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The Ethical Practice of Human-Centered Civil Justice Design

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THE ETHICAL PRACTICE OF HUMAN-CENTERED CIVIL JUSTICE DESIGN

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ABSTRACT

Over the past two decades, legal professionals have increasingly engaged in a new form of professional activity: civil justice design. In the past, legal professionals handled cases and transactions for clients or served as neutrals, including mediators and arbitrators, who helped to resolve disputes between parties. Today, legal professionals increasingly play a principal design role in creating systems that resolve streams of conflicts, disputes, and grievances between parties. Lawyers regularly now create internal grievance procedures, procedures for companies to resolve disputes with customers, and court-annexed alternative dispute resolution systems. The emergence of this new role raises difficult questions about the ethics and responsibilities that attach to legal professionals who serve as civil justice designers. The primary ethical dilemma for these civil justice designers will be the tension between, on the one hand, maximizing a client's interest and, on the other, providing the public with vibrant, fair, just, and legitimate institutions for resolving disputes. The Model Rules of Professional Conduct offer little guidance on how to resolve these tensions, and socialization into the legal profession may lead legal professionals to distance themselves from ethical responsibilities. These trends and conditions may result in systemic civil justice problems and a tragedy of the commons, which saps the longevity of our legal institutions. Yet there is a wider more virtuous moral principle that applies to all human relations: the principle of neighborly morality. In this article, I discuss the principle of neighborly morality and an analytical framework developed by Professors Howard Gardner, Mihaly Csikszentmihalyi, and William Damon for understanding role ethics. I discuss the ethical responsibilities that apply to civil justice designers, including the criteria of excellence, engagement, and ethics, and a reflective practice of dispute system design, human-centered civil justice design, which assists civil justice designers in resolving this tension.

INTRODUCTION

Over the past two decades, legal professionals have increasingly engaged in a new form of professional activity: civil justice design.[1] In the past, legal professionals handled cases and transactions for clients

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1. *See* Victor D. Quintanilla, *Human-Centered Civil Justice Design*, 121 PENN ST. L. REV. 745 (2017); *infra* Part I.

or served as neutrals, including mediators and arbitrators, who helped to resolve disputes between parties. Today, legal professionals increasingly play a principal design role in creating systems that resolve streams of conflicts, disputes, and grievances between parties. Often, these legal professionals seek to create dispute systems that are cost efficient and effective. For example, lawyers regularly now create internal grievance procedures, procedures for companies to resolve disputes with customers, and court-annexed alternative dispute resolution systems.[2]

In short, legal professionals now increasingly serve in a relatively new social and professional role: the role of civil justice designer. This trend is desirable. When legal professionals occupy new roles in society, they bring important skills and habits of mind, often including commitments to preserve the legitimacy of legal institutions and serve the public.[3]

Yet the emergence of this new role raises difficult questions about the ethics and responsibilities that attach to legal professionals who serve as civil justice designers. The primary ethical dilemma for these civil justice designers will be the tension between, on the one hand, maximizing a client's interest and, on the other, providing the public with vibrant, fair, just, and legitimate institutions for resolving disputes.[4] The professional ethics that apply to civil justice designers must assist in resolving this tension. In this article, I discuss the ethical responsibilities that apply to civil justice designers and a reflective practice of dispute system design, *human-centered civil justice design*, which assists legal professionals in resolving this tension.

The first challenge is that while lawyers increasingly serve in the new role of civil justice designer, the professional responsibilities that attach to this role are ill-defined.[5] For example, the American Bar Association ("ABA") Model Rules of Professional Conduct ("Model Rules" or "Rules") elaborate the responsibilities that emanate from the duty to serve clients, but offer little guidance on how to reconcile the tension between serving a client's interest and avoiding harm to the public when designing civil justice systems. Even so, when legal professionals engage in civil justice design, their labor impacts not only their clients, but also the diverse array of stakeholders affected by any dispute system through which streams of conflict flow. While the Preamble of the Model Rules of Professional Conduct calls on legal professionals to serve as officers of the court and to care about the quality of justice, these aspirational calls are not binding and are in marked tension with other aspects of the Model Rules, which describe a legal professional's

2. *See* discussion and notes *infra* Part I.

3. *See* discussion and notes *infra* Part I.

4. *See* discussion and notes *infra* Part II and Part IV; *see, e.g.*, Victor D. Quintanilla & Alexander B. Avtgis, *The Public Believes Predispute Binding Arbitration Clauses Are Unjust: Ethical Implications for Dispute-System Design in the Time of Vanishing Trials*, 85 FORDHAM L. REV. 2119 (2017).

5. *See* discussion and notes *infra* Part II.

primary duty as emanating from the lawyer-client relationship.[6] Further, empirical research suggests that legal education and professional socialization threaten these public-spirited aspirations from taking root.[7] Taken together, this dearth of guidance in the Model Rules of Professional Conduct and the deleterious effects of professional socialization may leave lawyers with the belief that they must zealously advance their client's interest when designing a system for resolving disputes.

Were a legal professional to disregard the harm they cause to stakeholders and the public when designing a civil justice system, that indifference would be inconsistent with a wider, more virtuous moral principle that applies to all human relations.[8] "Do unto others as you wish them to do to you" is a moral precept of human relations that is virtually universally endorsed.[9] Indeed, the basic intuitions guiding the "Golden Rule" can be found reflected in world religions and western and eastern philosophical systems.[10] This moral compass of neighborly morality speaks to the importance of avoiding harm to others, and treating others well, and has roots in faith, philosophy, and science.[11]

The second challenge is extending this basic precept of neighborly morality into a role ethic for civil justice designers.[12] For example, while the principle itself warns against harming others within one's community, the principle alone is insufficient for specifying the role ethic and responsibilities that attach to newly emerging roles in society. In this article, I will apply the analytical framework created by Professors Howard Gardner, Mihaly Csikszentmihalyi, and William Damon for analyzing role ethics.[13] Under this framework, new professional roles require three virtues: excellence, engagement, and ethics.[14] For example, when a legal professional engages in civil justice design, the lawyer has a responsibility to develop expertise and knowledge of the specialized knowledge in the field on how to design systems that resolve streams of conflict. Developing this expertise would meet the criteria of excellence. Next, when a legal professional engages in civil justice design, the lawyer has a responsibility to truly understand and learn the nature of causes and conditions that may improve or harm the aspirations, needs, and common concerns for those whom she designs. Developing this understanding from stakeholders about the context in which she designs would meet the criteria of engagement. Finally, a civil justice designer would have the responsibility to act ethically, to avoid harm, and to have compassion for those whom she seeks to serve.

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6. *See* discussion and notes *infra* Part II.
7. *See* discussion and notes *infra* Part II.
8. *See* discussion and notes *infra* Part III.
9. *See* discussion and notes *infra* Part III.
10. *See* discussion and notes *infra* Part III.
11. *See* discussion and notes *infra* Part III.
12. *See* discussion and notes *infra* Part IV.
13. *See generally* HOWARD GARDNER, TRUTH, BEAUTY, AND GOODNESS REFRAMED (2011).
14. *See* discussion and notes *infra* Part IV.

The final challenge is identifying a practice or process whereby civil justice designers can accomplish the three criteria of excellence, engagement, and ethics.[15] In this article, I illuminate one such ethical practice, *human-centered civil justice design*, which can be adopted by law-trained individuals who seek to serve others in the role as civil justice designers or architects.[16]

I. GROWTH OF DISPUTE-SYSTEM DESIGN AND THE ROLE OF CIVIL JUSTICE DESIGNERS

In the past fifty years, we have witnessed a rise in the number of legal professionals who serve in a relatively new role: the role of civil justice designer.[17] The emergence of this new role for legal professionals parallels the shift in emphasis from practicing traditional forms of adversarial litigation toward creating dispute systems that solve conflict between repeat players and designing internal grievance structures within private organizations[18] and court-annexed alternative dispute resolution (ADR).[19] As the need for creating effective dispute systems has increased, legal professionals have been called to shift their emphasis from harnessing ex-post procedures to litigate disputes to designing ex-ante structures that resolve streams of disputes in an effective manner.[20]

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15. *See* discussion and notes *infra* Part V.

16. *See* Quintanilla, *supra* note 1; discussion and notes *infra* Part V.

17. The role of civil justice designer differs from the role of mediator or arbitrator. By way of example, whereas mediators and arbitrators largely administer a process of alternative dispute resolution, a civil justice designer would explicitly reflect on and create the court-annexed ADR system in which these mediators or arbitrators are called on to serve. Leaders in organizations such as the American Arbitration Association ("AAA"), the Center for Public Resources Institute for Dispute Resolution ("CPR"), and the Association of Conflict Resolution, insofar as they develop structures, protocols, and practices that comprise the dispute system in which conflicts are resolved serve in the role of civil justice designers. From another angle, the distinction shifts from the perspective of a neutral who seeks to resolve a dispute on behalf of particular parties, to the perspective of an architect who reflects on the features of a wider system or structure through which a stream of present or future disputes and conflicts will flow.

18. *See, e.g.*, Lisa Blomgren Bingham, Cynthia J. Hallberlin, Denise A. Walker & Won-Tae Chung, *Dispute System Design and Justice in Employment Dispute Resolution: Mediation at the Workplace*, 14 HARV. NEGOT. L. REV. 1 (2009) (dispute system design and internal grievance systems); Lauren B. Edelman & Mark C. Suchman, *When the "Haves" Hold Court: Speculations on the Organizational Internationalization of Law*, 33 L. & SOC'Y REV. 941 (1999) (on the rise of private dispute resolution within organizations); DAVID B. LIPSKY ET AL., EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT: LESSONS FROM AMERICAN CORPORATIONS FOR MANAGERS AND DISPUTE RESOLUTION PROFESSIONALS 6 (2003).

19. *See* Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN. ST. L. REV. 165 (2003); Frank E.A. Sander, Varieties of Dispute Processing, Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7–9, 1976) in 70 F.R.D. 79, 111 (1976).

