate's workload renders the lawyer unable to provide competent and diligent representation and the supervisor fault to take remedial action . . . the supervisor himself is responsible for the subordinate's violation of the Rules of Professional Conduct.").

69 LEFSTEIN, *supra* note 48, at 58 ("[N]o heads of public defense agencies appear to have been disciplined as a result of inadequate supervision or otherwise failing to ensure compliance with professional conduct rules . . . ."); NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 203 n.88 (2009) ("[D]efense attorneys who represent the indigent are rarely disciplined even when their caseloads are excessive, and they fail to provide competent representation.").

70 Lorelei Laird, *The Gideon Revolution: Starved of Money for Too Long, Public Defender Offices Are Suing—and Starting to Win*, A.B.A. J., Jan. 2017, at 44, 51 (discussing *Hurrell-Harring v. State of New York*).

The previous Section established the positive law regulating lawyers does not create any differences in standards regarding competence, diligence, and communication for public defenders.[71] It maintains that accountability for failures to meet those obligations rests directly on the shoulders of the individual practicing attorney and the supervisory duties run concurrently and do not absolve individual lawyers of professional misconduct.

However, today public defenders offices labor under crushing workloads with only one fourth of the reporting being adequately staffed to handle their cases.[72] The average caseload in Rhode Island is over 1,700 cases annually, and in some jurisdictions public defender report representing 2,200 or even 4,000 cases in a year.[73] Large caseloads directly impact a lawyer's ability to be competent, diligent, and communicative by rendering them unable to meet with clients, be prompt, preserve evidence, conduct needed fact development and investigations, and engage in effective motion practice.[74] Moreover, is it

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71 Phyllis E. Mann, *Ethical Obligations of Indigent Defense Attorneys to Their Clients*, 75 MO. L. REV. 715 (2010).

72 Laird, *supra* note 70, at 46 (citing Bureau of Justice statistics); Bunton, *supra* note 47 ("Many public defenders are unable to visit clients, file motions in a timely manner or conduct the necessary investigations. In fact, our workload is now twice the standard recommended by the American Bar Association."); Elliott, *supra* note 47 (quoting New Orleans's Deputy District Defender Jee Park discussing evidentiary issues attaching to a lack of resources to handle the city's indigent caseload after a million-dollar shortfall).

73 *See* Lisa C. Wood, Daniel T. Goyette & Geoffrey T. Burkhart, *Meet-and-Plead: The Inevitable Consequence of Crushing Defender Workloads*, 42 LITIG. 20 (2016) (discussing the case loads of attorneys in upstate New York and Illinois). *But see* KING COUNTY, WASH., THE STATE OF KING COUNTY PUBLIC DEFENSE 5 (2015), https://www.kingcounty.gov/~/media/courts/OPD/documents/The_State_of_King_County_Public_Defense_PDAB_Report_March_2015.ashx?la=en [https://perma.cc/PH82-3MP6] (reporting that according to standards set by the Washington Supreme Court, full time public defenders are authorized to handle no more than 150 cases per year).

74 Bunton, *supra* note 47 ("A 2013 study in Missouri provided a snapshot of the problem. For serious felonies, defenders spent an average of only nine hours preparing their cases; 47 hours were needed. For misdemeanors, they spent two hours when 12 hours were necessary."); COMM'N ON THE FUTURE OF LEGAL SERVS., ABA, REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 54 (2016) [hereinafter ABA FUTURES REPORT] ("When attorneys are saddled with hundreds or thousands of cases, core legal tasks—investigation, legal research, and client communication—are quickly jettisoned. As a result, clients who have a right to effective, ethical counsel receive only nominal representation."); Jed Lipinski, *The Trials and Travails of a New Orleans Public Defender*, NOLA.COM (Mar. 30, 2016), https://www.nola.com/crime/2016/03/new_orleans_public_defender_trials_and_travails.html [https://perma.cc/9EFW-XQA7]

impossible to engage in good lawyering where the lawyer cannot guarantee the client accurately understands what the law allows or mandates.[75] A 2016 report by the ABA on the Future of Legal Service (ABA Futures Report)[76] notes that that "even the most skilled attorneys cannot deliver effective, competent, and diligent representation when representing hundreds or thousands of clients per year."[77]

Recent years have seen public defense lawyers attempt push back on these overload trends. Supervisors have attempted to turn away work.[78] The New Orleans' Public Defender's Office, saddled with over 22,000 cases a year, began to refuse to represent clients and put them on a waiting list, despite the fact of being court appointed.[79] Six districts around the state followed suit by putting needy indigent defendants on wait lists.[80] In response, the American Civil Liberties Union (ACLU) filed a class action federal lawsuit on behalf of suspects who cannot afford to hire their own lawyers, seeking federal intervention in the state public defender crisis.[81]

Some courts supported the ability of public defenders to refuse public defense work where professional duties would be compromised. In 2012, Missouri's highest court ruled that judges cannot order public defenders to take on more clients than they can represent fully.[82] The next year, the Florida Supreme Court followed suit, invalidating a state law that barred public defenders from refusing cases due to overloads on

(reporting that some public defenders must travel more than 250 miles to see transferred clients impeding not only communication but candor based on trust).

75 *See* Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

76 In 2014, the ABA created a Commission on the Future of Legal Services tasked with increasing access to legal services. After two years of inquiry, numerous public hearing, written comments, and much professional and academic involvement, the commission issued its report. ABA FUTURES REPORT, *supra* note 74, at 4.

77 *Id.* at 54.

78 Lipinski, *supra* note 74 (reporting that New Orleans' chief defender announced his office would refuse certain felony cases where defendants face lengthy sentences leaving 110 indigent accused parties waitlisted or unrepresented).

79 Elliott, *supra* note 47.

80 *Id.*

81 *Id.* ("'We know that we cannot accept those appointments and know that we're going to do ethical, constitutional representation,' Park says.").

82 State *ex. rel.* Mo. Pub. Def. Comm'n v. Waters, 370 S.W.3d 592 (Mo. 2012).

work burdens.[83] In its option, the Florida Supreme Court held that "[w]hen understaffing creates a situation where indigent [defendants] are not afforded effective assistance of counsel, the public defender may be allowed to withdraw."[84] This is in tension with ABA ethics opinions that, as a matter of positive law, would compel public defenders to appear unless permitted to withdraw regardless of other ethics issues.[85]

The bar issues reports, but it is virtually silent in enforcing rules. Here, the bar exercises discretion in a way that shows cognizance of the significant mitigating circumstances under which public defenders (and their clients) labor. Disciplining well-meaning, overworked and undercompensated individual lawyers, who are caught in a system where they have little autonomy, does little to advance the cause of institutional change. Thus, despite the clear applicability of the professional rules as written, the open acknowledgement of the professional conduct issues implicated in excessive public defender caseloads and the bar's own calls for reform,[86] bar associations rarely discipline public defenders for violations of duties of competency, communication, or diligence.[87]

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83 Pub. Def. v. State, 115 So. 3d 261 (Fla. 2013) (rejecting legislation that denied permission to withdraw on this basis).

84 *Id.* (quoting Day v. State, 570 So. 2d 1003, 1004 (Fla. Dist. Ct. App. 1990)).

85 ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-441, at 5 (May 13, 2006) (noting that the public defender must continue to serve if motion to withdraw is denied); *see also* Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Hughes, 557 N.W. 2d 890, 894 (Iowa 1996) (noting that appeal, rather than failure to comply, is the appropriate step for disputing a court order); Utah Bar Ethics Adv. Op. 107 (Feb. 15, 1992) (same).

86 ABA FUTURES REPORT, *supra* note 74, at 54 (arguing in favor of reform of the overburdened indigent defense system) ("The profession should not stand by while defendants—many innocent—suffer.").

87 Even in instances where public defenders provided incompetent representation, lawyers were not disciplined until their misconduct implicated issues of dishonesty, not mere lack of diligence, competence, or communication. For example, where a public defender counseled a client to plea to a felony charge where misdemeanor charges were available—clearly calling into question their compliance with diligence, competence, and communication duties—it was only later, when the same attorney falsified documents, that the attorney was disbarred. Laird, *supra* note 70, at 48 (discussing *Hurrell-Harring v. State of New York*).

3. Counterpoint: Private Sector Enforcement of Code

This is not to say that the bar is unwilling to discipline lawyers for competency and workload related violations generally.[88] In the private sector, as opposed to the public defender context, work burden binge behavior and competence is more closely scrutinized. Private sector supervisors and law firm partners were disciplined after the court found that firm practices, including assigning associates caseloads of nearly 600 active cases, "adversely affected the attorneys' ability to practice law in the manner required by the Rules of Professional Conduct."[89] In another case, a law firm partner (Ficker) who ran a high volume legal practice specializing in severe traffic violations, was disciplined where work burden issues led to competency and communication issues.[90] In that case, Ficker would assign cases to associates with often a one-day notice and they would appear in court with no previous client interaction.[91] However, this same fact pattern is not uncommon in the world of public defense.

Private lawyers have also been disciplined for a lack of competency when representing criminal defendants.[92] Some cases arise where they provide indigent defense representation on a contract basis or as assigned counsel. Attorneys in these situations have argued, unsuccessfully, that their lack of diligence and communication were a

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88 *See, e.g.*, *In re* Cohn, 194 A.D.2d 987, 991–92 (N.Y. App. Div. 1993) (bankruptcy/family law); *see infra* notes 89–95.

