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## How Should We Determine Who Should Regulate Lawyers-- Managing Conflict and Context in Professional Regulation

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## How Should We Determine Who Should Regulate Lawyers--Managing Conflict and Context in Professional Regulation

David B. Wilkins

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## AFTERWORD

### HOW SHOULD WE DETERMINE WHO SHOULD REGULATE LAWYERS?— MANAGING CONFLICT AND CONTEXT IN PROFESSIONAL REGULATION

*David B. Wilkins\**

#### INTRODUCTION

On many a late night during the summer and fall of 1991, as I struggled to revise yet another draft of *Who Should Regulate Lawyers?*,<sup>1</sup> I comforted myself by reciting the mantra intoned by countless assistant professors working on tenure pieces before me: “Don’t worry, you can always fix any problems in the *next* article, and besides *no one will ever read this anyway!*” Thanks to Ted Schneyer, the AALS Professional Responsibility Section, and the *Fordham Law Review*, I have now been given the opportunity to “fix” my prior mistakes by examining the thoughtful contributions of an outstanding group of authors and commentators who have not only read my article, but have taken the comparative institutional analysis I advocated there in provocative and important directions.

Needless to say, I have no intention of trying to correct the many errors and omissions in my prior work. Nor can I address all of the challenging issues raised in the Symposium. Instead, I want to take this opportunity to say a few words about two questions that confront scholars interested in comparative institutional analysis in the field of professional regulation. The first is methodological: What are the proper criteria for comparing institutions in this area? The second is substantive: Does a comparative institutional analysis suggest a contextual approach to professional regulation, and if so, is such an approach feasible? The next two parts briefly examine these questions in light of what I have learned from the other contributions to this Symposium. I conclude by saying a few words about the future of comparative institutional analysis.

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1. David B. Wilkins, *Who Should Regulate Lawyers?*, 105 Harv. L. Rev. 799 (1992) [hereinafter Wilkins, *Who Should Regulate Lawyers?*].

## I. COMPARED TO WHAT?

When I wrote *Who Should Regulate Lawyers?*, the first question that I had to answer was not how to do a comparative analysis of regulatory institutions, but rather whether such an analysis was necessary at all. Most articles in the field devoted surprisingly little attention to comparing existing or proposed enforcement mechanisms with others that might be employed. Those commentators that did compare regulatory systems, for example, in the course of condemning Rule 11, often relied on an idealized account of alternative methods of controlling lawyer misconduct, generally the disciplinary system, that bore little relationship to reality.

The dearth of rigorous comparative analysis limited the value of much that was written about professional regulation. As Ted Schneyer nicely summarizes in his Foreword to this Symposium, virtually every proposal to either expand, contract, or retain a given institution's regulatory authority rests on assumptions about the competence of alternative regulatory structures.<sup>2</sup> Without critical examination, these assumptions have been allowed to drive policy choices in ways that may not serve the goal of creating a workable and effective system for regulating lawyers. As more and more institutions claim some degree of regulatory authority over the legal profession, the danger that important decisions about the distribution of regulatory authority will be made on the basis of little more than folklore or intuition has correspondingly increased.

To acknowledge the need for a comparative analysis of regulatory institutions, however, does not answer the question of how such an analysis should be conducted. As Fred Zacharias argues, professional regulation potentially serves a number of discrete functions, including deterring misconduct, providing guidance to practitioners, contributing to public debate, and improving the image of regulators or those whom they regulate.<sup>3</sup> Moreover, as Ted Schneyer notes, regulatory institutions can pursue these goals through a number of interrelated tasks, ranging from drafting rules of conduct to enforcing existing

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2. See Ted Schneyer, *Foreword: Legal Process Scholarship and the Regulation of Lawyers*, 65 *Fordham L. Rev.* 33, 53-54 (1996) [hereinafter Schneyer, *Foreword*]. For example, in 1991, the ABA reiterated its long-standing view that the traditional disciplinary system should be the exclusive mechanism for enforcing the rules of professional conduct. See A.B.A. Commission on Evaluation of Disciplinary Enforcement, Report to the House of Delegates 3-4 (1991). This claim rests on the assumption that professional discipline is "more effective" in some relevant sense than available alternatives.

3. Fred C. Zacharias, *Who Can Best Regulate the Ethics of Federal Prosecutors, or, Who Should Regulate the Regulators?: Response to Little*, 65 *Fordham L. Rev.* 429, 448 n.82 (1996) [hereinafter Zacharias, *Response to Little*]. Professor Zacharias develops this important point in Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 *Notre Dame L. Rev.* 223, 225-39 (1993) [hereinafter Zacharias, *Specificity in Codes*].

rules and imposing sanctions.<sup>4</sup> Finally, as noted above, there are now a large number of institutions that actively assert at least some regulatory jurisdiction over lawyers, and an even greater number that could enter the field in the future. Given this dizzying array of functions, tasks, and potential players, how should one go about comparing regulatory competence?

*Who Should Regulate Lawyers?* attempts to develop a general framework for comparing four broad categories of regulatory institutions.<sup>5</sup> Ted Schneyer raises four criticisms to this framework.<sup>6</sup> These criticisms underscore important difficulties in any comparative institutional analysis. I therefore use Schneyer's objections in a slightly reconfigured form, to discuss three methodological questions regarding the kind of scholarship to which this Symposium is dedicated: (1) Is it permissible to compare regulatory institutions on some, but not all, of the tasks or functions that these institutions might serve, and if so, which tasks or functions can profitably be isolated?; (2) What is the role of evolutionary development in either the structure or the functioning of a given institution in a comparative analysis?; and (3) Do categorical distinctions concerning either subgroups within the bar or particular kinds of regulatory problems help to clarify institutional choices?

#### A. Comparing Regulatory Tasks

*Who Should Regulate Lawyers?* makes the counterfactual assumption that all enforcement actions are based on a single set of substantive rules, to wit, either the ABA's Model Rules of Professional Conduct or Model Code of Professional Responsibility.<sup>7</sup> Having thus artificially bracketed arguments over the substantive content of ethical rules (which I refer to as "content" arguments), the article compares sanctioning systems along two dimensions: "compliance" arguments which examine the relative ability of each of the systems to detect and deter lawyer delicts at the lowest possible cost; and "independence" arguments which examine whether subjecting lawyers to each of the four controls would either promote or undermine professional independence.<sup>8</sup>

Schneyer and other authors in the Symposium criticize this analytic framework on two related fronts. First, several authors question the decision to bracket content arguments.<sup>9</sup> These arguments, they assert,

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4. See Schneyer, *Foreword*, *supra* note 2, at 38-39.

5. See Wilkins, *Who Should Regulate Lawyers?*, *supra* note 1, at 804-19. Schneyer concisely summarizes the major points of this framework. See Schneyer, *Foreword*, *supra* note 2, at 48-50.

6. See Schneyer, *Foreword*, *supra* note 2, at 53-56.

7. Wilkins, *Who Should Regulate Lawyers?*, *supra* note 1, at 810-11.

8. See *id.* at 809-14.

9. See Schneyer, *Foreword*, *supra* note 2, at 53-58; see also Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 *Fordham L. Rev.* 71, 82-83 (1996)

are often at the heart of disputes about regulatory authority. Thus, Schneyer claims that the Seventh Circuit's decision to impose heightened burdens on plaintiffs seeking to bring third party claims against lawyers for aiding and abetting violations of the securities laws was more a dispute over the content of a lawyer's professional obligations than a decision about the propriety of using liability controls to enforce existing rules of professional conduct.<sup>10</sup> Similarly, Professor Little points out that the most contentious issues relating to the regulation of federal prosecutors involve the Justice Department's claim that these lawyers are no longer subject to the ABA's version of the anti-contact rules.<sup>11</sup> For his part, Professor Green argues that the decision concerning what role courts should play in policing conflicts of interest in litigation depends upon whether courts replace the categorical prohibitions contained in the Model Rules with their own open-textured standards geared towards protecting the integrity of the trial process.<sup>12</sup>

