Selling Out: An Instrumentalist Theory of Legal Ethics

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ABSTRACT

Legal ethics has received attention mostly from scholars who view it as a field for the application of moral philosophy. However, economic analysis is also useful in the study of legal ethics, because it can illuminate the incentives that generate ethical dilemmas and controversies. This is especially true in the subfield this paper devotes its attention to, lawyer conflict of interest rules. The problem I focus on is the incentive of the lawyer to "sell out" his client—for example, by providing confidential information to a potential adversary or by providing legal misinformation to the client in order to aid the adversary. The lawyer is in a unique position to auction off the client's legal rights to the highest bidder. Troublingly, in those instances where the client most values his legal right, the lawyer will find it more profitable to sell out the client than to arrange a mutually beneficial consent to a conflict of interest. I examine implications for the regulation of legal ethics.

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INTRODUCTION

Legal ethics has received attention mostly from scholars who view ethics as a field for the application of moral philosophy.[1] However, economic analysis is also useful in the study of legal ethics, because it can illuminate the incentives that generate ethical dilemmas and controversies.[2] This is especially true in the subfield this paper devotes most of its attention to, attorney conflict of interest rules.[3]

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1. *See, e.g.*, David Luban, *Calming the Hearse Horse: A Philosophical Research Program for Legal Ethics*, 40 MD. L. REV. 451 (1981); Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963 (1987); Alice Woolley & W. Bradley Wendel, *Legal Ethics and Moral Character*, 23 GEO. J. LEGAL ETHICS 1065 (2010).

2. Although instrumentalist or incentive-based arguments are far from the dominant approach among legal ethicists, there has been a developing undercurrent within ethics scholarship that questions the moral basis of the traditional ethical norms, such as loyalty and the duty of confidentiality. *See* Shaffer, *supra* note 1, at 963; William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988); Maura Strassberg, *Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics*, 80 IOWA L. REV. 901 (1995).

3. *See, e.g.*, Robert H. Aronson, *Conflict of Interest*, 52 WASH. L. REV. 807 (1977); Nancy J. Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 TEX. L. REV. 211 (1982).

Economic analysis of legal ethics mostly adopts the agency cost framework,[4] which views ethical problems as emanating from the divergence of incentives between principal and agent.[5] However, the incentives of principals and agents, like the incentives of any two people, will always diverge to some degree.[6] Agency costs infect all relationships, and so an agency cost approach leads to the question of which costs are significant and which ones are not.[7] Similarly, a client-centered approach to legal ethics, which stresses the autonomy of the client,[8] could lead one to imagine that any divergence between the incentives of principal and agent is potentially a problem of ethics. Moreover, in the area of attorney conflicts, the divergences are really between alternative principals (one client versus another client), not between principals and agents. For these reasons, the agency cost framework, without some additional refinement, may not be the most promising perspective from which to analyze legal ethics.

This paper takes a different approach from agency cost theory. The approach here is to identify the pressure points of incentive divergence, and the social costs of failing to regulate attorney conflicts of interest. By starting at the ground level with incentives, my hope is that this analysis can point to the types of interactions where ethical constraints are most helpful, to rank ethical conflicts in terms of potential for social harm and the consequent need for regulation, and to suggest the types of regulation most likely to be beneficial. In evaluating the need for

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4. The term "agency costs" refers to costs (or, more generally, losses in social welfare) that arise from the divergence between the incentives of principals and agents. The term appears to have been coined by Michael Jensen and William Meckling. *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 309-10 (1976). Scholars have found several applications of agency cost theory in the law. *See, e.g.*, Jonathan Klick & Robert H. Sitkoff, *Agency Costs, Charitable Trusts, and Corporate Control: Evidence from Hershey's Kiss-Off*, 108 COLUM. L. REV. 749 (2008); Lee-ford Tritt, *The Limitations of an Economic Agency Cost Theory of Trust Law*, 32 CARDOZO L. REV. 2579 (2011).

5. Jonathan R. Macey & Geoffrey P. Miller, *An Economic Analysis of Conflict of Interest Regulation*, 82 IOWA L. REV. 965, 968–69 (1997).

6. *See* Richard A. Epstein, *The Legal Regulation of Lawyers' Conflicts of Interest*, 60 FORDHAM L. REV. 579, 581 (1992).

7. *See id.* at 580–81.

8. Client autonomy appears to be a basic norm underlying legal ethics. *See, e.g.*, DAVID BINDER, PAUL B. BERGMAN, PAUL R. TREMBLAY & IAN S. WEINSTEIN, LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH (3d ed., 2011); MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 9 (1975); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 146 (1986); Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L. J. 1060, 1061 (1976); Stephen L. Pepper, *Autonomy, Community, and Lawyers' Ethics*, 19 CAP. U. L. REV. 939, 939–40 (1990); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities,* AM. B. FOUND. RES. J. 613, 614 (1986); Fred C. Zacharias, *Limits on Client Autonomy in Legal Ethics Regulation*, 81 B.U. L. REV. 199, 199–200 (2001). For a modern equivocal defense of the autonomy norm and lawyering, *see* DANIEL MARKOVITS, A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE 3 (2008). Of course, limited information on the part of the client may justify paternalism in the legal profession, which clashes with the autonomy norm, but even the paternalism defense takes autonomy as the appropriate default norm. *See* David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454, 464–65 (1981). Some authors have rejected the autonomy norm. *See, e.g.*, Shaffer, *supra* note 1, at 969–70; Simon, *supra* note 2, at 1116–18.

ethical rules, it is helpful to first develop a sense of how serious the harm associated with ethical lapses might be.

The implications of this analysis are not optimistic. The problem I focus on is the incentive of the lawyer to "sell out" his client. The lawyer can sell out his client by providing confidential information related to the client to a potential adversary, or by providing legal misinformation to the client in a manner that aids the adversary. Selling out can occur before any dispute arises, and in this case it injures the legal rights of the client. Selling out can also occur after a dispute arises.

Troublingly, the lawyer is in a unique position to auction off the legal rights of the client to the highest bidder.[9] Often the most plausible bidder will be the party likely to injure the client. Indeed, an implication of this analysis is that any time the vulnerable client puts a positive value on his legal right, the attorney will find it more profitable to sell out the client than to arrange a mutually beneficial consent to a conflict of interest.

The problem of selling out is especially acute with respect to legal rights. The lawyer stands between the potential victim and the potential injurer, with the ability to transfer the victim's rights to the injurer. Potential victims are unlikely to realize the danger, and even if they realize it will almost never consider bidding to secure or recapture their rights. Injurers, however, will often realize the danger of future liability to potential victims and will be eager to bid for the rights of victims. In a thoroughly unethical legal system, the lawyer will form a coalition with the injurer to strip vulnerable clients of legal rights.

This troubling set of incentives, I argue, provides the strongest justification for ethical regulation of lawyers, and a central perspective from which to interpret such regulations. The framework here provides a simple positive theory of ethical rules. In a normative vein, I suggest reforms, in the nature of stronger disclosure requirements. Specifically, I suggest in the conflict scenario, where the rules already require disclosure of potential harms to the vulnerable client, that there should also be a "return the favor" requirement of disclosing (again, to the vulnerable client) potential gains to the party on the other side of the conflict.

Although conflict of interest is the focus of this paper, the underlying framework applies equally to the duty of confidentiality and to abuse of client information generally – such as personally profiting from confidential client information.

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9. Much of the literature defending the autonomy norm as the foundation of legal ethics emphasizes the importance of the lawyer, chiefly in enabling the individual to navigate through a modern complex society. *See, e.g.*, WOLFRAM, *supra* note 8, at 1–2; Fried, *supra* note 8, at 1074–75. The role of the lawyer seems morally defensible when the individual confronts a state that both provides rights to the individual but at the same time cannot afford to aid every individual in the assertion of his or her rights. However, instead of navigating the individual according to his wishes, the lawyer might navigate the client according to someone else's plans. The role of the lawyer is more difficult to defend on moral grounds, however, when the lawyer aids one individual in using the administrative machinery of the state to suppress the rights of another individual. *See generally* DAVID LYONS, ETHICS AND THE RULE OF LAW (1984) (comprehensive critical evaluation of ethics and legal institutions); WOLFRAM, *supra* note 8, at 70–78 (describing and critiquing ethical theories applied to lawyers).

In virtually all such cases, the lawyer is stripping a right from the client for personal gain. The instrumentalist literature (and a good part of recent ethics scholarship) has suggested weak support at best for the duty of confidentiality, arguing that its social value is entirely context specific.[10] However, in the all too plausible environment where prospective injurers can identify their likely victims and bid for the victims' private information through attorneys, the nearly absolute nature of the confidentiality duty is much easier to justify. The duty of confidentiality signals to injurers that the lawyer's office is an unlikely venue for suppressing the rights of prospective victims.

Part II describes contributions of this paper to the literature on lawyer regulation. The main contribution is the modeling of incentives that generate core ethical controversies, such as the conflict of interest problem. Focusing on incentives enables the analyst to see that the same incentive distortions are at the base of seemingly unrelated ethical prohibitions. Part III defines concepts central to the argument, distinguishing "legal rights" from "legal claims" and the valuation of such concepts. Part IV presents a few stories and a numerical example illustrating the sell-out problem. Part V presents an economic analysis of incentives to transfer legal rights, and associated welfare consequences. Part VI examines the litigation contest. Part VII discusses potential legal reforms to address the incentive issues.

I. CONTRIBUTION OF INCENTIVES APPROACH

The conflict of interest problem and the duty of confidentiality have been the subjects of numerous articles.[11] However, none of the previous articles on ethics, so far as I am aware, model the incentives that generate ethical breaches.[12] This section discusses (i) the uniqueness of the incentives approach; (ii) the boundaries of the Article and analysis; and (iii) comparisons with traditional framework. An examination of incentives can reveal underlying distortions—that is, divergences between private and social incentives—common to seemingly

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10. *See, e.g.*, Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1 (1998) (arguing that confidentiality rules should be abolished because they benefit lawyers and not clients); Louis Kaplow & Steven Shavell, *Legal Advice About Information to Present in Litigation: Its Effects and Social Desirability*, 102 HARV. L. REV. 565, 605–611 (1989) (presenting an equivocal view of confidentiality); Steven Shavell, *Legal Advice about Contemplated Acts: The Decision to Obtain Advice, Its Social Desirability, and Protection of Confidentiality*, 17 J. LEGAL STUD.123, 138-44 (1988) (arguing that the duty of confidentiality does not ensure socially desirable outcomes); Dru Stevenson, *Against Confidentiality*, 48 U.C. DAVIS L. REV. 337 (2014) (advocating the repeal of confidentiality rules). For similarly skeptical views of the confidentiality norm, though not grounded explicitly in economics, *see* Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989) (finding confidentiality rules and exceptions create ethical ambiguities); Simon, *supra* note 2, at 1140–43 (opposing strict confidentiality rules).

11. For an ethics textbook with a survey of the literature, *see* MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 45–67, 127–51 (5th ed., 2016).

12. Macey & Miller, *supra* note 5, present an abstract model of the costs of conflicts of interest, but their model does not include a detailed analysis of incentives for avoiding harm and associated welfare consequences.

disparate provisions of the ethical rules, and shed light on the welfare consequences of ethically problematic conduct.[13]

Under the incentive-based approach, the conflict of interest problem and the confidentiality duty are closely related. In the conflict of interest scenario, the regulator's concern is that a lawyer may use his position to harm one client in order to benefit another client. A lawyer might choose such an action because the two clients' interests are adverse, and it is in the lawyer's private interest to continue the relationships to retain the income from both clients. The client who is willing to bid the most for the lawyer's fidelity is likely to be favored in this conflict. Alternatively, one client may seek to reward the lawyer for taking actions that harm the other client.[14]

In the confidentiality problem, the regulator's concern is that the lawyer may pass confidential information from Client A to Client B, resulting in harm to A. Why would the lawyer do such a thing? One possible reason is error; the lawyer simply fails, due to inadvertence, to keep information confidential. Mistakes such as this are likely to be rare, and professional reputation, coupled with negligence liability, should be sufficient to keep them in check.[15] The greater danger is that Client B will bid for the information on A, because their interests are adverse. If there were no duty of confidentiality, parties whose interests are adverse to a particular lawyer's clients would be especially interested in seeking relationships with the same lawyer. The lawyer might be tempted by the revenue potential of taking on such adverse parties as clients.

The model here addresses two fundamental issues in the theory of legal ethics. One is the principle of client autonomy, the corollary of which is attorney loyalty.

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13. A social welfare, or welfare-economics, perspective on ethics norms would focus on the degree to which the private incentives of lawyers deviate from the incentives that would maximize society's wealth. For example, lawyers may choose to file suit in instances where society's wealth would be enhanced by the lawyer forgoing litigation. *See* Steven Shavell, *The Social versus the Private Incentive to Bring Suit in a Costly Legal System*, 11 J. LEGAL STUD. 333, 334–5 (1982) (presenting a mathematical model of lawyers' incentives to pursue litigation relative to society's incentive to pursue litigation).

14. This sentence and the one preceding hint at an interesting puzzle that this paper addresses. If a lawyer favors one client's interests over another because the favored client is a greater source of income, then the source of the alleged conflict is the lawyer's interest in money. However, there is nothing special or unusual about a service provider, lawyers or massage therapists, putting their interests in a greater income over the interests of one particular client. Indeed, if this were evidence of an ethical violation, the same violation would taint all buyer-seller relationships. For a brief encounter with this problem, *see* Nancy J. Moore, "*Who Should Regulate Class Action Lawyers*?" 2003 U. ILL. L. REV. 1477, 1490 (2003) (describing financial incentives for allocating time to clients). Clearly, professional ethics violations must involve conflicts that are different in quality from the routine conflict between the self-interest of the service provider and the interest of the client. How should one draw the line between such routine conflicts and the sorts of conflicts deserving of regulation under an ethical code? One approach might be to distinguish conflicts that are likely to be constrained by competition from conflicts that are less likely to be so constrained.

15. Consider, for example, medical errors. Physicians make mistakes too, sometimes due to negligence, sometimes not. Physician errors, as a general matter, are not viewed as ethical problems. Not every error that would justify a medical malpractice lawsuit would also justify an investigation of the physician's ethics. Given this, it would seem implausible to argue that lawyers are different, in the sense of requiring an investigation of ethics for every instance of error involving a breach of confidentiality.

In the traditional model, client autonomy is at the core of legal ethics.[16] The rules, it follows, should not get in the way of client choice, within reason, unless the client is unable to understand the implications of his decision. For example, the case for prohibiting an attorney from representing both sides in the same litigation would appear to depend on whether the parties fully understand the risks they incur by accepting common representation as adverse parties. If the parties understand the risks, the autonomy model would appear to favor allowing them to consent to the ethical conflict.[17] An alternative argument for limiting client autonomy could be based on negative externalities—that is, harms to society that might result even if the parties fully understand the risks of waiving an ethical prohibition. Again, take the case of simultaneous and adverse representation in the same litigation. If such representation harms courts,[18] or the social perception of courts,[19] then a case could be made for limiting the autonomy norm.

The autonomy norm has been framed largely as a moral principle, with elaborate arguments making the moral case for attorney loyalty to the client.[20] However, the autonomy principle need not be viewed in solely moral terms. One could easily provide an economic justification for the autonomy norm grounded on the proposition that a contract between a lawyer and a client, just as a contract between any two rational parties, should be presumed to maximize the wealth of the parties jointly, unless there are informational asymmetries.[21]

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16. *See, e.g.*, Fried, *supra* note 8.

