

POWER AS A FACTOR IN LAWYERS’ ETHICAL DELIBERATION

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Abstract

A fundamental disagreement among legal ethics scholars concerns the difference between client-centered and justice-centered approaches to lawyers' ethical obligations. Advocates of client-centered approaches put lawyers' duty to the client first. Justice-centered theorists critique the elevation of the client's interests over other important concerns lawyers affect through the work they do on behalf of clients. Scholars who adopt justice-centered approaches argue that lawyers' ethical obligations should be analyzed with a paramount focus on achieving justice.

Legal ethicists often view these two approaches as inconsistent with each other, but I argue in this Article that they are not necessarily so. Building on the growing awareness of the need for context-specific legal ethics analysis, I argue that a key factor responsible for the disagreement between client- and justice-centered legal ethics scholars is their focus on different practice settings, where different ethics concerns have priority. Ethicists concerned about the immense power of corporate clients to do harm to fragile structures of public regulatory law focus on lawyers' duties to concern themselves with the underlying justice of their representations, while ethicists immersed in practice settings involving the representation of relatively powerless clients or interests, such as in criminal defense and poverty law practice, are adamant about the need for client-centeredness. I argue that we can make much better sense of the debate between client- and justice-centered ethicists if we appreciate the importance of context in setting ethics priorities.

The challenge then becomes identifying the variables that account for the different emphases of justice- and client-centered approaches. I suggest that a key factor underlying ethicists' varying views about the appropriate balance to be struck between client- and justice-centeredness is the relative power of the lawyer's client in relation to other interests affected by the representation. Of course, power is not, and should not be, the only factor taken into account in calibrating ethics analysis to context, but it is an important one, which deserves further attention in legal ethics scholarship.

I next propose a normative standard for how relative client power should be taken into

consideration in lawyers' ethical deliberations. In representations involving obvious and substantial power imbalances, lawyers representing less powerful interests should adhere to a client-centered, zealous advocacy approach, whereas lawyers for powerful clients should temper their representations with an eye to protecting adequate consideration of the interests of the less powerful. I identify several reasons why considerations based on relative client power should factor into lawyers' ethical deliberations in this way. These reasons include the representation reinforcement function of zealous client advocacy on behalf of the under-represented interests and the fact that the liberal underpinnings of client-centered legal ethics models support the protection of the dignity of natural individuals, but not aggressive advocacy on behalf of the interests of institutions that are mere creations of law.

Factoring client power into lawyers' ethics analysis also avoids the powerful criticisms leveled against justice-centered models on grounds that these approaches call for the paternalistic substitution of lawyers' socially situated judgments about morality and justice on clients who are least able to resist such lawyer domination. Finally, consideration of client power provides an ethics norm that pushes back most directly against the moral hazards produced by self-interest in varying practice contexts. In the context of representing powerful clients, lawyers' incentive is to do too much for their clients; in the context of clients with relatively little power, lawyers' incentive is to do too little. An ethics norm that calls on lawyers to temper their advocacy when representing powerful clients but to pursue client-centeredness when representing clients with little power asks lawyers to correct for the specific pressures faced in their practice locations.

To test my theory, I apply a power-based ethics model to a series of hypotheticals drawn from the work of ethicists in the justice- and client-centered traditions. I show how considering client power in resolving difficult ethical dilemmas in situations of obvious and substantial power imbalance can help produce ethical judgments that are most appropriately tailored to varying practice contexts.

POWER AS A FACTOR IN LAWYERS' ETHICAL DELIBERATION

I. INTRODUCTION

A fundamental disagreement among legal ethics scholars concerns the difference between client-centered and justice-centered approaches to lawyers' ethical obligations. Stated most simply, advocates of client-centered approaches put lawyers' duty to the client first. Scholars closely identified with clinical legal education, poverty law, and indigent criminal defense frequently advocate client-centered approaches.¹ In contrast, justice-centered approaches critique the elevation of the client's interests over other important concerns lawyers affect through the work they do on behalf of clients. Scholars who adopt justice-centered approaches argue that lawyers' ethical obligations should be analyzed with a paramount focus on achieving justice. David Luban,² William Simon,³ Robert Gordon,⁴ Deborah Rhode,⁵ Bradley Wendel,⁶ and Russell Pearce⁷ are leading proponents of justice-centered approaches. It is less clear that these

¹ See, e.g., Robert Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990); Binny Miller, *Giving Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1994); Lucie White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes of the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990); Charles J. Ogletree, *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239 (1993).

² See, e.g., DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988).

³ See, e.g., WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* (1998).

⁴ See, e.g., Robert Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988).

⁵ See, e.g., DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* (2000).

⁶ See, e.g., W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363 (2004).

⁷ See, e.g., Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241 (1992).

scholars come from shared practice locations--unless legal academia should be considered such a location--but it does seem fair to characterize much of the work of these scholars as centrally concerned with the way in which lawyers for relatively powerful clients, especially the huge corporate entities that masquerade in law as “persons,” can cause great harm to the fragile fabric of public regulatory law.

Legal ethicists often view these two approaches as inconsistent with each other, but I argue in this Article that they are not. Instead, client-centered and justice-centered approaches represent two potential emphases, and choices between them should be tailored to the context of the legal representation. I propose a partial theory for how this calibration of ethics to context should occur. Drawing on an insight shared among many contemporary legal ethics scholars, I first note that ethics analysis must be context specific in some respects. David Wilkins and others have forcefully developed this line of argument: the central concerns for ethics analysis sometimes vary by practice setting.⁸

⁸ See David Wilkins, *Who Should Regulate Lawyers?*, 105 *Harv. L. Rev.* 799 (1992) (arguing that the best institutional mechanisms for regulating lawyers vary with practice context). Wilkins perhaps has been the most eloquent advocate of context-specific regulation, but a great many other scholars have by now pursued similar points. See, e.g., Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor after Enron*, 35 *CONN. L. REV.* 1185 (2003); David Luban, *Are Criminal Defenders Different?*, 91 *MICH. L. REV.* 1729 (1993) (focusing on issues such as “the balance of advantages in criminal prosecutions, and the balance of bargaining power, to justify

the client-centered ethics of criminal defenders). Likewise, empirical scholars of the legal profession, such as Lynn Mather and Tanina Rostain, have undertaken careful studies of how practice context correlates with differences in lawyers' perceptions of how to provide good legal services to their clients. *See, e.g.*, LYNN MATHER, CRAIG A. MCEWEN & RICHARD J. MAIMAN, *DIVORCE LAWYERS AT WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE* (2001) (study of different ethics orientations of differently situated divorce lawyers in small New England towns); Tanina Rostain, *Waking Up From Uneasy Dreams: Professional Context, Discretionary Judgment, and The Practice of Justice*, 51 *STAN. L. REV.* 955, 964-67 (1999) (summarizing empirical literature on how practice context affects legal ethics orientation).

For example, the legal ethics problems of most concern in lawyers' representation of relatively powerless persons are very different from the problems of most concern in lawyers' representation of powerful institutional clients. At this historical moment in the development of legal ethics thought this insight is well accepted, at least in some circles,⁹ but much work remains to be done to incorporate this insight into the legal ethics analysis.¹⁰

The challenge I undertake in this Article is to probe why legal ethicists' emphasis on the priority of client- versus justice-centered considerations varies with practice context. What, for example, accounts for the view of many justice-centered ethicists that it is okay to fight like hell for a criminal defendant who has committed murder, but not for a corporate polluter who has slightly increased the cancer risk in a surrounding community by negligence in controlling the release of potentially toxic substances? Although it is difficult to argue that the murderer has done less injustice than the careless corporation, many justice-centered legal ethicists still assert that the murderer deserves client-centered representation while the corporate polluter does not.¹¹ The task is to search for the underlying factors that produce such conclusions.

I propose in this Article that one important factor that accounts for these context-specific results is the relative power of the client or interests being represented in comparison to the power of the adversary and other interests at stake in the representation. Of course, client power

⁹ Not all legal ethicists, of course, share this view, but for purposes of my analysis here I wish to build on the work of scholars who have defended this claim in order to further analyze how a context-based approach might work.

¹⁰ Indeed, to survey the new model rules the ABA Ethics 2000 Commission recently promulgated is to be reminded that, where the "rules meet the road," so to speak – that is, in the template to which states turn in drafting their rules regulating lawyer conduct – much more work needs to be done to incorporate a context-specific approach into the positive law that regulates lawyers' practice. For a discussion of the limited ways in which the current ABA Rules of Professional Conduct embrace context-specific ethics regulation, see note 77 *infra*.

¹¹ See, e.g., Luban, *supra* note 8 (arguing that zealous advocacy is owed clients in criminal defense but not corporate misconduct cases).

is not – and should not be – the only factor guiding lawyers’ ethical judgments, but I argue here that it is an important one in situations involving obvious and substantial power imbalances among the interests affected by the representation.¹²

The next question is why relative client power should serve as a factor in guiding lawyers’ exercise of ethical judgment in such situations. I propose several reasons. Most basically, consideration of relative client power helps synthesize valuable aspects of client- and justice-centered approaches and to target these approaches to the practice contexts in which they are most appropriate. This tailoring helps improve the fit between these approaches and the jurisprudential traditions on which they are based. A context-specific, power-sensitive legal ethics norm resonates both with liberalism’s concerns for irresolvable pluralism and the preservation of the dignity and voice of individuals, and with post-modernism’s insights into the pervasive effects of power on actors’ conduct and perspectives. Concern about client power also resonates with the core communitarian concerns of justice-centered theorists about the harm done when lawyers engage in overly zealous advocacy for powerful clients bent on evading laws designed to protect the public interest. Lawyers’ active agency in corporate misconduct scandals such as Enron and the savings and loan crisis of the 1990s shows that professional conduct regulation alone cannot stop lawyers from assisting with the commission of such harms; general

¹² There are, of course, many other ways legal ethics analysis should be improved, and I do not pursue all of them here. One reader, for example, has suggested that I should more vigorously attack the adversarial system. It may be very well be that the legal system needs much reform in this respect, but my focus in this Article is different: I am attempting to think through how legal ethics principles might be better designed even in a system that is extremely flawed, not only in its procedural institutions, but also in swaths of substantively unjust law, as I discuss further in Part I-A-1 *infra*. Similarly, another commentator has suggested that I should focus more on lawyers’ choice of clients and general type of practice. I wholeheartedly agree that these are among the most important ethical decisions lawyers make, and have indeed devoted another article to this topic. See Susan D. Carle, *Re-Valuing Lawyering for Middle-Income Clients*, 70 *FORDHAM L. REV.* 719 (2001). In this Article, however, my focus is on lawyers’ appropriate conduct *after* accepting a particular representation.

norms that guide lawyers' exercise of discretionary judgment are needed as well, as I discuss further below.¹³

Those ethics norms must push against the temptations of self-interest, and those temptations vary dramatically depending on the relative power of lawyers' clients. In the context of representing powerful clients, lawyers' incentive is to do too much for their clients; in the context of clients with little power, lawyers' incentive is to do too little. Attention to client power as a factor in guiding lawyers' exercise of ethical discretion thus provides an ethics norm that resists the differential moral hazards produced by self-interest in different legal practice locations. Lawyers' calibration of the zealotry of their representation in inverse relationship to their clients' power offers a posture that most directly corrects for this tug of self interest, a virtue surely important to ethics principles designed to preserve the profession's integrity against the pressures of business expediency.

Another important reason that client power should affect lawyers' ethical analysis is that adding this consideration tempers the flaws or extremes of pure client- or justice-centered approaches. Justice-centered approaches face powerful criticisms on the grounds that they call for the paternalistic substitution of lawyers' judgments about matters of morality and justice for those of those clients, especially clients who have few alternative options for obtaining legal representation.¹⁴ Using relative client power to guide lawyers' choices between client- and justice-centered approaches prevents lawyers from imposing their own substantive visions of

¹³ See *infra* Part III-A.

¹⁴ See, e.g., Stephen Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM B. FOUND. RES. J. 613 ("For access to the law to be filtered unequally through the disparate moral views of each individual's lawyer does not appear to be justifiable").

justice on clients who cannot easily walk away, while still calling on lawyers representing powerful interests to refrain from exploiting opportunities that would bar adequate consideration of less powerful interests affected by the representation. This approach indirectly has a justice-regarding aim, in that it seeks to permit something like “fair” or “just” ends to emerge from the working of legal processes, but it does so without asking lawyers to impose their own substantive views of the morality or justice of particular situations on those clients who can least resist.

I develop my argument in favor of consideration of relative client power as a factor in lawyers’ ethical deliberations through the following steps: In Part II, I sketch the background to the debate between client-centered and justice-centered approaches, and locate both approaches in their respective jurisprudential underpinnings in order to explore the limits of their fit to context. In Part III, I outline my argument about why, in situations involving obvious and substantial power imbalances, relative client power should be a factor in lawyers’ ethical deliberations, and respond to some of the more obvious objections raised by this proposal. Finally, in Part IV, I test my model by applying it to a series of hypotheticals drawn from the work of ethicists in the justice- and client-centered traditions. I demonstrate through these concrete examples how attention to client power leads to an analysis somewhat different from either of these two other alternatives, and argue why this analysis is superior to the results produced by either alternative in its pure form. In short, a power-based analysis draws from strengths of both client- and justice-centered perspectives, but better tailors those approaches to the contexts their underlying principles support.

II. THE DEBATE BETWEEN JUSTICE- AND CLIENT-CENTERED LEGAL ETHICS APPROACHES

In this Part I sketch the recent history of the development of various schools of legal ethics thought in order to situate the debate between client- and justice-centered approaches for readers who are not legal ethics experts. Readers intimately familiar with these debates may want to skip to Part III, though I hope through my explication to present a new way of thinking about a fundamental divide in contemporary legal ethics theory that will help point to a synthesis of these divergent traditions.

I group these traditions into two basic approaches: justice-centered views, which emphasize lawyers' duties to attend to the overall justice or morality of the issues they handle on behalf of clients, and client-centered approaches, which emphasize lawyers' duties to place their clients' interests above all other considerations except the bounds of law. I further discuss the various critiques and responses these sets of legal ethics scholars make to each other and note some of the jurisprudential influences important to each group.

A. The Justice-Centered View

The justice-centered approach to legal ethics analysis has complex historical origins.¹⁵ It would be far too simple to assert that this view arises with the critical legal ethics scholarship of the 1970s in the wake of Watergate, but its most recent origins can be located there, in an important article by philosopher Richard Wasserstrom,¹⁶ and in philosopher David Luban's classic book,

¹⁵ See, e.g., Pearce, *supra* note 7 (locating justice-centered strains in antebellum legal ethics thought); Robert Gordon, *supra* note 4 (examining a late nineteenth century model of corporate lawyering that emphasized lawyers' independence from and wise discretionary judgment with respect to client representations); Susan Carle, *Lawyers' Duty to Do Justice: A New Look At the History of the 1908 Canons*, 24 LAW & SOCIAL INQUIRY 1 (1999) (examining complex ways in which duty-to-do-justice issues pervaded debate about first national model rules of legal ethics).

