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The Ethics of Implementation: Institutional Remedies and the Lawyer's Role

SUSAN POSER*

“A right is not a right, unless it can be enforced; a remedy is not a remedy, if it is available only in theory.”¹

The issue addressed in this Article is whether and to what extent a lawyer has an ethical responsibility to pursue implementation of the remedy in institutional reform litigation. Institutional reform litigation refers to cases in which an individual or class of individuals sues a large organization in order to vindicate constitutional or statutory rights.² The types of cases with which this Article is concerned are the “public law”³ type, such as school desegregation, prisoners' rights and patients' rights cases, although included under the rubric of institutional reform can be, inter alia, antitrust, reapportionment and bankruptcy cases.⁴ I am interested in the former types of cases because of the nature of the individual rights at stake and the fact that the demand for plaintiffs' attorneys in these cases far outweighs the supply, which is part of the context in which the ethical dilemma discussed in this Article arises. The implementation stage of institutional reform litigation arises after an individual or class of individuals prevails at the liability stage, or pursuant to a settlement, and a court orders the defendant organization to change in order to vindicate the plaintiffs' rights. At that point, the defendant organization, whether it be a prison, mental hospital or school district, usually has the burden of implementing the order. What is the plaintiffs' lawyer's responsibility in monitoring and pressing for implementation?⁵ Can she fairly

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1. STANDARDS FOR PROVIDERS OF LEGAL SERVICES TO THE POOR i (1986) [hereinafter STANDARDS FOR PROVIDERS OF LEGAL SERVICES].

2. See Abram Chayes, *Foreword: The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976) (labeling this public law litigation); see also Owen Fiss, *Foreword: The 1978 Term*, 93 HARV. L. REV. 1, 2 (1979) (labeling it structural reform litigation).

3. See Chayes, *supra* note 2, at 1284 (describing the characteristic features of this type of litigation).

4. *Id.* See also David L. Kirp & Gary Babcock, *Judge and Company: Court-Appointed Masters, School Desegregation, and Institutional Reform*, 32 ALA. L. REV. 313, 315-16 (1981) (listing the types of suits that fall under the institutional reform heading).

5. This article will not address the duties of the defendant's lawyer, although there are important issues about the ethical responsibility of the defendant's lawyer who may be encouraged to resist implementation. See Paul L. Tractenberg, *The View from the Bar: An Examination of the Litigator's Role in Shaping Educational Remedies*, in JUSTICE AND SCHOOL SYSTEMS: THE ROLE OF THE COURTS IN EDUCATION LITIGATION 390, 401

ignore the case and move on to the next case while remaining willing and able to renew litigation and move for contempt if the defendants fail to comply?⁶ Or does the lawyer have a duty to continue her advocacy on behalf of her client to the same extent (although perhaps in a different form) as she had during the liability stage, even if that means turning away new clients? Or, is her role somewhere in between?

Although much attention has been paid to the role of plaintiffs' lawyers during the liability stage of this type of litigation,⁷ during settlement negotiations,⁸ and at the time the remedy is chosen,⁹ there is virtually no scholarly literature on the professional responsibility of lawyers in the implementation stage of institutional reform litigation. With one exception,¹⁰ there currently exist no specific rules or literature to which a lawyer in this situation can turn for guidance, and neither the scholarly literature on professional responsibility nor on institutional reform litigation acknowledges this as an ethical problem. An examination of case law and case studies, however, reveals its shadowy existence.

For example, in the celebrated Willowbrook case,¹¹ as told by David and Sheila Rothman,¹² five years after the consent judgment had been signed, which required the community placement of thousands of mentally retarded residents who were at the time residing at the Willowbrook State School, the authors

(Barbara Flicker ed., 1990) (discussing the role of defendants' attorneys in institutional reform litigation and their ethical obligations in the compliance phase).

6. Courts retain jurisdiction throughout the implementation stage of institutional reform litigation. *Special Project: The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784, 816-17 (1978) [hereinafter *Special Project*]. New claims that arise after the liability stage of a case but relate to the subject matter of the class action, and the remedial decree must be made through the class counsel. *Gillespie v. Crawford*, 858 F.2d 1101, 1102-03 (5th Cir. 1988). Counsel has a duty to look into such claims and to "exercise his independent judgment to determine whether a motion to enforce the consent decree should be filed." *McNeil v. Guthrie*, 945 F.2d 1163, 1166 (10th Cir. 1991). Thus, class counsel remains an integral part of the remedial process.

7. See, e.g., DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1090-1114 (1988) (arguing that the plaintiffs' lawyer should exercise some degree of discretion when deciding which parties to represent and how to represent them, within the context of the liability phase); Andreas Eschete, *Does a Lawyer's Character Matter?*, in *THE GOOD LAWYER* 270, 280-83 (David Luban ed., 1983) (discussing the adversarial role of the lawyer in institutional reform litigation).

8. See, e.g., Mary K. Kane, *Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer*, 66 TEX. L. REV. 385, 395-6 (1987) (identifying several potential conflicts of interest for the plaintiffs' attorney in settlement negotiations).

9. For a discussion of intra-class conflicts that arise when plaintiffs must determine the type of remedy they are seeking, see generally Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L. J. 470 (1976) (discussing conflicts within the plaintiff class in school desegregation litigation) and Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982) (suggesting procedural reforms that could ameliorate intra-class conflict).

10. See *infra* notes 192-193, and accompanying text (discussing the STANDARDS FOR PROVIDERS OF LEGAL SERVICES).

11. *New York Ass'n for Retarded Children, Inc. v. Carey*, 706 F.2d 956 (2d Cir.), *cert. denied*, 464 U.S. 915 (1983).

12. DAVID J. ROTHMAN & SHEILA M. ROTHMAN, *THE WILLOWBROOK WARS* (1984).

recount a confrontation between members of the class of parents of children at Willowbrook and their lawyers who were pressing for a settlement involving a modification of the consent decree. At a meeting, one of the parents accused the lawyers of being "gutless and ignorant, negotiating with the state when they should have been suing it for contempt. Either because of inexperience or in a rush to get back to their private clients, they were selling out the class."¹³

Another writer, recounting the ongoing litigation over the San Francisco jails, observed that once the litigation ended in a settlement that more or less satisfied all parties, the lawyers thought that the "worst" was over and the implementation "was seen as a natural consequence of the consent decree rather than as the beginning of a new and complex stage in the case."¹⁴ They were wrong. In fact, as one scholar has put it, at the enforcement stage, "[p]laintiff and defendant are thrown into an ongoing relationship of resistance, threat, bargaining, and compromise."¹⁵

Other case studies are notable for their focus on the work of non-parties in the implementation stage. For example in a study by Philip Cooper examining the case of *Wyatt v. Stickney*¹⁶, brought on behalf of mentally ill patients in Alabama, Cooper noted that:

It was clear that any meaningful remedy would necessarily include some statement of the standards of care that the courts would consider minimally adequate for the mentally ill and the mentally retarded. No interest group concerned with mental health could afford to be left out of that decision.¹⁷

Various citizen committees were set up to monitor implementation of the consent decree, but the plaintiffs' lawyers were noticeably absent from Cooper's discussion of implementation. Cooper discusses the lawyers' roles in establishing liability up until the court order in 1972, and then concentrates on the role of the review panel charged with monitoring implementation until 1975, when the plaintiffs moved to reopen the case for lack of compliance. What were the plaintiffs' lawyers doing during that time? This question is not addressed in the study.¹⁸ Another article written by one of the plaintiffs' lawyers in the case also fails to discuss in any detail his role in pursuing implementation.¹⁹ This is

13. *Id.* at 324.

14. Jutta Lungwitz, *Stone v. City and County of San Francisco — Impact of a Consent Decree on the Medical and Mental Health Services of a San Francisco County Jail* (unpublished manuscript, on file at The Center for Law & Society, University of California, Berkeley).

15. Robert D. Goldstein, *A Swann Song for Remedies: Equitable Relief in the Burger Court*, 13 HARV. C.R.-C.L. L. REV. 1, 76 (1978).

16. 344 F.Supp. 373 (M.D. Ala. 1972).

17. PHILIP J. COOPER, *HARD JUDICIAL CHOICES* 175 (1988).

18. Nor is it discussed in a law review casenote about the same case. See Note, *The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338 (1975) (focusing on the judge and the parties to the litigation).

19. See Jack Drake, *Judicial Implementation and Wyatt v. Stickney*, 32 ALA. L. REV. 299 (discussing

particularly striking in light of the article's focus on why full compliance with the district court's remedy was not fully achieved.²⁰

This issue does not ordinarily arise in traditional, private, civil litigation where there are clear steps that the lawyer can follow to collect a money judgment, such as putting liens on the defendant's property or obtaining a writ of execution.²¹ Moreover, there is incentive to pursue a money judgment because the attorney can bill for the time spent tracking down the judgment and because collecting the client's judgment is of personal, financial interest to the attorney, particularly if she is working on a contingent fee basis or has a continuing relationship with her client.²²

There are a variety of possible explanations for attorneys' waning enthusiasm after receiving a favorable trial or settlement outcome but before implementation. Pursuing implementation in institutional reform litigation involves tremendous patience and perseverance which is often met with only excuses (some of which may be justified) and delay.²³ The loss of interest may be due to the lack of intellectual stimulation in implementing a court order as opposed to turning to a new case; naiveté about the difficulty of implementation and the degree of opposition to be encountered;²⁴ the structural limitations of the class action in

generally the facts of the case and his recommendations regarding effective methods of implementation). The article does mention at least one motion for contempt made by plaintiffs' lawyers. *Id.* at 308.

20. *Id.* at 307-11.

21. See James J. Brown, *Collecting a Judgment*, 13 No. 1 Litigation 31 (1986); see also FED. R. CIV. P. 69 (allowing writs of execution in order to enforce civil judgments for payment of money); Chayes, *supra* note 2, at 1287 (discussing the "traditional" liability rules and the relative absence of prospective relief).

22. See Marc Feldman, *Political Lessons: Legal Services for the Poor*, 83 GEO. L.J. 1529, 1552-3 (1995) (identifying client independence and economic incentives as influencing attorney accountability to clients). This is not to say that attorneys are not often reimbursed for time spent pursuing implementation in institutional reform litigation. See *infra* note 78, and accompanying text; Balark v. Curtin, 655 F.2d 798, 802-3 (7th Cir. 1981) (ordering an award of reasonable attorney's fees in civil rights case, including fees incurred in collecting judgment).

23. This factor, notably, is not limited to institutional reform litigation. Marc Feldman, in an evaluation of legal services for the poor, recently observed, in the context of landlord tenant disputes, that:

The entry of a favorable judgment by a trial court is a far cry from actually collecting that judgment. The judgment must be docketed and specified collection procedures learned and followed. Post-judgment discovery may be required, together with additional submissions and appearances seeking orders and even sanctions. The landlord may or may not continue to be represented by counsel. She will be difficult to locate, unavailable, and uncooperative. Once assets are located, they must be seized and converted. Each and every step requires new knowledge, additional time, energy and "staying power."

Feldman, *supra* note 22, at 1557 (footnote omitted). Feldman found that legal services lawyers often do not invest the necessary time and energy at this stage of the litigation, which contributes to what Feldman perceives as "the inadequate solutions of much Legal Services work." *Id.* at 1556.

24. For example, Rothman and Rothman observed, after the signing of the consent decree:

[M]any of those involved believed that the case was over at last. The review panel would soon be selected and its members . . . would implement the decree. . . . [Plaintiffs' lawyer] thought he was, more or less, finished with the suit. . . . They all imagined they had signed a treaty ending the war. In fact, they had only opened a new theater for a new campaign.

ROTHMAN & ROTHMAN, *supra* note 12, at 124. See also Lungwitz, *supra* note 14, and accompanying text. This

which the client is often a diffuse and internally inconsistent collection of people, and therefore unable to monitor its attorney effectively;²⁵ the reliance on judges, experts, masters, and monitors for follow through, which may be interpreted by lawyers as usurping their function;²⁶ the indeterminacy of ethical rules,²⁷ which do not explicitly deal with the lawyer's role during implementation; and the uncertainty associated with the fact that there is rarely a clear point at which implementation is accomplished, as the Supreme Court has recently acknowledged in its efforts to determine when implementation has been sufficiently achieved so that a district court can terminate its oversight.²⁸

An ethical evaluation of the behavior of the plaintiffs' lawyer at the implementation stage of institutional reform litigation can be distinguished from the problems that beset lawyers representing groups at other stages of litigation. Conflicts between lawyers and clients and among members of the plaintiff group in these cases can arise throughout the earlier stages of litigation and can take a number of forms. Derrick Bell has described how parents of African American children faulted the NAACP for concentrating its litigation strategy on integration at the expense of better schools for those children,²⁹ and Deborah Rhode has

may very well be directly related to the virtual absence of teaching about enforcement of judicial orders in law school. See Feldman, *supra* note 22, at 1587 (perceiving that the widely held view in the classroom is that "with one 'stroke of the pen' a decision is reached and implemented").