17. *See* Fred C. Zacharias, *Waiving Conflicts of Interest*, 108 YALE L. J. 407, 412–16 (1998).

18. *See id.* at 419.

19. *Id.* at 420.

20. A prominent example is Fried's theory of the "lawyer as friend." *See* Fried, *supra* note 8, at 1074–75 ("The lawyer acts morally because he helps to preserve and express the autonomy of his client vis-à-vis the legal system. It is not just that the lawyer helps his client accomplish a particular lawful purpose. Pornography may be legal, but it hardly follows that I perform a morally worthy function if I lend money or artistic talent to help the pornographer flourish in the exercise of this right. What is special about legal counsel is that whatever else may stop the pornographer's enterprise, he should not be stopped because he mistakenly believes there is a legal impediment. There is no wrong if a venture fails for lack of talent or lack of money - no one's rights have been violated. But rights *are* violated if, through ignorance or misinformation about the law, an individual refrains from pursuing a wholly lawful purpose. Therefore, to assist others in understanding and realizing their legal rights is always morally worthy. Moreover, the legal system, by instituting the role of the legal friend, not only assures what it in justice must - the due liberty of each citizen before the law - but does it by creating an institution which exemplifies, . . ., the ideal of personal relations of trust and personal care which (as in natural friendship) are good in themselves."). The morality-based argumentation sometimes has a florid air about it, inviting skeptical questions. What is especially morally salutary about this "friend" of the landlord who seeks to evict a tenant that has suffered an unforeseen economic loss? For a skeptical response to the lawyer-as-friend thesis, *see, e.g.*, Edward A. Dauer & Arthur Allen Leff, *Correspondence: The Lawyer as Friend*, 86 YALE L.J. 573 (1977). Considerably broader reasons to be skeptical of the thesis are suggested in LYONS, *supra* note 9, and in DAVID LYONS, CONFRONTING INJUSTICE: MORAL HISTORY AND POLITICAL THEORY (2013).

21. Specifically, the Coase Theorem implies that a contract between informed parties will necessarily maximize their joint welfare, otherwise the parties would modify the contract in order to increase their joint welfare. *See generally* R. H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960). On informational obstacles as barriers to Coasean bargaining, *see, e.g.*, Joseph Farrell, *Information and the Coase Theorem*, 1 J. ECON PERSP. 113 (1987).

The other core problem in ethics, confidentiality, has been a controversial topic of late.[22] One could treat confidentiality as an implication of the autonomy norm, on the theory that a lawyer who refuses to retain the confidences of the client could hardly be a faithful agent. However, faithfulness of the agent to the principal does not immediately imply confidentiality in all matters. The parties to a marriage promise to be faithful, but this promise does not imply a duty of confidentiality in all matters. Unlike in the case of marriage, the confidentiality duty lawyers owe to clients appears to be a bedrock principle that operates more broadly in the legal industry than the duty of fidelity.[23]

The novel perspective this paper introduces on these core issues, autonomy and confidentiality, is the risk, distant or near, of predatory conduct. In this perspective, the primary function of ethics rules is to prevent a type of expropriation that would otherwise occur in their absence. Lawyers and injurers may find it mutually beneficial to join forces to the disadvantage of vulnerable clients. This is not to say that lawyers are out to harm clients. The point is that financial incentives tend to weigh in favor of lawyers facilitating the efforts of injuring parties rather than their victims. The purpose of ethical regulation is to blunt this inherent distortion of incentives. Ethical regulation is necessary, moreover, because competition is likely to be inadequate to constrain this incentive distortion—indeed, competition may exacerbate the incentive distortion by financially weakening lawyers who attempt to resist it.[24]

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22. *See, e.g.*, Zacharias, *supra* note 17.

23. *See* Fischel, *supra* note 10, at 1–5. Unlike the duty of fidelity, which mostly ends with the termination of the lawyer-client relationship, the duty of confidentiality extends indefinitely. *See* FREEDMAN & SMITH, *supra* note 11, at 263 ("The lawyer's obligation of confidentiality, which extends indefinitely, [is] beyond the end of the lawyer-client relationship."); *see also* N.Y. RULES OF PROF'L CONDUCT R. 1.9(a) (N.Y. STATE BAR ASS'N 2020) ("A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing."). Substantially related matters are those that "involve the same transaction or legal dispute or if, under the circumstances, a reasonable lawyer would conclude that there is otherwise a substantial risk that confidential factual information that would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." N.Y. RULES OF PROF'L CONDUCT r. 1.9 cmt. 3 (N.Y. STATE BAR ASS'N 2020). Whether the former client's interests are materially adverse to those of the prospective client is a fact-specific inquiry. *See, e.g.*, Tekni-Plex, Inc. v. Meyner & Landis, 674 N.E.2d 663, 667 (N.Y. 1996). The foregoing rules and related case law suggest that the duty of fidelity is more complex and flexible than is the duty of confidentiality.

24. Because of this, the inherent conflict identified here is different from the routine conflict between the incentive of a professional to earn the highest fee for the smallest amount of work and the best interest of the client. For routine conflicts such as this, competition should be a sufficient regulator, just as any market where a seller would like to earn the highest price in exchange for the lowest amount of effort. Of course, the Model Rules include provisions governing routine conflicts too. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.5 (2018) [hereinafter MODEL RULES] ("A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include . . . the time and labor required . . . the fee customarily charged in the locality for similar legal services . . . the experience, reputation, and ability of the lawyer. . . ."). Rules such as 1.5 should be unnecessary in a competitive market.

II. LEGAL AND ECONOMIC INFRASTRUCTURE

In applying economic analysis to legal ethics, it helps to have simple representations of the interests at stake, an economic language for the analysis of conflicts of interest. Accordingly, this section sets forth the legal and economic structure by which the Article will evaluate conflicts of interest.

I define *legal rights* and *unmatured legal claims*,[25] which are essentially the same, as entitlements protected by the law. For example, the legal right to exclude an invader from your property, protected by trespass law, is also an unmatured legal claim for trespass. It is unmatured because the trespass has not occurred. As Calabresi and Melamed explained,[26] the legal entitlement can be protected by a property rule or a liability rule. Property rule protection means that the holder of the legal right can enjoin a future taking of that right.[27] Liability rule protection means that the holder of the right can seek *compensation* through the courts for a violation of the right, but not an injunction.[28]

The holder of a legal right can put a price on it. The value of the right is the anticipated loss, translated into money terms, suffered by the holder if the legal right were taken from him.[29] Thus, if the right to sue for trespass were expropriated from a property owner, he would expect to suffer harm from a trespass. The net change in wealth experienced by the property owner, if his right were expropriated, constitutes the minimum price that the property owner would place on his legal right.

As utilitarian philosopher Jeremy Bentham noted long ago, rights would be meaningless talk without corresponding burdens.[30] The burden created by a right includes the cost to the potential infringer or injurer of taking care to avoid harming the right holder by violating the right. Another factor increasing the burden is the potential liability borne by the potential injurer even when he is taking care to avoid the infringement. In the absence of legal rights, these burdens would not exist.[31]

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25. I am borrowing Robert Cooter's use of the term "unmatured" tort claims. *See* Robert Cooter, *Towards a Market in Unmatured Tort Claims*, 75 VA. L. REV. 383, 383 (1989) (defining "unmatured" as events that may occur). Here, however, I refer to legal claims of any sort—tort, contract, etc.

26. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972).

27. *See id.*

28. *See id.*

29. For details on calculating the price of rights waiver, *see* Keith N. Hylton, *Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis*, 8 SUP. CT. ECON. REV. 209, 219 (2000).

30. *See, e.g.*, David Lyons, *Founders and Foundations of Legal Positivism*, 82 MICH. L. REV. 722, 724 (1984) (reviewing H. L. A. HART, ESSAYS ON BENTHAM: STUDIES ON JURISPRUDENCE AND POLITICAL THEORY (1982) and W. L. MORISON, JOHN AUSTIN (1982)) ("[Bentham] held that rights arise when, but only when, obligations have identifiable beneficiaries.").

31. These burdens would not exist because potential infringers presumably would not see a need to avoid infringing a nonexistent right and would not fear liability for any actions that might be viewed as infringements. On the technical pricing of these "burdens," *see* Hylton, *supra* note 29.

Legal claims, or causes of action, arise when a legal right is violated. To return to the trespass example, when a threatened trespass actually occurs, the holder of the legal right can go to court to seek some remedy for the violation. After the violation, the holder of the legal claim has an asset that is worth the value of the expected compensation for the violation minus the cost of obtaining compensation. When the person who has a legal claim settles with the injuring party, he essentially sells his legal claim to the injurer.[32]

As should be clear form the foregoing, rights and claims may have different valuations. The holder of property would not necessarily put the same price on the right to sue for trespass as he would put on the claim for trespass. It might seem at first that he or she would value the right more than the claim, but that is not necessarily true. The value of the right will reflect the likelihood that the interests protected by the right would be violated if the right did not exist. The value of the claim, on the other hand, reflects the likelihood that the claim will result in compensation in court. The likelihood that the interests protected by the right will be violated in the absence of the right may be small in some settings. An employee working in a family firm who is also a member of the family is unlikely to suffer racial discrimination, for example, and so may not place a significant value on the right to sue for discrimination. On the other hand, even when the right itself is not worth much ex ante, the value of an actual claim based on the violation of the right may be substantial.

Rights and claims can be expropriated by courts, legislatures, or third parties. For example, a legislature could – setting aside constitutional constraints – abolish the right to sue for trespass, or for discrimination.[33] In the case of a legal claim, a legislature or court could adopt new procedural hurdles that make the claim essentially worthless.[34] Attorneys can also expropriate legal rights and legal

32. *See, e.g.*, ROBERT G. BONE, CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE 72 (2003) (describing and analyzing settlement as a sale to the defendant of the plaintiff's right to sue); Keith N. Hylton, *Toward a Regulatory Framework for Third-Party Funding of Litigation*, 63 DEPAUL L. REV. 527, 536 (2014).

33. Such an enactment undoubtedly would generate a constitutional challenge. Abolishing the right to sue for trespass would arguably affect a taking, since it would expose the owner of property to invasions and occupations of strangers. The due process and equal protection theories that have led some courts to strike down damage caps would seem to apply with greater force to a law abolishing the right to sue for a specific tort. However, a court might conclude that the right to sue for trespass is just one of many ways the state protects property rights and therefore the abolition effects only a minimal deprivation of property. For example, a cap on damages may have the same impact on a right as abolishing the right to sue. Many state courts have upheld damages caps against constitutional challenges. For a count of the states, *see* Constitutional Challenges to State Caps on Non-economic Damages, Am. Med. Ass'n (2017), https://www.ama-assn.org/sites/ama-assn.org/files/corp/media-browser/public/arc-public/arc-constitutional-challenges_1.pdf. [https://perma.cc/4M79-MH85]. The extreme case is Virginia, which upheld against constitutional challenges a cap on total damages (pecuniary and nonpecuniary) in medical malpractice cases. *See* Etheridge v. Med. Ctr. Hosps., 376 S.E. 2d 525 (Va. 1989).

34. For example, suppose a plaintiff with a discrimination claim were required by law to go through a succession of expensive and hostile mediation and arbitration processes before finally getting a chance to take the claim to court. The procedural hurdles would make the prosecution of the claim so expensive that the vast majority of plaintiffs would drop their claims.

claims. If all, or sufficiently large percentage, of the lawyers in a town falsely convince residents that their legal rights are unlikely to be recognized by courts or that their confidential information will not be protected, then they will have effectively expropriated those rights.[35] Similarly, if a lawyer falsely persuades a tort victim that he or she is unlikely to gain compensation for his or her injury in court, even though the injury is to a right protected by the law, the lawyer will have effectively expropriated the victim's legal claim.

The social welfare consequences of expropriation differ depending on whether it is a legal right or a legal claim that is expropriated.[36] If a right is expropriated, then potential violators of the right will realize that they can act with impunity toward the victim. Expropriation of rights can turn potential victims into the legal captives of injurers, leading to a greater frequency of injury, with negative implications for society's welfare. The expropriation of a legal claim, however, is just a transfer of resources in the first instance. The right has already been violated, so the claim is merely a demand for compensation for that violation. In the short term, the expropriation of a claim transfers resources from the injured party to the injuring party. In the long term, expropriation of claims can have the same effects on welfare as expropriation of rights. If people know that their claims will be expropriated with some frequency, they will perceive a diminution in the value of their rights in proportion to the frequency of expropriation. Moreover, if claims are expropriated, injured parties may seek compensation directly through retaliation without going to court, which also has the potential to reduce society's welfare.[37]

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35. Alternatively, the state can expropriate the legal rights of targeted citizens by threatening to penalize lawyers who might represent those citizens, or by forcing the lawyers to reveal the activities of the targeted clients. Under a looming threat of punishment, lawyers would be reluctant to advise such citizens to pursue their rights. Consider, for example, lawyers in the South during the Jim Crow era. In *NAACP v. Alabama*, 357 U.S. 449 (1958), the Supreme Court held that Alabama's demand for the NAACP's records and membership lists violated the Constitution's Due Process Clause. Alabama's demand for such records would have threatened the livelihoods, if not the physical safety, of lawyers who had worked with or had become members of the NAACP. Facing the threat of exposure, even lawyers who were inclined to support the NAACP's causes would have shied away from such work and would have dissuaded clients from pursuing civil rights claims. Similarly, the government of China has sought to extinguish the civil rights of citizens by sequestering civil rights lawyers, presumably to compel them to reveal the activities of their clients. *See, e.g.*, Alex W. Palmer, *'Flee at Once': China's Besieged Human Rights Lawyers*, N.Y. TIMES MAGAZINE (July 25, 2017), https://www.nytimes.com/2017/07/25/magazine/the-lonely-crusade-of-chinas-human-rights-lawyers.html [https://perma.cc/FGH6-LZVD].

36. *See supra* note 25 and accompanying text.

37. The risk of retaliation seems plausible when the injured parties are aware that they have enforceable rights, and also aware that obstacles prevent them from enforcing their rights. This is different from the case where the parties are not aware that they have enforceable rights or have been conditioned to believe that rights that have been formally promised by the state do not exist in reality. Systems of slavery, for example, are founded on the denial of legal rights to the enslaved, delegating the power to recognize or not to recognize rights to slaveholders. *See, e.g.*, Keith N. Hylton, *Slavery and Tort Law*, 84 B.U. L. REV. 1209, 1216-17 (2004). Reducing the risk of private retaliation is one of many justifications for the tort system. *See* Kemezy v. Peters, 79 F.3d 33, 35 (7th Cir. 1996) (Posner, J.) ("If we assume realistically that the criminal justice system could not or would not take up the slack if punitive damages were abolished, then they have the additional function of

The attorney-client relationship is a forum in which rights or claims can be enhanced in value, or expropriated, extinguished, or dampened, depending on the client's interaction with the lawyer. There are three activities in which these outcomes can be observed. The most obvious is representation of a client. The term representation covers a wide range of activity, from advice to arguing for a client in court. I will assume that the core of representation involves advocating on behalf of a client in a court or some other adjudicatory tribunal. Another activity in which the lawyer may influence the value of rights and claims is negotiation, where the lawyer bargains on behalf of the client with some other party. The third general activity is counseling, which could consist of advice on how to comply with the law or on the value of client's rights. Of course, there is a large overlap between all three activities. Much of counseling is representation. The rules of attorney ethics must apply to some degree to all three activities, otherwise lawyers would attempt to evade the regulations by characterizing their activity as exclusively within some unregulated line of activity.