89 Davis v. Ala. State Bar, 676 So. 2d 306 (Ala. 1996). These partners were also disciplined pursuant to Alabama's Rule 8.4(g), which provides that it is misconduct for a lawyer to "engage in any other conduct that adversely reflects on the practice of law," since they provided subpar service where their advertisements promised a high standard. *Id.* at 310 (quoting ALA. RULES OF PROF'L CONDUCT r. 8.4(g) (1995)).

90 Att'y Grievance Comm. v. Ficker, 706 A.2d 1045, 1047 (Md. 1998).

91 *Id.* Ficker was found in violation of his supervisory duties in this context and that his associates are not being disciplined for their failure to provide competent representation.

92 This may be, in part, due to the fact that criminal defendants have a more difficult time seeking redress through a malpractice claim given the incredibly strict standard applied to criminal malpractice suits. In many jurisdictions, the client in a criminal malpractice case will have to prove actual innocent or judicial relief from the criminal conviction. Peeler v. Hughes & Luce, 909 S.W.2d 494 (Tex. 1995).

result of being overburdened and having too many cases.[93] Competency has also been policed where private lawyers represent criminal defendants for fees paid by the client and not the state. *The Mississippi Bar v. Pegram* involved an attorney with no prior criminal law experience who accepted a felony drug possession case and $20,000 for representation through trial.[94] In that case, the attorney continued to represent the client even when experienced co-counsel dropped out. Unprepared for trial and hoping to negotiate a plea, the attorney withdrew on the first day of trial and ultimately faced disciplinary action primarily arising from competency issues.[95] Where defense lawyers charge fees to clients and lack experience, they have also been found incompetent and subject to discipline.[96]

The silent norm of not requiring public defenders to provide diligent and competent representation at the same levels as those with paying clients, is clear not only in non-enforcement of breaches of duties of diligence, competence, and communication; it may also manifest in efforts to actively limit public defenders from engaging in robust representation.[97] In the recent case of Drew Willey, a lawyer assigned to defend indigent clients, the political act of underfunding met the judicial power of enforcement. There, supervising Judge Ewing removed Mr. Willey from representing his clients not for failure to be diligent but "because he spent too much time on them and requested funds to have their charges investigated."[98] As alleged in the complaint, Judge Ewing noted, "There is a delicate balance between making sure

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93 *In re* Disciplinary Proceedings Against Artery, 709 N.W.2d 54, 62 (Wis. 2006) (relaying an attorney's claim that his actions were defensible in part because he accepted "too many appointments at the appellate level from the [state public defender's] office"); *In re* Whitlock, 441 A.2d 989, 990 (D.C. 1982) (relating an attorney's claim that his failures were due to his inability to turn away persons seeking legal assistance and a resulting oppressive case load).

94 The Mississippi Bar v. Pegram, 167 So. 3d 230 (Miss. 2014).

95 *Id.* at 236.

96 *See also* Office of Disciplinary Counsel v. Henry, 664 S.W.2d 62 (Tenn. 1983) (holding that an unexperienced lawyer in a first-degree murder case did not act competently when he failed to conduct an investigation, did not try to discover the State's case, did know the rules of criminal procedure, and did not talk to possible witnesses).

97 Willey v. Ewing, No. 3:18-CV-00081, 2018 WL 7115180 (S.D. Tex. Dec. 17, 2018)

98 Richard R. Oppel, *His Clients Weren't Complaining. But the Judge Said This Lawyer Worked Too Hard*, N.Y. TIMES (Mar. 29, 2018), https://www.nytimes.com/2018/03/29/us/indigent-defense-lawyer-texas.html [https://perma.cc/2LJZ-QM4W].

that that person gets adequately represented, as opposed to did they get the best representation."[99] While this may reflect a disconnect between the bar and judges, it may also reflect a tacit synergy: both have accepted high levels of resource scarcity and a different set of expectations for indigent defense counsel.

B. *Big Law: The Well-Heeled Tactics of Harassment, Burden, and Delay*

Financial coercion is at play in both elite law firms and public defense work—however from opposite extremes. Where public defenders are thwarted from meeting ethics requirements because of chronic underfunding, big law lawyers may violate rules arguably because they are being paid to do so.[100] Yet the bar is silent here, too.

Over forty years have passed since a duty of zealous advocacy was intentionally omitted from the modern Model Rules and replaced with a duty of "reasonable diligence."[101] A presumption against hardball, bullish, win-at-all-cost lawyering appears on paper. The ABA Model Rules are unequivocal that "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person."[102] Moreover the Model Rules also require lawyers to "make reasonable efforts to expedite litigation consistent with the interests of the client."[103] Under the rules as written today, using tactics of harassment, intimidation, embarrassment or delay to win a case simply should not fly.

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99 Complaint at ¶ 94, Willey v. Ewing, No. 3:18-CV-00081 (S.D. Tex. Mar. 19, 2018), https://cdn.buttercms.com/d9QeQu4nTtKY9bdxzDHr [https://perma.cc/TW75-UQYF].

100 Eileen Zimmerman, *The Lawyer, the Addict*, N.Y. TIMES (July 15, 2017) (private practice lawyer noting that, "In law, you are financially rewarded for being hostile."), https://www.nytimes.com/2017/07/15/business/lawyers-addiction-mental-health.html [https://perma.cc/RP3W-RWQX].

101 MODEL RULES OF PROF'L CONDUCT r. 1.3 (AM. BAR ASS'N 2016) (prescribing diligence); *id.* r. 1.4 cmt. 1 (mentioning zeal while noting that zeal does not require "press[ing] for every advantage that might be realized for a client").

102 *Id.* r 4.4(a).

103 *Id.* r 3.1(a).

Yet, the disconnect between code driven rules and practice is real, systemic, and known.[104] One court described the "routine chicanery of federal discovery practice" in a proceeding considering sanctions under the Federal Rules of Civil Procedure:

> Today's "litigators" are quick to dispute discovery requests, slow to produce information, and all-too-eager to object at every stage of the process. They often object using boilerplate language containing every objection imaginable, despite the fact that courts have resoundingly disapproved of such boilerplate objections.[105] Some litigators do this to grandstand for their client, to intentionally obstruct the flow of clearly discoverable information, to try and win a war of attrition, or to intimidate and harass the opposing party. Others do it simply because it's how they were taught.[106]

Aggressive, zeal-oriented tactics persist, particularly in large firm civil practice.[107] There, verbal harassment, highly adversarial discovery production, and making and contesting all possible motions and requests may be the institutional norm.[108] Such litigation tactics can be

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104 This is a longstanding issue, one identified and discussed in scholarly circles for over thirty years. *See, e.g.*, 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; Robert W. Gordon, *The Ethical Worlds of Large-Firm Litigators: Preliminary Observations*, 67 FORDHAM L. REV. 709 (1998).

105 New Federal Rules of Civil Procedure directly attack the practice of using boilerplate. *See* Sec. Nat'l Bank of Sioux City v. Abbott Labs., 299 F.R.D. 595, 596 (N.D. Iowa 2014).

106 Sec. Nat'l Bank of Sioux City, Iowa v. Abbott Labs., 299 F.R.D. 595, 596 (N.D. Iowa 2014), *rev'd sub nom.* Sec. Nat'l Bank of Sioux City v. Day, 800 F.3d 936 (8th Cir. 2015).

107 Stuart D. Colburn, *The Importance of Professionalism*, TEX. B. BLOG (Nov. 25, 2014), https://blog.texasbar.com/2014/11/articles/news/the-importance-of-professionalism [https://perma.cc/3LRT-AJ84] (noting how in larger cities "Rambo-litigation tactics have been common and are sometimes still practiced").

108 Mark C. Suchman, *Working Without a Net: The Sociology of Legal Ethics in Corporate Litigation*, 67 FORDHAM L. REV. 837, 863 (1998) (quoting an associate describing their experience) ("You're taught these things when you walk into the firm. You're taught to be aggressive and to not just hand things over. The attitude is . . . we're going to build up all sorts of road blocks."); *see* Kimberly Kirkland, *The Ethics of Constructing Truth: The Corporate Litigator's Approach*, *in* LAWYERS IN PRACTICE ETHICAL DECISION-MAKING IN CONTEXT 152, 159, 173 (Leslie C. Levin & Lynn Mather eds., 2012) (noting that corporate litigators "view evasive responses to discovery requests as acceptable tactical lawyering" and "see their tactics—even those that violate court rules—as legitimate because they believe they are consistent with their duty to protect their clients and they conform to their ideal of an adversarial game well

viewed as not only legitimate, but expected by clients and opposing counsel.[109] Belittling statements and other forms of verbal intimidation often occur outside the presence of a judicial officer where there are party to party discussions, but nonetheless occur with the knowledge of lawyers and members of the bar.[110] Bullying tactics may even be used as selling points to clients, as inflexibility, aggressive behavior, and belligerence are touted as strengths.

And while the judiciary, through the Federal Rules of Civil Procedure and related disciplinary actions has actively attempted to stem the tide of lawyer misconduct, the bar has been relatively quiet.[111] Excessive argumentativeness, frivolous measures, obstructing access to information, and aggressive verbal behavior are norm of practice in the

played"); William T. Gallagher, *IP Legal Ethics in the Everyday Practice of Law: An Empirical Perspective on Patent Litigators*, 10 J. MARSHALL REV. INTELL. PROP. L. 309, 321 (2011) (confirming the norm in patent practice of interpreting discovery requests in as narrow a way as possible, despite knowing what the adversary seeks).

