

2005

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### Recommended Citation

Manuel A. Utset, *A Model of Time-Inconsistent Misconduct: The Case of Lawyer Misconduct*, 74 Fordham L. Rev. 1319 (2005).

Available at: <https://ir.lawnet.fordham.edu/flr/vol74/iss3/8>

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## A Model of Time-Inconsistent Misconduct: The Case of Lawyer Misconduct

### Cover Page Footnote

Professor of Law, University of Utah, S.J. Quinney College of Law. I would like to thank Nancy McLaughlin, Daniel Medwed, and Linda Smith for their comments.

# A MODEL OF TIME-INCONSISTENT MISCONDUCT: THE CASE OF LAWYER MISCONDUCT

*Manuel A. Utset\**

## INTRODUCTION

The recent corporate scandals resulted from systematic violations of federal securities laws and state corporate law by managers over long periods of time. This type of systematic managerial misconduct requires the active participation of lawyers or at least their turning a blind eye to manager actions that should arouse their suspicion and a desire to investigate further. Thus, corporate scandals invariably lead scholars and regulators to question the effectiveness of existing regulations of corporate lawyers.

What can lead lawyers to either actively assist corporate managers in systematic fraud and criminal activity, or remain ignorant and passive when they know or should know to inquire and act? A common lawyer-misconduct scenario that is hard to regulate is the following: A lawyer starts with a set of internalized ethical norms that she applies steadfastly to her professional (and nonprofessional) decisions and actions; however, little by little the lawyer begins to override those (*prima facie* applicable) principles when acting on her client's or her own behalf, until one day the lawyer and society find that the lawyer has gone from good to bad, with relative ease and little warning.

The lawyer caught in this moral disintegration scenario faces a series of ethical dilemmas: repeated opportunities to trump, or not, her personal ethical principles for more immediate self-interest concerns.<sup>1</sup> The more insidious contexts involve relatively minor, but repeated, misconduct, where the divergence from a lawyer's ethical code is relatively small and not, at least on its face, irreversible. This type of incremental decision making can cause a lawyer to go from good to bad in slippery-slope fashion, shifting her moral baseline in incremental steps.

This Article offers a new explanation for lawyer misconduct and moral disintegration, one based on the "time-inconsistent misconduct" model that I develop in Part III. The time-inconsistent misconduct model builds on the

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1. See *infra* Part II.B (discussing the moral disintegration problem).

growing empirical evidence finding that people have time-inconsistent preferences.<sup>2</sup> Time-inconsistent preferences are a product of the simple (and to many, intuitive) fact that people value immediate gratification. From a long-term perspective people want to act relatively patiently in future periods, but when they are faced with immediate costs they often choose to procrastinate; they do so even though they know that procrastination hurts them. When people face the prospect of immediate rewards, the pull of immediate gratification can lead them to act sooner than they otherwise want to and to overconsume.

Economists have begun to develop time-inconsistent preferences models to explain under-saving for retirement, procrastination in enrolling in retirement accounts, addiction to drugs, deadlines in principal-agent contexts, and commitment devices used by consumers.<sup>3</sup> My time-inconsistent misconduct model builds upon the general intuitions of these models, extending them to the decisions of individuals to engage in legal and ethical misconduct and further developing various general implications.

I will say that a person engages in time-inconsistent misconduct whenever the person has made a long-term decision to abstain from misconduct in a particular context (after concluding that engaging in that misconduct does not make economic sense—i.e., its expected costs exceed expected rewards)—and later reverses that decision and engages in misconduct solely due to the pull of immediate gratification.<sup>4</sup>

This Article develops three general arguments regarding time-inconsistent misconduct and extends them to explain certain types of lawyer misconduct. First, people will have incentives to engage in time-inconsistent misconduct that provides them with immediate rewards. This can lead a lawyer to do such things as repeatedly lie, overbill clients, and embezzle funds even though the lawyer has a long-term preference to abstain from such misconduct. I refer to this type of behavior as “nibbling opportunism.” A time-inconsistent person may take too many opportunistic nibbles, in the same manner that she may overconsume cake, cigarettes, and money early in life notwithstanding a long-term preference to retire in good health and with sufficient savings.

Second, a person who has made a long-term decision to take a legally required action at the required time may nonetheless repeatedly procrastinate following through due to a desire to avoid the immediate effort and costs of taking the action. This can lead corporate lawyers to procrastinate confronting managers, making disclosures to the board of directors, and withdrawing their previous advice.

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2. See Christopher Harris & David Laibson, *Hyperbolic Discounting & Consumption*, in 1 *Advances in Economics & Econometrics, Theory & Applications: 8th World Congress 258, 258-60* (Mathias Dewatripont et al. eds., 2003) (setting forth various findings and summarizing literature).

3. See *infra* Part I.C.

4. In other words, the person has not acquired new information showing that engaging in misconduct actually has positive expected returns.

Third, a person who has determined that misconduct has positive expected returns and made a long-term decision to engage in misconduct may nonetheless repeatedly procrastinate following through if the immediate costs of engaging in misconduct are sufficiently high. I refer to this phenomenon as “time-inconsistent honesty.”

At the core of the time-inconsistent misconduct model is a positive claim that the time-inconsistent preferences of individuals are an important source of systematic misconduct in a variety of legal contexts. From this follows a normative claim that it is important for policy-makers to take time-inconsistent misconduct into account, given that (1) such misconduct can impose large welfare losses on third parties and the time-inconsistent actors, and (2) the incentives and penalties needed to deter time-consistent and time-inconsistent individuals differ—to effectively deter the latter, policy-makers need to directly target the short-term preferences that motivate time-inconsistent misconduct.<sup>5</sup>

Part I summarizes the evidence on time-inconsistent preferences and the general models that have been developed by economists to fit this evidence into received microeconomics and macroeconomics models. Part II introduces some of the general obstacles to effectively regulating lawyers and discusses some of the explanations that have been offered for the moral disintegration of lawyers. Part III develops the time-inconsistent misconduct model. Part IV applies the model to lawyer misconduct and offers suggestions for various policy changes. Part V offers some conclusions.

## I. TIME-INCONSISTENT PREFERENCES: PROCRASTINATION AND OVERCONSUMPTION

### A. *Inter-temporal Decision Making*

I will assume that people choose their actions with the general goal of maximizing their utility. As a general matter, a person deciding whether or not to take an action will compare the costs and rewards associated with that action.<sup>6</sup> Many of the decisions that people make in their everyday

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5. I have begun this more general project in a series of recent papers. See Manuel A. Utset, *A Theory of Self-Control Problems and Incomplete Contracting: The Case of Shareholder Contracts*, 2003 Utah L. Rev. 1329 [hereinafter Utset, *Incomplete Contracting*] (arguing that time-inconsistent preferences are a source of contractual gaps); Manuel A. Utset, *Time-Inconsistent Management & The Sarbanes-Oxley Act*, 33 Ohio N.U. L. Rev. (forthcoming 2005) (applying the time-inconsistent misconduct model in the context of recent corporate scandals and Sarbanes-Oxley Act); Manuel A. Utset, *A Model of Time-Inconsistent Misconduct* (Sept. 5, 2005) (unpublished manuscript, on file with author) [hereinafter Utset, *Time-Inconsistent Misconduct*] (developing the time-inconsistent misconduct model); Manuel A. Utset, *Time-Inconsistent Reliance and Contract Law* (Apr. 2005) (unpublished manuscript, on file with author) (showing that time-inconsistent preference can lead to under-reliance by contract parties).

6. See Richard A. Posner, *Economic Analysis of Law* 4 (2003).

lives—both at home and at work—are inter-temporal in nature. An inter-temporal decision is one in which the costs and rewards that flow from the decision are not all incurred or received in the same time period.<sup>7</sup>

### 1. Long-Term Decisions

Suppose that a person has bought a bottle of wine and is trying to decide whether to drink the bottle in one year's time or in two years; she knows that waiting two years will improve the wine's taste and her ultimate enjoyment. People, however, are impatient: As a general matter, they prefer to receive rewards earlier in time and defer costs until future periods.<sup>8</sup> Thus, the person's impatience or time preference will lead her to discount the added pleasure that she expects to get from drinking the more mature wine in two years. Assume that the person decides that she prefers to wait the two years. I will refer to this front part of an inter-temporal decision as a "long-term decision."

### 2. Short-Term Decisions

Suppose that a year has elapsed and the person revisits her original decision. At this point, she must choose between drinking the bottle immediately and waiting an additional year. The person again compares the pleasure of drinking a wine that has matured for one year with the (discounted) pleasure of drinking the more mature wine in year two. A person will make a "short-term decision" to override her long-term decision for two types of reasons. First, the person has received new information that leads her to change her original conclusions regarding the wine. Second, a person may override her long-term decision if she has become more impatient during the year that has elapsed. That is, if the person values immediate gratification and the added utility from drinking the wine immediately is sufficiently high, she will drink the wine in year one.

### 3. Time-Consistent Preferences

A person with time-consistent preferences, who has not received new information, will not override her long-term decision; she will always follow through as planned.<sup>9</sup> A person is said to have "time-consistent

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7. Generally, an inter-temporal decision is one that has deferred consequences, requiring an actor to account for costs and rewards that are distributed over time. See George F. Loewenstein & Dražen Prelec, *Preferences for Sequences of Outcomes*, in *Choices, Values, and Frames* 565, 565 (Daniel Kahneman & Amos Tversky eds., 2000); George Loewenstein & Richard H. Thaler, *Anomalies: Intertemporal Choice*, 3 *J. Econ. Persp.* 181, 181 (1989) (defining inter-temporal choices as "decisions in which the timing of costs and benefits are spread out over time").

8. For a general discussion of time discounting, see Shane Frederick et al., *Time Discounting and Time Preference: A Critical Review*, 40 *J. Econ. Literature* 351 (2002).