The rules of attorney conflicts have at their core the problem of a lawyer who cannot serve two masters at once.[38] Rule 1.7(a) provides a categorical prohibition of concurrent conflicts of interest,[39] subject to a consent exception in Rule 1.7 (b).[40] Irrespective of consent, the lawyer cannot argue on behalf of client A while at the same representing client B in *A v. B*.[41] However, in much of the analysis

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heading off breaches of the peace by giving individuals injured by relatively minor outrages a judicial remedy in lieu of the violent self-help to which they might resort if their complaints to the criminal justice authorities were certain to be ignored and they had no other legal remedy.").

38. *See, e.g.*, Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1386 (2nd Cir. 1976); *In re W. T. Byrns, Inc.*, 260 F. Supp. 442, 445 (E.D. Va. 1966); Woods v. City Nat'l Bank & Trust Co., 312 U.S. 262, 268 (1941) (all referencing Matthew 6:24 "No man can serve two masters; for either he will hate one, and love the other, or he will cling to one, and slight the other . . .").

39. *See* MODEL RULES R. 1.7(a)(2) ("Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if . . . there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client."); *see also* Griva v. Davison, 637 A.2d 830, 844 (D.C. Cir. 1994) (noting that a law firm cannot represent a partnership and one or more of its individual partners at the same time if "such dual or multiple representation would result in an 'actual conflict of positions' in which case the absolute prohibition of Rule 1.7(a) comes into play."). *See generally* North Carolina State Bar v. Whitted, 347 S.E.2d 60 (N.C. Ct. App. 1986) (disbarring attorney who failed to disclose possible effect of his multiple representation of two wrongful death claimants where apportionment from same fund would benefit one client to the other client's detriment.)

40. *See* MODEL RULES R. 1.7(b) (Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing).

41. *See* MODEL RULES R. 1.7(a); *see also* FREEDMAN & SMITH, *supra* note 11 at 265 ("The most obvious conflict between current clients is where the lawyer is representing two or more clients whose interests are adverse to each other."); RONALD D. ROTUNDA, LEGAL ETHICS IN A NUTSHELL 145 (5th ed., 2018) ("The

below, it will appear that the conflict problem is least worrisome in terms of impact on social welfare in the case where a single lawyer representing A and B argues *A v. B* in court. The more harmful social welfare effects are implicated by conflicts at the counseling stage.

III. STORIES

There are many stories that could be offered to motivate this paper's analysis. In this section, I will apply the framework described above to three specific illustrations. The illustrations demonstrate that a lawyer, rather than attempting to improve the welfare of his vulnerable clients (e.g., potential victims of some tort), can often improve his own welfare by dissuading them from asserting their legal rights.

I will start with a simple story of a potential tort, where lawyers can intervene to "buy out" rights of potential victims' to sue, through executing waiver agreements.[42] Consider the following hypothetical, based on a real case, offered by Shay Lavie:[43]

> A golf course is negligently operated and golf balls hit adjacent premises. There are two identifiable classes of victims: the first includes those who border the golf course, and the second consists of farther landowners. The second class suffers fewer damages, and the longer distance makes it harder to prove the golf course's liability. The golf course buys out the first class's rights to sue-either before, after, or during damages, through liability waivers or settlement agreements.[44]

However, golf balls probably do not do much damage to the property of neighbors. I will consider, instead, a variation that suggests a potential for substantial harm:

> A hospital purchases a home, in a residential neighborhood, to use as a treatment residence for young men with behavioral problems. If the hospital operates the home negligently, there is a considerable chance that one or more of the young men might damage the property of neighbors – the risk of personal assault is zero. The hospital approaches lawyers in the town and asks them to buy out the rights to sue – that is, to negotiate waiver agreements – of the neighbors most likely to be injured. The hospital identifies five neighbors in this category.

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clearest non-consentable conflict is that the lawyer in litigation may not represent both Client A and Client B in the case of *A v. B*."); WOLFRAM, *supra* note 8, at 350 ("Almost without exception, a lawyer may not represent adverse parties in the same litigation. Lawyers have done so and have been disciplined.").

42. I use the term "buy out" rather than simply "buy" to describe a situation where the potential victim does not retain the right to sue.

43. Shay Lavie, *The Malleability of Collective Litigation*, 88 NOTRE DAME L. REV. 697, 729 (2012).

44. *Id.*

> The expected harm is $40,000 to each neighbor. Suppose the risk of such damage when the treatment residence operates carelessly is .5 per year. If the hospital operates the home with care, the risk of property injury is only .10.

What price would each neighbor set for a buy out of rights? To simplify, I will focus on the choice between the status quo, in which the five neighbors retain their right to sue, and the alternative where all five have sold their rights. After selling out their rights, the neighbors will no longer be able to compel the hospital to take care by threatening liability, and hence the hospital will not take care in operating the treatment home. The expected loss to each neighbor if all five sell their rights is the increase in expected harm, which is (.5)$40,000 = $20,000.[45] If the neighbors had not sold their rights, each would have had to pay for his own litigation expenses against the hospital. Assume that the litigation cost is $10,000. Thus, when the neighbor retains the right to sue, he or she would still be burdened by the expected litigation cost, which is (.1)$10,000 = $1000. Hence, the minimum price each neighbor will charge to waive his right to sue the hospital is $20,000 − $1000 = $19,000.

How much will the hospital pay to purchase the legal rights of the five neighbors? Suppose the cost of taking care to prevent harm to the surrounding neighborhood is $65,000 per year. The hospital also faces the risk of litigation even when it is taking all reasonable precautions. Suppose the hospital's cost of litigation is $30,000. Against a single one of the five neighbors, the hospital's expected litigation and liability costs are the sum of the litigation cost ($30,000) and the liability ($40,000), discounted by the ten percent likelihood of occurrence that is, (.10)($30,000 + $40,000) = $7,000. Thus, for the hospital, the expected cost of taking care and of liability is $65,000 + (5)($7,000) = $65,000 + $35,000 = $100,000.

Suppose the hospital adopts a strategy of offering the same price for a waiver to each of the neighbors, and not purchasing any waivers unless all sign. If all sign, the hospital will pay as much as $100,000/5 = $20,000 to each neighbor for a waiver.

In this scenario, the lawyers contacted by the hospital can arrange rights-transfer deals between the hospital and each of the neighbors. For each neighbor, the hospital is willing to pay as much as $20,000 for the waiver, and the neighbor demands at least $19,000, leaving $1,000 of bargaining space.

Since the hospital is not going to pay the lawyer more than the total bargaining surplus of $1,000 per neighbor, the lawyer's compensation from the hospital for securing each waiver is limited by the surplus from the transaction. If the lawyer takes as much as a third of the surplus, the lawyer's compensation per transaction would be roughly $300.

45. This calculation does not subtract off the expected loss that the neighbor bears when he retains his legal right, (.1)($40,000) = $4,000, because that loss will be fully compensated by the court.

However, the lawyers could imagine a different way to arrange the rights buyouts. Suppose the neighbors, aware of the danger presented by the proposed facility, have already begun to approach the local lawyers, seeking advice.

Each lawyer could approach the hospital and say, "If you pay me $15,000 per neighbor that I counsel, I can eliminate the risk of a lawsuit." How so? "I can explain to each neighbor the difficulty of prevailing and the likely cost of litigation. I can also tell them how difficult it will be to find a lawyer in this area who will bring a lawsuit for this sort of case. I can eliminate the litigation risk from 5 lawsuits per year to zero."

If this seems too nefarious to be plausible, a similar proposal can advance through another route. The hospital can approach each of the lawyers for advice and say, "We hope that we can get you to work for us when we arrange this deal to acquire the residence. We intend to pay well, on the order of tens of thousands, and hope to employ several local lawyers to work on parts of this transaction. We anticipate returning to you in the near future. In the meantime, we need to make sure that we can clear regulatory hurdles and any NIMBY-based opposition." This message should be sufficiently clear to signal to the lawyers that they can make more money by staying on the side of the hospital.

Receiving $15,000 in exchange for dissuading each neighbor from going to court is a better deal for the lawyer, and potentially for the hospital, than the alternative of arranging waiver deals with the neighbors. All the lawyer needs to do is sow fear and confusion among the neighbors about their legal rights. In other words, the lawyer can do better financially by attempting to extinguish the legal rights of the neighbors than by attempting to confirm their rights.

Rather than offer "client-centered counseling" to the neighbors, the lawyer can improve his or her welfare, and that of the hospital, by dissuading them from exercising their rights. Of course, such behavior is unethical. The problem is that the behavior is profitable in the short run, and profits tempt ordinary people, including lawyers, to do unethical things.

Is this a special result due to peculiar assumptions in this example? Unfortunately, the answer is no. In legal counseling, the lawyer can generally gain in the short run by selling out his more vulnerable client – the potential victim of a future injury – to the potential injurer. Lawyers' interests are inherently conflicted. The incentives illustrated in this example do not depend on the assumption that a mutually beneficial rights waiver can be arranged for each neighbor. Even if no mutually beneficial rights waiver could be arranged, the lawyer still has an incentive to sell the neighbor out.

Consider this problem from the perspective of attorney conflicts of interest and client autonomy. In this illustration, the efficient, wealth-maximizing solution is for the neighbors to waive their rights to sue in exchange for compensation from the hospital. Now translate this situation into the language of attorney conflict management. This is an optimal setting for the vulnerable client to consent to the conflict – that is, to waive his or her right to prohibit the attorney from

representing him and also representing the hospital. Here, the maximum harm that might result from a conflict consent would be realized if the attorney does everything in his or her power, after gaining consent, to diminish the legal rights of the neighbor and enhance the freedom of the hospital to operate without the threat of legal action from the neighbors. The most that the neighbor might seek in exchange for such a consent is the price the neighbor would put on a waiver of his legal right. Similarly, the most that the hospital will pay for the services of an attorney who can neutralize a prospective opponent is the value to the hospital of a rights waiver from that opponent. Thus, an optimal consent arrangement is feasible. It represents an ideal setting where a lawyer could disclose the conflict, and offer a transaction that leaves both parties, potential victim and potential injurer, better off after the disclosure.

However, even though consent to the conflict of interest is efficient, and the attorney should therefore be able to compensate the neighbor for the value of the rights potentially forfeited, such a deal seems unlikely. The more likely outcome is that the hospital gains ownership of the neighbors' rights without any compensation. Why is this so? Several reasons are obvious.

First, the attorney can make more money by selling out the vulnerable client than by arranging consent with compensation. Given this, an attorney may choose not to bother with disclosure, despite the potential ethical violation, since he could suffocate the neighbor's rights in most cases without any punishment ever arising from it. After all, what is the neighbor going to do: Discover years later that the attorney gave him bad advice and then sue for malpractice or file a grievance with the state bar association? The attorney should be able to couch his deliberately poor advice in a manner that makes it appear, on a later recounting, to be a reasonable effort to describe the law.[46]

Second, if the attorney chooses to disclose the conflict, in most cases that would appear to be all that would happen – just disclosure. Rule 1.4(b) and Rule 1.8(a) require the attorney to disclose the conflict and the risks to the client.[47] Still, the attorney can disclose and leave it to the client to either walk out or continue with the representation (that is, consent to the conflict). If the attorney follows his disclosure with the statement that he would still attempt to give neutral

46. One defense not considered in the text is whether an attorney-client relationship was formed by the initial consultation. I assume the question whether an attorney-client relationship was formed would be answered affirmatively. *See, e.g.*, Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1319 (7th Cir. 1978); Ronald I. Friedman, *The Creation of the Attorney-Client Relationship: An Emerging View*, 22 CAL. W. L. REV. 209, 217 (1986); MODEL RULES R. 1.18.

47. MODEL RULES R. 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."); MODEL RULES R. 1.8(a)(1) ("A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless . . . the transaction and terms on which the lawyer acquires the interest are . . . fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client.").

advice in spite of the conflict, most potential clients would accept that promise and continue without being fully aware of the expected cost of doing so.[48]

Third, even if the attorney actually provides neutral advice, there is the risk that in a later representation of the hospital, the attorney will disclose confidential information from the current client. The attorney can assert at the outset that he would never do such a thing. Would the client then tell the attorney that his word is not reliable? The problem with an assertion by the attorney that he would never disclose confidential information of the client is that it is an unverifiable promise at the time it is made. Moreover, for the client to ask for verification would upset the attorney-client relationship from the start.

Consider another story. Vanessa takes a job in the film industry, working under a producer, Bob, who has a reputation for sexually harassing women. Aware of the reputation, Vanessa approaches a lawyer for advice. She has not been harassed by Bob yet, but she is aware that harassment is a risk of working in Bob's office.[49] She would like to know whether she would have a strong legal claim if she is eventually harassed by Bob in the manner for which he is known. Vanessa would not sell her legal right to sue for harassment to Bob for any price. Bob, on the other hand, would like to purchase Vanessa's legal right. The price that Bob is willing to pay for Vanessa's right is a function of his expected liability if Vanessa sues while he is on his best behavior, added to the value that Bob perceives in being free to harass Vanessa.

No lawyer would be able to arrange a rights transfer in this scenario. However, Bob is willing to purchase Vanessa's legal right, and is willing to pay a substantial sum. Vanessa, on the other hand, is not aware that her right might be up for

48. One risk in this path is that a grievance board may later hold that the consent was ineffective because the attorney failed to disclose sufficiently as required under Rule 1.4(b) and Rule 1.4 comment 7. MODEL RULES R. 1.4(b); MODEL RULES R. 1.4 cmt. 7 ("A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person."). On the other hand, a grievance board may hold that the consent was ineffective because the risk facing the client made the conflict nonwaivable. MODEL RULES R. 1.7(b) ("Notwithstanding the existence of a concurrent conflict of interest . . . a lawyer may represent a client if the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client, the representation is not prohibited by law, the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal, and each affected client gives informed consent, confirmed in writing."). Thus, if a court were to hold that the lawyer could not have reasonably believed that he was able to provide competent representation to each client, the lawyer may be subjected to punishment even though he procured the vulnerable client's consent. However, the sanction imposed on the lawyer still depends on the victim discovering the duplicity and taking action against the lawyer, which is doubtful.

49. This example is based in part on the case of Harvey Weinstein, who employed lawyers to intimidate victims and others who attempted to bring the numerous allegations of sexual assault and harassment against him to light. *See*, *e.g.*, Matthew Goldstein & Adam Liptak, *Weinstein Work Pulls Lawyer Back Into an Ethical Debate*, N.Y. TIMES (Nov. 7, 2017), https://www.nytimes.com/2017/11/07/business/weinstein-lawyer-david-boies.html [https://perma.cc/DD7R-KV9W]; Ronan Farrow, *Harvey Weinstein's Army of Spies*, NEW YORKER (Nov. 6, 2017), https://www.newyorker.com/news/news-desk/harvey-weinsteins-army-of-spies [https://perma.cc/XH5S-GJYR]. One potentially troubling conflict appears in the relationship of Boies's law firm with the New York Times. Boies represented both Weinstein and the New York Times. Allegations suggest that Boies's firm sought information to discredit reporting by the Times. *See* Goldstein & Liptak, *supra* note 49.

bid. If Bob can funnel money into the proper channels, he may be able to reduce the value of Vanessa's right to the point where the risk of it being asserted in the near future is minimal.