109 Kimberly Kirkland, *Ethics in Large Law Firms: The Principle of Pragmatism*, 35 U. MEMPHIS L. REV. 631 (2005) (reporting that confidential interviews of corporate lawyers exposed a disconnect between rules of ethics and discerning "practice norms" which actually provided parameters for litigation approaches; these included expectations to adopt aggressive and non-cooperative tactics); ROBERT NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LAW FIRM 778–79 (1998) (discussing how clients may demand a "hardball" or "attack dog" litigation).

110 *See, e.g.*, Francine Friedman Griesing & Ashley Kenney, Griesing Law, Taking the High Road: How to Deal Ethically with Bullies Who Don't Play by the Rules 10 (n.d.) (article prepared for 2012 ABA Section of Litigation Corporate Counsel CLE Seminar, Feb. 14–17, 2013), http://docplayer.net/39737742-Taking-the-high-road-how-to-deal-ethically-with-bullies-who-don-t-play-by-the-rules.html [https://perma.cc/3TSU-VJBG] (quoting a law firm partner as telling his opponent, "'F#*% with me and you will have a huge *%^&hole'" and "'You are such a whiner. I will kick your ass, in court or anywhere else pansy.'").

111 *See, e.g.*, reforms to federal rules regarding frivolity and discovery practice. Alexander Nourse Gross, *A Safe Harbor from Spoliation Sanctions: Can an Amended Federal Rule of Civil Procedure 37(e) Protect Producing Parties?*, 2015 COLUM. BUS. L. REV. 705, 718 (discussing the use of concepts of "bad faith" and "serious prejudice" to allow judges to levy sanctions in the context of electronic discovery); Steven S. Gensler and Hon. Lee Rosenthal, *Breaking the Boilerplate Habit in Civil Discovery*, 51 AKRON L. REV 683, 699–702 (outlining rule reform and the use of tactics like boilerplate to impede meritorious discovery). However, that even where egregious discovery violations have been found by a court, big law lawyers have been able to escape discipline from the bar even where their clients pay hefty sanctions. *See* Qualcomm Inc. v. Broadcom Corp., No. 05-CV-1958-B (BLM), 2010 WL 1336937, at *1 (S.D. Cal. Apr. 2, 2010) (finding in case where firm lawyers failed to produce thousands of pages of relevant documents which resulted in $8.5 million dollars of sanctions for their client, the discovery failures were not sufficiently in "bad faith" to warrant discipline of the outside counsel attorneys).

big law context that the bar in these contexts shows very little interest in policing.[112] That is not to say that the bar has no interest in regulating elite law firms at all—the bar is active in enforcing violations of rules regarding overbilling fees, conflicts, and communication.[113] But in relation to burden, delay, and harassment, the bar suspends activity in all but the most egregious of situations.[114]

While some might argue that burden, delay, and harassment may be more difficult or costly to prove than overbilling, conflicts, and failure to communicate, it is equally likely that they are actually easier to support. The former misconduct occurs in the public space and in interactions that are likely to be with other lawyers. The former group, overbilling, communication, and conflicts rely more on discovery—obtaining knowledge of the inner workings of a law firm. One could also argue silence lacks meaning because it is overwhelming for the bar to engage in perfect enforcement. In this context, nonenforcement is a time management strategy. But such an explanation is too simplistic. The bar does go after firms that serve large organizational clients—but

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112 Daniel C. Girard & Todd I. Espinosa, *Limiting Evasive Discovery: A Proposal for Three Cost-Saving Amendments to the Federal Rules*, 87 DEN. U. L. REV. 473, 482 (2010) (discussing use of rote expansive language in discovery requests). Some would argue that these are a few bad actors, rather than systemic misconduct, and that this type of practice is often ineffective. However, neither of these arguments negates why behavior of this kind in the elite law firm context is tolerated. The codes as written require sanction of individual actors (including the few bad apples if there are few). If these are outliers, one might expect that peers would hold them accountable for sullying their reputation if it is, indeed, so undeserved.

113 *See, e.g.*, *In re* Pharr, 950 So. 2d 637, 640–41 (La. 2007) (per curiam) (suspending lawyer who charged unreasonable flat fee); Cuyahoga County Bar Ass'n v. Okocha, 697 N.E.2d 594, 597 (Ohio 1998) (lawyer disbarred for exaggerating expenses and billing for costs not incurred which were found equivalent to misappropriation); People v. Rider, 109 P.3d 1075, 1080 (Colo. 2005); *In re* Hirschfeld, 960 P.2d 640, 643–44 (Ariz. 1998) (en banc) (disbarring lawyer who repeatedly abused nonrefundable retainers); *In re* Calahan, 930 So. 2d 916, 936–37, 939 (La. 2006) (large contingency fee found to be defrauding client); Att'y Grievance Comm'n of Md. v. Guida, 891 A.2d 1085, 1096–97, 1103 (Md. 2006) (disbarring lawyer for charging unreasonable flat fee, among other violations); SK Handtool Corp. v. Dresser Indus., 619 N.E.2d 1282, 1288–95 (Ill. App. 1993) (Winston & Strawn was disqualified from a big case for hiring an associate who had done a small amount of work on the other side and for not erecting a screen soon enough).

114 *In re* Kahn, 16 A.D.3d 7, 9 (N.Y. App. Div. 2005) (per curiam) (disciplining an attorney who repeatedly approached female staff and attorneys with spherical mints and asked, "do you want to suck one of my balls?"); Fla. Bar v. Martocci, 791 So. 2d 1074, 1075 (2001) (calling another attorney a "stupid idiot" and telling her to "go back to Puerto Rico").

only for conduct it views as inappropriate in that practice context, and, as we will see in later Sections, conduct that it does not see sufficiently covered by concurrent regulatory systems like the court and the market (which is particularly effective). Silence here lends insight into what lawyers think is professionalism, which includes acceptance of practice specific norms contingent on facts such as the relative economic power of lawyers and their clients, other parties, and the court's active role in disciplinary oversight.

C. *Lawyering in the Public's Interest*

In the context of public lawyering and particularly "cause" lawyering, rules regarding client autonomy and communication may appear more pliable than in the corporate context.[115] The law of lawyering is well-defined about lawyer's ongoing duty to communicate with their clients.[116] It is incumbent on lawyers to be clear about what is the scope of representation, and a failure to delineate that scope clearly can expose the lawyer to liability.[117]

Likewise, in the written code of professional conduct, both lawyer and client possess a delineated sphere of autonomy.[118] Clients oversee setting the goals of representations.[119] Lawyers set forth the means of

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115 Cause lawyers are "activist lawyers who use the law as a means of creating social change in addition to a means of helping individual clients." Margaret Etienne, *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers*, 95 J. CRIM. L. & CRIMINOLOGY 1195, 1196–97 (2005); Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: An Introduction*, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 3, 4 (Austin Sarat & Stuart Scheingold eds., 1998) ("Cause lawyering . . . is frequently directed at altering some aspect of the social, economic, and political status quo.").

116 MODEL RULES OF PROF'L CONDUCT r. 1.4 (a)–(b) (AM. BAR ASS'N 2016).

117 Nichols v. Keller, 15 Cal. App. 4th 1672 (1993) (finding that a lawyer's failure to adequately clarify for a layperson the limitations of representation regarding worker's compensation subjected the lawyer to potential liability).

118 In the abstract, the ends/means distinction has clarity, however, in the specific, questions still arise. The Supreme Court recently decided whether an admission of guilt constitutes a strategic (means oriented) decision or a goal (ends oriented) decision in the death penalty context. *See* McCoy v. Louisiana, 138 S. Ct. 1500 (2018).

119 MODEL RULES OF PROF'L CONDUCT r. 1.2(d).

attaining those goals.[120] However, in public lawyering there may be a tension between goals of individual clients (often needing monetary damages and individual relief) and those of lawyers (who seek developments in the law and collective relief for social movements).[121]

1. Lawyers and Clients: Autonomy, Scope, and Communication

Despite the high premium placed on client-centric service in the explicit code of conduct of lawyers, the question of whether a lawyer must be an amoral role differentiated professional or one passionately committed to the substantive ends of their client remains in the individual lawyer's discretion.[122] As a matter of positive law, lawyers may choose to represent clients with whom they share moral affinity or conviction[123] or be neutral partisans within the limitations of lawful objectives.[124] Essentially, a lawyer can believe in his or her client's cause,

120 *Id.* r. 1.2(a), (d).

121 DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 319 (1988) ("[T]he 'double agent problem' . . . originates in the fact that the lawyer is an agent for both the client and the cause; as the name suggests, the role of double agent carries within it the seeds of betrayal.").

122 For a discussion of the moral validity of leaving role differentiation as a choice for lawyers to make, see William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1098 (1988); WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS (1998); *cf.* LUBAN, *supra* note 121, at xxii (advocating a "moral activism" model where lawyers coax clients towards just causes of action).

123 Rules facilitating a choice for a role-integrated practice include: MODEL RULES OF PROF'L CONDUCT r. 2.1 ("In 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."); *id.* r. 1.16(a) (creating a presumption that lawyers may decline representation on any grounds other than the three enumerated); *id.* r. 1.16(b)(4) (providing that if a lawyer "fundamental[ly] disagree[s]" with or finds a client's proposed actions "repugnant," she may withdraw from the representation).