20. *See* WILLIAM L. URY, JEANNE M. BRETT & STEPHEN B. GOLDBERG, GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT 41–42 (1988) ("[A] dispute resolution system is designed to reduce the costs of handling disputes and to produce more satisfying and durable resolutions."); Carrie Menkel-Meadow, *The Lawyer as Consensus Builder: Ethics for a New Practice*, 70 TENN. L. REV. 63, 80 (2002) [hereinafter

The field of dispute system design began in the context of labor management and internal grievance structures.[21] For example, in the late 1980s, legal professionals began creating structures to resolve grievances between employees and employers.[22] Later, legal professionals became involved in developing ADR procedures,[23] fashioning, for example, court-annexed mediation and non-binding arbitration alternatives to jury trials.[24] Over the past decade, legal professionals also began creating binding consumer arbitration regimes, which have proliferated in recent years.[25]

Legal professionals now routinely serve private and public organizations by creating systems to resolve streams of conflict that emanate from harm to employees and customers along with the grievances that flow from these adverse events.[26] Legal professionals are involved in creating dispute systems that serve stakeholders inside private and public organizations;[27] affected stakeholders outside organizations, such as customers and members of the public harmed by business activity;[28] and between users of online platforms.[29] Judges and lawyers, moreover, are increasingly involved in creating (or improving upon) problem-

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Menkel-Meadow, *The Lawyer as Consensus Builder*]; Shauhin A. Talesh, *How Dispute Resolution System Design Matters: An Organizational Analysis of Dispute Resolution Structures and Consumer Lemon Laws*, 46 L. & SOC'Y. REV. 463, 466 (2012) [hereinafter Talesh, *How Dispute Resolution System Design Matters*].

21. *See* URY ET. AL., *supra* note 20, at 41–64; Lisa Blomgren Bingham, *Designing Justice: Legal Institutions and Other Systems for Managing Conflict*, 24 OHIO ST. J. ON DISP. RESOL. 1, 10 (2008).

22. *See, e.g.*, URY ET. AL., *supra* note 20, at 41–64; *see* LIPSKY ET AL., *supra* note 18, at 6–8.

23. *See* Hensler, *supra* note 19, at 174–181; Paul D. Carrington, *ADR and Future Adjudication: A Primer on Dispute Resolution*, 15 REV. LITIG. 485 (1996).

24. *See, e.g.*, DIVORCE MEDIATION: THEORY AND PRACTICE (Jay Folberg & Ann Milne eds., 1988); E. ALLAN LIND & JOHN E. SHAPARD, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS (1983); ELIZABETH ROLPH, INTRODUCING COURT-ANNEXED ARBITRATION: A POLICYMAKER'S GUIDE (1984).

25. Quintanilla & Avtgis, *supra* note 4; *see also* J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L. J. 3052, 3074–75 (2015); Patrick E. Higginbotham, *The Present Plight of the United States District Courts*, 60 DUKE L. J. 745, 752 (2010); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L. J. 2804, 2808–11 (2015).

26. *See, e.g.*, NANCY H. ROGERS ET AL., DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES (2013); LISA BLOMGREN AMSLER, JANET MARTINEZ & STEPHANIE SMITH, DISPUTE SYSTEM DESIGN (2017).

27. *See, e.g.*, Blomgren Bingham et al., *supra* note 18, at 2–4; *see generally* CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS (1996).

28. Talesh, *How Dispute Resolution System Design Matters*, *supra* note 20, at 464–66 (tracing the development of ADR systems that allowed automobile manufacturers to resolve disputes with dissatisfied customers); Robert H. Jerry, II, *Dispute Resolution, Insurance, and Points of Convergence*, 2015 J. DISP. RESOL. 255, 262–64 (2015) (tracing ADR response to natural disasters to Hurricane Andrew in 1992); Tracy A. Thomas, *Symposium: Remedies For Big Disasters: The BP Gulf Oil Spill and the Quest For Complete Justice*, 45 AKRON L. REV. 567 (2012).

29. Orna Rabinovich-Einy & Ethan Katsh, *Technology and the Future of Dispute Systems Design*, 17 HARV. NEGOT. L. REV. 151, 164–75 (2012) (describing the emergence of Online Dispute Resolution (ODR) in the early stages of the internet, and outlining a need for more DSD principles in ODR, and vice versa).

solving courts,[30] deciding how space within courthouses can be best used, and deciding how to allocate scarce resources across the state to legal aid providers to improve the statewide delivery of access to justice.[31] Finally, legal professionals have been called to design systems to resolve disputes emerging from mass-scale events that affect wide swaths of society, such as the dispute systems designed after September 11 and the BP oil spill.[32] Often situations like these present challenges for those who create dispute processing systems and call for creativity and innovation to meet the needs, concerns, and aspirations of stakeholders effectively.

Like other authors, I use the word *design* to mean the intentional and reflective creation of a system or process to achieve a set of goals. Whereas others have written about dispute system design in the context of intra-organizational conflicts (employer-employee disputes) and conflicts between repeat-player parties with continuing relationships and transactions (business-supplier), by *civil justice design* I mean to connote a broader family of reflective activity, including designing systems and processes that seek to serve the public or that affect the quality of public legal institutions. Legal professionals, both judges and lawyers, are increasingly called to serve in the role of civil justice designers when creating processes, systems, and institutions for stakeholders and the public.[33] When engaged in the role of civil justice designer, legal professionals work closely with stakeholders and communities with affected interests to diagnose problems and needs, they design and implement systems that seek to address these problems and needs, and evaluate the performance of the systems designed.[34]

In the 1970s, Professor Frank Sander envisioned the trend toward court-annexed alternative dispute resolution structures and coined the term the "multi-door courthouse."[35] Today, when viewed across the arc of a professional career and when examining the many roles performed by a legal professional at a particular time, lawyers serve as "multi-role" legal professionals. At multiple points in a legal professional's career, she may serve in the role of a litigator, transactional attorney, and civil

30. Menkel-Meadow, *The Lawyer as Consensus Builder*, *supra* note 20, at 81; Shauhin Talesh, *Mental Health Court Judges as Dynamic Risk Managers: A New Conceptualization of the Role of Judges*, 57 DEPAUL L. REV. 93, 113–27 (2007) (outlining the role of judges in problem-solving mental health courts).

31. *See* Laura Abel, *Designing Access: Using Institutional Design to Improve Decision Making About the Distribution of Free Civil Legal Aid*, 7 HARV. L. & POL'Y REV. 61, 81–82 (2013).

32. Lawyers use their consensus-building skills in public policy contexts to facilitate complex debates around legislative rule-drafting and regulatory negotiations (called negotiated rulemaking or "reg-neg"). Acting as neutral facilitators, lawyers can help stakeholders reach solutions to complex problems such as environmental clean-up plans. *See* Menkel-Meadow, *The Lawyer as Consensus Builder*, *supra* note 20, at 75–76; *see also* Maria R. Volpe, *Post Disaster ADR Responses: Promises and Challenges*, 26 FORDHAM ENVTL. L. REV. 95, 96–99 (2014).

33. *See* Quintanilla, *supra* note 1; Edelman & Suchman, *supra* note 18; Talesh, *How Dispute Resolution System Design Matters*, *supra* note 20.

34. *See generally* Quintanilla, *supra* note 1; ROGERS ET. AL., *supra* note 26; AMSLER, MARTINEZ & SMITH, *supra* note 26.

35. Sander, *supra* note 19, at 111.

justice designer. So too, in a judge's career, a judge may serve in the role of a neutral arbiter within the courtroom and in the role of an architect, designer, or administrator of within-court or out-of-court processes, systems, or institutions on the public's behalf.

That legal professionals are increasingly inhabiting these roles is desirable. Legal professionals, for example, often bring a public spiritedness to their work on behalf of communities and habits of mind that include close study of processes and how people interact with these processes. Indeed, lawyers serve a unique, indispensable role that serves the public's interest, which involves the intermediation of class, policy, and partisan interests, or private interests, public values, and institutions. Alexis de Tocqueville elaborated this wider ethic,[36] Talcott Parsons expounded on it,[37] and Louis Brandeis also advanced this more public spiritedness.[38] As Anthony Kronman has stated,

> Lawyers serve the private interests of their clients but they also care about the integrity and justice of the legal system that defines the public order within which these interests are pursued. In this way they provide a link between the realms of public and of private life, helping to rejoin what the forces of privatization are constantly pulling apart.[39]

Lawyers aspire to safeguard the legitimacy of the civil justice system and our public institutions, and, as public-spirited professionals, work for democracy to flourish. Yet, as this role has increasingly emerged, one pressing challenge has been defining the ethics or the best practices in this new and emerging area of civil justice design. The ethics and responsibilities that apply to legal professionals in these new roles are not specified in traditional formulations of model rules.[40] This lack

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36. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 243 (J.P. Mayer & Max Lerner eds., George Lawrence trans., Harper & Row, Publishers 1966) (1835) ("[Lawyers] serve as arbiters between the citizens . . . .").

37. *See* TALCOTT PARSONS, *A Sociologist Looks at the Legal Profession*, *in* ESSAYS IN SOCIOLOGICAL THEORY 370, 370–71 (The Free Press rev. ed. 1954) (elaborating the role of lawyers as serving both clients and the public interest, a role that maintains stability and dynamism in democratic society); TALCOTT PARSONS, *The Professions and Social Structure*, *in* ESSAYS IN SOCIOLOGICAL THEORY 34, 38 (The Free Press rev. ed. 1954).

38. *See* Louis D. Brandeis, Address to the Harvard Ethical Society: The Opportunity in the Law (May 4, 1905), *in* BUSINESS—A PROFESSION 329 (Small, Maynard & Co. 1925) (discussing the role of lawyers in protecting public interest); *see also* Robert F. Cochran, Jr., *Louis D. Brandeis and the Lawyer Advocacy System*, 40 PEPP. L. REV. 351, 354–56 (2013).

39. Anthony T. Kronman, *Professionalism*, 2 J. INST. FOR STUDY LEGAL ETHICS 89, 95 (1999).

40. *See* Menkel-Meadow, *The Lawyer as Consensus Builder*, *supra* note 20, at 113. ("Our legal ethical standards (as lawyers) do not provide useful beacons of light as we navigate in these new, but much needed, roles."); Bingham, *supra* note 21, 47–48 (2008) ("However, individual practitioners find themselves designing justice, and we do not have ethical guidance for them in this emerging role."); Louise Otis & Eric H. Reiter, *Mediation by Judges: A New Phenomenon in the Transformation of Justice*, 6 PEPP. DISP. RESOL. L.J. 351, 369 (2006) (Otis and Reiter discuss the possibilities of institutionalizing alternative dispute resolution within courts, as well as the precautions that would be necessary if judges took on roles in these processes. "It is important as well to acknowledge that mediation requires judges to play a different role than their familiar adjudicative function."); Orna Rabinovich-Einy, *The Legitimacy Crisis and the Future of Courts*, 17 CARDOZO J. CONFLICT

of specification stems from the wide gap between these newly emerging roles and traditional legal roles exemplified by the lawyer-client relationship.[41]

II. Civil Justice Designers, the Model Rules of Professional Conduct, and Concerns About Zealous Advocacy

The rise of this new role raises questions about the ethical responsibilities and contours of a lawyer's role when engaged in civil justice design. At root, the ethical quandary will be not whether this new form of practice is good for legal professionals or clients, but instead whether the role of civil justice designer is good for the public at large.[42] The chief difficulty is that the Model Rules of Professional Conduct are primarily geared for the responsibilities that flow to clients within the lawyer-client relationship, and largely in the context of the adversarial process.[43]

In this regard, Professors Vicki Jackson and Carrie Menkel-Meadow have reasoned that the Model Rules fail to recognize lawyers in what is publicly recognized as among the most important role a lawyer performs—that of a "constructive lawyer."[44] The Model Code of Judicial Conduct is similarly limited insofar as it is primarily geared to the role of judges as neutral decision-makers in disputes within the courtroom.[45] As such, in this section, we examine the extent to which (if at

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Resol. 23 (2015) (arguing that informal dispute resolution processes that grew out of ADR in the 1970s and 1980s have created a need for new sources of legitimacy outside of the formal rule codes).