25. See Bell, *supra* note 9, at 490-91 (noting that public interest lawyers may feel more accountable to the segment of the general public that is aware of the lawyers' public policy goals and may be contributing more financially to the effort than to the clients whose case they are bringing); Gary Bellow & Jeanne Kettleton, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. REV. 337, 341 (1978) (lack of economic leverage hinders a client's ability to keep attorneys accountable); Kane, *supra* note 8, at 389 (lack of accountability results in part from the absence of the usual employer-employee relationship and from the fact that the attorney must represent an "amorphous group of clients"); see also Morris v. Travisono, 310 F. Supp. 857, 859-60 (D.R.I. 1970) (detailing this problem within the context of prisoners' rights litigation).

26. See generally Michael S. Lottman, *Enforcement of Judicial Decrees: Now Comes the Hard Part*, 1 Mental Disab. L. Rep. 69 (1976) (outlining certain "necessary elements" to compliance, stressing judicial action and "monitoring bodies"); Debra Dobray, *The Role of Masters in Court Ordered Institutional Reform*, 34 BAYLOR L. REV. 581 (1982) (discussing the use of "institutional reform masters" and arguments against them). Much of the literature on the remedial stage of institutional reform litigation has focused on the role of the judge without much discussion of the role of plaintiffs' lawyers. See, e.g., Susan P. Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805 (1990) (describing the various judicial approaches in the remedial process). On the many and varied powers granted to the judge in class action litigation, see *Special Project*, *supra* note 6, at 880-81 (citing as judicial options: control of suit certification as a class action, modification of the certification order, orders requiring notice to absentees, and formation of subclasses) and FED. R. CIV. P. 53 (outlining federal rules regarding special masters).

27. See generally David B. Wilkens, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468 (1990) (arguing that the traditional model of legal ethics is fraught with indeterminacy).

28. See *Missouri v. Jenkins*, 115 S. Ct. 2038 (1995) (reviewing district court remedies in the eighteenth year of litigation); *Freeman v. Pitts*, 503 U.S. 467 (1992) (reviewing school desegregation efforts in Dekalb County, Georgia); *Board of Educ. of Oklahoma City Pub. Schools v. Dowell*, 498 U.S. 237 (1991) (ruling that courts should consider good faith efforts at compliance and whether vestiges of past discrimination have been eliminated when determining whether to dissolve a desegregation decree); see also John B. Weiner, *Institutional Reform Consent Decrees as Conservers of Social Progress*, 27 COLUM. HUM. RTS. L. REV. 355 (1996).

29. Bell, *supra* note 9, at 516.

described the conflicts among members of a plaintiff group over everything from the initiation of litigation to choosing an appropriate remedy.³⁰ The question of how the lawyer should balance the diversity of interests among the members of a plaintiff class in an ethical fashion has been much discussed and remains a vexing problem.³¹

At the implementation stage, however, the remedy has been negotiated by the parties and ordered by a court and the focus moves from what the remedy ought to be to how and whether it will be implemented. Although conflicts within the plaintiff group can and do arise at this stage of the litigation, and might evolve into a dispute among plaintiff class members as to whether the defendants should or should not implement the remedy, such disputes are really about the type of remedy, not about the plaintiffs' attorney's duty actively to seek implementation. For example, Bell describes the ambivalence of some African American leaders in Boston over the implementation of a desegregation plan because of their desire to put some efforts toward improving the educational quality in the predominantly black schools.³² Their ambivalence was about the type of remedy chosen, not about whether and how the lawyer should seek the implementation of the chosen remedy. This Article addresses the latter issue which raises the question of what role the lawyer should have in the process by which a client's legal rights become a reality.

Should lawyers be responsible for aggressively pursuing implementation in institutional reform litigation, and if so, should their misperception of the degree of difficulty in seeking implementation and their subsequent failure to pursue the implementation of the remedy be considered unethical?

This Article will look to various approaches to legal ethics to determine if they can shed light on understanding and defining this issue as one of professional responsibility. The role of lawyers in the implementation stage of institutional reform litigation raises questions not only about the lawyer's duty to her client, but also about her own competence, as well as her duty to the public and the court. These are all issues covered in general terms by the *Model Code of Professional Responsibility* and the *Model Rules of Professional Conduct*, as well as by scholars who comment on and propose alternative approaches to the ethical

30. Rhode, *supra* note 9, at 1185-7.

31. See, e.g., Stephen Ellmann, *Client Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103 (1992) (examining the conflict between respect for the individual members of a class and the need to represent them as a whole).

32. Bell, *supra* note 9, at 482-83. Sometimes such conflicts among class members at this stage of the litigation can lead a court to create subclasses of the plaintiff class for the purpose of separate representation during the process of developing a remedy. See, e.g., *Halderman v. Pennhurst*, 612 F.2d 83, 110 (3d Cir. 1979) (finding that decertification of a class of mentally handicapped plaintiffs was not necessary when intra-class disputes arose); *Special Project*, *supra* note 6, at 898-99 (stating that "[s]ubclassing is the most effective and efficient means of ensuring adequate representation of all dissimilar interests where those interests are shared by identifiable, discrete groups"); *Developments in the Law — Class Actions*, 89 HARV. L. REV. 1318, 1479-82 (1976) (analyzing some of the issues that confront judges when considering the subclass option).

obligations of lawyers. In fact, one need not look beyond the ethical standards that are already either in force by virtue of ethical codes or simply suggested in the scholarly literature to find the ethical principles that apply to lawyers in the implementation setting.

In Part I, I will briefly discuss the traditional approaches to legal ethics and explore what those approaches dictate about the lawyer's conduct in the implementation stage of institutional reform litigation. In Part II, I will look at what the ethics codes have to contribute in this regard. In Part III, I will discuss critiques of traditional approaches and the consequences of those critiques for the implementation issue. In Part IV, I will address some potential objections to the recognition of an ethical duty to pursue implementation, and in Part V, I will conclude with some preliminary observations that might inform future efforts to address this problem.

I. TRADITIONAL LEGAL ETHICS

A. THE ADVERSARY MODEL

Most debate about the ethical implications of lawyers' actions or inactions centers on some aspect or tenet of what can be broadly described as the adversary system. Discussions of particular situations that face lawyers and may raise ethical questions are analyzed in terms of whether and how the action that the lawyer chooses to take in that situation can be justified by one or more of the basic assumptions of the adversary system. The world of legal scholars who write about legal ethics can be roughly divided into those who support justifications for lawyer behavior that are based on one or more of those assumptions, and those who question or reject entirely those assumptions and proffer alternative views and justifications.

There are many different ways of stating the basic tenets of the adversary system. Generally, the two basic tenets of the adversary system are, in one scholar's words, Partisanship and Neutrality.³³ Neutrality refers to the attorney's attitude toward her client and her client's goals. This tenet focuses on the client's autonomy as a rights-bearing individual, and views the lawyer's role as "help[ing] to preserve and express the autonomy of his client vis-a-vis the legal system."³⁴ A lawyer's actions may be justified by whether they serve her client's needs and goals, assuming they are legal, regardless of the content of those needs

33. See Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529, 1534 (stating that partisanship and neutrality form the "standard conception" of legal ethics as seen by moral philosophers); see also William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 36-38 (combining these principles in the terms "adversary advocacy" and "partisan advocacy"); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1085 (1988) (labeling this conception "libertarian").

34. Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1074 (1976). Fried likens the lawyer's posture toward her client as one of a limited purpose friend

and goals.³⁵ The attorney acts as an agent of the client and is thereby not in a position to question the validity of the client's goals, and cannot be held responsible for the consequences that might follow the pursuit and achievement of those goals. This justification posits liberty and autonomy as moral goods,³⁶ and views access to the law, only possible in our complex legal system through a lawyer, as an exercise of that autonomy. The lawyer, in order for her actions to be justifiable, must facilitate this access without interfering, through injection of her own concept of morality, with the client's autonomy.

In the extreme version, the lawyer loses her identity as a moral agent and simply becomes an instrument of the client, the proverbial "hired-gun."³⁷ This is the only way for the client to enjoy the full extent of her legal rights. From the point of view of the client, this is a non-consequentialist approach to legal ethics because it takes the client's moral and legal autonomy and dignity as goods in themselves, regardless of the ultimate consequences. On the other hand, in submitting to the client's autonomy, the lawyer herself is bound by a purely consequentialist ethic as the unquestioning agent of client-driven goals. The justification for a lawyer's morally neutral stance toward her client rests on the systemic justification of the adversary system, i.e., that the adversary system leads to truth and justice by pitting partisan advocates against each other before a neutral arbiter.

Critiques of this justification for lawyers' actions generally center on the impossibility of a human being, lawyer or not, being a neutral moral agent,³⁸ and the relative value of such an approach even if it is possible.³⁹ The agency approach offers no rationale for why an attorney should value her own client's individualism and autonomy above the good of the community, except by simply asserting that they are valuable in themselves.⁴⁰ Moreover, there is no justification, some argue, for the proposition that every person should be able to exercise every possible right.⁴¹

who must treat her client's interests as her own insofar as it is necessary to "preserve and foster the client's autonomy within the law." *Id.* at 1073.

35. See generally Monroe-H. Freedman, *Perjury: The Lawyers' Trilemma*, No. 1 *Litigation* 26 (1975) (going one step further by contending that in the criminal defense context, lawyers have a duty at least to tolerate some nonlegal goals of clients, such as committing perjury).

36. Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 *AM. B. FOUND. RES. J.* 613, 616.

37. *Id.* at 614. Pepper states that different moral standards apply to lawyers when serving a client than to an ordinary layperson. The lawyer is an amoral agent and only the client is morally accountable.

38. See Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 *STAN. L. REV.* 589, 617-18 (1985) (examining the concept of the neutral attorney acting in his "institutional role").

39. See *id.* at 604-5 (discussing the lack of justification for the transference of reverence for individual rights in the criminal context over to the civil context, particularly in the representation of group rights); Eschete, *supra* note 7, at 278 (noting that in many situations, the lawyer's personal sense of morality is crucial to being a good lawyer).

40. Simon, *supra* note 7, at 1125.

41. Schneyer, *supra* note 33, at 1540. For an interesting discussion of the irresolvable nature of the diametric

Partisanship, the other fundamental tenet of the adversary system philosophy, requires the lawyer to press for every legal advantage to which her client might be entitled. This tenet is justified by a view of legal disputes, and particularly litigation, as a contest between parties, each of whom presents as strong a case as possible before a neutral party, who in turn, from the wealth of information presented from diametrically opposed views, can discern the truth from the strengths and weaknesses of each party's arguments and make an informed decision. "The adversary system assumes that the most efficient and fair way of determining the truth is by presenting the strongest possible case for each side of the controversy before an impartial judge or jury."⁴²

Under this theory, the attorney's behavior is a function of her institutional role, not her own personal morality.⁴³ As a society, we have determined that the best way to achieve justice and simultaneously protect individual rights is through this system, and the system will only work if each player fulfills a particular role. For a lawyer to do otherwise would be to usurp the function of the opposing party, the judge, and the jury. Thus, when a lawyer aggressively cross-examines a witness whom the lawyer knows to be truthful, or when a lawyer invokes the statute of limitations in defense of a valid breach of contract claim, she is undertaking acts that, even if viewed individually as offensive, are condoned by the institution on the systemic level.⁴⁴ Thus, like the Neutrality justification, the justification for lawyers' actions based on Partisanship is essentially consequentialist in nature, where the goals being sought are simultaneously the unveiling of truth, the protection of rights, and the proper functioning of the "sociopolitical system concerned with the administration of justice in a free society."⁴⁵

Critiques of the Partisanship justification for legal action focus primarily on its empirical validity. Partisan representation may not be an effective way of getting at the truth and can actually be calculated to avoid the truth, such as when one side indulges in aggressive cross-examination of a truthful witness. Moreover, inevitable variations in the quality of the representation between parties can lead to an unbalanced view presented to the tribunal,⁴⁶ as in the situation where an individual consumer is up against a large corporation in court. Thus, Deborah Rhode has argued that partisan representation in fact places procedural formalism above substantive justice at the expense of truth and justice.⁴⁷ This, in turn, raises

positions held by the advocates of this position and their critics, see Note, *Litigation Ethics: A Niebuhrian View of the Adversarial Legal System*, 99 YALE L.J. 1089 (1990).

42. MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 9 (1975).

43. See generally Robert C. Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 CAL. L. REV. 379 (1987) (examining the negative public image of the lawyer and whether it is justified).

44. See generally Fried, *supra* note 34, at 1073 (arguing that strong partisan advocacy is "necessary to preserve and foster the client's autonomy within the law").

45. Freedman, *supra* note 35, at 46.

46. Rhode, *supra* note 38, at 597.

47. *Id.* at 604.

the question whether we should have the degree of trust in our institutions that justifies partisan behavior.⁴⁸

Under the adversary theory, Neutrality is a necessary partner to Partisanship because it links the goal of facilitating the arbiter's search for truth by means of aggressive advocacy on both sides with the client's exercise of autonomy in asserting her legal rights. It is not enough that a lawyer is loyal to her client's goals, the lawyer must also pursue that client's interests aggressively. Notably, although the critics of these tenets refute various aspects of the justifications for the kind of behavior by lawyers that these tenets condone, none of the discussions of the specific duties of lawyers in litigation contradicts the basic assumption that the lawyer is required to advocate strongly on behalf of her client. William Simon, for example, argues against the Neutrality principle, suggesting instead that the lawyer must use her own judgment to assess the merits of the client's claims. But once the lawyer and client have agreed on appropriate goals, the lawyer is still duty-bound to pursue those goals in such a manner so that they can realistically be accomplished, even though the lawyer maintains some control over those means as well.⁴⁹ Thus, even with all of the criticism of the strong versions of Partisanship and Neutrality, the critics retain a weak version of those concepts. If they did not, one might begin to wonder what function a lawyer serves.⁵⁰

B. TRADITIONAL LEGAL ETHICS APPLIED

The Neutrality justification for conduct by a lawyer based on the client's interest in the full exercise of her legal rights is easily applied to the implementation setting. If the justification for the lawyer's amoral, functional role vis-a-vis her client is that this is the only way that the client, as a rights-bearing individual, can exercise autonomy in relation to the legal system, then it is difficult to distinguish between the liability and the implementation stage of institutional reform litigation in terms of the lawyer's role. The client's goal at the implementation stage of the litigation is the vindication of rights that have been recognized by a court through the implementation of a remedy ordered by a court.⁵¹ In a sense, Neutrality is simplified at the implementation stage because the client's

48. See Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 12-13 (1975) (arguing that the "amorality" of the lawyer is only justified if we have "an enormous degree of trust and confidence in the institutions themselves"); David Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER* 83 (David Luban ed., 1988) (critiquing many of the underlying premises of the adversary system as the best method to achieve justice).

49. Simon, *supra* note 7, at 1091 ("The discretionary approach incorporates much of the traditional lawyer role, including the notion that lawyers can serve justice through zealous pursuit of clients' goals.").

50. See Albert W. Alschuler, *The Search for Truth Continues, The Privilege Retained: A Response to Judge Frankel*, 54 U. COLO. L. REV. 67, 72-73 (1982) (arguing that non-partisan lawyers would leave clients facing essentially a long series of "judges," without a true advocate).

51. Fiss, *supra* note 2, at 2.

goals have, in a sense, been pre-approved by a court by virtue of the client's success on the issue of liability.

But there is an even better reason why the Neutrality principle supports the aggressive pursuit of implementation by a lawyer in institutional reform litigation. The Neutrality principle is based on the notion that the lawyer is the conduit to the client's full exercise of her legal rights in order to preserve the dignity and autonomy of the client. In most commercial and personal injury civil litigation, the client's primary goal is the recovery of damages for injury to economic interests or physical injury, and promoting the dignity of the individual is the more abstract concern that justifies the lawyer's service in general. In contrast, in institutional reform litigation that involves the vindication of individual constitutional rights in organizational settings, the client's primary goal itself can often be understood as the preservation of dignity. For example, in *Brown v. Board of Education*,⁵² the Supreme Court relied on concepts of individual dignity and self-esteem in declaring segregation of public schools unconstitutional: "To separate [school children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."⁵³ The Court has abided by this rationale for desegregation, stating in 1992 that "the principal wrong of the *de jure* system [was] the injuries and stigma inflicted upon the race disfavored by the violation."⁵⁴

In *Wyatt v. Stickney*,⁵⁵ the court found that the conditions still existing in the defendant hospital for the mentally ill six months after the court had first ruled that the conditions were unconstitutional "constituted dehumanizing factors contributing to the degeneration of the patients' self-esteem."⁵⁶ The court went on to appoint human rights committees to review proposals "to ensure that the dignity and the human rights of patients are preserved."⁵⁷

Thus, in institutional reform litigation, as in other types of litigation, the Neutrality principle is applicable to the lawyer's posture vis-a-vis her client, insofar as the lawyer must respect and support the client's autonomy when that autonomy is expressed through the pursuit of legal rights. But the Neutrality

52. 347 U.S. 483 (1954).

53. *Id.* at 494.

54. *Freeman v. Pitts*, 503 U.S. 467, 485 (1992). *See also* *Board of Educ. of Oklahoma City Pub. Schools v. Dowell*, 498 U.S. 237, 258 (1991) (Marshall, J., dissenting) ("Remedying and avoiding the recurrence of this stigmatizing injury have been the guiding objectives of this Court's desegregation jurisprudence."). *But see* *Missouri v. Jenkins*, 115 S.Ct. 2038, 2062 (1995) (Thomas, J., concurring) ("[T]he theory that black students suffer an unspecified psychological harm from segregation that retards their mental and educational development . . . not only relies upon questionable social science research rather than constitutional principle, but it also rests on an assumption of black inferiority."); *see also* *Sturm*, *supra* note 26, at 861 (1990) (suggesting that judicial intervention by itself can legitimize the protection of individual dignity).

55. 344 F. Supp. 373 (M.D. Ala. 1972).

56. *Id.* at 375.

57. *Id.* at 376.

principle is often even more directly relevant to bringing about a client's vindication of her dignity and autonomy in institutional reform litigation than in other types of litigation. If the dignity and autonomy that the client is seeking are dependent on how that individual is treated on a daily basis in an institution, then the achievement of the client's goals requires the implementation of the remedy. Thus, if, as Charles Fried asserts, the limits of the lawyer's loyalty to the client and the degree to which the lawyer makes her client's interests her own is the degree necessary to preserve and foster the client's autonomy within the law,⁵⁸ the duty of Neutrality continues through the implementation of the remedy. It is only with implementation, in many of these cases, that a client can truly have her autonomy and dignity respected by the defendant organization.

As previously discussed, in the representation of an ordinary client, the duty of Partisanship is justified by the notion that opposing, partisan presentations are the most effective way of both promoting the client's legal rights and enabling a neutral arbiter to determine the truth. It is a pragmatic justification which assumes that truth, justice, and the exercise of individual rights, although given different weight by different scholars, are valid goals to which the system aspires.

In fact, during the liability stage of litigation, which is the context in which this duty is generally discussed, there are really two "truths" to be determined. As Lon Fuller stated: "The lawyer appearing as an advocate before a tribunal presents, as persuasively as he can, *the facts and the law* of the case as seen from the standpoint of his client's interest."⁵⁹

One "truth" is the determination of what actually transpired in the world that gave rise to the dispute. The aggressive cross-examination of witnesses is to test this kind of truth and the factfinder's job is to weigh all of the testimony, which has been thoroughly tested, to determine the facts. The second type of "truth" pertains to the legal, as opposed to the factual, arguments. In difficult cases, the lawyers must argue and test their opposing views of what the law requires and from these opposing views, the judge must determine what the law is.⁶⁰

In one sense, after the plaintiff has won at the liability stage of institutional reform litigation, and a remedy has been ordered, the tribunal is no longer a neutral arbiter and the adversary apparatus seems to dissolve. The judge has made findings of fact and endorsed a plan by which the defendant typically must expend vast sums of money to change an institution. Also diminishing the appearance of the triangular relationship at the core of the adversary system, and therefore the need for partisan advocacy, is the fact that the judge, who is often

58. Fried, *supra* note 34, at 1073.

59. 44 A.B.A. J. 1159, 1160 (1958), reprinted in *Report of the Commission on Professionalism to the Board of Governors and the House of Delegates of the ABA*, 112 F.R.D. 243 (1986) (emphasis added).

60. I am not suggesting that judges "discover" the law in the natural law sense. Rather, I merely mean that when the law is not clear, the function of opposing counsel is to present differing interpretations of the law so that the judge can make an informed decision.

deeply involved in creating the remedy and monitoring implementation, is seen as aligned with the plaintiff.⁶¹

But in institutional reform litigation, the determination of the facts and law to reach a judgment as to liability for the underlying cause of action is only the first set of “truths” that a judge must determine. The judicial decree that results from such a determination creates a new legal regime that imposes specific obligations on the defendants. In the implementation stage, the factual “truth” that still remains to be determined is whether the defendants are complying with the order, and the legal “truth” is whether the order effectively vindicates the clients’ rights, whether it should be modified, and whether the defendants’ lack of compliance is unconstitutional or contemptuous. For example, in *Board of Education of Oklahoma City v. Dowell*,⁶² the Supreme Court set the legal standard for dissolution of a desegregation decree as requiring a showing by the defendant that it had complied with the decree “for a reasonable period of time” and that the vestiges of past discrimination have been eliminated “to the extent practicable.”⁶³ In *Freeman v. Pitts*,⁶⁴ an action brought by a defendant school district to dismiss the court’s jurisdiction over its efforts to desegregate seventeen years after the initial order, the issue before the court was “the degree of compliance with a school desegregation decree.”⁶⁵

Although the lawyer’s role in the implementation stage is not the traditional one of asserting a factual situation in the past and proposing a legal interpretation, the task of creating and monitoring a present and future factual situation and applying it to legal standards of compliance also requires partisan advocacy. Initial remedial orders are almost invariably non-specific,⁶⁶ and are open to various interpretations once the practical problems of compliance are raised.⁶⁷

61. See Kane, *supra* note 8, at 405-09 (suggesting a partnership between the judge and the plaintiffs’ attorney for solving representational problems in institutional reform litigation); Chayes, *supra* note 2, at 1298 (the decree “prolongs and deepens, rather than terminates, the court’s involvement with the dispute”); Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 104 (1979) (“Once a judge has found a violation of law, he is permitted — indeed, expected — to become an advocate for its correction.”).

62. 498 U.S. 237 (1991).

63. *Id.* at 249.

64. 503 U.S. 467 (1992).

65. *Id.* at 474. See also *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992) (setting out conditions under which consent decrees in institutional reform litigation can be modified).

66. See *Feliciano v. Barcelo*, 672 F. Supp. 591, 623 (D.P.R. 1986) (finding that the correctional system of Puerto Rico had not brought its facilities up to “constitutional” standards in terms of shelter, sanitation, medical care and safety as required by a previously issued injunction); Goldstein, *supra* note 15, at 64-71 (discussing the vagueness of initial court orders and suggesting more specific orders, escalating in intrusiveness as noncompliance continues).

67. See *Feliciano*, 672 F. Supp. at 623 (after an initial order was not complied with, the judge ordered the monitor to hold hearings to get factual input from all parties); *Ruiz v. Estelle*, 679 F.2d 1115, 1162 (5th Cir. 1982) (outlining the powers and limitations on a special master appointed in case involving the Texas Department of Corrections); *Special Project*, *supra* note 6, at 817-21 (discussing various ways in which a decree may need to be modified during implementation).

