The Ethics of Honoring Law in Action

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ABSTRACT

Legal Realists and jurisprudential scholars have long recognized the importance of the gap between law on the books and law in action. Their insights about the gap inform effective practice by lawyers serving their clients. But the gap also presents a challenge to those lawyers who commit to an internal perspective about the law, accepting that law has authority on its own, and not only because of the worries about its enforcement. When the law on the books conflicts with the law in action, may a fidelity-committed lawyer honor the latter?

This Article answers that question in the affirmative. It concludes that some strains of law in action will represent "real law," reflecting community acceptance, and a good lawyer will, or at least may, honor that authority. Not all law in action is "law" deserving respect, however, and a good-faith practicing lawyer will need to discern the difference.

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INTRODUCTION

For more than a century, law and society scholars have described and critiqued the gap between "law on the books" and "law in action."[1] This Article represents a beginning attempt to tease out the implications of that gap for practicing lawyers who have committed to what Professor W. Bradley Wendel has termed "fidelity to the law."[2] The Article pays particular attention to how a lawyer ought to govern her own conduct when the prevailing law of lawyering on the books differs from how that law is practiced.

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1. Roscoe Pound produced the first and most prominent appearance of the distinction. *See* Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 12 (1910). In the intervening century-plus, scholars have developed and nurtured a field known as "gap studies," exploring that disconnect. *See, e.g.*, Richard L. Abel, *Law Books and Books About Law*, 26 STAN. L. REV. 175, 184–85 (1973) (describing the "gap problem"); Jon B. Gould & Scott Barclay, *Mind the Gap: The Place of Gap Studies in Sociolegal Scholarship*, 8 ANN. REV. L. & SOC. SCI. 323 (2012). The literature on this topic is voluminous.

2. W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO THE LAW (2010).

Lawyers who represent clients will strive to respect the law of lawyering in their practices, in what H.L.A. Hart might call an "internal" fashion.[3] The internal perspective treats substantive law as valuable in its own right and not simply a source of penalties or costs to be avoided or borne.[4] While lawyers' clients might proceed in a more Holmesian "bad man" fashion,[5] treating the law as a constraint to be navigated, the lawyers themselves do not, or at least ought not, adopt that "external" orientation.[6] Or, for purposes of this Article, we might assume that most lawyers strive to honor the law.[7]

The challenge, though, is that any practicing lawyer will, from time to time, encounter examples of the gap between the law she reads in books, compendia, or opinions, and the law as it operates on the ground and in her community.[8] For but one example, which serves as an animating impetus for this Article, consider the operation of the American Bar Association's ("ABA") *Model Rules of Professional Conduct* ("*Model Rules*") Rule 1.6(a),[9] which most states in the nation have adopted verbatim[10] and thus represents binding law on the books. Rule 1.6(a) forbids disclosure of most information related to the lawyer's representation of her client, including the client's identity. The *Restatement (Third) of the Law Governing Lawyers* ("The *Restatement*"), however, informs its readers that the language of Rule 1.6(a) ought not be read to mean what it says, but instead warrants a more flexible and reasonable interpretation.[11] The *Restatement* effectively tells its users what the law and society scholars[12] have argued for decades: that the law on the books may say something, but the law in action says

3. H.L.A. HART, THE CONCEPT OF LAW 86–88 (1961).

4. *See* Scott J. Shapiro, *What Is the Internal Point of View*, 75 FORDHAM L. REV. 1157, 1159 (2006).

5. O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459–62 (1897).

6. *See* Ryan C. Williams, *Jurisdiction as Power*, 89 U. CHI. L. REV. 1719, 1739 (2022) (contrasting Hart's "internal" point of view with its corresponding "external" perspective).

7. *See* Alice Woolley, *Is Positivist Legal Ethics an Oxymoron*, 32 GEO. J. LEGAL ETHICS 77, 79 (2019) (accepting, and then critiquing from an ethical standpoint, lawyers' general respect for positive law).

8. *See, e.g.*, Scott L. Cummings, *The Social Movement Turn in Law*, 43 L. & SOC. INQUIRY 360, 371 (2018); Ann Southworth & Catherine L. Fiske, *Our Institutional Commitment to Teach About the Legal Profession*, 1 U.C. IRVINE L. REV. 73, 79–80 (2011) (effective legal education will permit law students "to observe how patterns of compliance and noncompliance constitute the meaning of law").

9. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2023) [hereinafter MODEL RULES].

10. *See infra* note 69 and accompanying text.

11. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60(1)(a) (Am. L. Inst. 2011) [hereinafter RESTATEMENT].

12. Law and society scholars, sometimes known as sociolegal scholars, apply social science and empirical analysis to understand the nature of law. Eschewing conventional doctrinal approaches to legal scholarship, law and society scholars "inquire into the social structures that induce compliance" with legal standards. Mauro Bussani, *Strangers in the Law: Lawyers' Law and the Other Legal Dimensions*, 40 CARDOZO L. REV. 3125, 3130 (2019). "Much of sociology of law has been concerned to study the 'impact' of law on society, or the 'gap' between law and society, or the 'influence' of society on law." *Id.* at n.11; *see also* Carroll Seron, Susan Bibler Coutin & Pauline White Meeusen, *Is There a Canon of Law and Society?*, 9 ANN. REV. L. & SOC. SCI. 287, 290 (2013) ("For law and society scholars, . . . the meaning of law is not intrinsic to statutes or cases, but rather is dependent on extralegal factors; . . . the form, interpretation, enforcement, and impact of law tend to reinforce the extant social structure; and . . . the sources of law are themselves socially derived.").

something different, and the latter *matters*.[13] Many other comparable examples exist within a lawyer's practice, including using screening devices to manage concurrent conflicts of interest,[14] representing out-of-state clients in trademark matters,[15] and assisting clients with actions that, in theory, have criminal implications, but, in practice, do not.[16] Each of these examples receives brief treatment below.

The question this Article will address, and the question the fidelity-committed lawyer must resolve for herself, is whether she may treat law in action as "the law" and remain faithful to her commitment, when that law in action differs from clear law on the books. For practicing lawyers, it is a question deserving of some guidance.[17]

This Article concludes that in some settings—but surely not all settings—law in action is a version of "the law" deserving of the lawyer's respect. To reach that conclusion, we first encounter several variations of what the scholars have identified as law in action. For our purposes, the understanding of law in action is that represented by the *Restatement* example, where the law one locates in the books is not actually the authority that matters in practice. We might term this version the "replacement" variation. In some instances, law in action means exactly that. But in many instances discussed in the literature, law in action refers to very different phenomena.

Frequently, discussion of the gap between law on the books and law in action describes unexpected effects in practice of some legislation, court ruling, or similar initiative (the "implementation" variation).[18] Equally often, the gap refers to a phenomenon that is far from welcome.[19] In this version, which we might term the "distortion" variation, well-meaning laws on the books fail to achieve their purpose because of inequities within systems, or the inability to monitor or enforce the laws on the books.

A practicing lawyer who is committed to fidelity and who encounters law in action must first discern which version she observes. If what she encounters is what we understand here as the replacement variation, she has the opportunity to choose whether to honor that law in action. This Article concludes that if the law in action is indeed a replacement variation, a lawyer may choose to honor it. If what she observes is instead the distortion variation, however, she ought not treat

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13. *See* Carrie Menkel-Meadow, *Uses and Abuses of Socio-legal Studies*, *in* ROUTLEDGE HANDBOOK ON SOCIO-LEGAL THEORY AND METHODS 35 (Naomi Creutfeldt, Marc Mason & Kirsten McConnachie eds., 2019).

14. *See* discussion *infra* Section II.B.

15. *See* discussion *infra* Section II.C.

16. *See* discussion *infra* Section II.D.

17. In essence, this inquiry is an effort "to ponder the metaphysics of whether a seemingly tolerated practice can be fairly described as unlawful." Bert I. Huang, *Shallow Signals*, 126 HARV. L. REV. 2227, 2255 (2013).

18. *See infra* notes 147–55 and accompanying text.

19. *See infra* notes 156–76 and accompanying text.

that law in action as authority, without sacrificing her commitment to fidelity. This means that she must discern the difference, using some reliable tool or tools.

This Article proposes a heuristic to assist a lawyer in recognizing the difference between distorted law in action and replacement law in action. The only sensible distinction between these two stances is the following: for law in action to serve as a credible substitute for law on the books, it must be that the action taken would be accepted if the relevant authorities learned of it and had the resources to address it. If the authorities would penalize it in a world with sufficient resources available, it is not the kind of law in action that preserves a lawyer's fidelity commitment.

Therefore, the resulting guidance is that a lawyer may (and in many instances ought to in order to remain competent as a client advocate) honor the replacement variation of law in action, when properly discerned. Thus, if the *Restatement* offers an accurate report of the law of lawyering on the ground, then a lawyer may not be criticized for following the *Restatement*. Accepting that provisional conclusion, the Article proceeds to note two possibly complicating ideas.

The first complication arises from the reality that one discerns law in action based on the exercise of reflective judgment amid ambiguity and uncertainty.[20] One may read law on the books; but by direct contrast, one feels or discerns law in action in a much more ambiguous fashion. This exercise of judgment, which by itself is nothing new to practicing lawyers, nevertheless implicates notions of bounded rationality,[21] adding to the distortion possibilities. A practicing lawyer's identification of law in action is left solely to her interpretive discretion. And research shows that an individual's judgments about whether an ambiguous action is acceptable or not is always affected by her interests and self-serving biases, what Stephen Pinker and others call "myside bias."[22] A lawyer's reliance on law in action is more problematic than her reliance on law on the books precisely because she must read a terrain rather than a book.

The Article concludes that the myside bias worry, while real, is simply inevitable, and ought not prevent a good-faith lawyer from her efforts to read law in action responsibly.[23] Lawyers exercise discretion in the face of uncertainty on a daily basis, and the myside bias will always be distorting. There is nothing special about this version of that risk.

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20. *See* discussion *infra* Section V.A.

21. The bounded rationality conceptions were first introduced by Herbert Simon. *See* Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q.J. ECON. 99, 99–100 (1955). They owe much of their later influence to the pioneering work of Amos Tversky and Daniel Kahneman. *See, e.g.*, Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453 (1981); Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 AM. ECON. REV. 1449, 1469 (2003).

22. STEVEN PINKER, RATIONALITY: WHAT IT IS, WHY IT SEEMS SCARCE, WHY IT MATTERS 292–98 (2021); *see infra* notes 250–55 and accompanying text.

23. *See infra* notes 258–61 and accompanying text.

The second complication appears to be more worrisome. A critical premise of this inquiry is that the law in action inquiry only matters if the lawyer has a commitment to fidelity to the law, in an "internal" fashion. The challenge the lawyer faces, and explored here, is whether reliable law in action ought to qualify as "law," entitled to her respect. But the most cogent reasoning underpinning the fidelity commitment is the compelling idea that the law deserves respect because of its institutional character.[24] Given the inevitability of disagreement among citizens about values and interests, the law serves as a mediating response to that pluralism, because it arises through shared, available, democratic processes. But one now sees the complication for the law in action perspective. Law on the books emerges from the institutional structures agreed upon by the populace. Law in action, of course, does not, or at least not directly so. This seems to risk undercutting the thesis developed thus far, that a lawyer committed to fidelity may, in many instances, honor law in action.

The Article concludes that this second complication does not, and cannot, diminish the authority of law in action, notwithstanding the hiccup in the reasoning behind that stance.[25] As we shall see below, the choice for the good-faith lawyer is to honor law in action, or not do so, and to settle for the law on the books. The type of law in action in question will have support among the regulators and enforcement regime (as opposed to success in eluding them). If the lawyer has read the terrain adequately, it will be preferable given the lawyer's on-the-ground practice needs to respect the accepted operations within her community rather than being constrained by the written words that lack that acceptance. While not perfectly consistent with her fidelity commitments, this stance shares enough of the same qualities to warrant its favor over a strict adherence to law on the books.

I. THE FIDELITY COMMITMENT IN PRACTICE

The challenge this Article confronts is whether a good-faith lawyer may act consistently with law in action—in other words, may honor such law in action—when that "authority" differs from what the lawyer may find on the books. That question only has meaning if the lawyer in question *cares* about fidelity to the law. To establish that premise, consider two practicing lawyers, Linda and Harriet. These two lawyers, along with a third attorney, Ben, whom we shall meet in due time, serve as working examples of the ideas developed here.

Linda operates her law practice based on a commitment to honoring the substantive law of lawyering. Linda is neither a jurisprudence scholar nor a legal historian,[26] but she is a thoughtful and caring lawyer who will only act as the law

24. *See* WENDEL, *supra* note 2, at 61–62.

25. *See infra* notes 272–74 and accompanying text.

26. It is critical to this enterprise to recognize that practicing lawyers often will not be as familiar nor adept as scholars with the jurisprudential debates about lawyers' duties regarding the meaning of what should count as "the law." *See, e.g.*, Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1557 (1995) ("[L]awyers in general may not be

permits her.[27] Linda is one of the types of individuals whom Rebecca Stone has described as non-Holmesian,[28] who cares about honoring the substantive law because it is the law.[29] Whether she has read his work or not, Linda is sympathetic to the message of W. Bradley Wendel, a leading advocate for lawyers' "fidelity to the law."[30] Wendel argues that lawyers ought to accept what H.L.A. Hart has termed as the "internal" perspective, by which the law's authority arises from its essence as established authority emerging from democratic efforts to manage pluralism and disagreement,[31] and not because of its ability to impose sanctions.[32]

Linda possesses the virtue that one scholar has termed "law-abidance."[33] The following description of that virtue helps us understand Linda's orientation to her legal duties: "The [law-abidance] virtue does not, however, comprise a disposition to obey the law qua law, regardless of its moral merits; although it does include a disposition to conform to the not-patently-unjust conventional moral norms of the actor's society—especially where those norms constitute customary law."[34]

To understand why her law-abidance commitment matters, and to help us discern why every lawyer would not necessarily share Linda's commitment, consider Harriet, another lawyer practicing in Linda's community. Harriet is (as many of her and Linda's clients are) a Holmesian "bad [wo]man,"[35] calculating the risks and benefits of following what the law actually requires. Harriet, an "externalizer,"[36] obeys the law of lawyering instrumentally, calculating that if she does not, she will suffer penalties that outweigh the benefits of her actions.[37]

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particularly able or sophisticated in counseling about the nature of law and legal obligation. Jurisprudence is not a required course in most American law schools . . . .").

27. The tension between the guidance from sophisticated theory and the workaday responsibilities of lawyering with a busy practice is not unusual. For one earlier inquiry into that tension in the context of "practicing philosophy," see Paul R. Tremblay, *The New Casuistry*, 12 GEO. J. LEGAL ETHICS 489, 489–93 (1999). *But see* Andrew Ayers, *What If Legal Ethics Can't Be Reduced to a Maxim?*, 26 GEO. J. LEGAL ETHICS 1, 2 (2013) (arguing persuasively against efforts to over-simplify legal ethics challenges faced by practicing lawyers).

28. That reference is to Oliver Wendell Holmes's "bad man" thesis. *See* Holmes, *supra* note 5, at 459.

29. Rebecca Stone, *Legal Design for the "Good Man,"* 102 VA. L. REV. 1767, 1767 (2016).

30. *See* WENDEL, *supra* note 2; W. Bradley Wendel, *Legal Ethics as "Political Moralism" or the Morality of Politics*, 93 CORNELL L. REV. 1413, 1418, 1435 (2008); W. Bradley Wendel, *Pluralism, Polarization, and the Common Good: The Possibility of Modus Vivendi Legal Ethics*, 131 YALE L.J. F. 89, 92 (2021).

31. *See* WENDEL, *supra* note 2, at 60–64; W. Bradley Wendel, *Should Lawyers Be Loyal to Clients, the Law, or Both?*, 65 AM. J. JURIS. 19, 29 (2020) (citing HART, *supra* note 3).

32. *See* Stone, *supra* note 29, at 1781 (describing an "externalizer," for whom "likely penalties give her a sufficient self-interested reason to conform" to legal constraints).

33. G. Alex Sinha, *Virtuous Law-Breaking*, 13 WASH. U. JURIS. REV. 199, 225 (2021) (borrowing the term from William Edmundson, *The Virtue of Law Abidance*, 6 PHILOSOPHERS' IMPRINT 1 (2006)).