¹⁶ Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 NATURAL L. FORUM 1 (1975).

The Good Lawyer.¹⁷ Wasserstrom, Luban, and others questioned lawyers' justifications for adopting a role-specific morality that allows them to pursue their clients' interests within the bounds of the law with near total disregard for the other interests affected by their representations. Wasserstrom and Luban also sought to refute as a matter of moral philosophy the non-accountability view of lawyers' ethical obligations, which holds that lawyers should not be held morally accountable for the positions they take and advocacy they engage in on behalf of clients.¹⁸

Shortly after, starting in the early 1980s, William H. Simon, a brilliant, then young legal scholar identified with the critical legal studies movement who had previously worked as a poverty lawyer and clinical law teacher, began a systematic attack on client-centered ethics. Simon's early work falls very much in the critical legal studies mode of deconstruction, focused on pointing out contradictions and poking holes in traditionally accepted jeremiads.¹⁹ In his later work, however, Simon commits himself to the much harder task of re-construction – of rebuilding the conceptual framework of legal ethics analysis along lines consistent with his critique of client-centered advocacy.²⁰ That work has taken him in a very different direction than of most clinical theorists,²¹ even though his concerns about achieving greater justice in the

¹⁷ DAVID LUBAN, *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* (1983).

¹⁸ This position, however, is still embodied in the ABA Model Rules. See Model Rule 1.2(c).

¹⁹ See, e.g., William Simon, *The Ideology of Advocacy, Procedural Justice and Professional Ethics*, 1978 WISC. L. REV. 29 (1978).

²⁰ See, e.g., SIMON, *supra* note 3.

²¹ See, e.g., William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. MIAMI L. REV. 1099 (1994) (criticizing clinical and poverty law scholars for misguided legal ethics analysis).

American legal system remain at bottom very similar to theirs.

Both Simon and Luban draw on legal history for support of their arguments in favor of justice-centered legal ethics, arguing that such conceptions flourished in lawyers' ethics thinking in prior historical periods.²² In this they had the important help of historian and critical legal studies scholar Robert W. Gordon. Gordon has convincingly shown how a different view of professional independence existed among elite corporate lawyers of the late 19th Century.²³ He has most recently continued to write, in the wake of Enron and other recent corporate scandals, about how such a view should be restored in developing a separate set of legal ethics dictates for corporate lawyers involved in regulatory compliance counseling work.²⁴ Other scholars, such as Russell Pearce,²⁵ locate justice-centered approaches civic republicanism and turn-of-the-twentieth century Progressivism, and, in yet another line of exploration by Pearce, Thomas Shaffer and others, in Judeo-Christian religion.²⁶

1. The Legalists and Moralists

There are significant differences among the views of scholars who espouse justice-centered ethics approaches. One is that between those Wendell recently labeled the *legalists* and

²² See, e.g., SIMON, *supra* note 3, at 128 (invoking Brandeis as a figure exemplifying justice-centered lawyering)); Luban, *supra* note 2, at 238 (invoking Brandeis as a model of a lawyer committed to the public interest); SIMONLUBAN, *supra* note 32, at 128234 (invoking Louis Brandeis's notion of public interest lawyering as a historical model for justice-centered lawyering).

²³ See Gordon, *supra* note 4.

²⁴ Gordon, *supra* note 8.

²⁵ See Pearce, *supra* note 7.

²⁶ See, e.g., Russell Pearce, *The Jewish Lawyer's Question*, 27 TEX. TECH. L. REV. 1259 (1996); Thomas L. Shaffer, *Should a Christian Lawyer Serve the Guilty?*, 23 GA. L. REV. 1201 (1989).

the *moralists*.²⁷ The moralists, who include not only Luban but also Rhode, Pearce, Shaffer, and many others, view justice as based in moral intuitions or moral dictates that lie at least in part outside the prescriptions of law.²⁸ The legalists, to which school Simon and Wendell belong, present sophisticated arguments that justice can be found in lawyers' interpretations of legal rules themselves.²⁹ Simon espouses a sophisticated view of legal interpretation that allows lawyers to probe beneath the dictates of positive law for the best, most generous understandings of its normative purposes. For example, Simon reads into U.S. law a legal right to basic standards of income maintenance,³⁰ and acknowledges that there are broad swaths of law, such as criminal justice, where his assumptions about the underlying justice of law's purposes must be suspended.³¹ Thus, Simon argues, "aggressive defense is justified because it subverts punishment which, although formally prescribed, is unjustly harsh and discriminatory in terms of the more general norms of the legal culture,"³² just as aggressive representation of the welfare

²⁷ Wendel, *supra* note 6, at 369-73.

²⁸ See LUBAN, *supra* note 2.

²⁹ A symposium organized in honor of the publication of Simon's book contains many thoughtful analyses of this theory from leading proponents of moralist approaches. See *Review Essay Symposium: The Practice of Justice by William H. Simon*, 51 STAN. L. REV. 867 (1999). Luban, writing as a so-called moralist under Wendel's classification scheme, argues that "[l]aw just isn't that good," and that moral intuition must be applied in making ethical judgments. Luban, *Reason and Passion in Legal Ethics*, *id.* at 888, 898. Thomas Shaffer, writing from the perspective of religious ethics, suggests that notions of justice from religious perspectives are "countercultural," in contrast to Simon's model derived from the dominant culture. Thomas L. Shaffer, *Should a Christian Lawyer Sign Up for Simon's Practice of Justice*, *id.* at 917. Tony Alfieri urges greater consideration of the need for lawyers to consider racial justice in crafting their representational strategies, Anthony V. Alfieri, *(Er)Race-ing an Ethic of Justice*, *id.* at 935; and Robin West blasts Simon for his "romantic conception of the invariable goodness of law, and the invariable illegality of injustice." Robin West, *The Zealous Advocacy of Justice in a Less than Ideal Legal World*, *id.* at 903, 973, 985.

³⁰ See SIMON, *supra* note 3, at 148-40.

³¹ *Id.* at 189-90.

³² *Id.* at 189-90.

recipient client is justified under broadly based legal norms not current instantiated in positive law.³³ Indeed, the key difference between Simon and the clinical and postmodern legal ethics scholars he criticizes may amount to nothing more than a dispute about how broad these swaths of unjust law are in our legal system, as I discuss further in Part V below.

Wendel, though also a legalist, has a somewhat different approach to law, in that he sees its key purpose as serving a social coordination function. Wendel argues that a lawyer should look to law as the authoritative statement of how society has chosen to coordinate relations among its members, and should seek to carry out those purposes in client representations.³⁴ Wendel's explanation is helpful and important so far as it goes: To the extent that a lawyer is dealing with law that has this social coordination function as its primary characteristic, there seems little reason to object to Wendel's legal ethics model.

The difficulty with Wendel's approach arises with respect to the many areas of law that have purposes different from or additional to social coordination. Law, for example, dictates such matters as resource distribution and allocations of other basic rights subsumed under the concept of justice. In these areas Wendel, like Simon, concedes that, if the fundamental justice of law is uncertain, a legal ethics stance different from the one he proposes is necessary.³⁵ In those problematic areas of law, however broad (or not – a question I will leave to some other day) an approach other than the legalists' is required. A legalist perspective cannot work because in these areas we are *not* confident about the fundamental justice of law and the results produced

³³ *Id.* at 148-49.

³⁴ *See* Wendel, *supra* note 6, at 378-79.

³⁵ *See id.* at 148-49.

through its operation. Significantly, these are the contexts about which poverty law and clinical scholars tend to write, and it is thus no surprise that their legal ethics models, derived from representation settings in which law's fundamental justice may be in substantial doubt, are very different from those of Simon and Wendell. Indeed, one piece of evidence that one may be functioning in such a problematic area of the legal system is the presence of obvious and substantial power imbalances among the parties involved in a legal dispute. This is one reason why, in situations involving such obvious and substantial power imbalances, client power should be a factor guiding lawyers' exercise of ethical judgment, as I discuss further in Part III below.

Justice-centered theorists who espouse substantive moralist bases for legal ethics analysis often draw on communitarian theories to support their positions. Their underlying jurisprudential assumptions thus differ significantly from those of client-centered ethicists, who tend to view law as involving an adversarial system of truth testing, and thus to emphasize the importance of zealous advocacy of clients' positions without regard for their justice in relation to the public interest or community good.³⁶ Justice-centered theorists' communitarian perspective is reflected in their strong interest in the historical traditions civic republicanism³⁷ and turn-of-the-twentieth-century progressivism,³⁸ both of which assume the ability of actors to identify and act in accordance with shared notions of the public interest. If community good or public interest can be consensually or objectively identified, as lawyers during these historical moments

³⁶ On adversarial legal ethics, see Richard Wasserstrom, *supra* note 16; David Luban, *The Adversary Excuse*, in LUBAN, *supra* note 2, at 83.

³⁷ See, e.g., Pearce, *supra* note 7; Gordon, *supra* note 4.

³⁸ See, e.g., William H. Simon, *Babbitt v. Brandeis: The Decline of the Professional Ideal*, 37 STAN. L. REV. 487 (1980) (discussing Progressive Era lawyers as embodying a better model of professional ideals).

believed, then the argument that lawyers should act with concern for the common good foremost in mind in the course of representing clients is a strong one. But if notions of community good or common interest are situated in social context and widely disparate, then it becomes difficult to build a theory of ethics on lawyers' obligation to act on the basis of their notions of what justice requires. Such a theory ends up defensively dodging challenges that it endorses the exercise of subjective judgment and the elitist domination of lawyers over clients.

In short, moralists face critiques based in modern and post-modern skepticism about the objective ascertainability of such matters as truth, morality and justice. Arguments that lawyers should do what they determine to be "just" under the circumstances collapse into moral or legal relativism if such determinations are subjective: in acting in the interests of justice, lawyers will simply be following their own personal preferences or those they hold by virtue of their social locations.³⁹ That idea appears of little use as a guide to legal ethics analysis. Thus, even the most adamant justice-centered theorists must concede that a central problem with all versions of justice-centered analysis is that, if we abandon the views of earlier historical eras that matters of truth, morality and justice are objectively ascertainable, we lose an important component of the justification for justice-centered legal ethics.

But even if justice-centered theorists' focus on lawyers' ability to ascertain correct *substantive* results on questions of legal interpretation or morality fail to convince, it does not follow that their work has nothing to offer. To the contrary, these theorists are very persuasive on the inadequacy of client-centered legal ethics without more. As they point out, it surely cannot be that lawyers, as officers of the legal system charged with upholding the purposes of the

³⁹ Such arguments have been central in attacks on justice-centered views. See, e.g., Pepper, *supra* note 14.

law and the working of legal processes, need not concern themselves with the effects of their representations on the system of law and legal institutions in which they operate. It is at least clear that the proper functioning of the legal system requires lawyers to act in such a way as to preserve its continuing integrity and effectiveness. In other words, even if lawyers should not impose their own views of substantive justice on their clients, they surely have a duty to help protect the public purposes of law and legal institutions. The challenge is to identify how lawyers should do this without running into the epistemological difficulties inherent in both moralist and legalist justice-centered approaches.

2. *Justice-Centered Ethics and Critical Theory*

Simon was once a member of the critical legal studies movement and his work, emphasizing the discretion and indeterminacy built into law, draws on some aspects of critical legal studies.⁴⁰ But he is not a comfortable fellow traveler with most of those who identify themselves as critical theorists today.⁴¹ Indeed, there is some irony in the fact that Simon, an early “crit,” should now insist that law provides the source of determinate substantive dictates in legal ethics analysis. Simon recognizes and addresses this irony in the following passage:

My friends and teachers in Critical Legal Studies devoted a good deal of effort to extending the Realist critique of the objectivity of the legal reasoning associated with judges and demonstrating the relative “indeterminacy” of judicial doctrine. We thought that the mainstream tendency to exaggerate objectivity and determinacy gave an undeserved legitimacy to the work of the

⁴⁰ In *Practice of Justice*, Simon relies almost exclusively on Ronald Dworkin’s quite different theory of flexible but determinate legal interpretation in *Taking Rights Seriously*, RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 81-130 (1978) (discussing how judges reach correct results in hard cases).

⁴¹ In some ways, of course, Simon clearly *is* a critical theorist, in light of his willingness to challenge sacred assumptions and turn traditional analysis on its head. *See, e.g.*, Note, *Rethinking the Professional Responsibilities of Federal Agency Lawyers*, 115 HARV. L. REV. 1171, 1182 & n. 60 (2002) (calling Simon’s legal ethics model a “critical model”).

centrist/conservative judiciary. We hoped that such critique would loosen things up for Progressive politics.

I have always thought that this was an important and worthwhile project, but it was apparent to me from the beginning that the situation was quite different with lawyers' ethics. Here skepticism is the mainstream tendency. Here it is the assertion of indeterminacy and subjectivity that serves to legitimate a conservative status quo.⁴²

What Simon does not sufficiently acknowledge in this passage is that skepticism as a posture toward claims of justice in the context of legal ethics analysis can have multiple origins. The traditional one is based on classical liberal justifications for adversarial, individual-rights approaches to legal representation. Another, however, arrives at similar conclusions from a very different starting point, locating the need for skepticism about moral truths and for restraint in a lawyer's imposition of her own values on clients in a very different understanding of the dangers and pervasiveness of power as a "force field" bending well meaning efforts away from conscious intent.⁴³

Similarly, Simon attributes the "indeterminacy and subjectivity" approach to questions of justice to traditionalists who defend the status quo,⁴⁴ without recognizing that justice-centered approaches are similarly associated with a flawed status quo characterized by a paternalistic, lawyer-dominated notions of public interest law. Scholars of the history of public interest law have noted the ways in which elite public interest lawyers have stood in the way of their clients'

⁴² William Simon, *The Legal and the Ethical in Legal Ethics: A Brief Rejoinder to Comments on The Practice of Justice*, 51 STAN. L. REV. 991, 992 (1999).

⁴³ On this Foucauldian notion of power as applied to lawyering analysis, *see, e.g.*, Lucie White, *Seeking the Face of Otherness*, 77 CORNELL L. REV. 1499, 1501-02 (1992).

⁴⁴ *See* Simon, *supra* note 42, at 992.

wishes and desires, unreflective about the sometimes counterproductive effects of their own socially situated perspectives on the development of those movements.⁴⁵

In all events, Simon, along with many other justice-centered theorists, has been indifferent at best and hostile at worst to the virtues of critical theory for legal ethics analysis. But some strains of critical legal theory would seem to have useful application to questions about lawyering in situations of substantial power imbalance, especially since that is the political context on which critical theory tends to focus. It thus seems well worth exploring the potential applicability of these strains of critical theory to legal ethics analysis. Again somewhat ironically, it is theorists with client-centered legal ethics perspectives who have begun to do this work.