Suppose the lawyer Vanessa approaches has Bob as a client or has done work for Bob in the past and may work for him again in the future. If Vanessa were immediately aware of the risk that Bob may bid for her rights through the lawyer, she would not approach the lawyer in the first place. In the worst-case scenario, where all of the entertainment lawyers in the area are connected to Bob, she could bid to regain her legal rights, paying enough to keep her lawyer faithful. Given that the value she puts on her right to sue is nearly infinite, she should win in the bidding war against Bob. However, to describe this Coasean "solution" to the problem of inefficient rights transfer is at the same time to note how unlikely it is to occur.[50] Few prospective victims would consider purchasing a right that they know the law gives them already, and surely not from the lawyer they have approached to help protect the right.

This example offers a potential explanation for part of the function of the nondisclosure agreement in cases involving harassment and other intentional wrongs. The NDA affects the rights not of the current complainant, but of the next one.[51] The injurer has an incentive to purchase the NDA now to reduce the value of the rights of the next victim. The next victim, however, typically is unable to bid against the injurer, and probably would not bid even if he or she were able to do so. When the lawyer arranges the NDA, he is in effect selling part of the value of the next victim's right to the injurer.

Similar conflicts arise over time.[52] Consider the case of two sequential victims, Drew and Michael, of the same injurer, Smith. Lawyer represents Drew against Smith in period 1, and Smith against Michael in period 2. In the future, however, Drew may return to Lawyer to pursue Smith for new injuries or Smith's

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50. Under the Coase theorem, any inefficient allocation of rights can be modified in the direction of efficiency through negotiations among affected parties. *See* Coase, *supra* note 21, at 13. In this "Coasean" solution the prospective victim must purchase the right to be free from harassment, even though the victim, according to the law, already possesses the right. Few victims would consider paying for a right that they know the law gives them.

51. In effect, the payment for silence from the first victim reduces the value of the legal right of the second victim, because the second victim will find it difficult to prove his or her claim against the injurer if it should arise in the future. The second victim is not present at the time of the transaction to bid for the maintenance of his or her right. On hush money and settlements, *see* Andrew F. Daughety & Jennifer F. Reinganum, *Hush Money*, 30 RAND J. ECONOMICS 661, 675 (1999) (concluding that the welfare implications of hush money payments are ambiguous). The problem of a second victim not being present to bid for the maintenance of his or her right is no different, at bottom, from that of the single victim not understanding that his or right is up for bid. In both cases, the potentially efficient transaction cannot occur. On the other hand, as Daughety and Reinganum show, the social welfare case for prohibiting NDAs is complicated. The NDA, as part of a settlement agreement, may make settlement more likely, which in turn may increase both the probability of suit and the resources available to compensate later plaintiffs.

52. Macey & Miller, *supra* note 5, at 976.

associates.[53] Aware of this, Smith has every incentive in period 2 to weaken Drew's legal rights. Smith can do this by purchasing from Lawyer sufficient information on Drew to weaken Drew's right in a situation of potential harm. The important feature here, again, is the asymmetry in willingness to bid. The injurer has an incentive to bid to weaken the rights of the victim at present, while the victim may not even be aware that his rights could be the subject of a trade through the lawyer that he consults.

This example also illustrates in some detail the idea of the lawyer being a repeat player. As a repeat player, the lawyer can foresee and adjust for harms and benefits to other parties not directly involved in the emerging dispute. Repeat institutional players can engage with lawyers to the same effect. Some conflicts of interest arise when the lawyer deals with individual one-shot litigants and repeat players (such as the hospital in the first illustration or the producer/entertainment industry in the second example) over roughly the same period of time.

One response to these stories is to say that instead of creating an ethics problem by violating the conflict of interest provisions, specifically Rules 1.7(a) and 1.8(a),[54] the injurer should just approach the lawyer and offer a side payment to disclose private information of the vulnerable client or to give poor advice to the vulnerable client. Under this alternative strategy, the injurer may have a greater probability of secrecy, since the vulnerable client may find it harder to discover that the injurer had consulted with the lawyer. However, this alternative approach hardly appears to be a safer strategy for the lawyer and injurer. First, it is not clear that such a strategy would enable the lawyer to avoid a finding that he did enter into a representational relationship with the injurer.[55] Second, whatever the lawyer's status with respect to the injurer, he or she clearly violates his or her duty to faithfully represent the vulnerable client, Rule 1.3.[56] Moreover, the decision to accept a side payment from the injurer specifically to harm the vulnerable client obviously creates a basis for tort liability based on theories of

53. Obviously, harassment or discrimination by an employer might fit this story. The first injury might be the harassment and the second defamation based on the employer's statements on the first victim. Another concrete example might be a police officer sued by Drew for battery in period 1, and the same victim suffers new injuries from a second tort in a later period. For a real-world context for this example, *see* PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 52 (2017) (demonstrating the repeated harassment of black males by some police officers).

54. MODEL RULES R. 1.7(a); MODEL RULES R. 1.8(a).

55. *See* Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1320 (7th Cir. 1978) ("A 'client' is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.").

56. MODEL RULES R. 1.3 cmt. 1 ("A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").

negligence, fraud, misrepresentation, or for criminal punishment based on fraud.[57]

In the next part, I develop a formal version of these stories to generate general claims about incentive problems in legal representation.

IV. THE ECONOMICS OF LEGAL RIGHTS

A. THE VALUE OF LEGAL RIGHTS AND LEGAL REPRESENTATION

Although I rely mostly on stories and examples, there is a formal structure underlying the argument of this paper. In this part, I will try to convey the formal structure.

I use the term victim to refer to the party who is at risk of injury, and injurer to the party who is likely to injure the victim. The injurer can reduce the risk of injury to the victim by taking care. The basic terms of the model are as follows:

TABLE 1

L	Loss suffered by victim in the event of an injury
B	Cost to infringer of taking care to avoid injuring the victim
P	Probability of injury to the victim when the injurer does not take care
Q	Probability of injury to the victim when the injurer takes care
C_{pr}	Cost of litigation for the victim (plaintiff) with legal representation
C_{pnr}	Cost of litigation for the victim without legal representation (*pro se*)
C_{dr}	Cost of litigation for the injurer with legal representation
C_{dnr}	Cost of litigation for the injurer without legal representation

I assume that if the victim sues, the victim will win and the court will give him or her an award that fully compensates for the loss – in other words, every injury is an

57. *See, e.g.*, Slotkin v. Citizens Cas. Co. of New York, 614 F.2d 301, 314 (2d. Cir. 1979) (finding hospital, primary insurer, and their counsel liable for fraud in connection with a medical malpractice suit where the policy limit was intentionally misrepresented to induce a premature settlement); Hughes v. Consol-Pennsylvania Coal Co., 945 F.2d 594, 617 (3d. Cir. 1991) (attorney's misrepresentation of facts to plaintiff client to obtain favorable prices for other party and failure to disclose simultaneous representation of both parties in transaction constituted fraud); Ratcliff v. Boydell, 674 So. 2d 272, 280 (4th Cir. 1996) (upholding a trial court finding that attorneys were liable for fraud and intentional infliction of emotional distress, among other violations, for intentionally misrepresenting client's annuity to intimidate client into paying an excessive attorney's fee); Cresswell v. Sullivan & Cromwell, 668 F. Supp. 166, 168 (S.D.N.Y. 1987) (denying law firm's motion to dismiss plaintiff's claim alleging fraud and negligent misrepresentation where law firm allegedly failed to produce documents that could have allowed investors to obtain greater settlements than had been obtained in a separate litigation).

infringement of the victim's right. Thus, the expected payoff from suing is the difference between the loss and the cost of litigation for the plaintiff. Given that the victim will win his lawsuit, I assume that the injurer will prefer to take care in view of the risk of being sued for infringing the victim's right – that is, $B + QL < PL$. Lastly, I assume that the cost of litigation without legal representation (*pro se*) is greater than the cost with legal representation; that is, $C_{pnr} > C_{pr}$ and $C_{dnr} > C_{dr}$.[58]

In the model below, the victim approaches a lawyer for counseling on a matter before any legal claim arises. The lawyer gives him or her an estimate of the likely cost of litigating if he or she is injured, and, if possible, an assessment of the risks he faces. I allow for the lawyer to arrange a rights buy out (waiver) and also consider the lawyer's incentives to bring about the same transfer of rights through selling out the client.

B. ENFORCEABLE LEGAL RIGHT

In examining the value of legal counseling, first consider the case where the victim intends to retain and enforce his legal rights. Doing so allows us to consider a simpler set of circumstances and to get a broader view of the valuation of legal rights. Legal counseling enhances the value of rights by clarifying expected enforcement costs and benefits.[59]

The value of an enforceable legal right is the expected compensation the right holder would receive if the right is violated less the expected cost of enforcing the right. Thus, the value of the enforceable right is the difference between the expected award and the cost of litigation, discounted by the likelihood that an injury occurs in the first place. If the victim does not have legal representation, the cost of enforcing the right *pro se* would be prohibitive in many cases.[60]

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58. This may seem to be a questionable assumption. It may seem cheaper to avoid hiring a lawyer. However, since the risk of losing is higher without a lawyer, any comparison between represented litigation and pro se litigation should control for the probability of success. For any given probability of success, pro se litigation is likely to be more expensive, save for the cases of an individual who is trained in the law (or an extremely quick study on the law) and who possesses enormous free time to prosecute a case. For a discussion of individual experiences with pro se litigation, *see* Donna Bryson, *Study: More help needed for unrepresented in family court*, ASSOCIATED PRESS (June 10, 2016), https://www.kansaslegalservices.org/node/2053/study-more-help-needed-unrepresented-family-court [https://perma.cc/RZQ7-ECKL]. On the costs, success rates, and duration for pro se litigants, *see* Spencer G. Park, *Providing Equal Access to Equal Justice: A Statistical Study of Non-Prisoner Pro Se Litigation in the United States District Court for the Northern District of California in San Francisco*, 48 HASTINGS L. J. 821, 823–33 (1997); Danielle D'Onfro, *Multidistrict Litigation: A Surprising Bonus for Pro Se Plaintiffs and a Possible Boon for Consumers*, SSRN 20–24 (March 3, 2010), https://ssrn.com/abstract=1563741 or http://dx.doi.org/10.2139/ssrn.1563741 [https://perma.cc/4VM6-CYK4]

59. Steven Shavell, *Legal Advice about Contemplated Acts: The Decision to Obtain Advice, Its Social Desirability, and Protection of Confidentiality*, 17 J. LEGAL STUD. 123–50 (1988).

60. To illustrate, suppose the cost to the victim of proceeding with his claim *pro se* is $110,000, which represents the cost to the victim of taking time off from work to learn the intricacies of the legal system to prosecute his claim, and the inferior value of his output. Suppose the lawyer will bill the victim $10,000 for prosecuting the claim. Suppose the probability of an injury is .25 given that the injurer is taking care to avoid an infringement. Given this, the value of legal counseling is to the victim is .25($110,000 - $10,000) = $25,000. Using Table 1, the cost-reduction benefit of legal counseling is $QCpnr – QCpr$.

In addition to correcting the victim's perceptions of the cost of enforcing rights, the lawyer may correct the victim's misimpressions of the probability of future injury through an infringement of a right and the likely compensation award.[61] The value of legal counseling therefore consists of enforcement-cost reduction and predictive components. Since these are valuable pieces of information, lawyers may justifiably charge substantial fees for their services.

C. LEGAL RIGHTS AND BURDENS

This section discusses the value of legal rights and legal burdens. The enforceable right just considered in the previous section does not reflect the full value of a legal right. The full value of a right is the price a victim would demand to go without the right. Unlike the valuation of a retained and enforceable legal right, the valuation of a legal right considers trading it away – that is, extinguishing the right in exchange for compensation.

If the victim did not have a legal right, the injurer would have no financial reason to take care to avoid injuring him. The value of a legal right will therefore reflect the difference in the victim's welfare if moved from a regime of possessing the right to one of not possessing the right. The difference in expected harm when the victim moves from having the legal right to not having the right is the difference in expected harm to the victim when the injurer does not take care to avoid injury and the expected harm when the injurer takes care to avoid injury. Since the victim receives compensation when he or she retains the right, his or her expected harm in the latter case is just the cost of enforcement.

It follows that the value of a legal right is the difference between expected harm in the absence of the right and the expected cost of enforcing the right. From Table 1, the value of the victim's legal right is $PL - QC_{pr}$. Let the likelihood of an injury to the victim when the injurer does not take care be .75 (and .25 when the injurer takes care), and the loss be \$100,000. The value of the victim's right (at risk of loss) is (.75)(\$100,000) – (.25)(\$10,000) = \$72,500.[62]

Legal representation enhances the overall value of rights in the same manner as it enhances the value of retained or enforceable rights. Legal representation reduces the cost of enforcement and clarifies the risks of proceeding without a right.

Victims' legal rights burden injurers. When the threat of assertion is sufficient to induce the injurer to take care, as assumed here, the legal burden on the injurer when the victim retains his or her right is the sum of the cost of taking care and of

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61. This harm-predictive component of advice is examined in Steven Shavell, *Legal Advice about Contemplated Acts: The Decision to Obtain Advice, Its Social Desirability, and Protection of Confidentiality*, 17 J. LEGAL STUD. 123–50 (1988).

62. If the victim's right were not at risk of loss—that is, if the right remains enforceable—then the value would be (.25)(\$100,000) – (.25)(\$10,000) = \$22,500. The victim puts a higher value on the right at risk because transferring such a right immediately results in a greater probability of harm. Given this greater probability of harm, the victim demands more in compensation to accept the risk.

the expected costs of liability and litigation, which from Table 1, is $B + QC_{dr} + QL$. This expected burden is the maximum that the injurer would pay to gain ownership and extinguish the victim's right.

Obviously, the services that a lawyer provides by counseling a victim can also be provided to an injurer. Holding fixed the quality of the outcome, the cost to the injurer of proceeding without a lawyer is likely to be higher than the cost of defending with a lawyer.[63] The lawyer may also provide the same predictive benefit by correcting misimpressions of the likelihood of or the magnitude of an award from a lawsuit.[64]

D. WAIVER OF LEGAL RIGHTS

If the victim bargains with the injurer, the two could reach an agreement to extinguish the victim's right through a waiver agreement. This section discusses how waivers factor into the economic analysis. The parties will reach a waiver agreement, if the value that the victim places on his or her right is less than the maximum the injurer will bid to extinguish the right, $PL - QC_{pr} < B + QC_{dr} + QL$, or equivalently, $(P - Q)L - B < Q(C_{pr} + C_{dr})$.

If, to the contrary, the victim's demand price is greater than the injurer's bid, the two will not reach an agreement to extinguish the right. The condition under which victim and injurer reach an agreement to extinguish the victim's right is equivalent to saying that *the social (or deterrence) benefit of having the right is less than the social cost of enforcement*.[65] The legal rights game is not worth the candle.

Another way of approaching the rights waiver is by thinking of the waiver transaction surplus, that is, how much wealth could be created by the parties signing a waiver agreement. The waiver deal surplus is positive only when the victim's demand price for the right is less than the injurer's bid. The waiver deal surplus is the difference between the injurer's bid and the victim's demand, which is greater than zero only when the waiver enhances the joint wealth of injurer and victim. This is the sum from which the lawyer must seek his or her compensation if he arranges a transaction with the injurer with respect to the victim's right. Obviously, the waiver deal surplus is negative, and no waiver deal will be arranged, if the victim values his or her legal right more than the injurer is willing to pay for it.