Professor Green's article also highlights a second criticism of my framework, one grounded in inclusion rather than exclusion. As Schneyer points out, my framework treats questions about the appropriateness of particular sanctions as a subcategory of compliance arguments.<sup>13</sup> Professor Green contends, however, that the character of the sanction should be treated as a separate question. Thus, although he agrees with me that courts should play an important role in enforcing the existing conflict rules, he argues that disqualification is not the appropriate sanction. Instead, Green asserts that courts should impose monetary penalties on lawyers who violate the Model Code, reserving disqualification for those cases where continued representation threatens the integrity of the trial process. Indeed, Schneyer implies that comparisons about institutional competence should take into account six different "sub-tasks" associated with professional regulation: rulemaking, rule interpretation, violation detection, guilt determination, sanctions designing, and sanctions imposition.<sup>14</sup>

These related criticisms highlight the difficulty of isolating particular regulatory functions. As I acknowledged in *Who Should Regulate Lawyers?*, content arguments are often what is really at stake in the

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[hereinafter Green, *The Judicial Role*] (stressing the need to consider the content of the standards used in setting the rules); Rory K. Little, *Who Should Regulate the Ethics of Federal Prosecutors?*, 65 *Fordham L. Rev.* 355, 412-14 (1996) [hereinafter Little, *Federal Prosecutors*] (discussing the inadequacy of the Wilkins model in addressing the realities of multiple rules, substantive content of rules and multiple enforcement bodies).

10. See Schneyer, *Foreword*, *supra* note 2, at 56.

11. See Little, *Federal Prosecutors*, *supra* note 9, at 367-68, 408-10.

12. See Green, *The Judicial Role*, *supra* note 9, at 95-97.

13. See Schneyer, *Foreword*, *supra* note 2, at 48.

14. See *id.* at 38.

debates over enforcement procedures.<sup>15</sup> Moreover, as Schneyer rightly points out, institutions often get into the enforcement business because they have adopted a particular rule and therefore believe that they now have to enforce it.<sup>16</sup> Other enforcement debates turn on the appropriateness of particular sanctions. Thus, many commentators contended that the most troubling aspect of the Office of Thrift Supervision ("OTS") assertion of regulatory authority in the Kaye, Scholer case was the "freeze order" that set conditions on the law firm's ability to distribute its assets.<sup>17</sup> Similarly, prior to the 1993 Amendments to Rule 11, many critics charged that the Rule's reliance on monetary sanctions produced most of the Rule's negative consequences.<sup>18</sup>

Nevertheless, there are important reasons not to conflate content and compliance arguments. Professor Brickman's attack on the ABA's Advisory Opinion regarding contingency fees is a case in point. Professor Brickman frames his critique as an attack on the self-interested nature of self-regulation.<sup>19</sup> On these grounds, his disagreement is not so much with the content of Rule 1.5, prohibiting a lawyer from charging an "unreasonable fee," but rather with the Advisory Committee's claim that lawyers who charge standard contingent fees should not be disciplined for violating this norm. As Susan Koniak notes in her Response, however, Brickman also supports a legislative initiative that would substantially alter the substantive rules regulating how plaintiff lawyers litigate contingency fee cases.<sup>20</sup> Although Professor Brickman undoubtedly believes that the same self-interested bias affects the ABA's legislative and enforcement roles, this is far from self-evident. Professor Koniak persuasively argues that there are good reasons why even a disinterested decision maker might reject the content argument that a rule requiring plaintiffs to seek early settlements in every case—and to reject such offers at their peril—is in the best interests of either the clients of contingency fee lawyers or the

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15. See Wilkins, *Who Should Regulate Lawyers?*, *supra* note 1, at 809.

16. See Schneyer, *Foreword*, *supra* note 2, at 42-47.

17. See Steve France, *Just Deserts: Don't Cry for Kaye, Scholer*, *Legal Times*, Apr. 6, 1992, at 28 (noting that stories about the case featured a "Greek chorus" of senior law firm partners and academics complaining about the freeze-order).

18. See, e.g., Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 *Geo. L.J.* 1313, 1314 (1986) (evaluating the "compensation-punishment dichotomy" and suggesting that nonmandatory sanctions better serve the purpose of the rule).

19. See Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 *Fordham L. Rev.* 247, 250-57 (1996) [hereinafter Brickman, *Contingency Fees*].

20. See Susan P. Koniak, *Principled Opinions: Response to Brickman*, 65 *Fordham L. Rev.* 337, 338-39 (1996) [hereinafter Koniak, *Response to Brickman*] (noting that Brickman's ABA request paralleled the legislative initiative he supports by asking whether plaintiff's lawyers are ethically required to solicit early settlement offers from defendants).

litigation system as a whole.<sup>21</sup> She goes on, however, to conclude that the ABA's position on how the existing norm should be interpreted and enforced gives credence to Professor Brickman's concerns. This raises a general question about the role of interpretation.

Schneyer correctly notes that the task of interpreting the scope of a given professional rule is analytically separate from the task of rulemaking.<sup>22</sup> What Schneyer fails to note, however, is the extent to which this process is inextricably intertwined with enforcement. As I noted in *Who Should Regulate Lawyers?*, enforcement officials invariably exercise a certain amount of discretionary authority over the content of professional norms when they apply these rules to particular cases.<sup>23</sup> This power to give a "substantive tilt" to a given content rule is particularly evident in circumstances where the norm is ambiguous, incomplete, or in tension with other plausibly applicable rules. As all of the participants in this Symposium acknowledge, both the Model Code and the Model Rules are filled with such commands.

Two examples from this Symposium nicely illustrate the importance of substantive tilt. First, Professor Little notes that the Attorney General's actions in the anti-contact area were prompted by a series of cases in which courts, acting under their supervisory authority over lawyers, sanctioned federal prosecutors for violating various ethical rules.<sup>24</sup> Second, Schneyer notes that the OTS's authority to enforce existing ethics rules against banking lawyers created both an "*in terrorem*" effect, which caused these lawyers to settle their disputes with the agency prematurely, and paved the way for more specific "protocols" that will have to be enforced in agency rulemaking proceedings.<sup>25</sup>

Contrary to Schneyer's implication, however, these examples highlight the importance of distinguishing between content and compliance arguments. To begin with, both the Justice Department's complaint about the court's interpretation of the anti-contact rules, and the degree to which OTS attempted to fit its allegations against Kaye, Scholer and other law firms into the existing framework of ethical rules, underscore the extent to which the Model Code and the Model Rules remain the preeminent standards of ethical conduct. Although, as I acknowledged at the time, it is surely artificial to assert that *every* enforcement official agrees that these are the appropriate standards, the ABA's formal pronouncements continue to be the stan-

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21. *Id.* at 350-52. Indeed, in a related context, the Advisory Committee for the Federal Rules of Civil Procedure, a group that would seem to be far less protective of lawyer self-interest than the ABA, has, for reasons analogous to the ones given by Professor Koniak, consistently resisted attempts to encourage early settlement offers by expanding the fee-shifting provisions of Rule 68.

22. See Schneyer, *Foreword*, *supra* note 2, at 38-39.

23. See Wilkins, *Who Should Regulate Lawyers?*, *supra* note 1, at 810.

24. See Little, *Federal Prosecutors*, *supra* note 9, at 361-63.

25. See Schneyer, *Foreword*, *supra* note 2, at 57-58.



dard against which all other regulatory pronouncements are judged. Precisely because these rules are so widely accepted as binding, assertions such as the Attorney General's that government lawyers are no longer bound by these prescriptions are universally perceived as radical.

More important, rulemaking still provides a potential mechanism for correcting substantive tilt. Although there is no "super-legislature" with the unquestioned authority to adjudicate disputes such as those now brewing between the ABA and the Justice Department, the ABA's limited yet important success at forcing dissenting institutions to come to the bargaining table by threatening to invoke its rulemaking authority demonstrates the power that the ABA still has to correct "substantive tilt" through the exercise of its legislative power.<sup>26</sup> Furthermore, just because there currently is no "super-legislature" does not mean that one might not be created in the future. As Fred Zacharias argues here and elsewhere, Congress has both the authority and the competence to establish uniform conduct rules for federal prosecutors—and perhaps for the profession as a whole.<sup>27</sup> If Congress were to step in and definitively resolve the reach of the anti-contact rules in this context, many of the problems Little identifies regarding inconsistent interpretations by federal courts in different jurisdictions would disappear.