B. Client-Centered Approaches

Client-centered, zealous advocacy approaches to legal ethics analysis have several origins. Again taking the 1970s as a somewhat arbitrary starting point for a quick historical overview, one would point to Charles Fried's classic article, "The Lawyer As Friend," as the paradigmatic traditional expression of this view.⁴⁶ Monroe Freedman defended a similar approach, focusing on the criminal defense context but discussing corporate representation as

⁴⁵ See, e.g., Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 YALE L. J. 1445 (1996) (critiquing Brandeis's lack of engaged involvement with his public interest clients); Norman W. Spaulding, *The Myth of Civic Republicanism: Interrogating the Ideology of Antebellum Legal Ethics*, 71 FORDHAM L. REV. 1397 (2003) (critiquing the way in which civic republican models of lawyers' ethics ignore class dimensions of this professional ideology); David B. Wilkins, *Class Not Race in Legal Ethics: Or Why Hierarchy Makes Strange Bedfellows*, 20 LAW & HIST. REV. 147 (2002). (questioning motivations of patrician lawyers involved in the early NAACP); Susan D. Carle, *Re-envisioning Models for Pro Bono Lawyering: A Comparative Study of the Early NAACP and the National Consumers League*, 9 AM. U. J. OF GENDER, SOCIAL POLICY AND LAW 81 (2001) (discussing benefits and drawbacks of elite lawyers' involvement in two early national public interest law organizations).

⁴⁶ Charles Fried, *The Lawyer As Friend: the Moral Foundations of the Lawyer-Client Relation*, 85 YALE L. J. 1060 (1976).

well.⁴⁷ At around the same time, civil rights and poverty lawyers were developing client-centered theories of client representation from other angles,⁴⁸ and this work developed still further after many former poverty movement lawyers found homes in legal academia as clinicians, pioneering clinical legal scholarship as an intellectual force that sought to pull legal academia's focus more toward analyzing actual client representations.

1. Criminal Defense

All contemporary ethicists, including those in the justice-centered tradition, agree that arguments for zealous client advocacy are most persuasive in the criminal defense context.⁴⁹ I will suggest in Part IV-B-2 below that this is because criminal defense presents the context where it is most plausible to impose a strong presumption as to the potentially overwhelming power of the state, pitted against a comparatively powerless individual threatened with deprivation of life and liberty. But Freedman and other legal ethicists writing about the criminal defense context do not explicitly espouse context-specific analysis, and sometimes make the same arguments about the importance of zealous client advocacy in quite different practice settings, such as in lawyers' representation of publicly traded corporations before the Securities and Exchange Commission.⁵⁰

⁴⁷ See MONROE FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975).

⁴⁸ See, e.g., Stephen Wexler, *Practicing Law for Poor People*, 79 *YALE L.J.* 1049 (1970); Edgar S. and Jean Camper Cahn, *Power to the People or the Profession?—The Public Interest in Public Interest Law*, 79 *YALE L.J.* 1005 (1970); and Gary Bellow, *Turning Solutions Into Problems: The Legal Aid Experience*, 24 *NLADA Briefcase* 106 (Aug. 1977).

⁴⁹ See, e.g., SIMON, *supra* note 3, at 187-94 (presenting justifications for zealous advocacy in the criminal defense context); Luban, *supra* note 8 (arguing that context of criminal defense supports client-centered, zealous advocacy ethics stance).

⁵⁰ See, e.g., FREEDMAN, *supra* note 47, at 21-24 (berating the SEC, in arguments foreshadowing the corporate bar's indignation following enactment of the Sarbanes-Oxley Act, for taking the position that lawyers should curtail the zeal of their advocacy in their representations of clients before the Commission in order to safeguard the purposes of federal securities law). Other scholars associated with criminal defense representation, including Charles Ogletree

I will suggest that these scholars' key analytical mistake in what is otherwise sound reasoning occurs here – in assuming that an ethical stance developed in one practice context should be transferred outside it.

2. *The Clinical Scholarship Movement*

Another line of client-centered ethics theory comes from the clinical legal education movement's concern with legal ethics issues arising in the representation of low-income clients. Such writing often focuses on narratives involving the representation of disguised actual clients, and seeks to capture and analyze the micro-dynamics of the operation of power between lawyer and client. Classics include Lucie White's iconic piece in which her client, Mrs. G., employs a far more creative litigation strategy than that which White, then a legal services lawyer, had advised.⁵¹ The case involves a hearing to determine whether Mrs. G. must return money received due to a welfare officer's accidental overpayment of benefits. White analyzes the complicated relations of power, race, class and gender among Mrs. G., the welfare department social worker responsible for the payment error who is pursuing the hearing, and White, who had grown up in the region but is very much set apart from the other actors in the story by race, class privilege,

and Abbe Smith, have similarly and persuasively defended the zealous advocacy model for the ethics of public defenders. *See, e.g.*, Ogletree, *supra* note 1; Charles J. Ogletree, Jr., *An Essay on the New Public Defender of the 21st Century*, 58-Winter LAW & CONTEMP. PROBS. 81 (1995); Barbara Babcock, *Defending the Guilty*, 32 CLEVELAND STATE L. REV. 175 (1983). Smith, a clinical law teacher closely associated with Freedman, frequently emphasizes the importance the criminal defense context makes. *See, e.g.*, Abbe Smith, *The Difference in Criminal Defense and the Difference It Makes*, 11 WASH. U. J.L. & POL'Y 83 (2003) (arguing that the degree of zealous representation appropriate in the context of criminal defense is different from civil cases in light of many differences between these representational contexts); *see also* Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443, 445-47 (1999) (making a special defense of zealous advocacy on the part of public defenders, by noting that the majority of those accused of crimes are poor people, the percentage of poor people among those convicted of crimes is even greater, and the clients of criminal defense lawyers are also disproportionately nonwhite). But Smith, too, sometimes asserts that the same principle of zealous advocacy should apply in all settings. *See, e.g.*, Smith, *supra*, at 137.

⁵¹ *See* White, *supra* note 1.

law school education, and her power and authority as an attorney.

The story's punch line involves Mrs. G's decision on the witness stand to disregard White's advice and instead present a narrative about her need to preserve her human dignity by buying Sunday shoes for her children.⁵² After the hearing, the welfare department decides to drop the case against Mrs. G, and White realizes that she had failed to understand, across lines of class, race, and legal training and authority, her client's perspective and wisdom in formulating a narrative or theory for her case.

As the Mrs. G. study demonstrates, client-centered lawyering literature seeks to deconstruct traditional assumptions about the ease with which lawyers can ascertain and advocate for their clients' interests. In noting the difficulties of lawyering across lines of class and education and other axes of social difference, these scholars have forced more sophistication in legal ethicists' awareness of the distinction between zealous advocacy and client-centeredness. Client-centeredness encompasses but does not stop at zealous advocacy; lawyers must also strive to understand their clients' self-perceived interests, rather than imposing stock legalist viewpoints about what clients' interests in the representation should be.

These scholars' case-study methodology also allows them to closely examine the micro-dynamics of client-centered counseling. Clinical scholars describe a collaborative interaction between client and lawyer. They insist that client-centered representation involves neither simply accepting the client's statement of goals and interests as articulated at the outset of a representation, nor imposing one's own views of the goals and interests the client should wish to pursue. Instead, client-centered counseling at its best involves an exchange of information,

⁵² *Id.*

knowledge and perspectives between client and lawyer, from which both parties and the quality of the legal representation gain. Key to this dialogic process, however, is the ultimate right of the client to decide on both the goals and the means used in the legal representation.⁵³ Thus, client-centered theorists insist, in the end, if client and lawyer fail to see eye-to-eye after such reciprocal dialogue, it is the *client's* wishes that should prevail.⁵⁴ Clinical scholars have identified many reasons why client-centeredness is appropriate in their practice context;⁵⁵ one important one is that it preserves the relative power of the client in relation to the lawyer whose position of relative social privilege could otherwise easily lead to domination over the client.⁵⁶

3. *Rebellious or Community Lawyering*

Another strain of client-centered lawyering theory that arises out of but in some ways sets itself apart from the classic client-centered lawyering literature goes by the name of rebellious or community lawyering. Advocates of this approach, including Gerald López,⁵⁷ Lucie White⁵⁸ and

⁵³ See, e.g., Dinerstein, *supra* note 1, at 549 (making this point).

⁵⁴ See, e.g., Pepper, *supra* note 14; FREEDMAN, *supra* note 47 (arguing that the lawyer should attempt to talk the client out of committing perjury on the witness stand in a criminal case, but ultimately should not disclose the perjury or withdraw from the case if the client fails to follow the lawyer's counsel).

⁵⁵ See, e.g., Kate Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369 (2006) (identifying many reasons for client-centered representation); Dinerstein, *supra* note 1 (same).

⁵⁶ Kruse, *supra* note 55, at 377.

⁵⁷ GERALD LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE (1992); Gerald López, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603 (1989); Gerald López, *Lay Lawyering*, 32 UCLA L. REV. 1 (1989); Gerald López, *The Work We Know So Little About*, 42 STAN. L. REV. 1 (1989).

⁵⁸ See, e.g., Lucie E. White, *To Learn and To Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WISC. L. REV. 699; Lucie E. White, *Collaborative Lawyering in the Field: On Mapping Paths from Rhetoric to Practice*, 1 CLINICAL L. REV. 157 (1994) [hereinafter *Collaborative Lawyering*].

many others,⁵⁹ have developed models of client-centeredness that focus on understanding poor or otherwise disadvantaged clients in the context of their communities.⁶⁰ Rebellious and community-based lawyering theorists also emphasize exploration of creative lawyering strategies and the breaking down of distinctions between lawyering and community organizing techniques. What makes supporters of this approach similar to classic client-centered lawyering theorists is their focus on relatively powerless or disadvantaged clients, communities, and interests, and their insistence that lawyers should seek to refrain from dominating their clients and instead should strive to help client communities discover and pursue their interests as they themselves perceive them.

Simon has critiqued these genres of legal ethics scholarship on a number of grounds, some of which have merit but some of which do not. Simon notes, for example – correctly to my mind – that the clinical client-centered lawyering literature has many elements that are similar to the traditional client autonomy view.⁶¹ He also argues – again correctly, to my mind – that

⁵⁹ Jane Murphy, *Lawyering for Social Change: The Power of the Narrative in Domestic Violence Law Reform*, 21 HOFSTRA L. REV. 1243 (1993); William Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U.L. REV. 455 (1994); Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443 (2001); Michael Diamond, *Community Lawyering: Revisiting the Old Neighborhood*, 32 COLUM. HUM. RTS. L. REV. 67 (2000); Shauna I. Marshall, *Mission Impossible?: Ethical Community Lawyering*, 7 CLINICAL L. REV. 147 (2000).

⁶⁰ See, e.g., LÓPEZ, *supra* note 57 (describing various perspectives to public interest law practice and choosing community lawyering as the best); Christine Zuni Cruz, *[On the] Road Back In: Community Lawyering in Indigenous Communities*, 5 CLINICAL L. REV. 557 (1999) (describing community lawyering in the context of Cruz's return to her native American community); Victor M. Hwang, *The Hmong Campaign for Justice: A Practitioner's Perspective*, 9 ASIAN L. J. 83 (2002) (describing creative organizing and lawyering techniques in campaign to win the Hmong people rights to welfare benefits); see also Michael Diamond, *Community Lawyering: Revisiting the Old Neighborhood*, 32 COLUM. HUM. RTS. L. REV. 67 (2000); and Shauna I. Marshall, *Mission Impossible?: Ethical Community Lawyering*, 7 CLINICAL L. REV. 147 (2000). Lucie E. White, *Collaborative Lawyering in the Field: On Mapping Paths from Rhetoric to Practice*, 1 CLINICAL L. REV. 157 (1994).

⁶¹ Simon, *supra* note 21, at 1104, 1111-12 (“the client ‘empowerment’ recommended by the new scholarship seems quite similar to the client autonomy exalted in the traditional doctrine”).

clinical legal scholarship can become too exclusively focused on the micro-dynamics of client lawyer interactions at the expense of important broader questions about effective strategies for political change.⁶² But he incorrectly asserts that these scholars deny that lawyers exercise ethical discretion in lawyering and claim they can refrain from imposing any values or power in their client relationships.⁶³ That is far from what these scholars claim; their project instead is to reflect on and develop better ethical practices in order to guide the exercise of their power and discretion. Nor does it at all follow from the valid aspects of Simon's critique that poverty law scholars' general ethics project is illegitimate: surely close reflective analysis of how ethical discretion operates in lawyer relationships with poor clients can help in the development of ethical norms appropriate to this practice context.

Simon correctly observes that post-modern theory has strongly influenced some scholars affiliated with the client-centered and rebellious lawyering movements and that this influence is in part responsible for the movements' drastic scaling down of their political ambitions.⁶⁴ But to say that the lawyering theory of the poverty law movement has become too focused on micro-dynamics at the expense of theorizing strategies for broader-scale political change is not to say that it is not political at all. Critical lawyering theorists do not see representation of relatively

⁶² *Id.* at 1100 (“The scale of practice portrayed is typically small – often one on one – and the benefits are often as much psychological as they are material. At each stage in this remarkable evolution, the concern with lawyer oppression of clients has increased, while the scale of material and organizational ambitions has declined.”)

⁶³ *Id.*

⁶⁴ Many commentaries on the politics of post-modernism have made similar critiques about its lack of political thrust. *See, e.g.,* Kathryn Abrams, *Cross-Dressing in the Master's Clothes* (Book Review), 109 *YALE L. J.* 745, 774 (2000) (critiquing post-structuralist theorist's concept of politics as involving “subversive repetition” on the grounds that it “fails to account for when such repetitions will become disruptive and when they will simply be co-opted”) (internal citation omitted); Joel F. Handler, *Postmodernism, Protest, and the New Social Movements*, 26 *L. & SOC'Y REV.* 697, 719-28 (1992) (criticizing focus of postmodernist activism on local disruptions that fail to produce sustained, large-scale political change).

powerless clients as merely providing “psychological” therapy.⁶⁵ Their hope is that lawyering interactions present small-scale moments of possible client empowerment. This idea stems from post-modernists’ claims that the micro-dynamics of power’s operation in the flux and confusion of local, particular situations creates opportunities for resistance and change.⁶⁶ Their underlying faith commitment is that the development through reflective analysis of an ethics of respect and restraint will produce better client-lawyer interactions – *i.e.*, ones more likely to lead to effective large-scale political action – than ones in which lawyers unduly and unreflectively dominate their clients.⁶⁷

A second contribution post-modernism offers legal ethics theory is a wariness about the effects of power relationships in shaping actors’ socially constructed consciousness.

⁶⁵ Simon, *supra* note 21, at 1100.

⁶⁶ See, e.g., White, *supra* note 43 (applying late twentieth century social theory to a micro-analysis of lawyering). Or, as López writes:

[P]ower—the capacity to make things the way we want them—isn't something only some people have. . . . Power necessarily runs in all directions within relationships. No person, no group is ever *absolutely* powerless in any relationship, not battered women and not low-income people of color in the East Bay. In fact, when we call a person or a group "subordinated" or "victimized," we're always describing a state of relative powerlessness. For all that they endure, battered women and low-income people of color still retain the capacity to work rebelliously with both stock and improvised stories—the capacity to resist victimization and subordination and to reverse its tendencies Granted, no one is weaponless in a power struggle. But some of us have tanks and some of us only rocks. . . . We cannot escape the exercise of power either, certainly not through law and not even through love. . . . To help us remember how our everyday lawyering is inescapably a part of the power we all inevitably exercise, try picturing . . . social life as networks of competing power strategies. Think of every social situation as the convergence of particular power strategies. . . . long with the many informal strategies we daily use, law provides more formal strategies to understand and shape our relationships.