34. Edmundson, *supra* note 33, at 2.

35. Holmes, *supra* note 5, at 459–62 (identifying the "bad man" thesis).

36. Stone, *supra* note 29, at 1781.

37. *See* Stephen R. Galoob & Ethan J. Leib, *Fiduciary Loyalty, Inside and Out*, 92 S. CAL. L. REV. 69, 81–82 (2018) ("Holmes's bad man is rational, self-interested, and cynical. He is only motivated to conform to the law in order to avoid negative consequences that might arise from nonconformity. As such, the Holmesian bad man sees potential legal sanctions as the most important aspect of law; only when the costs of non-conformity

If under some circumstances she would likely avoid any costs or repercussions (because, say, she would not get "caught," or the costs of complaining about her unlawful acts are too high for any possible complainants), Harriet will act in her client's interests even if some law says she should not. Linda is different from Harriet. Linda does not engage in those cost/benefit or risk assessment calculations. Putting aside questions of serious harm generated by her compliance—that is, the civil disobedience or moral activism questions[38]—Linda will honor the law because that's what lawyers (and citizens) ought to do.[39] Harriet, meanwhile, is not amoral in her stance. She would not "cheat,"[40] even if she could get away with it, if doing so would cause palpable harm to others. In this way, Harriet differs from Ben, the lawyer we will consider in Part III, who is even more crassly calculating.[41] But she does approach her lawyering decisions instrumentally, assessing the costs and benefits of compliance with the available substantive law.[42]

Linda and Harriet (and later Ben) serve as props for the proceeding discussion. Linda will obey the law even if noncompliance is costless, even if enforcement is scarce. Harriet may or may not honor the law, as she calculates the risks and rewards of compliance, including the likelihood of enforcement.[43] But it is important to note that in their counseling and advising of their *clients*, Linda and

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with a legal directive are higher than those associated with conformity can the bad man be expected to conform.").

38. This Article sidesteps the more familiar, and richly developed, legal ethics debate about whether Linda ought to privilege her moral commitments over the obligations imposed by substantive law, notwithstanding her internal orientation. Wendel's central thesis is that lawyers owe primary fidelity to the law as established by community institutions. *See, e.g.*, WENDEL, *supra* note 2, at 87–89; W. Bradley Wendel, *Legal Ethics Is About the Law, Not Morality or Justice: A Reply to Critics*, 90 TEX. L. REV. 727, 741 (2012). David Luban, among many other scholars, argues for a stronger reliance on shared moral commitments. *See, e.g.*, David Luban, *Misplaced Fidelity*, 90 TEX. L. REV. 673, 685 (2012) (book review of WENDEL, *supra* note 2); David Luban, *The Adversary System Excuse*, *in* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 83 (David Luban ed., 1983). As a "Wendelian," Linda ought to sympathize with the former stance, but for present purposes this Article need not reach that question. This Article's aim is to understand the role of a fidelity-committed lawyer such as Linda when the law on the books fails to reflect entrenched practices, and where following either source of authority (the law on the books, or the law in action) would not create any significant injustice.

39. *See* Tom Ginsburg & Nicholas Stephanopoulos, *The Concepts of Law*, 84 U. CHI. L. REV. 147, 147 (2017).

40. It is easy to categorize Harriet's "bad woman" strategy as cheating and getting away with it. Applied to her, the term operates differently from the "cheating" described by Robert Cover in his review of the work of judges encountering the Fugitive Slave Act. *See* ROBERT M. COVER, JUSTICE ACCUSED 197 (1975) (confronting the idea of cheating by judges); Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1303 (1982) (similar reference to that term); *see also* Aviam Soifer, *Covered Bridges*, 17 YALE J.L. & HUMAN. 55, 77 (2005) (discussing Cover's "cheating" references).

41. *See infra* notes 196–98 and accompanying text.

42. In this way, Harriet resembles "Jane," one of Rebecca Stone's "bad" actors, in her sensitivity to the effects of her taking enforcement risks. *See* Stone, *supra* note 29, at 1772–73.

43. *See* Gregory Klass, *The Rules of the Game and the Morality of Efficient Breach*, 29 YALE J.L. & HUMAN. 71, 81 (2017) ("The art of cheating on this [Holmes's bad man thesis] picture is the taking of calculated risks. The sophisticated cheater weighs the possible gains of a transgression against the consequences should she be caught, and transgresses only when it is a good bet.").

Harriet are indistinguishable. As noted above, clients are often Holmesian, implementing strategies that minimize costs when considering the likelihood of enforcement and the price of sanctions, if any.[44] The law of lawyering respects this stance, expressly permitting lawyers to advise clients about the consequences of their actions, including the likelihood of enforcement.[45] Because it is lawful for Linda to adopt a Holmesian perspective with her clients, her doing so does not conflict with her fidelity commitment.[46] And, to make the point in a slightly different way, if Linda herself were to seek counsel about her own actions, she would not, in that client role, adopt a Holmesian stance. Presumably, Harriet would.

One last note warrants mention before we move on. One might legitimately wonder why this distinction matters at all, especially if Linda—just like Harriet—takes actions that have no external consequences. This Article addresses that inquiry below.[47] As we shall see, not only does this quandary matter to Linda's sense of integrity as a lawyer, but she also must confront the question of whether she may advise others, through teaching or writing, to act in similar fashion, contrary to law on the books. If Linda concludes that she may be a faithful lawyer while contravening some clear law on the books, then she may advise others to do the same.[48]

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44. *See, e.g.*, Pepper, *supra* note 26, at 1600–01. It would be a mistake, however, to assume that clients are Holmesian and do not care about the morality and justice of their actions. *See, e.g.*, Katherine R. Kruse, *The Jurisprudential Turn in Legal Ethics*, 53 ARIZ. L. REV. 493, 527 (2011); Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO. J. LEGAL ETHICS 103, 103 (2010) (discussing how lawyers tend to "overemphasiz[e] the clients' legal interests and minimiz[e] or ignor[e] the other cares, commitments, relationships, reputations, and values that constitute the objectives clients bring to legal representation"); Tanina Rostain, *Ethics Lost: Limitations of Current Approaches to Lawyers Regulation*, 71 S. CAL. L. REV. 1273, 1303 (1998) ("Typically, people obey laws not primarily because they fear sanctions but because they have internalized commitments to legal institutions and values.").

45. MODEL RULES R. 1.2(d) ("[A] lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."); MODEL RULES R. 1.2(d) cmt. 9 (discussing how the Rule's prohibition on assisting with conduct that is criminal or fraudulent "does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct"); *see also* Peter A. Joy & Rodney J. Uphoff, *What Do I Do With the Porn on My Computer: How a Lawyer Should Counsel Clients About Physical Evidence*, 54 AM. CRIM. L. REV. 751, 765–66 (2017); Pepper, *supra* note 26, at 1587–98.

46. *See* Paul R. Tremblay, *At Your Service: Lawyer Discretion to Assist Clients in Unlawful Conduct*, 70 FLA. L. REV. 251 (2018) [hereinafter Tremblay, *At Your Service*] (arguing that the Model Rules permit assisting clients with noncriminal or nonfraudulent conduct).

47. *See infra* notes 191–96 and accompanying text.

48. There is one further benefit to Linda's resolution of the conflict between the law as written and the law on the ground. Progressive critics of Wendel's fidelity thesis argue that such a commitment elevates "respect for the law and the legal system to a normative plane." Anthony V. Alfieri, *Fidelity to Community: A Defense of Community Lawyering*, 90 TEX. L. REV. 635, 648 (2012) (book review of WENDEL, *supra* note 2). The critics worry that the normative value of fidelity discourages deeper moral confrontation with injustice. *Id.* at 653–54; William H. Simon, *Authoritarian Legal Ethics: Bradley Wendel and the Positivist Turn*, 90 TEX. L. REV. 709, 721 (2012) (book review of WENDEL, *supra* note 2). A recognition that law on the ground often will deserve respect even in the face of contrary written law ought to reduce those worries somewhat.

That same reasoning applies to Linda's advising of her clients. If Linda honors her baseline commitment to represent clients zealously and to advise them competently "within the bounds of the law,"[49] her communication of those bounds to the client will differ depending on whether she communicates the constraints imposed by law in action or by law on the books.[50]

II. DISSONANCE BETWEEN THE SUBSTANTIVE LAW OF LAWYERING AND ITS TREATMENT AT STREET LEVEL

But for the law in action tension, and perhaps the "moral activism" discomforts (which, as noted above, this Article will elide[51]), Linda's lawyering life is straightforward. If the relevant authority directs her actions, she will follow that direction. If the relevant authority offers her discretion about how to proceed, she will use her well-developed lawyering judgment in light of the best read of the ambiguous law as well as her, and her client's, interests.[52]

But what about instances where the relevant authority is clear, but Linda's read of her community tells her that in practice the law is different? Some scholars have noted that the gap between law on the books and law in action is overdramatized because a lawyer's encounter with "the law" is *always* subject to her interpretation and judgment as influenced by the community in which she practices.[53] If that assertion is sound, then Linda never faces the challenges addressed in this Article. But many examples belie that assertion, situations where the prevailing written authority is clear, but practices within a community proceed in a different direction. Let us consider four examples.

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49. The "basic principles" underlying a lawyer's professional duties "include the lawyer's obligation zealously to pursue and protect a client's legitimate interests, within the bounds of the law . . . ." MODEL RULES pmbl. 9. *See* David Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 470–73 (1990) (unpacking that concept in the light of realism and critical studies); Kruse, *The Jurisprudential Turn in Legal Ethics*, *supra* note 44, at 500 (critiquing the realist stance regarding the bounds of the law).

50. Kate Kruse describes the realist understanding of this counseling role as follows:

> [L]awyers who did not take account of gaps between what the "law in books" says and how the law is likely to be applied or implemented in a client's case might be criticized for providing legal advice that, while technically accurate, was nonetheless useless to their clients as a practical matter.

Kruse, *The Jurisprudential Turn in Legal Ethics*, *supra* note 44, at 499.

51. *See supra* note 38.

52. *See* Samuel J. Levine, *Taking Ethical Discretion Seriously: Ethical Deliberation as Ethical Obligation*, 37 IND. L. REV. 21 (2003) (discussing the importance of contextual judgment in ethical lawyering practices).

53. *See, e.g.*, Issa Kohler-Haussman, *Jumping Bunnies and Legal Rules: The Organizational Sociologist and the Legal Scholar Should Be Friends*, *in* THE NEW CRIMINAL JUSTICE THINKING 246, 247 (Sharon Dolovich & Alexandra Natapoff eds., 2017) ("perhaps law on the books was always already law in action because there are no obvious, unmediated meanings of legal rules prior to the interpretive and constructive sociocultural practices that constitute them as legal rules in practice"); Gould & Barclay, *supra* note 1, at 334 (wondering whether the "gap" topic has become a "straw man").

A. THE SUBSTANTIVE LAW GOVERNING CONFIDENTIALITY

Imagine a simple story. Linda, an attorney in a medium-size suburban community, has a portfolio of existing clients whom she represents. A prospective client, PC, asks Linda for help to resolve a dispute with a business supplier, EC, whom Linda recognizes as one of her existing clients. Linda's ongoing work for EC is nearly finished and entirely unrelated to the dispute raised by PC. A standard rule of professional conduct (Model Rule 1.7(a)(1)[54]), adopted verbatim by the supreme court in Linda's state,[55] declares that an attorney may not represent a person to oppose a current client, even on unrelated matters, unless the two clients consent, and even then, only if the lawyer is certain she will be a competent lawyer for both clients, according to Rule 1.7(b).[56] If PC and EC agree, after an intelligent discussion with her, Linda may accept PC's case as a new matter.[57] Linda could begin this process by explaining to PC that she represents EC, and ask permission to have a conversation with EC about possible consent. Or, alternatively, Linda might put PC on hold while Linda first approaches EC to see if they would be open to beginning a conversation. Either way gets the dialogue going. The litigants very well might refuse consent, but in many circumstances, they may have reasons to not care and, therefore, would agree.[58]

The problem is that a different rule of professional conduct, Model Rule 1.6(a), prohibits either conversation, even though Rule 1.7(b) presupposes such a conversation. Rule 1.6(a) states that a lawyer may not disclose "information relating to the representation" to another without implied authorization, the client's informed consent, or one of the betraying-type exceptions of Rule 1.6(b).[59] The mere fact of representation is itself "information related to the representation,"[60] and therefore, may not be disclosed absent permission.[61] Rule 1.6(a) thus bars telling another person the identity of Linda's clients.

Consequently, given that Rule 1.6 is the law in her jurisdiction, Linda cannot begin a conversation with PC about the fact that she represents EC (or that she "has a

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54. MODEL RULES R. 1.7(a)(1).

55. A 2022 review by the author's research assistant of the rules of professional conduct in the 50 states and the District of Columbia shows that vast majority of jurisdictions continue to employ Model Rule 1.7(a) exactly as the ABA's version reads.

56. MODEL RULES R. 1.7(b).

57. Note that without such an agreement, all of Linda's law firm colleagues are forbidden from representing PC in its claim against EC, even those who might work thousands of miles away and have no knowledge of EC's matter. *See* MODEL RULES R. 1.10(a); Nathan M. Crystal, *Disqualification of Counsel for Unrelated Matter Conflicts of Interest*, 4 GEO. J. LEGAL ETHICS 273, 275 (1990).

58. *See* RESTATEMENT § 122; Unified Sewerage Agency v. Jelco Inc., 646 F.2d 1339, 1345–46 (9th Cir. 1981).

59. MODEL RULES R. 1.6(a).

60. *See* ABA Comm. on Ethics & Prof'l Resp., Formal Op. 480 at 2 (2018) ("[e]ven client identity is protected under Model Rule 1.6").

61. *See* Theo Liebmann & Stefan Hillel Krieger, *The Elephant in the Room in Clinical Scholarship: Ethical Guardrails and Case Histories*, 29 CLINICAL. L. REV. 135, 137–39 (2022); Douglas R. Richman, *Lawyers' Right of Professional Self-Defense and Its Limits*, 74 S.C. L. REV. 303, 313 (2022).

conflict," which communicates the same thing), and she cannot have a conversation with EC to get permission to disclose the fact of representation to PC. Linda is stuck.[62]

Meanwhile, the *Restatement* permits the conversation's beginning, which is what really matters here. Section 60(1)(a) of the *Restatement* reads as follows:

> [T]he lawyer may not use or disclose confidential client information as defined in § 59 if there is a reasonable prospect that doing so will adversely affect a material interest of the client or if the client has instructed the lawyer not to use or disclose such information . . . .[63]

The *Restatement* "rule" about confidentiality is much more lenient, and protects much less information, than the Model Rule. The American Law Institute ("ALI") drafters of the *Restatement* acknowledge the difference:

> Although the lawyer codes do not express this limitation, *such is the accepted interpretation*. For example, under a literal reading of ABA Model Rule 1.6(a) (1983), a lawyer would commit a disciplinary violation by telling an unassociated lawyer in casual conversation the identity of a firm client, even if mention of the client's identity creates no possible risk of harm. Such a strict interpretation goes beyond the proper interpretation of the rule.[64]

The *Restatement* offers no citation to authority for its more lax (and more sensible) interpretation of the Model Rule, but to practicing lawyers, the *Restatement's* position seems, well, *right*.[65] And, importantly, while the ABA has amended the *Model Rules* several times since 2000,[66] when the ALI published the *Restatement*, including adding an important new exception expressly authorizing disclosure of client identity when lawyers change firms,[67] it never changed the basic Rule 1.6(a), nor applied the new exception to the story described above. While some jurisdictions have amended their Rule 1.6 to include the

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62. There are many scenarios where a lawyer would not be stuck, such as when the law firm already advertises its representation of EC on its website (and therefore presumably already has EC's informed consent to disclose the representation to others) or has an advance waiver in place. For a discussion of advance waivers of concurrent conflicts of interest, see Richard W. Painter, *Advance Waiver of Conflicts*, 13 GEO. J. LEGAL ETHICS 289, 289 (2000). But in many instances the story as described is real.

63. RESTATEMENT § 60(1)(a). Section 59, referenced in the quoted text, defines "confidential client information" as "information relating to the representation of a client, other than information that is generally known." *Id.* § 59.

64. *Id.* cmt. c(i).

65. *See, e.g.*, David Luban, *The Art of Honesty*, 101 COLUM. L. REV. 1763, 1763 (2001) (noting that "no lawyer is so literal minded about the confidentiality requirement" about the identity of one's clients to worry about that disclosure).

66. *See, e.g.*, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2013 (Art Garwin ed., 2013).

67. *See* MODEL RULES R. 1.6(b)(7). The ABA added Rule 1.6(b)(7) in 2012. That rule authorizes a lawyer to share client identity information and the nature of a lawyer's prior representation to permit a new firm to screen for conflicts effectively. Prior to that rule change, the literal language of Rule 1.6(a) prohibited effective conflict checking for lateral hires, a result which no one intended. *See also* ABA Comm. on Ethics & Prof'l Resp., Formal Op. 09-455 (2009) (attempting to massage that inconsistency before the change in the rule).

Restatement's gloss,[68] the vast majority of jurisdictions continue to adhere to the *Model Rules*' language.[69]

Linda practices in one of the ABA-following jurisdictions, but she has the *Restatement* in front of her. Which does she follow? If Linda follows the *Restatement* and starts a conversation with one of the two businesses, has she done anything *wrong*? And, to refine the controversy here, if Linda were an ethics lecturer for a bar association continuing legal education (CLE) session, may she tell the participants that the operative standard is that represented by the *Restatement*? May she publish her recommendation?