124 *Id.* r. 1.2 ("A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities."; *id.* r. 1.2 cmt. 3 ("Lawyers are thus urged to select clients irrespective of any affinity with them, and, indeed, irrespective of any affinity between the person or positions of the client and the general views of society. Access to legal services, in other words, is not to be determined by a lawyer's approval of or identification with prospective clients and their causes.").

but does not have to.[125] Cause lawyers are motivated to work in these areas because they are motivated by the issues at stake and may take often lower-paid positions to fulfill a calling to support those issues.[126]

To place boundaries on this discretion to choose between morally-engaged or amoral advocacy, the positive law of lawyering has drawn distinctions between lawyer and client autonomy. At times paternalistic, at other times deferential to client decision-making, professional conduct rules toe this ephemeral line by dividing autonomy into a distinction between ends and means.[127] Clients decide what are the goals or sought outcomes of a representation (destination: beach or mountains?).[128] The lawyer, on the other hand, has the principal authority to make decisions regarding how to reach the desired outcome in the case (do we go by car, plane, or train?).[129] The effective exercise of both client and lawyer autonomy is predicated on communication (what are the relative advantages of beach or mountains? What factors are relevant to the client? Speed, comfort, cost?).[130] There are no exceptions

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125 Some have argued that "intense identification" between lawyers and their clients is problematic, as it suffused the relationship with a "self-interested perversion of the service norm." Spaulding, *Reinterpreting Professional Identity*, *supra* note 26, at 7. Professor Spaulding refers to this high identification scenario as "thick identity" and strongly counsels against it. *Id.*

126 Bettina E. Brownstein, *Private Practice and Cause Lawyering: A Practical and Ethical Guide*, 31 U. ARK. LITTLE ROCK L. REV. 601, 605 (2009) ("[F]ull-time cause lawyering generally does not pay as well as other types of jobs for lawyers.").

127 Also, the deep-seated tension between the inherent superior knowledge of lawyers as experts and their role as conduits for clients' legal rights is monitored and modulated through rules regarding client autonomy; however, the tension in the rules between paternalism and client empowerment is peppered throughout. For rules with paternalistic views of clients, see, for example, MODEL RULES OF PROF'L CONDUCT r. 4.2 (allowing only lawyers to grant access to speak to their clients); *id.* r. 1.7(b)(1) (not allowing current clients to waive conflicts where lawyer fails and objectively reasonable standard). For client empowering standards, see *id.* r. 1.6 (empowering only client to waive confidentiality under normal circumstances); *id.* r. 1.9 (allowing former clients to waive in all conflicts situations).

128 *Id.* r. 1.2(a) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation . . . ."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 21(1), (2) (AM. LAW INST. 2000) (defining scope of client's presumptive authority).

129 *See* MODEL RULES OF PROF'L CONDUCT r. 1.2(a) ("[A] lawyer . . . shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.").

130 Clients can only meaningfully make decisions after "a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications." *Id.* pmbl. at [2]; *see also id.* r. 1.2(a). This is a symbiotic dependency; lawyers

to these autonomy requirements based on area of practice or type of client.[131] The comments do recognize that limited delegations of decision-making may be made at the outset of a representation, so long as the duties of communication are met and there is no material change in circumstance.[132]

Lawyers may also limit the scope of their representation "if the limitation is reasonable under the circumstances and the client gives informed consent."[133] The comments acknowledge as appropriate a client's ability to limit objectives, but no such parallel for lawyers.[134] Instead, proper limitations on scope focus on limitations on the means of pursuing the objective. This comports with the requirement that limitations on scope must be contingent on clear communication and must preserve the ability of a lawyer to provide competent representation and comport with other rules of professional responsibility (including those governing autonomy).[135]

2. Cause Lawyering, Public Lawyering: Clients and Causes

Cause lawyering, also referred to as "public interest" lawyering, refers to "lawyers who use law to change law or regulations to achieve greater social justice for people" or "lawyers who use law to achieve goals that transcend traditional client service."[136] The aforementioned

need candid information to develop strategy and effectively represent clients, and clients need candid information to engage in informed decision-making.

131 The Model Rules do enumerate examples of what are clearly defined as "ends": the right to settle, plea, and testify in the criminal context. *See id.* r. 1.2.

132 *Id.* r.1.2 cmt. 6 ("A limited representation may be appropriate because the client has limited objectives for the representation.").

133 *Id.* r. 1.2(c). "At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time." *Id.* r. 1.2 cmt. 3.

134 *Id.* r.1.2 cmt. 6 ("A limited representation may be appropriate because the client has limited objectives for the representation.").

135 MODEL RULES OF PROF'L CONDUCT r. 1.2 cmts. 7, 8.

136 Carrie Menkel-Meadow, *The Causes of Cause Lawyering, Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers*, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES, *supra* note 115, at 31, 33.

longstanding tension between a morally engaged and an amoral version of lawyering has placed cause lawyering in a contested position.[137]

A core assumption of a lawyer-client relationship can be inverted in the cause lawyering context: here, clients do not always come to lawyers with their problems; lawyers or movements may search for clients with problems they are seeking to solve not through legislative reform but using the court to push forward a policy agenda.[138] To develop law through case law one must have standing—a case in controversy. Thus, a lawyer must have a client to bring a claim. In cause lawyering, lawyers may vet potential clients based on their ability to advance the development of American law in a way the lawyers view as societally necessary or advantageous. The weak assertion of client autonomy is exacerbated in the class context where the typical lawyer/client relationship is more attenuated.[139]

Acknowledgement of the tension between cause lawyers and the clients they individually represent is not a new observation. It has been over forty years since Derrick Bell Jr. drew these issues in the context of school desegregation and asked if they "justif[ied] a higher standard of professional responsibility on the part of civil rights lawyers to their clients, and more diligent oversight of the lawyer-client relationship by the bench and bar."[140] In that Article, Professor Bell highlights that

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137 STUART A. SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING 6–7 (2004). "[T]here is an intrinsic and pervasive ethical tension between cause and conventional lawyering, which means that cause lawyering is, almost by definition, a suspect enterprise." *Id.* at 17.

138 Even the terms "cause lawyering" or "public interest lawyering" make clear to whom the lawyering is in service of—either the cause or the public. *In re Primus* defined public interest lawyering as having two parts, a non-paying client and a primary motive to advance public justice. 436 U.S. 412, 429–31 (1978).

139 Ronald R. Edmonds, *Advocating Inequality: A Critique of the Civil Rights Attorney in Class Action Desegregation Suits*, 3 BLACK L.J. 176, 178–79 (1974) (arguing that civil rights attorneys, more so than others, are isolated from their clients because of lack of access to their lawyers before and during the legal process); Edgar S. & Jean Camper Cahn, *Power to the People or the Profession?—The Public Interest in Public Interest Law*, 79 YALE L.J. 1005, 1042 (1970) (articulating concern over the lack of accountability to clients and a failure to consult with clients arising from a sense that "the power to serve the public can all to readily be viewed as a personal possession—a private prerogative to play god").

140 Derrick A. Bell Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 471 (1976); *see also* Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 214–18 (1976).

lawyers and clients in the civil rights community did not share views on the goals of representation post-*Brown v. Board*. Civil rights lawyers focused on the goal of desegregation, while Black community members and families of class members were concerned with improving education for their children.[141]

The broader societal goals of lawyers in those cases animated which plaintiffs ultimately went to court. The desegregation strategy of lawyers driving the civil rights movement was intelligent, deliberate, and methodical, with strategically chosen parties and venues to seek incremental growth of supportive case law.[142] In the public school civil rights cases, the middle class contributors to civil right organizations also impacted the kinds of relief sought—integration, not necessarily equality.[143] Bell also identified another conflict—that lawyers may not only prioritize causes over clients, they may also feel more loyalty to their contributors (and therefore employers) than their clients.[144]

Professional responsibility case law involving civil rights lawyers provides some insight into a potential disconnect between the causes of lawyers or movements and their individual clients. In the landmark decision, *NAACP v. Button*, the Supreme Court invalidated a Virginia law forbidding solicitation by an organization that is not a party or lacks a pecuniary right as an unconstitutional infringement on First Amendment rights.[145] This law, had it remained in place, would have eviscerated the NAACP, since the litigation policies and strategies of the NAACP were developed on an institutional rather than a case-by-case

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141 Bell, *supra* note 140, at 483.

142 *See* Rabin, *supra* note 140, at 215–18; NAACP v. Button, 371 U.S. 415, 450 (1963) (Harlan, J., dissenting) (noting that particularly in school cases, "specific directions were given as to the types of prospective plaintiffs to be sought, and staff lawyers brought blank forms to meetings for the purpose of obtaining signatures authorizing the prosecution of litigation in the name of the signer").

143 Bell, *supra* note 140, at 489–94.

144 *Id.* at 490 (quoting the head of Legal Defense counsel) ("There may be financial contributors to reckon with who may ask that certain cases by brought and other not."); Leroy D. Clark, *The Lawyer in the Civil Rights Movement—Catalytic Agent or Counter Revolutionary?*, 19 U. KAN. L. REV. 459, 469 (1971) (arguing as a former legal defense fund lawyer) ("[T]here are two 'clients' the civil right lawyer much satisfy: (1) the immediate litigants (usually black) and (2) those liberals (usually white) who make financial contributions. . . . too often the litigation undertaken was modulated by that which was 'satiable' to the paying clientele . . . .").