The issues about the scope and meaning of the parties' obligations and the parties' compliance with them are issues of fact and law that are often continuously litigated during the implementation stage.⁶⁸ Specific issues of law, such as the constitutionality of remedial measures, are the particular responsibility of the lawyers, and are not delegable to masters or monitors.⁶⁹

Furthermore, there is evidence from the cases and case studies that the plaintiffs' counsel, even if not solely responsible for monitoring compliance, is expected to maintain a posture of vigilance and partisanship at the remedial stage. In *Collins v. Schoonfield*, a relatively successful jail conditions case in which no third-party monitor was appointed and the plaintiffs' attorneys undertook primary responsibility for monitoring compliance, the attorneys themselves believed that they should maintain an adversarial posture during the compliance stage.⁷⁰ In *Bradley v. Milliken*,⁷¹ after the Supreme Court reversed the lower court's order of an inter-district busing remedy, and remanded the case, the district court noted that "[n]o party has ever taken the initiative in the remedial phase of these proceedings. For example, although unfavorable Monitoring Commission Reports of lagging implementation of court-ordered remedial programs provided many opportunities for initiative, the plaintiffs have failed to take action."⁷² The court interpreted the plaintiffs' lawyers' failure to seek compliance with a particular portion of the court's decree as a tacit acceptance of the defendants' failure to comply:

Notwithstanding the numerous reports submitted by the Commission, however, no party to this litigation has filed any pleadings to challenge in an adversary proceeding the reason for the Detroit Board's lagging implementation of the remedial programs. The silence of the parties, particularly the plaintiffs, leads the court to believe that the interest of all parties in this component has been reasonably satisfied.⁷³

Similar behavior on the part of the plaintiffs' lawyers' was discussed from the defendants' point of view by Dudley Spiller in his study of *Hamilton v. Schiro*⁷⁴, a

68. See *Feliciano*, 672 F. Supp. at 625 (ordering that information about conditions of confinement be continually collected); see also *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737, 747-48 (6th Cir. 1979) (ruling that District Court judge may not abdicate his power by receiving the advice of "legal experts" in the field of school administration); Susan P. Sturm, *The Promise of Participation*, 78 IOWA L. REV. 981, 989 (1993) ("[C]ourts clearly engage in legal activity when they formulate and enforce injunctions . . . Courts make and enforce law even when they act on indeterminate, non-doctrinal, remedial principles.").

69. See *Reed*, 607 F.2d at 747-48 (ruling that the District Court must use its own resources, not the help of special masters, to make legal determinations).

70. M. Kay Harris, *A Case Study of Collins v. Schoonfield*, in *AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS* 355, 399 (1977). See also Goldstein, *supra* note 15, at 69 (arguing that continued pressure from the plaintiffs' attorney during compliance will prevent the court from issuing more intrusive orders).

71. 460 F. Supp. 299 (E.D. Mich. 1978).

72. *Id.* at 302.

73. *Id.* at 318-19.

74. 338 F.Supp. 1016 (E.D.La. 1970).

prison reform case. Spiller observed that, to support the defendants' contention that one of the provisions of the decree was unenforceable, the city attorney pointed out that "neither the special master nor the plaintiffs' attorney had actively sought implementation of that particular provision. His inference was that, since neither sought implementation, the provision was legally unenforceable."⁷⁵

Thus, it appears that both lawyers and judges assume that plaintiffs' lawyers have a duty to pursue implementation of institutional remedies. In fact, this assumption is often evident on the face of the order. For example, consent decrees sometimes include a provision for the award of attorneys' fees for time spent enforcing the judgment.⁷⁶

Moreover, there is evidence that continued partisan advocacy can have a positive effect on implementation. In a study of *Taylor v. Sterret*, a jail reform case in Dallas, one scholar attributed the success of the court's order in part to the fact that the prisoners' lawyers were committed to the case throughout its implementation stage during which time they "gathered information on jail conditions, monitored compliance, followed developments in similar cases, and filed motions."⁷⁷ In *Collins v. Schoonfield*, the judge stated that he thought that the relationship between the defendants charged with implementation and the plaintiffs' attorneys was one of the three factors primarily responsible for compliance with the court's orders.⁷⁸ In another case study of corrections litigation, it was reported that upon a motion by the plaintiffs' lawyers, the judge awarded them attorneys' fees after finding that the defendants were not meeting their court-ordered obligations, and that "all of the violations would have continued but for the efforts of plaintiffs' counsel."⁷⁹

M. Kay Harris, in her case study of *Collins*, described the active involvement of the plaintiffs' lawyers in seeking compliance with the court's orders, which included the following steps:

- (1) get the defendants to commit themselves on paper (hence the requirement for the regular 90 day compliance reports); (2) talk to inmates extensively; (3) do on-the-spot investigation and inspection in the facility to obtain a balanced view of what both sides have reported; and (4) negotiate or apply pressure from a position of strength, an option that follows on attainment of the first three steps.⁸⁰

75. Dudley P. Spiller, *A Case Study of Hamilton v. Schiro*, in *AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS* 247, 288 (1977) (footnotes omitted).

76. *See, e.g., World Teacher Sem. v. Iowa Dist. Ct. for Jefferson County*, 406 N.W.2d 173, 177 (Iowa 1987); *see also Reed v. Cleveland*, 607 F.2d 737, 742 (6th Cir. 1979) (billable time spent by plaintiffs' attorneys for enforcement of decree submitted to the judge).

77. Anthony Champagne, *The Theory of Limited Judicial Impact: Reforming the Dallas Jail as a Case Study*, in *THE POLITICAL SCIENCE OF CRIMINAL JUSTICE* 93 (Stuart Nagel et al. eds., 1983).

78. Harris, *supra* note 70, at 386.

79. M. Kay Harris, *A Case Study of Holland v. Donelon*, in *AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS* 143, 191 (1977).

80. Harris, *supra* note 70, at 395-96. In another corrections case, it was reported that the plaintiffs played an important role in monitoring compliance by "investigating the extent of compliance; filing motions with the

The author of the study found that the Collins case was generally acknowledged by the participants from all sides to have had a "positive impact" on jail conditions.⁸¹

Susan Sturm, in an article based on a survey of public interest corrections litigators, documents a general agreement among members of organizations that specialize in corrections litigation that "[t]he process of monitoring and enforcing a remedy requires the continued presence and involvement of plaintiffs' counsel," and that implementation is enhanced when the attorney acts as an aggressive monitor.⁸² Yet, in his study of lawyers involved in institutional reform litigation in the area of education, Paul Tractenberg found that only about half of the plaintiffs' lawyers were involved at the implementation stage,⁸³ and most of them saw their role in implementation as neutral. At the same time, however, some of these lawyers acknowledged that they should have monitored the remedy and its enforcement more actively.⁸⁴

The ethical justifications for the principles of Neutrality and Partisanship are particularly persuasive when applied to lawyer conduct at the implementation stage of institutional reform litigation. Not only is a client's dignity at a somewhat abstract level promoted by seeking vindication through legal channels, but, as discussed above, in this type of litigation a client's own, personal dignity might often depend on the actual vindication of legal rights. The need for aggressive advocacy in order to persuade recalcitrant defendants to follow through with court-ordered change is clear from the cases,⁸⁵ and, as Sturm found, the actual vindication of individual rights in organizational settings through the implementation of remedies is promoted when plaintiffs' lawyers actively monitor the progress of implementation. Thus, the traditional tenets of legal ethics support the recognition of an ethical duty for lawyers actively to seek the implementation of remedies.

II. THE ETHICS CODES

The principles of Neutrality and Partisanship, although broadly descriptive of some of the general interests at stake in the attorney-client relationship, are not always sufficiently instructive to a lawyer deciding upon a particular course of

court designed to inform the court of noncompliance, obtain greater compliance, and obtain further relief; and cooperating with the media." Harris, *supra* note 79, at 190.

81. Harris, *supra* note 70, at 405.

82. Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 734 (1993). See also Susan P. Sturm, *Lawyers at the Prison Gates: Organizational Structure and Corrections Advocacy*, 27 U. MICH. J.L. REFORM 1, 16 (1993) ("Innovative approaches to fact-finding, remedial formulation, and monitoring are often key to successful implementation of corrections decrees.").

83. Tractenberg, *supra* note 5, at 393. Tractenberg hypothesized that this response to his survey indicated that many plaintiffs' lawyers did not envision a formal implementation stage, rather than that they did not participate in implementation. It is not clear why the former hypothesis is more probable. See also *supra* notes 14-20 and accompanying text.

84. *Id.* at 406.

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

action. Moreover, it is not only broad principles but also specific rules which the American Bar Association and all of the states have determined should guide lawyers in understanding their ethical obligations. The *Model Rules of Professional Conduct*⁸⁶ were adopted by the American Bar Association in 1983 and replaced the *Model Code of Professional Responsibility*⁸⁷ as the Bar's official code of ethics. Most states have adopted versions of the *Model Rules*, although some states have retained versions of the *Model Code*.

Neither the *Model Rules* nor the *Model Code* wholeheartedly adopts the principles of Neutrality and Partisanship.⁸⁸ Moreover, research has not uncovered any instance where their provisions have formed the basis of a legal action or a disciplinary proceeding against a lawyer for failing to pursue the implementation of a court order or consent decree.⁸⁹ Nevertheless, analysis of these provisions indicates that they do have something to say about lawyers' duties in the implementation stage when they are examined with that issue in mind. The provisions concerning competence and conflicts of interest form the basis for a duty to pursue implementation, while a variety of other sections support that duty.

A. COMPETENCE

Canon 6 of the *Model Code* states that "A Lawyer Should Represent a Client Competently."⁹⁰ Included under the rubric of competent representation is the duty only to take on matters which the lawyer is competent to handle,⁹¹ to prepare adequately for a matter,⁹² and not to neglect a matter.⁹³ The Ethics Committee of the American Bar Association has interpreted this provision to mean that a lawyer cannot take on more cases than she can competently handle, and must withdraw if she finds herself in that position.⁹⁴ The ABA has adopted a stated preference for quality over quantity of representation, even in the legal services context where lawyers are under constant pressure to take on new matters.⁹⁵

86. MODEL RULES OF PROFESSIONAL CONDUCT (1983) [hereinafter MODEL RULES].

87. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969) [hereinafter MODEL CODE].

88. See generally Schneyer, *supra* note 33 (many litigation tactics that would clearly advance a client's interests are nonetheless violations of the *Model Code* and *Model Rules*); Charles W. Wolfram, *Parts and Wholes: The Integrity of the Model Rules*, 6 GEO. J. LEGAL ETHICS 861 (1993) (critiquing the *Model Rules*, particularly the question of whether the *Rules* form a fully integrated whole).

89. *But see* DiPalma v. Seldman, 33 Cal. Rptr. 2d 219, 221-22 (Cal. Ct. App. 1994) (malpractice action for failure to collect judgment); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1010 (1967) (duty to disclose to client that due to attorney error, judgment was no longer collectible); Green v. McKaskle, 770 F.2d 445, 446-47 (5th Cir. 1985) (intervention by individual in class action permissible when based on claim that intervenor was not adequately represented in the class action).

90. MODEL CODE Canon 6.

91. MODEL CODE DR 6-101(A)(1), EC 6-1, EC 6-3.

92. MODEL CODE DR 6-101(A)(2), EC 6-3.

93. MODEL CODE DR 6-101(A)(3).

94. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 347 (1981).

95. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1359 (finding that the duties of competence and non-neglect might entail establishing priorities for accepting cases so that the quality of

The provisions of the *Model Code* are quite specific about what constitutes quality under the *Code*. Canon 7 exhorts lawyers to represent clients "zealously within the bounds of the law."⁹⁶ The disciplinary rules prohibit a lawyer from intentionally failing to "seek the lawful objectives of his client through reasonably available means,"⁹⁷ and from prejudicing or damaging his client.⁹⁸ Although the lawyer is permitted in accordance with the lawyer's professional judgment to forego asserting certain client rights,⁹⁹ the *Code* makes clear that the lawyer must always have in mind the best interests of the client,¹⁰⁰ and the decision to forego legal objectives is ultimately up to the client.¹⁰¹

At first glance, the *Model Rules* appear to have softened the competence and zeal requirements of the *Code*. *Model Rule* 1.1 defines competent representation as having "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation" but does not specifically prohibit neglect. *Model Rule* 1.3 states that "A lawyer shall act with reasonable diligence and promptness in representing a client."¹⁰²

These competence provisions in the *Model Rules*, taken together, stand primarily for two propositions. First, lawyers have a duty to carry through on all matters. This is stated outright in the comment to *Rule* 1.3,¹⁰³ as well as in other provisions. For example, the comment to *Rule* 1.16, which deals with withdrawal, states that a lawyer should not accept representation in a matter unless it can be performed to completion.¹⁰⁴ Second, competence and diligence require a lawyer to hold a current client's interests in high regard and work diligently to serve them. Thus, although the comment to *Rule* 1.3 states that "a lawyer is not bound to press for every advantage that might be realized for a client,"¹⁰⁵ it also states that the lawyer should act "with commitment and dedication to the interests of the client and with zeal in advocacy."¹⁰⁶ In commenting upon the

representation does not suffer because of the quantity of cases). See also Bellow & Kettleon, *supra* note 25, at 355-60 (discussing the tension between the aspirations to make services available and the obligations in Canons 6 and 7 to provide competent advocacy, regardless of resources).