This example serves as the basis for the law on the books versus law in action inquiry. To the uninitiated, the *Restatement's* read of the law on the ground appears to be a paradigmatic example of law in action, accepting that the jurisdiction's rules of professional conduct are surely "law on the books,"[70] and that the *Restatement* is nothing more than a report about how the law works in practice.[71]

B. THE SUBSTANTIVE LAW GOVERNING SCREENING IN CONCURRENT CONFLICT SETTINGS

The *Restatement*'s confidentiality example is not an isolated phenomenon.[72] Consider a lawyer's treatment of a different, concurrent conflict development. I recently published an article that explored a reasonably common but under-analyzed practice where a lawyer, or a law student, works as an active participant in

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68. *See, e.g.*, ALASKA RULES OF PROF'L CONDUCT R. 1.6(a) (2022); MASS. RULES OF PROF'L CONDUCT R. 1.6(a) (2015).

69. A review by the author's research assistant of the rules of professional conduct in the fifty states and the District of Columbia shows that, as of 2022, at least forty jurisdictions continue to employ MODEL RULE R. 1.6 (a) exactly as the ABA's version reads.

70. The rules of professional conduct as adopted by a jurisdiction's highest court constitute unambiguously the "law of lawyering" and must be obeyed by practicing lawyers. *See* Nix v. Whiteside, 475 U.S. 157, 168–69 (1986) (discussing how once Iowa adopted its version of the *Model Code of Professional Responsibility*, it became binding on all lawyers who appear in courts in Iowa); John Dzienkowski & John Golden, *Reasoned Decision-Making for Legal Ethics Regulation*, 89 FORDHAM L. REV. 1125, 1135 (2021); Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1398, 1411–12 (1992); W. Bradley Wendel, *Autonomy Isn't Everything: Some Cautionary Notes on* McCoy v. Louisiana, 9 ST. MARY'S J. LEGAL MAL. 92, 113–14 (2022) [hereinafter Wendel, *Autonomy Isn't Everything*] ("Lawyers are always bound by the rules of professional conduct of their admitting state.").

71. Note that this example accepts that the *Restatement* is not, on its own, "the law," as a source of binding authority. That assumption appears warranted. *See* Shyamkrishna Balganesh & Peter S. Menell, *Restatements of Statutory Law: The Curious Case of the Restatement of Copyright*, 44 COLUM. J.L. & ARTS 285, (2021); Joy & Uphoff, *supra* note 45, at 779. We revisit that topic below. *See infra* notes 214–19 and accompanying text.

72. In addition to the remaining three examples discussed here, we might observe that the *Restatement of the Law Governing Lawyers* offers other comparable examples where the guidance in its book differs from the rules of professional conduct. *See, e.g.*, Peter J. Walsh, *Multijurisdictional Practice of Law Issues in Estate Planning*, 40 EST. PLAN. 23, 31 (2013) (describing guidance from the *Restatement* about multijurisdictional practice that contradicts the language of the *Model Rules*); Wendel, *Autonomy Isn't Everything*, *supra* note 70, at 117 (noting that the Restatement "departs radically—and controversially—from the *Model Rules*" in its treatment of a lawyer's duties when representing an impaired client).

two law settings at the same time.[73] I hoped to better understand the simultaneous conflict of interest implications of that practice, given the baseline legal ethics proposition that a lawyer is deemed to represent every client in his firm.[74] A lawyer's active presence in two firms, therefore, effectively merges the firms for conflict purposes.[75] Given that (a) the phenomenon of multiple practices does occur and (b) when it does occur, it is apparent that each firm does not (and perhaps *cannot*) conduct conflict checks with the other firm on a daily basis, I described and defended what I called there a "jury-rigged" strategy.[76] This strategy acknowledges the small conflict risks and minimizes them through screening mechanisms that are not permitted under the *Model Rules* or the reported common law.[77] While developing that analysis, I encountered the question I aim to address in this Article (and noted in that piece that I would try to make sense of it in a later article[78])—that is, whether it is proper for a lawyer to engage in a practice that is safe enough, accepted implicitly within her community, but contrary to the black letter law of her jurisdiction.

Like with the confidentiality example above, the simultaneity puzzle presents a choice for the lawyer between compliance with the unambiguous language of the binding state law (which, if followed, would effectively prohibit simultaneous practices except under extremely limited conditions), and adoption of what appears to be the law in action, the accepted community stance, where the jury-rigged arrangement is common and seemingly proper.

For a lawyer like Harriet, the Holmesian practitioner,[79] this is an easy call, especially if she is confident that she will suffer no adverse consequences and no client or third party will be hurt. For Linda, with her fidelity commitment, however, she may only follow the community practices if she concludes that doing so is faithful to the law—that being the law in action.

C. UNAUTHORIZED PRACTICE OF LAW IN THE TRADEMARK FIELD

Consider another example where a practicing lawyer encounters tension between the law as written and the law as practiced and accepted within a community. This example involves trademark practice before a federal agency and the prohibition against the unauthorized practice of law. The details of this

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73. Paul R. Tremblay, *The Simultaneity Puzzle: Lawyers Working at Multiple Law Firms*, 89 TENN. L. REV. 131 (2021) [hereinafter Tremblay, *The Simultaneity Puzzle*].

74. *See* MODEL RULES R. 1.10 cmt. 2 (noting "the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client"); *see also* Adam Raviv, *The Real and Imagined Beneficiaries of Legal Ethics*, 35 GEO. J. LEGAL ETHICS 321, 347 (2022) (discussing the implications of that position).

75. Tremblay, *The Simultaneity Puzzle*, *supra* note 73, at 133.

76. *Id*. at 184.

77. The *Model Rules* authorize screening of lawyers to respond to former-client conflicts involving lateral lawyers, but never for concurrent client conflicts. *See* MODEL RULES R. 1.10(a)(2).

78. Tremblay, *The Simultaneity Puzzle*, *supra* note 73, at 187 n.232.

79. *See supra* notes 35–37 and accompanying text.

example could become complicated, but for our present purposes a brief description will need to suffice.

Every jurisdiction in the country prohibits lawyers from engaging in the unauthorized practice of law ("UPL"), through a rule of professional conduct similar to Model Rule 5.5(a).[80] In complementary fashion, every jurisdiction also prohibits nonlawyers from practicing law, with limited exceptions.[81] In many jurisdictions, engagement in UPL is a crime.[82]

One significant gloss on the UPL prohibitions arises from the U.S. Supreme Court's 1963 decision in *Sperry v. Florida*.[83] In *Sperry*, the Court held that Florida could not enjoin a nonlawyer, registered by the United States Patent and Trademark Office ("USPTO") to practice as a patent agent, from performing activities within the scope of his registration, even though the individual's actions constituted the "practice of law" in Florida.[84] The Court relied on the federal preemption doctrine.[85] The *Sperry* decision "stands for the general proposition that where federal law authorizes an agent to practice before a federal tribunal, the federal law preempts a state's licensing requirements to the extent that those requirements hinder or obstruct the goals of federal law."[86]

Sperry involved practice before the USPTO by a patent practitioner.[87] The USPTO, as its name indicates, also oversees the practice of trademark law and the representation of trademark applicants and owners before the agency.[88] Trademark attorneys often act as if the *Sperry* preemption applies equally to their practice,[89] meaning that they may represent out-of-state clients before the USPTO even if those clients have no connection to the lawyer's home state.[90]

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80. MODEL RULES R. 5.5(a) ("A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.").

81. *See, e.g.*, Deborah L. Rhode, *What We Know and Need to Know About the Delivery of Legal Services by Nonlawyers*, 67 S.C. L. REV. 429, 431–32 (2016); Monica Schurtman & Monique Lillard, *Remedial and Preventive Responses to the Unauthorized Practice of Immigration Law*, 20 TEX. HISP. J.L. & POL'Y 47, 99 (2014).

82. Ralph Baxter, *Dereliction of Duty: State-Bar Inaction in Response to America's Access-to-Justice Crisis*, 132 YALE L.J. F. 228, 234 (2022); *see, e.g.*, CAL. BUS. & PROF. CODE § 6125 (2019) (punishable by fine and imprisonment for up to one year); MASS. G. L. ch. 221 § 41 (punishable by fine and imprisonment up to six months).

83. Sperry v. Florida., 373 U.S. 379 (1963).

84. *Id.* at 383. *See* Fla. Const., art. V, § 23 (1885) (since repealed).

85. *See* Sperry, 373 U.S. at 385.

86. Surrick v. Killion, 449 F.3d 520, 530 (3d Cir. 2006); *see also* In re Desilets, 291 F.3d 925, 930 (6th Cir. 2002) (holding, in a claim of unauthorized practice of law, that "[w]hen state licensing laws purport to prohibit lawyers from doing that which federal law entitles them to do, the state law must give way").

87. 373 U.S. at 381.

88. *See* 15 U.S.C. §§ 1051 et seq.

89. *See, e.g.*, MARK L. TUFT, ELLEN R. PECK & KEVIN E. MOHR, CAL. PRAC. GUIDE PROF. RESP. § 1:157.11a (2022) ("An attorney who is a member of any state bar may represent others in trademark and other nonpatent matters in the [US]PTO.").

90. *See, e.g.*, *Law School Clinic Certification Program*, USPTO, https://www.uspto.gov/learning-and-resources/ip-policy/public-information-about-practitioners/law-school-clinic-1 [https://perma.cc/W7XL-FRZV]

Seemingly, those lawyers are mistaken.[91]

Without delving into the fine points of the *Sperry* implications, we may observe that the Supreme Court's action in that patent case does not mean that a lawyer may represent clients on a federal law matter in a state in which she is not licensed to practice.[92] Only if a federal statute or regulation expressly authorizes practice will the *Sperry* preemption apply.[93] The regulatory scheme for trademark practice is not the same as that for patent practice; indeed, the Court in *Sperry* cited to the difference between the two aspects of the USPTO to conclude that patent practice was preempted.[94]

Despite the absence of authority, both the trademark bar and the USPTO accept that a lawyer need not be licensed in the state where her trademark client resides or have a practice connected to that state.[95] While UPL enforcement is typically vigorous,[96] it is

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(last visited Nov. 7, 2023) (showing 26 of the 58 clinical programs providing pro bono trademark representation inviting clients from outside of their home states).

91. Research shows little attention to this issue. A helpful, but since removed, internet blog post explained the lack of support for the proposition that lawyers not licensed in a particular jurisdiction may lawfully represent clients in the jurisdiction on federal trademark matters. *See Evaluating the Unauthorized Practice of Law When Running a Nationwide/Multijurisdictional Trademark Practice*, TRADEMARK WELL, LLC BLOG (Jan. 2017) (on file with the author) ("Contrary to what some think, there are no special multijurisdictional practice of law rules for trademark attorneys providing legal services related to federal trademark law. Trademark attorneys providing trademark legal services are subject to the standard unauthorized practice of law analysis employed be each state or other relevant jurisdiction."). As described immediately below, that blog post accurately reports the state of the law.

92. *See* GEOFFREY C. HAZARD, JR., W. WILLIAM HODES, PETER R. JARVIS & TRISHA THOMPSON, THE LAW OF LAWYERING § 49.13 (4th ed. 2022) ("Federal 'authorization' that will oust state [unauthorized practice of law] regulations is not present merely because a federal agency has been established to enforce a particularly body of federal law.").

93. *See, e.g.*, In re Wells, No. 01-O-00379, 2005 WL 3293313, at *5 (Cal. Bar Ct. Dec. 5, 2005) (unpublished opinion) ("The legislative powers of the states will not be superseded by federal law unless that is 'the clear and manifest purpose of Congress.'").

94. Sperry v. Florida., 373 U.S. 379, 386 (1963):

> [R]egistration in the Patent Office does not authorize the general practice of patent law, but sanctions only the performance of those services which are reasonably necessary and incident to the preparation and prosecution of patent applications. That no more was intended is further shown by the contrast with the regulations governing practice before the Patent Office in trademark cases, also issued by the Commissioner of Patents. These regulations now provide that "[r]ecognition of any person under this section is not to be construed as sanctioning or authorizing the performance of any acts regarded in the jurisdiction where performed as the unauthorized practice of law." 37 CFR § 2.12(d). The comparison is perhaps sufficiently telling.

The trademark-related language from the Code of Federal Regulation quoted by the Court in *Sperry* remains in place, albeit in a different section. *See* 37 C.F.R. § 11.14(d) (2019).

95. *See* TRADEMARK WELL, LLC BLOG, *supra* note 91 ("almost every attorney engages in this sort of practice believing that it is acceptable under the rules").

96. *See, e.g.*, Matthew Longobardi, *Unauthorized Practice of Law and Meaningful Access to the Courts: Is Law Too Important to Be Left to Lawyers?*, 35 CARDOZO L. REV. 2043, 2051–52 (2014) (describing the campaigns to restrict the provision of legal advice); Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 GEO. J. LEGAL ETHICS 209, 216 (1990).

nonexistent for trademark work.[97]

Therefore, this state of affairs appears to represent yet another "gap" between the law on the books and the law in action. If Linda wished to represent an out-of-state client on a trademark application before the USPTO, knowing that lawyers throughout the country do exactly that with no criticism nor sanction, is that a proper action for her in light of her commitment to fidelity?

D. ASSISTANCE WITH "CRIMINAL" CONDUCT

A lawyer such as Linda also encounters the law-in-action phenomenon when asked to assist with conduct that qualifies as criminal in a literal fashion, but, in practice, is not so. Consider this example: Linda represents a humbly-resourced, cash-poor startup tech business, an enterprise with potential for success. The founder/CEO of the organization needs to "hire" a coder and has located an interested and attractive candidate. The startup cannot afford to pay minimum wage but can pay some small amount of cash supplemented by stock options. The coder welcomes that opportunity. The founder asks Linda for assistance with that employment arrangement.[98]

In Linda's state, the coder qualifies as an employee, and the business must pay her minimum wage and overtime.[99] The arrangement therefore is unlawful. Model Rule 1.2(d), in place in Linda's state, prohibits her from counseling or assisting a client with conduct Linda "knows is criminal or fraudulent."[100] The rule does not prohibit Linda from assisting with unlawful conduct if that conduct is neither a crime nor fraud.[101] If violation of the wage-and-hour laws is criminal, Linda may not assist with this transaction, per the rules of professional conduct; if not criminal, she may choose to assist, and might want to do so if the transaction is not exploitative or otherwise harmful. The wage-and-hour laws are primarily regulatory in nature, imposing, through state[102] and federal[103] provisions, requirements on employers as a matter of public policy, with civil damages or

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97. A Westlaw search within all state cases for discipline or civil or criminal prosecution involving the unauthorized practice of law by a licensed attorney for trademark representation produced no results. Westlaw search, July 27, 2023. *Cf.* People v. Harris, 915 N.E.2d 103 (Ill. App. 2009) (nonlawyer providing trademark assistance guilty of unauthorized practice of law).

98. This story is not uncommon. *See, e.g.*, Lawrence M. Friedman, Robert W. Gordon, Sophie Pirie & Edwin Whatley, *Laws, Lawyers, and Legal Practice in Silicon Valley: A Preliminary Report*, 64 IND. L.J. 555, 563 (1989); Lee A. Harris, *Taxicab Economics: The Freedom to Contract for a Ride*, 1 GEO. J.L. & PUB. POL'Y 195, 203 (2002) ("Typically, . . . it is legal or technical barriers, rather than natural barriers, that make the start-up costs for potential entrepreneurs prohibitively high.").

99. *See, e.g.*, David Bauer, *The Misclassification of Independent Contractors: The Fifty-Four Billion Dollar Problem*, 12 RUTGERS J.L. & PUB. POL'Y 138 (2015); Jenna A. Moran, *Independent Contractor or Employee? Misclassification of Workers and Its Effect on the State*, 28 BUFF. PUB. INT. L.J. 105 (2009).

100. MODEL RULES R. 1.2(d).

101. Carl A. Pierce, *Client Misconduct in the 21st Century*, 35 U. MEM. L. REV. 731, 891 (2005); Tremblay, *At Your Service*, *supra* note 46, at 282.

102. For one example, see MASS. GEN. LAWS. ch. 151A, § 47 (2016).

103. *See* Fair Labor Standards Act ("FLSA"), 29 U.S.C.A. §§ 201–219 (2006).

fines permitted.[104] In that respect they appear not to implicate fraudulent or criminal conduct.