145 *Button*, 371 U.S. at 428–29.

basis. The dissent argued that practice in an organizational context divided loyalty between the clients and the mission of the entity providing legal services.[146] It noted, fairly, that plaintiffs had little contact and communication with attorneys.[147] The dissenting opinion highlights two things: (1) descriptively how clients were under-informed about their cases, at times not even knowing their own counsel, and (2) how the majority of the Court was nonetheless willing to craft a remedy allowing these structures to remain in place despite a clear disconnect with established expectations regarding lawyer/client communication.[148] Here, not unlike in the public defender context, the choice not to follow the letter of professional conduct may have been the choice to recognize a broader social mission and political climate.

In relation to autonomy and communication with individual clients, differences between a strict reading of code and norms in cause lawyering persist today.[149] A more recent example of this arises in the death penalty context, where abolitionist lawyers[150] who represent clients on death row may seek to exhaust appeals even where their client

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146 *Id.* at 461–62 (Harlan, J., dissenting).

147 *Id.* at 450 (noting that some clients had no personal dealings with their lawyers and didn't even know their names). Even prominent lead plaintiffs in landmark cases lacked complete pictures of the choices they were making and the impact it would have on their children. Ruby Bridges, the elementary school girl who single handedly desegregated the Little Rock public school system, described in her autobiography how little her parents understood about the case that she was a part of. She describes her parents not as being motivated by larger question of racial equality but to attain for her a better education and "better life." RUBY BRIDGES, THROUGH MY EYES (1999).

148 *Button*, 371 U.S. at 450.

149 In one key area, the acceptance of settlement terms, client autonomy has remained ridged—partially due to intervention with self-regulation by case law. Evans v. Jeff D., 475 U.S. 717, 727–28 (1986) (requiring lawyers to accept settlement when best for clients or client would like to despite impact on attorney's fees).

150 John R. Mitchell, Comment, *Attorneys Representing Death Row Clients: Client Autonomy over Personal Opinions*, 25 CAP. U. L. REV. 643, 644 (1996) (discussing how many capital attorneys hold strong beliefs regarding the invalidity of capital punishment on moral, political, or administrative grounds); C. Lee Harrington, *A Community Divided: Defense Attorneys and the Ethics of Death Row Volunteering*, 25 LAW & SOC. INQUIRY 849, 865, 869 (2000) (quoting one death penalty attorney as rejecting client service as his central concern but rather to contest "the state's determinations to carry out executions," and another arguing that "[t]he machinery that is in place to kill people is actually dishonest and morally bankrupt" and even if a client wants to die, "it doesn't change my moral duty to challenge the intellectually dishonest and morally bankrupt machine").

does not wish to.[151] Clients like this, known as "volunteers" for execution,[152] exist and do not pursue their appeals.[153] Lawyers may use many factors including moral and political arguments to persuade their clients to change course,[154] but as a matter of professional rules, the decision whether or not to appeal is squarely that of the client, and the lawyer is obligated to "abide" by this choice.[155] However, lawyers morally opposed to the death penalty, as a matter of human rights, religion, or policy, may be unable or unwilling to forgo filing an appeal. This may be a morally defensible position.[156] However, it is not one that is permitted by the rules of conduct.[157]

It is this divide between reform-oriented goals of lawyers and movements and those of individual clients that may create conflict with the written code of lawyer conduct. The goal of a representation for a cause lawyer is often a change in the law or policy that will impact a

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151 Anthony V. Alfieri, *Mitigation, Mercy, and Delay: The Moral Politics of Death Penalty Abolitionists*, 31 HARV. C.R.-C.L. L. REV. 325, 325 n.2 (1996) (defining "abolitionists" as "civil rights and criminal defense lawyers committed to the invalidation of the death penalty").

152 John H. Blume, *Killing the Willing: "Volunteers," Suicide, and Competency*, 103 MICH. L. REV. 939 (2005) (discussing how the choice to die is suicidal but not irrational given context); Janill L. Richards, *A Lawyer's Ethical Considerations When Her Client Elects Death: The Model Rules in the Capital Context*, 3 SAN DIEGO JUST. J. 127, 154 (1995) (noting that not all clients who seek death are "not truly 'volunteers'").

153 *Information on Defendants Who Were Executed Since 1976 and Designated as "Volunteers"*, DEATH PENALTY INFO. CTR. (Apr. 13, 2015), https://deathpenaltyinfo.org/information-defendants-who-were-executed-1976-and-designated-volunteers [https://perma.cc/QS53-2J65]. There have been instances of clients seeking the death penalty where the prosecution did not. In this case, a lawyer with a client-centric view pushed for the client's goal, the death penalty, despite being fired by the public defender's office. *See* Mark Hansen, *Death*'s *Advocate,* 84 A.B.A. J., Dec. 1998, at 22 (describing the history of the case).

154 MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 2016).

155 *Id.* r. 1.2; Richards, *supra* note 152, at 131 (discussing as opposite of set expectations the dangers of a lawyer substituting "her owns conception of what is the client's best interest"); *see also* McCoy v. Louisiana, 138 S. Ct. 1500 (2018) (where the Supreme Court set aside a lawyer's ability to forgo the guilty phase of trial to strategically place their client in a better position at the penalty phase).

156 Louis Fisher, Note, *Civil Disobedience as Legal Ethics: The Cause-Lawyer and the Tension Between Morality and "Lawyering Law"*, 51 HARV. C.R.-C.L. L. REV. 481, 501–02 (2016).

157 Some may argue that their clients lack capacity, under rule 1.14, to make such decisions and essentially embrace suicide. *See* MODEL RULES OF PROF'L CONDUCT r. 1.14. However, even rule 1.14 does not allow lawyers to assume the role of decision maker for the client—rather than consolidate such power, the proper course of action is to seek counsel of additional parties or entities or the appointment of a guardian ad litem. *Id.* r. 1.14(b).

group of people that includes the client but is more than the client; this frequently takes the form of injunctive relief.

The goal of the client is personal—they may not care (at certain points, or at all) if the institution is reformed or the overall class of people to which they belong are benefitted, so long as they can receive individualized redress—often monetary compensation. Take, for example, the scenario where a class of women allege sexual abuse while in state custody. A prisoner's rights group, whose mission is improving the lives of all prisoners, is representing the class. These lawyers may take the case to seek injunctive relief—better training of guards, increased surveillance, new administrative reporting remedies, and external oversight. The clients, abused and former prisoners, seek damages and accountability from individual officers—for pain and suffering, to cover the cost of children born from the abusive circumstances. So long as both goals may be reached in tandem, a conflict need not arise.

However, often seeking damage remedies requires a different set of legal arguments and proof than an injunctive remedy. The likelihood of damage awards against the state is remote, against individual officers, even more remote. The attorneys tell the clients they will pursue damages, knowing that they are likely to be struck from the suit at the summary judgment phase. But by then, the clients will have been deposed, their emotional and time investment made, their testimony, painful and necessary for the injunctive claims yet likely insufficient to create tort liability, will be incorporated into the record. Damage claims are struck on summary judgment. Injunctive relief is attained. Similarly situated parties have more protection. These specific clients have suffered through their own testimony for little gain. Although, some might argue that these clients had little to start off with, they can hardly be viewed as being in a better position having expended time, effort, and energy on the enterprise.

The scenario described above, and the tensions inherent in cause lawyering, are not new or unfamiliar to practicing attorneys.[158] In our

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158 It is not likely that the lack of discipline is attributable to a lack of awareness by the bar of this tension—the missions of the American Civil Liberties Union or the National Right to Work are clear and unwavering in their ideologically driven commitments. *What Is the ACLU?*, ACLU FAQ, https://www.aclu.org/faqs#1_1 [https://perma.cc/V6L4-WD6V] (last visited Apr.

legal system, to bring a case one must have a client, and a cause lawyer is one who brings cases for those who are often disenfranchised—vulnerable populations. However, individualized client service maybe secondary to legal reform—thus, clients may be selected because of their willingness to place the cause first, above their own self-interest, or they are relying on lawyers who are devoted to this cause to accurately represent the pros and cons of these situations fairly.[159] They are clients who, not unlike the criminally indigent, must take their representation where they can. Here, the greater good being served is likely a class that includes them as individuals—but the rules of professional conduct, client-centric as they facially appear, do not explicitly treat such clients differently than any other. So why does the bar show little interest in inquiring into or policing overreach into client autonomy in this context?

III. MINDING THE GAP: REASONS AND EXPLANATIONS

This final Part focuses on why the bar is silent in the face of misconduct and theorizes as to what are the real rules of ethical conduct. Legal ethics, as practiced in these pockets of silence, drifts from strict application of rules to a more malleable interpretation of lawyering that is context specific and where there is not only room but the expectation that moral and policy judgments are made. In short, lawyers are not committed to clarity or a unitary code. They know that these are difficult issues, best left to delicate and nuanced understandings, difficult to gain abstract consensus on. The true law of

1, 2019) (detailing mission as working "to defend and preserve the individual rights and liberties guaranteed to all people in this country by the Constitution and laws of the United States"); *About*, NAT'L RIGHT TO WORK LEGAL DEF. FOUND., https://www.nrtw.org/about [https://perma.cc/JA5W-UHKE] (last visited Apr. 1, 2019) (reporting that "mission is to eliminate coercive union power and compulsory unionism abuses through strategic litigation . . . .").