Finally, even in the absence of a "super-legislature" it does not follow, as Schneyer asserts, that a particular institution must take responsibility for enforcing its own rules.<sup>28</sup> Kaye, Scholer provides a perfect case in point. In that case, OTS had the option of pursuing its claims against Kaye, Scholer either in an administrative enforcement proceeding or in the courts.<sup>29</sup> Given the potential for substantive tilt in an agency enforcement proceeding—particularly with respect to the freeze-order—a strong argument can be made that OTS should have pursued its claims against the firm in a forum that provided a better

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26. See Wilkins, *Who Should Regulate Lawyers?*, *supra* note 1, at 811 (discussing the power of rulemakers to correct substantive tilt). The attempt by the ABA Task Force on Lawyer's Representation of Regulated Clients, discussed by Schneyer, to force OTS to submit "novel or non-traditional interpretations of professional codes" to the ABA for "authoritative rulings" is a perfect example of this phenomena. See Schneyer, *Foreword*, *supra* note 2, at 58 n.124 (citations omitted).

27. See Zacharias, *Response to Little*, *supra* note 3, at 454-56 (arguing that Congress is arguably the best entity to regulate the conduct underlying the "no-contact" rule by legislatively creating a substantive standard that fairly balances the competing interests of prosecutors and defendants); see also Fred C. Zacharias, *Federalizing Legal Ethics*, 73 *Tex. L. Rev.* 335 (1994) [hereinafter Zacharias, *Federalizing Legal Ethics*] (arguing that Congress probably has the power to formulate national ethical standards).

28. See Schneyer, *Foreword*, *supra* note 2, at 58.

29. See David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye, Scholer*, 66 *S. Cal. L. Rev.* 1145, 1201-03 (1993) [hereinafter Wilkins, *Making Context Count*].

opportunity for Kaye, Scholer to challenge the merits of the claims brought against it.<sup>30</sup>

The presumption that enforcement authority invariably follows legislative authority also undermines several of the proposals presented here. For example, even if we grant that the Justice Department should be able to fashion its own anti-contact rule for federal prosecutors, it does not follow that this agency should also be given the authority to enforce this new standard. This new form of "self-regulation"<sup>31</sup> is subject to all of the same criticisms as the traditional system of professional discipline that it is designed to replace.<sup>32</sup> Professor Painter's provocative proposal for contractually established individualized content rules for agency lawyers also suffers from the assumption that legislative authority entails enforcement authority.<sup>33</sup> Regardless of the merits of this proposal as a rulemaking device, it is far from clear that the agencies negotiating these individually tailored contracts are in the best position to enforce their terms. Although Professor Painter's system depends upon allowing each party to punish defections, a third party still has an important role in determining whether a defection has in fact occurred.

Nor should one assume, as Brickman apparently does, that substantive tilt created by decision-maker bias is only a problem for the ABA, or, for that matter, any other single institutional actor. Brickman argues that no structural impediment prevented the ABA from using his request for guidance as an occasion to clarify the reach of Rule 1.5 and to further the public debate over contingent fees.<sup>34</sup> Instead, the Committee simply chose not to do so. Sadly, such evasion is a predictable consequence of the bar's control over this aspect of the disciplinary process.

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30. Of course, as Schneyer notes, making courts the ultimate sanctioning authority will not necessarily prevent what from the bar's perspective appears to be substantive tilt. See Schneyer, *Foreword*, *supra* note 2, at 45-46. As I argue below, however, this possibility must be balanced against the danger that the bar's own enforcement system is biased in the opposite direction.

31. The Attorney General's proposal is not technically "self-regulation" as that term has traditionally been defined since the process is directly controlled by state authorities rather than lawyers acting in their purely "professional" capacity. See Andrew Kaufman, *Problems in Professional Responsibility* 532-46 (1989) (rejecting the characterization of the current disciplinary process as self-regulation).

32. For a critique of the dangers of "self-regulation" in the traditional disciplinary system, see Deborah L. Rhode, *The Rhetoric of Professional Reform*, 45 Md. L. Rev. 274, 288-93 (1986).

33. Richard W. Painter, *Game Theoretic and Contractarian Paradigms in the Uneasy Relationship Between Regulators and Regulatory Lawyers*, 65 Fordham L. Rev. 149 (1996) [hereinafter Painter, *Game Theoretic*].

34. See Brickman, *Contingency Fees*, *supra* note 19, at 270-76. Indeed, I have previously argued that clarifying the content of ambiguous rules is the primary purpose for such advisory opinions. See David B. Wilkins, *Legal Realism for Lawyers*, 104 Harv. L. Rev. 468, 501-03 (1990) [hereinafter Wilkins, *Legal Realism*].

Brickman fails to acknowledge, however, that the regulatory goals selected by the legislative controls he endorses will also be influenced by the incentives of the regulators. Legislators, executive officials, and even voters each have interests that are likely to affect their view about the proper balance among competing regulatory goals.<sup>35</sup> In this case, it is likely that the desire on the part of some state officials to reduce the aggregate amount of contingent fee litigation will bias them against "standard" contingent fees and lead them to support encouraging plaintiffs to accept early settlement offers. The point here simply is that every control system is vulnerable to the institutional incentives of those in charge. Identifying these incentives, and exploring their likely effect on potential regulatory goals, must, therefore, be a primary goal of comparative institutional analysis.<sup>36</sup>

Similarly, Professor Green's attempt to link content arguments to questions about the appropriateness of particular sanctions needlessly complicates his otherwise sensible proposal for reducing the harm to "innocent" clients from successful disqualification motions. At the heart of Green's argument is the claim that monetary sanction, rather than disqualification, is the appropriate penalty for lawyers who violate the existing conflict rules. It is this concern about disqualification as a sanction that leads Professor Green to propose that courts adopt a new substantive rule for imposing this remedy. As Professor Martyn argues, however, in his attempt to limit the use of disqualification as a sanction, Professor Green advocates a bifurcated process that runs the risk of undermining the substantive content of the existing conflict rules in circumstances where Green himself believes that they should be applied.<sup>37</sup> Thus, given that judges have strong incentives to keep cases moving at all costs, lawyers caught representing conflicting interests may receive little more than a nominal fine even in circumstances where there is some measure of concrete harm to third parties or to the process. Martyn, therefore, argues in favor of maintaining the existing substantive standard and instead focusing directly on the issue

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35. See Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. Rev. 1389 (1992).

36. As Professors Ayres and Silver emphasize, however, it is important not to romanticize these incentives, either by confusing intentions with effects, or by overemphasizing certain desirable attributes of particular regulators. See Ian Ayres, *Response to Painter*, 65 Fordham L. Rev. 201, 203-04 (1996) [hereinafter Ayres, *Response to Painter*] (criticizing Professor Painter for being overly optimistic about the incentives of agency lawyers); Charles Silver, *Professional Liability Insurance as Insurance and as Lawyer Regulation: Response to Davis*, 65 Fordham L. Rev. 233, 234-35 (1996) [hereinafter Silver, *Response to Davis*] (criticizing Mr. Davis for confusing "justifications" with "effects").

37. See Susan P. Martyn, *Developing the Judicial Role in Controlling Litigation Conflicts: Response to Green*, 65 Fordham L. Rev. 131, 133 (1996) [hereinafter Martyn, *Response to Green*] (arguing that "rational" lawyers would be likely to perceive Green's proposal as substantially lowering their chance of receiving a substantial sanction).

of the appropriate sanction by giving judges a range of sanctioning authority, including disgorgement of both past and present fees.<sup>38</sup>

Finally, the strength of all of these arguments about content, substantive tilt, and sanctions depend in large part on one's views about the importance of professional independence. When I wrote *Who Should Regulate Lawyers?*, independence arguments occupied a central place in the debate over various alternative sanctioning systems. These arguments are largely conspicuous by their absence in this collection of essays.<sup>39</sup> At one level, this is hardly surprising. Traditionally, the most vocal advocates of independence arguments have the kind of faith in the operation of the disciplinary system that is not shared by any of the participants in this Symposium. Nevertheless, given that lawyers and policy makers continue to place a high value on maintaining professional independence, one might have expected independence arguments to play a more prominent role.