9. See Gary S. Becker, *Accounting for Tastes* 11 (1996) (noting that time-consistent preferences require that "the choices an individual *would like* to make in the future, if he

preferences" if at the time of making her short-term decision she does not give extra weight to the prospect of immediate gratification; this means that her level of impatience (or discounting for time preference) stays constant over time—i.e., it is the same when she makes a short-term decision as it was when she made her long-term decision.<sup>10</sup> As a result, her short-term decision will confirm her original, long-term one. A time-consistent wine drinker will adhere to her original decision and drink the more mature wine in year two.

### B. *Inter-temporal Decision Making: General Framework*

More generally, when a person makes a long-term decision about a future action she will follow three steps. First, she will determine the expected costs and rewards of taking the action, accounting for various risks and her time preference. The person will discount for the risk that future contingencies will have an impact on the costs and rewards of the action. She will also discount future costs and rewards to account for her time preference or impatience, as discussed above. After discounting for risks and impatience, the person will compare the expected costs of the action with the expected rewards. If the expected rewards exceed the expected costs, I will say that the action has "positive expected returns"; if expected costs exceed expected rewards, the action has "negative expected returns."

Second, a person will make a long-term decision to take actions with positive expected returns and abstain from those with negative expected returns. Third, if the person has decided to take an action, she will then determine when to act. A person will choose to take an action in the period that will maximize the expected returns from that action.

When the allotted time to act arrives, the person will make a short-term decision to either follow through as planned, or reverse her long-term decision. A person will reverse her long-term decision if she has acquired new information showing that the action is no longer worthwhile—i.e., that it now has negative expected returns.

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knew now what would happen in the interim, are exactly the same as the choices he will *actually* make then").

10. See David Laibson, *Intertemporal Decision Making*, in *Encyclopedia of Cognitive Science* (forthcoming 2005) (manuscript at 12), available at <http://post.economics.harvard.edu/faculty/laibson/papers/ecsmar2.pdf> (noting that the discount rate, which captures the rate of decline of exponential discount function, is constant over time). Economists introduce the exponential discount factor,  $\delta$  (which is set to less than one), to capture a decision maker's time preference. The decision maker is assumed to give full weight to costs and rewards to be incurred in the current period; she also discounts all future costs and rewards using her exponential discount factor—i.e., her discounting in the current period, period 1, period 2, and so on would be as follows: 1,  $\delta$ ,  $\delta^2$ ,  $\delta^3$ , . . . . In making tradeoffs between any two adjacent periods, therefore, a person always discounts by her discount factor  $\delta$ .

### C. Time-Inconsistent Preferences

A person with time-inconsistent preferences will make long-term decisions using the three-step decision-making framework set forth in the previous section. At the time of making her long-term decision, the time-inconsistent person has a long-term preference to act in a time-consistent manner. However, unlike her time-consistent counterpart, a time-inconsistent person will sometimes reverse her long-term decisions even though she has not acquired new information. At the time of making a short-term decision, a person with time-inconsistent preferences will give added weight to the prospect of immediate gratification; if that added weight is sufficiently great, the person will choose to override her long-term decision.<sup>11</sup>

There is a large body of evidence from economics experiments showing that people value immediate gratification;<sup>12</sup> when they make long-term decisions, they want to be relatively patient, but become increasingly impatient the closer they get to receiving a reward or having to incur a cost. Thus, from a long-term point of view, people tend to have the best intentions for their future selves: They make plans to start diets, stop smoking, and finish writing papers. However, when the time to act arrives, the chocolate cake trumps the diet, Joe Camel prevails, and finishing the paper gives way to going to the movies.

#### 1. Procrastination

A person with a preference for immediate gratification will give added weight to a cost that she has to incur immediately. At the time of making a long-term decision to take an action, a person will discount costs—to account for risks and her long-term time preference—in the same manner as a time-consistent person. However, when the allotted time to act arrives, a time-inconsistent person will give added weight to the immediate costs of following through, and if the added weight is great enough, she will procrastinate.<sup>13</sup>

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11. See Ted O'Donoghue & Matthew Rabin, *Doing It Now or Later*, 89 Am. Econ. Rev. 103, 106 (1999) (noting that when people calculate trade-offs between undertaking onerous tasks in one of two future periods, they tend to give extra relative weight to the earlier period as it gets closer in time). This is due to the fact that instead of the constant level of impatience—i.e., constant discount rates—that motivates time-consistent preferences, individuals tend to have declining discount rates. See Richard H. Thaler, *Some Empirical Evidence on Dynamic Inconsistency*, in *Quasi Rational Economics* 127, 128-30 (1991) (finding that the implicit discount rate dropped as the length of the delay in receiving the promised money increased).

12. See George A. Akerlof, *Procrastination and Obedience*, 81 Am. Econ. Rev. (Papers & Proc.) 1, 5-8 (1991) (summarizing empirical evidence of procrastination in areas of drug addiction, savings behavior, and within organizations); Harris & Laibson, *supra* note 2, at 258.

13. See Akerlof, *supra* note 12, at 1 (noting that individuals procrastinate “when present costs are unduly salient in comparison with future costs, leading individuals to postpone



A person “procrastinates” when she (1) makes a long-term decision to take an action at a particular time, and (2) makes a short-term decision to delay for at least one period in order to avoid the added disutility of having to incur immediate costs. A person with time-consistent preferences would never procrastinate, since by definition she does not give added weight to immediate costs.

For example, a person with a long-term preference to enroll in a retirement account will procrastinate following through if the immediate cost of enrolling is sufficiently high, compared with the loss that she will suffer from delaying one period.

## 2. Overconsumption

A preference for immediate gratification will also lead a person to give added weight to a reward that she can receive immediately. This can lead a person to take actions sooner than she had wanted (i.e., to reverse long-term decisions to be more patient). Over time, repeated reversals of this sort can lead a person to take more actions of a particular type than she wanted from a long-term perspective. In short, she may “overconsume” vis-à-vis her long-term preferences.

A person “overconsumes” when she does as follows: (1) makes a long-term decision to take an action at a particular time; and (2) makes a short-term decision to act at least one period earlier than she had wanted, due to the added utility from the immediacy of a reward.<sup>14</sup> This means that a person also overconsumes when she makes a long-term decision to abstain from taking an action, but later reverses that decision given the prospect of an immediate reward. For the same reasons as above, a person with time-consistent preferences will not engage in overconsumption.

For example, suppose a person, for health reasons, has made a long-term decision to abstain from eating chocolate cake. The person will reverse that decision and eat a slice of cake in each period in which the added utility

tasks until tomorrow without foreseeing that when tomorrow comes, the required action will be delayed yet again”).

14. See O’Donoghue & Rabin, *supra* note 11, at 104 (distinguishing between taking action when one should wait, given that one receives immediate rewards, but delayed costs, and procrastination, delaying action one should take, because of immediate costs and delayed rewards). The following table sets forth the various relative timing for costs and rewards and their effect on a person’s incentive to procrastinate, act too soon, or overconsume.

	Rewards (immediate)	Rewards (delayed)
Costs (immediate)	Depends on relative cost-benefit analysis	Procrastinate
Costs (delayed)	Act too soon; overconsume	Immediate gratification not an issue

from immediate gratification is greater than the added incremental future cost (in reduction of health and medical costs) from eating the slice.

### 3. Awareness of Propensity to Override Long-Term Decisions

Each time that a person procrastinates or overconsumes she incurs a (delayed) welfare loss—i.e., a loss that she would have avoided if she had adhered to her long-term preferences. Commitment devices allow a person to avoid these welfare losses, but they are costly—they take time and effort to implement and restrict the set of future actions available to a person;<sup>15</sup> therefore, commitment devices will be adopted only when their benefits exceed the costs.<sup>16</sup>

A “sophisticated” person correctly predicts the full magnitude of her future temptation to override her long-term decisions and adopts commitment devices to restrict her ability to do so. A naive person is completely unaware of her time-inconsistent preferences and never incurs the costs of adopting commitment devices; therefore, over time, she can suffer large aggregate welfare losses. Real people actually tend to be overoptimistic about their future ability to withstand the pull of immediate gratification—i.e., they are neither fully naive nor fully sophisticated, but are “partially naive.”<sup>17</sup> Therefore, they may not adopt fully effective commitment devices.<sup>18</sup>

### 4. Commitment Devices as Evidence of Time Inconsistency

A time-consistent person, by definition, knows that she will never reverse her long-term decisions and will never incur the costs of commitment. Therefore, evidence that people adopt commitment devices provides positive confirmation of time-inconsistent preferences and of people’s awareness of their time inconsistency.<sup>19</sup>

For, example, people with long-term preferences to eat healthily, exercise, and lose weight, but who repeatedly yield to immediate gratification, join health clubs and go to special weight-loss spas, both of

15. A “commitment device” is any mechanism adopted by a person to restrict her ability to yield to self-control problems in future periods—i.e., to restrict the set of actions available to her future, less patient self.

16. I will assume throughout this Article that the benefits of commitment devices exceed the costs.

17. See Dan Ariely & Klaus Wertenbroch, *Procrastination, Deadlines, and Performance: Self-Control by Precommitment*, 13 *Psychol. Sci.* 219, 220-22 (2002) (presenting a study finding that a group of students with external deadlines performed better than a second group who underestimated the full extent of their propensity to procrastinate, and adopted suboptimal deadlines).

18. See Ted O’Donoghue & Matthew Rabin, *Choice and Procrastination*, 116 *Q.J. Econ.* 121, 127 (2001) (asserting that even small amounts of overoptimism can lead a partially naive person to act in same manner as a naive person).