However, the federal Fair Labor Standards Act ("FLSA") allows for criminal penalties for willful violations of the wage-and-hour laws,[105] as do many states.[106] Let us assume that Linda's state law includes criminal penalties for willful violations of those provisions. Ordinarily, one would accept that an action defined as a crime does not cease to be "criminal" when enforcement is unlikely.[107] But here is where a lawyer such as Linda might recognize the law-in-action gloss on her strategic choices. It seems entirely true that the *only* criminal prosecution (as opposed to civil enforcement) of wage-and-hour violations occurs with serious, systemic, and nonconsensual violations of the minimum wage and overtime law.[108] Correspondingly, it is never a crime in practice when a small business cheats a bit when struggling to develop its products, even if, on occasion, that action may trigger some civil action.[109] A lawyer such as Harriet would assist the startup, knowing that no one really cares, the work is not a terrible use of her lawyering skill given the entrepreneurial benefits she will be supporting, and she will likely never suffer any adverse consequences for her literal noncompliance with Rule 1.2(d). Linda, though, while accepting all of those qualifications, also needs to know whether her assistance is *lawful* under a fair reading of Rule 1.2(d). If the treatment of low-level wage-and-hour violations is not actually "criminal" using the lens of law in action, she may aid the client.

These four examples show that good-faith lawyers like Linda need guidance about how they should proceed when encountering "gap" settings. That guidance needs to come from an understanding of the nature of law in action.

III. THE ROLE OF LAW IN ACTION FOR THE FIDELITY COMMITMENT

In Part III, the Article unpacks and distinguishes several strands of law in action found in the sociolegal literature. It concludes that in only one of those understandings does the law in action resemble authoritative guidance perhaps

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104. *See* 29 C.F.R. Part 578, Minimum Wage and Overtime Violations—Civil Money Penalties (establishing civil penalties for violations of the wage-and-hour laws).

105. 29 U.S.C.A. § 216(a)–(b) (2006).

106. *See, e.g.*, MASS. GEN. LAWS. ch. 151A, § 47 (2016); Commonwealth. v. Northern Telecom, Inc., 517 N.E. 2d 491 (Mass. App. 1988); *see also* Benjamin Levin, *Wage Theft Criminalization*, 54 U.C. DAVIS L. REV. 1429, 1443–44 (2021) (reporting on state criminal provisions).

107. *See* Maine Prof'l Ethics Comm'n, Op. 199 (July 7, 2010) (referring to marijuana businesses, legal in Maine but not under federal law, stating that Maine's Rule of Professional Conduct 1.2(d) "does not make a distinction between crimes which are enforced and those which are not"); *see also* Sam Kamin & Eli Wald, *Marijuana Lawyers: Outlaws or Crusaders?*, 91 OR. L. REV. 869, 901 (2013) (rejecting as failing the "common-sense test . . . the position that no conduct can be criminal if the government is aware of the conduct and systematically fails to enforce the law").

108. *See, e.g.*, Anthony Damelio, Note, *Making Wage Theft Costly: District Attorneys and Attorneys General Enforcing Wage and Hour Law*, 49 FORDHAM URB. L.J. 109, 122 (2021) ("Criminal penalties are rarely, if ever, invoked.").

109. *See* Pepper, *supra* note 26, at 1562.

warranting a lawyer's respect. This Part then examines how a practicing lawyer might distinguish that respect-worthy law in action from simple lawbreaking.

A. SITUATING THE LAW IN ACTION LITERATURE WITHIN THE LAW OF LAWYERING STORIES

The four examples above represent spaces within the law of lawyering where what one reads about a lawyer's obligation corresponds poorly with how the world operates on the ground. Those examples appear, to the uninitiated, to capture well what the sociologists and jurisprudence scholars mean when they write about the "classic" or "iconic" gap between law on the books and law in action.[110] The discussion of the gap has been extensive over the years among law and society scholars and many others.[111]

And if so, again to the uninitiated, then what would law in action represent other than a more reliable version of "the law"? The very phrase communicates that "law in action" is *law*, in some fashion, and that the law should *matter*. A lawyer such as Linda, committed to operate with respect for the law, accordingly, may maintain her fidelity stance while honoring the "truer" version of how the law operates—the "real law," as several writers describe it,[112] or "how it all actually works."[113]

The question we encounter is this: Should law in action represent an acceptable, and perhaps better, version of law for practicing lawyers? Unfortunately for lawyers like Linda, the answer to that question is elusive. The gap between law on the books and law in action is more complicated than the novices among us might suppose. Consider, for starters, a prominent book about law and society by the sociologist Kitty Calavita, offering a useful introduction for lay readers to the "gap" between law on the books and law in action.[114] The book's gap studies

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110. Many of the references employ descriptors of the gap such as "iconic," "classic," "familiar," and "well-explored in the literature." *See, e.g.*, KITTY CALAVITA, INVITATION TO LAW & SOCIETY: AN INTRODUCTION TO THE STUDY OF REAL LAW 9 (2d ed. 2016) ("canonical"); Megan Doherty Bea & Emily S. Taylor Poppe, *Marginalized Legal Categories: Social Inequality, Family Structure, and the Laws of Intestacy*, 55 L. & SOC'Y REV. 252, 267 (2021) (the "familiar distinction"); Regina Jefferies, *Transnational Legal Process: An Evolving Theory and Methodology*, 46 BROOK. J. INT'L L. 311, 358 (2021) ("well-explored in the literature"); Carol Seron, Susan Bibler Coutin & Pauline White Meeusen, *Is There a Canon of Law and Society?*, 9 ANN. REV. L. & SOC. SCI. 287, 294 (2013) ("iconic"); Brian Z. Tamanaha, *Sociological Jurisprudence Past and Present*, 45 L. & SOC. INQUIRY 493, 508 (2020) ("iconic distinction"); Anjuli Verma, *The Law-Before: Legacies and Gaps in Penal Reform*, 49 L. & SOC'Y REV. 847, 850 (2015) ("canonical").

111. A search for "law in action"/p "law on the books" in the Westlaw law review library produced 910 hits in October 2022. Westlaw search, October, 2022. Another non-duplicative 342 publications appear if one searches for "law in action"/p "law in the books." *Id*. The study of the difference has come to be known as "gap studies." *See, e.g.*, Gould & Barclay, *supra* note 1, at 323.

112. CALAVITA, *supra* note 110, at 9; Sanford Levinson & J.M. Balkin, *The "Bad Man," the Good, and the Self-Reliant*, 78 B.U. L. REV. 885, 893 (1998); Pepper, *supra* note 26, at 1571; Southworth & Fiske, *supra* note 8, at 86.

113. CALAVITA, *supra* note 110, at 8.

114. *Id*. at Chapter 6 ("The Talk versus the Walk of Law"). Calavita's text has been noted for its apt summary of the gap and its implementation. *See* Matthew Fritz-Mauer, *Lofty Laws, Broken Promises: Wage Theft and the Degradation of Low-Wage Workers*, 20 EMP. RTS. & EMP. POL'Y J. 71, 95 n.117 (2016); *see also*

chapter ("The Talk versus the Walk of Law"[115]) begins with a story of a tourist spot in Ireland where a prominent sign announces that walking along a coastal cliff behind a fence is strictly forbidden.[116] Calavita realizes quickly, however, that everyone walks along the cliff, past the sign, all the time, and no one cares, neither the authorities nor the other visitors.[117] To the visitors, the law on the books is saying, "Don't you dare walk on this cliff!" while the law in action permits that activity. The "real law," as Calavita terms it, about walking along the cliff is the latter—the law in action.[118] That example captures quite elegantly the *Restatement*'s assertion about Rule 1.6(a) described and the other stories offered above.[119] The law as it applies to the persons living in the world is not the version written down.[120]

The early Realist treatment of the gap resonates with this understanding. The pioneering Realist Karl Llewellyn distinguished between what he called the "paper" rules and the "working" rules.[121] Here's one helpful description of Llewellyn's ideas:

> Building on an older distinction between laws on the books and laws in action, Llewellyn carves a paper/working/real rule distinction. For him, some rules on the books go unused in official decision-making—unused in the advertised, popularly assumed way at any rate. This subset of book rules is deemed to be mere "paper" rules because something else is doing the lion's share of the work guiding official decisions. In contrast to the paper ones, a system's "working" rules are those which officials really do predominantly rely upon to decide. Working rules are divided into two types. (I) written working rules: a different subset of book rules. (Officials use these in the generally assumed way.) (II) unwritten working rules: alternative norms that cannot be found in official sources. Officials rely upon these rules far more heavily than on their cognate ("paper") book ones to reach a specific outcome for a decision.[122]

Ellen Berrey, *Social Enterprise Law in Action: Organizational Characteristics of U.S. Benefit Corporations*, 20 TRANSACTIONS: TENN. J. BUS. L. 21, 26 n.18 (2018); Symposium, *Calavita's Invitation to Law & Society: Introduction to the Study of Real Law*, 39 L. & SOC. INQUIRY 204 (2014).

115. CALAVITA, *supra* note 110, at 109–34.

116. *Id*. at 109.

117. *Id*.

118. *Id*. at 130–31.

119. *See supra* notes 63–65 and accompanying text.

120. The Calavita story is evocative and quite helpful to the present enterprise, but its message is also incomplete. As one reader of a draft of this article has noted, as soon as a visitor falls from the cliff, that sign and its message will surely resume its character as the more authoritative statement of the law. E-mail from Carrie Menkel-Meadow, Distinguished and Chancellor's Professor of Law, Univ. Cal. Irvine Sch. L., to author (June 7, 2023) (on file with author).

121. Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 439 n.9 (1930) (distinguishing "paper" rules from real or "working" rules).

122. David Frydrych, *Legal Realism and "Working" Rules*, 35 CAN. J.L. & JURIS. 321, 322 (2022) (emphasis omitted) (citing several Llewellyn works, including Llewellyn, *supra* note 121; Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931)).

Llewellyn's distinctions describe the phenomenon Linda observes, as captured in the four stories above. Other writers in this area offer similar descriptions of the operation of the gap. One observer notes, "If the law on the books and the law in action don't match, a Realist could say, stop worrying so much about what the books say."[123]

Note that the Realist's advice communicates the *attractiveness* of law in action as a source of authority. "Stop worrying so much about what the books say," the Realist tells us, because the law in action will be a superior source of guidance. That theme—that lawyers in practice ought to be nimble in their comfort with law in action, or law "on the ground"[124]—appears often in the literature.[125] Working lawyers need to appreciate how the law's effects are experienced[126] as they represent their clients.[127] As one recent commentary describes it:

> Lawyers need to (1) know a lot about the law on the books and the law in action and (2) be good at working within the parameters of the conventional style of legal reasoning. This is all to be expected. Law school muddles somewhere between vocation and education. Good lawyers need to know the system, and they need to know it well.[128]

A prominent clinical teacher agrees, noting that clinical education requires an understanding of those local customs and law in action to teach law students "a different set of considerations regarding legal research, analysis, thinking and

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123. William Ortman, *When Plea Bargaining Became Normal*, 100 B.U. L. REV. 1435, 1485 (2020) (citing Mark Fenster, *The Dramas of Criminal Law: Thurman Arnold's Post-Realist Critique of Law Enforcement*, 53 TULSA L. REV. 497, 517 (2018)); *see also* David Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 490 (1990) (noting the Realists' assertion that "this is how we do things around here").

124. *See e.g.*, Elizabeth Mertz, *Social Science and the Intellectual Apprenticeship: Moving the Scholarly Mission of Law Schools Forward*, 17 LEGAL WRITING: J. LEGAL WRITING INST. 427, 431 (2011) (contrasting "law on the ground with 'law in the books'"); Lauren Sudeall & Daniel Pasciuti, *Praxis and Paradox: Inside the Black Box of Eviction Court*, 74 VAND. L. REV. 1365, 1373 (2021) (describing "law on the ground" in housing courts).

125. *See e.g.*, Aviam Soifer & Miriam Wugmeister, *Mapping and Matching DNA: Several Legal Complications of "Accurate" Classifications*, 22 HASTINGS CONST. L.Q. 1, 2 (1994):

> The best lawyers and judges must understand the importance of knowing the rules and having a sense of the parameters. But it is also crucial to know that rules can be broken and parameters changed. Because classifications are constructed by human beings, classification schemes betray unthinking presuppositions and unconscious prejudices. Classifications tend to feed the yearning for certainty that is the enemy of clear thinking, and they often undermine justice as well.

126. *See* Andrew Roesch-Knapp, *The Cyclical Nature of Poverty: Evicting the Poor*, 45 L. & SOC. INQUIRY 839, 845 (2020) (describing the "gap between the rule as it is written and as it is experienced").

127. Roscoe Pound appears to agree. As he wrote over a century ago about the relationship between the legal theory and the on-the-ground practice of law, "Legal monks who pass their lives in an atmosphere of pure law, from which every worldly and human element is excluded, cannot shape practical principles to be applied to a restless world of flesh and blood." Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 607, 612 (1907).

128. Daniel J. Sequeira, *Conversations After Class: "Becoming Critical," or The Steps Necessary to Achieve Critical Thought for Law Students*, 92 U. COLO. L. REV. 1237, 1249 (2021).

decision-making and the skills/thought processes necessary to confront unwritten rules that emerge from local legal cultures."[129]

So far, this understanding of law in action coincides helpfully with Linda's curiosity about how she ought to proceed as a lawyer with fidelity. But a deeper familiarity with the law-in-action phenomenon muddies the waters considerably. It appears that most strands of law in action are less than attractive, represent descriptive rather than normative phenomena, and present a different understanding from what we have envisioned thus far. With those versions of law in action, a fidelity-committed lawyer may either elect not to "honor" that law because it merely describes the operation of legal principles on the ground or may refuse to honor it because the applicable law in action represents distortion or abuse of the law on the books. The task for a lawyer such as Linda, therefore, becomes much more challenging.

Let us return to Kitty Calavita's introduction to "real law."[130] After offering her evocative story about the cliff walk, Calavita's law-in-action examples are all troublesome instances of good laws on the books distorted, misused, or exploited by those who implement the laws.[131] For instance, she notes that the federal agency responsible for enforcing wage-and-hour laws (the law on the books, of course) systematically ignores blatant violations of the statutes and regulations (thus representing quite real law in action).[132] Calavita discusses critically how police make the law rather than apply existing law fairly.[133] She notes the inconsistent treatment of undocumented workers and other immigrants.[134] Her lesson to her readers is to not accept law on the books simply as one reads it but to attend to the messy on-the-ground implementation—the "real law"—which is so often distorted by racism, class biases, and privilege.[135]

Calavita's description of law in action is reflected in the broader literature, along with other somewhat different strands as well. One finds that the extensive discussion of law in action within the available scholarship tends to fit into essentially four (or perhaps five) buckets. What follows is a brief description of each, concluding with the strand most useful for lawyers like Linda.

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129. Andrea M. Seielstad, *Unwritten Laws and Customs, Local Legal Cultures, and Clinical Legal Education*, 6 CLINICAL L. REV. 127, 163 (1999).

130. CALAVITA, *supra* note 110.

131. *Id.* at 110–34.

132. *Id.* at 110–11. Calavita's examples of unenforced wage-and-hour laws are not those described above, involving entrepreneurial startups, as accepted and acceptable interpretations of otherwise clear regulatory language. *See supra* text accompanying notes 98–104. Instead, her examples report agencies' unresponsiveness to serious complaints by exploited workers. CALAVITA, *supra* note 110 at 110–11.

133. *Id.* at 115–16.

134. *Id.* at 116–17.

135. A commentary on Calavita's book emphasizes this point, noting her subtitle and suggesting that a "[m]ore accurate [subtitle] would have been *An Introduction to the Study of* Realized *Law*." Richard Lempert, *Calavita's Invitation to Law & Society: Introduction to the Symposium*, 39 L. & SOC. INQUIRY 204, 207 (2014) (emphasis in Lempert's text).

1. Activist judging. The first law-in-action strand is a version that, when unpacked, seems not to qualify as law in action in any meaningful way, even if this strain is not uncommon and represents the earliest iteration of this idea. It stems from Roscoe Pound's original treatment of law in action,[136] where activist courts stretch the meaning of legislation to achieve ends favored by the judges.[137]

Pound's seminal article focused largely on the actions of courts ruling on matters in which some legislation applied.[138] Writing at the turn of the twentieth century, Pound was troubled by activist courts undoing legislation aimed to address social ills.[139] The legislation constituted law on the books, while the actions by judges, not always adhering to the law as written, represented law in action.[140] Pound wrote,

> [T]he distinction between legal theory and judicial administration is often a very real and very deep one. . . . [A]ny one who studies critically the course of decision upon constitutional questions in a majority of our state courts must agree . . . that the courts in practice tend to overturn all legislation which they deem unwise . . . .[141]

Pound's observations served as an early recognition that judges' individual leanings and their assessment of the specific facts before them represented "the law" more accurately than what one might read on a page.[142]

Pound's insight helped spur the development of legal realism,[143] and later critical legal studies,[144] both of which grappled with the indeterminacy of substantive law. For our purposes, however, Pound's central "law in action" point has little relevance.[145] This Article aims to inform practicing lawyers such as Linda. For

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136. Pound, *supra* note 1.

137. *Id.* at 15–16.

138. *Id.* at 15–16, 27.

139. *Id.* at 30.