LÓPEZ, *supra* note 57, at 41-42.

⁶⁷ I have attempted to begin to think about a legal ethics model based on respect and restraint in the context of lawyering for public interest law movements in Susan Carle, *How Should We Theorize Class Interests in Thinking*

Recognizing the insidious and pervasive operation of power and ideology in all facets of social interaction, post-modern lawyering theorists are particularly suspicious of claims to know the common good. Those claims are tainted by – indeed pervaded by – the interests of the dominant class.⁶⁸ In this respect post-modernism as applied to legal ethics analysis produces results more like traditional liberalism’s emphasis on the need for zealous client advocacy than like those stemming from the strains of communitarianism that support justice-centered legal ethics perspectives. Post-modernism is skeptical of claims to know a common good that stands apart from political struggle. It is also deeply doubtful about the possibilities for progress or lack of co-optation in that political struggle between the more and the less powerful. But it sees that struggle going on all the time, in the many interstices and contested local battlegrounds of daily social life. Lawyers whose legal ethics perspectives are influenced by these strains of critical theory strive to take part in that struggle on the side of the less powerful. Their legal ethics literature is based on these post-modernist-influenced understandings – on developing principles that help make those sites in which lawyers participate in political struggle more about resistance to entrenched forms of power and less about perpetuating the domination of those with power and privilege, including lawyers, over those with relatively few such resources. As an aspiration, that idea surely has much merit as one aspect of the development of a legal ethics analysis suitable for lawyering across social differences and on behalf of those with the least social advantage.

About Professional Regulation?, 12 CORNELL LAW SCHOOL JOURNAL OF LAW AND PUBLIC POLICY 571 (2003).

⁶⁸ Thus even Wilkins, hardly a radical post-modernist, skeptically suggests that elite lawyers involved in the practice of public interest law are in fact doing nothing more than perpetuating the long term interests of their own dominant economic class. *See* Wilkins, *supra* note 45.

In short, in contrast to Simon, I view the literature developed out of the poverty law and clinical legal education movements as largely on the right track in focusing on how to enhance client perspectives and empowerment in the context of lawyering relationships with persons, groups and interests with little social, economic, political, or legal power. The key challenge, however, is to reconcile this view of lawyers' appropriate ethics stance with justice-centered theorists' convincing showing of the potential harm overly aggressive client advocacy can do to the public interest. My argument is that a key aspect of that reconciliation requires embracing legal ethics approaches with emphases that differ depending on practice location.

4. Corporate Representation

Thus far, I have described client-centered legal ethics theory that arises out of practice contexts involving the representation of relatively powerless individuals and communities. My description has not covered the entire territory, however; some prominent spokespersons for client-centered lawyering write from the context of corporate representation.⁶⁹ But these traditionalists represent the old guard. Public policy trends away from strict lawyer confidentiality in the face of serious danger to the public interest and toward greater lawyer activism in investigating and correcting wrongdoing by organizational clients suggest that the course of legal ethics regulation is sweeping past these commentators' objections.⁷⁰ Arguments

⁶⁹ See, e.g., Larry Fox, *The Fallout from Enron: Media Frenzy and Misguided Notions of Public Relations Are No Reason to Abandon our Commitment to our Clients*, 1324 Practising Law Institute Corporate Law and Practice Course Handbook Series, PLI Order No. B0-018J, Westlaw 1324 PLI/Corp. 867 (2002) (defending client-centered corporate lawyering in the wake of Enron).

⁷⁰ Compare ABA Model Rule 1.6 (2005) (providing discretion for lawyers to disclose client confidences where the lawyer reasonably it "necessary to prevent reasonably certain death or substantial bodily harm"; to "prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another" if the lawyer's services were used; or "to prevent, mitigate or rectify substantial injury" to the same interests in the same circumstances), with ABA Model Rule 1.6 (2002) (defining stricter mandatory duties of confidentiality that did not allow lawyers to disclose client confidences in any situation other than "to the extent the

for zealous client advocacy on behalf of enormously powerful corporations fail to pack the persuasive punch they once did in light of successive waves of corporate scandals in which lawyers played a significant role. It has simply become increasing hard to explain how the proper overall working of legal system is enhanced when lawyers for savings and loan companies stonewall federal regulators so that investors lose billions more before their clients' insolvency and financial mismanagement is uncovered, or approve sham transactions and then engage in a pitifully inadequate internal investigation of a whistleblower's misconduct charges in the course of the events leading to the collapse of Enron.⁷¹ In all of these scandals, a key aspect of the lawyers' conduct that commentators later found objectionable involved lawyers' adherence to a strongly client-centered, zealous advocacy ethics stance. Yet in most instances these lawyers' actions failed to cross the line beyond the conduct permitted under legal ethics rules.⁷² These scandals have thus exacerbated the crisis of confidence about the effectiveness of current client-centered models of legal ethics regulation. As many leading legal ethics scholars have persuasively argued in their autopsies of these and other corporate scandals, the time for context-specific approaches to lawyer regulation has arrived.⁷³

lawyer reasonably believes necessary . . . to prevent the *client* from committing a *criminal* act that the lawyer believes is likely to result in *imminent* death or substantial bodily harm" (emphasis added). *See also* Sarbanes-Oxley Act of 2002, § 307, Pub. L. No. 107-204, 116 Stat. 745, 784 (codified as amended at 15 U.S.C. § 7245 (Supp. II 2002)); SEC Implementation of Standards of Professional Conduct for Attorneys, 17 C.F.R. Part 205 (imposing disclosure, reporting, and investigative obligations on lawyers representing publicly traded companies).

⁷¹ *See, e.g.*, Gordon, *supra* note 8.

⁷² *See* William H. Simon, *The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology*, 23 LAW & SOC. INQUIRY 243 (1998) (describing in detail the charges the Office of Thrift Supervision filed against Kaye Scholer and the New York court's dismissal of them).

⁷³ *See, e.g.*, David Wilkins, *Making Context Count: Regulating Lawyers After Kaye Scholer*, 66 S. CAL. L. REV. 1145 (1993) (using Kaye Scholer as an example of the need for context-specific regulation).

III. POWER AS A FACTOR IN LAWYERS' ETHICAL DELIBERATIONS

A. The Importance of Discretion in Lawyers' Ethical Judgment

The savings and loan and Enron scandals helped focus attention on the fact that lawyers continually exercise discretionary ethical judgment in their client representations; the positive prescriptions legal ethics rules supply cannot determine by themselves what lawyers can or should do in all instances. Indeed, one of Simon's many important contributions to legal ethics study is his insight into the important role discretion plays in lawyers' ethical judgment.⁷⁴ Simon persuasively argues that such discretion operates continuously and unavoidably in all lawyers' practice decisions.

That positive law lacks determinacy in this respect is by no means a new insight, of course. As H.L.A. Hart convincingly established long ago, positive law is always rife with gaps and ambiguities that require the application of discretionary judgment.⁷⁵ This is particularly the case with regard to legal ethics rules that regulators have drafted to apply across the entire profession. These rules are often purposely left broad so as to provide general guidelines that can be adapted to the particularities of disparate practice settings. It is this indeterminacy in the positive dictates of ethics law that left lawyers in the savings and loan and Enron scandals to operate within a zone of discretion in which their general normative orientation toward zealous

⁷⁴ Simon's insight follows from the legal realists' investigation of the important role discretion plays in law practice generally. See Karl N. Llewellyn, *Law and the Social Sciences — Especially Sociology*, 62 HARV. L. REV. 1286, 1289-92 (1949) (discussing the important role of discretion in law practice). No one ever talks about Llewellyn as a legal ethicist, but a good argument can be made that he is the first great one in the legal realist tradition pursued by William Simon – as when Llewellyn writes about the importance of socializing legal actors into habits of mind that will lead them to exercise discretion wisely. See, e.g., *id.*

⁷⁵ H.L.A. HART, THE CONCEPT OF LAW 121-50 (1962) (discussing rule skepticism).

client-centeredness, rather than limits set by the rules, dictated their conduct. For the same reason, regulators were unable to prosecute these lawyers successfully for violations of legal ethics law; they were unable to show that these lawyers' conduct went beyond the wide bounds set by the law regulating lawyers' conduct.⁷⁶

Thus a key aspect of reforming the lawyers' conduct requires a shift in lawyers' general normative orientation, rather than mere altered prescriptions contained in legal ethics rules themselves. Following Simon and others who seek to propose new approaches to legal ethics analysis, I will focus in this Article primarily on this dimension of lawyers' discretionary judgment. In other words, I am seeking to carve the dimensions of and defend the general principle of a contextual approach that looks for factors that should guide lawyers' ethical deliberation, rather undertaking at this point to propose new rules. The general principles I explore here certainly could lead to revisions in the ethics rules as well, but that focus must await a future project.⁷⁷

⁷⁶ Thus legal ethics regulators failed to successfully prosecute the lawyers involved in either of these egregious cases on ethics misconduct charges. These lawyers' conduct, though arguably over the lines set by the rules in some instances, *see* Simon, *supra* note 72 (making such arguments), did not in the main violate the positive dictates of the ethics rules with sufficient clarity to result in legal penalty. *Id.*

⁷⁷ Indeed, a power-based approach ultimately does call for rethinking and restructuring of the Model Rules. In their current form, the Model Rules openly acknowledge the fundamental tension between client- and justice-centeredness and strike a balance between these two poles. For example, provisions of Article 1 of the Model Rules, addressing the "Client-Lawyer Relationship," embrace the client-centered and non-accountability views, as when Rule 1.2 states that lawyers are to "abide by a client's decisions concerning the objectives of representation," and that their representation "does not constitute an endorsement of the client's political, economic, social or moral views or activities." Model Rule 1.2(a) & (b). Other Articles provide the counterweight of lawyers' justice-oriented duties – to the court, third parties, and the public interest. *See, e.g.*, Model Rule 3.3 (Candor Toward the Tribunal); Model Rule 3.4 (Fairness to Opposing Party and Counsel); Article 4 (Transactions with Persons Other Than Clients); Model Rules Article 6 (Public Service). On balance, the rules are weighted toward client-centeredness within bounds. A *justice-centered* view, if codified generally, could require revision of many specific provisions, including but not limited to modifying Rule 1.2 and expanding Article 6 in order to shift this overall balance away from client-centeredness and toward justice-focused duties to the court and to the public interest. A *power-based* approach, as a third alternative, would embrace this shift in some contexts but would retain and perhaps even strengthen the client-centered balance of the current rules for other practice contexts. A detailed examination of how this would work must await another paper, however; for now my primary interest is in focusing on how a power-based analysis would

It also bears emphasizing before I proceed that my argument in favor of lawyers' consideration of relative client power in their everyday discretionary ethical judgment calls is *not* that lawyers should abandon general dictates against breaking the law, falsifying evidence, suborning perjury, or any of a number of other limits, but instead focuses on ethics analysis *within* limits that are appropriate in all contexts. Put otherwise, the argument that lawyers should consider power as a factor in ethical analysis does not propose that lawyers should disregard the boundaries set by law and professional conduct rules, but address the – often quite large – area of bounded discretion in which normative orientation guides decisions in the everyday choices, both large and small, that confront practicing lawyers.⁷⁸

In this area of bounded discretion, my proposal for consideration of relative client power in resolving close ethical judgment calls would work as follows: lawyers for clients with substantially greater power relative to that of other interests affected by the representation should strive to temper the zealousness of their client advocacy with an eye to protecting consideration of those less powerful interests. In contrast, lawyers for clients with substantially less power – in other words, lawyers representing “underdogs” vis-a-vis powerful interests – should be guided by the ethical principle of zealous, client-centered representation. In the middle range of cases, involving representations of clients with substantially equivalent power or power relationships that are sufficiently complex or multifaceted as to produce indeterminate results under a power-based test, consideration of relative client power should not come into play in guiding lawyers' ethical judgments. Thus, as I discuss further in Part IV below, my proposal for consideration of

apply as a matter of general principle.

⁷⁸ See, e.g., David B. Wilkins, *Everyday Practice Is the Troubling Case: Confronting Context in Legal Ethics*, in *EVERYDAY PRACTICE AND TROUBLE CASES* (Sarat, A., et. al., eds, 1998).

relative client power as a factor in legal ethics analysis applies only to some representations, involving obviously and substantial power imbalances among affected interests, and leaves the rest of the terrain to other ethics theories. But as I hope I have persuaded in Part I, the disagreement between the justice- and client-centered theorists arises precisely because advocates of each approach are writing with a focus on the disparate practice settings of corporate and individual client representation, respectively, where power imbalances tend to be the most salient. Before discussing through concrete hypotheticals how a context-specific ethics norms focused on relative client power would work, however, I make the case for why client power should make a difference at all.

B. Why Factor Client Power into Lawyers' Ethical Judgments?

The preliminary question presented is, why should relative client power make a difference to legal ethics analysis? I consider four possible reasons why this should be so. In doing so, I consider the jurisprudential bases for client-centered legal ethics in traditional liberal theory and the understandings of the importance of power in legal and political processes developed by both liberal and critical legal theorists. I also examine the assumptions that underlie the widely held consensus, shared by client- and justice-centered theorists alike, that the legal ethics principles applicable to criminal defense representation are and should be different. Finally, I point out the way in which considering client power rather than assessing the underlying “justice” of particular cases avoids some of the critiques that have been leveled against justice-centered ethics theories.

1. The Representation Reinforcement Function of Zealous Advocacy

As many legal ethics scholars have noted, the legal ethics norm of zealous, client-

centered advocacy has its origins in classical liberal jurisprudence.⁷⁹ John Rawls, the leading contemporary spokesperson for liberal political theory, describes its main task as theorizing the rules for a just and fair society under conditions of irresolvable pluralism. Different citizens hold incommensurable comprehensive doctrines and that this incommensurability of world views cannot be resolved.⁸⁰ As already noted, this fact of irresolvable pluralism provides an important rationale for client-centered, zealous advocacy legal ethics models. If no one has the upper hand in determining what constitutes justice, then the testing of clients' positions through zealous advocacy appears to be the only way to determine "just" results.⁸¹

In any event, as Rawls further states, the task for liberal political theory is to determine the rules or procedures to which citizens would agree for the just and fair operation of public institutions under these conditions of irresolvable pluralism. One method of determining rules for the operation of fair and just public institutions involves application of the difference principle. That principle holds that rules are just to extent that they would be agreed to from the hypothetical "original position"—*i.e.*, before persons knew about their relative advantages or disadvantages in the conditions of their actual lives – and that the rules that would be agreed to from this hypothetical original position are those that make the least advantaged persons better off than they otherwise would be. Advantage or disadvantage is measured according to persons' access to "primary goods," or those "conditions and means" generally necessary to allow citizens

⁷⁹ See, e.g., Wasserstrom, *supra* note 16.