41. *See infra* Part II.

42. *See* David Luban, *Asking the Right Questions*, 72 Temp. L. Rev. 839, 839 (1999) ("The right question is not whether new roles with no rules are good for lawyers and clients, but rather whether they are good for the rest of us—'us' being the citizenry who count on lawyers to be guardians of the law, and who market forces will not necessarily protect.").

43. *See generally* Kimberlee K. Kovach, *The Intersection (Collision) of Ethics, Law, and Dispute Resolution: Clashes, Crashes, No Stops, Yields, or Rights of Way*, 49 S. Tex. L. Rev. 789, 808–10 (2008) ("Lawyers are viewed as problem solvers who are able to not only represent clients in court, but who are also able to view the entirety of the client's problems and envision a variety of solutions. This is a far different vision than that of lawyers as battle-warriors in court."); *see also* Carrie Menkel-Meadow, *Are There Systemic Ethics Issues in Dispute System Design? And What We Should [Not] Do About It: Lessons from International and Domestic Fronts*, 14 Harv. Negot. L. Rev. 195, 200–04 (2009).

44. *See* Menkel-Meadow, *The Lawyer as Consensus Builder*, *supra* note 20, at 72; Carrie Menkel-Meadow, *The Lawyer as Problem Solver and Third-Party Neutral: Creativity and Non-Partisanship in Lawyering*, 72 Temp. L. Rev. 785, 786 (1999) (quoting Vicki Jackson, Professor, Remarks at the Meeting of the CPR Comm'n on Problem Solving in Legal Educ., at Geo. Univ. L. Ctr. (Oct. 22, 1999)).

45. Canon 3 of the Model Code of Judicial Conduct addresses "extrajudicial activities." It begins with Rule 3.1, which says: "[W]hen engaging in extrajudicial activities, a judge shall not: (A) participate in activities that will interfere with the proper performance of the judge's judicial duties; (B) participate in activities that will lead to frequent disqualification of the judge; (C) participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality; (D) engage in conduct that would appear to a reasonable person to be coercive; or (E) make use of court premises, staff, stationery, equipment, or other resources, except for incidental use for activities that concern the law, the legal system, or the administration of justice, or

all) the Model Rules of Professional Conduct delimit the conduct and craft of lawyers engaged in civil justice design.[46]

A. *The Model Rules of Professional Conduct*

The ABA Model Rules of Professional Conduct outline broad professional duties that lawyers have to their clients and aspirations of how legal professionals will serve the court, the bar, and the public. While the Rules recognize that lawyers may serve in multiple roles, including as counselors,[47] prosecutors,[48] and government lawyers,[49] the Rules emphasize the lawyer-client relationship and the role of lawyers in the adversarial process.[50] In light of the Rules' emphasis on the lawyer-client relationship, many lawyers conceive of the lawyer's duty as that of zealously advocating on behalf of their clients' interests.[51] The Model Rules do not speak to the role that lawyers play when designing legal

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unless such additional use is permitted by law." MODEL CODE OF JUD. CONDUCT r. 3.1 (AM. BAR ASS'N 2007). *See also* Kimberlee K. Kovach, *The Intersection (Collision) of Ethics, Law, and Dispute Resolution: Clashes, Crashes, No Stops, Yields, or Rights of Way*, 49 S. TEX. L. REV. 789, 821 (2008) ("Judges themselves, who mix the role of mediators and adjudicators, confront ethical dilemmas . . . . Yet, what guidelines govern [mediation participants'] conduct?").

46. While we reference the Model Rules of Professional Conduct, this code is a model that many states have adopted. The promulgated state codes would serve as the positive law in particular jurisdictions. *See* Lucian T. Pera, *Grading ABA Leadership on Legal Ethics Leadership: State Adoption of the Revised ABA Model Rules of Professional Conduct*, 30 OKLA. CITY U. L. REV. 637 (2005) (tracking state adoption of the ABA's 2002 amendments to the Model Rules); Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned,"* 14 GEO. J. LEGAL ETHICS 55, 55 (2000) (writing that forty-nine states have adopted some version of the ABA's Model Code of Judicial Conduct).

47. *See* MODEL RULES OF PROF'L CONDUCT r. 3.9 (AM. BAR ASS'N 2016) (discussing the procedures a lawyer must follow when "representing a client before a legislative body or administrative agency in a nonajudicative proceeding").

48. *See id.* at r. 3.8 (discussing the particular ethical responsibilities of prosecutors in criminal cases).

49. *See id.* at r. 1.11 (discussing conflicts of interest specific to current and former government lawyers).

50. *See, e.g.*, *id.* at r. 2.1, r. 2.3–2.4 (stating that a lawyer may advise a client on "moral, economic, social and political" considerations, provide a third party with "an evaluation of a matter affecting a client" if "compatible with . . . the lawyer's relationship with the client[,]" and serve as a third-party neutral for "two or more persons who are not" the lawyer's clients).

51. *See, e.g.*, Menkel-Meadow, *The Lawyer as Consensus Builder*, *supra* note 20; MODEL RULES OF PROF'L CONDUCT pmbl. (AM. BAR ASS'N 2016); *see also* MODEL RULES OF PROF'L CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 2016) ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."). The principle of zealous advocacy as expressed within the professional rules has waxed and waned across time. For example, the ABA Model Code of Professional Responsibility previously stated, "[t]he duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law." MODEL CODE OF PROF'L RESP. EC 7-1 (AM. BAR ASS'N 1980). While the ABA's Ethical Considerations were not mandatory, they were aspirational and represented the objectives toward which every member of the profession should strive and constituted a body of principles upon which lawyers can rely for guidance in many specific situations. *See* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 11 (1988) (discussing how wide and narrow understandings of this principle have dueled across time); *see also* Carol Rice Andrews, *Ethical Limits on Civil*

processes or institutions that serve the public whether within or without the attorney-client relationship.

Lawyers who engage in dispute system design within the scope of an attorney-client relationship invariably face tension between the norm of zealously advancing their client's interests and a wider ethic that seeks to limit harm to third parties and guard the quality of justice for all. For example, a legal professional who serves in the role of a dispute system designer may seek to maximize his or her client's economic interest with zeal. In this regard, the Model Rules of Professional Conduct state, "[a]s advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."[52] From this perspective, dispute system designers working at the behest of clients might deduce an ethical principle that says they should advance their clients' interests with zeal, rather than to weigh whether the public's interest in a just, fair, neutral, and legitimate civil justice system is in conflict with their client's interests.[53] The ethical principle of zealously advancing a client's interest may motivate these dispute system designers to select features of a dispute system that advance their client's economic interests as far as they can go within the broad delegation and discretion of decision-making authority allowed.[54]

Litigation Advocacy: A Historical Perspective, 63 CASE W. RES. L. REV. 381, 427–35 (2012); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1084–90 (1988).

52. MODEL RULES OF PROF'L CONDUCT pmbl. (AM. BAR ASS'N 2016); *see also* Michael H. Rubin, *The Ethical Utah Lawyer: What Are the Limits in Negotiation?*, 21 UTAH B.J. (2d ser.) 15, 15 (2008) ("Variations of the phrase 'zealous advocate' are currently relegated to mere aspirational statements in the Preamble to both the ABA Model Rules and the Utah Rules of Professional Conduct . . . . [Y]et, this has not stopped lawyers from using the phrase or courts from extolling it."); 35 COLO. L. 105, 122 (2006) (showing that the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct solicited comments in 2006 on the use of "zealous" during its review of the ABA's 2002 version of the Model Rules); *see also* 35 COLO. L. 105, *supra* at 122 ("A majority of the Standing Committee, however, believes that the concept of zealous representation within the bounds of the law remains a valuable guidepost for lawyers and, accordingly, recommends retention of the words 'zeal,' 'zealous' and 'zealously' in the Preamble and in the Comment to Rule 1.3."); *see also* Anita Bernstein, *The Zeal Shortage*, 34 HOFSTRA L. REV. 1165, 1193 (2006) ("Regarding zeal, the Rules make only one occupational distinction: the Preamble assigns this duty most clearly to the lawyer who serves as advocate. In response, commentators have divided on the question of whether, or to what extent, zeal applies to lawyers outside the context of litigation and similar settings where the client faces an adversary." (footnote omitted)).

53. *See* Quintanilla & Avtgis, *supra* note 4, at 2133; DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 49–80 (2000); Austin Sarat, *The Profession Versus the Public Interest: Reflections on Two Reifications*, 54 STAN. L. REV. 1491, 1493 (2002) (book review).

54. *See* Robin West, *The Zealous Advocacy of Justice in a Less Than Ideal Legal World*, 51 STAN. L. REV. 973, 974 (1999) ("The ideal of lawyering espoused by the profession, and memorialized by the various codes of ethics that govern it, strips the lawyer of responsibility for the moral quality of not only his clients' ends but also of his own actions taken on his clients' behalf—and all on the dubious bet that by so doing, the system, in some mechanistic and formalistic manner, will almost miraculously crank out justice as the outcome."). Commitment to a specific role conception can also be a vehicle for judges to pursue results without considering the impact decisions have on outside parties. *See, e.g.*,

For example, a zealously client-centered dispute system designer may engage in zero-sum thinking and maximize one side—their client's interest—when designing dispute system structures irrespective of the quality of justice or degradation to the rule of law. A dispute system designer may seek to zealously advance their client's financial interests by imposing a binding design structure on swaths of the public that extinguishes the public's legal rights and provides a meaningless form of redress with no commitment to avoid transgressing rights in the future. In doing so, they would fail to consider the public's perspective and fail to enact dispute resolution procedures that lead to neutral, unbiased, and just outcomes. This zealous advocacy would impair the legal infrastructure that supports private ordering, and it would come at the expense of the public's ability to rely on a just legal infrastructure that the public demands in a vibrant democracy that abides by the rule of law.[55]

This zealously client-centered system design activity is in tension with the aspirations of the Preamble to the Model Rules of Professional Conduct, which calls for broad social responsibilities and states that "[a] lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."[56] While the Preamble discusses the responsibility to zealously advocate on behalf of clients, it places this responsibility inside a broader aspiration to "seek[ ] a result advantageous to the client but consistent with requirements of honest dealings with others."[57] In this way, the Preamble reminds lawyers that they have a duty of integrity that extends beyond their client relationships and that extends to third parties.