140. *Id.* at 15. Note that Pound, in his influential article introducing the gap idea, referred to "law *in* the books," rather than "law *on* the books." *Id.* Of course, the distinction does not matter. Contemporary scholarship tends to employ the latter almost exclusively.

141. *Id.*

142. Consider the hyperbolic, but not infrequent, comment that the resolution of a dispute in court would depend on what the judge had for breakfast that morning. *See* William W. Fisher III, Morton J. Horwitz & Thomas A. Reed, *Introduction*, *in* AMERICAN LEGAL REALISM xii (William W. Fisher III et al. eds., 1993) 335, 336–37; Menkel-Meadow, *supra* note 13, at 36 n.1 ("The classic expression of [the experience of litigated matters] in American legal folklore is that legal realism is the study of 'what the judge had for breakfast.'" (citing JEROME FRANK, COURTS ON TRIAL: MYTHS AND REALITIES IN AMERICAN JUSTICE (1949))).

143. Jean-Louis Halpérin, *Law in Books and Law in Action: The Problem of Legal Change*, 64 ME. L. REV. 46, 46 (2011); Carrie Menkel-Meadow, *Taking Law and _____ Really Seriously: Before, During and After "The Law,"* 60 VAND. L. REV. 555, 564 (2007).

144. *See, e.g.*, Mae Quinn, *Feminist Legal Realism*, 35 HARV. J. L. & GENDER 1, 16 (2012); Riaz Tejani, *Moral Convergence: The Rules of Professional Responsibility Should Apply to Lawyers in Business Ethics*, 35 GEO. J. LEGAL ETHICS 33, 55 (2022); G. Edward White, *The Inevitability of Critical Legal Studies*, 36 STAN. L. REV. 649, 651 (1984).

145. *See* Halpérin, *supra* note 143, at 46 (Pound's pioneering article "is invoked more for its title than its content.").

Linda, a court decision announcing an interpretation of law on the books is itself law on the books. Put another way, if Linda desired to take a certain action in her professional role, and a court in her jurisdiction has decided that the action in question was lawful, Linda has no problem at all with her fidelity commitment. The puzzle for Linda, as we saw in the four examples above,[146] is where courts have not ruled, but the subtle and consistent observations are that the practice in question is acceptable.

2. Implementation of Law on the Books. A second version of law in action appearing with some frequency in the literature is essentially value-neutral, but, again, of little use to the question we examine here. We might term this strain of law in action the "implementation" version. Commentators in this realm observe, usually with some empirical foundation, that some well-intended law, regulation, or policy, when actually implemented in the real world, leads to unanticipated and often unwanted ripple effects.[147] Legal Realists offer a "new call to see the law 'fresh,' to examine it 'as it works,'"[148] that is, "how law actually works on the ground."[149] Parties may have, on the books, certain rights—enforceable, valid rights—but because of resource limitations and similar constraints, it will be very hard to treat those rights as useful.[150] To the commentators, attorneys and law students must recognize law in action in order to be effective in practice.[151]

An apt example would be the relationship between teaching contract law as law on the books and understanding the nature of contracts as law in action. Indeed, an innovative textbook for law school contracts classes is entitled *Contracts: Law in Action*.[152] The editors of that book do not purport to profess that real contract law is represented by some rogue actors who have hijacked the

146. *See supra* notes 54–109 and accompanying text.

147. *See, e.g.*, Mona Lynch, *Booker Circumvention? Adjudication Strategies in the Advisory Sentencing Guidelines Era*, 43 N.Y.U. REV. L. SOC. CHANGE 59, 68 (2019) ("[T]he core of much socio-legal scholarship is an understanding of the law as something that is always interpreted, understood, applied, and experienced in multiple, contested, and often competing ways. To that end, empirical socio-legal scholarship has moved beyond simply measuring the gap between 'law-on-the-books' and 'law-in-action,' focusing instead on the translation process between formal law and its implementation in practice.").

148. Elizabeth Mertz with Marc Galanter, *Realism Then and Now: Using the Real World to Inform Formal Law*, *in* RESEARCH HANDBOOK ON MODERN LEGAL REALISM 21, 22 (Shauhin Talesh, Elizabeth Mertz & Heinz Klug eds., 2021).

149. *Id.*

150. *See, e.g.*, Thomas W. Mitchell, *New Legal Realism and Inequality*, *in* THE NEW LEGAL REALISM, VOLUME 1: TRANSLATING LAW-AND-SOCIETY FOR TODAY'S LEGAL PRACTICE 203 (Elizabeth Mertz, Stewart Macaulay & Thomas W. Mitchell eds., 2016) (offering empirical evidence of the ways in which property partition laws disadvantage Black families); Sara Ross, *Resisting Renoviction and Displacement Through Cultural Land Trusts: Art and Performance Spaces, Pop-Ups, Diys, and Protest Raves in Vancouver*, 33 YALE J.L. & HUMAN. 92, 105 (2022) (describing how the city's ordinances on culture actually get implemented).

151. *See, e.g.*, Jane Aiken & Ann Shalleck, *Putting the "Real World" into Traditional Classroom Teaching*, *in* NEW LEGAL REALISM, *supra* note 150, at 51 (offering law-in-action perspectives for teaching a family law clinic).

152. STEWART MACAULAY, JEAN BRAUCHER, JOHN KIDWELL & WILLIAM WHITFORD, CONTRACTS: LAW IN ACTION (3d ed. 2010).

law on the books with their own replacement rules and authorities. Similarly, the editors do not treat judicial precedent, as Pound might have done, as law in action with some different quality of authority when contrasted with legislation. Instead, the benefit of *Contracts: Law in Action* is that students learn that contract formation, performance, and enforcement are governed, in theory, by a collection of identifiable laws on the books, but, in practice, depend on the complex interactions of people and institutions with limitations, personalities, and leverages.[153]

In this second version of law in action, no one asserts that law in action is a new form of "law," which a law-abiding actor would respect contrary to the more conventionally established law on the books. Instead, this prominent strain of the law-in-action literature recognizes that the real world on the ground is messy and contingent. Passing legislation or adopting regulations often cannot control the affected actors in the way that the legislators or agencies might have hoped.[154] It is descriptive, and, therefore, quite valuable to those who use the law to advance client interests, but the normative questions are separable.

This second strand of law in action also offers little benefit to Linda. Of course, she will recognize the hurly-burly of the real world in her counseling of clients and in developing her own law-of-lawyering strategies. Many writers, often from the clinical community, emphasize the relationship between this strain of law in action and effective lawyering practice.[155] But in this version of law in action, Linda is not confronted, like with the *Restatement*, with an opposing position that has the qualities of a mandate. In the third version, described next, we see the possibility of an alternative mandate.

3. Law in action filtered and distorted through street-level bureaucrats. A third strand of law in action appears in the literature, and this version has direct relevance to practicing lawyers with fidelity commitments. This is the version we saw in Kitty Calavita's chapter about law in action[156] and is probably the most common understanding of the concept. We might term this strain of law in action the "distortion" version. Here, the law on the books says one thing, but in practice, on the ground, and in the community, that authority does not function as "law" on which participants may rely. As we saw in Calavita's chapter, this strain offers two types of this practice-based authority.

a) Distortion and enforcement discretion. Much of Calavita's catalogue of "real law" represents well-intended law on the books suffering from non-

153. *Id.* at 24, 50–51; *see also* Robert A Hillman, *Precedent in Contract Cases and the Importance(?) of the Whole Story*, 87 TEMP. L. REV. 759, 762 (2015) (The *Contracts: Law in Action* text includes "interviews of litigants and their lawyers, and studies case records because [the editors] believe[] that such work is crucial for understanding contract law as it functions in the real world. The 'indistinct picture' presented by judicial opinions is thus far too shallow and incomplete.").

154. *See* Marsha Mansfield & Elizabeth Mertz, *Teaching an Interdisciplinary Law Class*, *in* RESEARCH HANDBOOK ON MODERN LEGAL REALISM, *supra* note 148, at 208–09 (offering a "two-fold integration of clinical and social science knowledge of how law works in practice").

155. *See* Aiken & Shalleck, *supra* note 151; Seielstad, *supra* note 129.

156. CALAVITA, *supra* note 110, at Chapter 6; *see supra* notes 114–20 and accompanying text.

enforcement or selective enforcement. Agencies and their employees tasked with implementation of the regulatory field have limited resources and inevitably exercise discretion about how to enforce the agency's mandate, often amid significant scarcity of time, money, and patience.[157] Consistent with long-established sociological observation of street-level bureaucracies, the staff becomes the source of the law in action.[158] As one commentator notes, "The law on the books is different from the law in action, and enforcement is a vital part of law's identity as law."[159]

Consider the enforcement of wage-and-hour laws, one of the examples discussed by Calavita.[160] Wage theft is a national crisis, and the law on the ground tends to ignore the issue,[161] in part because of limited enforcement resources.[162] One might conclude that, in a more perfect environment with greater resources, the agencies would choose to enforce the law on the books. The "gap," by that understanding, is not a result of corruption or exploitation, but simply a reality of the modern bureaucratic state.[163] Regardless of the underlying reason, the law in action fails to achieve the goals intended by the law on the books.

Note, however, that limited enforcement resources and generous agency discretion, while constituting law in action, sometimes achieves *better* outcomes and represents a positive step forward when compared to the law on the books. For example, some commentators have treated favorably the actions of the Obama administration bureaucrats in their approach to immigration matters.[164]

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157. *See, e.g.*, Levin, *supra* note 106, at 1473–74.

158. *See* MICHAEL LIPSKY, STREET-LEVEL BUREAUCRATS xiii (1980) (the "routines [the staff] establish, and devices they invent to cope with uncertainties and work pressures effectively *become* the policies they carry out"); Danielle S. Rudes, Shannon Magnuson, Sydney Ingel & Taylor Hartwell, *Rights-in-Between: Resident Perceptions of and Accessibility to Rights Within Restricted Housing Units*, 55 L. & SOC'Y REV. 296 (2021).

159. Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1045 (2013).

160. CALAVITA, *supra* note 110, at 110–11.

161. *See, e.g.*, Llezlie L. Green, *Wage Theft in Lawless Courts*, 107 CALIF. L. REV. 1303 (2019); Matthew Fritz-Mauer, *Lofty Laws, Broken Promises: Wage Theft and the Degradation of Low-Wage Workers*, 20 EMP. RTS. & EMP. POL'Y J. 71, 119 (2016).

162. Andrias, *supra* note 159, at 1086–87 ("While many causes of enforcement failure exist, scarce resources and low statutory penalties are significant factors.").

163. A similar example might be the actions of the judges and clerks in crowded housing courts. *See* Sudeall & Pasciuti, *supra* note 124, at 1372–75.

164. *See e.g.*, Hiroshi Motomura, *Making Immigration Law*, 134 HARV. L. REV. 2794, 2815 (2021); Hiroshi Motomura, *The President's Dilemma: Executive Authority, Enforcement, and the Rule of Law in Immigration Law*, 55 WASHBURN L.J. 1, 19, 24–25 (2015); David S. Rubenstein, *Taking Care of the Rule of Law*, 86 GEO. WASH. L. REV. 168, 204 (2018) (noting that supporters of Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans (DAPA) appreciate the law-in-action implications given the unforgiving law on the books). For an argument that the actions of the Obama administration were more reliably based on law on the books rather than law in action, see Peter Margulies, *Deferred Action and the Bounds of Agency Discretion: Reconciling Policy and Legality in Immigration Enforcement*, 55 WASHBURN L.J. 143, 165–72 (2015).

Other progressive scholars see possible benefit in the gap, given the need for the law to be fluidly responsive to the needs of citizens.[165] As one observer notes:

> [R]ealist, postmodern, and CLS (critical legal studies) scholars have found that for myriad of reasons—including the inherent vagueness of language, the multiplicity of possible interpretations for the legal rule, the sophistication of different legal players and limited enforcement resources, and the need for plasticity in the life of the law—this [law in action versus law on the books] is an inherent gap that in some cases may have productive value.[166]

The lesson for our purposes here is that law in action will very often distort the intended aims of law on the books, sometimes in ways that are harmful to those in need of service and protection, but at other times are helpful. In either instance, the gap in this strain results from the bureaucracy's inability to implement the law on the books efficiently and effectively. One may assume that, as noted above, the agencies would be more faithful with fewer constraints on their actions.[167]

b) Distortion attributable to power and privilege. A separate, although plainly related, strain of law in action scholarship represents a more worrisome manifestation of the gap. It is a prominent theme in the literature. Critics note that law on the ground, law as actually experienced by citizens, cannot escape the influences of privilege—notably race, class, and power.[168] The strain of law in action described above reflects the inevitable satisficing[169] necessitated by limited resources and bureaucratic functioning. This strain of law in action, by contrast, finds its explanation in theories of exploitation and sustained control.

Kitty Calavita's examples reflect this perspective on law in action. Calavita reports that police work, notorious for sidestepping law on the books, is often "spiked with racial hostilities."[170] She notes assessments of the free speech

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165. *See, e.g.*, Christine Cimini & Doug Smith, *An Innovative Approach to Movement Lawyering: An Immigrant Rights Case Study*, 35 GEO. IMMIGR. L.J. 431, 438 (2021) (describing "nimble" applications of formal law to achieve social justice); Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 807–09 (1989) (developing a more pragmatic understanding of the rule of law).

166. Hila Shamir, *Feminist Approaches to the Regulation of Sex Work: Patterns in Transnational Governance Feminist Law Making*, 52 CORNELL INT'L L.J. 177, 184–85 (2019).

167. *See* RICHARD ABEL, AMERICAN LAWYERS 143–44 (1989) (noting that weak enforcement does not qualify as good law).

168. *See generally* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys ed., 1990); Jeannine Bell, *Calavita's Law & Society: (En)Racing Law and Society*, 39 LAW & SOC. INQUIRY 209 (2014); Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645 (2017).

169. *See, e.g.*, Menkel-Meadow, *supra* note 13, at 585 (discussing satisficing in the context of law in action); Susan Silby, *The Every Day Work of Studying the Law in Everyday Life*, 15 ANN. REV. L. & SOC. SCI. 1, 15 (2019) (discussing satisficing in the context of the legal culture and other organizational units). The satisficing concept is attributed to the work of Herbert Simon. *See* HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR 118–20 (4th ed. 1997); Herbert A. Simon, *Rational Choice and the Structure of the Environment*, 63 PSYCH. REV. 129, 129 (1956).

170. CALAVITA, *supra* note 110, at 126; *see also* Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 832–34 (2021) (connecting gap studies to critical race theory); Gil

doctrine, where a court's treatment of individuals distributing political leaflets were "guided by precedent only when it served the decision it preferred for ideological and political reasons."[171] Many other writers note the relationship between the distortion observed in law in action relative to law on the books and the exercise of power and privilege. The prominent critical race writer Richard Delgado has written, in the context of racial justice, that for minority groups, "the mere announcement of a legal right means little. We live in the gap between law on the books and law in action."[172] Bernadette Atuahene writes of the exploitation and dispossession of low-income homeowners as a form of law in action to which scholars must attend.[173] A recent assessment of the implementation of Title VII's protection of fairness in employment notes the power of corporate actors to undercut the legislative goals.[174] Kara Swanson has written on the law-in-action developments in patent law affecting Black women.[175] Other feminist works note the discouraging impact of law in action and its relationship to power and privilege.[176]

In her assessment of the gap, Kitty Calavita offers this apt summary of this strain of the law in action phenomenon:

> If we shadow law as it leaves the page, we follow it into some obvious locales like regulatory agencies, but we track it into some more unlikely hangouts too. If we observe closely and listen carefully to what transpires in these venues, we learn not only about the ways of law but also about institutional logics, racialization, tensions in the political economy, and the real dynamics of power.[177]

Rothschild-Elyassi, *The Datafication of Law: How Technology Encodes Carceral Power and Affects Judicial Practice in the United States*, 47 LAW & SOC. INQUIRY 55 (2022) (relying on critical race theory to understand police misconduct).

171. CALAVITA, *supra* note 110, at 127.

172. Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 304 (1987) (quoted in Leonore F. Carpenter, *The Next Phase: Positioning the Post-Obergefell LGBT Rights Movement to Bridge the Gap Between Formal and Lived Equality*, 13 STAN. J. C. R. & C.L. 255, 255 (2017)).

173. *See* Bernadette Atuahene, *Predatory Cities*, 108 CALIF. L. REV. 107 (2020); Bernadette Atuahene, *Takings as a Sociolegal Concept: An Interdisciplinary Examination of Involuntary Property Loss*, 12 ANN. REV. L. & SOC. SCI. 171 (2016).

174. Frank W. Munger & Carroll Seron, *Law and the Persistence of Racial Inequality in America*, 66 N.Y. L. SCH. L. REV. 175, 197–200 (2021/2022). The authors note that in antidiscrimination work, "the law in action is often more telling than the law on the books." *Id*. at 197.

175. Kara W. Swanson, *Centering Black Women Inventors: Passing and the Patent Archive*, 25 STAN. TECH. L. REV. 305, 322–23 (2022).