159 While the rules governing lawyers explicitly provide guidance on dealing with such conflicts where lawyers stand to benefit from pecuniary gain, such safeguards are not in place here. MODEL RULES OF PROF'L CONDUCT r. 1.8(a) sets out requirements for engaging in a business transaction with a client where the lawyer will have a personal financial interest at play. The provisions here require, among other things, that the client be advised to seek alternative counsel and that they are given time to do so. *Id.*

lawyering is practical, painfully aware of financial and political limitations, and attentive to broader civic context and morality. This Part concludes that a multiplicity of factors including, economic and institutional pressures, regulatory context, and normative and moral weight, combine to influence the bar's willingness to overlook or facilitate misconduct in entire sectors of the legal profession.

A. *Economic and Institutional Pressures*

Market forces impact how and where professional rules have traction. Rules generally assume lawyer and client resources do not impact the exercise of professional duties; however, silence suggest differently.[160] The reticence of the bar to intervene where lawyers have limited ability to choose their clients and vice versa, appears to factor in economic and market pressures on legal actors.

1. The Lawyers: In Debt, At-Will, and At Your Service

The rules of conduct assume that each lawyer has professional autonomy and independence.[161] The reality for most lawyers today is that they carry significant debt, increasingly practice in hierarchical at-will employment contexts, and are increasingly subject to the direct market leverage of client capital. The average law school student graduates with over $110,000 in student loan debt.[162] Far above the

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160 In limited circumstances, written rules impliedly acknowledge that economic interests may impact lawyer's conduct. *See id.* r. 5.4(d) (barring non-lawyer ownership of law practices in to preserve professional autonomy); *id.* r. 1.8(a) (setting forth specific limitations on the ability of lawyers to engage in business transactions with clients).

161 *Id.* r. 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice."); ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 69–70 (1993); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988).

162 Susannah Snider, *10 Law School that Leave Grads with the Least Debt*, U.S. NEWS (Sept. 1, 2015), http://www.usnews.com/education/best-graduate-schools/the-short-list-grad-school/articles/2015/09/01/10-law-schools-that-leave-grads-with-the-least-debt. Other sources place this number higher. *See* Josh Mitchell, *Grad-School Loan Binge Fans Debt Worries*, WALL ST. J. (Aug. 18, 2015), https://www.wsj.com/articles/loan-binge-by-graduate-students-fans-debt-

overall average debt level is the top of the debt load. Graduates from some law schools face average student debt in excess $170,000 at the time of graduation.[163] Debt loads have become so great that some public interest lawyers report taking additional jobs to supplement their income and eventually switched to private practice.[164]

The direct economic pressure from mounting debt loads is multiplied by employment status insecurity. Rather than solo practitioners with broad professional autonomy, lawyers are at-will employees at the bottom of a hierarchical work structure.[165] They can be dismissed at any time and left to finance loans and life expenses on their own. Extensive social psychology research indicates that perceptions of ethics and decision-making pertaining to ethics are severely impacted by being subordinate in a hierarchical structure.[166] Thus, lawyers in today's workplace lack access to differently manage clients, cases loads, or cases themselves without risking their job. The bar's unwillingness to discipline individual public defenders may factor in the lack of economic independence and autonomy these lawyers have in managing their day to day practice.

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worries-1439951900 [https://perma.cc/6ZAV-6MBC] (amount for average law school debt in excess of $140,000).

163 *See Which Law School Graduates Have the Most Debt?*, U.S. NEWS, https://www.usnews.com/best-graduate-schools/top-law-schools/grad-debt-rankings (last visited Mar. 6, 2018) (reporting average debt at Thomas Jefferson School of Law at $182,411, with 90% of the graduating class carrying debt).

164 Jonathan D. Glater, *High Tuition Debts and Low Pay Drain Public Interest Law*, N.Y. TIMES, Sept. 12, 2003, at A1 (highlighting the plight of a young prosecutor, paid a paltry $26,000 annually, who took on part time bartending to finance her $70,000 law school debt before ultimately going to the private sector); Michael Higgins, *Exodus of State's Legal-Aid Lawyers Is Forecast*, CHI. TRIB., Dec. 27, 2006, at 3 (noting that in 2006, 42% of Illinois legal aid lawyers planned to quit within three years due in part to debt pressure); Adelle Waldman, *In Debt from Day One*, CHRISTIAN SCI. MONITOR, Mar. 9, 2004, at 11 (discussing how young lawyer abandoned career trajectory in public defense after amassing law school debt).

165 Solo practitioners are disciplined at higher rates than law firm attorneys. This is partially due to the transparency of accountability to clients, cash flow issues, as well as a less developed internal infrastructure.

166 MAX BAZERMAN & ANN TENBRUNSEL, BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT (2011) (summarizing numerous intra-organization ethical decision-making studies indicating that hierarchical work structures hinder individual autonomous action); ROBERT JACKALL, MORAL MAZES: THE WORLD OF CORPORATE MANAGERS (1988) (describing how norms and incentives of organizations constrain ethical decision-making).

In both the public defender and public interest settings, lawyers and the institutions they work for are not compensated differently based on the levels of individual client satisfaction they attain—it is public satisfaction in the form of political support, public appropriations, or donations that ultimately guides how well resourced their cases are. Therefore, since budgets are externally fixed and lawyers have little power to modify the institutional economics of their workplace, enforcement discretion may be properly exercised to avoid sanctioning these lawyers

2. The Market Power of Clients

The rules also presume that client resources do not dictate when codes apply. Whether rich or poor, all clients are to be treated the same. The reality is that they are not. In highly lucrative private practice, responsiveness to economic pressure takes a different form: rather than underfunding creating institutions where ethical lawyering is impracticable, powerful clients overfunding misbehavior may create powerful incentives to flaunt professional rules.[167] Because corporate clients are increasingly willing to move their business from one law firm to another, economic pressures do not terminate at client retention.[168] Rather, they shift: Maintaining a lucrative client relationship puts lawyers in the difficult position of needing to push back on client demands that fall outside of the ambit of professional conduct without personal protections from employment repercussions.[169] Firms are

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167 Some of this may be attributed to a race to the bottom: As in-house counsel institute bidding wars that splinter an entity's representation, fail to maintain long-term relationships, and overemphasize bang for the buck, law firms may be overly motivated to provide short term gains.

168 Galanter & Henderson, *infra* note 172, at 1872 n.16 ("In earlier years, clients were strongly wedded to specific law firms, due in part to high switching costs for clients and to professional norms that discouraged mobility.").

169 This is exacerbated by the intuitional structure of practice, with the rise of non-equity and non-lockstep partnerships, placing even partners under extreme market pressures. Kirkland, *The Ethics of Constructing Truth*, *supra* note 108, at 164–65 (discussing how the business structure of law firms impacts practice norms). Courts have also noted how large law firms to impart "substantial economic benefits" to attorneys who bring in clients. Patsy's Brand, Inc,. v. I.O.B. Realty, Inc., No. 98 CIV 10175(JSM), 2002 WL 59434, at *9 (S.D.N.Y. Jan. 16, 2002).

ranked by profits per partner,[170] rainmakers are compensated handsomely,[171] and the need to bring in and retain paying clients is a constant pressure on lawyers in big law practice.[172]

So, with powerful clients encouraging bad behavior one might expect heavy bar involvement—rather, silence indicates the opposite. Instead it reflects the economic realities of the bar association itself as a system of limited resources. Thus, where the party or entity involved can police itself (through the market perhaps), self-regulation is not needed. In big law, two principal parties are most likely to be harmed by routine misconduct and abusive tactics: clients and judicial resources. Big law clients assert their needs and police misconduct through economic pressure—fees and taking their business elsewhere.[173] The judiciary protects its resources through direct rulemaking.[174] The bar, with limited resources, must choose wisely how to allocate them, and prefers to let the federal courts take on hedging in such well-heeled adversaries for incivility and hardball and discovery abuses. The bar is less concerned about policing fair play among economically evenly

170 MILTON C. REAGAN, JR., EAT WHAT YOU KILL 7 (2004). In 1985, *The American Lawyer* began publishing an annual ranking of profits per partner that touted it heavily. Overnight, firms that had previously considered themselves rough equals discovered they were separated by vast chasms of wealth. Noam Scheiber, *The Last Days of Big Law*, NEW REPUBLIC (July 21, 2013), https://newrepublic.com/article/113941/big-law-firms-trouble-when-money-dries [https://perma.cc/6UD6-JUVM].

171 This modular lawyer model threatens the overall financial stability of law firms as entities as well, even though they originally were created, in part, to share risk. JOHN C. COFFEY JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 227 (2006) (reporting the "decline in law firm stability as 'star' attorneys increasingly practice in a free agent market").

172 Marc Galanter & William D. Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1872 (2008) (discussing the economic pressures at play in tiered partnerships); Peter Lattman, *Mass Layoffs at a Top-Flight Law Firm*, N.Y. TIMES: DEAL BOOK (June 24, 2013), https://dealbook.nytimes.com/2013/06/24/big-law-firm-to-cut-lawyers-and-some-partner-pay [https://perma.cc/2C3U-FL62] (reporting that when announcing layoffs, a firm's executive partner admitted the centrality of profit in a firm wide email) ("While we have been able to avoid these actions in the past, and it is very painful from a human perspective, the management committee believes that these actions are essential now to enable our firm to continue to excel and retain its historic profitability . . . .").