19. See O’Donoghue & Rabin, *supra* note 11, at 105 (stating that economists use commitment devices as evidence—“smoking guns”—of time-inconsistent preferences).

which require costly up-front commitments; students and professors use deadlines (preferably externally imposed)<sup>20</sup> to combat their temptation to procrastinate completing papers. Some economists have argued that people with long-term preferences to set enough money aside for retirement make highly illiquid investments in their youth—e.g., purchasing homes—to prevent themselves from overconsuming early in life; retirement accounts with penalties for withdrawals serve similar purposes.<sup>21</sup>

## II. LAWYER MISCONDUCT: THE PROBLEM

### A. *Some Difficulties in Regulating Lawyers*

The regulation of lawyers is made difficult by a number of well-known obstacles.<sup>22</sup> A lawyer generally serves more than one master—i.e., the client, society, and herself. Lawyers perform various tasks on behalf of their clients: For example, they act as advocates, provide legal advice, structure transactions, and help meet regulatory requirements.<sup>23</sup> As a general matter, a lawyer's highest duty is to her client. However, lawyers also owe a duty to society, given that they are granted a legal monopoly that provides them with great power, prestige, and financial rewards. Finally, lawyers are motivated, at least in part, by their own self-interest, something that no amount of regulation can extinguish, or would want to. (After all, regulations work because lawyers react to rewards and penalties in a self-interested manner.)

One can divide the potential conflicts arising from the three-way nature of this relationship into three categories: client and lawyer vs. society; lawyer and society vs. client; and client and society vs. lawyer. An

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20. See, e.g., Ariely & Wertenbroch, *supra* note 17, at 220-24 (offering the example of deadlines as commitment devices); T.C. Schelling, *Economics, or the Art of Self-Management*, 68 Am. Econ. Rev. 290, 290 (1978) (discussing various commitment devices); Klaus Wertenbroch, *Consumption Self-Control by Rationing Purchase Quantities of Virtue and Vice*, 17 Marketing Sci. 317, 317 (1998) (noting that paying a premium to acquire cigarettes can be a commitment device). Drug and alcohol rehabilitation programs require minimum stays and full payment (up front) for the required treatment period, a part of which is kept if the patient checks out early. For example the Cirque Lodge, a well-known facility of this type, has a thirty-day minimum stay and requires patients to pay for that thirty-day period at the time that they check in. See Cirque Lodge—Admission Criteria and Costs, <http://www.cirquelodge.com/admission.php> (last visited Oct. 21, 2005) (stating that patients are required to make a deposit of \$34,800 to stay at the Lodge and \$24,750 for the studio at time of check-in).

21. See David Laibson, *Life-Cycle Consumption and Hyperbolic Discount Functions*, 42 Eur. Econ. Rev. 861, 868 (1998) (discussing commitment devices to deal with procrastination in saving for retirement, including holding illiquid assets, such as those via defined benefit pensions, 401(k)s, social security contributions, and home equity).

22. See, e.g., Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 Stan. L. Rev. 589 (1985).

23. See Richard W. Painter, *The Moral Interdependence of Corporate Lawyers and Their Clients*, 67 S. Cal L. Rev. 507, 518-53 (1994) (discussing various roles played by corporate lawyers).

important difficulty in crafting ethics rules is that of providing lawyers with the right incentives to act on behalf of client, society, and self in a manner that will meet more general, substantive social goals.

The dynamic nature of the client-lawyer-society relationships, informational problems, and the incomplete nature of the contracts and professional and legal rules that bind the parties, all contribute to the regulatory difficulty. For example, a requirement to keep a client's confidence protects the client against inappropriate collusion between a lawyer and regulators or third parties against a client, and encourages clients to be forthcoming with information needed by lawyers to properly represent them;<sup>24</sup> at the same time, it allows a client and lawyer to collude "inappropriately" (however defined) against others. Informational problems and incomplete rules make it difficult, although not impossible, to resolve these problems in a satisfactory manner.

Lawyers not only have to balance their own interests with those of society, but in doing so they have to balance at least two different, sometimes conflicting sets of ethical rules: the code of professional ethics and the lawyer's own set of personal moral rules. This is no easy task. One problem is that moral rules are by nature defeasible, a task made easier if one can resort to another set of ethical norms for support. The lawyer can use duty to defeat truth, fidelity to defeat candor, and so on. Additionally, the lawyer can deploy nonethical reasons to defeat ethical rules.

There is an additional obstacle to regulating corporate lawyers. Managers, accountants, board members, and lawyers work together to create disclosure documents, structure transactions, and undertake a variety of other tasks that can later be challenged by shareholders and regulators.<sup>25</sup> Cooperation by team members has economic value; however, it also makes it difficult, when a claim of misconduct is raised to determine the complicity and responsibility of each party.<sup>26</sup> A coarse rule for punishing misconduct—one that fails to distinguish sufficiently between the various

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24. See Model Rules of Prof'l Conduct R. 1.6 cmt. 2 (2003) (stating that the confidentiality requirement promotes trust between lawyer and client and encourages communication).

25. See, e.g., Lawrence A. Cunningham, *Sharing Accounting's Burden: Business Lawyers in Enron's Dark Shadows*, 57 Bus. Law. 1421, 1454-56 (2002) (discussing the intersection between legal and accounting issues and the need for accounting knowledge by lawyers); Manuel A. Utset, *Producing Information: Initial Public Offerings, Production Costs, and the Producing Lawyer*, 74 Or. L. Rev. 275 (1995) (arguing that lawyers act as a form of "translator" between the different group members involved in drafting securities prospectuses).

26. See Roger C. Crampton, *Enron and the Corporate Lawyer: A Primer on Legal and Ethical Issues*, 58 Bus. Law. 143, 174 (2002) (arguing that lawyers, managers, accountants, and other group members rationalize their behavior by blaming misconduct on others); Cunningham, *supra* note 25, at 1454-55 (discussing the "pass-the-buck" problem between the lawyers and accountants and the diffusion of responsibility due to artificial boundaries between two professions). For a discussion of the general difficulties of providing incentives to team members, see Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 Am. Econ. Rev. 777 (1972).

parties—can create a number of misincentives, such as undermining cooperation and trust between parties, and a reluctance to share information or rely on the information provided by others.<sup>27</sup>

### B. Moral Disintegration

What can lead otherwise good lawyers to go so bad? A lawyer goes bad when misconduct becomes systematic, when she repeatedly overrides her personal moral code and engages in misconduct that violates the law or the rules of professional responsibility. An otherwise good, ethical lawyer is unlikely to go from good to bad if she engages in misconduct just once. However, when a lawyer has repeated opportunities to engage in minor misconduct that provides her with relatively small incremental gains and losses, misconduct becomes more tempting, and easier to justify *ex ante* and *ex post*. These types of contexts are particularly prone to what can be referred to as the “just-this-one-last-time” syndrome.

A number of explanations have been offered for the good lawyer’s traversal to the bad side; these include greed,<sup>28</sup> the existence of institutional constraints and reward structures that make it difficult for well-intentioned lawyers to keep to their “better” principles, pressure to conform, habit and acculturation,<sup>29</sup> and unconscious rationalizations due to cognitive dissonance.<sup>30</sup> While I am sympathetic to the role of habit, acculturation, and cognitive dissonance in moving lawyers along the path toward moral disintegration, such explanations rely to a large extent on forces mostly beyond the lawyer’s control. Cognitive dissonance does most of its work below the deliberative radar—i.e., subconsciously. Additionally, once a lawyer’s dissonance process gets started (even by the smallest ethical misstep), it feeds back upon itself in a mutually recursive, slippery-slope fashion, making positive confirmation difficult.<sup>31</sup> Habit and acculturation

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27. See Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. Pa. L. Rev. 1735 (2001) (discussing the role of trust and cooperation in the corporate context); Manuel A. Utset, *Reciprocal Fairness, Strategic Behavior & Venture Survival: A Theory of Venture Capital-Financed Firms*, 2002 Wis. L. Rev. 45, 132-38 (setting forth an analogous informational hold-up problem in the venture capital context).

28. See Lisa G. Lerman, *The Slippery Slope from Ambition to Greed to Dishonesty: Lawyers, Money, and Professional Integrity*, 30 Hofstra L. Rev. 879, 888-90 (2002) (citing lawyer greed as the principal catalyst for the slippery-slope slide to misconduct).

29. Rhode, *supra* note 22, at 633-38; Deborah L. Rhode, *If Integrity Is the Answer, What Is the Question?*, 72 Fordham L. Rev. 333, 335-36 (2003).

30. See Donald C. Langevoort, *The Epistemology of Corporate-Securities Lawyering: Beliefs, Biases and Organizational Behavior*, 63 Brook. L. Rev. 629, 647-48 (1997) (explaining cognitive dissonance); David Luban, *Integrity: Its Causes and Cures*, 72 Fordham L. Rev. 279 (2003) (discussing role of deception and cognitive dissonance).

31. Luban acknowledges that the cognitive dissonance resort to unconscious reasoning can raise questions regarding free will and moral responsibility. See David J. Luban, *The Ethics of Wrongful Obedience*, in *Ethics in Practice* 94, 112-13 (Deborah L. Rhode ed., 2000). Although Luban suggests a number of ways out of the determinism dilemma, the prominence of the unconscious in dissonance explanations creates a series of other problems,

explanations leave greater room for the exercise of free will, but still have a semiautomatic feel to them. In Part IV, I offer a simpler and, I believe, more intuitive explanation for what motivates lawyers to repeatedly override their moral principles. The explanation is based on the concept of time-inconsistent misconduct. However, I first need to develop the time-inconsistent misconduct model.

### III. A MODEL OF TIME-INCONSISTENT MISCONDUCT

In this part, I summarize the applicable parts of a model of time-inconsistent misconduct that I develop in greater detail elsewhere.<sup>32</sup> The principal goal of the current Article is to extend the time-inconsistent misconduct model to explain the observed misconduct of lawyers.