⁸⁰ JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT xi (2001) ("Under the political and social conditions of free institutions, we encounter a plurality of distinct and incompatible doctrines Political liberalism acknowledges and responds to this 'fact of reasonable pluralism' by showing how a political conception can fit into various and even conflicting comprehensive doctrines").

⁸¹ See discussion *supra* at text accompanying note 36. .

to pursue human flourishing and their diverse conceptions of the good.⁸²

Rawls is careful to emphasize that these conditions apply only to the operation of public institutions, but it seems fairly clear that one such institution for Rawls is the legal system.⁸³ Whether for Rawls the rules governing lawyers' conduct within the legal system would similarly be subject to the basic principles of justice is far less clear;⁸⁴ Rawls never writes at this level of specificity or application, and it would take me too far away from the central purpose of this Article to attempt such an application here. But it suffices to say that access to justice should be classified as a primary good.⁸⁵ If this is so, then under the difference principle rules that promote less advantaged citizens' access to justice are to be favored over those that do not. A rule that grants less advantaged clients access to justice through the provision of zealous, client-centered advocacy fits well in general terms within the difference principle approach. Zealous, client-centered advocacy for the least advantaged members of society provides enhanced access to justice for them and in this way enhances the overall fairness of the public institution of law.

Other general principles of liberalism similarly support client-centered ethics principles within a framework sensitive to substantial power imbalances.⁸⁶ One of these, inherited from

⁸² *Id.*

⁸³ JOHN RAWLS, *THE LAW OF PEOPLES: WITH THE IDEA OF PUBLIC REASON REVISITED* 134 (1999) (noting that ideas of public reason apply most strictly to the discourse and decision of judges).

⁸⁴ Those rules may instead best be classified as those that apply to transactions between individuals and associations. See RAWLS, *supra* note 80, at 54. On the debate about the scope of the basic structure and the extent to which it should include rules that regulate relations among individuals, see, e.g., *Symposium, Rawls and the Law*, 72 *FORDHAM L. REV.* 1381 (2004).

⁸⁵ See, e.g., DEBORAH RHODE, *IN THE INTERESTS OF JUSTICE* 118, 124 (2003) (defining access to justice as a key component of fundamental fairness of our legal system).

⁸⁶ RAWLS, *supra* note 80, at 140 (noting that many methods of deciding on rules for fair play within public institutions are available).

John Stuart Mills, involves the principle that all, even the most disadvantaged, be permitted to compete in the marketplace of ideas.⁸⁷ The legal system, as a site in that market place, offers a forum in which voices or perspectives can compete in the development of public reason. But if only some voices have the power to compete, there is no such free marketplace – ideas are competing based on the power of the voice, not the merits of the ideas. Contemporary liberal jurisprudence, then, supports the idea of zealous advocacy within the legal system on issues of public policy to the extent of amplifying voices so that all can be adequately heard, but not the further amplification through aggressive legal representation of already strong voices so that they drown out those with less volume.⁸⁸ This is a second, representation reinforcement reason for providing the least advantaged members of society with zealous, client-centered legal advocates.

These two general ideas are embedded in contemporary models of public interest law.⁸⁹ Those models, which appear to have first arisen in the context of the poverty law movement of the 1970s, set themselves against earlier Progressive-Era models for public interest lawyering that were based on notions of promoting the public interest detached from the perspectives of particular clients.⁹⁰ In contrast to these earlier tradition, the 1970s poverty-law model defined

⁸⁷ See, e.g., JOHN STUART MILL, *Of Individuality, as One of the Elements of Well-Being*, in ON LIBERTY 53, 53-54 (Elizabeth Rapaport ed., Hackett Publ'g Co. 1978) (1859) (discussing the need for a robust exchange of ideas to challenge unreliable orthodoxies).

⁸⁸ Similar arguments can be made within the framework of classical pragmatism's concern about creating the conditions for participatory democracy. See, e.g., Susan D. Carle, *Theorizing Agency*, 55 AM. U. L. REV. 307, 360-62 (2005) (discussing Dewey's concern about creating the conditions for participatory democracy by empowering all voices with the skills and mind set necessary to engage in deliberative processes).

⁸⁹ See, e.g., Edgar S. Cahn & Jean Camper Cahn, *Power to the People or the Profession?--The Public Interest in Public Interest Law*, 79 YALE L.J. 1005, 1006-07 (1970) (arguing that public interest law should confine itself to representing the poor and disenfranchised).

⁹⁰ For a more extensive discussion of this contrast between early twentieth century and contemporary ideas about public interest law, see Carle, *supra* note 12, at 732-38.

public interest law as giving voice to members of groups under-represented in the political process and underprivileged in terms of economic and social resources and benefits.⁹¹

These ideas in turn connect with legal ethics prescriptions. Zealous, client-centered representation makes sense as an ethics model where it is directed at amplifying the voices of those whose voices are not as loud. But the same rationale does not apply to the amplification through zealous advocacy of the voices of those whose voices are already strong. A liberal jurisprudence conceived along these lines thus supports the idea of a client-centered ethics within bounds, with the degree of zealousness of lawyers' representation of clients tempered by concerns about the representation reinforcement function of lawyers' advocacy.⁹²

Of course, it is not always the case that legal representation of less advantaged members of society involves giving voice to perspectives or interests that should be heard in order to further public reason. The representation enforcement idea does not, for example, support the notion of zealous advocacy for the acquittal and release into the community of an impecunious serial murderer. Thus the principle of representation reinforcement can do some work in explaining why client power should be a factor in lawyers' ethics analysis in situations of substantial power imbalance, but it cannot fully explain why a client's relative power

⁹¹ According to an often-quoted definition:

Public interest law is the name that has recently been given to efforts to provide legal representation to previously unrepresented groups and interests. Such efforts have been undertaken in recognition that the ordinary marketplace for legal services fails to provide such services to significant segments of the population and to significant interests. Such groups and interests include the poor, environmentalists, consumers, racial and ethnic minorities, and others.

COUNCIL FOR PUBLIC INTEREST LAW, *BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA* 6-7 (1976).

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disadvantage should entitle him or her to zealous, client-centered advocacy. Here other liberal jurisprudential considerations must also come into play. Those principles appear to reside primarily in liberal jurisprudential assumptions about the inherent value and dignity of individuals. In the case of legal representation of the murderer, liberal jurisprudential principles posit that the murderer has dignitary and liberty rights that deserve protection against state power, even separate from the political considerations that support vigorous advocacy of excluded voices on legal-political issues of public concern.

*2. Liberalism's Concern for the Dignitary Rights of Individuals,
Not Corporations*

The liberal emphasis on the dignitary rights of individuals thus forms another important, but not unbounded, justification for client-centered advocacy in some but not all representation contexts. It provides a key aspect of the justification for zealous advocacy in the criminal defense context. In Freedman's words,

Under our adversary system, the interests of the state are not absolute, or even paramount. The dignity of the individual is respected to the point that even when the citizen is known by the state to have committed a heinous offense, the individual is nevertheless accorded such rights as counsel, trial by jury, due process, and the privilege against self-incrimination.⁹³

In other words, the constitutional protections and zealous advocacy accorded defendants in criminal trials aim at a purposeful tipping or "unleveling" of the playing field in this representation context. The standard justification for creating this unlevel playing field in criminal cases is that the state has enormous potential power and the criminal defendant has

⁹³ FREEDMAN, *supra* note 47, at 2.

relatively little.⁹⁴ Thus role-specific ethics rules apply to prosecutors and defense counsel, under which the prosecutor is to attend to the “justice” of her case while defense counsel is to represent her client with the maximum zealousness permitted within the rules. The value of protecting individual dignity and rights against the potentially overwhelming force of the state justifies the lack of reciprocity in the ethical obligations owed by lawyers on the two sides. But there is no inherent reason why the same justifications based on substantial disparities in client power should not also apply in defining lawyers’ respective ethical considerations in civil matters that similarly have profound effects on clients’ interests.

The foundation of client-centered legal ethics principles in liberalism’s emphasis on the value of *individuals* also illuminates the fallacy of applying client-centered ethics to the representation of clients who are not individuals at all, but are instead legal fictions masquerading as natural entities by virtue of the constitutive power of law. Liberal ideas concerning the primacy of the rights of natural persons have no place in the context of representing entities lacking natural status, not only because organizations may possess enormous power, but also because they are not individuals at all. To be sure, organizations are granted the status of persons for some legal purposes, but only as a convenient fiction.⁹⁵ This fiction works for some purposes but not all, and there is no inherent reason why the fiction should apply in legal ethics analysis. Indeed, the objections of many liberal legal theorists to the lack of

⁹⁴ See discussion in Part II-B-1 *supra*.

⁹⁵ For critical accounts of the historical development of this legal fiction, see, e.g., Morton Horowitz, *Santa Clara Revisited: The Development of Corporate Legal Theory*, 88 W. VA. L. REV. 173 (1985); Mark Hager, *Bodies Politic: The Progressive History of Organization “Real Entity” Theory*, 50 U. PITT. L. REV. 575 (1989) (further developing on Horowitz’s work).

restrictions on the “free speech” rights of corporations in the context of political campaigns⁹⁶ can be applied with equal force to rules that fail to restrict the zealotry of lawyers’ promotion of corporations’ interests in the legal arena. Limiting client-centered ethics based in liberal jurisprudence to its core concern with the dignity and equality of *individuals* avoids the error of applying this concept to the very different context of representing entities that are no more than a creation of law and thus justifiably constrained by it. This prescription returns a legal ethics analysis based in liberal jurisprudence back to its concern with the dignity and equality of individuals and corrects the error of applying an orientation appropriate to the representation of relatively powerless individuals fighting against the power of the state to the very different context of corporate legal representation.

The context of corporate representation is different from the context of individual client representations for other reasons as well. A key one, which Wilkins persuasively identified in his seminal article on the need for context-specific regulation,⁹⁷ is the fact that very different moral hazards typically exist in the context of large corporation versus individual client representations. In the context of representing powerful clients, such as large corporations, lawyers’ incentive is to do too much for their clients; in the context of representing individual clients, who typically

⁹⁶ See, e.g., Ronald Dworkin, *The Curse of American Politics*, NEW YORK REVIEW OF BOOKS, October 17, 1996, at 19 (describing why “money is the biggest threat to the democratic process”), cited in RAWLS, *supra* note 83, at 139; Jamin Raskin, *Restoring Faith in Government: Equal Protection and the Wealth Primary*, 11 YALE L. & POL’Y REV. 273 (1993) (arguing that the law’s failure to control the enormous influence of corporate wealth on the political process violates constitutional one person/one vote principles); Jeffrey Nesteruk, *Bellotti and the Question of Corporate Moral Agency*, 1988 COL. BUS. L. REV. 683 (1988) (arguing that Supreme Court’s analysis of First Amendment rights of corporations ignores corporations’ lack of status as moral agents). Carl E. Schneider, *Free Speech and Corporate Freedom: A Comment on First National Bank of Boston v. Bellotti*, 59 S. CAL. L. REV. 1227 (1986) (criticizing Supreme Court’s reasoning in comparing corporate free speech rights to those of natural individuals).

⁹⁷ See Wilkins, *supra* note 8.

(but not always) have with relatively little power, lawyers' incentive is to do too little.

3. Correcting for the Moral Hazards of Self-Interest

Thus a third argument for why relative client power should play a role in lawyers' ethical deliberations involves the importance of promoting an ethical principle that most precisely and directly pushes against the differential moral hazards presented in disparate practice locations. An ethics norm that calls on lawyers to stay their hands or temper their representations when representing clients with relatively substantial power asks lawyers to be conscious and wary of the way in which self-interest may affect ethical judgment. Where strong client pressure exists to steam roller an overwhelmed opponent or stonewall a regulatory agency with limited resources, an ethical norm that requires lawyers to resist the effects of client power serves as a counterweight to the influences that may lead to over-aggressive client representation. On the other hand, where lawyers are representing relatively poor or disadvantaged clients, the typical moral hazard produced by self-interest is to do too little in light of clients' inability to pay for superior services. In this practice context, a norm that insists on zealous, client-centered advocacy corrects for the tug of self-interest that might otherwise lead lawyers to skimp on the quality of representation or devotion to their client. In sum, correction of moral hazard problems provides a strong and comprehensive justification for considering relative client power in formulating context-specific legal ethics priorities.

The objection can be raised, of course, that lawyers will not follow a power-based approach precisely because it too directly contravenes the tug of self-interest. Just as it contravenes lawyers' financial self-interest to give zealous, client-centered representation to poor people who cannot afford to pay for such extraordinary devotion, it contravenes lawyers'

business interests to temper their representations with concern about the public interest in representing powerful corporate clients that can easily take their business elsewhere if they are not satisfied with the aggressiveness of the representation they receive. But these objections can be made about any legal ethics principle. The very reason some legal questions about lawyers' conduct are labeled as "ethics" issues is that they require professional conduct other than that which self-interest readily motivates.⁹⁸ Although it may be hard to convince some lawyers to engage in a power-based approach to the exercise of discretionary ethical judgment, it is no more hard to do so than to convince lawyers to abide by other ethics principles. The problem of lawyers' self-interest should not be a reason to refrain from the development of principles that have the most appropriate fit in relation to the objectives of ethics analysis.

4. Avoiding Lawyer Domination of Clients

A final reason for introducing considerations of relative client power into lawyers' ethics analysis relates to the problems inherent in pure justice-centered approaches to the extent that they call on lawyers to impose their own substantive values on clients who cannot resist such lawyer domination. As discussed in Part II-A-1, justice-centered theorists have been subjected to withering critiques on the grounds that calls to lawyers to impose their substantive visions of law or morality on clients amount to nothing more than indefensible paternalism, especially where lawyers are representing relatively powerless clients who have few alternative options for obtaining legal services. A theory that calibrates lawyers' ethical priorities to context, however,

⁹⁸ Indeed, as a large sociological literature has postulated, the "professions" may be distinguished from mere business activity precisely by virtue of the existence of ethical norms that check temptations to succumb to moral hazards in the provision of services whose quality it is difficult for lay persons to assess. *See, e.g.*, Talcott Parsons, *The Professions and Social Structure*, in TALCOTT PARSONS, *ESSAYS IN SOCIOLOGICAL THEORY* 34, 43-45 (REVISED ED., 1954) (contrasting ethics norms of business and professions).

avoids these charges because it calls on lawyers to insist on consideration of the public interest only with respect to clients who have the option to take their legal business elsewhere. And, of course, as Gordon has perhaps most eloquently pointed out,⁹⁹ the force of moral suasion may lead these clients to follow -- and indeed even to greatly value -- their lawyers' advice on these matters. Indeed, the ideal justice-centered theorists picture is that moral suasion will operate effectively in relationships between trusted lawyers and their clients-- an outcome that clients with alternative legal representation options may value far more than nay-sayers typically assume.