The Preamble goes on to assert that as "public citizen[s]," lawyers are responsible for seeking to improve the law.[58] It advises legal professionals to improve the quality of service of the legal system and access to legal services.[59] Lawyers have a duty to increase the public's confidence in and understanding of legal institutions, and "should devote professional time and resources and use civic influence" to eliminate barriers to justice.[60] This section also acknowledges that the cost of legal services can be a barrier to justice for many, and it calls on lawyers to help remedy this problem.[61] The Preamble later says that "[a] lawyer should strive to . . . exemplify the legal profession's ideals of public service."[62]

Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1590 (1987) ("Fidelity to rules and to the autonomy of a legal system, and belief in its internal coherence, can support a judicial decisionmaker's avoidance of empathy and of his responsibility for human pain caused by law.").

55. *See* Quintanilla & Avtgis, *supra* note 4, at 2133; *cf.* MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 15–18, 33 (2013).

56. MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 1 (AM. BAR ASS'N 2016).

57. *Id.* at pmbl. ¶ 2.

58. *Id.* at pmbl. ¶ 6.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at pmbl. ¶ 7.

Model Rule 6.1 discusses pro bono practice, and says a lawyer should aspire to provide at least fifty hours of pro bono service annually. The rule says lawyers should also participate in activities that "improv[e] the law, the legal system, or the legal profession."[63] Together, the Preamble and Rule 6.1 describe a general civic and professional aspiration and duty. However, these principles offer little guidance to lawyers who serve in the role of civil justice designers who have clients with immediate concrete interests in developing a dispute system that deals with streams of disputes which may be in conflict with the public's interest in the quality of justice.

In the main, the Model Rules place primary emphasis on duties to clients and offer little guidance or mandatory obligations about how to design systems in light of the public's concern for a just and effective civil justice system. Almost all the statements above are phrased in terms of "should." According to the Preamble, "may" and "should" are used throughout the Rules to describe permissive or discretionary acts.[64] While the actions described above are recommended, there is no formal mechanism for ensuring professionals in the legal system abide by them.[65] By contrast, mandates in the Rules are signaled by the words "shall" or "shall not."[66]

Another limitation to the Model Rules is that often, responsibilities to third parties are framed in terms of a duty to a client. For example, Rule 4.4 on transactions with people who are not clients says, "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."[67] By using "shall not," this rule creates a mandate about the treatment of third parties, but it frames that conduct in terms of a lawyer's relationships with clients. Rule 1.6 similarly places ethical decisions in the context of the client relationship by making it permissible for a lawyer to breach client confidences "to prevent reasonably certain death or substantial bodily harm," or "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another *and in furtherance of which the client has used or is using the lawyer's services.*"[68] The ABA amended Rule 1.6 in 2003, but its use of a "may" or permissibility standard stops short of mandating that lawyers prevent harm to others.[69]

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63. *Id.* at r. 6.1.

64. *Id.* at pmbl. ¶ 14.

65. *Id.*

66. *Id.*

67. *Id.* at r. 4.4.

68. *Id.* at r. 1.6 (emphasis added).

69. Eugene R. Gaetke, *Expecting Too Much and Too Little of Lawyers*, 67 U. PITT. L. REV. 693, 727 (2006) ("To the extent that lawyers in general are viewed as not making enough disclosures to protect non-clients' interests, the level of discretion embraced by the new amendments' treatment of confidentiality is not likely to be the answer to the problem."); *see* David Lew, *Revised Model Rule 1.6: What Effect Will the New Rule Have on*

Overall, the Model Rules of Professional Conduct envision a profession that is actively engaged in serving clients, while at the same time aspirationally engaged in public service, striving to increase access to justice and faith in the legal system. Because the chief ethical quandary involves lawyers creating civil justice systems within lawyer-client relationships, dispute system design processes, and institutions that affect the public, the Model Rules offer little other than aspirational guidance, rather than prohibitions on the way this design activity is performed.

B. *Legal Education, Socialization, and Concerns about Zealous Advocacy*

While the Model Rules of Professional Conduct set forth the aspiration that lawyers will serve as officers of the legal system, and as public citizens having a special responsibility for the quality of justice, a growing body of work reveals that socialization into the legal profession and the formation of professional identities may threaten these values and ideals.[70] Within law schools, legal socialization is the process by which law students form their social and professional identities and "think like a lawyer."[71] Whereas research on legal socialization illuminates the "intense and transformative impact of legal education on students' understandings of what it means to be a lawyer,"[72] research on professional identify formation examines the formation of lawyers' self-conceptions, and the tension between serving clients and public values. In this section, I will briefly describe John Bliss's work on public interest drift, and findings from the Carnegie Report.[73]

In an analysis of "professional role distancing," John Bliss contrasted studies of "front-stage dynamics of law school classrooms" with "students' back-stage experiences of the professional role within their ongoing processes of self-construction" and sought to determine how law students engage in the process of "role distancing," or the process by which lawyers and law students distance their personal values from

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Practicing Attorneys?, 18 GEO. J. LEGAL ETHICS 881 (2005) (arguing that in the short-term, the ABA's permissive standard under Rule 1.6 will likely not result in more disclosures).

70. *See generally* WILLIAM M. SULLIVAN ET AL., CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 5 (2007); ELIZABETH MERTZ, THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER" (2007); Ronald M. Pipkin, *Law School Instruction in Professional Responsibility: A Curricular Paradox*, 4 L. & SOC. INQUIRY 247 (1979); Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31 (1992); DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY (2004); ROBERT GRANFIELD, MAKING ELITE LAWYERS 36–50 (1992); STUART A. SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING 51–71 (2004); James C. Foster, *The Cooling Out of Law Students—Facilitating Market Cooptation of Future Lawyers*, 3 L. & POL'Y Q. 243, 243–56 (1981); Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591 (1982); Craig Kubey, *Three Years of Adjustment: Where Your Ideals Go*, JURIS DR., Dec. 1976, at 34.

71. *See* SULLIVAN ET AL., *supra* note 70, at 5; *see generally* MERTZ, *supra* note 70.

72. John Bliss, *Divided Selves: Professional Role Distancing Among Law Students and New Lawyers in a Period of Market Crisis*, 42 L. & SOC. INQUIRY 855, 861 (2017) (quoting SCHEINGOLD & SARAT, *supra* note 70, at 57).

73. I will leave for another day a more extensive discussion of these phenomena.

their professional identities.[74] He examined this phenomenon in the context of "public interest drift," or the data showing that law students "'drift' away from public-interest-career commitment" throughout law school.[75] Bliss summarizes research tending to show that as students complete the socialization process and learn to think like lawyers, "they learn to eschew moral, political, and other contextual aspects of case analysis."[76] Bliss attributes some of this to "professional bifurcation," or the idea that lawyers need to separate their personal values from their clients' interests in order to foster "'zealous advocacy' for [their] client[s] irrespective of the client's cause."[77]

Moreover, the Carnegie Foundation attributed aspects of this troubling socialization to law school pedagogy, particularly the emphasis on "the procedural and systematic" and the case method of teaching.[78] For example, the study found that "most law schools emphasize the priority of analytic thinking, in which students learn to categorize and discuss persons and events in highly generalized terms."[79] At the same time, law students are encouraged to discard "facts" that do not have legal significance.[80] "Students discover that to 'think like a lawyer' means redefining messy situations of actual or potential conflict as opportunities for advancing a client's cause through legal argument before a judge or through negotiation."[81] Professors frequently discard arguments based on "social needs or matters of justice" as falling outside the "legal landscape."[82] In the process, students lose sight of how their moral and personal values can be integrated into their legal practices. In short, "students are told to set aside their desire for justice" and not let social justice-oriented concerns "cloud their legal analyses."[83]

In summary, the Model Rules of Professional Conduct ultimately delimit neither minimum standards for civil justice designers nor best practices, let alone a positive code of ethics for legal professionals engaged in civil justice design. Indeed, the chief difficulty with the Model Rules of Professional Conduct is that many legal professionals believe that their professional obligation is to zealously advance their client's economic interests. This view may create ethical tension with the aspiration of guarding the quality of justice for members of the public. Finally, given the process of legal socialization within law schools and in the first several years within the legal profession, the aspirations

74. *See generally* Bliss, *supra* note 72; GRANFIELD, *supra* note 70; Robert Granfield, *Cynicism and the Law: The Emergence of Legal Consciousness in Law School*, 25 J. SOC. PHIL. 188 (1994).

75. *See* Bliss, *supra* note 72.

76. *Id.*; *see also* GRANFIELD, *supra* note 70; Granfield, *supra* note 74, at 188.

77. Bliss, *supra* note 72, at 862.

78. SULLIVAN ET AL., *supra* note 70, at 5.

79. *Id.*

80. *Id.* at 5–6.

81. *Id.* at 6.

82. *Id.*

83. *Id.*

in the preamble to the Model Rules may be endangered by the demands of the client-centered legal profession as practiced today.

III. The Principle of Neighborly Morality: Avoiding Harm to Others and Caring for Members of One's Community

Having examined the extent to which the Model Rules of Professional Conduct delimit the conduct of legal professionals in the role of civil justice designers and found a dearth of guidance, we next turn to the moral and ethical principles that a professional has a responsibility to sustain when engaged in this emerging role.

The role of civil justice designer is a newly emerging societal role for legal professionals.[84] Whenever new professional roles emerge, we should reflect on the ethical dimensions and responsibilities of these new roles and examine the ethical principles that apply to professionals who engage in these new roles.[85] In this section, I examine the universal moral principle of avoiding harm to members of one's community and having compassionate regard for others, and briefly discuss the consensus among religious and secular sources for the importance of neighborly morality.[86] This principle of neighborly morality will serve as the starting point for the discussion in Part IV, which elaborates the role ethic and responsibilities of civil justice designers.