#### A. *Defining Misconduct*

I start with the premise that certain types of misconduct have already been identified by society, parties to a transaction, or a person contemplating engaging in misconduct—i.e., a person may decide that she will act in accordance with certain moral strictures and will label as misconduct any action that deviates from her moral code.

#### 1. Two Types of Misconduct

For our purposes, a person engages in misconduct when she fails to follow the dictates of a rule defining misconduct that is applicable to her. A person can engage in misconduct in two ways: (1) taking an action that, under a rule, she was under a duty not to take; or (2) failing to take an action that she was under a duty to take.

For example, criminal law and tort law require that people take some actions and abstain from taking others to avoid liability. Under agency law, a fiduciary owes a duty of loyalty and cannot take certain affirmative actions that hurt the principal: A manager cannot take a corporate opportunity; a lawyer cannot embezzle her client's funds. A fiduciary's duty of loyalty and duty of care also requires her to take certain affirmative actions on behalf of the principal. Additionally, a person may decide that her own moral code requires certain actions and prohibits others. A lawyer may determine that she has a moral obligation to disclose information about her client's illegal activities, notwithstanding professional ethics rules that

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not the least of which is how one can measure the extent of the problems and viability of proposed solutions. These problems by themselves do not make the dissonance theory unhelpful or unworkable, but do increase the importance of trying to find alternative explanations to the slippery slope that Luban describes. This Article proposes one such alternative explanation, not meant to disprove the cognitive dissonance arguments, but as an alternative.

32. See Utset, *Time-Inconsistent Misconduct*, *supra* note 5.

prohibit her doing so, or a moral obligation to abstain from engaging in opportunistic behavior that is legal but would hurt others.<sup>33</sup>

## 2. Incremental Misconduct

Misconduct generally has a history—it involves a series of decisions and actions over time that culminates in one or more acts of misconduct. In this Article, I am concerned with two types of incremental behavior. First, a person may engage in repeated misconduct over time—e.g., a lawyer may repeatedly embezzle money from her clients, assist them in illegal actions, or fail to make required disclosures. Second, a person engaged in misconduct will, over time, take a series of actions in furtherance of that misconduct; these actions may or may not constitute misconduct and include actions to plan, coordinate, or hide misconduct and a person's decision not to disclose her own or a coconspirator's past or current misconduct.

A person will (at least in theory) choose each action taking into account how it fits within her past history of misconduct and the actions that she may take in the future. When a person is accused of having engaged in misconduct, this history will be reconstructed and deployed to prove a number of things, including that the person knew or should have known that her actions involved misconduct; the misconduct was intended, or done with malice; or the person was justified or excused in her actions.<sup>34</sup> When passing judgment on misconduct, a number of questions may be raised

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33. In the words of Oliver Williamson, "opportunism" means not mere self-interested behavior, but

self-interest seeking with guile. This includes but is scarcely limited to more blatant forms, such as lying, stealing, and cheating. Opportunism more often involves subtle forms of deceit. Both active and passive forms and both *ex ante* and *ex post* types are included . . . .

. . . .

More generally, opportunism refers to the incomplete or distorted disclosure of information, especially to calculated efforts to mislead, distort, disguise, obfuscate, or otherwise confuse.

Oliver E. Williamson, *The Economic Institutions of Capitalism* 47 (1985); see also Oliver E. Williamson, *Opportunistic Behaviour in Contracts*, in 2 *The New Palgrave Dictionary of Economics & the Law* 703, 703-10 (Peter Newman ed., 1998) (stating that "[o]ppportunism is a type of self-interest seeking and may be contrasted both with stewardship (unself-interest seeking) and with simple self-interest seeking (look to your interests but keep all of your promises)").

34. The *ex post* reconstruction of a history of alleged misconduct is subject to a hindsight bias that can distort the manner in which that history is constructed, the relative importance given to actions and inactions, and the conclusion drawn in passing judgment. For a discussion of the hindsight bias in making judgments of this sort, see Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 *U. Chi. L. Rev.* 571 (1998). This hindsight bias in the reconstruction of past events can affect not only the actors who are directly engaged in misconduct but lawyers and other professionals who advised them during the course of the alleged misconduct. See Crampton, *supra* note 26, at 147 (arguing that lawyers should anticipate hindsight bias when advising clients acting at the margin of legality).

regarding the incremental nature of that misconduct. Why did the person not stop her misconduct sooner? What moral and legal judgment should follow from the repeated nature of her misconduct? What does the repeated nature of the misconduct tell us about the person's knowledge, intent, or disregard for the law?

### B. *Choosing Misconduct to Maximize Utility*

The standard law and economics model of misconduct and the time-inconsistent misconduct model start with the assumption that a person will engage in misconduct only if the expected rewards exceed expected costs (taking into account the probability of being caught and penalized, and the magnitude of the penalties).<sup>35</sup> If misconduct has positive expected returns, a person will determine the optimal period to act—i.e., the period that maximizes returns—and make a long-term decision to engage in misconduct in that period.

Moreover, a person will reverse a long-term decision to engage in misconduct if she has acquired new information indicating that the planned misconduct is no longer economically worthwhile—e.g., new information regarding the penalties imposed in recent cases.

### C. *Definitions and Assumptions*

In what follows, I will routinely compare “time-consistent” and “time-inconsistent” individuals. I do so to contrast the conclusions of my model with those of the standard model. It is not meant to imply that real people are either completely time-consistent or time-inconsistent. In the real world, individuals will have time-inconsistent preferences, but will exhibit different levels of time-inconsistency depending on how much weight they give to immediate gratification and their awareness of the problem. Importantly, however, even a very small preference for immediate gratification can lead to the sort of systematic misconduct predicted by the model.

#### 1. Time-Inconsistent Misconduct

Recall that a person engages in “time-inconsistent misconduct” when she (1) has determined that a particular type of misconduct has negative expected returns and thus made a long-term decision to abstain from

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35. This follows from the general premise that individuals choose their actions to maximize their utility. See Posner, *supra* note 6, at 219 (concluding that a rational criminal will commit a crime if the expected rewards exceed expected costs); Steven Shavell, *Foundations of Economic Analysis of Law* 479-80 (2004). The person will also discount exponentially to account for her long-term time preference, in the manner set forth in Part I. See *supra* Part I.A.3. I will assume throughout that decision makers are risk neutral, something that does not affect the general conclusions, given, in part, that my principal focus is on time preference and will in most instances assume that decision makers have complete information about future contingencies.



misconduct in one or more future periods, and (2) overrides that long-term decision and engages in misconduct solely due to her preference for immediate gratification.

## 2. Assumptions

In order to isolate the time-inconsistent sources of misconduct, I will adopt the following three assumptions throughout the rest of the Article.

### a. *The No New Information Assumption*

I will assume that once a person has made a long-term decision to engage in misconduct, she does not receive new information that would cause her to reverse that decision. This means that the only thing that can lead a person to reverse her long-term decision is her short-term impatience.

### b. *Negative Expected Returns Assumptions*

I also assume that in all instances in which a person makes a long-term decision regarding future misconduct, the misconduct in question has negative expected returns—i.e., the expected costs of misconduct always exceed the expected rewards. A caveat—this assumption and the conclusions that will follow from it do not affect conclusions regarding the more familiar misconduct scenario in which misconduct has positive expected returns: In that case the person will make a long-term decision to engage in misconduct.

### c. *No Long-Term Discounting Assumption*

Recall that when a person makes a long-term decision, she discounts all future costs and rewards to account for her general level of impatience or time preference. I will assume throughout that people have no long-term impatience and thus do not engage in long-term discounting. This assumption does not affect any of the conclusions below.<sup>36</sup>

## D. *A Time-Consistent Person*

Since by assumption misconduct always has negative expected returns, a time-consistent person will always make the same long-term decision: to abstain from misconduct in all periods in which she has the opportunity to

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36. This follows from the fact that the only difference between a time-consistent and time-inconsistent person is that the time-inconsistent person gives added weight to immediate costs and rewards, and from a long-term perspective all of the costs and rewards associated from misconduct are delayed. Therefore, when a person with time-inconsistent preferences makes a long-term decision she will engage in the same long-term discounting as her time-consistent counterpart and will always make the same decision. This means that setting the exponential discount factor,  $\delta$ , to 1 will not affect the outcome. See *supra* note 10 and accompanying text.

engage in misconduct. Given the no new information assumption, the time-consistent person will always follow through as planned and abstain from misconduct.

Therefore, the standard model of misconduct predicts that a person will never engage in time-inconsistent misconduct, or if one allows for the occasional mistake, that a person's time-consistent preferences will prevent her from engaging in systematic time-inconsistent misconduct. As a result, a time-consistent person will not incur welfare losses from misconduct (except for any produced by the occasional, nonsystematic mistake).

### *E. The Time-Inconsistent Misconduct Model*

In this section I develop four conclusions of the time-inconsistent misconduct model. First, unlike her time-consistent counterpart, a person with time-inconsistent preferences may engage in time-inconsistent misconduct in one or more periods. Second, she does so even though she knows that the actual costs of misconduct are greater than the rewards. Third, a person may repeatedly engage in time-inconsistent misconduct notwithstanding the fact that over time her behavior will produce large welfare losses for her and third parties affected by her misconduct. Fourth, on average a person with time-inconsistent preferences will engage in more misconduct than a time-consistent person.

#### 1. Nibbling Opportunism: Overconsuming Misconduct

In this section, the misconduct in question—nibbling opportunism—has the following four characteristics. First, a person is under a duty to abstain from taking an action (the “prohibited action”). Second, if the person takes a prohibited action she triggers a penalty (the only cost of misconduct) that is delayed for at least one period. Third, when a person takes a prohibited action she receives an immediate reward.<sup>37</sup> Fourth, the actual face value of this reward (i.e., the way that the person perceives it from a long-term perspective) is always less than the penalty and remains the same in all periods in which the person can engage in misconduct.