176. *See, e.g*., Kim Shayo Buchanan, *When Is HIV a Crime? Sexuality, Gender and Consent*, 99 MINN. L. REV. 1231, 1318 (2015) ("Feminists and others concerned about justice should be concerned when the 'law on the books' appears to be facially neutral, even as the 'law in action' is targeted by gender or race."); Kit Kinports, *Feminist Prosecutors and Patriarchal States*, 8 CRIM. L. & PHIL. 529, 540 (2014) ("Even when the law on the books has been protective of [domestic violence] victims, the law in action has often told a different story.").

177. CALAVITA, *supra* note 110, at 130.

4. Law in action as a better version of authority. We now see that attention to the "gap" between law on the books and law in action will discern several variations of that concept, and thus far, none of the strains described offer guidance to the lawyer, like Linda, as she represents her clients. Put another way, while it will be enormously useful to any practicing lawyer to understand how law on the books affects the lives of the participants within legal enterprises and to appreciate the challenges of implementing law on the books given the constraints on systems and bureaucracies, little of what we have seen thus far will answer that lawyer's question about her fidelity—whether to honor a certain practice when it reflects the gap and differs from the law on the books.

But a fourth and more relevant strain of the gap appears in the literature, and this strain does support Linda's suspicion that sometimes she will be more effective and more faithful to her commitments if she favors law in action over law on the books, when they differ. We might term this strain of law in action the "replacement" version.

In this version of the gap, commentators argue—like Kitty Calavita's example of the cliff path in Ireland[178]—that often, the better authority is what the participants implement on the ground. As we saw earlier, "If the law on the books and the law in action don't match, a Realist could say, stop worrying so much about what the books say."[179] Respect for the law on the ground augments a lawyer's effectiveness because the law on the books can be crude, dogmatic, and unresponsive to the needs of a community.[180] "Being out-of-sync or failing to recognize broader existing stakeholders means laws are poorly aligned with on-the-ground realities and are out-of-touch with values and interests of the people laws serve."[181] As another group of prominent Realists writes, "[B]usiness norms and imperatives are often more powerful 'law' than formal law on the books."[182]

These observations tell us that sometimes, even for lawyers who resist the Holmesian stance of using the law instrumentally (unlike our lawyer Harriet[183]), discerning the superior law in action can be imperative.[184] Indeed, some provocative recent scholarship has criticized actors who refuse to respect law in action, adhering instead to outmoded and otherwise-irrelevant law on the books.[185] Jessica Bulman-Pozen and David E. Pozen have unpacked (and criticized) a

178. *Id*. at 109–10; *see supra* text accompanying notes 114–20.

179. Ortman, *supra* note 123, at 1485.

180. *See, e.g*., Jessica Bulman-Pozen & David E. Pozen, *Uncivil Obedience*, 115 COLUM. L. REV. 809, 855 (2015) (describing "the alleged gap that had opened up between the relatively rigid law on the books and the more flexible law in action"); Pamela S. Karlan, *Bullets, Ballots, and Battles on the Roberts Court*, 35 OHIO N. U. L. REV. 445, 447 (2009) ("the law in action may sometimes be less rigid than the law on the books").

181. Jessica Silbey, *New Copyright Stories: Clearing the Way for Fair Wages and Equitable Working Conditions in American Theater and Other Creative Industries*, 83 OHIO ST. L. J. ONLINE 29, 30 (2022).

182. MACAULAY ET AL., *supra* note 152, at 2.

183. *See supra* notes 35–37 and accompanying text.

184. *See* Katherine R. Kruse, *The Human Dignity of Clients*, 93 CORNELL L. REV. 1343, 1363 (2008) (lawyers "can—in their low-level structuring of human relations—create a mosaic of the law in action that is more responsive to those excluded voices than the law on the books").

185. Bulman-Pozen & Pozen, *supra* note 180.

phenomenon they term "uncivil obedience"—"hyperbolic, literalistic, or otherwise unanticipated adherence to their formal rules."[186] To Bulman-Pozen and Pozen, uncivil obedience occurs when actors, typically as a form of dissent or protest, scrupulously obey laws that no one expects to be obeyed.[187] They offer many examples, each of which would qualify as the gap between the formal written rule (therefore, law on the books) and the sensible practice on the ground (therefore, law in action).[188]

These examples of uncivil obedience represent significant evidence of the version of law in action that most affects Linda's practice and her attention to the law of lawyering. It is plain that sometimes the law as written really is not "the law," and in those instances, it would be disruptive and puzzling to favor the written rules over the well-recognized rules of engagement on the ground.

If one accepts that proposition, the challenge is how one discerns the distinction. As Bulman-Pozen and Pozen write, "The uncivil obedient must believe that her behavior truly conforms to relevant legal norms, not just that she is unlikely to be caught or punished."[189] The next section attempts to understand the difference as it would be useful to a workaday, practicing lawyer.

B. DISTINGUISHING LAW IN ACTION FROM SKIRTING THE LAW WITHOUT CONSEQUENCE

Thus far, the analysis has concluded that effective lawyering requires that lawyers and law students must not accept law on the books at face value, particularly in legal systems in which lawyers operate with different practices and understandings. That insight assists lawyers to be better guides for their clients.[190] At the same time, because much of what observers describe as law in action is noxious and hurtful to the interests of vulnerable populations, those lawyers and law students must tread with care.

Here is where we need to confront the epistemological question[191] we cannot avoid: How does a fidelity-committed lawyer like Linda *know* that a certain practice qualifies as acceptable law in action? A moment's reflection shows that the *sine qua non* of that determination is this: Linda must conclude, with sufficient confidence, that if an objector was to challenge her failure to honor law on the

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186. *Id*. at 810.

187. *See id*. at 818–19.

188. The authors include speed-limit protests, work-to-rule efforts, fastidious airline maintenance requests, and (writing pre-*Dobbs*) strict abortion-related regulations. *Id*. at 818–20. They also invoke the grass-roots poverty-advocacy efforts of Frances Fox Piven and Richard Cloward in the 1970s to swamp public welfare offices with applications for cash aid and food stamps. *Id*. at 819, 830; *see* FRANCES FOX PIVEN & RICHARD CLOWARD, POOR PEOPLE'S MOVEMENTS 275–88 (1977).

189. Bulman-Pozen & Pozen, *supra* note 180, at 824.

190. *See* Mansfield & Mertz, *supra* note 154, at 208 (echoing Jerome Frank's critique that "the law student is graduated with . . . an insufficient feeling of the inter-relation between law and the phenomenon of daily living") (*quoting* Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 PENN. L. REV. 907, 921–22 (1933)).

191. *See* Huang, *supra* note 17, at 2255 ("ponder[ing] the metaphysics" of this kind of question).

books, the authority hearing that challenge would decide in her favor.[192] Then, and only then, may Linda accomplish her fidelity aims within her practice.[193]

Let us explore that assertion in more detail. If Linda aims to achieve fidelity to the law, she must operate differently from Harriet, the Holmesian lawyer we met at the beginning,[194] and also from Ben, a lawyer we will meet in a moment. Harriet will take some actions that are not lawful (have no support in law on the books) because her tactics help her clients, and she will suffer no ill consequences because the authorities are too swamped, busy, or distracted to monitor and enforce that law on the books. Put another way, Harriet will, on occasion, calculate the costs (including the likelihood of detection) and the benefits of her actions and proceed in a way that maximizes utility, regardless of the law on the books.[195] She might well serve as an effective lawyer, but we cannot conclude that she is operating with fidelity to the law if, for instance, a trove of new resources allowed authorities to penalize her in a timely fashion for taking that action.[196]

Harriet, however, might be distinguished from the lawyer we shall call Ben, in this way: Harriet will never cut corners while avoiding the authorities' enforcement if doing so is fundamentally hurtful to others. Ben, by contrast, will cut corners whenever it helps him, and he believes his chances of getting caught are small enough to justify the risk. Here is a story about Ben.

Ben is a single parent lawyer in solo practice struggling to raise his family with the inconsistent income his legal work provides. Ben receives a bill from his child-care provider and, at the moment, does not have enough money in the bank or available credit to cover the charges. Childcare is essential if he is to continue

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192. Steven Pepper employs the concept of "desuetude" to represent the idea that some seemingly authoritative legal sources do not, in fact, have any practical power, because those assigned to enforce the law do not treat those sources as valid any longer. *See* Pepper, *supra* note 26, at 1554–55.

193. Consider this explanation from Professor Bruce Green:

> I assume that most people, most of the time, want to obey the law as they understand it, regardless of whether they can get away with transgressing. The question then is how people understand the written rules and regulations to which they are subject. My argument, and this is purely descriptive, is that to a significant extent, people look around to see what others do as a guide to understanding what they can do—not in the sense of what they can "get away with," but in the sense of what is allowed. It seems fair for them to do so.

Bruce A. Green, *Taking Cues: Inferring Legality from Others' Conduct*, 75 FORDHAM L. REV. 1429, 1431 (2006); *see also* Dane S. Ciolino, *Harmonizing Legal Ethics Rules with Advocacy Norms*, 36 GEO. J. LEGAL ETHICS 199, 217 (2023) (noting the accepted and open practice among trial lawyers to use persuasion techniques categorically forbidden by the *Model Rules*).

194. *See supra* notes 35–37 and accompanying text.

195. *See* Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 20 (1988) (noting the economists' view of actors who "treat[] all legal rules simply as the prices of misconduct discounted by the probability of their enforcement"); Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255, 277 (1990) (describing "the 'Holmesian bad man's' strategy of violate-and-pay") (*citing* Holmes, *supra* note 5, at 173). In this way Harriet resembles "Betty," Rebecca Stone's "bad" actor, but she shares the moral commitments of Stone's remaining three "good" actors. *See* Stone, *supra* note 29, at 1772–73.

196. For a discussion of the role lawyers play when enforcement is stymied by insufficient staffing and resources, see Pepper, *supra* note 26, at 1568–70.

his law practice and to show up in court, meet with clients, and the like. He does have $25,000 in his IOLTA client trust account, which he knows he will not distribute for at least a month, and he has some reliable payments coming in two weeks from work for which he has billed a responsible client. So, imagine that this lawyer "borrows" the money for childcare, knowing that he will return the funds in two weeks.[197] His chances of getting caught are small.[198]

Linda, Harriett, and Ben represent three approaches to the fidelity stance. Linda commits to proceed only when "the law," however she understands that concept, permits her to do so. (Again, as noted at the beginning, Linda might, on occasion, proceed as a moral activist and intentionally resist unjust applications of some prevailing law, but that stance does not forfeit her categorization as a fidelity adherent.[199]) The question we are trying to answer for Linda is whether law in action sometimes qualifies as the prevailing law. Harriet is not a fidelity adherent, but she also has some important integrity concerns. She will only cheat—and "cheating" seems to be an apt description for those who are not constrained by the prevailing legal authority[200]—when it is helpful to her and/or her client but also not unfairly harmful to others. For Harriet, the idea of law in action is irrelevant. Instead, she is instrumental, but with a solid moral compass. Finally, Ben is purely instrumental, a cheater who will take what he can get away with or can afford to risk.

Linda assuredly does not want to be Ben. But she also wants to distinguish herself from Harriet, believing that fidelity to the law *matters* and that she has a moral (or political) obligation to honor the law.[201] To emphasize that distinction and her commitment, and to distinguish her practice most explicitly from a version of cheating, Linda wants to be satisfied that she can teach others to do what she does. Therefore, if Linda were to teach a professional responsibility course as an adjunct at a local law school, offer CLE seminars about legal ethics to

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197. Lawyers like Ben are not unheard-of. For a discussion of the temptation to use funds entrusted to the lawyer for the lawyer's own needs, see, e.g., Lisa G. Lerman, *A Double Standard for Lawyer Dishonesty: Billing Fraud Versus Misappropriation*, 34 HOFSTRA L. REV. 847, 886 (2006); Leslie C. Levin, *The Ethical World of Solo and Small Law Firm Practitioners*, 41 HOUS. L. REV. 309, 359 (2004).

198. Of course, Ben is a fiduciary in this story, which complicates his Holmesian stance. For a discussion of the relationship between "bad man" amorality and fiduciary responsibilities, see Galoob & Leib, *supra* note 37.

199. That description of Linda's response to moral complexity is not necessary for the goals of this Article, and in fact, is somewhat internally contradictory. As noted above, an express goal of Brad Wendel's fidelity project is to counter those moral activists who would privilege ordinary morality over the demands of law, when acting lawfully causes injustice. *See supra* note 38 and accompanying text. Wendel writes, "Within a moderately decent society, the ethics of lawyers acting as lawyers has to be oriented toward the law, not morality or justice. If lawyers wish to be activists or dissidents, they can be, but it is essential that they not confuse these very different social roles." Wendel, *A Reply to Critics*, *supra* note 38, at 740. Our understanding of Linda is as a lawyer adopting the Wendelian stance, but with a streak of activism as well.

200. *See* COVER, *supra* note 40 and accompanying text (discussing the "cheating" idea in the context of Robert Cover's work).

201. Linda has adopted what jurisprudence scholars have dubbed the "internal" perspective. *See* WENDEL, *supra* note 2, at 197–98 (describing the insights of H.L.A. Hart).

members of the bar, or publish a bar journal piece recommending law-of-lawyering strategies for practitioners, she needs to be assured that she can instruct others about how to honor the law while not resembling Harriet (or, surely, Ben).

This teaching context helps us understand why the distinctions here matter. We ought to readily agree that Linda should not train law students or attorneys to proceed in a Harriet fashion—to ignore the law whenever the costs are small and worth bearing or risking, and where no one gets really hurt. Lawyers may act that way in practice,[202] and we may not care a great deal given Harriet's do-no-harm condition, but we will agree that such a stance cannot serve as the express, intentional guide to responsible lawyering. Seen another way, Linda would not prepare written materials instructing her readers to adopt the Harriet stance.

We now appreciate why we need to articulate the distinction between Linda and Harriet. Both lawyers ignore law on the books, but Linda only ignores law on the books when discernable law in action replaces it. Harriet does not need (nor care about) law in action; for Linda it is critical. To be sure, Linda could operate her practice such that she *only* honors law on the books, and her fidelity commitment would be preserved.[203] As we saw, however, she would not be a competent or nimble lawyer if she did not recognize the practical applications of law on the books that result in law in action. We might even consider her a naïve "dilettante"[204] who fails to "confront unwritten rules that emerge from local legal cultures."[205]

The only possible distinction between the approach of Linda and that of Harriet is the following: Law in action serves as a credible substitute for law on the books if, and only if, the action taken would be approved if the relevant authorities learned of it and had the resources to address it.

If the authorities would penalize it in a world with sufficient resources available to them for enforcement, it is not the kind of law in action that preserves Linda's fidelity commitment. That is precisely the Harriet stance. Linda's *clients* will often (although not always[206]) resemble Harriet,[207] and her counseling role will include ensuring that those clients recognize the risks and enforcement

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202. The literature often treats practicing lawyers, or at least some of them, as more Holmesian than Linda. *See, e.g.*, Pepper, *supra* note 26, at 1554, 1559; Frederick Schauer, *Legal Realism Untamed*, 91 TEX. L. REV. 749, 779 (2013); Etienne C. Toussaint, *The Miseducation of Public Citizens*, 29 GEO. J. ON POVERTY L. & POL'Y 287, 304–05 (2022); Charles M. Yablon, *The Lawyer as Accomplice: Cannabis, Uber, Airbnb, and the Ethics of Advising "Disruptive" Businesses*, 104 MINN. L. REV. 309, 327–28 (2019).

203. *But see* Bulman-Pozen & Pozen, *supra* note 180, at 821 (arguing that fastidious "uncivil obedience" can be a troublesome stance).

204. Motomura, *supra* note 164, at 2795.

205. Seielstad, *supra* note 129, at 163.

206. *See, e.g.*, David Luban, *The Bad Man and the Good Lawyer: A Centennial Essay on Holmes's The Path of the Law*, 72 N.Y.U. L. REV. 1547, 1577–78 (1997).

207. As one authority describes it, "Clients are more interested in the bottom line than in the principle of the thing." DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES 2 (5th ed. 2019); *see also* Lynn M. LoPucki, *Legal Culture, Legal Strategy, and the Law in Lawyers' Heads*, 90 NW. U. L. REV. 1498, 1545 (1996).

factors in their calculation.[208] Some of the time, Linda's clients will assume an instrumental attitude toward their legal obligations,[209] and, in those instances, will rely upon Linda's advice and predictions about costs of noncompliance with the substantive law and risks of detection. At other times, Linda's clients will proceed as "good persons,"[210] with a more internal or law-honoring perspective; in those instances, Linda's counseling will include her best read of law in action along with law on the books.[211] But for her own lawyering actions, Linda will remain dedicated consistently to fidelity, honoring the law of lawyering, whether located on the books or in action.