In this regard, a basic moral intuition applies in the course of how we as members of society are expected to relate to other members of our communities. To clarify concepts, when speaking of *ethical*, I draw distinction between the concept of *ethics*, which refers to specific rules and judgments, and *morality*, which consists of the underlying ideas about humans and the relationships on which those rules are based.[87] In this sense, by morality, I mean a property of our relations with other human beings—individuals whom we know well and also those who are unfamiliar, as well as groups, both close and remote.[88] *Morality* in this way entails interactions that exist between or among humans due to their common humanity, their mutual recognition of this fact, and their membership in some kind of community.[89]

This basic moral precept is one of avoiding harm to others and includes a conscious and compassionate regard for their well-being.

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84. *See* Ury et al., *supra* note 20, notes and sources.

85. *See* Gardner, *supra* note 13, at 79–84.

86. *See, e.g.*, A Global Ethic: The Declaration of the Parliament of the World's Religions (Hans Küng & Karl-Josef Kuschel eds., John Bowden trans., 2006); Gardner, *supra* note 13, at 79–84.

87. *See* Gardner, *supra* note 13, at 79–84. The terms morality and ethics have been used differently by scholars. *See also* Webb Keane, Ethical Life: Its Natural and Social Histories 18–19 (2016) ("Whereas morality deals with such questions as what one should do next, ethics concerns a manner of life—not momentary events but something that unfolds over the long term and is likely to vary according to one's circumstances. Viewed from this perspective, the trolley problem addresses an issue of morality, and the Kluane rabbit hunters, the nature of ethics. Ethics is thus less about decisions and the rules that should govern them than about virtues . . . .")

88. *See* Gardner, *supra* note 13, at 79–84.

89. *See id.* at 82.

The essence of this neighborly morality is that people's behavior toward others should be guided by the way they wish others to behave toward them. In particular, one should refrain from actions one wishes others not to commit against oneself. In this way, the Golden Rule echoes across cultures and experiences as a near-universal mandate on how to treat others. The Golden Rule emphasizes treating others as one wishes to be treated, and in particular serves to remind the observer to treat others of a lower "station" with respect.[90] The Golden Rule is not limited to our treatment of those people we know and interact with most closely. "[M]odern ethics has stressed the equal, basic value of *each* individual, and, hence, the obligation to consider remote as well as proximate others in thinking about what to do."[91]

The Golden Rule can be found reflected within major world religions, including Judeo-Christian and Chinese religious texts.[92] As quoted in the declaration of the parliament of the world religions:

> There is a principle which is found and has persisted in many religious and ethical traditions of humankind for thousands of years: What you do not wish done to yourself, do not do to others! Or in positive terms: What you wish done to yourself, do to others! This should be the irrevocable, unconditional norm for all areas of life, for families and communities, for races, nations and religions.[93]

These major world religions emphasize that moral conduct entails avoiding harm toward others and behaving with compassion. Whether it is in scriptural prescriptions or in the ideal or exemplary life that is admired across world religions, avoiding harm to others and behaving with compassion to those within one's community is a near universal basis for living a good life.[94]

In Judaism, the Ten Commandments include an ethic of restraint: a morality that prevents one from acting on one's immediate impulses, such as aversion and greed, and has prohibitions against murder, adultery, and theft, for example. Rabbi Hillel in the 1st century B.C. noted the centrality of this ethic of care when stating, "[w]hat is hateful to you, do not do to your neighbor: that is the whole Torah, while the rest is commentary thereof; go and learn it."[95]

In Christianity, in the Gospel of Saint John, "[m]y command is this: Love each other."[96] In the sermon of the Mount, "[a]ll things whatso-

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90. *See* JEFFREY WATTLES, THE GOLDEN RULE 172–73 (1996).

91. *See id.* at 172.

92. *See generally id.*

93. *See* A GLOBAL ETHIC: THE DECLARATION OF THE PARLIAMENT OF THE WORLD'S RELIGIONS, *supra* note 86, at 23.

94. *See generally* THE DALAI LAMA, TOWARD A TRUE KINSHIP OF FAITHS: HOW THE WORLD'S RELIGIONS CAN COME TOGETHER (2010).

95. 1 THE BABYLONIAN TALMUD: TRACTATE SHABBATH § 31*a* (I. Epstein, ed., H. Freedman, trans.), https://halakhah.com/shabbath/index.html. *See also Leviticus* 19:17–18 (King James) (*"Thou shalt not hate thy brother in thine heart: . . . but thou shalt love thy neighbor as thyself."*).

96. *John* 15:12–18 (New International).

ever ye would that men should do to you, do ye even so to them: for this is the law and the prophets."[97] "Thou shalt love thy neighbor as thyself."[98] In the Sermon on the Plain, in Luke, "[d]o to others as you would have them do to you."[99]

In Hinduism, there is a sense of a universal welfare for all beings, "[s]eers whose impurities have been destroyed, whose doubts have been dispelled, who have restrained themselves, who delight in the welfare of all beings, reach the nirvana of Brahman."[100] "One should never do that to another which one regards as injurious to one's own self. This, in brief, is the rule of Righteousness. One by acting in a different way by yielding to desire, becomes guilty of unrighteousness."[101]

So too in Islam, the Prophet Muhammad said, "[n]one of you [truly] believes until he wishes for his brother what he wishes for himself."[102] Similarly, a man once asked the Prophet Muhammad what was the best thing in Islam, who replied, "[t]o feed (the poor) and greet those whom you know and those whom you do not know."[103]

In Buddhism, "[i]n five ways should a clansman minister to his friends and familiars—by generosity, courtesy, benevolence, by treating them as he treats himself, and by being as good as his word."[104] Since others too care for their own selves, those who care for themselves should not hurt others. In Jainism, "a man should wander about treating all creatures as he himself would be treated."[105]

In Confucianism, "[o]ne word which sums up the basis of all good conduct . . . loving kindness. Do not do to others what you would not like yourself."[106] So too in *The Analects*, "Is there any single saying," asked Tzu Kung, "that one can act upon all day and every day?" The Master replied: "Never do to others what you would not like them to do to you."[107] In another dialogue on the thread running through the

97. *Matthew* 7:12 (King James).

98. *Leviticus* 19:18 (King James).

99. *Luke* 6:31 (New International).

100. THE BHAGAVAD GITA 5:25 (W.J. Johnson trans. 1994); *see also id.* at 3:20 ("Looking only to what maintains the world, you too must act."); *id.* at 12:13 ("Without hatred for any creature, friendly and compassionate, free from possessiveness and egoism"); *id.* at 16:2 ("Non-violence, truthfulness, freedom from anger, renunciation, tranquility, absence of calumny, compassion for creatures, freedom from greed, gentleness, modesty, steadiness").

101. MAHABHARATA, ANUSANA PARVA 113 (Kisari Mohan Ganguli trans. 1896), http://www.sacred-texts.com/hin/m13/m13b078.htm. *See also Yuddha Kanda, in* THE RAMAYANA OF VALMIKI 331–32 (Hari Prasad Shastri trans., 3d ed. 1976) ("A superior being does not render evil for evil; this is a maxim one should observe; the ornament of virtuous persons is their conduct. One should never harm the wicked, or the good, or even criminals meriting death. A noble soul will ever exercise compassion, even toward those who enjoy injuring others . . . . ").

102. AN-NAWAWI, FORTY HADITH (Ezzeddin Ibrahim & Denys Johnson-Davies trans. 1997). In the Qur'an, God is named the Compassionate and the Merciful.

103. SAHIH AL-BUKHARI loc. 12, (ebook) https://sunnah.com/bukhari/2.

104. UDANAVARGA 5:20 (Thupten Jinpa, trans.).

105. JAINA SUTRAS, SÛTRAKRITÂ?GA 1.11:33 (Hermann Jacobi trans., vol. 35, 1895) (ebook) http://www.sacred-texts.com/jai/sbe45/sbe4559.htm.

106. THE ANALECTS OF CONFUCIUS 15:23 (Arthur Waley trans., 1989).

107. *Id.*

doctrines, Tseng Tsu explained, "[o]ur Master's Way is simply this: Loyalty, consideration."[108]

This principle of neighborly morality, moreover, is woven throughout the great works and canon of Western philosophical thought. For example, Aristotle described our social relationships as a series of concentric social circles, beginning at the center with self-love, then closest friends and family, followed by fellow citizens, and finally, to the circle of friendship that includes every human being. Friends have similar views and activities, so they will for each other what they will for themselves.[109] Friendship includes goodwill—*wishing* good for the other, as for the other's sake; and a friend is also motivated to *act* to do good to his or her friend.[110] "To be friends, then, they must be mutually recognized as bearing goodwill and wishing well to each other . . . ."[111] In the outer circles of fellow citizens and all human beings, Aristotle's ideas of restoring justice through proper proportion and of an attitude of goodwill come into play.[112]

Immanuel Kant writes about duty—including duty toward others—as separate from wants or desires. Rational, principled thinking gives way to what is right and must therefore be done, regardless of what the actor or recipient wants.[113] For Kant, the hallmarks of goodwill and a good person are decisions based on moral law.[114] Kant believed that rational thinking rooted in moral law could be governed by a Categorical Imperative: "Act only according to that maxim whereby you can at the same time will that it should become a universal law."[115] The Categorical Imperative in this form provides a formula for assessing all other rules or moral mandates. Kant calls upon an actor to begin with a maxim that states her reasoning for a given course of action, and then to recast it as a universal law of nature, which all actors must adhere to. If the maxim is still conceivable and the actor rationally would or could still act on it as a universal law, then it is morally sound.[116] While Kant and John Stuart Mill are exemplars for different forms of philosophical (e.g., deontological vs. utilitarian) thought, J.S. Mill concluded that the Golden Rule converged with utilitarianism. In *Utilitarianism*, he wrote, "[t]o do as one would be done by, and to love one's neighbour as oneself, constitute the ideal perfection of utilitarian morality."[117]

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108. *Id.* at 4:15. Zoroastrianism: *That nature only is good what it shall not do unto another whatever is not good for its own self.*

109. *See* Aristotle, *Nicomachean Ethics*, *in* 9 GREAT BOOKS OF THE WESTERN WORLD 407 (W.D. Ross trans., 1952).

110. *See id.*

111. *See id. See also* DIOGENES LAERTIUS, LIVES AND OPINIONS OF EMINENT PHILOSOPHERS 188 (H.G. Bohn ed., C.D. Yonge trans. 1853).

112. *See* Aristotle, *supra* note 109.

113. IMMANUEL KANT, ETHICAL PHILOSOPHY 429–33 (James W. Ellington trans. 1983).

114. *Id.*

115. *Id.* at 421.