All of this is in accord with the claim that *in a market with no transaction costs, legal rights will be waived when and only when the social value of litigation is*

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63. Again, the injurer might be able to represent himself more cheaply and suffer a bad outcome. For any given outcome, then, legal representation is cheaper. For the infringer, the cost-reduction component of legal counseling $Q(Cdnr - Cdr)$.

64. *See* Shavell, *supra* note 61, at 135.

65. The left-hand side is the social gain from rights enforcement and the right-hand side is the social cost of enforcement. *See* Keith N. Hylton, *Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis*, 8 S. Ct. Econ. Rev. 209, 213 (2000).

negative.[66] Thus, in a zero transaction cost setting, no welfare-reducing litigation will occur.[67] This proposition is consistent with the Coase Theorem, which holds that in a setting of zero transaction costs, all resources will be allocated efficiently. The proposition contrasts with one due to Shavell,[68] that private and social incentives to litigate diverge.

We can therefore contrast two propositions on legal rights. The "incentive divergence theorem" (Shavell) says that private and social incentives to litigate diverge, and as a result, victims may sue even when society would be better off if suit were barred.[69] The contrasting "waiver theorem" holds that if parties can negotiate waivers of legal rights, the incentive divergence problem will not be observed. Individuals will retain the right to sue, and therefore litigation will be observed, only when litigation is socially efficient. Both claims are related to the Coase Theorem because of the importance of transaction costs to each.[70]

E. CONFLICT OF INTEREST

The conflict of interest poses a risk to the victim the moment he or she seeks advice from the lawyer. With some probability, the lawyer will engage in conduct that puts the victim's right at risk by severely reducing or eliminating the value of the victim's right. The lawyer could persuade the victim that he or she has no legal rights that a court would recognize, that the cost of enforcement is prohibitively high, or the lawyer could pass confidential information from the victim to the injurer to weaken the victim's right to the point of worthlessness.

The conflict of interest poses the same risk to the victim as does the waiver, though with less clarity. The conflict implies a "probabilistic waiver." This section shows that the reasoning of waiver contracts analysis applies equally to conflicts of interest.

Specifically, if the probability of expropriation through attorney conflict of interest is ascertainable, the victim would seek compensation equal to his or her waiver demand price discounted by the probability of expropriation. Thus, if the probability of expropriation is one half, the victim will demand half of his waiver

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66. *Id.* at 220.

67. *Id.* at 220–21.

68. Shavell, *supra* note 13.

69. Shavell, *supra* note 13, at 336.

70. I have assumed that the victim's rights are protected by the law. In theory, Coasean bargaining can occur even if the victim has no legal rights. If the victim has no rights, then in the Coasean model he can negotiate with the injurer to take care. If the injurer takes care, he bears the burden of care without the risk of litigation because the victim has no right to sue. The victim gains by the avoided harm, which is the difference in the expected harm levels. So, if the avoided harm is greater than the burden of care, the victim has an incentive to pay the injurer to take care. Alternatively, suppose the victim does have the legal right and the cost of litigation is so high that the compensation amount is less than the litigation cost. The victim's right is meaningless here because he would never go to court. In the hypothetical zero transaction cost Coasean setting, the victim can purchase care in a bargain with the injurer. Needless to say, this illustration of the Coase Theorem also reveals its limitations. Has anyone observed a case where someone without legal rights has bargained for some degree of respect from others? How would a person without legal rights persuade a person with legal rights to bargain?

demand price as compensation for the risk of expropriation due to conflict. The injurer, on the other hand, knows that the value to them of the lawyer's conduct is simply one-half of his bid for the victim's right. Thus, if the two parties share the same prediction of the likelihood of expropriation, a compensated conflict waiver will take place when and only when a full waiver of legal rights would be welfare-enhancing as between the two parties.[71] Welfare-reducing conflicts of interest would occur only when transaction costs would prevent the relevant principals from entering into a waiver agreement.

The probability of expropriation through conflict may be perceived differently by the victim and by the injurer. Indeed, if the attorney under-reports the risk of expropriation to the victim, so that the victim believes that the probability of expropriation is lower than it really is, the victim will consent to a conflict waiver even when such a waiver would reduce his or her welfare.[72] Of course, aware of this risk, the victim would assume the worst, and expropriation through conflict would occur with probability one.

F. SELLING OUT

The foregoing assumes that the lawyer negotiates in good faith for a conflict waiver from the victim. It assumes that the lawyer discovers the injurer's willingness to pay for a waiver and then arranges for compensation from the injurer to the victim.

However, another other option for the lawyer is to accept payment from the injurer, based on the injurer's bid for the victim's right, and then extinguish the victim's claim without compensation to the victim. The lawyer can extinguish the right by confusing the victim about the validity of his or her rights or by passing the victim's confidential information on to the injurer. This section arrives at the conclusion that lawyers are incentivized to sell out their clients.

In the absence of continual monitoring by the victim, the lawyer has an incentive to take the payment from the injurer. If the lawyer takes the payment, the lawyer gets as much as the injurer's maximum bid to extinguish the victim's right. If the lawyer gets the parties together for a deal, the lawyer gets a portion of the waiver deal surplus. However, the waiver deal surplus is just the difference between the injurer's bid and the victim's demand price for his or her own right. Thus, the injurer's bid will exceed the waiver deal surplus as long as the victim

71. Here are the details of this argument. Suppose W is the probability of expropriation through a conflict. A conflict waiver would occur when and only when $W(PL - QCpr) < W(B + QL + Qdr)$.

72. If the lawyer's report to the victim of the probability of expropriation is Wv and the real probability is W, where $Wv < W$, then compensated conflict-of-interest waivers will take place when $Wv(PL - QCvr) < W(B + QL + Qt)$. Such waivers are efficient only if $PL - QCvr < B + QL + Qt$. Clearly, the victim may waive even though it reduces his welfare. One could argue, as I suggest in the text above, that this analysis is flawed because it assumes the probability of expropriation is exogenous when in fact it is controlled by the injurer. Thus, any agreement based on a fixed probability less than one would simply encourage the injurer to increase the probability of expropriation. This suggests that the only plausible agreement is one that assumes the worst—that is, that the injurer will expropriate the victim.

puts a positive value on his or her legal right.[73] The only time the waiver deal surplus will be greater than or equal to the injurer's bid to extinguish the right is when the victim puts a negative or zero value on his or her right.

Put another way, as long as the victim places a positive value on his or her legal right, the lawyer has an incentive to sell him out. Here is the general statement:

Selling Out: For any legal right that the victim values, the lawyer can always do better by selling out the victim to the injurer than by arranging a mutually beneficial rights waiver. The only case in which the lawyer could not gain by selling out the victim is when the victim is indifferent to or burdened by the right.

The foregoing argument assumes that the value of the waiver deal is positive, which means that if the victim and injurer could get together to bargain, a waiver agreement would be reached. This is the best-case scenario for the victim. If the value of the waiver deal is negative, meaning that there is no potential for a wealth-enhancing waiver, then again the lawyer's best option is to take the direct bid from the injurer.

In the case where the value of the waiver deal is negative, the victim can at least potentially pay the lawyer a sufficient sum to ensure the lawyer's fidelity. But there are several obstacles to this Coasean solution to the sell-out problem. First, it conflicts so greatly with background legal rights that it would strike most victims to be preposterous. In the Coasean bargain where the victim pays the lawyer to be faithful, the victim is, in effect, compelled by the lawyer to purchase back his or her legal right after he or she reveals that it is at risk to the lawyer. No victim who believes that the law protects their right is likely ever to engage in such conduct. The hypothetical Coasean bargain to secure a legal right requires a high degree of cognitive dissonance on the part of the victim: he or she must consult his lawyer in the confidence that the lawyer will be his or her agent, and at the same time negotiate for the loyalty of the agent. Such cognitive dissonance is a general barrier to Coasean bargaining.[74]

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73. For a more detailed statement, consider the following. If the lawyer takes the payment from the injurer, he gets as much as the injurer's maximum bid, $QL + QCdr + B$. If he gets the parties together for a deal, he gets a portion of the waiver deal surplus: $QCpr + QCdr - PL + QL + B$. Comparing the two, the direct bid from the injurer exceeds the deal surplus if $QL + QCt + B > QCvr + QCt - PL + QL + B$, or, equivalently, if $0 > QCvr - PL$. Since the last term is negative, the lawyer's best option is to take the side payment from the injurer. The only time the lawyer would prefer the waiver deal over the side payment is when the victim places a negative value on his right.

74. *See generally* George A. Akerlof & William T. Dickens, *The Economic Consequences of Cognitive Dissonance*, 72 AM. ECON. REV. 307 (1982) (explaining the relationship between economics and cognitive dissonance). The concept of cognitive dissonance has been mentioned before in the legal ethics literature. *See* Simon, *supra* note 2, at 1138–40. However, in this previous application of the term, the problem identified is the psychological strain on a lawyer who is required by the law to distance himself from the client's goals and to view them objectively. Such dissonance, it is argued, may prevent the lawyer from advocating aggressively on behalf of the client. The dissonance problem I refer to here, by contrast, results in a psychological burden on the client, who must, under Coasean bargaining, trust the lawyer to some degree but at the same time be prepared to bid for the lawyer's fidelity.

Second, even if a victim were willing to engage in such conduct, he or she would have no way to find out how much he or she should pay. The injurer, on the other hand, would know precisely how much they should bid for the victim's right. The only case of relative clarity would be the worst-case scenario where the lawyer tells the victim-client that he or she intends to expropriate his or her right by selling it to the injurer; for example, by selling confidential information on the victim to the injurer. Even in this case, full clarity would require the lawyer to disclose not only his or her intention to sell the client out, but also a reasonably precise estimate of the harm that might befall the victim as a consequence.

Finally, consider the case where the victim views the right as a burden rather than a benefit. This is the only case where the lawyer could do better financially by arranging the waiver transaction rather than by selling out the client. The reason is that the waiver deal surplus is larger than the injurer's willingness to bid in the case where the victim would like to unload the right and the injurer is willing to purchase it. It is as if a seller of a coffee mug would pay $1 for someone to take it (perhaps because he needs to get rid of the mug and cannot simply discard it), and the buyer would be willing to pay $2 for the coffee mug. The deal surplus in the transaction for the mug would be $3, exceeding the valuation of the buyer.

How could the victim view a legal right, ostensibly awarded in his or her favor, as a burden? For this to be true, the victim would have to anticipate the right being asserted even though the value to him or her is negative. However, as a general matter, no victim would anticipate asserting a right when the value is negative. In most cases, then, the lowest value that a legal right will have will be zero, because the right is an option exercised in the discretion of the victim.[75] This implies that the instances where the lawyer can do better financially by arranging the waiver transaction than by selling out the victim are rare.

Negative rights valuations should be rare indeed, but can exist. Take the case where the victim may be part of a future class action. The victim does not control the exercise of the right to sue; it is no longer an option exercised at the discretion of the victim. The class lawyers arrange a settlement where the benefit to the victim is negligible, but the cost of the class action is imposed on the victim. The best illustration is *Hoffman v. BancBoston Mortg. Corp.*,[76] where legal fees substantially exceeding the gain of many class members were deducted from each

75. *See, e.g.*, Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 STAN. L. REV. 1267, 1275–76 (2006) (presenting real option theory to explain how litigants choose whether or not to continue with a lawsuit); Bradford Cornell, *The Incentive to Sue: An Option-Pricing Approach*, 19 J. LEGAL STUD. 173, 175–76 (1990) (applying the stock option-pricing model to litigation). Because of the divisibility of legal costs, some negative-value lawsuits (not the same as negative-value rights) may be brought to court. *See* Lucian A. Bebchuk, *A New Theory Concerning the Credibility and Success of Threats to Sue*, 25 J. LEGAL STUD. 1, 15 (1996) (describing how divisible litigation expenses encourage defendants to settle negative-value cases). *See generally* Alon Klement, *Threats to Sue and Cost Divisibility Under Asymmetric Information*, 23 INT'L REV. L. & ECON. 261(2003) (stating that under informational asymmetry, defendants can still deter negative-value cases even when litigation expenses are finely divided).

76. No. CV-91-1880, 1994 WL 17094767 (Ala. Cir. Ct. Jan. 24, 1994).

class member's home mortgage escrow account.[77] In a case like *Hoffman*, the victims, fully informed of the sequence of events that would unfold, would pay to extinguish their right to be a member of the *Hoffman* class action. BancBoston, on the other hand, would have been willing to purchase the rights from the victims.

Negative-value legal rights are rare, but the existence of the class action, or any mechanism that takes away the victim's control over the decision to sue while still leaving him or her potentially responsible for litigation costs (e.g., shareholder derivative actions),[78] can generate such rights. For negative-value rights, the lawyer's incentive to sell out the client is weaker than the incentive to arrange a mutually beneficial waiver. Market forces fully support ethical conduct in the presence of negative-value rights.

G. WELFARE CONSEQUENCES

The welfare consequences of selling out are likely to be negative. I noted earlier that the incentive to sell out the vulnerable client is substantial regardless of whether the surplus from a waiver agreement is positive or negative. Still, when the surplus is positive, one might suggest that the welfare consequence of selling out is positive, because the transfer of the victim's legal right moves an asset from one individual to another who puts a greater value on it. This is efficient in the Kaldor-Hicks sense, because the winning party could in theory compensate the losing party and all would be better off in the end as a result of the transaction.[79] This conclusion is premature, for two reasons.

First, in the rights transfer game analyzed in this part, there is nothing to guarantee that the lawyer would sell out the client when and only when the waiver deal surplus is positive. Since the lawyer could just as easily sell out the client when the waiver deal surplus is negative, there is no reason to give greater credit to the efficient transfer case than the inefficient transfer case. The theoretical Kaldor-Hicks welfare gain would in reality be a matter of speculation.

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77. *Id.* at *6. For a thorough discussion exploring the implications for class action settlements, *see generally* Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051 (1996).

78. This can be viewed as a problem of "agency costs" in the sense that the incentives of lawyers may differ from those of the victims in general. *See generally* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991) (explaining the relationship between agency costs and class and shareholder derivative litigation); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986) (explaining various private and social incentives for parties and attorneys to litigate class and derivative actions).

79. A move from A to B is Kaldor-Hicks efficient if the winners *could* compensate the losers and all will be better off. This is somewhat less restrictive than Pareto efficiency, which requires that the move from A to B leaves no one worse off and at least one person better off. On Kaldor-Hicks and other concepts of efficiency, *see, e.g.*, RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 48–87 (1981); Kenneth J. Arrow, *Little's Critique of Welfare Economics*, 41 AM. ECON. REV. 923, 928–32 (1951).

Second, even in the cases of efficient transfer, the victim still loses an asset without gaining compensation for it. If the victim makes investments in the belief that they will retain their legal rights, they will eventually be disappointed to discover that they do not have the right. The realization of the precariousness of legal rights would dampen incentives to make investments that rely on the existence of those rights.[80] For example, investments in property are unlikely to be made by possessors who fear that the property may be expropriated without compensation. These investment-dampening effects are likely to be at least as important in the long run than any potential momentary gain from transferring assets to higher-valuing users.