173 *See supra* Section III.A.2.

174 *See infra* Section III.C.1.

matched parties that can exert influence over their lawyers and between adversaries through exerting market-based control.[175]

Descriptively, both in the criminal and the cause lawyering context, the bar ignores apparent violations of the law regulating lawyers (competence, diligence, and communication in the former, autonomy and communication in the latter). Both scenarios involve clients that lack the ability to procure other representation. Given this structure, such clients are in a particularly vulnerable position, having neither market power to wield nor expertise and legal sophistication. As a particularly vulnerable population, one would expect the bar to be active in policing lawyer conduct relating to autonomy, communication, and diligence. The bar is not.

It may well be that the removal of a client's ability to exert economic pressures give the bar the space (from malpractice risk perhaps) to place duties to others before the individual clients' interest. In the case of criminal defense, it may be that duties to other individual clients, everyone else on the criminal docket who also needs some/any representation, is weighed against any one individual client's interest in perfect by-the-letter lawyering. Cause lawyering seeks to address issues of broad social import, and the bar seems willing to entertain that this may mean that the interests of the client are served only insofar as they remain aligned with the public good mission.[176] Since lawsuits need parties to exist and move forward, and parties with assets in society already have access to lawyers, those who are most available to be

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175 "Reporting a violation is especially important where the victim is unlikely to discover the offense." MODEL RULES OF PROF'L CONDUCT r. 8.3 cmt. 1 (AM. BAR ASS'N 2016).

> If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent.

Id. r. 8.3 cmt. 3.

176 Cause lawyering carries with it prestige that is rooted in an acknowledgement of its societal value, not monetary rewards. David M. Trubek, Yves Dezalay, Ruth Buchanan & John R. Davis, *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 CASE W. RES. L. REV. 407, 459 (1994) (discussing how providing for parties that would otherwise go unrepresented supports the legitimacy of the legal profession and the legal system as a whole).

plaintiffs in cause lawyering cases often do not have the funds to secure alternative representation.

B. *Regulatory Context*

Silence also speaks to a cognizance by the bar of regulatory context. While the bar is engaged in the project of professional self-regulation (and therefore definition), it does not do so in a vacuum.[177] Rather, the law governing lawyer conduct is an increasingly interconnected web of self-regulation, common law, constitutional law, and administrative law. Two principal regulatory factors that may influence whether the bar decides to strictly enforce self-governance rules are whether (1) other law external to self-regulation is actively policing lawyering conduct in the areas, and (2) strict self-regulation might be so politically unpopular as to result in direct regulation by non-lawyers.

1. Federal Rules, Constitutional Law, and How Self-Regulation Plays with the Big Kids

Self-regulation also plays out differently in a rich alternative regulatory context. Scholars have long argued that non-enforcement in one arena shifts the power to police the profession from the bar to other actors, such as the state.[178] The presence of a concurrent regulation is particularly salient where the misconduct at issue is the result of an institutional norm (that of a government or big law office) and the non-self-regulatory body has the ability to impact change on an institutional level, either by levying economic penalties or imposing new conduct requirements across the board.

Federal judges have taken a growing role in policing lawyer conduct through their expertise of the modern Federal Rules of Civil Procedure.[179] These rules increasingly govern lawyer conduct both

177 Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147 (2009).

178 *See* LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 93–128 (2004); Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389 (1992).

179 *See* FED. R. CIV. P. 11, 26, 30, 37.

immediately before the court, through Rule 11 sanctions, and over the course of discovery.[180] Thus, the court regulates the conduct before it, ultimately protecting judicial resources as much as client resources or autonomy. For example, modern class action doctrine may render bar oversight redundant as it creates significant new barriers to bringing a class action case at all. Thus, the regulatory context of enforcement may modify how the bar prioritizes enforcement. Likewise, Rules 30 and 26(g) of the Federal Rules of Civil Procedure and the court's inherent power to regulate lawyers give Judges discretion to impose sanctions for impeding, delaying, or frustrating a deponent's examination.[181] Rule 30 allows a party to move to terminate or limit a deposition if conducted "in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party."[182]

The court's direct oversight here catches the most egregious overstepping so harm of the bar's lack of disciplinary action is not boundless. Courts have advanced the argument that to counter the economic pressure to misbehave, firms should institute strict policies that protect lawyers from "adverse consequence[s]" should their adherence to ethical standards lead to the loss of a client.[183] Moreover, allowing the federal bench to lead leaves big law firms policed by an authority that can hit bad actors where it hurts the most—in their pocketbook, through sanctions, fee withholding, and fee reductions.

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180 *See* Wechsler v. Hunt Health Sys., Ltd., 216 F. Supp. 2d 358 (S.D.N.Y. 2002) (applying Rule 11 sanctions where lawyers "sought to needlessly delay th[e] action"); Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 858 P.2d 1054 (Wash. 1993) (denouncing firm for improper discovery tactics); Naposki v. First Nat'l Bank of Atlanta, 18 A.D.3d 835 (N.Y. App. Div. 2005) (sanctioned for delay where law firm withheld information regarding a settlement that mooted appeal).

181 *See* FED. R. CIV. P. 30(d)(2), 26(g).

182 *Id.* 30(d)(3)(A).

183 Patsy's Brand, Inc. v. I.O.B. Realty, Inc., No. 98 CIV 10175(JSM), 2002 WL 59434, at * 9 (S.D.N.Y. Jan. 16, 2002). In considering proposed Rule 11 sanctions for failure to provide truthful factual statements, the court noted that

> the ultimate responsibility should rest with the firm and not its litigating partner. Given the economic pressures of big firm practice, it is the responsibility of the firm to insure that each of its partners is aware . . . that if a lawyer's adherence to those [highest ethical] standards results in the loss of a client, large or small, the lawyer will not suffer any adverse consequence.

Id.

In relation to public criminal defense practice, the overlap of constitutional law with the self-regulatory regime plays a role in understanding the bar's silence in the face of widespread misconduct occurring due to intuitional conditions. Constitutional ineffective assistance provides a minimal backstop to client harm arising from public defender misconduct—at least as a legal construct. Habeas is an available post-conviction remedy to those represented by public defenders, while those represented by private lawyers have more limited redress.[184]

Lawyers are aware that institutional reform in this area is more likely to undergo effective change through the development of constitutional law, rather than the punishment of individual attorneys who are unwilling or unable to forgo a public defender job. In the *ABA Futures Report*, the ABA committee argues not for disciplinary enforcement but that bar associations "must support lobbying, education, and, where necessary, litigation, to ensure that lawyers have the resources that they need to comply with their ethical and constitutional duties."[185] What is not said is significant: the committee does not argue that attorneys ought to be harshly sanctioned or charge ethics committees with strict enforcement. In the context of a constitutionally enforceable standard, changing the constitutional law is the bar's proposal for recourse.

2. Preserving Self-Regulation: Interplay with Lawmaking and Policy

Finally, silence preserves political capital for the system of self-regulation. The clash of harsh rhetoric (for public consumption) and weak punishment (to keep legal services as we know it going) might appease calls for outside regulation while protecting lawyers who do

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184 Not only do clients with private defense attorneys lack the ability to bring an ineffective assistance of counsel claim, but they can also have a very exacting standard to obtain any civil remedy postconviction. *See supra* note 92.

185 In the *ABA Futures Report*, the ABA committee argues that bar associations "must support lobbying, education, and, where necessary, litigation, to ensure that lawyers have the resources that they need to comply with their ethical and constitutional duties." ABA FUTURES REPORT, *supra* note 74, at 54.

their best under their circumstances. Thus, where the party or entity involved can police itself, self-regulation is not needed.[186]

Self-regulation has a dynamic relationship between protecting clients, courts, concepts of law, and the legal profession itself. In doing so, self-regulatory rules attempt to balance all competing duties. Silence might help to plaster over where they clash or where that view would be publicly controversial. It would be highly controversial to say openly that indigent criminal defense lawyers do not need to have experience before handling difficult cases, communicating with clients, developing facts, or engaging in motion practice. It would be unpopular to declare that lawyers can use individual clients to serve what the bar considers to be the greater public good. Ultimately the bar recognizes stewardship over the development of law separate from client goals as valid.

Silence here also protects the bar from internal division. It keeps the door (mostly) closed on opening the rules to innumerable exceptions. If we dealt openly with the need to provide special professional responsibility rules for, say, criminal defense attorneys, that might lead other types of attorneys to clamor for their own super-individualized rules. That would render the law of lawyering vulnerable to innumerable battles large, small, and tiny about innumerable normative judgments that would be difficult, if not impossible to agree on. These flood gates remain closed, in part, because the bar adheres to an official line that is strongly transsubstantive and transpersonal. Silence preserves that norm as intact while facilitating more nuanced practices.

Removing silence would eviscerate flexibility and nudges legislators to jump in and regulate. That intervention is unpredictable and could move things in the opposite direction from increased access to representation. In Missouri, for example, after the court ruled that public defenders could not be forced to take on case overloads, the head public defender evoked the right to refuse cases. This, in turn, prompted the state assembly to propose disbanding the public defender's office and privatizing public defense.[187]

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186 *See supra* Section III.A (discussing how big law clients assert their needs and police misconduct through economic pressure); Section III.C.1 (noting that the judiciary protects its resources through direct regulation).