116. *Id.*

117. JOHN STUART MILL & JEREMY BENTHAM, UTILITARIANISM AND OTHER ESSAYS 288 (Alan Ryan ed. 1987).

IV. THE ROLE ETHIC AND RESPONSIBILITIES OF CIVIL JUSTICE DESIGNERS: EXCELLENCE, ENGAGEMENT, AND ETHICAL CONDUCT

While *neighborly morality*, or the Golden Rule, offers a moral compass to guide interactions between those who share membership in a community, *ethics* refers to a set of principles and practices applying to those who occupy roles within a complex and highly differentiated society.[118] In the realm of morality, one thinks of oneself as a member of a community and about one's interactions with other members of this community, whereas in the realm of role ethics, one thinks of oneself as occupying a role and about the responsibilities applying to persons within this role.[119]

As elaborated in Part II, the professional standards and principles regulating legal professionals who serve as civil justice designers have not yet fully emerged.[120] Yet, a growing number of lawyers now engage in civil justice design, and this trend will continue.[121] Until the role ethic of these civil justice designers is defined, the chief difficulty will be the tension between, on the one hand, serving clients who wish to maximize their own selfish interests in the design of a dispute system and, on the other, the public's interest in a civil justice system and in dispute systems that are fair, just, and legitimate.

Professors Howard Gardner, Mihaly Csikszentmihalyi, and William Damon have developed an evidence-based framework for understanding the responsibilities that apply to professionals who occupy roles in society and how these professionals can perform these roles ethically.[122] Their framework on good work contains three analytical criteria: *excellence, engagement,* and *ethics.*[123] Under this framework, good work is *excellent,* i.e., the work meets the technical standards of the relevant profession. Good work is *engaging,* i.e., the work is personally meaningful. Carrying out good work over a career proves too difficult unless the work is inviting and meaningful to the practitioner. Finally, good work is *ethical,* i.e., the work is carried out in a responsible, ethical manner. That is, a professional meeting the role ethics of a particular role constantly interrogates herself about what it means to be responsible in that role, seeks to behave in that way, and attempts to admit her failings and correct course.[124] This framework, and the three analytical criteria of excellence, engagement, and ethics are an important vehicle for translating the moral intuitions of neighborly morality into a role ethic that applies to civil justice designers.

To begin, in the realm of *excellence,* civil justice designers will become experts in the process of dispute system design, including

118. *See* GARDNER, *supra* note 13, at 79–84.
119. *See id.*
120. *See* text and notes referenced *supra* Part II.
121. *See* text and notes referenced *supra* Part I.
122. *See* GARDNER, *supra* note 13, at 88–94.
123. *See id.*
124. *See id.*

learning frameworks that help structure analyses of conflict streams and dispute systems, along with the multiple process options and variations available when constructing systems that resolve streams of disputes.[125] Civil justice designers will investigate the needs, aspirations, and concerns of stakeholders and affected parties, including the particular organizations, communities, cultures, histories and dynamics of disputes.[126] Civil justice designers should carefully reflect on whether the design that they seek to develop can actually accomplish what it was designed to do and how to evaluate and adapt systems as conditions change.[127] Excellence would entail knowledge about social psychology and about the social psychology of experienced justice; sociological and psychological accounts of organizational dynamics and conflict theory; knowledge of research methodologies for assessment; and a growth mindset that strives to learn these areas of knowledge, civil justice design, and stakeholder interests, aspirations, concerns, and needs.[128]

Moreover, a civil justice designer will gather data and develop hypotheses,[129] while at the same time embracing ambiguity as she learns from stakeholders and affected communities in a particular project. She would develop and discard theories and iterate and test pilots when developing possible interventions.

In the realm of *engagement*, civil justice designers will ensure that stakeholders, affected communities, and users of any system have input when creating a dispute system and have the ability to provide feedback about the effectiveness of the dispute system.[130] Civil justice designers

125. *See* URY ET AL., *supra* note 20, at 41–43; *see generally* ROGERS ET. AL., *supra* note 26; AMSLER ET. AL., *supra* note 26; Quintanilla, *supra* note 1, at 756–58.

126. *See* Quintanilla, *supra* note 1, at 756–58; Lisa Blomgren Bingham, *Designing Justice: Legal Institutions and Other Systems for Managing Conflict*, 24 OHIO ST. J. ON DISP. RESOL. 1, 4–6 (2008) (describing how Elinor Ostrom's institutional analysis framework can be applied to understand the multiple layers of dispute system design, including the action situation, the "(1) *rules* used by participants to order their relationships, (2) the attributes of the *biophysical world* that are acted upon in these arenas, and (3) the structure of the more general *community* within which any particular arena is placed").

127. *See* Quintanilla, *supra* note 1, at 756–58; Menkel-Meadow, *The Lawyer as Consensus Builder*, *supra* note 20, 108–109 (arguing that civil justice designers "should attempt to ensure that decisions . . . are implementable and that contingencies and future processes have been considered . . . . Effective process experts should also assist the parties in developing plans for contingencies or uncertainties in agreements or decisions and provide for future deliberative or dispute-resolution processes").

128. *See* Quintanilla, *supra* note 1, at 756–58.; *see generally* AMSLER ET AL., *supra* note 26; Menkel-Meadow, *The Lawyer as Consensus Builder*, *supra* note 20, 81–83.

129. *See* Quintanilla, *supra* note 1, at 756–58; AMSLER ET AL., *supra* note 26, at Chapter 5 (Evaluating Dispute System Design); *see also* Bingham, *supra* note 126, 48–50 (arguing that more data is needed to measure justice).

130. *See* Quintanilla, *supra* note 1, at 756–58; Menkel-Meadow, *The Lawyer as Consensus Builder*, *supra* note 20, at 103 ("Ensuring that a consensus-building process is legitimate by inviting all appropriate stakeholders is widely regarded as the key to the success of such processes and distinguishes such a deliberative democratic process from more conventional lawsuits or transactional matters."); Menkel-Meadow, *The Lawyer as Consensus Builder*, *supra* note 20, at 106 ("All identified stakeholders, whether direct constituents or in represented capacities, should have adequate opportunities to be heard and to participate in proceedings that may result in decisions affecting them. Parties and stakeholders should be able to choose representatives to represent or express their interests."); *see also*

will ensure that any process designed can be adequately explained to and understood by its users.[131] They should take responsibility for implementation and evaluation. They should be engaged when designing a system, seeking to truly understand and know the causes and conditions that may foster aspirations and fulfill human well-being, or that may create concerns and harm.[132] Drawing on this understanding, they would aspire to help others resolve problems when possible in peaceful and harmonious ways.

In the realm of *ethics*, while there is as yet no binding professional ethical code,[133] civil justice designers should nonetheless avoid harming the public, stakeholders, and affected members of the community.[134] They would seek to be compassionate toward all people affected by any proposed intervention and design. Civil justice designers should not become tools of a client that wants to use civil justice design to achieve inappropriate or illegitimate ends. Civil justice designers will ensure that their conduct ensures at minimum:[135] (1) that any dispute system provides the parties with self-determination, (2) that any dispute system is transparent and effectively communicated to ensure the parties provide their informed consent before entering the process,[136] including disclosure of any interests or relationships that

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Bingham, *supra* note 126, at 36 (arguing that voice contributes to a sense of justice); COSTANTINO & MERCHANT, *supra* note 27, at 64 ("Feedback as it relates to interest-based conflict management systems design requires both the ability and the willingness to ask how well things are working, to learn about what is not working, and to pursue making changes where necessary.").

131. *See* Bingham, *supra* note 126, at 38–39 (arguing that the ability of explanations, provided without ulterior motives, contribute to a sense of justice); URY ET AL., *supra* note 20, at 41–43; ROGERS ET AL., *supra* note 26; AMSLER ET AL., *supra* note 26; Quintanilla, *supra* note 1, at 756–58.

132. *See* COSTANTINO & MERCHANT, *supra* note 27, at 59 ("The first principle, putting the focus on interests, really means that the starting point in organizational conflict management becomes the statement, clarification, and illumination of the issue at hand from the perspective of the needs and concerns from the interest groups. In other words, rather than initially seeking various means to cover up the core concerns that give rise to the dispute through positions (one party's idea of a solution) and other strategies to mask the real problem or concern, the conflict management system is designed to provide processes at the outset that promote and support the identification of such core concerns.").

133. *See* Menkel-Meadow, *supra* note 43, at 205. There are, however, non-binding principles for ADR Provider Organizations. *See* CPR-GEORGETOWN COMMISSION ON ETHICS AND STANDARDS OF PRACTICE IN ADR, PRINCIPLES FOR ADR PROVIDER ORGANIZATIONS (2002), https://www.cpradr.org/resource-center/protocols-guidelines/ethics-codes/principles-for-adr-provider-organizations; *see also* MYRNA C. ADAMS ET AL., SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION, DESIGNING INTEGRATED CONFLICT MANAGEMENT SYSTEMS-GUIDELINES FOR PRACTITIONERS AND DECISION MAKERS IN ORGANIZATIONS (2001).

134. *See* AMSLER ET AL., *supra* note 26, at Chapter 6 (Ethics in System Design).

135. *See generally* AMSLER ET AL, *supra* note 26, at Chapter 6 (Ethics in System Design); Susan Nauss Exon, *Ethics and Online Dispute Resolution: From Evolution to Revolution*, 32 OHIO ST. J. ON DISP. RESOL. 609 (2017).

136. *See* Dale C. Hetzler & Ashley Nicole Speth, *Future Dispute System Design: Ethical Imperatives, Millennial and Beyond*, 24 OHIO ST. J. ON DISP. RESOL. 131 (2008). *See, e.g.*, AMERICAN BAR ASSOCIATION ET AL., MODEL STANDARDS FOR MEDIATORS § VI.B (2005); INTERNATIONAL OMBUDSMAN ASSOCIATION, IOA BEST PRACTICES: A SUPPLEMENT TO IOA'S STANDARDS OF PRACTICE § 4.1 (3d ed. 2009).

may affect the impartiality or independence of actors within the system, (3) that any dispute system reduces the actual and apparent conflicts of interest and commitment affecting the independence, neutrality, and impartiality of the system,[137] (4) that any dispute system does not undermine legal rights, (5) that any dispute system takes reasonable steps to protect the appropriate level of confidentiality, and (6) that any dispute system maintains quality and effectiveness while keeping the cost and time to users as low as possible.[138] They must ensure that their proposed civil justice design system does not systematically discriminate against or harm particular individuals.[139] They would exhibit certain qualities: empathy; compassion; a degree of creative confidence, abandoning the belief that problems cannot be solved; and a willingness to share feedback and improve in light of feedback from stakeholders and perspective taking.[140] To discharge their role ethically, civil justice designers would place the responsibility to serve the public over their own self-interest or self-gain.