In any event, evaluation of clients' relative power as a factor in lawyers' ethics analysis moves the focus away from demands that lawyers impose their own substantive determinations of legal merits or substantive morality on their cases, and towards calls on lawyers to concern themselves about whether their representation tactics are steam hollering substantially less powerful interests affected by their representation.

Here again, obvious objections arise. Are not, one might ask, determinations about relative power in particular contexts as difficult and contested as are questions of justice based on interpretations of the purposes of law or on moral considerations? For example, how should relative power be determined? Should it be based on access to material resources, political access, membership in social networks of privilege, a combination of these indices, and/or other factors?¹⁰⁰ Should it be analyzed relatively; absolutely; in top-down terms, as the ability to command; or as something that circulates and is never wholly absent or wholly secure, as a

⁹⁹ See, e.g., Gordon, *supra* note 8.

¹⁰⁰ For a thoughtful article analyzing these different ideas about power, see Michael H. Schwartz, *Power Outage: Amplifying the Analysis of Power in Legal Relations*, 33 WILLAMETTE L. REV. 67 (1997).

Foucauldian would posit? But these questions, while important, need not be answered definitively for my proposal to work, for the following important reason: assessments of relative power become more difficult only as imbalances of power, apparent on any measure, become less significant. In cases of substantial power imbalance – such as indigent criminal defendants against the state, moderate-income neighborhoods against corporate polluters, or poor tenants against landlords – the analysis of relative power will be readily apparent under any definition, and it is precisely in these cases that lawyers’ ethics analysis should be influenced by considerations of client power. Where the affected parties or interests are more evenly matched, on the other hand, the power-based analysis has less concern about the content of lawyers’ ethical norms, as I will discuss further in Part IV-E.

In short, consideration of client power offers a contribution to pure justice-based theories because questions of justice become all the *more* difficult in the close cases. Under a justice-based approach the problem of lawyers’ exercise of unduly subjective ideas of justice is exacerbated in precisely those settings in which the exercise of such judgment, if not sufficiently justified by consensus or objective warrant, becomes the most, rather than the least, problematic. But a power-based view, which adjusts the choice between client- versus justice-centered models depending on the relative power of the client, avoids critiques based on lawyer domination of those clients least able to resist, while retaining the objective of stopping lawyers from assisting powerful clients in undermining law’s public purposes.

IV. APPLYING A POWER-BASED ANALYSIS

In this section I illustrate a power-based analysis more concretely by applying it to several

categories of hypotheticals. The first category consists of legal representation in cases involving adversaries or affected interests of substantially unequal power. These are the scenarios in which consideration of power as a factor in legal ethics analysis is most important. A second is in representations of clients against the government, in which context I argue that consideration of client power should continue to be a factor in lawyers' ethical judgment calls. I also discuss examples of how a power-based analysis might work with respect to several popular hypotheticals involving procedural and evidentiary issues.

A. Representations Involving Adversaries of Unequal Power

In a first category of representations involving lawyers representing less powerful clients against more powerful interests, a power-based approach calls on the lawyer to exercise her ethical discretion in favor of the most vigorous attention to the client's self-articulated perspective and to advancing her client's interests. In contrast, lawyers for more powerful clients should exercise their ethical discretion against exploiting available legal strategies in ways that interfere with the ability of less powerful interests affected by the representation to have their positions considered in the legal process. The lawyer for the more powerful client should still present her client's substantive perspective, of course, but should temper her presentation with an eye to allowing full consideration of the interests of less powerful constituencies.

In the hypotheticals that follow I discuss just a few such examples, borrowing primarily from scenarios other legal ethics scholars have already offered so as both to illustrate my proposed approach more concretely and highlight its contrasts to pure justice- and client-centered views. A host of other examples also could have been used; my selection is somewhat arbitrary and certainly under-inclusive of the wide range of situations calling for context-specific ethical

judgment along the axis of client power. Drawing on the insights of client-centered analysis, I envision the process of moral dialogue between client and lawyer that should occur. I also highlight, as justice-centered ethics theorists do, the ultimate decision to withdraw from the representation that the lawyer representing powerful interests should make if consensus with the client about other-regarding concern in a particular situation ultimately cannot be achieved. Critics point to this necessary consequence of the justice-centered approach – *i.e.*, the prospect that a lawyer ultimately may be required to withdraw from a representation – as proof of its impracticality.¹⁰¹ But, as I have already discussed in Part III-B-3, this cannot be a reason for discarding otherwise appropriate and justified principles for ethical conduct. The very concept of ethics suggests that there is a line that lawyers will desire to, but should not, cross. It is, indeed, the existence of such lines--explained thoroughly to the client at the outset of the representation, of course--that signals the existence of ethics principles at all.

Hypothetical One: In his recent important article, Wendel offers the example of a lawyer for a coal company who is representing the company in a case involving a claim for black lung benefits by a miner suffering from black lung disease.¹⁰² In the first iteration of the hypothetical, the miner has a lesion on his lung which measures 1.5 cm, which is sufficiently large to entitle him to benefits under the statute.¹⁰³ Wendel concludes, and I agree, that the lawyer for the company should concede that the miner is entitled to benefits, even though his client wishes to

¹⁰¹ See, e.g., FREEDMAN, *supra* note 47 (arguing that, in the context of client perjury in the criminal context, lawyers should refrain from the ultimate step of withdrawing from the representation); Pepper, *supra* note 14 (arguing that lawyers should discuss moral questions with their clients, but should not ultimately withdraw in cases of moral disagreement with a client's lawful objectives).

¹⁰² Wendel, *supra* note 6, at 389.

¹⁰³ *Id.* at 390.

avoid paying benefits wherever possible because doing so puts it at a competitive disadvantage relative to foreign competitors that do not have to pay benefits to black lung disease victims.

In a second iteration of this hypothetical, Wendel imagines that the miner has received a lung transplant and is receiving powerful drugs to prevent a rejection of the transplanted organ, which he is able to afford only because he receives black lung benefits. A creative client representative suggests that the lawyer argue that the miner's benefits should be terminated, because he no longer has a 1.5 cm lesion on his lung as required to trigger the statutory presumption of disability. This would mean that the miner would have to establish his disability through a lengthy administrative process, and in the meantime the company would be entitled to terminate payment of benefits, at a substantial cost savings to it. The client representative presses the lawyer to advance this argument, and Wendel asks what the lawyer should do.¹⁰⁴

Wendel notes that under the dominant client-centered conception the lawyer should follow the client representative's instructions. Under Wendel's legalist approach, however, the lawyer should examine the purposes of the black lung benefits law in facilitating coordinated social action with respect to the administration of these benefits, and should decline to file a motion for termination of benefits. The stable and clear meaning of the statute leads to the interpretation that it should cover miners who have received a lung transplant due to black lung disease. Thus, Wendel notes, he arrives at the same conclusion as the moralists do, albeit through a somewhat different path.¹⁰⁵

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 392. He also arrives at the same conclusion Simon does, though his reasons for following law and the guides he uses to interpret law differ, as he discusses *id.* at 392. *See also* Part II-A-1 *supra* (discussing the differences between Simon and Wendel's versions of legalism).

An approach that factors client power into the analysis arrives at the same conclusion as both the legalists and moralists do, albeit by a different analytical route. Under a power-based analysis, the lawyer should attempt first to persuade the client representative against insisting on filing a motion to suspend benefits, but, if unable to do so, should decline to pursue the coal company's objectives in the scenario posed above. He should do so, however, not because he believes the purpose of the law is clear, but because his client is the more powerful interest in the situation. To be sure, this step may lead the client representative to seek new counsel. But the lawyer's position should not come as a complete surprise to the mining company, provided that the lawyer has explained at the outset of the representation that he subscribes to an ethics view that calls on him to avoid steam-rolling less powerful interests. Although this disclosure may cause the lawyer to lose some potential business, it may be attractive to clients who wish to enhance their public reputation by signaling agreement with such public-regarding approaches to legal disputes – an advantage to forcing a more public-regarding ethics by the bar that is vastly underestimated in my view.¹⁰⁶ In any event, under an analysis concerned about relative client power, the lawyer declines to argue for the termination of benefits for the miner who has suffered a lung transplant. The difference between this view and a justice-based approach can be illustrated by varying the hypothetical once again, as follows:

Imagine the same set of facts, except this time, due to measurement variation or a slight improvement in the miner's condition, the miner's most recent medical records show a slight decrease in the size of his lesion, so that it now appears to be slightly under the 1.5 cm threshold for the statutory presumption of total disability, but still within the margin of possible

¹⁰⁶ For an analysis of the beneficial signaling function of creating a new category of lawyers involved in a more public-regarding approach to regulatory compliance counseling, *see* Gordon, *supra* note 8.

measurement error. The lawyer for the coal company notices this and discusses it with his client. The client representative instructs him to file a motion for termination of benefits.

Here, as in the situation of the lung transplant, the coal company lawyer should either decline to file the motion despite his client's urging. Even though the statutory purpose is clear and calls for the interpretation that a 1.5 cm lesion is the intended threshold for a presumption of disability, the lawyer should resolve close cases in favor of his client's adversary, the miner, because he has less overall power in the situation and great need for the benefits provided when the coal company does not dispute the presumption of disability.

Of course, slippery slope arguments can be made: What if the miner's lesions measure only 1 cm, or .75 cm, or even less? At what point does the coal company's lawyer cease to stay his hand in arguing that the miner is not entitled to take advantage of the statutory presumption of disability? The answer to this question should be calibrated to the situation: the lawyer should resolve ambiguous or close questions in favor of the less powerful interests involved, but may make tempered arguments pointing out that the requirements for the statutory presumption are not met, and may make these arguments more forcefully to the extent that the issue becomes less ambiguous or close to the line. In other words, the lawyer may point out that the miner has failed to meet the statutory presumption when this is clearly and obviously the correct interpretation of the facts, even though he should refrain from or substantially temper such arguments in close or ambiguous cases.

In contrast, consider the case of the lawyer for the miner. Must the lawyer for the miner point out the weakness in his client's case in the situation in which the lesion appears to be slightly under the 1.5 cm threshold? On a legalist account, the lawyer must do so, because this is

the clear intent of the statute: miners are entitled to the statutory presumption of disability only if they meet the statutorily defined threshold. Under a power-based analysis, however, the lawyer need not do so—within the range of evidentiary ambiguity—because her client is the less powerful party. Again, this is not to say that the lawyer may suborn perjury or falsify evidence, but simply that, in that important and sometimes quite wide area of ethical discretion in close and ambiguous cases that Simon has persuasively identified, the factor of client power should lead the lawyer to resolve close judgment calls in favor of her relatively less powerful adversary.

Of course here the moral issues are fairly clear: an individual is suffering from an illness caused by his work for a company that has profited from it, and he thus can be argued from a moralist viewpoint to be entitled to benefits in light of the overall justice of the situation. But the power-based view offers benefits to legal ethics analysis even in contexts where the relative weight of moral considerations is more ambiguous, as in Hypothetical Two below.

Hypothetical Two: Another helpful employment law case, this time one that Simon discusses at length in his book, involves a labor law question.¹⁰⁷ Simon presents the facts in rich and realistic detail. A labor union represents the clerical and technical workers at a wealthy private university. The workers previously had been organized as a single employer local, but then merged with a larger local representing workers from several employers. The merger did not work out well, however, and the union and university workers' leaders agreed that the university workers should revert back to a single employer local. The larger local disclaimed interest in representing the university workers and purported to delegate its representative function back to

¹⁰⁷ I use employment and labor law cases, not only because they reflect my own former practice context --I practiced at the union-side labor law firm of Bredhoff & Kaiser in Washington, D.C., from 1991-1996 -- but also because they involve organizational clients, namely, labor unions, that can sometimes be the less powerful party but in other contexts, such as in disputes against individual members, are the more powerful adversary.

the reconstituted university local. The reconstituted local held an election of bargaining unit members, who ratified the new arrangement by a five-to-one margin with 55% of those eligible voting.¹⁰⁸

On advice of counsel, however, the university now refuses to recognize the reconstituted local or to deduct union dues under the check-off provisions of the collective bargaining agreement. The university argues that the larger local could not transfer its representative authority to another entity without a representation election supervised by the National Labor Relations Board. The union is strongly opposed to this proposal for many reasons. It argues that holding such an election is unnecessary in light of the results of its internal vote and would be very burdensome to the union in terms of time, effort and money. It would require the union to resist anti-union campaigning by the employer and would also expose the union to possible challenges from other unions competing to represent the university's workers. The employer could also contest the results of the representation election through proceedings before the NLRB that could take years to resolve. The union's only recourse against the university would be to file a complaint with the NLRB, arguing that the university is improperly failing to observe the check-off provisions of the collective bargaining agreement, but this claim would also take a great deal of money and time to resolve. Simon's question is whether the lawyer for the university should go forward in filing the demand for a representation election.¹⁰⁹

Simon's conclusion is that the university lawyer should not file the petition challenging the union's claim to legitimately represent the workers. This is because the problem arose from

¹⁰⁸ *Id.* at 151.

¹⁰⁹ *Id.*

procedural irregularities and carelessness on the part of the union’s leaders, but not from any real concern that the local’s representation is not genuinely representative of the bargaining unit members’ wishes. On a justice-based view, the university lawyer has responsibility to assess the substantive merits of the university’s argument against the purposes of the National Labor Relations Act. This assessment should lead the lawyer to conclude that the university’s argument is supported only by “formal considerations that undercut the relevant statutory purposes,” and the lawyer therefore should not press the claim.¹¹⁰ Simon recognizes that the issues involved are complex, and that the analysis changes depending on how one characterizes the perspectives of the union and management and how one casts or weighs the complex, multiple aspects of the statutory purposes involved. But, he concludes, on balance, that the university lawyer should stay her hand, in part because she “should recognize that she has a bias in the matter and that there are limitations on her knowledge of the union.”¹¹¹

Invoking the potential for lawyer bias seems somewhat problematic in this and many other examples of justice-based analysis, however, because of the very small difference in many situations between bias and situated perspective. What might to one person appear to be bias is another’s compelling truth. In Simon’s scenario, for example, many of the justifications the university offers for its perspective would appear eminently persuasive to some observers—such as that the local is out of touch with its membership, is not representing the workers well, has within it dissidents whose views deserve a chance to be heard, may have pressured voters in its internal vote, and in general deserves to face a test of its support in which members can

¹¹⁰ *Id.* at 152.

¹¹¹ *Id.* at 154.

reconsider their interests and the university can counter the deceptions the union has made in the past.¹¹² Indeed, the inevitability of strongly diverging situated perspectives formed by socialization in particular practice contexts is a point on which commentators have challenged Simon, and one to which Simon has failed to offer an adequate response.¹¹³

A power-based perspective, in contrast, offers a cleaner analysis. The power-based view agrees with a justice-based analysis in the above situation, but for a different reason. The justice-centered analysis posits that the university lawyer should not challenge the representation petition because she has reason to believe that a majority of the union's members do support representation and the public purposes underlying the procedures for challenging union representation claims exist to resolve legitimate doubts on this question. Adding the factor of relative client power leads to the conclusion that the university lawyer should not challenge the union's representation claim because lawyers for more powerful clients should resolve close ethical questions with an eye to protecting the interests of the less powerful adversary.