##### *a. Incremental Gains and Losses from Prohibited Action*

For each period in which a person can take a prohibited action she will give added weight to the immediate rewards from that action; the magnitude of this added weight depends on that person's level of preference for immediate gratification. Therefore, each time that a person engages in misconduct the incremental “gain from the prohibited action” is the

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37. Given the no long-term discounting assumption, delayed rewards and costs will not be discounted to account for a person's long-term impatience. Additionally, since my goal here is to distinguish between the effects of immediate rewards and immediate costs, I will assume that if misconduct has immediate rewards, all those rewards are immediate and all costs delayed; if it has immediate costs, all costs are immediate and all rewards delayed.

additional utility (over the actual value of the reward) that the person gets due to the immediacy of the reward.<sup>38</sup>

Since, by assumption, the penalty for misconduct is delayed, the person will see that penalty at its face value—i.e., she will not give it the added weight that she would if she had to incur that penalty immediately. This means that each time that a person engages in misconduct the incremental “loss from the prohibited action” is equivalent to the difference between the actual reward (i.e., without the added weight) and the penalty for taking the prohibited action in that period.

#### b. *Long-Term and Short-Term Decisions*

The person will make a long-term decision to abstain from taking the prohibited action in all future periods. As with the time-consistent person, this is due to the assumption that engaging in misconduct always has negative expected returns.

My first proposition is the following: A person will make a short-term decision to take a prohibited action in each period in which the incremental gain from the prohibited action exceeds the incremental loss. A person will do so even though she knows that the penalty that she incurs exceeds the actual reward from taking the prohibited action. As long as the added utility from grabbing the immediate reward is sufficiently high, the person will willingly incur that penalty.

However, since a person has a long-term preference to act in a time-consistent manner—i.e., not to yield to the pull of immediate gratification—each time that she takes a prohibited action, she incurs a welfare loss equivalent to the difference between the actual reward that she received and the penalty that was imposed.

#### c. *Awareness of Propensity to Engage in Nibbling Opportunism*

A person’s awareness of her time-inconsistency will affect how many opportunistic nibbles she actually takes. A naive person will take a prohibited action in each and every period in which the incremental gain exceeds the incremental loss. Recall that at the time of making a long-term decision, a naive person incorrectly believes that she will act in a time-consistent manner in all future periods and never engage in time-inconsistent misconduct. As a result, a naive person will never see the need

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38. Since, by assumption, the rewards from misconduct are constant over time, this incremental gain will solely depend on the added weight placed on the immediate reward. If the rewards varied over time, the person would give extra weight to the immediate reward and compare it with the reward that she would receive in any other future period in which she would want to take the prohibited action. Since these other rewards are delayed (and I am assuming that there is no long-term discounting), the person will perceive them at their face value.

to adopt commitment devices, and can incur large aggregate welfare losses from repeated nibbling opportunism.

On the other hand, a sophisticated person correctly predicts that she will want to take prohibited actions in future periods. She will therefore adopt a commitment device to (1) reduce the incremental gain from the prohibited action, or (2) increase the incremental loss by an amount that is sufficient to deter future misconduct. For example, the sophisticated person can take actions to prevent access to the immediate rewards from misconduct, or can contract with a third party who would provide a sufficiently high additional penalty each time that she takes prohibited actions. I would argue that a number of standard contract provisions in financial and construction contracts can be read as commitment devices—i.e., a person would agree to those contract provisions even though they provided no other value. A partially naive person will be overoptimistic about her future ability to forego opportunistic nibbles and will adopt commitment devices that are not sufficiently high-powered to deter all future misconduct.

## 2. Procrastination in Taking Required Actions

The time-inconsistent misconduct in this section has the following four characteristics. First, a person has a duty to take an action by a required time period. Second, failing to act by that period constitutes an act of misconduct and will trigger a penalty that will be imposed in the following period or in some later period. Moreover, each subsequent delay in taking the required action will also trigger a penalty to account for that delay. Third, the person will incur an immediate cost at the time of taking the required action. Fourth, the actual face value of this cost (i.e., as perceived from a long-term perspective) remains the same in every period.

### a. *The Incremental Gain and Loss from Procrastination*

A person with a preference for immediate gratification will have a short-term preference to avoid immediate costs, if possible—i.e., if they can be delayed until some future period. In other words, at the time of acting, the immediacy of the cost produces an “added disutility” (over the actual cost of acting). Each time that a person delays taking a required action, she avoids this added disutility—this is her “incremental gain from procrastination.” Each time that the person delays taking the required action, the person incurs a (delayed) penalty—her “incremental loss from procrastination.”

### b. *Long-Term and Short-Term Decisions*

Since misconduct always has negative expected returns, the person makes a long-term decision to take the required action in the required period. My second proposition is the following: A person will make a short-term decision to delay taking the required action in each period in

which the incremental gain from procrastination exceeds the incremental loss from procrastination. A naive person will procrastinate in each such period and may never take the required action. In other words, she may procrastinate for one period too many—until her time-inconsistent misconduct is discovered and legal (or other disciplinary) action is brought. A sophisticated person, foreseeing this possibility, will adopt commitment devices. For example, she may set a deadline enforced by a third party who would provide an additional penalty that is sufficiently high to remove her incentive to procrastinate.

### F. *Positive and Normative Implications*

In this section, I briefly set forth some of the positive and normative implications of the time-inconsistent misconduct model. In Part IV, I discuss some further implications in the context of lawyer misconduct.

#### 1. Revealed Preferences and Time-Inconsistent Misconduct

##### a. *Standard Motivation for Misconduct*

The standard time-consistent model predicts that a person will never engage in systematic time-inconsistent misconduct. Under the model a person will abstain from misconduct whenever expected costs exceed expected rewards. Economists often infer the preferences of actors by observing their behavior—an actor's actions will generally reveal her preference for taking that action. Therefore, under the standard model, if a person is observed repeatedly engaging in misconduct, the default conclusion is that the person is acting under a belief that the misconduct has positive expected returns.

Even models of misconduct that are not influenced by economics adopt the general cost-benefit framework when describing observed misconduct. In other words, not all models accept the premise that people always engage in misconduct whenever that misconduct has positive expected returns. However, when actual misconduct is observed, the default explanation (which can always be rebutted, of course) is that the person must have had a belief that the misconduct had positive expected returns.<sup>39</sup>

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39. This belief, of course may be mistaken. Most theories allow for the possibility that individuals may occasionally engage in misconduct with negative expected returns, due to some type of mistake—e.g., the decision maker may not have had sufficient information, or was coerced into taking the action. However, these mistakes are not systematic in nature; people with long-term preferences to abstain from misconduct will not repeatedly reverse those long-term preferences due to the same mistake. Sometimes a person may mistakenly engage in misconduct with negative expected returns, but other times she may abstain from misconduct that has positive expected returns. As a result, over time these mistakes will tend to cancel out (i.e., will appear more random in nature). Moreover, even theories based on a person's overoptimistic assessments or other cognitive biases—which may lead a person to repeatedly make long-term decisions to engage in misconduct with negative

### b. *Ambiguous Motivations and Revealed Preferences*

The time-inconsistent misconduct model, on the other hand, predicts that people may engage in repeated time-inconsistent misconduct, notwithstanding (1) a long-term preference to always abstain from such misconduct, and (2) the fact that each time that the person engages in misconduct she knowingly incurs an incremental welfare loss. Therefore, under the model, if a person is observed engaging in repeated misconduct, it is not possible without more evidence to infer that the person is acting under a belief that misconduct has positive expected returns; she may instead be engaged in time-inconsistent misconduct.

## 2. Policy Implications: Inefficient Deterrence

### a. *Standard Solution: Changing Long-Term Preferences*

Suppose that a policy maker, who adopts the standard time-consistency assumption, observes a person engaged in repeated misconduct. She will conclude that to affect deterrence, she will have to change that person's long-term preferences by an amount that would make misconduct no longer economically worthwhile. The policy maker may raise expected costs by increasing the penalties for misconduct or the probability of discovering ongoing misconduct; alternatively, she may adopt policies to reduce the expected (gross) rewards from misconduct.

### b. *The Need to Target Short-Term Preferences*

However, a person who engages in time-inconsistent misconduct is already acting under a belief that expected costs exceed expected rewards. As a result, the above policy changes will not be effective to deter time-inconsistent misconduct unless they impact the immediate rewards and immediate costs that motivate such misconduct. My third proposition is the following: In order to deter time-inconsistent misconduct, a policy maker will need to reduce the incremental gain or increase the incremental loss from misconduct by a sufficient amount. In other words, a policy maker has to adopt the same strategy used by sophisticated individuals when they adopt commitment devices to deter their "future selves" from engaging in misconduct.

### i. Taking Prohibited Actions

Suppose that a person who has a long-term preference to abstain from misconduct is observed engaging in repeated nibbling opportunism. A policy maker can either reduce the immediate rewards or increase the

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expected returns—share the general pattern of time-consistent models: short-term decisions ratify those long-term decisions.

incremental loss that the person incurs each time that she takes an opportunistic nibble. For example, when prosecutors bring multi-count indictments, they are sometimes accused, no doubt to an extent correctly, of trying to create bargaining leverage to force a plea or to induce a defendant to testify against a codefendant. However, the prospect of a multi-count indictment can act as a commitment device since it also has the effect of increasing the incremental loss to a person for each individual act of time-inconsistent misconduct.

## ii. Procrastination in Taking Required Actions

Suppose that a person repeatedly procrastinates taking an action that she is under a duty to take. In order to deter this type of time-inconsistent misconduct, a policy maker can either decrease the immediate costs of taking the required action or increase the incremental loss that the person incurs each time that she procrastinates. A number of provisions in the Sarbanes-Oxley Act have the effect of reducing the immediate costs of confronting and disciplining managers by board members, auditors, and lawyers.<sup>40</sup> Therefore, these provisions not only deter time-consistent misconduct but they also act as commitment devices to reduce time-inconsistent procrastination by gatekeepers.