H. ILLUSTRATION 1: PATENT CIRCUMVENTION

This section uses examples to demonstrate the economic analysis set forth above. Consider the following application of this model, based on *Andrew Corp. v. Beverly Manufacturing*.[81] Lawyer represents Andrea, a patentee who Lawyer guided through patent prosecution. While still representing Andrea, Lawyer advises Brent on how to avoid a finding of infringement of Andrea's patent. In particular, Lawyer provides an opinion letter stating that Brent's invention does not infringe Andrea's patent.

If every patent were a property right with clear boundaries, Lawyer would inflict no harm on Andrea by advising Brent of the boundaries of Andrea's patent. Everyone would know what constitutes infringement of Andrea's patent under these conditions, and Lawyer could not possibly harm Andrea by pointing out the obvious to Brent. Brent would have received the same advice from any other lawyer. There would be no sense in which confidential information was shared with Brent, or any danger that Lawyer's continuing representation of Andrea would be compromised.

However, many patents have unclear or "fuzzy" boundaries.[82] For such patents, a lawyer who represents the patentee could inflict severe harm on the patentee by using information gleaned from their representation of the patentee to inform a rival of the varying strength of Andrea's patent claims.

Suppose the patent can be broken down to two claims X and Y. Claim X is unambiguously valid. Claim Y is most likely invalid, but sufficiently unclear that most rivals to the patentee would fear an infringement claim based on Y. In the

80. *See, e.g.*, Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214 (1967) (defining "demoralization costs" as, in part, incentive costs arising from the failure to secure property rights); Keith N. Hylton, *Property Rules and Liability Rules, Once Again*, 2 REV. L. & ECON. 137, 140–43 (2006) (emphasizing incentive costs of failing to protect property rights as reason property rules dominate liability rules).

81. 415 F. Supp. 2d 919 (N.D. Ill. 2006). The account here is based loosely on *Andrew Corp*. In the actual case, the facts showed that no lawyer for the firm worked on both the Andrew and Beverly matters.

82. *See generally* JAMES BESSEN & MICHAEL J. MEURER, PATENT FAILURE: HOW JUDGES, BUREAUCRATS, AND LAWYERS PUT INNOVATORS AT RISK (2008).

absence of Lawyer's advice to Brent about Andrea's patent, Brent would avoid taking actions that might be deemed to infringe either claim X or Y.

The substitute created by Brent is not exactly the same product as Andrea's. Brent copies (that is, implements the information revealed by) component Y and steers clear of X. But this is enough to provide a reasonable substitute for a large portion of Andrea's intended market.

Lawyer, having Andrea as a client, is in a unique position to know the likely validity of X and Y, and to counsel Andrea on both matters. He is therefore in a unique position to provide Brent with the sort of advice that would encourage him to move forward with his substitute technology, with minimal fear of losing a patent infringement lawsuit.

Suppose the expected loss to Andrea resulting from Brent's launch of a substitute is $1 million. Andrea could approach Lawyer and offer to pay as much as $1 million for Lawyer not to represent Brent or a similar rival. If the expected gain to Brent is only $200,000, Lawyer would take the payment from Andrea and refuse to counsel Brent.

Suppose, instead, that the gain to Brent is $2 million, because he is a more efficient implementer of the information revealed by the patent claims than Andrea.[83] In this scenario, Lawyer could arrange a compensated conflict waiver that leaves both parties better off. Brent could pay the lawyer $1.2 million, to be transferred by the lawyer to Andrea.

Two observations follow. First, it seems unlikely that a patentee would consider approaching his or her lawyer to offer a payment in exchange for the lawyer's promise not to reveal the weaknesses in the patentee's patent claims to a competitor. Even if the lawyer reveals that they are thinking of representing a potential competitor to the patentee and that there might be a potential conflict, the patentee is unlikely to bid for the lawyer's fidelity. I have suggested that cognitive dissonance may be the simplest account.

Second, if the lawyer follows the requirements of the ethics rules, and discloses the conflict and proposes a written waiver, it still seems that a great deal could go wrong. The lawyer is required to disclose the potential harm to the patentee,[84] but the lawyer could misrepresent the degree of potential harm. The lawyer could take the position ex post that they did not know at the time they sought the waiver from the patentee that the other client would seek information on the varying

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83. Of course, taking overall social welfare into account, the lawyer's disclosure of the patentee's private information may enhance society's wealth by limiting the scope of a patent monopoly. This is not clear. A fuzzy patent boundary may lead to error on both sides of the boundary. If the lawyer's disclosure limits the patent's scope excessively, then the disclosure may reduce long-term welfare by reducing innovation incentives. In general, a broader perceived scope provides stronger innovation incentives. *See, e.g.*, Robert P. Merges & Richard R. Nelson, *On the Complex Economics of Patent Scope*, 90 COLUM. L. REV. 839 (1990).

84. MODEL RULES OF PROF'L CONDUCT R. 1.4(b) (1983) [hereinafter 1983 MODEL RULES] ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."); 1983 MODEL RULES R. 1.4 cmt. 7 ("A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person.").

strengths of the patentee's claims. It would be practically impossible to determine whether such an explanation is valid. Knowing the difficulty of determining the validity of such an explanation, there would be little to prevent the lawyer from selling out the patentee even when formally following the ethical rules.[85]

Third, suppose the lawyer discloses the conflict and proposes a written waiver, with a full disclosure of what he intends to reveal to the competitor. The lawyer could minimize the appearance of harm by advising the patentee that Claim Y is objectively weak and that the patentee is unlikely to prevail in an infringement action based on Y.

Summing up, the lawyer is in a good position to minimize the patentee's perception of harm from the conflict, and at the same time maximize the perception of gain to the competitor. Under these conditions, selling out the patentee could be the most profitable path for the lawyer.

I. ILLUSTRATION 2: TAKING PROPERTY OR STEALING A BUSINESS, THROUGH LEGAL REPRESENTATION

Andrew is bidding on commercial property. Lawyer represents Andrew and has invested in Brad's firm, a competing bidder for the same property. Andrea loses the bid and Brad wins, mostly from taking advantage of confidential information Lawyer has taken from Andrew and passed on to Brad.[86] The confidential

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85. Of course, the rules clearly regulate the lawyer's conduct on the matter of gaining consent. The rules require informed consent to a conflict waiver. *See* 1983 MODEL RULES R. 1.0 (informed consent is defined as an "agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct"); 1983 MODEL RULES R. 1.7(b) ("Notwithstanding the existence of a concurrent conflict of interest . . . a lawyer may represent a client if the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client, the representation is not prohibited by law, the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal, and each affected client gives informed consent, confirmed in writing."). However, I am arguing that the incentives of the lawyer are not in alignment with the Model Rules, and therefore the risk remains that the lawyer will evade both the letter and spirit of the consent rules.

86. The Model Rules explicitly address this conflict. 1983 MODEL RULES R. 1.8(b) ("A lawyer shall not use information relating to representation of a client to the disadvantage of the client."); 1983 MODEL RULES R. 1.8 cmt. 5 ("If a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase."). The same issues obviously arise when the lawyer represents both sides of a transaction. *See, e.g.*, Hughes v. Consol-Pennsylvania Coal Co., 945 F.2d 594, 617 (3d. Cir. 1991) (finding attorney's misrepresentation of facts to client A to obtain favorable prices for client B and failure to disclose simultaneous representation of both client A and client B in transaction constitutes fraud); *In re* Dolan, 384 A.2d 1076 (N.J. 1978) (reprimanding attorney for representing both municipal agency and developer in real estate transaction where developer purchased land from agency and "work of the developer involve[d] a probability of some municipal action such as zoning applications, land subdivisions, [and] building permits."); Baldasarre v. Butler, 604 A.2d 112 (N.J. Super. Ct. App. Div. 1992) (holding that attorney engaged in conflict of interest by representing both vendors and purchaser and that attorney committed both legal and ethical fraud in failing to reveal existence of agreement under which purchaser was to assign his interest to the attorney). In a notable case, an attorney exploited confidential information obtained during his capacity as a U.S. Department of Justice attorney regarding more than forty whistleblower fraud cases to sell to companies under federal

information might consist of plans or knowledge Andrew has of investments in or near the property.

Given his information on the value of the property, Andrew would pay as much as $2 million for ownership. However, he reasons that a bid of only $1 million should be sufficient to obtain ownership of the property. Brad, aware of Andrew's confidential valuation, values the property at $2 + \Delta$ million, where Δ is the additional amount of value that Brad thinks can be gained from the property. Here, Δ can be positive or negative – that is, it may reflect additional value that Brad can derive or a lower valuation that would result from Brad's ownership.

The legal right transferred here is Andrew's confidential information on the value of the property. The loss to Andrew from the transfer is $1 million (the difference between his valuation and his bid). The gain to Brad from the transfer is $2 + \Delta$ minus the bid price entered by Brad. If the differential is positive, it is possible that Brad could compensate Andrew for his loss through a compensated consent to the conflict. On the other hand, if the differential is zero or negative, then an efficient transaction with respect to the right cannot be arranged between the parties.

Whether the differential is positive or negative, the lawyer's incentives are clear. If the lawyer simply transfers the information to Brad and takes a stake in the property, the lawyer gets a share of the surplus going to Brad. If the lawyer negotiates a compensated waiver, the lawyer can gain a share of the surplus differential, which will be smaller than the total surplus to Brad. As in the previous application, the more profitable scenario for Lawyer involves Lawyer taking a stake directly in Brad and transferring Andrew's confidential information.

The same pattern plays out where the lawyer takes over a business of its former client by soliciting the client's customers directly, as in *David Welch Co. v. Erskine & Tulley*.[87] Welch had developed a specialty in collecting delinquent employer contributions to certain employee benefit trust funds. The law firm, Erskine & Tulley, had been an agent of Welch until their relationship was terminated. After the termination, Erskine & Tulley developed the same business as Welch by soliciting its customers, using information that it had gained by serving as lawyers for Welch.[88]

If the lawyer is a more efficient operator of the business, a mutually beneficial transfer can be arranged between the parties. Erskine & Tulley, if more efficient

investigation. *See* Spencer S. Hsu, *Ex-Justice Dept. lawyer caught in 'most serious' internal corruption case in recent memory*, WASH. POST, (Mar. 8, 2018), https://www.washingtonpost.com/local/public-safety/ex-justice-dept-lawyer-caught-in-most-serious-internal-corruption-case-in-recent-memory/2018/03/08/560071e2-2262-11e8-86f6-54bfff693d2b_story.html?noredirect=on&utm_term=.09188456e13a [https://perma.cc/TJ9Y-M2LJ].

87. 203 Cal. App. 3d 884 (1988).

88. *Id.* at 892 (finding that Erskine & Tulley owed a duty to Welch to refrain from acquiring any pecuniary interest involving collection work for trust funds in question unless Erskine & Tulley first notified and obtained Welch's informed consent).

than Welch, could have bought out Welch's business, leaving both parties better off. However, the law firm could do better financially by using the confidential information from its client to approach the client's customers directly.

J. CONSTRAINTS ON SELLING OUT

This section focuses on the constraints of selling out. There are mechanisms that regulate the sell-out problem. The foregoing analysis does not consider any of them. Still, the value of an analysis that ignores regulatory mechanisms is that it reveals the underlying incentives that need to be regulated and suggests the difficulties in designing an effective regulatory system.

Reputation is one mechanism that polices the conduct of lawyers.[89] A lawyer who regularly sold out his clients would gain a reputation for doing so and lose business. But this points in the opposite direction too: there may be conditions under which the reputation market is insufficient to control selling out. The lawyer may perceive that the information on the lawyer's propensity to sell out clients may reach them too late for them to do anything about it. The lawyer may perceive the short-run profits from selling out to be greater than the distant and uncertain penalties generated by his unethical conduct.

Legal malpractice law, or breach of fiduciary duty,[90] provides another constraint. A client could sue a lawyer for malpractice (or an intentional tort) if the lawyer intentionally gave poor advice or transferred confidential information to an adversary without gaining the client's consent.[91] Rule 1.6 prohibits such a transfer of information. However, the negligence rule is sufficiently flexible that even in the absence of any clear ethics rules governing the lawyer's conduct in a specific case, the facts and circumstances could provide a sufficient basis for a negligence claim against the lawyer.[92] Again, this constraint's effectiveness

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89. Fred C. Zacharias, *Effects of Reputation on the Legal Profession*, 65 WASH. & LEE L. REV. 173, 176 (2008) ("Because of the importance of lawyers' reputations in the minds of prospective clients, lawyers' desires to maintain specific types of reputation have significant impact on the implementation of professional rules and other legal constraints on lawyer behavior. To the extent reputation is dependent on the way lawyers behave, or are likely to behave in particular contexts, that affects the manner in which lawyers comply with the constraints.").

90. One could easily treat these two theories (negligence and fiduciary duty breach) as essentially the same, or as two species of negligence claim. *See* Charles W. Wolfram, *A Cautionary Tale: Fiduciary Breach as Legal Malpractice*, 34 HOFSTRA L. REV. 689, 716 (2006).

91. *See* MODEL RULES R. 1.6(a) ("A lawyer shall not reveal information relating to the representation unless the client gives informed consent."); *see also* U-Haul Co. of Nevada v. Gregory J. Kramer, Ltd., No. 2:12-CV-231-KJD-CWH, 2013 WL 4601361 (D. Nev. Aug. 28, 2013) (analyzing action brought by former client against their attorney for attorney's improper use of confidential information acquired during prior representation that led to client's premature settlement); Hughes, 945 F.2d at 617 (finding attorney liable for fraud where he intentionally gave client misleading advice in a transaction); Cameron & Mittleman v. Chapman, 2010 WL 909137 (N.J. Super. Ct. App. Div. Mar. 17, 2010) (finding that two law firms were jointly liable for negligence in handling transaction between buyer and seller where the Plaintiff alleged one of the firms deliberately concealed the risk to the seller, which resulted in seller's loss of royalties).

92. *In re Disciplinary Action Against McKechnie*, 656 N.W.2d 661, 668–69 (N.D. 2003) ("We recognize the important distinction between conduct by an attorney that is simply negligent and conduct that rises to the

depends on whether the client discovers the selling out in time to bring a malpractice suit against the lawyer, and whether the client can present a strong case on causation grounds.

The rules of ethics obviously constrain the lawyer. The problem is in figuring out how the rules are enforced. They could be enforced directly through malpractice litigation. If a victim is harmed as a result of the lawyer's selling out (in this case by disclosing information on the client), the lawyer is clearly in violation of Rule 1.6, which prohibits disclosure of confidential information without the consent of the client.[93] While such a violation may not generate a per se malpractice theory for the victim, the victim may use the ethical rule violation as evidence, and sometimes a rebuttable presumption, of malpractice.[94] Another route to enforcement is through an appeal to the ethics board of the relevant state, to seek to have the lawyer disbarred.[95]

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level of an ethical violation . . . not every negligent act violates an ethical rule."); Florida Bar v. Neale, 384 So.2d 1264, 1265 (Fla. 1980) (discussing that where attorney learned an important fact late in the proceeding and then overlooked the statute of limitations on client's statutory remedy, thus preventing subsequent suit, attorney was negligent but not sufficiently so to warrant disciplinary action). Clients who bring legal malpractice actions against their attorneys have to prove that the attorney had "a duty 'to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise,' (2) that the [attorney] breached that duty, (3) that the breach proximately caused the injury, and (4) that actual loss or damage resulted from the negligence." Jones v. Westbrook, 379 P.3d 963, 967 (Alaska 2016).

93. 1983 MODEL RULES R. 1.6(c) ("A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.").