96. MODEL CODE Canon 7, EC 7-1, 7-19 (1974).

97. MODEL CODE DR 7-101(A)(1).

98. MODEL CODE DR 7-101(A)(3).

99. MODEL CODE DR 7-101(B)(1).

100. MODEL CODE EC 7-9.

101. MODEL CODE EC 7-8.

102. MODEL RULES Rule 1.3.

103. MODEL RULES Rule 1.3 cmt. 3 ("Unless the relationship is terminated . . . a lawyer should carry through to conclusion all matters undertaken for a client."). See also MODEL CODE EC 2-31 ("Full availability of legal counsel requires both that persons be able to obtain counsel and that lawyers who undertake representation complete the work involved.").

104. MODEL RULES Rule 1.16 cmt. 1.

105. MODEL RULES Rule 1.3 cmt. 1.

106. *Id.* This is a carryover from the mandate of the *Model Code* Canon 7 that "a lawyer should represent a client zealously within the bounds of the law." MODEL CODE Canon 7. See 1 GEOFFREY C. HAZARD & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 7 (2d ed. 1990) (recounting that the *Model Rules* replaced "zeal" with "reasonable diligence and promptness").

duty of zeal, Geoffrey Hazard has stated that “the single most fundamental principle of the law of lawyering is that so long as lawyers stay within the bounds of the law, they serve society best by zealously serving their clients, one at a time.”¹⁰⁷

B. CONFLICTS OF INTEREST

The primary contexts in which conflicts affecting the attorney-client relationship arise and are relevant to the issues addressed in this Article, involve a lawyer who concurrently represents two clients with differing interests and therefore cannot be completely loyal to one client without interfering with the representation or relationship with the other, and a lawyer whose own interests conflict with those of a client. Thus, under the *Model Code*, Disciplinary Rule (DR) 5-105(A) requires that a lawyer decline a new client if acceptance of the employment would adversely affect the lawyer’s professional judgment on behalf of another client; and DR 5-101(A) prohibits the acceptance of employment if the lawyer’s own interests would adversely affect the representation.¹⁰⁸ Similarly, under *Model Rule 1.7*, conflicts arise when one client’s interests are adverse to another client’s,¹⁰⁹ and when the representation of one client is “materially limited” by the lawyer’s responsibilities to another client, a third party, or the lawyer’s own interests.¹¹⁰ The comment to *Rule 1.7* makes clear that the primary concern of the *Rule* is the loyalty implicit in the lawyer-client relationship and the fear that representing adverse interests would impair that loyalty.¹¹¹

Taken together, the ethics rules on competence and conflicts support the recognition of a duty on lawyers to pursue the implementation of remedies in institutional reform litigation. Because these cases, usually class actions, remain open until the implementation is accomplished,¹¹² and the lawyer retains some specific duties, such as adding new claims and bringing contempt motions,¹¹³ the duty to continue the representation of a client to completion of the matter would also seem to require that lawyers’ ethical duties continue as well. Thus, the duty of competence requires that lawyers continue to advocate on behalf of their clients and serve their best interests during the implementation stage of litigation.

107. HAZARD & HODES, *supra* note 106, at 24.

108. There are exceptions to both of these rules. The prohibition is lifted under *Model Code* DR 5-101(A) with the client’s consent and under DR 5-105(A) if, along with consent, it is “obvious” that the lawyer can adequately represent the client’s interests.

109. MODEL RULES Rule 1.7(a) (1987).

110. MODEL RULES Rule 1.7(b). There are exceptions to these prohibitions if the lawyer reasonably believes there will be no effect on her relationship with her client or her representation of her client and she obtains client consent. See MODEL RULES Rule 1.7(a)(1)-(2), 1.7(b)(1)-(2).

111. MODEL RULES Rule 1.7 cmt. 3.

112. See *supra* note 6 and accompanying text.

113. See, e.g., Gillespie v. Crawford, 858 F.2d 1101, 1103 (5th Cir. 1988) (stating that individual members of the class must pursue any equitable or declaratory claims through the class representative).

Lawyers who lose interest in the case after the liability stage or after a consent decree is signed may be violating the conflicts rules, depending on their reason for losing interest. Thus, a lawyer who fails to pursue implementation aggressively might simply want to move on to the next case, a violation of *Model Rule* 1.7(b) and DR 5-105(A)'s prohibitions against representing clients when the representation would impair the loyalty to another client and prevent the lawyer from carrying out an appropriate course of action.¹¹⁴ The desire to move on to the next case might also stem from the lawyer's interest in setting precedent over seeking implementation, in which case the lawyer is putting her objectives, the creation of precedent, ahead of the client's objectives, the actualization of a legal right that has been won in court.¹¹⁵ In that situation, the lawyer's own interests would be limiting her responsibilities to her client, also a violation of *Model Rule* 1.7(b), and DR 5-101(A). Thus, the conflicts rules would indicate that a lawyer has a duty to continue her advocacy on behalf of her client as during the liability stage, even if that means turning away new clients.

In addition to the rules on competence and conflicts, there are other provisions that are relevant to the ethics of implementation. The *Model Code* and *Model Rules* both address the issue of third parties paying for litigation (often the situation in institutional reform cases) and make it clear that lawyers should not be influenced in their professional judgment by outside sources of fees.¹¹⁶ The ABA has interpreted these provisions to permit the Board of Directors of a group providing legal services to set policy,¹¹⁷ but once a case is accepted, lawyers cannot then change priorities in a way that would affect their representation.¹¹⁸

Although there do not seem to be any cases that directly address these types of conflicts in the context of institutional reform litigation, the issue has arisen in the legal services context. The issue arises because, in addition to the rules on conflicts, the ethics rules also state that lawyers should help make legal counsel available¹¹⁹ and should participate in pro bono activities, particularly legal services, without the expectation of a fee.¹²⁰ If interpreted to mean that in the context of legal services, one has a duty to serve as many clients as possible, these provisions potentially conflict with the provisions on competence and conflicts of

114. This interpretation of *Model Rule* 1.7(b) is buttressed by Comment 4. MODEL RULES Rule 1.7 cmt. 4 (1996).

115. There is a variety of other more personal objectives that might be driving public interest lawyers in such a situation, such as ego gratification and the desire to change society. See, e.g., Bell, *supra* note 9, at 493 (positing that the desire to change society or to reinforce the attorney's sense of her abilities may direct the suit toward goals other than those that would be best for the plaintiffs); Kane, *supra* note 8, at 395 (discussing the same subject in the context of settlement negotiations).

116. MODEL CODE DR 5-107(B); MODEL RULES Rule 1.8(f), 1.7 cmt. 10.

117. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 334 (1974).

118. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1359 (1976).

119. *Model Code* Canon 2 states "a lawyer should assist the legal profession in fulfilling its duty to make legal counsel available." MODEL CODE Canon 2.

120. MODEL RULES Rule 6.1 (1993).

interest.¹²¹ Those provisions are concerned with the quality of representation, while an emphasis on serving as many clients as possible marks a concern with the quantity of representation. In the context of institutional reform litigation, a similar argument might be made for the setting of precedent in many cases over the implementation of that precedent in fewer cases.¹²²

Gary Bellow and Jeanne Kettleon have discussed this dilemma and concluded that the *Model Code* requires that even legal services lawyers have an obligation to provide quality over quantity. Relying mainly on the *Code* provisions involving competence and conflicts of interests, as well as ethics opinions,¹²³ they argue that the paucity of legal services for the indigent does not excuse lawyers from their obligations to represent their clients competently and conflict-free.¹²⁴ Moreover, a concern with quantity over quality in the legal services context can often end up actually benefitting fewer clients because even when more clients win judgments, insufficient attention to enforcing judgments leaves them without a satisfactory resolution to their legal problems.¹²⁵

Having established that under the rules of ethics there is some duty on lawyers to pursue institutional remedies zealously, there is some difficulty applying those same rules in justifying their failure to do so. The most likely justifications lie in the notions of consent and withdrawal. *Model Rule 1.2* allows the lawyer to limit the objectives of representation "if the client consents after consultation."¹²⁶ The comment states that this can include limitations on specific objectives or means, although it cannot so limit the representation that the attorney can no longer "provide competent representation to a client."¹²⁷ If the objectives are so limited by agreement and the client does not stick to that agreement, under *Rule 1.16*, the attorney is justified in withdrawing from the case.¹²⁸ The attorney may not withdraw from one client, however, merely because she is retained by another client whose case she prefers because, in most cases, this would likely result in "a material adverse effect on the interests of the client."¹²⁹ Absent such termination, the lawyer "should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved."¹³⁰ Thus, in the context of

121. For an extensive discussion of this conflict, see Bellow & Kettleon, *supra* note 25, at 354-63.

122. *Model Code* EC 5-23 acknowledges the risk imposed by placing the setting of precedent over client rights but doesn't really resolve it. See also *infra* notes 196-198 and accompanying text.

123. See, e.g., ABA Comm. on Ethics and Professional Responsibility, Formal Op. 347 (1981) (stating that legal services lawyers must limit their representation of new clients when it will hurt old clients, and evincing a preference for existing clients over future clients).

124. Bellow & Kettleon, *supra* note 25, at 353.

125. See *supra* note 23.

126. MODEL RULES Rule 1.2.

127. MODEL RULES Rule 1.1.

128. MODEL RULES Rule 1.16 cmt. 8.

129. MODEL RULES Rule 1.16(b).

130. MODEL RULES Rule 1.3 cmt. 3.

institutional reform litigation, both the consent rules and the withdrawal rules would require an explicit agreement between the attorney and her client that the attorney will represent the client aggressively through the liability stage but if they win, she will not necessarily pursue the remedy with the same degree of zeal, particularly if other matters arise. Barring such circumstances, there is little doubt that under the ethics rules as they now stand, there is a duty on lawyers to pursue implementation of remedies zealously.

Under the ethics rules, the attorney-client relationship is a cooperative endeavor in which the client defines the objectives of the litigation "because realization of these objectives is the very reason the lawyer was hired in the first place,"¹³¹ and the lawyer determines the means and strategies for attaining those objectives,¹³² subject to consultation with the client.¹³³ The failure to pursue implementation in institutional reform litigation can be described as resulting from a lack of zeal, loyalty and/or conflict of interest.

III. NON-TRADITIONAL LEGAL ETHICS

If one is skeptical of grounding ethical duties in some aspect of the adversary system or in the indeterminate patchwork of ethics codes, then the justification for the aggressive pursuit of implementation by the plaintiffs' lawyer based on those premises is equally unsatisfying. Therefore, it must be determined what obligations the plaintiffs' lawyer has at the implementation stage of institutional reform litigation under alternative approaches to legal ethics.

All of the alternative approaches to legal ethics discussed below share the premise that in order to properly address the professional responsibility of lawyers, the scope of inquiry must be broadened to include considerations beyond the traditional principles of the adversary system and the ethics codes. The shared rationale for rejecting the traditional approach to adversary ethics is concern for the effect that it has on lawyers' lives, third parties and on the overall achievement of just results.¹³⁴ At the same time, however, most of the critics of the adversary system justification do not in turn set out comprehensive alternative approaches to legal ethics. Yet it is possible to glean from their critiques considerations relevant to the issue at hand.

One approach centers on the need for lawyers to rely on their own sense of moral responsibility to justify their professional behavior. This approach takes seriously the adversary system's goals of truth and justice but does not see the

131. HAZARD & HODES, *supra* note 106, at 28.

132. MODEL RULES Rule 1.2 cmt. 1. *See also* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 156-57 (1986) (discussing the "division of realms" between lawyer and client).

133. MODEL RULES Rule 1.2(a).

134. *See infra* notes 136-44 and accompanying text (suggesting alternatives to adversary ethics in the institutional reform setting).

behavioral components of the adversary system as an effective way of reaching those goals.

Rhode, for example, argues that the professional ideology promoted by ethical rules is incoherent because institutional constraints make the realization of the ultimate goals impossible.¹³⁵ As an alternative to the extreme versions of Neutrality and Partisanship, Rhode suggests that, within certain bounds, lawyers assume personal, moral responsibility for their professional actions.¹³⁶ The boundaries of ethical behavior are determined by the degree to which the lawyer can justify the consequences of her professional activity. This process of moral justification, in turn, forces the lawyer to face the larger normative questions about what her own individual responsibility entails.