The civil justice designer meeting the first criterion of this role ethic will be technically excellent—she will know the various concepts and methods for engaging in civil justice design and the theories of psychology and behavioral science relevant for designing systems that resolve streams of conflict. The civil justice designer meeting the second criterion of the role ethic will be engaged—she will care about what happens to members of the public affected by her design. Lastly, a civil justice designer meeting the final criterion of this role ethic will be ethical. She will avoid harming others and will serve the public over her own self-interest or self-gain. In broad brush strokes, these are the three criteria that apply to legal professionals who serve in the role of civil justice designer.

V. THE ETHICAL PRACTICE OF HUMAN-CENTERED CIVIL JUSTICE DESIGN

In this section, we introduce the process of human-centered civil justice design[141] and discuss how this ethical practice allows legal professionals to meet their role ethic and achieve excellence, engagement, and ethics when serving as a civil justice designer.

To begin, the practice of human-centered civil justice design weaves knowledge and best practices about design systems that exemplify excellence when engaging in the role of civil justice designer,

137. *See, e.g.*, Lisa B. Bingham, *Emerging Due Process Concerns in Employment Arbitration: A Look at Actual Cases*, 47 LAB. L.J. 108, 116–117 (1996); Cal. Rules of Court, Rule 3.859(c) (2009) ("The amount or nature of a mediator's fee must not be made contingent on the outcome of the mediation."); *see generally* Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189 (1997).

138. Jo DeMars, Susan Nauss Exon, Kimbelee K. Kovach, & Colin Rule, *Virtual Virtues: Ethical Considerations for Online Dispute Resolution Practice*, DISP. RESOL. MAG. (Fall 2010), at 6–10.

139. Menkel-Meadow, *The Lawyer as Consensus Builder*, *supra* note 20, at 109; *see also* Bingham, *supra* note 21, at 18–19.

140. Bingham, *supra* note 21, at 39 (discussing "interpersonal justice").

141. *See generally* Quintanilla, *supra* note 1.

while at the same time orienting the professional toward engaging with affected communities in an ethical manner. For example, the practice of human-centered civil justice design is rooted in human experiences with the processes, systems, people, and environments encountered when navigating the civil justice system and how these experiences interact with the entangled web of hardships and legal adversities people face every day.[142] Human-centered civil justice designers empathize and immerse themselves with intended beneficiaries and stakeholders (e.g., parties, lawyers, judges, and members of the public) through observation and interviews to uncover their needs and experiences, embracing and identifying those needs in order to determine stakeholders' interests and goals before narrowing and identifying the problems to be solved. These designers ideate and brainstorm a range of human-centered solutions before winnowing them down based on feasibility and financial viability. In this way, when legal professionals apply the practice of human-centered civil justice design they engage the role with excellence, engagement, and ethics.

Regarding these three criteria, human-centered civil justice design synthesizes insights and practices from two interdisciplinary strands: human-centered design thinking[143] and dispute system design.[144] Human-centered design thinking provides a framework for designing *with* communities affected by problems, allowing designers to deeply understand the people that they seek to serve when creating solutions stemming from the community's needs.[145] The approach is bottom-up, rather than top-down, and begins with the premise that the people who confront problems are the ones who hold the key to answering them.[146] Designers closely observe how people behave; how features and cues within environments affect thoughts, emotions, and behaviors (i.e., psychological experiences); and the meaning people make from the environments and the processes they encounter.

Regarding the criterion of excellence, human-centered civil justice design is a practice that seeks to improve our civil justice system. The approach aspires to promote a civil justice system that is experienced by the public as "just, speedy, and inexpensive"[147] and to prevent "wicked problems," including unintended consequences stemming from ill-

142. *See* Quintanilla, *supra* note 1, at 756–58; for a discussion of the human-centered design approach to problem solving, *see* TIM BROWN & BARRY KATZ, CHANGE BY DESIGN: HOW DESIGN THINKING TRANSFORMS ORGANIZATIONS AND INSPIRES INNOVATION 3–4, 50–53 (2009); IDEO.ORG, THE FIELD GUIDE TO HUMAN-CENTERED DESIGN 9–14, 71–73 (2015); Paul Brest, Nadia Roumani & Jason Bade, *Problem Solving, Human-Centered Design, and Strategic Processes*, STANFORD PACS (2015), http://pacscenter.stanford.edu/wp-content/uploads/2015/09/Download-the-full-article-here.pdf; Tim Brown, *Design Thinking*, HARV. BUS. REV. (Jun. 2008), https://hbr.org/2008/ 06/design-thinking.

143. *See* Quintanilla, *supra* note 1, at 756–58.

144. *See id.*

145. *See* BROWN & KATZ, *supra* note 142, at 39–40; IDEO.ORG, *supra* note 142, at 9; BREST ET AL., *supra* note 142, at 3; Brown, *supra* note 142, at 86.

146. *See, e.g.*, MARGARET GERTEIS ET AL., THROUGH THE PATIENT'S EYES: UNDERSTANDING AND PROMOTING PATIENT-CENTERED CARE 5 (1993) (describing patient-centered medicine as "an approach that consciously adopts the patient's perspective").

147. FED. R. CIV. P. 1.

crafted system design changes.[148] Civil justice designers realize these aspirations by harnessing the best practices of human-centered design and dispute system design. These best practices include: (1) uncovering the public's varied needs, goals, and concerns to identify the causes, conditions, and nature of problems and the extent to which the existing civil justice system departs from the public's needs and aspirations; and (2) iterating and conducting pilots of proposed civil justice interventions before formally redesigning the civil justice system.

Moreover, human-centered civil justice designers move through three overlapping spaces when designing an intervention: *inspiration*, *ideation*, and *implementation*.[149] Inspiration is the opportunity that motivates the search for solutions.[150] The *inspiration* stage entails identifying key beneficiaries and stakeholders (i.e., people and institutions that contribute to problems or solutions) and empathizing with them through direct observation, ethnography, surveys, psychological studies, and other forms of accessing their experiences and perspective-taking.[151] After designers identify stakeholders, they narrow the number of needs the specific project will address. Next, in the *ideation* stage, designers translate these insights and generate, develop, and test ideas, always considering the criteria of desirability, feasibility, and viability.[152] Finally, in the *implementation* stage, designers develop the best ideas into a concrete plan of action.

Regarding the criterion of engagement, in the *inspiration* stage, human-centered civil justice designers seek to empathize with the many beneficiaries and stakeholders of the civil justice system, conferring on them standing, dignity, and respect by ensuring that their needs, goals, and concerns are heard and considered.[153] These beneficiaries and

148. *See* Horst W. J. Rittel & Melvin M. Webber, *Dilemmas in a General Theory of Planning*, 4 POL'Y SCI. 155, 161 (1973) ("[Y]ou may agree that it becomes morally objectionable for the planner to treat a wicked problem as though it were a tame one, or to tame a wicked problem prematurely, or to refuse to recognize the inherent wickedness of social problems."); Richard Buchanan, *Wicked Problems in Design Thinking*, 8 DESIGN ISSUES 5, 15–16 (1992).

149. These are overlapping spaces rather than sequential stages of a lockstep methodology. The reason for the iterative, nonlinear nature is that design thinking is fundamentally an exploratory process; it will invariably make unexpected discoveries. *See also* BREST ET AL., *supra* note 142, at 26.

150. *See* BROWN & KATZ, *supra* note 142, at 16; IDEO.ORG, *supra* note 142, at 29.

151. *See, e.g.*, Dorothy Leonard & Jeffrey F. Rayport, *Spark Innovation Through Empathetic Design*, Harv. Bus. Rev. 102, 104 (1997) (describing empathic user-centered design as a process that involves "gathering, analyzing, and applying information gleaned from observation in the field"); FRANK E. RITTER ET AL., FOUNDATIONS FOR DESIGNING USER-CENTERED SYSTEMS: WHAT SYSTEMS DESIGNERS NEED TO KNOW ABOUT PEOPLE 4 (2014) (advocating a theory of systems design that includes "[r]eflection and experimentation with potential users of the system . . . throughout the design and development process").

152. BROWN & KATZ, *supra* note 142, at 16; IDEO.ORG, *supra* note 142, at 75.

153. This approach has been successful in the medical context. A traditional patient-centered model of treatment consists of six interconnected components that make doctors partners with their patients in diagnosis and treatment: (1) exploring both the disease and illness experience; (2) understanding the whole person; (3) finding common ground regarding management; (4) incorporating prevention and health promo-

stakeholders include parties to disputes, lawyers, judges, court administrators, and members of the public.[154] By examining the way in which people experience justice as well as the justiciable hardships people face, civil justice designers uncover the needs, concerns, and goals of stakeholders (which may conflict), as well as the meaning people make of experiences in the civil justice system.[155] This understanding may be collected through observation, interviews, surveys, focus groups, deep immersion within communities, and psychological and behavioral studies of stakeholder experiences.[156]

Next, in the *ideation* stage, human-centered civil justice designers involve stakeholders at multiple points in the design process, including brainstorming, evaluating, and piloting. This pluralism allows diverse perspectives to emerge and ensures that any civil justice intervention is balanced among the many process values promoted by the civil justice system. Finally, human-centered civil justice design is optimistic and humble, creating pilots in the *implementation* stage and testing these

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tion; (5) enhancing the patient-doctor relationship; and (6) being realistic. For example, a doctor who practices patient-centered care will involve patients in the decisionmaking process, make sure patients feel fully informed, treat patients' physical discomfort, and provide emotional support. GERTEIS ET AL., *supra* note 146, at 5–11. Studies suggest that there is a relationship between patient-centered care and positive patient outcomes, which may also be related to a patient's (1) "trust;" (2) "adherence to recommended treatment;" and (3) "continuity with health care providers." Mark Meterko et al., *Mortality Among Patients with Acute Myocardial Infarction: The Influences of Patient-Centered Care and Evidence-Based Medicine*, 45 HEALTH SERV. RES. 1188, 1189 (2010).

154. Each of these populations will have different perspectives that will cast light when learning the needs and concerns of the public and the way in which our civil justice design is experienced. Amartya Sen has reasoned about the importance of including the "impartial spectator," when addressing justice dilemmas, which in this context I take as including impartial, non-party members of the public who may have previously or who may in the future encounter and navigate the civil justice system. *See* AMARTYA K. SEN, THE IDEA OF JUSTICE 44–46 (2009).