To a large extent, these provisions are a more direct and efficient way of deterring time-inconsistent misconduct than the increased penalties of Sarbanes-Oxley. This is because very high-powered penalty schemes, such as those in Sarbanes-Oxley, impose significant costs on society, including administrative and error costs (for example, the penalizing of individuals who did not engage in misconduct). They also create a series of well-known misincentives: For example, they can lead to wasteful avoidance of valuable but risky transactions and excessive, overly formalistic record keeping, and may cause agents to focus on tasks that are less likely to trigger penalties at the expense of other more valuable tasks.<sup>41</sup>

## 3. A Time-Inconsistent Person's Welfare Losses: Policy Implications

Society has an interest in deterring time-inconsistent misconduct that hurts third parties; however, I argue that even when third parties are not hurt, policy makers can create value by effectively deterring time-

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40. See, e.g., Sarbanes-Oxley Act of 2002 § 301, 15 U.S.C. § 78j-1 (2000 & Supp. II 2002) (requiring a wholly independent audit committee, thereby reducing the ability of managers to increase immediate costs to the board of directors of challenging financial statements prepared by managers); *id.* § 303, 15 U.S.C. § 7242 (making it illegal for managers to increase the immediate costs to auditors of refusing to go along with fraudulent financial statements); *id.* § 307, 15 U.S.C. § 7245 (reducing the immediate costs to lawyers of confronting managers who are acting illegally; increasing the costs to lawyers of delaying taking "up the ladder" problems not properly addressed; and reducing the immediate costs of withdrawing representation of a corporate client).

41. See Utset, *supra* note 27, at 128-42 (arguing that analogous misincentives are produced by high-powered incentive schemes in venture capital contracts).

inconsistent misconduct. Each time that a person engages in time-inconsistent misconduct, she incurs a welfare loss equivalent to the incremental loss from misconduct, which depending on a person's level of awareness and the availability of commitment devices can add up to large aggregate welfare losses.

Policy makers can provide commitment devices to help deter this misconduct. They can provide sophisticated individuals with what I refer to as "off-the-rack" commitment devices—i.e., government can supply the rope, the mast, and information about the Sirens, but it does not (necessarily) have to tie Ulysses to the mast. These commitment devices can either be default rules or require that a person opts in. In some instances, policy makers will have to provide mandatory devices—i.e., to deter misconduct by naive (and sufficiently partially naive) individuals who are overoptimistic about their own abilities to abstain from misconduct and will opt out of default commitment devices.<sup>42</sup>

Opt-in devices would provide standard-form solutions to typical time-inconsistent misconduct scenarios and thus reduce the cost of commitment. A sophisticated person will opt out of default commitment devices when she has available less costly forms of commitment. As with default rules generally, off-the-rack commitment devices can provide value where a large number of individuals routinely face the same misconduct scenario and adopt their own devices.

### G. *Time-Inconsistent Honesty*

So far I have assumed that misconduct always has negative expected returns. I will now make the opposite assumption—that misconduct has positive expected returns. Given this assumption, it follows that time-consistent and time-inconsistent individuals will always have long-term preferences to engage in misconduct. For the same reasons as before, the time-consistent person will always follow through with her planned misconduct.

#### 1. Delayed Misconduct

Suppose that misconduct requires a person to incur immediate costs at the time of following through—e.g., in time and effort, added anxiety, and

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42. Tax withholding is one such device, most colorfully summarized by E.B. White. In complaining about its advent, he claims that the rule betrays a government with little confidence in the citizenry: "[I]f left to your own devices, you will fritter away your worldly goods and tax day will catch you without cash." E.B. White, *The Second Tree from the Corner* 123 (1954). Default commitment devices do not have to be mandatory to the extent that the immediate costs of opting out are sufficiently high to lead a naive or partially naive person to repeatedly procrastinate opting out. The same argument generalizes to mandatory and default rules in other contexts. See Utset, *Incomplete Contracting*, *supra* note 5, at 1384 (arguing that a person may repeatedly procrastinate opting out of default rules).



so on.<sup>43</sup> My fourth proposition is the following: A person with a long-term preference to engage in value-maximizing misconduct will procrastinate following through with the planned misconduct in each period in which the incremental gain from procrastination (in the form of delaying the immediate costs) exceeds the incremental loss from procrastination (in the form of the forgone misconduct rewards due to having procrastinated that period).

Moreover, a person may repeatedly procrastinate and never follow through with misconduct that would have yielded her positive expected returns. While this person behaves properly, she does so for the wrong reasons (because of her self-control problems). I therefore refer to this type of behavior as “time-inconsistent honesty.”

## 2. Normative Implications

This puzzling result is more than a mere curiosity, since it has a number of important normative implications.

### a. *Misguided Deregulation*

Suppose that a policy maker who adheres to the time-consistency assumption is reevaluating an existing regulatory regime. She has gathered evidence that over a period of time the regulated actors have abstained from systematic misconduct. Assume that these individuals (or a subset of them) had long-term preferences to engage in misconduct, but repeatedly procrastinated following through—i.e., that their observed appropriate behavior was due to time-inconsistent honesty. If the policy maker makes changes that reduce (by a sufficient amount) the immediate costs of engaging in misconduct (as opposed to, for example, reducing the long-term expected penalties), these individuals will no longer have an incentive to procrastinate and will follow through with the planned misconduct.

### b. *Commitment Devices to Assure Misconduct*

A sophisticated person will correctly predict that she will be tempted to procrastinate and will adopt commitment devices to assure her future misconduct. For example, she may borrow money that she plans to repay with the proceeds from her misconduct.<sup>44</sup> In the previous section, a person’s sophistication led to the adoption of commitment devices to deter

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43. If the misconduct produces immediate rewards, then the person’s incentive to follow through as planned will be greater, something that may require policy makers to adopt rules that increase the immediate costs of misconduct, reduce the immediate rewards, or increase the incremental loss from misconduct.

44. For example, the loan repayment schedule can be tied to coincide with each period in which she may be tempted to procrastinate following through with her misconduct.

misconduct; here however, sophistication increases the amount of actual misconduct in society.

#### H. *Time-Inconsistent Group Members*

The time-inconsistent misconduct model has a number of implications for misconduct carried out in groups. I will just briefly mention two of them.<sup>45</sup>

##### 1. Planned Defections and Procrastination

A group member who has determined that defecting from a group—e.g., whistle-blowing—has positive expected returns will nonetheless repeatedly procrastinate, as long as the immediate costs of defecting are sufficiently high. One implication is that the penalties necessary to keep coconspirators from defecting are lower than those predicted by the standard model. If the penalty is immediate in nature, it only has to be high enough to make procrastination worthwhile; the penalty does not need to turn defection into a negative expected returns proposition.

I argue that hate groups, gangs, cartels, and criminal organizations will tend to be more cohesive than theory predicts since the penalties to prevent defections are lower than one would expect. Policy makers who want to cause group members to defect need to adopt policies that reduce the immediate costs of defection (e.g., the witness protection plan, anonymous whistle-blowing, clemency for whistle-blowers); alternatively, policy makers can increase the immediate rewards from defection by a sufficient amount (e.g., monetary rewards for whistle-blowing, public praise, and payment or subsidizing of any legal fees). More generally, time-inconsistent individuals will remain in groups longer than standard theory predicts. This has implication not only in cases of misconduct but other types of group activities.

##### 2. Procrastination and Collective Action

Second, forming groups often requires potential group members to incur a number of immediate costs—in time, effort, coordination, and other transaction costs. Therefore, as a general matter, overcoming collective-action problems will be more difficult than standard collective-action theory predicts, since even when a sufficient number of potential group members are willing to contribute, they may nonetheless procrastinate following through. This has implications for the formation of groups of coconspirators and cartels. A policy maker can exploit time inconsistency by increasing the immediate costs of collusion. In other words, the

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45. I develop these implications in more detail in Manuel A. Utset, *Hyperbolic Discounting, Repeated Prisoners' Dilemma, and Collective Action* (Apr. 2005) (unpublished manuscript, on file with author).

arguments regarding time-inconsistent honesty can be generalized to the context of group formation.

### 3. Commitment Devices for Group Members

In the discussion of time-inconsistent honesty, I argued that a sophisticated time-inconsistent person will adopt commitment devices to make sure that she does not procrastinate following through with planned misconduct (i.e., misconduct with positive expected returns). This type of commitment device is more common than may initially appear. The mafia and certain gangs use formal initiation rites—e.g., killing someone—and similar institutional strategies that act as commitment devices.<sup>46</sup> These institutional features of criminal organizations are usually explained as devices that group members adopt to make sure that other group members do not defect.

My claim is that a group member may independently value these institutions as commitment devices to assure that she follows through with planned misconduct. After all, the “internal” immediate costs of taking a morally abhorrent action, such as killing someone, may be sufficiently high to lead her to procrastinate following through; even though by assumption she believes that committing the crime has positive expected return—i.e., it is a crime that a time-consistent criminal would carry out at the allotted time. Coconspirators often need to coordinate the timing of their criminal acts, making this type of procrastination an obstacle to coordination. Additionally, a group member with long-term preferences not to defect, may nonetheless engage in time-inconsistent defection—for example, when she is offered a sufficiently large immediate reward, such as a reduction of the maximum penalty for a crime she has committed.

## IV. TIME-INCONSISTENT MISCONDUCT AND LAWYERS

Models of lawyer misconduct that adopt the standard time-inconsistency assumption will fail to capture the type of misconduct predicted by the time-inconsistent misconduct model. This part will focus on two general conclusions that follow from applying the time-inconsistent misconduct model to lawyer misconduct. First, a time-inconsistent lawyer with a long-term preference to avoid engaging in any opportunistic behavior—because acting opportunistically has negative expected returns—may nonetheless engage in repeated nibbling opportunism. Thus, the time-inconsistent misconduct model predicts that lawyers will take more opportunistic, illegal, or otherwise improper actions than predicted by the standard model. Moreover, the nibbling opportunism argument can be extended to provide an alternative explanation of the moral disintegration of lawyers.