Along similar lines, Simon has suggested an approach to legal ethics that involves a “professional duty of reflective judgment.”¹³⁷ Simon advocates a discretionary approach to choosing cases whereby the lawyer assesses the internal merits of individual cases to determine whether they are worth pursuing. In making this assessment, Simon suggests that the lawyer acknowledge the tensions brought on by the adversary system¹³⁸ and, when adherence to the adversary approach to these problems would work an unjust resolution, always resolve them in a way in which substantive justice is best served.¹³⁹ Unlike Rhode, Simon suggests that discretion is bounded by the moral concerns of the profession rather than individual perceptions of morality. This differs from Rhode’s approach to professional responsibility because it emphasizes the lawyer’s duty to keep in mind the purposes of legal rules when deciding how best to represent a client. These purposes are a check on excessive partisanship. In exercising the “professional duty of reflective judgment,” an outgrowth of the lawyer’s commitment to the “legal values” of the legal culture in which the lawyer practices,¹⁴⁰ the lawyer must at times determine what would constitute substantive justice in a particular case,¹⁴¹ what the purpose of a particular legal rule is,¹⁴² and how to frame the case to increase the likelihood that the relevant law will be properly applied.¹⁴³

How would these approaches to the lawyer’s role inform the duty of the plaintiffs’ lawyer at the implementation stage of institutional reform litigation? Under Rhode’s approach, the plaintiffs’ attorney’s conduct at the implementation

135. Rhode, *supra* note 38, at 626-27.

136. *Id.* at 643-44.

137. Simon, *supra* note 7, at 1083.

138. *See id.* (showing the tension between substance and process, purpose and form, and broad and narrow framing).

139. *Id.* at 1096-98; Wilkens, *supra* note 27, at 505 (calling this purposivism).

140. Simon, *supra* note 7, at 1120.

141. *Id.* at 1098.

142. *Id.* at 1103.

143. *Id.* at 1108-09.

stage would be driven by whatever the attorney determined to be her moral responsibility after winning the case at the liability stage. Rhode, like other supporters of this view,¹⁴⁴ appears to assume that this approach would lead to fairly consistent results among different lawyers once they carefully considered the larger normative questions concerning the goal of our legal system and their appropriate role in it. For example, Rhode states that ethical decisions must be made in the context of a "realistic social and economic backdrop."¹⁴⁵ Andreas Eschete argues that a personal sense of morality is crucial to being a good lawyer because it is often impossible to identify one clear client interest, particularly in institutional reform litigation.¹⁴⁶ This puts the responsibility on the lawyer for taking into consideration all the interests and shaping a case in accordance with the "underlying public values of the legal system."¹⁴⁷

These considerations about justice and fairness provide less guidance in the context of institutional reform than they might in other contexts because there are widely differing views about the purpose and the effectiveness of institutional reform. For example, Abram Chayes has argued that institutional reform litigation is an appropriate way of vindicating the rights of individuals because of the particular institutional attributes of judges,¹⁴⁸ while Owen Fiss has emphasized judges' function in giving "concrete meaning and application to our constitutional values."¹⁴⁹ Others have argued that courts should not entertain institutional reform cases because they lack the capacity to create and implement effective remedies.¹⁵⁰ This approach cannot inform the scope of the ethical duty at the implementation stage of institutional reform litigation because any attorney inclined toward this view presumably would not have gotten involved in the case in the first place. A middle ground was suggested by Stuart Scheingold, who has argued that institutional reform litigation, by virtue of the limitations of the judicial process, cannot bring about substantial social change but may be valuable for its symbolic contributions:

Instead of thinking of judicially asserted rights as accomplished social facts or as moral imperatives, they must be thought of, on the one hand, as authoritatively articulated goals of public policy and, on the other, as political resources of unknown value in the hands of those who want to alter the course of public policy.¹⁵¹

Because all of these views are based on differing, but presumably honest,

144. See, e.g., Wasserstrom, *supra* note 48, at 12-13; Eschete, *supra* note 7, at 280-83.

145. Rhode, *supra* note 38, at 607.

146. Eschete, *supra* note 7, at 280-83.

147. *Id.* at 281.

148. Chayes, *supra* note 2, at 1307-09.

149. Fiss, *supra* note 2, at 9.

150. See generally DAVID L. HOROWITZ, *THE COURTS & SOCIAL POLICY* (1977); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE* (1991).

151. STUART SCHEINGOLD, *THE POLITICS OF RIGHTS* 6-7 (1974).

perceptions of reality, it would be personally, morally respectable for an attorney to adhere to any of them. One view of the lawyer, represented here by references to Chayes and Fiss, would require a lawyer who consults her own personal morality for ethical guidance and who undertook a case with the belief that she could not only win the case, but improve her client's situation, to pursue implementation. The other view, presented by Scheingold, regards the attempt to bring about actual change through litigation alone as futile. A lawyer adhering to this view might initiate institutional reform litigation solely for its symbolic value and therefore would not feel under a personal moral responsibility to pursue implementation.¹⁵²

Under Simon's conception of ethical discretion, it is difficult to know the relevant "legal values" that a lawyer is expected to invoke in the exercise of her ethical discretion. Simon states that the overall goal of the lawyer in the exercise of discretion must be to "seek justice,"¹⁵³ but as the above discussion demonstrates, justice in the context of institutional reform litigation is not a settled concept. It is certainly plausible for an attorney to perceive that aggressive pursuit of implementation comports with the purposes of law, particularly after such implementation has been specifically ordered by a judge. On the other hand, if justice is perceived as the setting of precedent for the benefit of future claimants, it might not require aggressive monitoring. Thus, at least on the surface, neither Rhode's nor Simon's conception of legal ethics suggests a definitive ethical duty on lawyers to seek implementation.

David Luban has developed a model of ethical decisionmaking to address this issue in the context of public interest practice. Arguing that the traditional approaches to legal ethics are inadequate to address the problems of rationing that face public interest lawyers, he proposes a new approach. Luban posits a political action model of public interest litigation which he calls "dirty hands," and argues that attorneys should have a lot of discretion in determining litigation strategy, assuming that the ends of litigation are "both just and weighty."¹⁵⁴ Public interest lawyers are justified in recruiting and manipulating their clients for the sake of "just and weighty" ends, and in deciding which side to take when a conflict arises among the class members in a class action.

Luban's concept of political action justifies departures from the normal scope of attorney-client duties. He argues that political action is a distinct human endeavor for which there is a distinct morality. One risks personal manipulation and betrayal in the attempt to achieve political ends and the rewards of political

152. Arguably, the NAACP Legal Defense Fund lawyers did not expect desegregation to result directly, but rather wanted to get a proclamation of constitutional rights in order to arouse public awareness and force the political branches to act. *See generally* RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1976).

153. Simon, *supra* note 7, at 1090.

154. LUBAN, *supra* note 7, at 323 and chs. 14-15.

comradeship.¹⁵⁵ Thus, whatever the potential ethical problems, they are acceptable in the context of class-based institutional reform litigation because the exigencies of that type of litigation require that the attorney, albeit possessing an important fiduciary duty to her clients, must be given broad discretion in directing and controlling the lawsuit. Under this theory, the decision not to pursue a remedy vigorously could be a legitimate choice based on litigation strategy, scarcity of resources, and/or a realistic acknowledgment of the difficulties involved in implementation and thus the perceived futility of vigorous enforcement efforts.

In a similar fashion, Paul Tremblay argues that legal services decisionmaking cannot be as client-centered as other litigation because of the problem of scarce resources and the lawyer's duty to a "community of clients."¹⁵⁶ Because professional ethics permit lawyers to turn away clients and public interest lawyers often must establish a system for deciding what kind of cases to accept,¹⁵⁷ Tremblay argues that the principles behind priority-based screening of clients should be extended to all of the other decisions that a public interest lawyer must make in the course of litigation. Thus, when client needs and community needs conflict, the attorney, no matter what stage of the case, may consider those latter needs in choosing litigation strategy, even in situations where this means abandoning her client for the sake of another.¹⁵⁸

Under this approach, the diminished zeal in the implementation stage might be justified as a strategic choice that the lawyer is entitled and required to make. The nature of institutional reform is so distinct from traditional litigation, the argument might go, that it justifies departure from general norms of practice. If the lawyer thinks that her time will be more effectively spent pursuing a new political goal, or serving a different community interest, then that lawyer is ethically justified in not zealously pursuing the remedy. Thus, a lawyer's conviction that the symbolic power of setting a precedent in a particular area of law is more important than the speedy implementation of the remedy justifies her choice of exercising less zeal on behalf of her client after the precedent is set.

But there is something wrong with this interpretation of Luban and Tremblay's theories in particular which points to the proper interpretation of the other theories previously discussed. The premise of these theories is that public interest impact litigation is a form of political action. The argument is based on the notion

155. *Id.* at 335.

156. Paul R. Tremblay, *Toward A Community-Based Ethic for Legal Services Practices*, 37 UCLA L. REV. 1101, 1103 (1990).

157. Both the *Model Rules* and the *Model Code* do not require that a lawyer take on any case. Moreover, the Comment to *Model Rule* 1.2 specifically allows lawyers to limit the types of cases handled by a legal aid agency. MODEL RULES Rule 1.2; MODEL CODE DR 7-101; Bellow & Kettleson, *supra* note 25, at 345 (discussing how bar ethics opinions support the rights of public interest law groups to make intake decisions based on political as well as legal considerations).

158. Tremblay, *supra* note 156, at 1153.

that in these types of cases, we have to move away from the exclusivity of the attorney-client relationship and the undivided loyalty that it entails, and must see the relationship as more malleable, encompassing not only client wishes, but also the independent political judgments of the lawyer according to political exigencies.¹⁵⁹ Yet if we take Luban's political model and its implications seriously, and we acknowledge that there are still some aspects of an attorney-client relationship intact (after all, Luban is talking about political action in the context of this relationship), then our only conclusion can be that his model would require an all out pursuit of implementation. Political action, as Luban acknowledges, is not an abstract, theoretical undertaking, and political actors in particular aim for and expect tangible results from their struggles.¹⁶⁰ Thus, on Luban's terms, lawyers who fail to follow through on implementation have violated their duties as political actors because, at least in many cases, they withdraw their commitment just at the point where such commitment is needed to help to bring about actual change.¹⁶¹

Moreover, the hallmark of these non-traditional theories, and the concept that they share with the traditional approaches to adversarial ethics as well as the *Model Code* and the *Model Rules*, is that the lawyer must obtain client consent in order to shape the litigation according to the lawyer's view of the ultimate goal.¹⁶² Both Luban and Tremblay emphasize the importance of informing the client about the special nature of their legal relationship and the fact that if the political aims of the attorney change, the client "might be left high and dry."¹⁶³ Luban states that "manipulation of a client on behalf of the cause is tolerable when and only when the conditions of mutual political commitment" (freedom, reciprocity, and equality) are met.¹⁶⁴ Taking this approach to avoid aggressive advocacy in the implementation stage would require that the lawyer tell the client that the aim of the litigation is a judicial articulation of rights and that even "winning" the case may not bring about any actual change in the situation of the client or those similarly situated if the lawyer subsequently decides that she does not want to spend time pursuing the defendant's compliance with a court order or settlement.

159. LUBAN, *supra* note 7, at 349.

160. *Id.* at chs. 13-14.

161. *See generally supra* notes 77-81 and accompanying text (discussion cases in which partisan advocacy had a positive impact on implementation).

162. MODEL RULES Rule 1.2(c) (stating that a lawyer may limit the objectives of the representation if the client consents after consultation); MODEL CODE DR 7-101(A)(1) (stating that a lawyer shall not "[f]ail to seek the lawful objectives of his client through reasonably available means").

163. LUBAN, *supra* note 7, at 318.

164. *Id.* at 337. This approach has been criticized as not squarely addressing the scope of informed consent. *See* Stephen Ellmann, *Book Review Essay: Lawyering for Justice in a Flawed Democracy; Lawyers and Justice: An Ethical Study*, 90 COLUM. L. REV. 116, 180 (1990) (giving the example where a client may agree to join a political movement but not fully understand or agree to the degree of manipulation to which she is subjecting herself).