155. One way in which we come to know the idea of justice is by observing justice and injustice in the world around us. *See* Aristotle, *Physics*, *in* 8 GREAT BOOKS OF THE WESTERN WORLD 259, 259 (W. D. Ross trans., 1952) ("When the objects of an inquiry, in any department, have principles, conditions, or elements, it is through acquaintance with these that knowledge, that is to say scientific knowledge, is attained."); *see also* John Locke, *An Essay Concerning Human Understanding*, *in* 35 GREAT BOOKS OF THE WESTERN WORLD 93, 121 (W. D. Ross trans., 1952) ("All ideas come from sensation or reflection."); George Berkeley, *A Treatise Concerning the Principles of Human Knowledge*, *in* 35 GREAT BOOKS OF THE WESTERN WORLD 401, 413 (W. D. Ross trans., 1952) ("[T]he existence of an idea consists in being perceived."); David Hume, *A Treatise of Human Nature*, *in* 35 GREAT BOOKS OF THE WESTERN WORLD 449, 457 (W. D. Ross trans., 1952) ("When we entertain, therefore, any suspicion that a philosophical term is employed without any meaning or idea (as is but too frequent), we need but enquire, from what impression is that supposed idea derived? And if it be impossible to assign any, this will serve to confirm our suspicion.") (emphasis deleted).

156. This approach can help design teams define and understand problems in a way that the beneficiaries and stakeholders may not be able to articulate. For example, in the business context, a consulting group observed consumers who carried both cell phones and beepers and realized that the consumers were using the combination as a way to screen calls—they would give special beeper codes to people whose calls they wanted to screen. From that observation, the consultants were able to realize a consumer "need for filtering capabilities on cell phones." Leonard & Rayport, *supra* note 151, at 106.

interventions with randomized controlled trials (RCTs) before integrating civil justice interventions more broadly.

By engaging in this iterative, bottom-up, pluralistic, and incremental process, human-centered civil justice designers can better avoid the wicked system problems and unintended consequences that befall less reflective design processes, achieving excellence in their role. RCTs offer an important benefit for civil justice designers who seek to isolate the causal effects of their system design interventions—and the mechanisms that undergird these effects. In this regard, piloting and implementing incremental design changes with RCTs would reveal whether interventions truly address human needs and aspirations—examining gaps between law in the books and law in action[157]—without unintentionally creating wicked system problems that diminish experiences of justice, unreasonably increase costs or delays, or frustrate access to justice.[158]

Throughout this process, designers harness pilots and prototypes to develop insight from stakeholders regarding the causes, conditions, and nature of civil justice problems. These pilots and prototypes are empirically tested with RCTs to explore the system-wide effects of any proposed intervention. Human-centered civil justice design accommodates the reality of our dynamic civil justice system and seeks to reconcile and promote diverse process values that are at times in tension with each other, such as efficiency and promoting both the opportunity to participate and human dignity.[159]

Human-centered civil justice designers draw from psychological and behavioral science on how members of the public experience the civil justice system and their encounters with court officials, including psychological science on procedural justice and distributive justice. Justice researchers have demonstrated that experiences of injustice erode the public's beliefs about the legitimacy of the civil justice system,

157. *See* Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 15 (1910); Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 457–59 (1930). This process of piloting and revising is crucial to any student-centered or learner-centered approach in education, for example. Because a student-centered approach seeks to tailor educational processes based on empirical and theoretical knowledge of students' cognitive development and individual learning styles, student-centered educators must open themselves up to feedback from students and must be willing to adjust their processes when they realize that their pedagogical techniques are not working for students. STUDENT-CENTERED LEARNING: NINE CLASSROOMS IN ACTION 186–88 (Bill Nave ed. 2015).

158. *See* Rittel & Webber, *supra* note 148, at 163 ("With wicked problems, . . . any solution, after being implemented, will generate waves of consequences over an extended—virtually an unbounded—period of time. Moreover, the next day's consequences of the solution may yield utterly undesirable repercussions which outweigh the intended advantages or the advantages accomplished hitherto. In such cases, one would have been better off if the plan had never been carried out.").

159. *See* Quintanilla, *supra* note 1, at 756–58; *see generally* Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 6 DUKE L.J. 1153, 1171–77 (1973).

whereas experiences of justice foster beliefs about legitimacy.[160] Indeed, decades of research reveals that a sense of justice powerfully influences compliance with legal decrees,[161] cooperation with legal authorities,[162] and engagement in other pro-social,[163] participatory,[164] and democratic behaviors.[165] These plural effects nourish a vibrant American democracy.[166] The public's experiences of justice are, therefore, central to human-centered civil justice design. These designers also draw from research on how altering features of rules, processes, and dispute resolution facilitates pro-social behavior, cooperation, and intergroup harmony, thereby allowing humans to achieve their full potential and to flourish.

Finally, with regard to the criterion of ethical conduct, human-centered civil justice design integrates and reconciles three overlapping criteria: *desirability* (i.e., what meets stakeholders' needs and aspirations), *feasibility* (i.e., what is technologically possible within the foreseeable future), and *viability* (i.e., what is financially sustainable).[167] The approach begins with humans—their needs, aims, and fears—and uncovers what is desirable, imbuing innovation and problem-solving with a human-centered ethos. The approach requires a thorough empirical understanding, through direct observation, of what people need in their lives and what they like or dislike about particular practices and institutions.[168] Human-centered design seeks to create a

160. *See* Quintanilla, *supra* note 1, at 772–74; *see, e.g.*, Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375, 379–80 (2006); Kristina Murphy et al., *Nurturing Regulatory Compliance: Is Procedural Justice Effective When People Question the Legitimacy of the Law?*, 3 REG. & GOVERNANCE 1, 2–5 (2009).

161. *See* Quintanilla, *supra* note 1, at 772–74; *see, e.g.*, TOM R. TYLER, WHY PEOPLE OBEY THE LAW 161–69 (2006).

162. *See* Quintanilla, *supra* note 1, at 772–74; *see, e.g.*, Betsy Stanko et al., *A Golden Thread, a Presence Amongst Uniforms, and a Good Deal of Data: Studying Public Confidence in the London Metropolitan Police*, 22 POLICING & SOC'Y 317, 318–20 (2012); Tom R. Tyler et al., *Legitimacy and Deterrence Effects in Counterterrorism Policing: A Study of Muslim Americans*, 44 LAW & SOC'Y REV. 365, 365–74 (2010).

163. *See* Quintanilla, *supra* note 1, at 772–74; *see, e.g.*, David De Cremer & Daan Van Knippenberg, *How do Leaders Promote Cooperation? The Effects of Charisma and Procedural Fairness*, 87 J. APPLIED PSYCHOL. 858, 858–60 (2002).

164. *See* Quintanilla, *supra* note 1, at 772–74; *see, e.g.*, David De Cremer & Tom R. Tyler, *Managing Group Behavior: The Interplay Between Procedural Justice, Sense of Self, and Cooperation*, 37 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 151, 185–93 (2005).

165. *See* Quintanilla, *supra* note 1, at 772–74; *see, e.g.*, E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 61–172 (Melvin J. Lerner ed. 1988); Donna Shestowsky, *The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante*, 99 IOWA L. REV. 637, 643–44 (2014).

166. *See* Quintanilla, *supra* note 1, at 772–75; *see, e.g.*, Tyler, *supra* note 160, at 375–400 (reviewing psychological literature on legitimacy and concluding that "the exercise of authority via fair procedures legitimates that authority, and encourages voluntary deference.").

167. *See* BROWN & KATZ, *supra* note 142, at 18; IDEO.ORG, *supra* note 142, at 13–14.

168. *See* BROWN & KATZ, *supra* note 142, at 43–44; IDEO.ORG, *supra* note 142, at 22. For example, empathic user-centered design in business has helped companies determine customer needs, sometimes before a customer is even able to articulate what his or her need is, through processes of observation and prototyping. *See* Leonard & Rayport, *supra* note 151, at 104–06.

range of options that are technologically feasible in meeting human needs[169] and examines alternatives for solutions that are financially viable.[170]

In this regard, the goal of human-centered civil justice design is to guide in the ceaseless, compassionate evolution of a civil justice system that benefits humanity. It applies psychological and behavioral research on human needs, limitations, capabilities, and potential in the design of the civil justice system.[171] The approach focuses on human beings; their interactions with one another within the civil justice system; their experiences with the processes, systems, and environments they encounter when navigating the civil justice system; and how these experiences interact with the entangled web of hardships and legal adversities they face in the everyday. Civil justice designers investigate how humans respond to features of the civil justice system in particular contexts.[172] This information serves as the basis for predicting the probable effects of design alternatives and proposing system design recommendations. Civil justice designers also harness pilots and RCTs to test and incrementally apply design recommendations. When pilots and RCTs reveal the causal effects of a design change, an innovation may be more broadly adopted. Civil justice designers monitor and evaluate the influence of improvements to ensure the intended aims and benefits manifest in particular contexts. Given that the civil justice system is dynamic, prior interventions may reveal the need for subsequent interventions. In this way, human-centered civil justice design is a ceaseless process that facilitates experiences of justice and addresses legal needs that interact with social, financial, and environmental circumstances to threaten human well-being.

CONCLUSION

In closing, the ethical practice of human-centered civil justice design promotes human flourishing and nourishes democratic institutions. When legal professionals engage in the practice of human-centered civil justice design, they satisfy the responsibilities that emanate from their role as system designers, and meet the three criteria of their role ethic: excellence, engagement, and ethical conduct. Human-centered civil justice design puts into practice a form of neighborly morality that prevents democratic degradation and erosions of the civil justice system that threaten the vitality of our legal institutions. The ethical practice of human-centered civil justice design truly empathizes with

169. *See* BROWN & KATZ, *supra* note 142, at 18–19.

170. *Id.*

171. In this way, human-centered civil justice design shares much in common with the human factors approach in engineering and design. *See generally* MARK S. SANDERS & ERNEST J. MCCORMICK, HUMAN FACTORS IN ENGINEERING AND DESIGN (7th ed. 1993).

172. *See* Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1237 (1931) (discussing "[t]he belief in the worthwhileness of grouping cases and legal situations into narrower categories than has been the practices in the past. This is connected with the distrust of verbally simple rules—which so often cover dissimilar and non-simple fact situations").

the beneficiaries and users of the civil justice system and seeks to learn their needs and potential and understand their perspectives. This practice aspires to promote human dignity and human fulfillment and to design the continual growth, justness, and achievement of our democratic institutions. These aims and societal values are truly fragile and easily decay when norms and institutions decline. Legal professionals who inhabit the new societal role of civil justice designer must balance the interests of their client with the needs and perspective of the public. The ethical practice of human-centered civil justice design offers a synthesis that sustains and protects the fairness, legitimacy, and justice of our civil justice system.