Independence arguments deserve an important place in any comparative evaluation of regulatory systems. Consider, for example, Schneyer's analysis of *Barker v. Henderson, Franklin, Starnes & Holt*.<sup>40</sup> This was the first of a line of cases in which the Seventh Circuit imposed additional restrictions on plaintiffs seeking to hold their attorneys liable as aiders and abettors under the securities laws. Schneyer asserts that this line of cases is really about rulemaking authority, rather than, as I argued in *Who Should Regulate Lawyers?*, about the enforcement of existing rules.<sup>41</sup> Schneyer's characterization, however, depends upon the validity of the Seventh Circuit's stated assumptions about professional independence. Thus, the *Barker* court rejected plaintiffs' assertion that the lawyers in that case had violated existing ethics rules when they continued to represent the client after they became aware that material facts had not been disclosed to the client's auditors.<sup>42</sup> The court reached this conclusion on the ground that there was no evidence that any lawyer had "thrown in

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38. *Id.* at 142. The question of whether "sanctions" should be treated as a separate inquiry from enforcement authority depends upon the extent to which we conceive of a given institution as being able to employ an infinite variety of potential sanctions. I return to these issues in part II.

39. Only Professor Koniak expressly discusses the importance of the bar as an institution retaining a "healthy measure of independence from the state." Koniak, *Response to Brickman, supra* note 20, at 347. Koniak connects professional independence to the preservation of individual freedom in a democracy. *Id.* at 347-48. Professor Little makes a classic separation of powers argument against federal preemption of a state court's inherent power to regulate the conduct of federal prosecutors. See Little, *Federal Prosecutors, supra* note 9, at 408-09. For a discussion of the importance of both "democratic theory" and "separation of powers" arguments in the lexicon of independence claims, see Wilkins, *Who Should Regulate Lawyers?*, *supra* note 1, at 853-63.

40. 797 F.2d 490 (7th Cir. 1986), discussed in Schneyer, *Foreword, supra* note 2, at [28-29].

41. See Wilkins, *Who Should Regulate Lawyers?*, *supra* note 1, at 809-14.

42. See *Barker, supra* note 40, at 493.

his lot with the primary violators."<sup>43</sup> This requirement that the lawyers and clients become co-venturers in the client's fraud, however, appears nowhere in Rule 1.2(d).<sup>44</sup> Instead, the Seventh Circuit's conclusion rests on the assumption that professionals such as lawyers would not risk their reputations to involve themselves in fraudulent schemes unless they received more in compensation than their standard fees.<sup>45</sup> This assumption, however, undervalues the substantial pressures on lawyers such as those in *Barker* to satisfy their clients' demands.<sup>46</sup> Indeed, it is precisely in circumstances such as these—where client pressures are strong, where the relevant norm ("knowingly assisting" client fraud) is vague and open-ended, and the risk of sanction from other enforcement systems is low (disciplinary bodies rarely sanction these kinds of externality violations)—that we want to reinforce a lawyer's commitment to professional independence. If the lawyers in *Barker* had independently evaluated both their client's goals and the public purposes underlying legal rules, they might have refused to continue representing a client whose refusal to disclose material information to its auditors, although arguably legal, nevertheless undermines long-term legal values.

Another well-known securities case, *In re Carter & Johnson*, nicely illustrates the point.<sup>47</sup> In that case, two partners at a large New York law firm continued to assist their clients in filing documents and issuing public statements even though both knew that the company had failed to disclose material information, and both had counseled their client that disclosure was necessary to avoid violating the securities laws.<sup>48</sup> After years of litigation, the SEC rejected the claim that the lawyers' conduct violated existing ethical standards, partly on the ground that the ethics rules did not create a duty to disclose what they knew about their clients' actions.<sup>49</sup> Nevertheless, from the perspective of professional independence, it would have been preferable if the lawyers had refused to continue working until their advice on disclosure was followed, thereby making it more difficult for their client to

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43. *Id.* at 497.

44. See Model Rules of Professional Conduct Rule 1.2(d) (1994) ("A lawyer shall not . . . assist a client [ ] in conduct that the lawyer knows is criminal or fraudulent."). As the commentary to the Rule makes clear, this prohibition applies even in circumstances where the Rules instruct the lawyer not to reveal the information. See *id.* Rule 1.2(d) cmt. ("The lawyer is not permitted to reveal the client's wrongdoing, except where permitted by Rule 1.6. The lawyer is required, however, to avoid furthering the purpose . . . . Withdrawal from representation . . . may be required.")

45. See *In re VMS Sec. Litig.*, 752 F. Supp. 1373, 1401 (N.D. Ill. 1990) (noting that "[t]he Seventh Circuit has twice acknowledged that the potential injury to a defendant's reputation for integrity far outweighs any possible gain from retaining a client").

46. See Wilkins, *Who Should Regulate Lawyers?*, *supra* note 1, at 849.

47. Exchange Act Release No. 17,597 [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,847 (Feb. 28, 1981). I discuss this case in some detail in Wilkins, *Who Should Regulate Lawyers?*, *supra* note 1, at 836-37.

48. *Id.* at 836-37.

49. *Id.* at 837.

undermine the purposes of the securities laws. This result, however, is far less likely to occur if lawyers acting in this position face no credible threat that their interpretation of the limits of Rule 1.2(d) will be subject to rigorous ex post review. By restricting the role of the institutions that might otherwise have the ability and incentive to engage in this kind of review, decisions like *Barker*, and the Supreme Court's recent abrogation of aiding and abetting liability under Rule 10(b)5 for all parties,<sup>50</sup> make it less likely that lawyers will embrace this form of publicly-motivated independence.

Having made these points in defense of my framework, it is important to emphasize that no attempt to isolate regulatory tasks can ever be entirely successful. Nor, however, is it possible to consider all regulatory tasks simultaneously. As Professor Zacharias notes, these goals may often be in conflict.<sup>51</sup> Thus, to take just one example, even if we accept that Professor Painter's proposed regime of individual contracting will increase the gains from cooperation, his suggestion is still less likely to generate the kind of publicly accessible information about lawyer conduct that can provide useful guidance to other practitioners or contribute to the public debate over regulatory goals. As I have argued elsewhere, providing this kind of information is an important by-product of enforcement proceedings.<sup>52</sup> In addition, as Professor Ayres points out in his response, to the extent that Painter's proposal includes a move away from the regime of default standards supplemented by common law interpretation currently in place in many administrative settings, it may also diminish, rather than promote, overall compliance.<sup>53</sup>

None of this, of course, should be taken to deny the importance of comparative studies that focus on content arguments directly. Moreover, as I indicated at the outset, in some circumstances one may have to reach a judgment about the proper content of professional norms, or about rulemaking competence more generally, before one will feel comfortable about reaching an all-things-considered judgment about the propriety of various forms of professional regulation. My point simply is that any sensible comparative analysis must hold certain

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50. See *Central Bank v. First Interstate Bank*, 511 U.S. 164 (1994). For a discussion of the implications of *Central Bank* on law suits against lawyers, see Ann Maxey, *Competing Duties? Securities Lawyers' Liability After Central Bank*, 64 *Fordham L. Rev.* 2185 (1996).

51. See Zacharias, *Response to Little*, *supra* note 3, at 461; Zacharias, *Specificity in Codes*, *supra* note 3.

52. See Wilkins, *Who Should Regulate Lawyers?*, *supra* note 1, at 883-86.

53. See Ayres, *Response to Painter*, *supra* note 36, at 207. Both the OTS and the SEC employ broad standards such as "good faith" and "professional conduct" as default rules for lawyers appearing before these agencies. See Wilkins, *Making Context Count*, *supra* note 29, at 1197-98 (describing OTS enforcement practices); Wilkins, *Who Should Regulate Lawyers?*, *supra* note 1, at 835-37 (describing the SEC's Rule 2(e)).

things fixed so that others may be brought clearly into view. The same applies to the definition of institutional structure.