Here again, the decision must of course be made in consultation with the client representative, and in the course of that consultation the lawyer may learn facts that change the analysis. It may appear that there is a minority in the union's membership whose interests the union is failing to represent, and that attention to the interests of this less powerful constituency within the union militates in favor of challenging the union's assertion of continued representation authority. Finally, the client representative's position with the employer very likely will color her statement of the facts, and the lawyer will be required to assess the factors at

¹¹² Id. at 153.

¹¹³ See Rostain, *supra* note 8 (challenging Simon on these grounds); see also Simon, *supra* note 42, at 1004-06 (dismissing Rostain's argument without sustained analysis).

work in shaping the representative's depiction. The lawyer must of course make judgment calls within a realm of uncertainty on all such matters, and has every right to give his client the benefit of a doubt along the way. But consideration of client power calls on the lawyer to seek to avoid using legal processes in ways that interfere with the ability of less powerful interests to receive due attention to the substantive merits of their legal positions – including not forcing unnecessary expenditures of legal resources to test claims that have little validity. Where the lawyer's best judgment is that the client is seeking to do this, the lawyer should insist to the point of possible withdrawal from the representation that such tactics not be pursued.

Thus a model that factors in client power, like justice-based approaches, asks lawyers to act with an eye to ultimate justice, but in a different manner and sometimes with different results. The difference between power-based and substantive justice-based approaches can be further demonstrated by once again altering the hypothetical. Imagine that the lawyer making the ethical judgment call is the lawyer for the union. Imagine, further, that this lawyer has strong reason to believe that the union in fact may no longer enjoy the support of a majority of the local's members. Should the lawyer stay her hand and decline to use the strategies available to resist management's call for a decertification vote?

Simon's answer must be yes: the union lawyer, recognizing that the purposes underlying the procedures for requesting representation votes are designed to detect the true wishes of bargaining unit members, should decline to engage in strategies available to her – which, in my former practice experience, generally involved slowing down the time line for holding such an election by vigorously searching out and filing potentially meritorious unfair labor practice

charges.¹¹⁴ Indeed, speaking now as a former union-side labor lawyer involved in representing union locals in decertification cases in an era of declining union membership, I will openly confess that I find such a justice-focused position unsettling as tested against the intuitions developed through immersion in an actual practice context. No union-side labor lawyer worth that title would have conceded a decertification case simply because it was reasonably clear that the eventual result would be loss of the bargaining unit – doing so would mean the loss of significant resources in terms of years of additional dues, egg on the union’s face, and the potential for spiraling losses as news of one successful decertification campaign spread to other locals. Of course, the intuitions of lawyers socialized into particular practice contexts cannot be the guide to ethical appropriateness in general – that lack of reflectivity is, indeed, the phenomenon the many schools of critical legal ethics scholars identified in Part I are seeking to resist. But the legalists’ failure to capture the moral intuition that more zealousness is due the representation of the client’s interests in the context of representations of the underdog in many situations is a factor deserving of further analysis.

Hypothetical Three: Here is another example, again drawn in very general terms from my own former practice experience. Imagine a predominantly white union local sued by an African-American member on duty of fair representation (dfr) charges. The member alleges that the leaders of the local illegitimately blocked him and other African Americans from running for leadership positions in the local. The lawyer’s investigation gives her reason to suspect that there is at least some merit to the union member’s allegations. The lawyer has considerable

¹¹⁴ Here again, I am not arguing that lawyers for less powerful interests may flout the bounds of legitimate advocacy or the bounds of ethical discretion, but am confining my analysis for now to discretionary judgment calls within the existing rules.

experience in handling and securing the dismissal of dfr claims. Should the lawyer zealously pursue the dismissal of such charges?

My answer in this situation is no— in comparison to the union member, the union local is the more powerful party and the lawyer should exercise her ethical discretion in favor of protecting the interests of the African American union members and against vigorous advocacy of the interests of her client, the union local, in early dismissal of the case. Again, this is not to say that the lawyer should abdicate representation of the union local, but only that the lawyer should resolve close judgment calls in favor of the less powerful adversary. Here again, both legalist and moralist justice-centered ethicists would agree. But a power-based approach works better because it accounts for both the moral intuition that the union lawyer should fight zealously against the management-sponsored decertification election and that she should not adopt this stance against the potentially meritorious race discrimination claim filed by the local's African American members. One context calls for a client-centered approach but the other for the opposite, and the power relationship between the parties explains this difference.

A moralist might argue that what accounts for the difference in the two cases is the more morally problematic nature of seeking to defeat a potentially meritorious race discrimination claim as compared to contesting a potentially legitimate argument for union decertification. But any such argument must assume relatively broad consensus on moral questions, which in fact does not exist on the union decertification question, as I have already noted. To some, a union's continued claim to representation status when it lacked majority support would be morally problematic indeed. Moreover, the duty of fair representation hypothetical works even for a far

less morally weighted dfr claim with no race issues involved.¹¹⁵

Hypothetical Four: A final example that demonstrates the differences among the client-centered, justice-centered, and power-based approaches comes from zealous representation advocate Monroe Freedman’s divorce representation hypothetical, as borrowed by Simon in order to highlight the contrasts between Freedman and himself.¹¹⁶ In Freedman’s scenario, a lawyer represents a husband seeking a divorce from his wife. The wife asks the husband for financial information, and the lawyer knows that the husband has income about which the wife is unaware. The wife is represented by a “bomber” lawyer, however, who “has no value in life other than stripping the husband of every penny and piece of property he has, at whatever cost to the personal relation and children, or anything else.”¹¹⁷ Freedman argues that the lawyer should not disclose his client’s confidence because it is not the role of the lawyer to be a conduit of information to his client’s adversary; other aspects of the legal system are designed to provide the machinery for uncovering falsehood.

Simon agrees with Freedman’s conclusion, but for different reasons. Simon argues that “since the disclosure of the husband’s actual income to the bomber may prompt escalation of the already unfair demands,” it may be appropriate to defer disclosure until it becomes clear

¹¹⁵ See, e.g., *Truck Drivers Local 568 v. NLRB*, 379 F.2d 137 (D.C. Cir. 1967). This dfr case involved the merger of the seniority lists of a large and a small union local after two companies employing the unions’ members merged). On a power-based analysis, In this scenario, if there were a substantial imbalance between the power of the large and small locals, the lawyer for the significantly more powerful local should seek to avoid trampling on the interests of the members of the less powerful one.

¹¹⁶ SIMON, *supra* note 33, at 9, 141,

¹¹⁷ *Id.* at 9, 141 (quoting *A Gathering of Legal Scholars to Discuss “Professional Responsibility and the Model Rules of Professional Conduct,”* 35 U. MIAMI L. REV. 639, 652-53 (1981) [hereinafter *Panel Discussion*]).

“whether the case is likely to be resolved fairly without it.”¹¹⁸ On a power-based analysis, in contrast, the lawyer for the more powerful client, which the hypothetical implies is the husband, should provide the information, even if the lawyer for the wife appears to be a bomber. Indeed, the lawyer representing the less powerful client – in Freedman’s hypothetical, apparently the wife – should in circumstances of significant inequality of resources be *more* “bomber”-like, seeking maximum economic resources and other advantages for her client even though it would be ethically inappropriate for the husband to do so.

This hypothetical takes on particular significance in light of recent detailed empirical research into the practice context of divorce law. In an excellent recent study of divorce law practice in several small New England towns, Lynn Mather et al. document the intra-professional dynamics produced by the introduction of a new generation of women lawyers, many of whom came with ideologically driven, feminist motivations to their work, into a practice community best described as having been in the past a “good ole boys” club.¹¹⁹ The old-timer members of this formerly staid practice community, cognizant of their need to go back to the same small group of other practitioners in future cases, had developed informal practice norms that frowned upon aggressive positions in discovery and negotiations. The new female lawyers, in contrast, who tended to represent women in divorce cases, eschewed these collegial practice norms, refused to take the husbands’ lawyers at their word about financial asset and other suspect information, and began making onerous discovery demands, leading the old timers to brand them

¹¹⁸ SIMON, *supra* note 3, at 142.

¹¹⁹ MATHER, *supra* note 8.

as unduly aggressive and lacking in collegiality.¹²⁰

This empirical example is rich with implications for legal ethics theory.¹²¹ For my purposes here, its main lesson is that behavior that appears to reflect overly aggressive client-centered lawyering from the perspective of lawyers comfortable in a traditional practice communities may appear from another practice perspective to be necessary zealous advocacy in the interests of the underdog. From this vantage point, denunciations of zealous, client-centered ethics appear tinged with self-interested bias and the privileging of the interests supported by the status quo.

Hypothetical Five: A final example, discussed over the years by many ethics commentators, involves David Dudley Field's representation of Jim Fisk and Jay Gould in the Erie Railroad scandals of the 1860s. The scandals involved fraudulent stock manipulations, looting of company assets, and bribery and corruption of the state legislature. Although it does not appear that Field took part in or assisted his clients in any such illegal conduct, he mounted an aggressive legal defense of them. In justification for his zealous representation, Field invoked Lord Erskine's defense of Tom Paine when he was charged with seditious libel after publishing *The Rights of Man*, including Lord Erskine's famous speech championing the need for lawyers' independence and zealous advocacy in order to protect civil liberties.¹²² Simon correctly points

¹²⁰ *Id.* at 55-56.

¹²¹ See Susan D. Carle, *The Effect of Context on Practice (Book Review)*, 52 BUFFALO L. REV. 1347 (2005) (book review) (discussing implications for legal ethics study of Mather et al.'s findings).

¹²² Erskine's often quoted words were: "From the moment that any advocate can be permitted to say, that he will or will not stand between the Crown and the subject arraigned in the court where he daily sits to practice, from that moment the liberties of England are at an end." THOMAS ERSKINE, TRIAL OF THOMAS PAINE 358, 412 (22 How. St. Tr. 1792), cited in Richard W. Painter, *The Moral Independence of Corporate Lawyers*, 67 S. CAL. L. REV. 507, 508-09 & n.4 (1994).

out the inappropriateness of Field’s comparison of his representation posture to Lord Erskine’s in the Paine case in light of the very different contexts in which the two representations took place.¹²³

But Simon’s analysis of this difference is unpersuasive. According to Simon, the important difference in the Fisk and Gould case was “procedural failure that triggers responsibility to assess substantive merit.”¹²⁴ But this does not fully explain the intuition that there is an important difference between the two examples, because there were significant procedural concerns in the Paine case as well, but in that case those concerns were reason for *more zealous* representation. Instead, the underlying reason that called for justice-centeredness in the Fisk and Gould case was the power of these clients to use their huge financial resources to corrupt the legislature and otherwise exploit and manipulate procedures to further their nefarious ends. In the Paine case, in contrast, the problems with the fallibility and potential weaknesses of procedural protections were dangerous to Paine, not to the public interest. In other words, the real difference between the two cases was that the power imbalance in the Paine case – a powerful government against an unpopular individual – favored zealous advocacy in favor of the relatively powerless client, whereas the power analysis in the Fisk and Gould situation favored public-regarding attention to the interests of stockholders and the public.

B. Representation of Clients Against the Government

The same considerations explain the strong moral intuition that zealous client advocacy is appropriate in representing an individual against the power of the state. Adding a focus on

¹²³ *Id.* at 161. SIMON, *supra* note 3, at 160-61.

¹²⁴ *Id.* at 162.

relative client power in particular situations into the analysis, however, suggests that this presumption should not always hold, especially in representations of powerful organizational clients against government lawyers with comparatively limited resources.

1. Representation of Powerful Interests Against the Government

Simon, Wendel, Gordon and others use many examples involving the representation of powerful clients against the government to illustrate the merits of a justice-centered view.

Classic chestnuts of this type include post-mortem commentary on the Savings and Loan crisis of the 1980s¹²⁵ and the involvement of lawyers in the Enron collapse more recently.¹²⁶ In all of these examples, justice-centered theorists, whether legalists or moralists, agree that the lawyers should have been far less zealous on their clients' behalf and should have served far more of a law-protecting role. A power-based view agrees with this analysis, but for different reasons.

The reason the lawyers should have been less zealous in their advocacy for their clients in these situations is not simply that they should have sought to preserve the purposes of law or morality, but also because, in context, vis-a-vis government agencies with relatively limited personnel resources for investigation of corporate wrongdoing, these lawyers' corporate clients were in some respects the more powerful entity, or at least had much more equivalency of resources in terms of their ability to evade detection of wrongdoing by government agencies engaged in compliance monitoring and civil enforcement actions. In such situations, involving government investigations of powerful entities that can outmatch or at least rival the resources of state and even federal law enforcement agencies, the lawyer for a powerful private client should

¹²⁵ See Simon, *supra* note 72; Wilkins, *supra* note 73.

¹²⁶ See Gordon, *supra* note 8; David Luban, *Making Sense of Moral Meltdowns*, in *LAWYER' ETHICS AND THE PURSUIT OF SOCIAL JUSTICE* 355 (S. Carle, ed., 2005).

exercise discretion against exploiting tactical advantages for his client and in favor of protecting the public policy interests the government is seeking to uphold.

2. *Criminal Defense Representations*

A power-based analysis also does a much better job than its alternatives in explaining why criminal defense is different. Although Simon,¹²⁷ Luban¹²⁸ and others have attempted to resolve the puzzle presented by our strong moral intuition that criminal defense is in fact different, commentators have not found these attempts at distinguishing the criminal defense context convincing.¹²⁹ A power-based analysis, on the other hand, has no difficulty explaining why criminal defense is, in most situations, different: it is different because, when the government is pursuing an individual defendant, the government has access to the overwhelmingly potential force of state power. Especially in cases of indigent defendants, but also in cases of well-off criminal defendants such as O.J. Simpson, the potential power of the government relative to that of the defendant is huge indeed. But here again, the criminal defense lawyer should sometimes take into account the relative balance of power vis-a-vis the interests she is opposing. Some tactics may be fair game but others not. In the O.J. Simpson case, for example, the government possessed extraordinary powers to enter into Simpson's property and to conduct searches and seizures at that property and at the crime scene – and, potentially, to abuse those powers by planting evidence or similar tactics. Simpson's defense team was, accordingly, well justified in its zealous attempts to cast doubt on the reliability of the evidence obtained

¹²⁷ See SIMON, *supra* note 3, at 170-94.

¹²⁸ See LUBAN, *supra* note 8.

¹²⁹ See *e.g.*, SIMON, *supra* note 3, at 174, 183 (criticizing Luban's analysis of why criminal law is different.)

through these extraordinary government powers. In contrast, Simpson possessed superior resources with respect to the quality, experience, and talent of his defense team, as compared to obviously out-matched prosecutorial team of Marcia Clark and Christopher Darden. In this arena, in which O.J.'s resources and power were superior to those of the government, Simpson's lawyers ethically were not entitled to engage in tactics such as blizzarding the government with motions to which the government lacked sufficient resources to respond.