187 Laird, *supra* note 70, at 48 (discussing *Hurrell-Harring v. State of New York*).

Some argue that public defenders' offices can only turn away cases where they are insulated from political removal. Some argue it is too risky where they are appointed. Others posit that public defenders who are elected directly have more political clout to assert such legal rights, since they have an independent source of power.[188]

To hold public defenders as generally in breach of client duties would be to engage in bar nullification of state level spending allocations: it would force states to either eliminate public defender's offices (not good for attorneys or clients) or pour many more resources into them (for which there is no public will). As such, what would be most likely to occur is a system where the court assigns lawyers who may or may not have a criminal law background to the case. Thus, enforcing rules strictly could lead to clients having worse representation, rather than better. The rules of conduct say nothing about using a sliding scale of enforceability in core areas like competence and diligence given the context of practice. However, the bar's unwillingness to compel compliance in this area indicates a refusal to nullify public policy choices and force increased state spending particularly where the represented population would be otherwise unable to secure good counsel.[189]

Thus, silence helps to craft workable solutions to pressing problems, preserving political capital, soothing friction between the bar, the courts, and the public, and structuring debates for future reforms. It allows for flexible easing or tightening as the situation and political and social realities demand.

C. *Normative Considerations and Moral Weight*

Silence indicates that the bar considers a normative analysis involving broader policy outcomes. In this way, there may be a willingness to acknowledge that the strict application of rules in certain contexts is not good for society, holistically. The "public good" is best served by lawyers engaging in litigation that protects more than a

188 *Id.*

189 As discussed earlier, this also recognizes that lawyers in modern practice are not free-solo actors, but subject to the demands placed on them in the workplace.

certain client, but a class of clients. The bar seems willing to entertain that this may mean that the interests of the client are served only insofar as they remain aligned with the public good mission.[190] In the case of criminal defense, it may be that duties to everyone else on the criminal docket (who also need some/any representation), are weighed against any one individual client's interest in perfect by-the-letter lawyering. Indigent defendants will be better off with some representation than none. Silence indicates that undercompensated lawyers struggling to do good for something or someone beyond their own self-interest, should not be penalized for the institutional circumstances they find themselves in—and that are ultimately outside of their control.

Thus, concerns of fairness also underlie the narrative of silence. The rules as written consider misconduct and punish lawyers individually, not institutionally. There is typically no structure under typical bar rules to punish a governmental agency, a law office, or a non-profit.[191] Rather, bar sanctions are levied against individuals and are distinct from any malpractice action that might arise for the entity pursuant to vicarious liability.[192] Likewise, court sanctions are usually levied against the firm, not the individual.[193] In each of these areas, but particularly in relation to criminal defense lawyers, it is the structure of legal employment that is dictating how they are approaching their position. The reality is that very few lawyers practice in an environment that gives them true autonomy over the terms of their client relationship and practice. It is fundamentally unfair in these situations to punish individual lawyers for situations far beyond their control. Moreover, it feels fairer to allow concurrent systems that do have mechanisms that are better able to impact institutional or entity accountability, to act.

Normative statesperson-like commitment remains bounded by raw economic power—where clients wield wealth, lawyers are prevented by realpolitik client coercion from prioritizing public good over individual clients. Descriptively, both in the criminal and the cause lawyering

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190 *See supra* note 176.

191 Ted Schneyer, *Professional Discipline for Law Firms*, 77 CORNELL L. REV. 1, 3–4 (1991).

192 *See* MODEL RULES OF PROF'L CONDUCT r. 5.1 cmts. (AM. BAR ASS'N 2016) (stating that lawyer supervision is distinct from legal liability for subordinate action).

193 Some jurisdictions, like New York and New Jersey do, in theory allow enforcement against firms as well as individual lawyers. *See* N.J. Rules of Professional Conduct Rule 5.1(a); N.Y. Code DR 1- 104.

context, clients that lack the ability to procure other representation. However, it may well be that the removal of a client's ability to exert economic pressures gives the bar the space to place duties to others before the individual clients' interest.

CONCLUSION: SILENCE IS GOLDEN

This Article posits that silence on the bar's part is meaningful even if it is unintentional, and that it provides lawyers and scholars with untapped data on how lawyers conceive of professional ethics.[194] Unlike the explicit code, silence is a granular and fact-specific arbiter of professionalism.[195] Silence breaks with a unitary code for lawyers across practice areas and embraces specialization. In wordless whispers it shouts: Lawyers share a common belief in a fluid conception of lawyering that includes, protects, and condones context specific considerations and the exercise of public policy-oriented judgment. These spaces are committed to principles of equity over formalism. Here, lawyers recognize that client-centricity has limits tethered and informed by pragmatism and broad consideration of legal needs. Here, client service is context specific—and sometimes the needs of the many overtake the needs of the few.

Naysayers may argue that the norms that exist in silence lack transparency and thereby create a public perception of lawyers as unprincipled or self-dealing.[196] Decreased transparency may also

194 Others may disagree and argue that trends to under-enforce norms or under-discipline lawyers in certain areas of practice have no impact on standards of conduct. *See* W. Bradley Wendel, *Government Lawyers in the Trump Administration*, 69 HASTINGS L.J. 275, 300 (2017) ("The under-enforcement of particular norms, or the reluctance of state disciplinary authorities to pursue cases against particular types of lawyers (for example, big-firm or government), does not alter the significance of the underlying standards of conduct.").

195 Silence here exposes the bar's engagement in concerted action (or inaction) without overt coordination but through tacit consensus. Lawyers generally have decided not to discipline public defenders for not knowing well or communicating deeply with their clients, big law attorneys for engaging in abusive pretrial practice with one another, or cause lawyers for pursuing policy agendas as paramount.

196 As such, silence may prove arguably to be a slippery slope to abdication of self-regulation in favor of judge-made law or direct statutory intervention. Scholars have argued effectively that if the profession fails to enforce its own rules, it forfeits legitimate claims to remain relatively unregulated by external forces. Susan P. Koniak, *The Law Between the Bar and the*

disenfranchise not only the public but lawyers who are unaware of the (unwritten) rules of practice. However, these claims are exaggerated. First, the flexibility imbedded in silence is bounded by core commitments too.[197] For example, any lawyer, of any subject matter area, of any size practice, is on the hook for stealing from their client or comingling funds; that is non-negotiable misconduct.[198] Such actions go to trustworthiness and honesty, core tenets and perhaps the sole values that may truly transcend context. Second, to the extent silence leaves lawyers subject to critiques of failed self-governance and external interference, the common law of lawyering provides a natural ally. Development and augmentation of the common law of lawyering through written opinions arises from cases rather than abstract advisory opinions, avoids the pitfalls redrafting the codes (which are rigid) or strict generalist disciplinary action. The language of the common law speaks to much of the taciturn. In these examples, the bar is considering concepts familiar to the common law: undue burden, good faith, fairness, unjust enrichment, and the public good. This type of law has the flexibility and gradations needed to reflect the professions' actual commitments to fairness, equity, and civic mindedness—as well as fidelity to clients and their causes of action.

State, 70 N.C. L. REV. 1389 (1992); Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639 (1981).

197 "Hard rules" that are non-negotiable are set forth in Model Rule 8.3 which delineates the narrow categories of misconduct requiring lawyers to report violations, those of trustworthiness, honesty, and fitness, which "a self-regulating profession must vigorously endeavor to prevent." MODEL RULES OF PROF'L CONDUCT r. 8.3 cmt. 3 (AM. BAR ASS'N 2016). Recognizing the difficulties inherent in self-policing, the comments of rule 8.3 explain that:

> If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent.

Id.; *see also* MODEL RULES OF PROF'L CONDUCT r. 8.3(a) (AM. BAR ASS'N 1983) (discussing that reporting requirements attach general to violations regarding trustworthiness, fitness, and honesty).

198 *See, e.g.*, *In re* Green, 156 P.3d 628, 636–37, 640 (Kan. 2007) (per curiam) (suspension of lawyer for retainer conversion); *In re* Miller, 735 P.2d 591, 593 (Or. 1987) (en banc) (per curiam) (disbarring lawyer for billing and expense fraud, which "amounted to stealing his clients' money").

Practicing lawyers reveal in silence what has long been theoretically advocated: differentiated application of positive law based on the context of practice and the structural legitimacy of the advocacy system. Here, the bar considers the relative strength of the parties, the common good, the interests, and the autonomy of lawyers themselves. Where basic presumptions of the adversary system are strong, such as equally matched parties with engaged attorneys, the bar does not expect, or want, full adherence to rules as written. Even though the standard conception of lawyering as amoral is widely regarded as dominant, the bar's inaction where lawyer activism upsets these expectations indicates that the juxtaposition of amoral lawyering and moral activism may be a false dichotomy. It is more likely that the profession agrees that lawyers are appropriately amoral actors in some contexts and not others.[199] Thus, the law regulating lawyers looks more like a specialized body of law than it initially appears—and one that reflects a deep commitment to workable solutions, fairness, and broad civic mindedness.

199 Turns out, adherence to the "standard conception" is not at all standard. Spaulding, *The Rule of Law in Action*, *supra* note 30, at 1378 ("Even a cursory survey of the profession reveals that lawyers endorse this principle [neutral partisanship] with varying degrees of enthusiasm and embody it with varying degrees of consistency.").