IV. APPLYING THE LAW IN ACTION CONCEPT TO LAW OF LAWYERING MOMENTS

The above analysis has concluded that if it is indeed true that sometimes the law of lawyering "in action" differs from the law of lawyering "on the books," and if that difference reflects acceptance within the applicable community of the former as preferable to the latter (as opposed to a difference reflecting distortion or exploitation of vulnerabilities), then a lawyer like Linda may, consistent with her fidelity commitment, opt to follow the law in action. This Part will revisit, in brief fashion, the four stories identified above as plausible examples of the gap, to assess whether a lawyer like Linda might proceed to act as she believes the world expects her to act, notwithstanding the law on the books.

A. THE MODEL RULE CONFRONTS THE *RESTATEMENT*

Our first story appears to be a paradigmatic example of law in action differing from law on the books. Recall that Linda has met a prospective client, PC, who has a claim against an existing client, EC, entirely unrelated to the work Linda has performed for EC.[212] Her preferred strategy would include a discussion with both actors about whether either (or ideally, both) would waive any technical conflicts of interest. Linda's state's rules of professional conduct forbid her from disclosing to either business the fact of representation or of a proposed representation, but her copy of the *Restatement* tells her not to read the rule so literally: "[s]uch a strict interpretation goes beyond the proper interpretation of the rule."[213]

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208. *See* Pepper, *supra* note 26, at 1553.

209. *See* Stone, *supra* note 29, at 1772.

210. *Id*. at 1770.

211. *See, e.g*., Aiken & Shalleck, *supra* note 151, at 67–71; William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 521 (2001) (noting that "the definition of the law-on-the-street necessarily differs, and may differ a lot, from the law-on-the-books," for lawyering purposes).

212. *See supra* text accompanying notes 54–69 (providing an example of the substantive law governing confidentiality).

213. RESTATEMENT § 60, cmt. c(i).

The direct law-in-action question here is whether Linda ethically may follow the *Restatement* if it represents law in action, where the law on the books conflicts with the *Restatement*. Note a few complications here. First, the *Restatement* is technically "on the books," as it is indeed a *book*, and Linda knows that courts on occasion use language that implies that *Restatements* have genuine, one might say inherent, legal authority.[214] But may, or should, practicing lawyers treat the *Restatement* as "the law on the books" for purposes of their fidelity commitments?

The most reliable response to that question is no, as scholars have demonstrated,[215] particularly when the *Restatement* addresses authority other than common law.[216] While scholars debate the proper role of the ALI and its restatements,[217] no scholar argues that the *Restatement* itself serves as authority to nullify a clear rule.[218] However, it serves a valuable purpose in communicating a reliable summary of common law or of interpretation of statutes and rules whose meaning may not be fully clear.[219]

In the instance considered here, no court or disciplinary authority Linda can locate has ever cited the *Restatement* to support the position she hopes to take.[220] At best, it represents little more than the best read of practice on the ground by experienced observers. That seems like classic law in action. On the other hand, the *Restatement* is hardly a description of "local legal culture,"[221] which so often appears as a relevant

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214. *See, e.g.*, Intel Corp. v. Hamidi, 71 P.3d 296, 302 (Cal. 2003) (deciding a dispute based on the *Restatement (Second) of Torts*, with language that implies the source is authoritative); *see* Shyamkrishna Balganesh, *Relying on Restatements*, 122 COLUM. L. REV. 2119, 2123–24 (2022) (criticizing the *Intel* court for that treatment).

215. *See, e.g.*, Balganesh, *supra* note 214; Balganesh & Menell, *supra* note 71.

216. Justice Antonin Scalia has famously noted the limited authority of the Restatements:

> Restatement sections [that interpret rules] should be given no weight whatever as to the current state of the law, and no more weight regarding what the law ought to be than the recommendations of any respected lawyer or scholar. And it cannot safely be assumed, without further inquiry, that a Restatement provision describes rather than revises current law.

Kansas v. Nebraska, 574 U.S. 445, 476 (2015) (Scalia, J., concurring in part and dissenting in part).

217. Scholars have long debated whether the goal of any ALI Restatement is descriptive (explaining how best to read common law developments) or normative (offering the most sensible approach for lawyers and judges to adopt). *See* Kristen David Adams, *The Folly of Uniformity? Lessons from the Restatement Movement*, 33 HOFSTRA L. REV. 423, 437–39 (2004) (describing the debate); Frederick Schauer, *The Restatements as Law*, *in* AMERICAN LAW INSTITUTE CENTENNIAL HISTORY (Andrew S. Gold & Robert W. Gordon eds., Oxford University Press 2023).

218. *See, e.g.*, Jeffrey W. Stempel, *Hard Battles Over Soft Law: The Troubling Implications of Insurance Industry Attacks on the American Law Institute Restatement of the Law of Liability Insurance*, 69 CLEV. ST. L. REV. 605, 611 (2021) ("Because Restatements are not binding law, no court is obligated to follow a Restatement provision.").

219. *See* Balganesh, *supra* note 214, at 2124.

220. My research through December 2022, and that of a reliable research assistant, has found no reported cases where the Restatement's confidentiality rule has been offered to counter a state's rule of professional conduct.

221. *See* Sudeall & Pasciuti, *supra* note 124, at 1372; Elizabeth Warren, *A Principled Approach to Consumer Bankruptcy*, 71 AM. BANKR. L.J. 483, 505 (1997) (noting a "concern" about local legal culture in bankruptcy leading to unfair inconsistencies).

component of law in action. It is a national resource, and its guidance to its readers is unqualified: "[S]uch is the accepted interpretation."[222] But let us assume—surely not controversially—that as an experienced lawyer practicing in her jurisdiction, Linda has no reason to doubt the descriptive accuracy of the *Restatement* within her local legal culture. If she happened to know that in her state the authorities have enforced Rule 1.6(a) contrary to the *Restatement*'s pronouncement, she has no law in action to consider. But that is not likely the case.[223]

So, returning to the question: we may comfortably conclude that Linda may ignore the literal application of the rule and rely on the *Restatement*, share the fact of her representation with PC, and begin her conversation. How might she defend her doing so? In part, she relies on the understanding that in her state, the law in action is a better source of guidance than the law on the books. What makes this the easiest example imaginable is that Linda has in front of her an authoritative source saying essentially, "the law in action regarding client confidentiality is more reliable than what you will see in your state's literal rules." Linda is honoring some version of the law; she effectively faces zero possibility of being in trouble for ignoring that other law. No one is harmed, *and* (and this seems critical) Linda believes that if anyone were to object, the *Restatement*'s prediction would be upheld. This story is also easy because the words on the page of the *Restatement* eliminate (or at least diminish considerably) entirely any myside bias about how well Linda might be reading her local culture.[224]

If we agree that Linda may take that action, then, if she were instead offering a CLE presentation to lawyers in her community or teaching a law school course in Professional Responsibility, her guidance to others would be the same: "In your practices, ignore the literal language of the state's rule and follow the *Restatement*. That serves as 'the law' for your purposes." Put another way, the *Restatement* is telling Linda (and her audience) that if anyone ever complained, they would be fine.[225]

B. THE REMAINING EXAMPLES

This Article need not, and given space considerations ought not, examine in great detail the remaining examples identified above, instances where Linda in her practice has encountered practices that jibe poorly, if at all, with her read of pretty clear law on the books. But each warrants a brief discussion.

1) The simultaneity puzzle. This example seeks to understand the duties of a fidelity-committed lawyer who spends time in two practice settings at the same

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222. RESTATEMENT § 60, cmt. c(i).

223. *See supra* note 220 (noting no reported cases interpreting the two standards).

224. We encounter the myside bias worry below. *See infra* notes 250–52 and accompanying text.

225. For another example of the *Restatement* offering to practitioners a reading of the substantive law different from the law on the books, see James Geoffrey Durham & Michael H. Rubin, *Multijurisdictional Practice and Transactional Lawyers: Time for a Rule That Is Honored Rather Than Honored in Its Breach*, 81 LA. L. REV. 679, 722–25 (2021) (noting that the Restatement offers lawyers safe harbors from claims of multijurisdictional unauthorized practice when the applicable *Model Rule* would not do so).

time. As we saw above,[226] the applicable rules of professional conduct (a) impute that lawyer's conflict of interest allegiances to every client in each firm, notwithstanding that the lawyer knows nothing about the clients of the other lawyers in the firm,[227] and (b) prohibit screening (absent consent from every such client) as a strategy to avoid any resulting conflicts.[228] As I explored in great detail in the earlier article discussed above,[229] a lawyer hoping to moonlight at two firms must either "cheat" with a "jury-rigged" strategy of effective (but not permitted) screening or not moonlight at all.[230]

The question we face here is whether that cheating via such a jury-rigged strategy is foreclosed to a fidelity-committed lawyer. Plainly, Harriet will cheat, but may Linda? And, importantly, may Linda teach others to adopt that strategy? Unlike the previous example, Linda finds no Restatement-like authority (aside from one clinical law professor's publication) confirming her judgment that the strategy is "the accepted interpretation."[231] Lacking that, Linda would need to tell herself, and her audience of students or CLE attendees, something like the following:

> My message to you is surely not "Go ahead with the strategy—it's plainly illegal, but you won't get caught." Instead, my message is that the lack of clear authority does not reflect the understanding of those who care about professional duties. My read of professional regulation in our local community is that no one will care (which is another way of saying "you won't get caught"), but more importantly if somehow a professional regulator or a judge were to assess your strategy, they would approve of it.

If she hopes to maintain her fidelity commitment, and not be like Harriet, Linda would need to read her community confidently enough to be sure of that assessment. One important source of support for her assessment would be her read of the actions of courts encountering former-client screening before the *Model Rules* expressly permitted that practice.[232] Model Rule 1.10(a), permitting former-client screening, followed much common law treatment of motions to disqualify, where courts recognized the safety of screening mechanisms even before those mechanisms had any explicit support.[233] The lawyers who implemented those measures were not necessarily Holmesian. Instead, they recognized and

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226. *See supra* notes 62, 77 and accompanying text.

227. The imputation arises from Model Rule 1.10(a)(1). *See* MODEL RULES R. 1.10(a)(1); Tremblay, *The Simultaneity Puzzle*, *supra* note 73, at 145–46.

228. Screening is only permitted in former-client representation contexts; *see* MODEL RULES R. 1.7(a)(1), 1.10(a)(2); Tremblay, *The Simultaneity Puzzle*, *supra* note 73, at 142–43.

229. Tremblay, *The Simultaneity Puzzle*, *supra* note 73, at 142–43.

230. *Id.* at 184–85.

231. RESTATEMENT §60 cmt. c(i) (advising about the *Model Rules*' confidentiality provision).

232. *See* Tremblay, *The Simultaneity Puzzle*, *supra* note 73, at 187–89 (discussing this development).

233. *See, e.g.*, Nemours Found. v. Gilbane, Aetna, Fed. Ins. Co., 632 F. Supp. 418, 420–21 (D. Del. 1986) (showing court's acceptance of screening before any formal authority to do so).

relied upon the on-the-ground treatment of former-client conflicts. Eventually, the law in action evolved into a form of law on the books.

2. The Trademark Practice. As we saw above,[234] a lawyer is in violation of Rule 5.5 of a state's rules of professional conduct[235] if she represents a client residing in a state in which she is not licensed to practice, absent some narrow exceptions. For lawyers working before the USPTO on trademark matters, one exception that might apply would be the federal preemption applied to a Florida patent (but importantly not trademark) practitioner in *Sperry v. Florida*.[236] As that earlier discussion showed, a careful assessment of *Sperry's* relevance to trademark work concludes that no federal preemption would attach to trademark work, which relies on a different set of regulations from those in the patent arena. Therefore, the law on the books would indicate that representing out-of-state trademark applicants or holders before the USPTO, other than on a limited, temporary basis, violates Rule 5.5. *Sperry* does not stand for the broader proposition that a lawyer may lawfully represent clients nationally if her work focuses solely on federal law.[237]

In practice, however, the law in action treats *Sperry* as affording lawyers a license to represent clients nationally on trademark matters. If this is true, then adopting the stance curated above, a lawyer such as Linda may accept trademark matters from anywhere in the United States without sacrificing her fidelity commitment.[238] But how might Linda *know* that such is the reliable law in action?

The trademark example invites a useful comparison of the Linda stance and the Harriet or Ben stance. All three lawyers understand that law firms regularly accept trademark clients regardless of their place of business or residence, and openly so. For example, they know that the USPTO promotes a pro bono program offered through several law school clinics across the country.[239] The USPTO website identifies each of the schools (fifty-eight in 2022) offering representation of businesses or individuals seeking trademark help, and that chart lists the geographical limitations, if any, of the respective programs.[240] A recent review of the USPTO chart shows that nearly half of the law school clinics publicly indicate that they will accept clients from any state.[241]

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234. *See supra* note 80 and accompanying text.

235. This discussion assumes that the state in question follows the *Model Rules*, and in particular, Rule 5.5. *See* MODEL RULES R. 5.5.

236. *See* Sperry v. Florida, 373 U.S. 379, 385 (1963).

237. *See* HAZARD, HODES, JARVIS & THOMPSON, *supra* note 92, § 49.13.

238. Some commentators have written about the gap between the limits on unauthorized practice as written and as practiced. *See* Durham & Rubin, *supra* note 225, at 683 ("Model Rule 5.5 is more often honored in the breach . . . .").

239. *See supra* note 90 and accompanying text.

240. *See Law School Clinic Certification Program*, *supra* note 90.

241. Of the 58 schools listed as of December 2022, 26 offer trademark services to prospective clients outside of the home state of the clinic. *Id.*

The transparent, public, and agency-approved practice of offering representation outside an attorney's home state[242] communicates that the work performed by the lawyers is lawful. Notwithstanding that transparency and the lack of any effort to hide this practice under some disciplinary radar, the trademark community knows of no efforts by state regulators, courts, or the USPTO to challenge the representation of out-of-state clients by the trademark practitioners.[243] It seems likely that the lawyers and the disciplinary authority read *Sperry* more broadly than warranted.[244]

If there indeed may be versions of law in action that supplant the more explicit law on the books, this trademark practice appears to be as good a fit as a fidelity-committed lawyer would hope to find. Harriet and Ben may accept a trademark client from far away, predicting confidently that, even if their doing so happens to have no support in the applicable federal guidelines, they will never suffer any consequences. Linda, though, may accept the same far-away client, understanding that "the law," as we now understand it, gives her permission to do so.

3. The "Crime or Fraud" Posture. The final potential law-in-action example, for purposes of this discussion, is the challenge encountered by some transactional attorneys when a client requests assistance with some action that is unlawful, but perhaps not criminal or fraudulent. As we saw above,[245] the *Model Rules*[246] forbid a lawyer from assisting a client with matters that constitute a crime or fraud but (by clear implication) permit such assistance with unlawful conduct not qualifying as criminal or fraudulent.[247] The example used for our purposes here involved assisting a startup business with an agreement to treat a willing helper as an independent contractor, compensated through partial cash payment and stock options when state or federal law would require that the helper receive the status of an employee entitled to minimum wage and overtime pay—therefore, a misclassification of the helper's status. While it is true that the wage-and-hour laws at the state and federal level include criminal penalties for violation of the provisions, every practitioner understands that in run-of-the-mill,

242. A brief note of clarification seems warranted here. Of course, it is possible—in theory—that every clinic offering its services outside of the home state of the law school includes lawyers licensed in those other states, which would satisfy Rule 5.5. But in practice, that likelihood is zero. There is simply no chance that the one or two lawyers who serve as counsel of record for the clinic students' work would be licensed in every state in the union.

243. A Westlaw search of reported cases nationally shows no discipline for unauthorized practice of law for representation before the USPTO of clients from a state where the attorney was not licensed. Westlaw search, December 14, 2022. Informally (as the listing on the USPTO clinic site indicates), trademark practitioners do not fear discipline for such representation.

244. *Compare* HAZARD, HODES, JARVIS & THOMPSON, *supra* note 92, § 49.13 (reading *Sperry* narrowly), *with* TUFT, PECK & MOHR *supra* note 89, § 1:157.11a ("An attorney who is a member of any state bar may represent others in trademark and other nonpatent matters in the [US]PTO.").

245. *See supra* note 100 and accompanying text.

246. MODEL RULES R. 1.2(d).

247. *See* Tremblay, *At Your Service*, *supra* note 46, at 267–82.

non-exploitative misclassifications, no prosecutor or regulator will ever file criminal charges.

To a lawyer such as Linda, while her client would be in violation of the employment laws, she would only contravene the law of lawyering if the assistance were criminal (as there is no plausible argument that it is fraudulent). While the law on the books includes criminal penalties, the prevailing practice does not.[248] Therefore, once again, applying the rubrics developed above, if the law in action is what really matters, then Linda seemingly may assist with this activity. Of course, Linda, given her ethical commitment to fidelity, will never assist if the treatment of the helper constitutes exploitation or deception. But if an attractive but cash-poor business, likely to contribute to community economic development if it can survive and grow, cannot afford to meet the technical requirements for its early-stage helpers, then a good-faith lawyer such as Linda might desire to aid the enterprise.