In a third scenario, the criminal defense lawyer is representing a defendant with respect to pretrial release. The lawyer has reason to believe her client is a threat to vulnerable persons in the community if released, but also must consider the advantages of pretrial release to the defendant in preparing a defense. Here the lawyer faces a difficult ethical dilemma. Contrary to other approaches, which simply assert that criminal defense is different, a power-based analysis could call on the lawyer to weigh her client's relative powerlessness as against the state against her client's potential threat to vulnerable members of the outside community. On the other hand, this is the judge's role in the pre-trial release hearing, and to the extent that the judge can be counted on to perform it adequately the lawyer can focus on the need to defend her client against the power of the state. But in situations in which the lawyer is better situated to make judgments about danger to the community than is the court – as, for example, when the lawyer has information about her client's intent to cause harm that the court does not know – a power-based approach may call on the lawyer to adjust the zealotry of her representation to take account of the interests threatened by it.

This result clashes dramatically with criminal defenders' legal ethics sensibilities. As many have pointed out to me, there are almost always vulnerable victims somewhere in the

potential ambit of concern in criminal cases, and a criminal defender could virtually never give her client zealous advocacy if she were attempting to balance these interests against her client's. It may well be that the criminal defense context is different because of the important individual rights issues, highlighted through classical liberal analysis,¹³⁰ that are at stake when natural beings face the force of the state. Moreover, an ethics stance that mandates that criminal defense lawyers engage in zealous client-centered advocacy may be justified on rule utilitarian grounds. Because zealous advocacy is usually due criminal defendants as against the potentially powerful force of the state, it is best to call on criminal defense lawyers to adopt this stance in all aspects of their representations.

In sum, although I confess to some continuing ambivalence on this question, I am at this point willing to agree that a bright-line rule of zealous advocacy is appropriate in defending natural persons in the criminal justice context, largely because such an irrebutable presumption serves to “hard wire” defense counsel to adopt the ethics stance that is most often appropriate.

In all events, a power-based analysis suggests that criminal defense is not different in all respects or all contexts. This is most obvious under a power-based analysis in contexts involving government prosecutions of corporate crime. In this situation, criminal defense lawyers should possess some of the duties justice-centered advocates recognize in the civil context, especially with regard to avoiding the exploitation of strategic opportunities – through stonewalling and the like – that interfere with the government's ability to enforce the law.

C. Procedural and Evidentiary Matters

Another set of issues on which to test the results of applying a power-based analysis

¹³⁰ See *supra* Part III-B-2.

concerns lawyers' ethical deliberations in procedural and evidentiary matters. To take one classic dilemma: A lawyer has reason to believe she can impeach a handwriting expert who tends to be nervous on the stand by surreptitiously substituting a writing with a signature different from the one the expert witness had previously identified. The client-centered advocacy view tends to permit such tactics; the justice-centered approach tends to disapprove of them.¹³¹ The justice-based approach asks whether the tactic would help the judge or jury decide the case fairly. If the lawyer believes the expert witness has correctly identified the handwriting, she should not attempt the impeachment tactic because it will "impede rather than enhance the adjudicator's ability to decide fairly."¹³² But if the lawyer has good reason to believe the contrary, she may appropriately decide to use the tactic because it will contribute to a fair decision. The power based approach, in contrast, would respond to context adding as a factor for consideration the relative balance of power between the two parties. This explains, for example, the moral intuition that it would be appropriate to engage in deceptive impeachment tactics when representing a criminal defendant, but completely inappropriate to do so if a prosecutor.

In short, while Simon says that a justice-oriented lawyer should respond to procedural defects by trying to mitigate them, and "[t]o the extent that the lawyer cannot neutralize defects, she should assume direct responsibility for the substantive validity of the decision," by forming her "own judgment about the proper substantive resolution and tak[ing] reasonable actions to

¹³¹ *Id.* at 143.

¹³² *Id.*

bring it about,”¹³³ consideration of client power leads to a different approach. It does not call on the lawyer to enter into the murky realm of substantive validity determinations, but instead asks to temper their representations to the extent that they threaten to prevent consideration of the interests of less powerful affected parties.

D. Representation of Interests Substantially Equal in Power

A final category of representations involve those in which lawyers are representing adversaries of relatively equal power and no other significant interests are at stake. Here we might imagine transactional work involving similarly situated parties or corporate insurance litigation, for example. To be sure, even in such representations, “little guy” interests may be affected, and to that extent, consideration of client power should be a factor in lawyers’ resolution of close ethical judgment calls. But to the extent that obvious and substantial power disparities do not appear to be hampering the fairness of the representation, lawyers need not worry about relative client power in making ethical judgment calls.

Another example of a situation in which consideration of client power will not provide a helpful guide in lawyers’ ethical deliberations is in the representation of competing interests that are substantially similar in that all have relatively *little* power. The scenario of a public interest lawsuit in which many interests, none with substantially disproportionate power, are at stake¹³⁴ comes to mind. Here, too, the balance of power among lawyers, clients, and affected individuals

¹³³ SIMON, *supra* note 33, at 140.

¹³⁴ For an example of such a situation, see *Fiandaca v. Cunningham*, 827 F.2d 825 (2d Cir. 1987) (conflict of interest problem raised where the remedy sought by New Hampshire Legal Assistance (“NHLA”) on behalf of a client class of female inmates in the state prison, which would have involved building a new facility for them with programs and services equivalent to those provided to male inmates, would interfere with the interests of another NHLA client class, consisting of citizens with mental retardation, whose sole care and treatment facility would have provided the site for building this facility for the women inmates).

is sufficiently complex and multi-sided as to render a power-based analysis unhelpful – except, of course, as to interests such as those represented by competing organizations that have substantially fewer material or social resources at their disposal.¹³⁵ But in those aspects of cases involving relatively balanced or impenetrably complex power relationships among competing interests, a power-based analysis cannot guide the ethics stance that lawyers should apply.

Again, questions instantly arise as to how large this set of such representations involving complex and multi-sided power relationship may be. In the new post-post-modern paradigm, theorists have begun to emphasize the flux and instability of power relations in many such scenarios. But the empirical question of how broad is the range of cases involving obvious and substantial imbalances of power need not be resolved here. The point is simply that in that range of cases, considerations of client power should factor into lawyers' ethical deliberations.

In situations that fall outside the substantial power-imbalance paradigm, other ethics considerations must apply. In middle-of-the-road cases, it may well be that lawyers should be free to set their norms of ethical practice by agreement. These may be zealous advocacy norms, norms calling for polite deference to opposing counsel, or postures somewhere in between. Moreover, in these cases, context-dependent problems of moral hazard with respect to lawyers' orientation to their client vis-a-vis other affected interests are not as great. Accordingly, the need for an ethics norm that arises from concern about the effects of power on the working of the legal system is not as great either.

This point can be further illustrated by considering several hypotheticals in which power considerations are too complex for a power-based analysis to apply. Consider, for example, the

¹³⁵ *Id.*

representation of organizations dedicated to advancing “pro-choice” or “pro-life” positions on the abortion issue. Here it is not clear which group currently has more social, economic and political power. Wendel’s analysis of precisely this question under his version of a legalist approach provides a helpful answer: Because both groups are relatively well represented in political processes, the lawyer’s appropriate ethical role should be to adopt an relatively evenhanded stance.¹³⁶ In this situation, viewed from the perspective of the relative power of the two political groups involved – as from the legalists’ concern with procedural reliability, which is the focus of Wendel’s analysis – lawyers’ ethical deliberation need not concern itself with distortions potentially caused by imbalance in the political power of the client groups they represent.

This example is particularly interesting, however, because it also illustrates how a power-based analysis accommodates pluralist substantive views on moral issues in a way that pure justice-centered approaches cannot. Lawyers with particular ethical convictions might see the situation as something quite different from what Wendel sees as a battle between groups with adequate procedural and political access. A lawyer who believes abortion is murder, for example, will see the situation as involving the protection of the rights of powerless unborn children.¹³⁷ A lawyer who believes anti-abortion laws punish poor women will view his appropriate ethics stance as requiring zealous advocacy on behalf of the beneficiaries of laws that

¹³⁶ Wendel, *supra* note 6, at 414 (“The views of both pro-life and pro-choice voters have been adequately represented in the political process. Their contributions to the debate have been a feature of the legislative and litigation battles that have resulted in the existing laws respecting abortion. Whether we regard the laws as an imperfect compromise or as legalized injustice, they are not the product of the systematic exclusion of one point of view from the public forum.”).

¹³⁷ See, e.g., Teresa S. Collett, *Speak No Evil, Do No Evil: Client Selection and Cooperation with Evil*, 66 FORD. L. REV. 1339, 1370 (1998) (“When the object of the association is evil, regardless of the intent of the association, the lawyer and the community should not assist the association in achieving its object. For example, a medical facility seeking to expand its service to include abortion has no moral claim for assistance, even in those instances where the intentions of the association is to protect women against the dangers of self-induced abortions”).

permit abortion. But under an approach that calls on lawyers to consider clients' relative power in the representation it does not matter that different people with different moral convictions would likely also see differently questions concerning power. There is no reason the *results* of lawyers' consideration of their client relative power must be the same for all lawyers. Instead, what is helpful about considering relative client power is that this factor offers a coherent criterion to help guide lawyers' exercise of discretionary judgment in a direction most likely to correct for the tug of self-interest and the distortion of legal processes by over-zealous representation, while also allowing for the irresolvable pluralism of people's moral and political views.

Another example a friendly critic has offered me: consider the situation presented in *Payne v. Tennessee*.¹³⁸ There the defendant committed a brutal murder of a mother and young child and attempted murder of a surviving child. The grandmother testified at a death penalty sentencing proceeding as to the painful effect on the surviving child's life of the loss of his mother and sister. The Supreme Court accepted certiorari to consider constitutional questions related to the admission of victim impact statements in capital sentencing proceedings. The U.S. government argued in favor of the admissibility of such statements; some state governments argued against them. How would a power analysis work here?

At the U.S. Supreme Court level, a power analysis would have little applicability. The setting calls for a vigorous and unrestrained airing of all substantive arguments expert advocates can craft, pro and con. But in a context without all the trappings of a highly public, sharply focused, national-level debate about the development of principles of public reason, a more

¹³⁸ 501 U.S. 808 (1991).

careful consideration of power dynamics would be warranted. The lawyer for the defendant facing the death penalty obviously should provide unreservedly zealous representation for his client. The prosecutor in this situation, to my mind, would justifiably weigh the probable harm to future community members strongly in the balance in urging consideration of victim impact testimony. The state and federal government positions reflect analyses of the positions of those authorized within both levels of government to determine questions of legal policy, and to my mind should not weigh significantly in one direction or the other on a power-based analysis.

E. *Considering Intangible Interests*

Another set of interesting hypotheticals raise the question of how lawyers should take into account intangible interests, such as the interests in avoiding the perpetuation of negative racial stereotyping,¹³⁹ or improving racial relations,¹⁴⁰ or preventing harm to the environment.¹⁴¹ These intangible interests often are not attached to particular parties or persons and become all the more fragile by virtue of this fact. But the fact that such interests are intangible does not mean that they cannot be factored into the ethical calculations of lawyers representing powerful clients. Among such important, fragile, yet nevertheless fully cognizable interests lawyers for powerful clients would be ethically charged with protecting under my model are interests in preserving the public access to information and knowledge and other aspects of the public

¹³⁹ See, e.g., Anthony Alfieri, *Lynching Ethics: Toward a Theory of Racialized Defenses*, 95 MICH. L. REV. 1063 (1997); Anthony Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301 (1995); Anthony Alfieri, *Race-ing Legal Ethics*, 96 COLUM. L. REV. 800 (1996); and Anthony Alfieri, *Impoverished Practices*, 81 GEO. L. J. 2567 (1993).

¹⁴⁰ Bill Ong Hing, *In the Interest of Racial Harmony: Revisiting the Lawyer's Duty to Work for the Common Good*, 47 STAN. L. REV. 901 (1995).

¹⁴¹ See, e.g., David Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Environmentally Critical Resources*, 12 HARV. ENVTL. L. REV. 311 (1988).

commons,¹⁴² avoiding environmental harms,¹⁴³ and protecting against financial harm that will be borne by future generations. To be sure, in these contexts, especially, a power-based analysis becomes very much like a justice-centered analysis because the lawyer is thinking about the balance of affected interests – much like a judge thinks about justice – removed from the presence of a tangible “other” capable of articulating a position to which the lawyer may show consideration. But someone surely should be looking out for these interests in situations of procedural breakdown or unreliability, as the justice-centered theorists have long and persuasively argued, and it thus seems that a model that calls on lawyers to concern themselves about these issues when representing powerful clients is well worth pursuing.

IV. CONCLUSION

A host of commentators, writing with a variety of intellectual commitments, have criticized justice-centered assumptions that an ethics dictate involving the pursuit of justice can be accomplished by applying discretionary judgment in interpreting law.¹⁴⁴ Yet another critique, drawn from post-modernism and liberalism alike, attacks notions of locating justice in substantive morality. Even justice-centered theorists such as Simon and Wendel readily acknowledge that law and justice cannot be equated in some realms.¹⁴⁵ In these areas there appears to be a fundamental injustice in positive law, or as Simon might put it, a disjunction

¹⁴² See, e.g., Glushko-Samuels Intellectual Property Law Clinic, <http://www.wcl.american.edu/ipclinic/index.cfm> (describing clinical program devoted to representing public interest in preserving an intellectual property “commons”).

¹⁴³ See, e.g., David Hunter, “Expanding Public Participation at International Financial Institutions: The Need for an International Administrative Procedures Treaty” (unpublished draft).

¹⁴⁴ See literature cited in note 29 *supra*.

¹⁴⁵ See discussion accompanying notes 30-33 & 35 *supra*.

between narrow positive law and more just norms which exist at a broader level in the legal culture. At bottom, the dispute between justice- and client-based analyses may come down to no more than different points of view about the general justice, validity, or trustworthiness of the legal system overall. Legalists can be comfortable with a justice-based orientation to legal ethics analysis because they view the legal system as fundamentally just, with some pockets of political and or procedural breakdown; those in the rebellious lawyering tradition view such problematic areas of law in the areas of criminal justice and welfare rights law as emblematic of a legal system lacking in justice in more fundamental respects.

Put otherwise, a legalist analysis only works where, at bottom, law is fundamentally just. To the extent that, or in those areas of law in which this claim cannot be supported, some other theory is required. A power-based analysis offers such an alternative. When representing the interests of those lacking in relative power, lawyers should seek to refrain from lawyer domination, encourage the development of their clients' perspectives, and engage in vigorous client-centered representation. When representing clients with the power to do great harm to those less powerful, on the other hand, lawyers should avoid strategies that interfere with full consideration of less powerful interests affected by their representations. This context-specific approach could well be codified through an overhaul of the model rules, but can and should be adopted by lawyers even within the framework of the current rules in their exercise of discretionary ethical judgment in the course of their legal representations.