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46. Having group members engage in murder is a particularly powerful commitment device, since there is no statute of limitations on prosecuting murder. I thank my colleague Daniel Medwed for this point.

Second, a lawyer with a long-term preference to take a required action at the appropriate time may nonetheless repeatedly procrastinate following through. The immediate costs of taking a required action—e.g., confrontation costs or mere effort—can lead a corporate lawyer to procrastinate acquiring information when she has been put on notice of potential problems, monitoring and confronting managers, disclosing problems to the board of directors or regulators, withdrawing representation, and retracting opinions and previous advice.

### A. *Nibbling Opportunism and Lawyer Misconduct*

Lawyers owe a duty of loyalty to their clients. Like other fiduciaries, however, a lawyer may face repeated opportunities to engage in self-dealing transactions. Lawyers have the ability to engage in this type of opportunistic behavior because contracts between lawyers and their clients are highly incomplete, particularly in ongoing relationships, such as those involving corporate counsel.<sup>47</sup>

#### 1. Nibbling Opportunism

Assume that a lawyer makes a long-term decision to abstain from taking a prohibited action in all future periods because she has concluded that taking that action has negative expected returns. Given the no new information assumption, a time-consistent lawyer will never take the prohibited action. However, a time-inconsistent lawyer will take the prohibited action in each period in which the incremental gain of an opportunistic nibble exceeds the incremental loss. A lawyer may engage in repeated nibbling opportunism of this sort, even though it leads her (as well as her clients and society) to incur large aggregate welfare losses.

A lawyer is more likely to engage in nibbling opportunism in contexts in which she has the ability to engage in incremental misconduct over relatively long periods of time; these include embezzling funds, overbilling clients, lying in court proceedings or during negotiations, helping managers put together highly questionable or fraudulent transactions, and drafting misleading disclosure documents. Of course, lawyers will often engage in this type of misconduct because they have determined that it has positive expected returns. However, a subset of the observed misconduct of lawyers can be explained in a more intuitive fashion, I believe, by resorting to the nibbling opportunism argument; this is particularly true in contexts where the aggregate costs of a lawyer's repeated misconduct over time greatly exceed the aggregate benefits. A time-consistent explanation would require

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47. No contract of any length or complexity is ever complete: The transaction costs of identifying all possible contingencies, bargaining over the obligations of parties to account for those contingencies, and writing contracts that correctly specify the parties' understanding will in most cases exceed the benefits. For a review of the law-and-economics literature on contract incompleteness, see Alan Schwartz, *Incomplete Contracts*, in 2 *The New Palgrave Dictionary of Economics & the Law*, *supra* note 33, at 277.

that one assume that either the lawyer discounted the risks of getting caught by a very significant amount or had a very high level of long-term impatience.

## 2. A Numerical Example

Suppose that a lawyer has the opportunity to embezzle money from her client over twenty periods. The lawyer can embezzle \$1000 in each period; however, each time in which the lawyer does so, she triggers a \$1150 penalty—this penalty will be imposed with one hundred percent probability one period immediately after each act of embezzlement; the lawyer is aware of all these facts.<sup>48</sup> Therefore, embezzling funds always produces a net loss to the lawyer of \$150. In period zero, both a time-consistent and time-inconsistent lawyer reach the same conclusion—to abstain from embezzling funds in all twenty periods, since each act of embezzlement has negative expected returns. The time-consistent lawyer will always keep to her long-term preference and never embezzle funds.

### a. *The Incentive to Nibble*

From a long-term perspective, the lawyer's preference for immediate gratification is not a factor; thus she values the \$1000 reward at its true face value. However, from a short-term perspective—i.e., when she is deciding whether or not to take an opportunistic nibble—the time-inconsistent lawyer gets additional utility from her ability to grab the \$1000 immediately.

Assume that the time-inconsistent lawyer has a preference for immediate gratification that leads her to give an added weight of twenty percent to immediate rewards. This means, in effect, that the lawyer values the additional utility due to the immediacy of the reward at \$200. Each period, the time-inconsistent lawyer compares this \$200 incremental gain from taking an opportunistic nibble, with the \$150 incremental loss (i.e., the guaranteed net penalty from embezzlement).

Given that the incremental gain from embezzlement always exceeds the incremental loss by \$50, the time-inconsistent lawyer will have a short-term preference to embezzle funds in all twenty periods. How many opportunistic nibbles a lawyer actually takes will depend on how well she anticipates her future temptation to embezzle funds.

### b. *Awareness, Commitment, and Welfare Losses*

A naive lawyer will embezzle \$1000 in all twenty periods. Since embezzling funds has negative expected returns, starting in period zero and

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48. As before, I assume that the long-term impatience captured by exponential discounting is not a factor—i.e., the exponential discount factor  $\delta = 1$ . See *supra* note 10 and accompanying text.

each period thereafter, the naive lawyer will make a long-term decision to abstain from embezzling funds in the following period. However beginning in period one and each period thereafter, the naive lawyer will grab the immediate \$1000 rewards, believing incorrectly each time that it will be her last opportunistic nibble.

As a result, the naive lawyer will receive an aggregate gross reward of \$20,000 over the twenty periods, but incurs a guaranteed aggregate penalty of \$23,000. The naive lawyer's failure to adhere to her long-term preferences yields her an aggregate welfare loss of \$3000. A sophisticated lawyer, on the other hand, will correctly predict that she will want to embezzle funds in all twenty periods. In order to prevent herself from doing so, she will adopt a commitment device that reduces the incremental gain (or increases the incremental loss) of each opportunistic nibble by at least \$51. A "partially naive" lawyer underappreciates her future temptation to embezzle funds and will adopt commitment devices to prevent only those opportunistic nibbles that she believes that she will actually take. Therefore, the partially naive lawyer will take more opportunistic nibbles than a sophisticated lawyer, but fewer than a naive one.

### c. *Uncertainty*

In real-world contexts, the penalties for misconduct are not guaranteed, since there is always some probability that the lawyer's misconduct will not be discovered and prosecuted. Suppose once again that a lawyer has the opportunity to embezzle \$1000, but that now she will be able to do so in an unbounded number of periods. Each time that the lawyer engages in misconduct it triggers an \$11,500 penalty. Unlike before, the penalty is no longer guaranteed; assume also that the lawyer believes that there is a ten percent chance that she will be caught and prosecuted for any one act of embezzlement. This means that in effect, the lawyer believes that the expected penalty is \$1150 (the same as before).<sup>49</sup> Finally, the time-inconsistent lawyer has the same preference for immediate gratification as before.

The time-consistent and time-inconsistent lawyers again make long-term decisions to abstain from embezzling funds in all future periods, since embezzlement in any period still has negative expected returns. As before, the naive lawyer will embezzle funds in all periods. Suppose that after embezzling for twenty periods the naive lawyer is one of the unlucky ten percent that gets caught. The lawyer receives the same gross reward as before—\$20,000—but now incurs a penalty of \$230,000, for an aggregate welfare loss of \$210,000. Suppose instead that the lawyer embezzles funds for 100 periods and then gets caught. This lawyer embezzled \$100,000, but incurs a penalty of \$1.15 million, for an aggregate welfare loss of \$1.05

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49. I will assume that the lawyer is risk neutral.

million. Again, this is a lawyer who had a long-term preference not to embezzle any funds. Therefore, her aggregate welfare losses are a social loss, and one that could have been avoided through the use of commitment devices. A sophisticated lawyer would adopt her own devices, but a naive or sufficiently partially naive lawyer would require external devices.

### B. *Procrastination by Corporate Lawyers*

The recent corporate scandals such as Enron and WorldCom identified various types of highly questionable behavior by corporate lawyers, including the failure of corporate counsel to (1) challenge questionable transactions; (2) acquire additional information once on notice of potential misconduct by managers, board members, or auditors; and (3) disclose the observed misconduct of managers and auditors to the board of directors or other appropriate parties. These three types of misconduct involved required actions that lawyers either failed to take or repeatedly delayed taking. The time-inconsistent misconduct model predicts that lawyers with a long-term preference to act at the appropriate time will procrastinate following through whenever the incremental gain from procrastination (in the form of avoiding the immediate costs of acting) exceeds the incremental loss.<sup>50</sup> The immediate costs that can lead a lawyer to procrastinate taking these actions include: time and effort, confrontation costs, ostracism by others in the group, and loss of salary.

These are the same costs that commentators have used to explain why lawyers in the recent scandals engaged in misconduct. However, it is important to note the difference. I agree that a lawyer will engage in time-consistent misconduct whenever misconduct has positive expected returns. My claim, however, is that these immediate costs can lead a lawyer to repeatedly procrastinate taking these actions notwithstanding a long-term preference to abstain from misconduct. One important implication is that a manager can take advantage of a lawyer's time inconsistency. A manager who wants to prevent a time-inconsistent lawyer from taking an action that would hurt the manager can increase the lawyer's immediate costs of acting by a sufficient amount to cause the lawyer to repeatedly procrastinate; even relatively small, but immediate penalties such as group pressure may have such an effect.

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50. The general problem of lawyer procrastination is something that is acknowledged in the Model Rules of Professional Conduct. Model Rule 1.3 requires that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." Model Rules of Prof'l Conduct R. 1.3 (2003). Additionally, comment three to that rule states, "Perhaps no professional shortcoming is more widely resented than procrastination." *Id.* R. 1.3 cmt. 3. The comment goes on to say that procrastination can have real material effects on the client's interest—for example, "as when a lawyer overlooks a statute of limitations" or more intangible effects such as causing the client anxiety and "undermin[ing] confidence in the lawyer's trustworthiness." *Id.*

### C. Policy Implications: Detering Time-Inconsistent Lawyers

In order to effectively deter time-inconsistent misconduct by lawyers, a policy maker will have to change the short-term preferences for immediate gratification that motivate the misconduct.