94. As a general matter, violation of an ethical rule does not create a per se tort liability. *See* 1983 MODEL RULES pmbl. 20 ("Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached."). However, violation of an ethical rule can be used as evidence of a breach of the standard of care or to create a rebuttable presumption of such a breach. *See* 1983 MODEL RULES pmbl. 20 ("Since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct."); Nicola A. Boothe-Perry, *No Laughing Matter: The Intersection of Legal Malpractice and Professionalism*, 21 AM. U. J. GENDER SOC. POL'Y & L. 1, 30–31 (2012) ("The courts have taken different approaches to the applicability of the Rules, to wit: as 'rebuttable evidence' of malpractice, as 'some,' or 'relevant' evidence of the duty owed, or as a breach of the professional standard of care."); Jean E. Faure & R. Keith Strong, *Model Rules of Professional Conduct: No Standard for Malpractice*, 47 MONT. L. REV. 363, 364 (1986) ("Historically . . . courts have resoundingly rejected the use of the Code in legal malpractice litigation and concluded that a violation of the Code does not create a private cause of action. More recently, however, a few courts have held that a proven violation of the Code is rebuttable evidence of malpractice."); *see, e.g.*, Woodruff v. Tomlin, 616 F.2d 924, 936 (6th Cir. 1980) (noting that while the Code of Professional Responsibility does not undertake to define standards for civil liability of lawyers for professional conduct, it constitutes some evidence of standards required of attorneys); Hart v. Comerica Bank, 957 F. Supp. 958, 981 (E.D. Mich. 1997) ("Indeed, violations of the [Model Rules of Professional Conduct] create a rebuttable presumption of legal malpractice, although they do not constitute negligence *per se*."); Beattie v. Firnschild, 394 N.W.2d 107, 109 (Mich. Ct. App. 1986) ("There is a rebuttable presumption that violations of the Code of Professional Responsibility constitute actionable malpractice."); Lipton v. Boesky, 313 N.W.2d 163, 166–67 (Mich. Ct. App. 1981) ("The Code . . . is a standard of practice for attorneys which expresses in general terms the standards of professional conduct expected of lawyers . . . Holding a specific client unable to rely on the same standards in his professional relations with his own attorney would be patently unfair."). *See generally* Note, *The Evidentiary Use of the Ethics Code in Legal Malpractice: Erasing a Double Standard*, 109 HARV. L. REV. 1102 (1996) (discussing the varied extents of judicial use of the Model Rules or the Model Code as evidence of legal malpractice).

95. *See* Wesley Romine, *Inadequate Preparation by an Attorney as a Basis for Malpractice Liability or Disciplinary Action*, 2 J. LEGAL PROF. 223 (1977) (discussing malpractice actions and disciplinary actions as

Yet another route is through the internalization of ethics norms by lawyers. Even without the threat of malpractice litigation or an appeal to an ethics board, lawyers may internalize the rules of ethics and comply, out of a fear of the damage to reputation that might follow from noncompliance or loss of esteem among colleagues in the profession.[96] Internalization, as a constraint on lawyer conduct, probably has some force in the real world. However, it is likely to vary depending on the beliefs and personality of the lawyer. Some lawyers may never internalize professional norms.[97]

V. LEGAL CLAIMS

In this part, I develop and apply the analysis of this paper to legal claims. Claims, recall, are matured rights, in the sense that some legal right must be violated to create a legal claim.[98] After a legal right is violated, the victim will contemplate bringing an action to enforce his right by seeking compensation for the loss resulting from the violation. I assumed earlier, to simplify matters, that the victim would win his claim with probability one. Now I will assume that the probability of obtaining compensation from the court is less than one, and more importantly that the plaintiff/victim and defendant/injurer may have different predictions of the trial outcome.

The different approach taken in this part can be reconciled with that of the first part of this paper. Suppose, for example, that before the injury occurs, both parties operate on the assumption that the court will compensate the victim. In other words, both assume that the plaintiff will be compensated with probability one. After the injury occurs, the parties focus on litigation and the details of the arguments and facts, and these details generate different predictions on the probability that the plaintiff will receive an award from the court. These different predictions make settlement infeasible in some cases. I use the following terms to represent the parties' litigation outcome predictions:

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two means of recourse for lawyer misconduct); Kilpatrick v. Wiley, Rein & Fielding, 909 P.2d 1283, 1290 (Utah Ct. App. 1996) ("[I]t is axiomatic that legal malpractice sanctions are distinct from professional disciplinary actions.").

96. Zacharias, *supra* note 89, at 176 ("Because of the importance of lawyers' reputations in the minds of prospective clients, lawyers' desires to maintain specific types of reputation have significant impact on the implementation of professional rules and other legal constraints on lawyer behavior. To the extent reputation is dependent on the way lawyers behave, or are likely to behave in particular contexts, that affects the manner in which lawyers comply with the constraints.").

97. The ethics and malpractice cases are full of instances of lawyers who have failed to internalize professional norms. *See In re Bynum*, 197 A.3d 1072 (D.C. 2018) (ordering attorney's disbarment for violations of multiple rules of professional conduct); Hughes v. Consol-Pennsylvania Coal Co., 945 F.2d 594, 616–17 (3d Cir. 1991) (finding attorney liable for fraud); In re Hoover-Hankerson, 953 A.2d 1025 (D.C. 2008) (disbarring attorney for multiple counts of "moral turpitude" including fraud and conspiracy against United States).

98. *See supra* Part III.

TABLE 2

P_p	Plaintiff's prediction of the likelihood of a verdict in his favor
P_d	Defendant's prediction of the likelihood of a verdict in plaintiff's favor

A. SETTLEMENT

The value of a legal claim to a plaintiff is simply the expected value of the lawsuit, which is the expected recovery net of the cost of litigation, $P_pL - C_{pr}$.[99] A settlement occurs when the defendant, the violator of the plaintiff's right, purchases the claim from the plaintiff. The maximum that the defendant will pay for the claim is the expected compensatory payout plus his defense cost, $P_dL + C_{dr}$. As is well known in the literature on settlement, the plaintiff and the defendant are likely to arrange a transaction where the plaintiff sells the claim to the defendant when the expected net reward to the plaintiff is less than the expected payout by the defendant, or equivalently, when the expected judgment differential is less than the joint litigation cost:[100] $(P_p - P_d)L < C_{pr} + C_{dr}$.

Thus, for legal claims, the major determinants of the choice between settlement and litigation, which is the choice between selling a claim and not selling it, are the difference in trial outcome predictions and the joint cost of litigation. Litigation is like a bet on the value of the plaintiff's claim, between the parties. If the costs of administering the bet exceed the difference in the parties' predictions, they will have no incentive to enter into the bet. The plaintiff will simply sell the claim to the defendant, who places a higher value on it than does the plaintiff.

From the perspective of the plaintiff, the danger of a compromised attorney is that he or she may sell the plaintiff's claim to the defendant, or to a third party, for inadequate compensation, or may go into litigation with a plan to provide inadequate representation.

Consider, first, the danger of selling the plaintiff's claim to the defendant for inadequate compensation—that is, settlement for an inadequate amount. Why would an attorney settle the plaintiff's claim for a sum less than the value of the claim?

One reason is that the attorney can enhance his or her compensation through such a sale. The attorney may choose to accept a smaller settlement sum in exchange for a direct payment from the defendant. For example, suppose the plaintiff's attorney's perception of the likelihood of winning is 50 percent, the

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99. *See* Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982).

100. This is the Landes-Posner-Gould model of settlement. *See* William M. Landes, *An Economic Analysis of the Courts*, 14 J. L. & ECON. 61 (1971); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 417–20 (1973); John P. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279, 288–91 (1973).

loss is $100,000, and the cost of litigation $10,000. If the plaintiff's attorney is following an optimal settlement strategy *for the plaintiff*—in other words, seeking to maximize the payoff to the plaintiff – he or she will agree to a settlement only if the amount is at least $40,000 because the expected payoff from litigation is (1/2)($100,000) − $10,000 = $40,000. Suppose the defense attorney's perception of the plaintiff's likelihood of winning is also 50 percent and his or her litigation cost is $10,000. This implies that the defendant is at most willing to pay $60,000 to settle the dispute. Typically, the plaintiff's lawyer would have to seek his or her compensation from the plaintiff, so it would be some portion of the $40,000, say $9,000. However, the plaintiff's attorney could accept a secret side payment of $20,000 from the defendant with a settlement payment going to the plaintiff of only $10,000. From this sum, the lawyer could take $2,000 as compensation, resulting in a total payoff for the lawyer of $22,000, a payoff to the plaintiff of $8,000 after fees, and a cost to the defendant of $30,000. In this scenario, the defendant and the plaintiff's lawyer do better in comparison to the optimal settlement strategy for the plaintiff, while the plaintiff does worse.

One might ask how a rational plaintiff could accept such a low settlement for a claim worth $40,000. If the plaintiff knows that they have a claim worth $40,000, why would they accept a settlement of $10,000? The answer is that the plaintiff will not necessarily know the value of their claim. The plaintiff relies on their lawyer's reports. When the lawyer tells the plaintiff that they should accept a settlement offer, the lawyer will explain that the settlement is greater than the expected value of the claim. That explanation will depend on the lawyer's perspective. The lawyer could overstate the cost of litigation and thereby under-report the value of the claim. In addition, the likelihood of winning is information the lawyer typically explains to the client. The lawyer may under-report the likelihood of winning to convince the client that a low settlement is desirable for them to accept. At the same time, the lawyer could receive a secret side payment from the defendant that is greater than the fee the lawyer might take from the settlement.

Why would the plaintiff's lawyer take such a side payment? It may be larger than the likely payment from the client, and it is a one shot deal where the lawyer never sees the client again. Another reason for taking a side payment from the defendant is that the lawyer really is the agent of the defendant—that is, loyalty is not really divided. Whatever the explanation, this is a case of selling out. Moreover, unless the plaintiff can learn in reasonable time what has happened, it is not clear how the ethical rules can completely protect the plaintiff.

Although this is a troubling hypothetical, there is a good reason to doubt that it would represent a frequent outcome. The low settlements envisioned in this account would become public information eventually and expose the lawyer's duplicity. It would seem to be a poor long-term or even medium-term strategy on the part of the lawyer. Thus, even in the absence of any ethical rules controlling the lawyer, the market in legal representation should provide a strong disincentive

for plaintiffs' lawyers to under-report the value of legal claims in order to procure side payments from defendants. It is hard to avoid the implication that for the settlement of legal claims, the market is likely a sufficient monitor of loyalty.

The upshot of this example is that selling out in the ordinary dispute settlement process is certainly possible, but it would be a difficult practice for a lawyer to maintain with any sort of regularity. Eventually, the practice would become known in the market, and the lawyer's reputation would be harmed. Punishment under the ethical rules increases the sanction already provided by the market, but probably comes in a far second to the market in terms of importance for attorney incentives.

Now consider the case where the lawyer represents *both* sides, plaintiff and defendant. This is typically treated as the core illustration of a nonwaivable conflict.[101] But in the settlement setting, this scenario is not nearly as threatening to the plaintiff's interests as those considered earlier, where the lawyer has the power to transfer the client's legal right to an adverse actor.

With a single lawyer representing both sides, settlement is certain to occur. The problem of different trial outcome predictions disappears—the lawyer will not disagree with himself. Since the lawyer is attempting to settle,[102] he or she is acting against his or her own self-interest, which is to keep the parties in dispute and churning fees. Since the vast majority of cases settle, a single lawyer representing both sides in many of the settling disputes could save enormous resources. Moreover, a single lawyer representing both sides in settlement negotiations could serve to some degree as a mediator, reducing the level of tension between the parties by listening to and objectively communicating the views of the other side to each party. Thus, two of the most common criticisms of lawyers, that they tend to run the clock to boost fees and to exacerbate disputes, would be less serious where a single lawyer represents both sides in settlement negotiations.[103]

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101. The *ABA Model Rules* describe concurrent and adverse representation in the same litigation as a nonwaivable ethical conflict. *See* 1983 MODEL RULES R. 1.7(b)(3) ("Notwithstanding the existence of a concurrent conflict of interest . . . a lawyer may represent a client if . . . the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal."). Some states, such as California, appear to be more lenient on the waiveability of concurrent and adverse representation, but the courts have narrowed the scope of the waiver provisions through judicial interpretation. *See, e.g.*, Zacharias, *supra* note 17, at 411, 408 (While Zacharias acknowledged that "the California code exhibits no hesitation about allowing concurrent clients to waive conflicts," he noted that "the viability of this provision has been questioned" in case law); Klemm v. Superior Court, 142 Cal. Rptr. 509, 512 (Cal. Ct. App. 1977) (finding that actual conflicts at trial or hearing are nonwaivable despite the California Code).

102. The lawyer is attempting to settle if they are acting in the joint interests of the clients. Given that there is no difference in the parties' perceptions of the expected judgment, the parties jointly gain nothing and only lose from litigation. Of course, one might argue that the parties lose in litigation but the lawyer wins because they increase their fees. This scenario seems implausible, however, because it would require the lawyer to conjure "disagreements" with his or herself simply to burden clients with additional fees. The clients presumably would see through this fraud.

103. For empirical support for this negative view of lawyers, see Orley Ashenfelter, David E. Bloom & Gordon B. Dahl, *Lawyers as Agents of the Devil in a Prisoner's Dilemma Game*, 10 J. EMPIRICAL LEGAL STUD. 399 (2013).

Would a single lawyer have a greater tendency to sell out either side in settlement than under separate representation? Assume that the amount at stake and the trial predictions are the same as in the previous example. The anticipated litigation costs are much lower, however, since there is only one lawyer. If the litigation costs are half, then the expected value of the plaintiff's claim is $45,000, and the expected payout by the defendant in litigation is $55,000. In the previous example, the plaintiff's lawyer sold the plaintiff out by under-reporting the value of the plaintiff's claim. Suppose the lawyer tells the plaintiff that his likelihood of victory is not the true value of 50 percent, but only 15 percent. Now the reported value of the plaintiff's claim is only $10,000. However, the lawyer, representing both sides in settlement, will necessarily give the same report to the defendant, so his or her perceived payout falls to $20,000. Since the case valuations on both sides are now lower, it is unclear that the lawyer could gain by under-reporting the value of the claim to both sides. This suggests that the danger of selling out by the plaintiff's lawyer during the settlement process, though probably unlikely as a general matter, is even less likely in the dispute settlement process where one lawyer negotiates on behalf of both sides.

This proposition can be stated more forcefully. With a single lawyer representing both sides in settlement, his or her compensation must come from the savings that he or she generates by steering the parties away from litigation. That savings amount is the same regardless of the lawyer's report on the value of the claim. Hence, the sole lawyer representing both sides would appear to have no incentive to under-report the value of the plaintiff's claim in settlement negotiations.

One might argue, of course, that the sole lawyer might give one report on the value of the claim to the plaintiff and a different report on the value of the claim to the defendant. The defendant would offer a large amount to settle and the plaintiff would accept a small amount, and the lawyer would pocket the difference. This seems unlikely. Surely, the defendant would ask what happened to the money, and the plaintiff might have similar concerns after hearing how much the defendant offered to settle.