### B. *Institutional Definition*

Schneyer correctly notes that one of the central questions raised in any comparative institutional analysis is how the various institutions should be defined. In traditional legal process analysis, institutions such as "courts," "legislatures," and "administrative agencies" were defined at a high level of abstraction using formalist criteria.<sup>54</sup> The articles in this Symposium, on the other hand, primarily examine specific institutions and their handling of particular problems. Professor Brickman, for example, concentrates on the ABA's Committee on Ethics and Professional Responsibility, while Anthony Davis examines the role of liability insurance companies. My own article falls in between these two poles. Thus, my four sanctioning systems (disciplinary controls, liability controls, institutional controls, and legislative controls), were meant to incorporate the full range of institutions that might regulate lawyer conduct. At the same time, by discussing concrete examples within these general categories, I attempted to move the debate over professional regulation away from the abstract and often conclusory level that existed in much of the literature.

The articles and responses in this Symposium make it clear that I was not entirely successful in striking this balance. On the one hand, the framework does not fully account for the ever-growing number of institutions that assert some form of regulatory control over lawyers. For example, although the four sanctioning systems were meant to be read against the backdrop of what I referred to as the embedded control of the market, I used client sophistication (as represented by the distinction between individual and corporate clients) as the principal proxy for this form of control. Anthony Davis's article underscores that this way of defining market controls ignores the substantial regulatory power that actors such as insurance companies exert over the profession.<sup>55</sup> Similarly, neither disciplinary controls nor institutional controls fully captures the kind of modified self-regulation, described by Rory Little, involved in the Attorney General's attempts to regulate the conduct of federal prosecutors.<sup>56</sup>

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54. For the basic statement of the legal process school, see Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (William N. Eskridge, Jr. & Philip P. Frickey eds. 1994). For a critique of the abstract and formal level at which the institutional analysis was conducted, see Edward L. Rubin, *Institutional Analysis and the New Legal Process*, 1995 Wis. L. Rev. 463.

55. Anthony E. Davis, *Professional Liability Insurers as Regulators of Law Practice*, 65 Fordham L. Rev. 209, 211 (1996).

56. Indeed, as Professor Little ruefully notes, my framework fails to include federal prosecutors at all. See Little, *Federal Prosecutors*, *supra* note 9, at 357-58. As I

On the other hand, Ted Schneyer correctly notes that by abandoning the kind of ideal types employed by traditional legal process scholars in favor of an examination of actual—and even potential—practice, my framework runs the risk of “fudging” the comparative analysis by treating some aspects of a given system as immutable while imagining plausible changes in others.<sup>57</sup> Schneyer overstates this charge. For example, in contending that I “cannot conceive” of changes that might improve the operation of the disciplinary system, Schneyer overlooks the fact that I both expressly consider the reforms to that system proposed, but as of yet unadopted, by the ABA<sup>58</sup> and endorse the very move towards holding law firms responsible for disciplinary violations (as opposed to individual practitioners) that Professor Schneyer has successfully championed.<sup>59</sup> Nevertheless, the problem he identifies remains: in a world in which both regulatory authority and institutional structures are in flux, how can we identify those aspects of a given institution that are essential to its operation as opposed to those that are subject to change?

*Who Should Regulate Lawyers?* does not purport to provide a comprehensive answer to this question, nor can I provide one here. Nor, I should note, do any of the other authors in this Symposium. Clearly, existing practice constitutes the primary touchstone. This is particularly true if efforts to reform these practices have been tried and failed. Thus, as Schneyer notes, there is no inherent reason why disciplinary agencies could not become more proactive or that greater efforts could not be made to encourage knowledgeable parties to report misconduct to these bodies. Nevertheless, attempts to achieve both of these goals have been largely unsuccessful. Persistent financial constraints continue to hamper the ability of disciplinary bodies to engage in proactive investigations, just as efforts to encourage lawyers, judges, and other knowledgeable insiders to report misconduct to disciplinary bodies have yielded few results. Moreover, these failures seem likely to continue because they are consistent with the incentives created by this form of control.

As I argued above, the regulatory incentives surrounding a given control system will have a profound effect on the system's operation. These incentives can be changed only with difficulty. Thus, so long as the bar continues to exert substantial influence over the disciplinary system, it is unlikely that this form of control will ever value externality problems as highly as agency problems. The image of the lawyer as the client's champion stands at the heart of the bar's view of the

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discuss in the next section, this omission has important consequences for other parts of my analytic framework as well.

57. See Schneyer, *Foreword*, *supra* note 2, at 54.

58. See Wilkins, *Who Should Regulate Lawyers?*, *supra* note 1, at 805 n.19 (discussing the changes proposed by the ABA's MacKay Report).

59. See *id.* at 874 n.323.



world.<sup>60</sup> This image has had a lasting effect on the development of the current disciplinary system. As Professor Mark Roe argues in a related context, decisions about institutional priorities made by one set of decision makers in response to a perceived set of problems radiate effects long after the historical contingencies that gave rise to these decisions have passed.<sup>61</sup> Although disciplinary controls have evolved a long way from their traditional roots as the way for the organized bar to demonstrate its legitimacy and its concern for client rights, those original structures and purposes continue to shape the direction of contemporary developments. Thus, it is not surprising that the reforms proposed by the MacKay Commission and every other official body that has examined the disciplinary process concentrate on agency problems, primarily those affecting individual clients. Although it might be possible to break the grip of this path of the past, doing so will inevitably involve efficiency costs.

This last point highlights the benefit of comparative institutional analysis. The point is not simply whether various control systems *could* address particular problems, but rather which mechanism is most likely to control these problems at the lowest possible cost, measured in terms of both compliance and independence arguments. Thus, the argument that disciplinary controls should concentrate primarily on individual agency problems does not assume, as Schneyer seems to imply, that it is impossible to imagine this control system addressing corporate externality problems. Instead, all that is necessary to support this conclusion is that other enforcement systems have a comparative advantage with respect to these latter problems. For the reasons spelled out in *Who Should Regulate Lawyers?*, liability and institutional controls have this kind of comparative advantage.

Nevertheless, as Schneyer correctly notes, there is nothing inevitable about this fact. The Supreme Court and various lower courts, as well as the SEC and the OTS, have recently cut back on the ability of both liability and institutional controls to address various externality problems.<sup>62</sup> The point of a comparative institutional analysis, however, is to suggest that these restrictions are misguided.

### C. *Categorical Rules Versus Case-by-Case Analysis*

Schneyer's final two criticisms relate to the usefulness of categorical judgments about various forms of professional regulation. The comparative institutional analysis in *Who Should Regulate Lawyers?* rests on two kinds of categorical judgments: the judgment that there are important differences between lawyers who represent corporations and those who work for individuals; and the claim that there is an

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60. See Rhode, *supra* note 32.

61. See Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 Harv. L. Rev. 641, 643-62 (1996).

62. See, e.g., sources cited in Schneyer, *Foreword, supra* note 2, at 48 n.72.

important distinction between agency problems affecting clients and externality problems that harm third parties or the public at large. Schneyer attacks these categorical judgments on two fronts. First, he questions the usefulness of these categories in particular circumstances. More generally, he wonders whether categories such as these are sufficiently nuanced to determine actual enforcement choices.

There is merit to each of these arguments. Given the inherent ambiguity and uncertainty over who is the prosecutor's "client," (is it the current administration, the electorate, the public interest?), categorizing misconduct in terms of agency and externality violations is particularly problematic.<sup>63</sup> Similarly, as Professors Green and Martyn demonstrate, in the context of conflicts of interest it is impossible to draw a bright line between agency and externality problems.<sup>64</sup> Nevertheless, the distinction between these two kinds of lawyer delicts is important, and failing to take note of it weakens arguments about the relative value of various control systems.<sup>65</sup>

Consider, for example, Davis's proposals for increasing the use of insurance contracts as regulatory devices. This form of market regulation is expressly tied to the operation of the litigation system. That system, however, is heavily weighted toward suits by injured clients claiming agency violations.<sup>66</sup> Given this underlying reality, insurance regulation is likely to entrench even further the importance of advo-

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63. See Little, *Federal Prosecutors*, *supra* note 9, at 416. This is just another example of the fact that my framework was not designed to deal with the unique problems encountered by federal prosecutors.