As with the previous three examples, the assessment for Linda will require her reliable read of the terrain to be certain that the practice is indeed what she perceives it to be. For the misclassification example, Linda may be quite confident in her read of the local practices, but she faces a serious ethical challenge here. To understand why, let us consider the differentiation between Linda and Harriet. Recall that Harriet has an easy time with this example. Her message to the client would be something like, "What we're doing here is technically or literally illegal, but everyone does it, and no one cares. Your helper *could* sue for damages if you only pay her through stock options, but you'll have to decide whether that is a risk worth taking. It seems like it is, given what you know about her and her willingness to work on spec. For me, I'm not supposed to help you if this is also criminal, and technically it is criminal, but I'm not worried about my getting in trouble. As I just said, no one cares. So, let's proceed."[249]

Is Linda's posture any different? Linda would need to be certain that she is proceeding not simply because she will never be "caught," which represents Harriet's stance. Instead, Linda must believe that even if she were to be challenged, no disciplinary authority would find her in violation of Rule 1.2(d). She is not in violation of that provision, because the assistance is not criminal activity, given Linda's law-in-action analysis, notwithstanding the language of the applicable statute. But if someone were to report Linda to the local bar counsel's office, that office may not adopt Linda's law-in-action reasoning. It is not at all unlikely that, if presented with this question, bar counsel would look at the wage-and-hour laws and the language of Rule 1.2(d) and conclude that Linda assisted with criminal conduct. Linda would need to persuade the disciplinary agency that its read of the wage-and-hour laws, while surely sensible, fails because of the

248. *See* Pepper, *supra* note 26, at 1562 (noting that not all actions included as criminal are actually treated as criminal).

249. It should be obvious that Ben, as a pure instrumentalist, would do the same.

law-in-action gloss. She cannot be at all confident that this second-level application of the gloss will work.

Of course, *no one will ever report her*. Linda will never have to make that argument before the disciplinary agency because, as she would tell her client, no one cares. But that means that Linda would need to adopt Harriet's stance if she wished to assist this attractive startup business. Her law-in-action strategy seems to fail her with this example.

V. TWO CHALLENGES TO THE LAW-IN-ACTION STRATEGY

The analysis above has concluded that a lawyer committed to fidelity to the law in her own performance may, consistent with that commitment, honor law in action in settings where the accepted practices have effectively replaced law on the books. This Part highlights two challenges which such a lawyer must confront. The first is what we might understand as the "myside bias" hurdle. The second is a conceptual difficulty in reconciling the fidelity stance with the origins of law in action. Let us consider each in turn.

A. THE MYSIDE BIAS CHALLENGE

On initial reflection, it appears that Linda's choice to recognize and honor law in action, consistent with her fidelity commitment, encounters a worrisome roadblock. It arises from insights developed within cognitive and behavioral psychology. We understand that Linda's identification of law in action is, by its very definition, left to her interpretive discretion. The "law" that she will honor, in the settings we care about here, must be discerned from practices, customs, and community sentiment. It will not be written down for her.

We know that our judgments about whether something ambiguous is acceptable are affected by our interests and self-serving biases, what Stephen Pinker and others call "myside bias."[250] Linda's reliance on law in action is more problematic than her reliance on law on the books precisely because she must read a terrain rather than read a book. Therefore, unless Linda opts to resemble Harriet and to take chances about enforcement, discipline, reputation hits, etc., when deciding whether to act contrary to law on the books, we are left at most with the conclusion that *maybe* she can participate in her chosen strategy.

Very few law-in-action examples will have a convenient *Restatement* page explaining that the practice on the ground is different from what the lawyer will read in a rule or in some other authoritative text. Most will resemble the simultaneity puzzle: the lawyer herself makes judgments about the harm caused by her action and the likelihood of an agency disagreeing with the chosen strategy. As

250. PINKER, *supra* note 22, at 292–98; James H. Stark & Maxim Milyavsky, *Towards a Better Understanding of Lawyers' Judgmental Biases in Client Representation: The Role of Need for Cognitive Closure*, 59 WASH. U. J.L. & POL'Y 173, 176–78 (2019); Tess Wilkinson-Ryan, *Justifying Bad Deals*, 169 U. PA. L. REV. 193, 197 (2020).

noted above,[251] the deeper understanding a lawyer has about local culture and customs, the better she will be able to make the necessary predictions. But the lawyer in question is still *human*, and humans are terribly susceptible to myside biases.[252]

The worry we see here is that Linda's read of the terrain will be distorted by her own interests and desires, and those of her clients. That distortion will often be unconscious.[253] There is little one can say about this problem except to note the inevitability of flawed predictions because of over-confidence and self-serving biases.[254] As one commentator notes, "Behavioral science research explains that biases, heuristics, and situational factors can have a powerful influence on ethical decision-making that operates outside of a person's conscious awareness. Thus, behavioral legal ethics provides a new lens through which to view and understand attorney decision-making."[255] A lawyer relying on law in action will effectively be saying something like this (as we see with the simultaneity puzzle):

> It would be good for my practice (or my client, or the community constituency I serve) if I took the not-legal action ("NL"). NL does not seem to be allowable under the rules and other authorities I can locate, but NL has never been enforced or punished in situations like the way I will implement it here. No one will be harmed, there is much good to be had, and if somehow anyone ever complained I am confident I would be vindicated. Therefore, relying on what I might describe as law in action, I will proceed with the NL strategy.

Here, there is no difference between the lawyer choosing NL as her law-of-lawyering strategy and her choice to counsel her client about a similarly not-lawful but seemingly innocuous action.[256] In both settings, she is relying on her

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251. *See supra* note 224 and accompanying text.

252. Countless books and articles have addressed the challenges of bounded rationality and implicit or unconscious biases, both generally and in the context of lawyering. For examples of this treatment, see, e.g., Alina Ball, *Minimizing the Impact of Cognitive Bias in Transactional Legal Education*, 52 CONN. L. REV. 1139 (2021); Max H. Bazerman & Francesca Gino, *Behavioral Ethics: Toward a Deeper Understanding of Moral Judgment and Dishonesty*, 8 ANN. REV. L. & SOC. SCI. 85 (2012); Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107 (2013); Paula Schaefer, *Behavioral Legal Ethics Lessons for Corporate Counsel*, 69 CASE W. RSRV. L. REV. 975, 978 (2019); W. Bradley Wendel, *The Rule of Law and Legal-Process Reasons in Attorney Advising*, 99 B.U. L. REV. 107 (2019).

253. *See* MAX H. BAZERMAN & ANN E. TENBRUNSEL, BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT 5 (2011) (stating that many of our judgments occur "outside of our awareness"); Tigran W. Eldred, *Prescriptions for Ethical Blindness: Improving Advocacy for Indigent Defendants in Criminal Cases*, 65 RUTGERS L. REV. 333, 389 (2012); Nancy Levit, *Confronting Conventional Thinking: The Heuristics Problem in Feminist Legal Theory*, 28 CARDOZO L. REV. 391, 401 n.57 (2006).

254. For an elaborate analysis of the relationship between professional judgment and bounded rationality, see PAUL BREST & LINDA HAMILTON KRIEGER, PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT: A GUIDE FOR LAWYERS AND POLICY MAKERS 303–42 (2010).

255. Schaefer, *supra* note 252, at 978; *see also* Robbennolt & Sternlight, *supra* note 252, at 1111 ("Many [legal] ethical lapses result from a combination of situational pressures and all too human modes of thinking.").

256. For a discussion of that process and its ethical challenges, see, e.g., Pepper, *supra* note 26; Tremblay, *At Your* Service, *supra* note 46; W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167, 1199 (2005).

predictions about how the law works on the ground. Yet, in both settings, her predictive judgments are almost assuredly affected—one might say distorted—by myside bias. "[A]n attorney's self-interest influences her professional decision-making automatically," as one observer reports.[257]

To note that inevitability, however, is not to conclude that lawyers should never make predictive judgments nor ever try to read the community customs and cultures to make their predictions richer and more accurate. Instead, the best one can do is to remind ourselves (and in the counseling context, tell the clients) that people constantly read ambiguous terrains in self-serving ways.

Therefore, the myside bias hitch ends up as a non-issue for present purposes. Linda's judgments about the practice of law generally—the judgments upon which she relies when advising her clients—will necessarily be affected by her implicit biases. Her judgments about her own conduct operate in the same way, and they would do so if she opted to adhere slavishly to law on the books, which requires interpretive judgments.[258]

At the same time, lawyers like Linda (and, indeed, like Harriet) need to remain vigilant about what observers call '"ethical fading'—becoming so acculturated to certain practices that the ethical component fades out of consideration, making unethical decisions easier."[259] The recognition that honorable lawyers need not always treat written authority as law to be complied with invites a less attentive attitude toward fidelity as such. Researchers report that lawyers in practice settings "appear[] to be so acculturated to certain practices they did not consider the ethical issues implicated by those practices."[260] The social scientists further report that "some evidence suggests that the longer lawyers work at their jobs, the more they come to see other attorneys' behavior as ethical."[261] All of this adds to the caution of lawyers' reliance on law in action, even as they often must do so to be effective and responsible practitioners.

B. THE "FIDELITY" UNDERPINNINGS CHALLENGE

This Article has proceeded on the fundamental premise that Linda is "Wendelian"[262] in her adherence to fidelity to the law. She "acknowledg[es] legal

257. Schaefer, *supra* note 252, at 985 (citing Eldred, *supra* note 253, at 339).

258. *See, e.g.*, Tigran W. Eldred, *Insights from Psychology: Teaching Behavioral Legal Ethics as a Core Element of Professional Responsibility*, 2016 MICH. ST. L. REV. 757, 758–59 (2016); David McGowan, *Politics, Office Politics, and Legal Ethics: A Case Study in the Strategy of Judgment*, 20 GEO. J. LEGAL ETHICS 1057 (2007) (discussing the importance of judgment in client advising).

259. Paula Schaefer, *Attorneys, Document Discovery, and Discipline*, 30 GEO. J. LEGAL ETHICS 1, 29 (2017); *see also* Ann E. Tenbrunsel & David M. Messick, *Ethical Fading: The Role of Self-Deception in Unethical Behavior*, 17 SOC. JUST. RSCH. 223, 224 (2004).

260. Levin, *supra* note 197, at 339; *see also* Judith A. McMorrow, *In Defense of the Business of Law*, 40 FORDHAM URB. L.J. 459, 470 (2012) (discussing the need for ethical infrastructures); Robbennolt & Sternlight, *supra* note 252, at 1120–21 (explaining ethical fading).

261. Lynn Mather & Leslie Levin, *Why Context Matters*, in LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT 3, 17 (Lynn Mather & Leslie Levin eds., 2012).

262. WENDEL, *supra* note 2.

obligations from the internal point of view,"[263] committing to honor the law not out of fear of the penalties for non-compliance (if so, she would resemble Harriet, the Holmesian), but for its own sake. We have concluded thus far that such a commitment must include law in action along with law on the books, because in some appropriate settings, the former captures her legal obligations more reliably and sensibly than the latter.

Before we end this examination of Linda's ethical duties, we must confront a confounding realization, one arising from an understanding of the jurisprudential genesis of her fidelity commitment.

Simply put, one of the leading arguments for the internal point of view, for the fidelity commitment, is the substantive law's institutional and democratic response to the reality of pluralism and disagreement. In his pioneering treatment of fidelity to the law, Brad Wendel assigns great weight to the role the law plays in managing inevitable and unresolvable conflicts among citizens.[264] As Wendel writes, "The point of law is to create a more or less autonomous domain of reasons, rooted in the community's procedures for resolving conflict and settling on a common course of action."[265] The heady challenge of pluralism requires some agreed-upon, shared procedures for cooperation in light of inescapable and unresolvable disagreement. Those procedures, developed through reasonably fair democratic processes, represent the law and serve as the basis for the law's authority.[266] Wendel follows H.L.A. Hart in his adherence to the internal approach to the law's authority. He notes that "to take the internal point of view with respect to an observed regularity of behavior is to accept that what people are doing is following a standard that applies to members of the relevant group (such as a political community) and following it *because* it makes legitimate demands on them."[267]

If Linda accepts the validity—in the selected circumstances developed here—of law in action when it fails to jibe with law on the books, how might she reconcile these institutional arguments with the reality of some authority emerging separately from the institutional structures on which the internal point of view rests? Wendel himself notes that "Holmes equated the content of the law with predictions of how legal officials would decide cases,"[268] and that this perspective introduced the Holmesian "bad man,"[269] as exemplified in Harriet's approach to her lawyering work. But Linda's law-in-action strategy does precisely that. And the

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263. *Id*. at 61; *see supra* notes 26–34 and accompanying text.

264. WENDEL, *supra* note 2, at 92–98.

265. *Id*. at 10.

266. In his articulation of this thesis, Wendel builds on many jurisprudential scholars and traditions. *See, e.g*., RONALD DWORKIN, LAW'S EMPIRE (1985); AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT (1996); JEREMY WALDRON, LAW AND DISAGREEMENT (1999).

267. Wendel, *Should Lawyers Be Loyal to Clients, the Law, or Both?*, *supra* note 31, at 29.

268. WENDEL, *supra* note 2, at 61.

269. *See* Holmes, *supra* note 5, at 459–62.

law in action she will honor has few, if any, of the institutional underpinnings on which the fidelity arguments rely. Law on the books emerges from the democratic, institutional procedures Wendel champions, and law in action—at least the version Linda intends to honor—by its very definition ignores or departs from the law on the books and its institutional pedigree.

It might appear, in the end, that Linda and Harriet resemble one another more closely than the earlier descriptions concluded. Linda's stance, like Harriet's, does not inherently rely on the democratic response to pluralism (that is, the law that the institutions announce) but instead gauges how officials will act—which can describe Harriet quite well. In her own way, Linda is "equat[ing] the content of the law with predictions of how legal officials would decide cases,"[270] which is Holmes's description of his bad man.[271]

That seeming resemblance, and with it, the possible collapse of the distinction developed throughout this Article, will not withstand a more careful scrutiny, however. Consider Wendel's description: "The good citizen regards the law as a source of reasons, while the bad citizen's reasons are essentially unaltered by the law, except insofar as the law is another source of negative consequences like being deprived of liberty or property."[272] As understood here, and by lawyers like Linda, the law in action serves as a source of reason for acting. It is true that this version of the reason-giving arises from less well-defined institutional structures (not from legislatures, agencies, or courts, at least expressly so), but the strain of law in action representing reason for acting does emerge from community sentiment.[273]

In this way, Linda's approach nevertheless remains preferable to Harriet's. Linda's stance has more integrity, is more internal, and is more virtuous.[274] Law in action—understood as those practices that officials would accept if called upon—possesses better legitimacy, and more closely equates to a community's shared response to the pluralist disagreements Wendel describes. If we understand Linda's choice as between rigid and unresponsive law on the books and what she perceives as a more faithful, accepted law in action, then it is difficult to argue, as an ethical matter, that she must opt for the former.

CONCLUSION

My reason for writing this Article, as should be readily apparent to readers, arises from my work with my students both in my community economic development clinic and in my classroom teaching the legal ethics course I teach every year. In those settings, I need to model honorable lawyering behavior, even if

270. WENDEL, *supra* note 2, at 61.

271. Holmes, *supra* note 5, at 459–62.

272. WENDEL, *supra* note 2, at 62.

273. *See supra* notes 177–89 and accompanying text (describing the version of law in action most deserving of being deemed "the law").

274. *See* Sinha, *supra* note 33.

lawyers in the hurly-burly of practice might cut corners. So, when my students and I encounter the kinds of settings that represent law in action, which is to say not faithful to the clear law on the books, and I *know* they represent law in action, I need a principled stance upon which to defend our ostensibly-unlawful actions. This Article serves as my effort to outline such a principled stance, or, at least, the beginnings of one.

The Realists have improved the practice of law on the ground through their insights about the gap between the law on the books and the law in action. Attorneys working with clients are more effective and more responsive by recognizing the limitations of attending only to the formal law as written. But those lawyers who attend to law in action will, on occasion, encounter a serious challenge. In their own law-of-lawyering practices, may they ignore clear written law in those instances where a Realist would teach that the law in action is more faithful to the law's aims and better accepted by the community?

This Article concludes that the answer to that question is yes, even for those attorneys who have committed to the internal perspective, respecting law for its own sake, and not only for the penalties its violation may trigger. The discussion here has concluded that a fidelity-committed lawyer has an ethical duty to honor genuine and legitimate law, and when the law in action represents that authority, she ought to follow it. This conclusion does introduce its own challenges because the fidelity-committed attorney needs to be *right* in her judgments. But those judgments appear to be little different from the day-to-day judgments that constitute the effective practice of law.[275]

275. As Avi Soifer is fond of saying (I believe quoting Yogi Berra), "In theory there is no difference between theory and practice. In practice there is."