This in turn raises the question of why anyone would give such consent.¹⁶⁵ This is different from a lawyer stating that she will only, for example, agree to bring particular causes of action and will not ask for certain damages that she thinks are unwarranted or unattainable. The difference is that in the latter case, the client at least is assured that her lawyer will pursue the limited case zealously and that if she wins, she can expect some compensation. It is hard to imagine why in most cases, plaintiffs in need of housing, integrated schools, accessible workplaces or suitable medical attention would consent merely to the setting of precedent. Moreover, because there may not be other lawyers available or willing to take on large institutional reform cases, plaintiffs may be in a position where any consent to limitations on representation is not the result of an informed and free decision, but rather an agreement to take something over nothing.¹⁶⁶ Thus, Luban's "dirty hands" approach and Tremblay's scarcity justification which persuasively justify a less client-centered ethical responsibility of legal services and public interest lawyers in the name of effective and efficient law reform, leave off after the case is won.

This reveals the deeper issue involved in any question of ethical duties. Like all questions of what is ethical given a variety of possible conduct in a situation is the underlying question of what goals or principles are considered paramount. In the context of the ethics of implementation, the question is whether the lawyer's role is primarily to achieve a favorable ruling from the court and set precedent or to bring about a change in the world and in the client's life. It is generally acknowledged that institutional reform litigation is intended to bring about change in public policy.¹⁶⁷ The reason that critics have suggested that people turn not to lawyers and courts but to government for this type of change is that they realize that what these clients want is actual change in public institutions and that the legal system is not equipped to implement public policy in large, public institutions.¹⁶⁸

But, if lawyers are involved in this type of litigation, something must remain of the basis of the lawyer's actions, that is, the lawyer-client relationship and the fact that that relationship cannot be based on manipulation or deceit (even if we accept Luban's notion that there may be some manipulation within the course of the representation). Thus, under all of the theories discussed above, if the lawyer does not intend to pursue implementation aggressively because she believes that institutional reform litigation is valuable solely in its ability to set favorable precedent, then she must inform her client of that view at the outset. The overwhelming evidence is that lawyers are not approaching these cases in this

165. This question is closely tied to the problem of getting consent from a class. See Rhode, *supra* note 9, at 1212-15.

166. Cf. Bellow & Kettleson, *supra* note 25, at 359 (discussing the problem of consent in the context of legal services programs for indigents); MODEL RULES Rule 1.2 cmt. (1983) (providing that a lawyer cannot make a client change her objectives to such an extent that Rule 1.1 is violated).

167. Chayes, *supra* note 2, at 1294-95.

168. HOROWITZ, *supra* note 150, at ch. 7; LUBAN, *supra* note 7, at 309.

manner, in part because they are not always aware at the outset what implementation will entail,¹⁶⁹ and in part presumably because most clients would probably not agree to this approach.

IV. OBJECTIONS TO THE RECOGNITION OF A DUTY

At least three objections to the recognition of a particular ethical duty on the part of lawyers to actively seek and monitor implementation are apparent. First, because there is almost never an orderly progression from the court order through the implementation, it would be difficult to evaluate the lawyer's behavior against the end result of implementation. It is generally recognized that the final result will never be exactly what was ordered or agreed to at the outset because of the many variables that go into implementation and the unanticipated problems that arise and have to be addressed individually.¹⁷⁰ Even an evaluation of the progress of implementation may be difficult as a lawyer may simply not be able to break the intransigence of certain defendants.¹⁷¹ This objection, however, fails for two reasons. First, most of the ethics rules in both the *Model Code* and the *Model Rules* are open to the same objection. For example, *Model Rule* 1.1 is renowned for its vagueness.¹⁷² If easy evaluation were a necessary component to ethical obligations, it would be almost impossible to articulate these obligations. In fact, it may be in the very nature of ethics rules that they are ambiguous.¹⁷³

Second, this objection looks to the wrong standard for evaluation. The fulfillment of the ethical duty must be judged by the lawyer's actions in pursuing implementation, not in the end result. In the event of a disciplinary proceeding or malpractice action based on this duty, phone logs, time sheets, number of new clients, as well as the progress of implementation and the attitude and compliance efforts of the defendants, to name just a few elements, could be examined to see whether the lawyer had spent sufficient time and energy on implementation.¹⁷⁴ Courts might also look at whether the attorney attempted to gain an understanding of the defendant's institution.¹⁷⁵ Numerous practical constraints, such as

169. See *supra* note 24 and accompanying text.

170. See JEFFREY L. PRESSMAN & AARON WILDAVSKY, IMPLEMENTATION 143 (1973) (noting the variables arising from the litigation that make implementation difficult).

171. See, e.g., *Implementing Structural Injunctions: Getting a Remedy When Local Officials Resist*, 80 GEO. L. J. 2227, 2249-50 (1992) (describing the intransigence of council members, for political reasons, to vote for legislation to carry out a federal district court's order to build desegregated housing in Yonkers); Kirp & Babcock, *supra* note 4, at 374-75.

172. Wilkens, *supra* note 27, at 480-81.

173. See *id.* (arguing that all legal rules are ambiguous and the ethics rules are no exception).

174. See Harris, *supra* note 70, at 381-83 (noting that other relevant factors might include socio-historical context and public attitudes in the media); Harris, *supra* note 79, at 191 (finding that the plaintiff's attorneys' use of the media to publicize the defendants' failure to comply with court orders "played a very important role in achieving compliance").

175. Sturm, *supra* note 82, at 43-44 (discussing how at the remedial stage of corrections litigation, effective enforcement includes a lawyer understanding the institution's procedure and personnel).

availability of adequate funds to achieve compliance, would influence any evaluation of attorney conduct. Finally, a lawyer has some protection in the ethics codes for the exercise of her professional judgment in making decisions about the pursuit of implementation. For example, DR 7-101(B)(1) allows an attorney, in the exercise of her professional judgment, to fail to assert a right or position of a client.¹⁷⁶

Evaluation of an attorney's fulfillment of this duty could also depend in part on whether there was a special master or other judicial assistant appointed to monitor the remedy and the extent to which the court intended that that party usurp some of the attorney's functions.¹⁷⁷ It may be that the involvement of non-parties has the perceived effect of relieving plaintiffs' lawyers from participation. If the role of monitoring compliance is explicitly given to a third party, then the lawyer might consider her role limited to traditional adversary procedures, such as bringing actions for modification of the decree and contempt in the event of noncompliance. That the appointment of a special master does not relieve plaintiffs' attorneys of their implementation duties, however, is generally recognized.¹⁷⁸ Plaintiffs' lawyers occupy a unique position vis-a-vis the implementation of remedial orders in institutional reform litigation because in such cases "the scope of the violation determines the nature and extent of the remedy."¹⁷⁹ The plaintiffs' lawyer developed the theory of rights that led to the court's order. In developing a litigation strategy, the lawyer more than any other participant in the litigation learns what the interests of the clients are and how the clients envision relief. In fact, as one scholar has put it, one problem with the broad grant of power to masters in implementation "is the realization that implicit in the formulation of a remedial plan is the understanding of the wrong to be remedied. When courts grant the institutional reform master great latitude in fashioning an appropriate remedy, invariably the master's own concepts of constitutionally acceptable conduct will color his recommendations."¹⁸⁰

This concern was echoed by the plaintiffs' attorneys in *Collins v. Schoonfield*, who opposed the appointment of a third party to oversee compliance because they believed it would take too long for a such a newcomer, not involved in the issues at the pre-trial and trial stage, to become effective.¹⁸¹

Moreover, masters and monitors, although often explicitly given the task of

176. MODEL CODE DR 7-101(B)(1).

177. See Vincent M. Nathan, *The Use of Masters in Institutional Reform Litigation*, 10 TOLEDO L. REV. 419, 446 (1979) (stating that if the attorney cannot or will not fulfill these duties, the master must, but Nathan is not explicit about where the duty properly lies).

178. See, e.g., *Halderman v. Pennhurst State School and Hospital*, 612 F.2d 84, 112 (3d Cir. 1979).

179. *Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1, 16 (1978).

180. *Dobray*, *supra* note 26, at 590; see also *Harris*, *supra* note 79, at 192 (noting that there is evidence that masters themselves expect that attorneys will continue to communicate with their clients throughout the compliance stage, and bring relevant complaints to the attention of the master).

181. 363 F.Supp. 1152 (D. Md. 1973). See *Harris*, *supra* note 70, at 399.

developing a remedial plan and monitoring its implementation, are delegates of the judge, not the parties.¹⁸² Judges recognize that by the use of masters, they can “minimize [their] personal participation in the details of implementation without sacrificing direct control or efficacy.”¹⁸³ There is some concern, at least in the scholarly literature, that monitors and masters have increasingly been exercising more power both as to fact gathering and as to fact determinations.¹⁸⁴ Courts tend to accept these determinations without much oversight which has been seen as a possible threat to the adversary system as well as to the Article III powers of judges.¹⁸⁵ Some have gone so far as to argue that excessive delegation may denigrate the legitimacy of federal judges:

Perhaps the most serious risk attending the use of an institutional reform master is that some may perceive the master’s relationship to the court as embodying an inappropriate, even corrupt, delegation of judicial authority. Appointed in the hope of securing an effective remedy, the master may instead jeopardize the court’s legitimacy.¹⁸⁶

Thus, recognition of a specific ethical obligation on plaintiffs’ lawyers to pursue compliance with court-ordered institutional remedies presents no more difficult a task of evaluation than any other ethical duty. Moreover, the presence of other compliance mechanisms may narrow, but should not eliminate, this duty.

The second objection to the recognition of the ethics of implementation is that the last thing lawyers, or society, need is one more basis for malpractice actions and discipline. The answer to this is simply that the duty, as has been discussed in this Article, already exists in the context of “ordinary” litigation,¹⁸⁷ as well as in the ethical rules and probably in the minds of most clients. As such, enforcing this ethical duty would only entail the recognition of a duty that is already there. Perhaps even more important is the fact that lawyers who do not explicitly agree with their clients at the outset that they are only trying to set a precedent are not doing for their clients what they were hired for and agreed to do. This is the most basic form of unethical activity.¹⁸⁸ On the other hand, given the practical considerations that work against enforcement of this duty, it might be argued that

182. See Fed. R. Civ. P. 53 (1996) (noting that a special master is appointed by the court and given specified authority by that court); see also Donald Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1993 DUKE L. J. 1265, 1274-1276 (discussing expansive powers of district court judges to appoint masters to assist with implementation under Fed. R. Civ. P. 53).

183. *Halderman v. Pennhurst State School and Hospital*, 612 F.2d 84, 111 (3d Cir. 1979).

184. *Dobray*, *supra* note 26, at 591.

185. *Id.*; Kirp & Babcock, *supra* note 4, at 385.

186. Kirp & Babcock, *supra* note 4, at 323.

187. At least one court has recognized a malpractice action against a lawyer where the client claimed the lawyer was negligent in not collecting a judgment. See *DiPalma v. Seldman*, 33 Cal. Rptr. 2d 219 (Cal. Ct. App. 1994) (showing a malpractice action can include a claim that the lawyer failed to collect on a judgment, provided the plaintiff can demonstrate that the judgment debtor was solvent).

188. The duty of competence is the first in both the *Model Rules* and the *Model Code*.

there is no point in the duty's recognition. But lack of enforcement is endemic in the realm of lawyers' ethical duties and is not a legitimate reason to do away with standards, even if many of them remain aspirational in nature. As Rhode has put it:

Whatever the likelihood of enforcement, a collective affirmation of professional values may have some effect simply by supplying, or removing, one source of rationalization for dubious conduct. It becomes marginally easier to justify the use of substantially misleading evidence when the profession's formal norms decline to direct otherwise. Conversely, standards pitched at a more demanding level can reinforce the lawyer who would prefer the ethical course but is reluctant to appear sanctimonious.¹⁸⁹

In addition, aspirational rules establish standards by which individual lawyers can measure their own behavior, and peer groups can exert pressure. As another commentator has stated:

The use of coercive sanctions is by no means the sole, or even the most important means by which a profession uses a code to regulate the conduct of its members. Most professions rely on both the 'internal sanction of professional conscience' and the 'informal external sanction of peer criticism' to promote compliance with professional norms. Codes can help articulate and reinforce these norms as they are used during 'socialization into the professional subculture' and in ritual and ceremonial occasions.¹⁹⁰

Finally, it might be objected that raising the ethical standards in a realm of practice dominated by public interest and legal services lawyers would chill that kind of practice. Public interest lawyers are already doing a public service and are relied upon by the disadvantaged as their only access point to the legal system.¹⁹¹ The other way to look at it, however, is that by recognizing these duties, lawyers will improve the ultimate outcomes in institutional reform litigation, helping both their clients in particular and the legitimacy of the process in general.