#### 1. Detering Nibbling Opportunism

A policy maker who wants to deter a lawyer from engaging in nibbling opportunism can use two general strategies. First, she can reduce the immediate rewards from each opportunistic nibble. For example, the law can make it more difficult for lawyers to have direct access to client's funds in the way that banks, casinos, and brokerage houses do for all of their employees (except for a well-specified and monitored group of employees charged with handling cash and other fungible consideration).

Second, the policy maker can increase the incremental loss to the lawyer from each nibble. Adopting a requirement to memorialize and keep careful records, providing clear justification for decisions in contexts that are prone to misconduct can help; this is because trying to justify improper actions will make the incremental loss of misconduct more salient.

More generally, rules that directly target reducing the immediate reward of misconduct should be more effective in deterring nibbling opportunism than those that increase the expected costs of misconduct; the latter, by definition, are delayed until the misconduct has been discovered and the lawyer punished. A rule that requires a lawyer to post a bond to cover any losses from client accounts will be more effective than a rule that reduces the net expected returns by an equivalent amount, but which involves greater ex post policing, prosecutions, and penalties. Posting a bond makes the incremental losses from misconduct more salient.

#### 2. Detering Procrastination by Lawyers

In order to deter lawyers from repeatedly procrastinating taking required actions a policy maker can adopt rules that reduce the immediate costs of acting. For example, section 307 of the Sarbanes-Oxley Act imposes new disclosure requirements on corporate lawyers. A lawyer is now required to "report evidence of a material violation of securities law or breach of fiduciary duty" to the chief legal counsel or chief executive officer, and if those officers fail to remedy the problem the lawyer has to take that information "up the ladder" to the audit committee and board of directors.<sup>51</sup>

Section 307 in effect helps reduce the immediate costs to lawyers of (1) confronting managers who are acting illegally, and (2) withdrawing their representation of a corporate client. It also increases costs to lawyers who procrastinate taking information "up the ladder" or following through once

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51. Sarbanes-Oxley Act of 2002 § 307, 15 U.S.C. § 7245 (2000 & Supp. II 2002).



they become aware that their original disclosure did not lead to the required change in corporate policy.

### 3. Time-Inconsistent Honesty and Lawyer Regulation

Suppose that a lawyer determines that a certain type of misconduct has positive expected returns and thus makes a long-term decision to engage in misconduct. However, if the misconduct requires that the lawyer incur an immediate cost, the lawyer will procrastinate following through with the planned misconduct in each period in which those costs are sufficiently high.<sup>52</sup> For example, the planned misconduct may involve an elaborate fraud that requires significant investments in time and effort up front, and will yield rewards in later periods, or requires the formation of a group of perpetrators and the need to incur costs to screen potential group members and coordinate actions.

Policy makers can take advantage of time-inconsistent honesty to deter lawyer misconduct by adopting rules that have the express purpose of increasing the immediate costs of engaging in misconduct. One such approach is to adopt gatekeeper schemes in which gatekeepers not only engage in their usual gatekeeping activities, but police each other. For example, the much criticized section 404 of the Sarbanes-Oxley Act adopts this type of cross-monitoring procedure, requiring that managers make representations regarding the company's internal control procedures and then requiring auditors "to attest to, and report on, the assessment made by the management."<sup>53</sup> This, in turn, leads accounting firms to hire lawyers to help prepare these attestations. It may well be that critics are correct that section 404 imposes potentially high compliance costs; however, the rule also increases the immediate costs to managers and auditors of engaging in certain types of misconduct, and, thus, may help foster time-inconsistent honesty (although not necessarily in the most efficient manner).

#### *D. Time-Inconsistent Misconduct: An Alternative Explanation to Moral Disintegration*

Questions of integrity arise when a person has a set of principles that she wants to adhere to and she faces one or more decisions in which those principles are challenged by outside pressures; this in turn requires that the person chooses to either adhere to her principles or yield. A person of integrity is one who after some amount of reflection and deliberation does not yield (or does not easily yield) to these outside pressures. Of course a person's principles change over time due to a variety of factors and

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52. If the lawyers' planned misconduct provides them with an immediate reward—e.g., embezzling money from a client's escrow account—then the time-inconsistent lawyer will follow through with the planned misconduct.

53. Sarbanes-Oxley Act of 2002 § 404(b), 15 U.S.C. § 7262(b).

influences.<sup>54</sup> Integrity arguments must therefore draw some distinction between legitimate changes in principles and illegitimate ones that undermine a person's integrity.

### 1. A Moral Integrity Contract

The time-inconsistent misconduct model offers an alternative explanation for why lawyers may repeatedly override their personal moral principles in a manner that would lead them down a path of moral disintegration. Assume that a lawyer has identified a well-defined context and set of contingencies within that context which will require her to make a series of binary—yes-no—decisions regarding a series of actions. Additionally she has also identified a set of moral rules that map one-to-one to each decision and provide her with the “moral answer” applicable to each action: either yes (take the action) or no (abstain). In other words, assume a world in which a lawyer has written a complete “moral integrity contract” to govern her future selves regarding a series of actions, where for each action there is an unambiguous moral rule that applies.

Suppose that there is no external enforcement mechanism for the contract, but the lawyer has concluded that the costs of breaching her integrity contract always exceed the benefits and has made a long-term decision to never breach the contract. Moreover, in reaching this decision, the lawyer took into account every possible future context in which she will have the opportunity to breach the contract and grab an immediate reward. A naive lawyer, however, will breach this contract in each period in which that immediate reward is sufficiently high compared to the incremental loss from breaching the contract “just that one time.” A sophisticated lawyer will anticipate her future temptation to engage in these unethical nibbles and adopt commitment devices—e.g., contracts with third parties who would penalize her each time that she breaches her integrity contract. Most lawyers, of course, will be partially naive, having some awareness of their future temptation to take unethical nibbles, but being overoptimistic about their ability not to yield to temptation.

While this is a highly stylized set of facts, I believe that it captures an important source of the moral disintegration of lawyers: their preference for immediate gratification and a failure to fully appreciate the need to adopt commitment devices. This is not only true of the individual lawyer, but also of the bar.

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54. For a discussion of some of the problems that arise due to conflicting second-order preferences and the lack of internal coherence, see Harry G. Frankfurt, *Identification and Wholeheartedness*, in *The Importance of What We Care About: Philosophical Essays* 159, 164-67 (1988) (distinguishing between (1) conflicts between first-order desires that actually motivate actions and second-order preferences that a person wants to guide their first-order desires and (2) ambivalence over these second-order preferences—i.e., not embracing any one of them wholeheartedly).

## 2. Does Moral Disintegration Require Moral Condemnation?

Given the possibility of time-inconsistent misconduct one may want to question whether moral disintegration is something that necessarily calls for moral condemnation. A lawyer with time-inconsistent preferences can have a strongly held second-order preference to always act in accordance with her personal moral principles and still quite comfortably and without necessarily thinking any less of herself, routinely give in to the pull of immediate gratification and override those principles. If a person tells us that she has a long-term preference to abstain from eating chocolate cake for well-founded health reasons and is observed eating chocolate cake each day, can one conclude that she does not have a preference to stop eating cake? Not without further evidence.<sup>55</sup>

Yielding to chocolate cake can be due to habit or advertising that has made cake something that she needs to have; but a much simpler explanation, and more intuitive, I believe, is that we are used to yielding to the pull of immediate gratification in almost all areas of our lives. There is no shame to it.<sup>56</sup> (In fact it appears to be hard wired in our brains.<sup>57</sup>)

### CONCLUSION

In this Article I argued that lawyers, like other people, can engage in repeated misconduct even though they have a long-term preference to abstain from misconduct. A lawyer will have an incentive to engage in nibbling opportunism when the immediate rewards are sufficiently high. This can lead a lawyer to engage in more misconduct than predicted by standard models. Additionally, lawyers may repeatedly procrastinate taking required actions because of a preference to avoid the immediate costs of taking those actions. Policy makers, I argue, need to take into account time-inconsistent misconduct, not only because this sort of misconduct can impose large welfare losses on clients and lawyers, but because it requires different policy solutions.

The time-inconsistent misconduct arguments may appear counterintuitive. Why would a person willingly engage in misconduct and

55. See Amartya Sen, *Choice, Orderings and Morality*, in Amartya Sen, *Choice, Welfare and Measurement* 74, 80-81 (1982).

56. British philosopher J.L. Austin wrote as follows:

I am very partial to ice cream, and a bombe is served divided into segments corresponding one to one with the persons at High Table: I am tempted to help myself to two segments and do so, thus succumbing to temptation and even conceivably (but why necessarily?) going against my principles. But do I lose control of myself? Do I raven, do I snatch the morsels from the dish and wolf them down, impervious to the consternation of my colleagues? Not a bit of it. We often succumb to temptation with calm and even with finesse.

J.L. Austin, *A Plea for Excuses*, in J.L. Austin, *Philosophical Papers* 175, 198 n.1 (3d ed. 1979).

57. See Jonathan Cohen et. al., *Separate Neural Systems Value Immediate and Delayed Monetary Rewards*, *Science*, Oct. 15, 2004, at 306.

incur a penalty that she knows exceeds the actual rewards? Why would she not know that the added short-term utility motivating her is transient and intangible? The answer is simple. Individuals make these same types of determinations when they choose to overconsume in other areas of their lives. There is no reason to believe that when people are faced with penalties and rewards in legal contexts that they are not equally moved by the pull of immediate gratification.