64. See Green, *The Judicial Role*, *supra* note 9, at 88-89 (noting that conflicts of interest are "in the very least" a hybrid between agency and externality conduct, and, from the perspective of the "current or former client who is not represented in the litigation" they are best characterized as externality problems); Martyn, *Response to Green*, *supra* note 37, at 132 (endorsing a similar description). For the record, although I agree with Professors Green and Martyn that conflicts of interest can be classified as externality problems if one views the current or former client whose lawyer represents another client with opposing interests as a "third party," such a characterization seems strained in light of the fact that these "victims" are entitled to object to the lawyer's actions precisely because the lawyer continues to owe them fiduciary duties. Failing to carry out a fiduciary obligation to present or former clients constitutes the essence of agency problems. What makes conflict situations both unique and difficult is that there are at least two sets of potentially conflicting agency problems at stake.

65. For example, Professors Macey and Miller's argument that agency regulation poses a unique threat to the lawyers for regulated industries rests on the implicit assumption that preventing agency problems is the only relevant regulatory goal. See Jonathan R. Macey & Geoffrey P. Miller, *Reflections on Professional Responsibility in a Regulatory State*, 63 *Geo. Wash. L. Rev.* 1105 (1995); see also Monroe H. Freedman, *Kaye Scholer—Overzealous or Overblown?*, 35 *S. Tex. L. Rev.* 577 (1994) (discussing the Kaye, Scholer case and concluding that the OTS shifted blame for its regulatory failures).

66. See Note, *Developments in the Law: Lawyers' Responsibilities and Lawyers' Responses*, 107 *Harv. L. Rev.* 1547, 1557-81 (1994). As I indicated above, recent developments are likely to accentuate that disparity. See *supra* note 62 and accompanying text.

cacy duties over those owed to the public or the legal system. This result seems particularly likely for solo or small firm lawyers who generally do not have the bargaining power to modify the risk-reducing restrictions imposed by their insurers.

Indeed, once one considers the background conditions facing particular lawyers and clients, even regulatory reforms that are specifically directed at preventing either agency or externality problems may actually end up producing the opposite result. Thus, once one recognizes that individual clients are generally unable adequately to monitor and evaluate the amount of effort their lawyer is exerting on their behalf, Professor Brickman's admirable attempt to prevent price gouging via the "standard" contingent fee (a classic agency problem) may unfortunately exacerbate the tendency for personal injury lawyers to settle quickly rather than fighting to obtain the maximum recovery for their clients.<sup>67</sup> At the opposite pole, Painter's attempt to reduce the incentive for lawyers representing regulated entities to encourage their clients to defect from socially beneficial cooperative schemes with regulators (a classic externality problem) may backfire once one takes into account Professor Ayres's trenchant observation that clients would have to be part of the kind of individualized negotiations between agency and firm lawyers Painter envisions.<sup>68</sup> Thus, in order for there to be "public" gains from such an arrangement, these lawyers must convince their sophisticated repeat-player clients both of the value of cooperating with regulators *and* of the firm's ability to credibly signal to their regulatory counterparts that they are keeping up their end of the bargain. As Gilson and Mnookin argue in a related context, however, both halves of this equation are likely to be difficult in the context of the kind of large firms and sophisticated clients who populate the federal regulatory environment.<sup>69</sup> To the extent that the lawyers fail to convince their clients on either issue, the "payoff" from Painter's scheme may be that it is even more difficult than it is today for lawyers for regulated entities to resist client pressures to subvert systemic values for short term gain.<sup>70</sup>

Even if one accepts the analytic scheme I propose in *Who Should Regulate Lawyers?*, these categories are still too general to produce judgments about the proper scope of professional regulation that will be valid for "all aspects of all cases in the category."<sup>71</sup> As William Simon argues in a related context, however, the same criticism can be

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67. See Koniak, *Response to Brickman*, *supra* note 20, at 340 n.19.

68. See Ayres, *Response to Painter*, *supra* note 36, at 205-06.

69. See Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 *Colum. L. Rev.* 509 (1994).

70. See Robert W. Gordon, *The Independence of Lawyers*, 68 *B.U. L. Rev.* 1, 11-13 (1988) (arguing that strong and immutable professional norms give lawyers some protection against the antisocial demands of powerful clients).

71. Schneyer, *Foreword*, *supra* note 2, at 53.

raised against any categorical scheme.<sup>72</sup> By their very nature, categorical rules are inherently over and under inclusive. As a result, even though liability and institutional controls are better at handling most corporate externality problems than the current disciplinary system, there may be some problems of this kind that would be better served by the kind of enlightened disciplinary system Professor Schneyer advocates. Although some of these problems can be addressed by allowing enforcement officials to make more refined contextual judgments at the point of enforcement,<sup>73</sup> the potential for over and under inclusion remains.

Nevertheless, context-specific categories tend to reduce arguments about over and under inclusion. This brings us to the second issue I would like to discuss.

## II. WHY CONTEXT COUNTS

A comparative institutional analysis in the field of professional regulation need not advocate a context-based approach to either rulemaking or enforcement. The bar, for example, has traditionally come to the opposite conclusion. Nevertheless, the central premise underlying *Who Should Regulate Lawyers?*, as well as most of the rest of my work, is that the traditional claim that a uniform set of ethical rules and enforcement practices governs all lawyers in all contexts is both descriptively false and normatively unattractive.<sup>74</sup> As a descriptive matter, the universal claims of the traditional model are belied by two features of contemporary law practice. First, the increasing specialization and diversification among lawyers and clients renders any single image of the lawyer/client relationship, e.g., the traditional model's implicit image of a solo practitioner representing an individ-

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72. See William H. Simon, *Should Lawyers Obey the Law?*, 38 Wm. & Mary L. Rev. (forthcoming 1996) [hereinafter Simon, *Should Lawyers Obey the Law?*]; see also William H. Simon, *Ethical Discretion in Lawyering*, 101 Harv. L. Rev. 1083, 1090-91 (1988) [hereinafter Simon, *Ethical Discretion*] (criticizing a categorical approach).

73. See Wilkins, *Who Should Regulate Lawyers?*, *supra* note 1, at 877-79.

74. See *id.* at 873-86 (arguing in favor of a multi-door enforcement policy that accounts for differences in lawyer/client contexts); see also Wilkins, *Making Context Count*, *supra* note 29, at 1216-17 (calling for the recognition of a paradigm shift towards a context-based regulatory mechanism for lawyers who represent federally insured financial institutions); Wilkins, *Legal Realism*, *supra* note 34, at 470 (advocating context-specific "middle-level" interpretive and regulatory principles as a response to the indeterminacy of many ethical rules). My work on the social structure of the bar and on the relationship between identity and professional role is similarly concerned with context. See, e.g., David B. Wilkins, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 Cal. L. Rev. 493 (1996) (arguing that law firm integration is a product of the institutional structure of firms); David B. Wilkins, *Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers*, 45 Stan. L. Rev. 1981, 1983-85 (1993) (arguing that racial identity plays a role in creating moral obligations).

ual client, inaccurate and misleading.<sup>75</sup> At the same time, the proliferation of formal and informal regulatory mechanisms directed either expressly or as a practical matter at particular subgroups within the profession belies any suggestion that these diverse lawyers and clients are subject to a unitary set of normative rules and enforcement practices.

At the normative level, the traditional model's facade of universality can only be maintained by ignoring differences among lawyers, clients, and practice settings that plausibly affect the feasibility and/or the desirability of applying particular ethical rules or enforcement practices, or both, in particular contexts. As a result, traditional ethics discourse has tended to be structured around the limiting case—criminal defense, or, even more specifically, *indigent* criminal defense.<sup>76</sup> To the extent that a given ethical norm or enforcement practice would be problematic in this context, regulators have traditionally been reluctant to apply it in any other (even where the unique dangers associated with the representation of indigent criminals are not present) for fear of creating a slippery slope that will undermine important professional values in the criminal context.