B. LITIGATION

Now consider a dispute in litigation. The parties have failed to settle, and on the eve of trial the plaintiff has a claim worth $40,000 in expected value, and the defendant has an expected payout of $60,000. The same "sell out" process considered previously could happen here too. The defendant could offer the plaintiff's lawyer a side payment to mismanage the plaintiff's case. However, the market disincentives noted earlier appear to be even stronger now. In the case of settlement considered earlier, the market disincentive resulted from word getting around that the plaintiff's lawyer obtains low settlements (compared to other lawyers doing the same sorts of cases). In the litigation scenario, a lawyer who chooses to fumble the plaintiff's case in court is inviting greater and more certain

penalties from the market. Judges, lawyers, and others would observe the compromised lawyer in action.

Next, consider the litigation process controlled by a single lawyer. Now the lawyer goes into court and argues both sides in *A v. B*. This has been viewed as the worst conflict scenario.[104] How can the lawyer fairly represent two opposing parties?

This seems doubtful at first. Commentators have noted that the lawyer may either favor one side or be constrained by financial interests to favor one side.[105] If this is the case, the lawyer may not assert the arguments of the non-favored side energetically.[106] For example, if one litigant is a repeat player, the lawyer may favor the repeat player over the one-shot litigant, for the obvious reason that the repeat player will bring the lawyer more business in the long term.[107] Alternatively, representing opposing sides may cause the judge to question the lawyer's sincerity, discounting all of the lawyer's arguments.[108]

However, there are constraints on selling out either client in the simultaneous and adverse representation scenario. The conflict is obvious to the judge, who will question the lawyer if it is clear that he or she is doing a poor job on the part of one of the parties. It is hard to see how the lawyer could sell one party out right in front of the judge, unless the judge is also compromised in the same manner as is the lawyer; and if the judge is compromised in the same manner, then requiring separate representation would not come close to solving the problems confronting the party against whom the judge is biased. Similarly, if the judge is unaware of the lawyer's bias, then the judge's inability to notice an obvious bias would be a greater problem for the plaintiff than the bias itself.

Finally, it is not clear why the judge would choose to discount all of the lawyer's arguments when the lawyer presents two sides of the same case. In the presence of a skilled lawyer, a judge might learn a great deal from the lawyer's presentations on both sides of a dispute. Single lawyer representation effectively changes the event from an adversarial process to something closer to an inquisitorial process, where the lawyer joins with the judge in attempting to sort through the facts and the issues. The judge may find that he or she is in a better position to reach a sound decision in this alternative framework than under the adversarial model.

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104. *See, e.g.*, FREEDMAN & SMITH, *supra* note 11, at 265 ("The most obvious conflict between current clients is where the lawyer is representing two or more clients whose interests are adverse to each other."). The *Model Rules* explicitly identify concurrent and adverse representation in the same litigation as a nonwaivable conflict. *See* MODEL RULES R. 1.7(b)(3); Freedman, *supra* note 8, at 265; Rotunda, *supra* note 41, at 145; Wolfram, *supra* note 8, at 350.

105. *See, e.g.*, John S. Dzienkowski, *Positional Conflicts of Interest*, 71 TEX. L. REV. 457, 485 (1993).

106. *Id.*

107. *Id.* at 486–87.

108. *Id.* at 489.

The parties must also be aware of the conflict, so presumably the party who fears the greatest disadvantage would seek to adjust his or her compensation arrangement with the lawyer to reflect his or her fear of bias. If the plaintiff thinks the lawyer is going to perform, because of bias, in a way that reduces his or her expected award by $5,000, the plaintiff will reduce his or her pay to the lawyer by the same amount.

The selling out problem here may seem more plausible at the level of preparation than at the level of courtroom performance. The lawyer may fail to do the sort of research he or she should do for one of the parties, after choosing the side he or she prefers to see win. Perhaps the parties and the judge would fail to realize this. Still, it seems to be such an open case of conflict that the lawyer would risk being caught quickly for failing to fairly represent either side. Again, if a party can be deprived of fair representation so openly before a judge, then the immediate implication is that the judge may be just as compromised as is the lawyer.

Of course, one could argue that the important harm done by single-lawyer representation of adverse parties is to the court rather than the parties. Third parties would think that the court is necessarily unfair or compromised if it permitted a single lawyer to represent opposing parties.[109] Alternatively, one could argue that society, including the courts, is deprived of alternative points of view when one lawyer represents adverse parties.[110] Different lawyers will approach an issue from different perspectives, and those differences in perspective will influence the sorts of arguments each lawyer will consider relevant or persuasive. A single lawyer would necessarily fail to generate the same clash in perspectives. Invoking Mill,[111] one could argue that the law advances through the public collision of alternative perspectives. In the absence of such a collision, the law itself would suffer over time.

Perhaps the most troubling feature of simultaneous and adverse representation is that it appears to permit a lawyer to adopt the ultimate hedging strategy. If the lawyer represents both sides of a dispute, then he or she cannot lose. If the lawyer cannot lose, then the lawyer may fail to invest in the position of either side as deeply as the lawyer would if he or she were the sole lawyer representing one side. Again, the courts would suffer by being denied access to the most vigorous arguments on any given issue.

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109. Zacharias, *supra* note 17, at 416–23 (discussing prohibiting conflicted representation in court because of its harmful effects on the court's ability to administer justice). The latest version of the comments on Model Rule 1.7 suggests that the primary harm from concurrent and adverse representation in the same litigation is the reduced effectiveness of advocacy. *See* 1983 MODEL RULES R. 1.7 cmt. 17 ("Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal.").

110. Zacharias, *supra* note 17.

111. JOHN STUART MILL, ON LIBERTY (1859).

These arguments raise an obvious line drawing problem. If harm to third parties is the fundamental reason we should prohibit single-lawyer representation of adverse parties, then the entire body of regulations on lawyers presumably should be based on or at least reflect the same concern. Such an approach would dismantle the autonomy-centric foundation of ethical rules, and require an overhaul of ethical rules generally.

Moreover, it is not clear that society or the courts are always better off having different lawyers argue opposing sides rather than a single lawyer. Much of the appeal of elite law firms is that they are able to outsmart and outmaneuver their less well-heeled rivals.[112] Elite law schools market themselves on their ability to push their graduates into elite law firms.[113] To have such a firm representing you is like going into a brawl with a heavy-weight boxing champion on your side. Their promises are often validated; poorer and less-connected law firms are often unable to compete.[114] The question this raises is why society should consider such one-sided bouts, and the potentially chilling effect the threat of such bouts has on potential litigants, as unquestionably superior to simultaneous and adverse representation by a single lawyer or law firm. Single lawyer representation of adverse parties is arguably fairer than a bout between parties unequally matched.

Ultimately, the third-party harm argument is impossible to dismiss. However, the core conflict problem is the risk of selling out, not the risk of failing to optimize the social value of the litigation process. The case of simultaneous and adverse representation does not appear to present an unusual risk of a lawyer violating the rights of one client to the advantage of another. The case for labeling it as a "conflict of interest" involving current clients is unclear.

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112. On the advantage of the elite law firm, *see* ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 272 (1995) ("First, these firms are elite institutions. They attract the best law school graduates, have the most powerful clients, and possess the greatest clout within the profession.").

113. LAUREN A. RIVERA, PEDIGREE: HOW ELITE STUDENTS GET ELITE JOBS 98, 332 (2016) ("At the most elite law schools, students are allowed to sign up to interview with any employer. Although firms may post suggested grade thresholds, they are forced by career services offices to interview anyone who applies."); *see also* William D. Henderson & Rachel M. Zahorsky, *The Pedigree Problem: Are Law School Ties Choking the Profession?*, ABA J. (July 1, 2012), http://www.abajournal.com/magazine/article/the_pedigree_problem_are_law_school_ties_choking_the_profession [https://perma.cc/UA2S-U2EY] ("One thread that binds the elite law schools is nearly a century of allegiance among the nation's corporate law firms. . . . The most famous training program was implemented by Paul Cravath . . . of Cravath, Swaine & Moore. . . . Cravath and his contemporaries favored graduates of a handful of Ivy League schools—namely Harvard, Columbia and Yale—and so-called national law schools, including the universities of Virginia and Michigan, for the coveted training positions. . . . Between 1950 and 1965, 73 percent of lawyers hired in large New York City law firms attended Harvard, Yale or Columbia.").

114. *See, e.g.*, Kronman, *supra* note 112; Emery G. Lee, *Law Without Lawyers: Access to Civil Justice and the Cost of Legal Services*, 69 MIAMI L. REV. 499 (2015) (describing the effects of inequality in resources and legal costs in determining access to justice).

VI. IMPLICATIONS FOR LAW

For the most part, this paper's analysis supports existing ethics rules and the conventional wisdom that has developed around them. But the analysis leads to a different view of the rules than expressed in conventional thinking, and some suggestions for reform.

First, the "heat zones," the areas where conflicts are most worrisome, appear to be different, from this model's perspective than in the ethics rules and supporting literature. The rules take the case of concurrent representation of opposing parties in court as the quintessential example of prohibited conflict.[115] This paper's analysis, by contrast, suggests that the case of concurrent representation in litigation is by no means the most troubling conflict scenario. This analysis suggests that the most troubling scenarios occur in the mundane, day-to-day counseling process, where a lawyer gives advice to the potential victim of another current, past, or prospective client.

This legal counseling stage is fraught with the potential for injury because it is at this stage where the lawyer can strip an individual of a legal right and sell it to the infringing party without the knowledge of the client. In this pre-litigation stage, lawyers can strengthen or weaken legal rights. Potential injurers, once aware of the special power of the attorney, will bid for the rights of prospective victims by offering rewards directly to attorneys. Because of this, the nearly absolute duty of confidentiality receives a stronger endorsement in this model than in the previous examinations of confidentiality from a social welfare perspective.[116]

The second key implication of this analysis is that the existing rules may fall far short of what is necessary to protect individuals from having their rights diluted or transferred from them in the representation process. Because of the importance given to the notion of autonomy, the rules permit conflicts in many instances, provided that the lawyer discloses and gains consent from vulnerable clients.[117] Consent is an ideal standard, in large part because a fully informed and autonomous client who consents to a conflict will do so only when he or she is better off consenting than prohibiting the conflict or exiting the relationship.

The trouble is that clients probably will not be fully informed and autonomous. If they were, vulnerable clients would demand compensation for the potential harms from conflicts.[118] But the lawyer can always do better for him or herself by

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115. *See, e.g.*, FREEDMAN & SMITH, *supra* note 11.

116. Fischel, *supra* note 10; Kaplow & Shavell, *supra* note 10.

117. 1983 MODEL RULES R. 1.7(b)(4) ("Notwithstanding the existence of a concurrent conflict of interest . . . a lawyer may represent a client if . . . each affected client gives informed consent, confirmed in writing.").

118. One appealingly simple "solution" to the conflict problem is the construction of impregnable "information walls" inside the firm. The discussion in this paper has adopted the assumption that a single lawyer deals or "unitary law firm" represents both victim and injurer. However, in a large law firm setting, a firm could, in theory, set up mechanisms to prevent information from passing from one client to another. Indeed, in *Andrew Corp. v. Beverly Manufacturing*, the law firm argued that it had not revealed any confidential information of the patentee to its other client. 415 F. Supp. 2d 919, 922–23 (N.D. Ill. 2006). The problem with this solution is that

failing to inform such clients fully of the potential harm, and taking the compensation for infringing their rights directly from the adverse party. The fact that the ethical rules do not even look for compensation, and that there appears to be no record in the case law of compensation, suggests that the current rules fall short of protecting client interests.

What should the rules do? This is obviously a difficult question. Ideally, the rules would say that consent is not effective, where client interests may be adversely affected, in the absence of any compensation, or at least the potential for compensation, to the vulnerable client for accepting the risk of harmful effects resulting from conflicts. This is likely to be unworkable because the amount of compensation that would be appropriate may be quite difficult to determine.

A plausible alternative is a more extensive disclosure requirement. Where there is a foreseeable loss to a vulnerable client and a gain to another, the rules should require disclosure not only of the potential loss to the vulnerable client but also the potential gain to the other client. This may seem at first glance to go too far because it would limit the second client's ability to profit from its own private information.[119] However, the precise problem in the conflict scenario is that the vulnerable client risks having its private information transferred to the second client. The efficient solution to this problem is to require the attorney to return the favor by transferring private information of the second client back to the vulnerable one, before seeking a waiver from the vulnerable client. Armed with information on the likely gain going to the second (adverse) client, the vulnerable client would be more likely on his or her own motivation to seek compensation for the expected harm suffered, especially when that harm appears to be less than the gain going to the second client.

For example, return to the illustration based on *Andrew Corp. v. Beverly Manufacturing*, where the lawyer aids the second client in circumventing the first client's patent. If the gain to the second client is sufficiently large, then the first client may consent as long as he or she receives a sufficient portion of the gain to leave him or her better off than if he or she did not consent to the conflict. The

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it effectively makes the conflict rules unenforceable, unless the lawyers within a firm chose to voluntarily disclose breaches. For skeptical views of this approach, *see* Freedman & Smith, *supra* note 11, at 286; Wolfram, *supra* note 8, at 402.

119. Being able to profit from your own private information gives you an incentive to develop the information in the first place. For discussion of this, *see* Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 15 (1978) ("One (seldom noticed) way in which the legal system can establish property rights in information is by permitting an informed party to enter—and enforce—contracts which his information suggests are profitable, without disclosing the information to the other party. Imposing a duty to disclose upon the knowledgeable party deprives him of a private advantage which the information would otherwise afford. A duty to disclose is tantamount to a requirement that the benefit of the information be publicly shared and is thus antithetical to the notion of a property right which—whatever else it may entail-always requires the legal protection of private appropriation."); *see also* Laidlaw v. Organ, 15 U.S. 178 (1817) (holding that a party to a contract is not bound to communicate intelligence of extrinsic circumstances exclusively within their knowledge, which might influence the price of the commodity).

compensation arrangement would enable both Andrea (patentee) and Brad (substitute maker) to attain an equal footing with respect to information on the value of the technology. Andrea, fully informed of Brad's plans, might choose to permit the information to be shared with Brad if she is provided sufficient compensation. The information exchange may result in both parties reaching a mutually beneficial arrangement. This is preferable, under the theory of this paper, to an arrangement where the lawyer reduces the value of one business in order to enrich him or herself and another client. Such an arrangement could be efficient in a narrow sense of the term if the gain to the advantaged client is greater than the loss to the disadvantaged client. The risk of such a transaction, however, would diminish the value of legal rights, and investments made in reliance on those rights.

CONCLUSION

To the extent that the law creates rights, it also creates burdens. A legal right to be free from trespass imposes a burden on potential trespassers to refrain from invading the property of others.

Lawyers can enhance legal rights, and thereby sharpen burdens; or they can weaken rights by giving deliberately poor advice about the scope or existence of rights or by passing on confidential information to parties who would injure their clients. Potential injurers might seek out the aid of lawyers to reduce the rights of parties who may be harmed by their actions.

This suggests a troubling asymmetry between legal rights and legal burdens. Potential injurers or infringers, who are burdened by the legal rights of the vulnerable parties with whom they interact, are likely to have a sense of the cost of those burdens, and that sense is likely to increase in accuracy with the degree to which the imposition of harm is either planned or foreseen. The vulnerable parties, however, are unlikely to have a clear sense of when and precisely how their rights might be at risk. Given this asymmetry, the lawyer is likely to be able to find, if he or she either looks for or signals the slightest receptivity to, a willing bidder for the rights of vulnerable clients. The risk of such selling out creates an important set of circumstances where rules governing the lawyer's conduct, in the form of a code of ethics, would appear to offer an advance over the constraints already provided by market competition and background common law rules.