Moreover, this view of the obligations of legal services lawyers has already been applied to legal services lawyers under their own professional code. *The Standards for Providers of Civil Legal Services to the Poor*, approved by the American Bar Association, impose a specific duty on legal services lawyers to pursue the enforcement of remedies. Standard 5.3-6 and its commentary state:

WHEN A FAVORABLE JUDGMENT, SETTLEMENT, OR ORDER IS OBTAINED, REASONABLE STEPS SHOULD BE TAKEN TO ENSURE THAT THE CLIENT RECEIVES THE BENEFIT THUS CONFERRED.

Effective representation of a client does not necessarily stop when a favorable judgment or settlement is obtained. The lawyer should take reasonable steps to assure that the adversary complies with the order, judgment, or

189. Rhode, *supra* note 38, at 648.

190. Nancy Moore, *The Usefulness of Ethics Codes*, in 1989 ANNUAL SURVEY OF AMERICAN LAW 7, 14 (1989).

191. Bellow & Kettleson, *supra* note 24, at 399-400.

settlement. Enforcement strategies should be part of long-range case planning from the outset of any litigation. . . .

. . . . If an order is obtained that involves a class of persons, the provider should notify all affected persons and enforce compliance.

Occasionally, particularly in complex matters, enforcement of compliance will become an extremely costly, long term endeavor that may be beyond the resources of the provider to pursue. To the extent that such costs are predictable the provider should by prior agreement at the onset of the representation establish with the client an understanding of the limits on what the provider will undertake on the client's behalf. (See Rule 1.2(c) of the Model Rules of Professional Conduct.) If otherwise consistent with the ethical duty owed to the client, a practitioner may withdraw from representation, if the continued representation will impose an unreasonable financial burden. (See Rule 1.16(b)(5) of the Model Rules of Professional Conduct.)¹⁹²

Although the language is somewhat equivocal as to the scope of the duty to pursue implementation, and employs the *Model Rules* to moderate the duty, there is at least a clear recognition that such a duty exists and that it must be considered by the practitioner. Interestingly, in an earlier draft of the standards, there was a more explicit recognition that the loss of interest in the case at this stage of the litigation was a recurring problem:

Because litigation so naturally focuses the efforts of an advocate to win at trial or to negotiate a favorable compromise, there is frequently a tendency to relax aggressive efforts on behalf of clients when it appears that victory has been achieved. Obtaining a favorable judgment or settlement, however, does not necessarily mean that there will be willing compliance with that agreement or order An advocate should be diligent, therefore, in assuring that orders, judgments, and settlements are complied with.¹⁹³

IV. CONCLUSION

It may be that lurking behind the failure of many of the remedies in institutional reform litigation are plaintiffs' lawyers who lack the ability and desire to seek implementation of institutional remedies. Unlike other analyses of institutional reform litigation, which have driven some scholars to throw up their hands and announce the ineffectiveness, if not positive harm, resulting from this type of litigation,¹⁹⁴ this problem may be solvable, and in the solving may eliminate other perceived difficulties with these types of cases. It may be that part of the reason that institutional reform litigation often leads only to symbolic victories is that there is not enough partisan involvement on the part of plaintiffs'

192. STANDARDS FOR PROVIDERS OF LEGAL SERVICES, *supra* note 1, at 5.3-6 (citations omitted).

193. STANDARDS FOR PROVIDERS OF LEGAL SERVICES § 2.7-1 (Discussion Draft 1981).

194. See HOROWITZ, *supra* note 150; ROSENBERG, *supra* note 150.

lawyers with implementation.¹⁹⁵

It must be noted that this Article does not assert that the ethical duty of implementation is grounded in the practical goal of improving society through institutional reform litigation. It is an empirical question whether this goal is better served by spreading resources so that many cases get litigated and precedent is set, but there is little left over to use for monitoring implementation (arguably the situation now), or by litigating fewer cases and using more resources toward implementation.¹⁹⁶ To state the issue perhaps more starkly than reality warrants, in the former case, more cases are taken on, but many of the clients end up disappointed by the lack of change in their lives, presumably the very reason for becoming involved in the litigation to begin with. In the latter situation, fewer individuals are heard in court, but those who are, and who win, see real change in their lives.¹⁹⁷ As an empirical matter, we do not know whether it is more effective to set legal precedent on the assumption that it will avoid other litigation by creating law in conformance with which other potential defendants will subsequently change their behavior, or whether achieving implementation in a smaller number of cases would demonstrate the success of such litigation to potential defendants who would then have an incentive to change their behavior on their own, knowing that if they are sued and lose, they will in fact have to change.¹⁹⁸ It has recently been observed that institutional reform litigation in the area of corrections is in the process of shifting from a "test case, law reform model to an implementation model."¹⁹⁹ This is due in part to the fact that so much legal precedent has already been set that attention now naturally turns to the implementation of these new legal norms.²⁰⁰ This observation supports the recognition of an ethical duty of zeal at the implementation stage, as well as an interpretation of the ethics codes which favors competence over caseload.²⁰¹

The duty to pursue implementation, even in lieu of taking on new clients, derives from the attorney-client relationship, the fundamental premise of which is that the lawyer treat the client as an autonomous individual and help that client

195. This is suggested by one of the survey responses received by Tractenberg. That attorney was "sharply critical of attorneys in school desegregation litigation for their failure to understand and deal effectively with the remedial and compliance stages" of education reform litigation. Tractenberg, *supra* note 5, at 428 n.31; Sturm, *The Legacy and Future of Corrections Litigation*, *supra* note 82, at 734 ("The regular presence of lawyers raising questions can itself improve the quality of service delivery within an institution, and resolve some issues without litigation.").

196. Bellow & Kettleson, *supra* note 25, at 380 (stating that it is neither likely nor necessarily desirable that there will ever be enough lawyers to litigate and effectively implement all of the potential cases that may exist).

197. *See id.* at 453-62 (discussing the problems brought on by scarce resources in public interest practice and the intractability of the dilemma between serving fewer clients more fully and serving more clients inadequately).

198. *But see id.* at 383 (suggesting that with increased enforcement of rules would come the shrinking of the scope of those rules to maintain the existing balance of wealth and power in society).

199. Sturm, *The Legacy and Future of Corrections Litigation*, *supra* note 82, at 707.

200. *Id.* at 711.

201. *See supra* note 96 and accompanying text.

achieve her lawful goals.²⁰² This premise is constant, although expressed in varying ways and with varying emphasis throughout the literature on legal ethics. The clients in these types of cases do not go to lawyers simply to win a lawsuit but to bring about a change in their lives to which they believe they are entitled, whether it be humane treatment in a prison, or an improved educational environment. As Luban put it, "few people seek access to the legal system because they crave legal vindication for its own sake; rather, they view recourse to the law as a way to obtain something else of value to them."²⁰³

No matter what one's view of a lawyer's duty to take on a client or one's view as to the appropriate remedy in these situations (subjects of an ongoing and complicated debate²⁰⁴), once a remedy has been chosen, its implementation, the real "winning" of the case as far as the client is concerned, is well within the attorney's purview. It is indisputable that in the context of traditional, civil litigation, lawyers as a matter of duty as well as routine turn to the collection of the money judgment after a case is won.²⁰⁵ There is no logical reason why it should not extend to cases where injunctions are the remedy of choice. Understood in the context of the attorney-client relationship, the ethical duty to pursue implementation has a natural place.

Moreover, the ethics of implementation can also be seen as justified by the lawyer's duty to the court. The legitimacy of the court's order depends to a large degree on its being effectively carried out. As Abram Chayes has stated: "In practice, if not in words, the American legal tradition has always acknowledged the importance of substantive results for the legitimacy and accountability of judicial action."²⁰⁶ In fact, the crucial observation that unites all of the opponents of court-ordered institutional change is that these remedies often are not carried out or, if carried out, do not often achieve their intended effect.²⁰⁷ Although clearly there are instances where constant vigilance and active participation in implementation would probably not make any difference in the final outcome,²⁰⁸ it is also evident that the ability of a court to get its order implemented effectively would enhance the apparent legitimacy of the court's involvement in these types of cases. Preserving the legitimacy of the judiciary is arguably one expression of a lawyer's duty as an officer of the court.²⁰⁹

202. All of the approaches to legal ethics retain this in one form or another.

203. LUBAN, *supra* note 7, at 309.

204. Simon, *supra* note 7; Bell, *supra* note 9; Rhode, *supra* note 9; Freedman, *supra* note 4; HOROWITZ, *supra* note 143.

205. See *supra* notes 21-22 and accompanying text. Cf. ABA Comm. on Ethics & Professional Responsibility, Informal Op. 827 (1965). The dearth of case law and scholarly literature on this point, coupled with anecdotal evidence that lawyers do in fact seek to collect their clients' judgments, is what makes this point indisputable.

206. Chayes, *supra* note 2, at 1316.

207. ROSENBERG, *supra* note 150, at 31-32.

208. See *supra* note 171 and accompanying text.

209. WOLFRAM, *supra* note 132, at 17-18.

To some extent, this analysis has artificially set aside the very real problems presented by the scarcity of lawyers, resources, and time endemic to public interest practice in general²¹⁰ and the lengthy, drawn out, and complicated process of implementation in particular.²¹¹ It is easy to say that a lawyer has an ethical duty in regard to implementation but it is harder to determine exactly how to carry out that duty within the constraints of practice. But there are small steps that can be taken toward the fulfillment of this duty. There is ample evidence that plaintiffs' lawyers are not prepared for the difficulty encountered in implementation.²¹² Arguably, it is unfair to impose an ethical duty on lawyers for something that is beyond their competence. On the other hand, it has also been noted that lawyers are capable of monitoring and when they do, compliance with orders improves.²¹³ It may be less a question of lawyer's competence than of the need for lawyers to recognize and internalize a duty that arises naturally from the web of duties already widely accepted by the profession. It may be incumbent upon lawyers who bring institutional cases to think about the remedy ahead of time and prepare themselves with a strategy for the effective monitoring of implementation. The current shift toward an implementation model of institutional reform litigation, chronicled by Sturm in the corrections context,²¹⁴ indicates that the recognition of a duty to pursue implementation is a necessary, pragmatic development. The next step is to develop standards by which to prescribe and measure lawyers' performance at the implementation stage. The recognition of a duty at this stage also makes judges more aware of a reciprocal responsibility to pay closer attention to the plaintiffs' lawyer's activities at the implementation stage.²¹⁵ A lawyer's actual duty in any particular case may depend on a variety of factors, including the extent to which one of the other enforcement mechanisms represents the plaintiffs' interests and is willing to pursue those interests with the defendant.²¹⁶ But the ethical duty of the lawyer must always be consistent with the lawyer's "special responsibility for the *quality* of justice."²¹⁷

210. Bellow & Kettleson, *supra* note 25.

211. *Id.* at 382-84. Bellow & Kettleson note that often plaintiffs who win in litigation are unable to reap the benefits because of their the social and economic status. *See id.* at 383. Another problem is the "burn-out" experienced by lawyers who do actively pursue implementation and therefore remain on a case for years after the initial judgment has been reached. *See Harris, supra* note 70, at 397. *See also* CHRISTOPHER STONE, *WHERE THE LAW ENDS* 27-69 (1975) (discussing the different effects certain sanctions have on organizations as opposed to individuals).

212. *See supra* notes 23-28 and accompanying text; Sturm, *The Legacy and Future of Corrections Litigation, supra* note 82, at 713 ("Plaintiffs' lawyers frequently fail to recognize and account for the dynamics of running a correctional institution in their remedial decrees.").

213. *See supra* notes 77-82 and accompanying text.

214. Sturm, *The Legacy and Future of Corrections Litigation, supra* note 82, at 727.

215. Judges are already responsible for monitoring lawyers for plaintiff classes until the case is closed. *See, e.g.,* McNeil v. Guthrie, 945 F.2d 1163, 1166 (10th Cir. 1991); Foe v. Cuomo, 92 F.2d 196, 198 (2d Cir. 1989).

216. Nathan, *supra* note 177, at 446 (noting that as attorney activity and interest in the case decreases, the court's reliance on the special master must increase).

217. MODEL RULES pmbl.