A contextual approach to professional regulation, however, creates its own problems. At one level, the move to context seems to deny that there are any common features about the lawyer's role or the practice of law.<sup>77</sup> At the same time, once one embraces context, it is not clear which of the infinite number of contextual differences among particular lawyers, clients, and regulatory settings are relevant and for which purposes.<sup>78</sup> By denying those aspects of the lawyer's role that cut across practice settings, while at the same time encouraging lawyers and other interested parties to view every situation as unique, a contextual approach to legal ethics runs the risk of either reducing the legal profession to a series of fiefdoms in which discrete subgroups fight over ethics for their own selfish purposes, or of producing a totally decentralized system based on some combination of individual conscience and private contract.<sup>79</sup>

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75. See David B. Wilkins, *Everyday Practice is the Troubling Case: Confronting Context in Legal Ethics*, in *Everyday Practice and Trouble Cases* (A. Sarat, ed., Northwestern University Press) (forthcoming 1997) [hereinafter Wilkins, *Everyday Practice*].

76. See David Luban, *Lawyers and Justice: An Ethical Study* 60-66 (1988) (noting and criticizing the importance of criminal defense to legal ethics).

77. See Thomas D. Morgan & Robert W. Tuttle, *Legal Representation in a Pluralist Society*, 63 *Geo. Wash. L. Rev.* 984, 998-99 n.77 (1995) (criticizing my call for "middle-level principles" on this ground).

78. See Martha Minow & Elizabeth V. Spelman, *In Context*, 63 *S. Cal. L. Rev.* 1597 (1990) (discussing the problem of deciding which contextual factors are relevant for which purposes).

79. For the claim that context-specific rules and enforcement practices facilitate capture by either lawyers or regulators, see Freedman, *supra* note 65 (arguing that the OTS's enforcement action against Kaye, Scholer captured and distorted legal ethics);

This interrelated set of concerns, which I will call the specificity problem, poses an important challenge to developing a context-specific account of legal ethics and professional regulation. Nevertheless, although it seems paradoxical, acknowledging these concerns should make us more, not less, willing to discard the universalizing assumptions of the traditional model. To see why, we must examine what is really at stake with respect to each pole of the specificity problem: that context undermines important universal values and that a contextual system is administratively unworkable or undesirable.

The first thing to notice about the first of these objections, that the move towards context implicitly denies and perhaps even undermines normative commitments that ought to unite all lawyers, is that it is itself an argument from context. Those who assert, to borrow a phrase from David Luban and Michael Millemann, that there is a "natural" law of lawyering<sup>80</sup> that differentiates the normative commitments of lawyers from those of ordinary citizens, are implicitly claiming that there is something about the context in which lawyers engage with clients and other members of society that separates this occupation from all others, or at least all other "non-professionals."<sup>81</sup> Proponents of the strong form of this proposition, i.e., that legal ethics cannot be criticized "by reference to the universal moral code,"<sup>82</sup> have been widely and persuasively criticized for both ignoring the fact that professions such as law must be designed to fill society's needs and denying the importance of individual moral agency.<sup>83</sup> Although it has

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Morgan & Tuttle, *supra* note 77, at 998-99 n.77 (expressing concern that context specific rules will not be able to "stand against harmful elements of that practice"). See generally Milton Friedman, *Capitalism and Freedom* 119-36 (1982) (arguing that specialization creates the potential for monopolies). For a sympathetic account of how attention to context can and should lead to a totally decentralized approach to legal ethics, see Gilson & Mnookin, *supra* note 69, at 517 (endorsing private contracts between lawyers and clients defining the scope of the lawyer's ethical responsibility); Simon, *Should Lawyers Obey the Law?*, *supra* note 72 (endorsing a "substantivist" approach to legal ethics in which individual practitioners decide both the content and the applicability of legal rules according to their own conception of legal merit); Simon, *Ethical Discretion*, *supra* note 72 (advocating individual discretion in ethical decision making). As I indicated above, Professor Painter makes a similar proposal with respect to contracts between agency lawyers and those representing regulated clients. See Painter, *Game Theoretic*, *supra* note 33, at 178-80.

80. See David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 *Geo. J. Legal Ethics* 31, 41-42 (1995).

81. See Geoffrey C. Hazard, Jr., *My Station as a Lawyer*, 6 *Ga. St. U. L. Rev.* 1, 7-9 (1989) (arguing that a lawyer's ethical obligations are defined by the unique requirements of his "station"). See generally Paul Camenish, *Grounding Professional Ethics in a Pluralistic Society* (1983) (arguing that common normative commitments link all "professionals").

82. Hazard, *supra* note 81, at 16.

83. See, e.g., David Luban, *Lawyers and Justice: An Ethical Study* 126-27 (1988) (critiquing "my station and its duties" from the perspective of moral agency); Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 *Tex. L. Rev.* 689, 690 (1981) (noting that "professional codes are desirable only insofar as they serve common goals to a greater extent than other forms of con-

now become popular to treat problems of professional ethics as if they were simply particular instances of more general moral or contractual issues.<sup>84</sup> I am, for reasons that I set out more fully elsewhere, sympathetic to a weaker version of the professionalism thesis: that there are good grounds for believing that lawyers, in virtue of their role with respect to clients and society as a whole, do have *prima facie* normative obligations that may differ from other members of society.<sup>85</sup> Even these "professional" obligations, however, are best understood in context.

Those who support unique professional obligations for lawyers must ground these duties in some central feature of the lawyer's role, such as the fact that lawyers are fiduciaries or that lawyers have been entrusted with social powers that are not granted to ordinary citizens. Every one of these duties and entitlements, however, is defined by and refracted through institutions.

Consider, for example, the claim that all lawyers have a *prima facie* duty to obey the law.<sup>86</sup> This claim flows naturally from the traditional model's assertion that one of the defining features of legal professionalism is that lawyers have specialized knowledge about law not available to ordinary citizens.<sup>87</sup> As Edward Rubin notes, however, although "[o]ne can generalize rather grandly about law," it is much more useful to conceive of law as "aspects of social institutions that operate at the particularized level."<sup>88</sup> Consequently, the "law" to which lawyers owe their obligation is in reality a vast overlapping web

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trol"). I have argued in favor of both of these objections to the strong form of "my station and its duties." See David B. Wilkins, *Practical Wisdom for Practicing Lawyers: Separating Ideals from Ideology in Legal Ethics*, 108 Harv. L. Rev. 458 (1994) (arguing that legal ethics must always be accountable to society's purposes, and therefore, society's ethics); Wilkins, *Legal Realism*, *supra* note 34, at 514 (arguing that "[f]or individual lawyers, ethical decisionmaking is inevitably a good faith exercise in discretionary judgment" which lawyers cannot completely evade by appealing to either rules or roles). I return to the distinction between individual decisionmaking and designing social institutions below.

84. See, e.g., Macey & Miller, *supra* note 65, at 1105 (arguing that "any problem between lawyers and clients in the private sector is simply a particular manifestation of the general agency problem that exists between shareholders and corporate managers, or doctors and patients").

85. See David B. Wilkins, *In Defense of Law and Morality: Why Lawyers Have a Prima Facie Obligation to Obey the Law*, 38 Wm. & Mary L. Rev. (forthcoming 1996). For a general defense of the normative coherence of "professionalism" when understood in institutional terms, see David B. Wilkins, *Redefining the "Professional" in Professional Ethics: An Interdisciplinary Approach to Teaching Professionalism*, 58 Law & Contemp. Probs. 241 (1995).

86. See Morgan & Tuttle, *supra* note 77, at 1004-05; Wilkins, *Obey the Law*, *supra* note 85, at 28.

87. See Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 Am. B. Found. Res. J. 613, 617 (arguing that lawyers have unique access to the public good of law).

88. Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 Harv. L. Rev. 1393, 1425 (1996).

of public and private institutions that define, negotiate, interpret, and apply legal rules and principles. The substantive content of the "law" that emerges from this process, and, therefore, the normative content of the lawyer's ethical obligation, cannot be separated from this context-specific institutional process.<sup>89</sup>

Moreover, what it means for a lawyer to "obey" the law is itself a function of institutional context. Lawyers occupy a number of distinct roles within the political and social institutions that make and interpret law. These roles plausibly affect the stance that a given lawyer should take towards a particular legal rule. Thus, to take a simple example, an advocate in court arguably shows no disrespect for a statute when she argues in a brief that the rule should be disregarded because it would cost her client too much to comply. If the same lawyer counseled a client in her office to ignore the rule on these grounds, we might have grounds for claiming that she violated her *prima facie* commitment to legality. Once we recognize the many differences that lie concealed within the broad categories of "advocates" and "advisors," we will be forced to acknowledge that there are many other instances in which the particular circumstances surrounding a lawyer's relationship to a given law-making or law-interpreting institution will, for better or for worse, plausibly affect the substantive content of the general command to "obey the law."<sup>90</sup>

Finally, contrary to the traditional model's image of the solo practitioner and the individual client, most lawyers work in organizations and for organizations.<sup>91</sup> These private institutions also play an important role in constructing the practical content that lawyers give to legal rules. In his pioneering study of the New York bar, Jerome Carlin demonstrated that a given lawyer's understanding of the normative content of ethical rules will be strongly influenced by the "ethical climate" of the institutions in which the lawyer works.<sup>92</sup> More recent examinations of the practices of various subgroups within the profession underscore the extent to which the institutions in which lawyers

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89. As Professor Rubin argues, the political decision to "protect the environment" is given legal expression through "the specific rules by which this protection is effected, the organization of the agency to which the task is assigned, the procedures that the agency must follow, and the grounds on which its decisions can be challenged." *Id.* As a result, the study of environmental law "can be described as a micro-analysis of these institutions." *Id.*

90. See Wilkins, *Making Context Count*, *supra* note 29, at 1183-203 (arguing that "litigation counsel" may have different ethical obligations vis-a-vis "the law" than regulatory counsel).

91. See Richard L. Abel, *American Lawyers* 203 (1989) (noting that by the mid-1970s, corporate clients consumed more than one-half of all private legal services and that of the remaining half, less than 18 percent were devoted to serving the personal interests of individuals); Ted Schneyer, *Professional Discipline for Law Firms?*, 77 *Cornell L. Rev.* 1, 4 (1991) (noting that more than two-thirds of the legal profession now practices in some kind of institutional setting);

92. See Jerome E. Carlin, *Lawyers' Ethics: A Survey of the New York City Bar* 166-67 (1966).



live and work structure their understanding of and allegiance to legal norms.<sup>93</sup>

Collectively, these realities underscore the legal profession's deep connection *and* commitment to the institutions in which law is created, interpreted, and applied. To the extent that we are to develop an account of lawyer professionalism that has meaning in the real world, it must begin with a detailed study of how these institutions shape and are shaped by the actions of lawyers. Context, therefore, is unavoidable.

By focusing on institutions, however, a contextual approach to professional regulation can also minimize some of the administrative problems captured by the second prong of the specificity problem. Five aspects of this second prong are especially relevant to the issues addressed in this Symposium: duplication, conflicts, competition, capture, and fragmentation. I close this part by discussing how the contributions to this Symposium illuminate each of these issues.

#### A. Duplication

In *Who Should Regulate Lawyers?*, I characterized the domains inhabited by corporate and individual lawyers as "semi-autonomous social fields" to illustrate how these hemispheres of the bar both "generate rules and customs and systems internally," but are also "vulnerable to rules and decisions and other forces emanating from the larger world."<sup>94</sup> The same can be said about each of the sanctioning systems. The five principal articles in this Symposium consistently demonstrate how decisions that are made in one arena are influenced, either consciously or unconsciously, by actions that are taken in another.

This permeability raises several potential problems for a contextual approach to professional regulation. First, as Professor Green has noted in another article, "too many regulators [can] produce too little enforcement."<sup>95</sup> Underenforcement can occur, as Green argues with

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93. See, e.g., Michael J. Kelly, *Lives of Lawyers: Journeys in the Organizations of Practice 8-12* (1994) (arguing that different work places develop their own conception of "legal professionalism" and other core values); Robert L. Nelson and David M. Trubek, *Arenas of Professionalism: The Professional Ideologies of Lawyers in Context*, in *Lawyers' Ideals/Lawyers' Practices* 177, 179 (1992) (arguing that "conceptions of lawyer professionalism reflect 'the arenas' in which they are produced"). For an insightful account of the various ways that institutions structure legal compliance, see Elizabeth Chambliss, *Towards the Displacement of EEO Conflict* (1996) (unpublished manuscript, on file with the *Fordham Law Review*); Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 *Law & Soc'y Rev.* 497 (1993).

94. Wilkins, *Who Should Regulate Lawyers?*, *supra* note 1, at 818 n.82 (quoting Sally F. Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 *Law & Soc'y Rev.* 719, 720 (1973)).

95. Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 *St. Thomas L. Rev.* 69 (1995).

respect to prosecutors, because "the various disciplinary authorities can justify relying on others to carry the load."<sup>96</sup> Or, to cite Professor Zacharias's description of the no-contact debate, underenforcement also occurs when one set of regulators steadfastly refuses to acknowledge the legitimate interests of other interested institutions.<sup>97</sup>

Multiple and permeable regulation can, of course, produce the opposite effect—overenforcement. Mr. Davis's description of insurance regulation is instructive. Disciplinary and liability controls already seek to prevent lawyers from representing conflicting interests. Davis now suggests that insurance carriers may refuse to indemnify lawyers in all cases involving conflicts. Although Davis views this as an unqualified victory for legal ethics, this characterization, as Professor Silver notes, is overly optimistic.<sup>98</sup> It is not difficult to imagine circumstances in which multiple representation is in the best interest of the legal system. Although cases involving the joint representation of an employer and its employees, joint defendants, or joint plaintiffs certainly present ethical problems, it is also true that in the absence of joint representation, some clients will be unable to afford legal representation. If lawyers face the loss of insurance coverage, as well as the threat of bar discipline and disqualification, it is likely that many practitioners will view the risks of such representation as exceeding the benefits, leaving those clients who can not afford separate counsel to fend for themselves.<sup>99</sup>

### B. *Conflicts*

A related problem stemming from the existence of multiple regulators is the danger that different sanctioning systems will develop conflicting substantive standards of lawyer conduct. Such conflicts pose two problems. First, lawyers who are arguably subject to more than one sanctioning system will have a difficult time determining which rule they should follow in particular cases. Second, conflicting rules give lawyers the opportunity to structure their conduct so as to take advantage of the most beneficial rule system. The articles in this Symposium demonstrate the importance of both of these concerns.

Professor Little underscores the problems federal prosecutors encountered when they were confronted with conflicting interpretations of the no-contact rules in various district courts.<sup>100</sup> Little's discussion highlights the danger inherent in a system of professional regulation

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96. *Id.* at 91.

97. See Zacharias, *Response to Little*, *supra* note 3, at 457-58 (discussing how the ABA and DOJ emphasized the personal interests of its dispute over the constituents in the regulation of grand jury subpoenas directed to attorneys).

98. See Silver, *Response to Davis*, *supra* note 36, at 241-42.

99. This is another example of the danger of overlooking distinctions among clients when judging the effects of any form of professional regulation, particularly market controls.

100. See Little, *Federal Prosecutors*, *supra* note 9, at 369-75.

that uses geography as a contextual variable. There is, of course, nothing new about this problem. Given that professional regulation has traditionally been considered the province of state supreme courts, there has always been the potential for lawyers practicing in different states to encounter conflicting standards. Nevertheless, the nationalization of many sectors of legal practice, when combined with the ABA's waning ability to set uniform standards of conduct, has brought the problem into sharp relief.<sup>101</sup>

Professor Zacharias accurately summarizes and critiques the arguments in favor of using geography as a contextual factor in professional regulation.<sup>102</sup> Whether or not this calculus favors creating a federal code of ethics for all lawyers, Little's analysis makes a strong case for national regulation of the conduct of federal prosecutors.

Ted Schneyer's claim that many lawyers who represent corporate clients have, in the wake of Kaye, Scholer and other developments, reorganized as limited liability entities underscores the second danger posed by the existence of conflicting rule structures.<sup>103</sup> Limited liability has primarily been a legislative creation. Although many bar associations have tacitly embraced this concept, it nevertheless remains in tension with the Model Rule's presumption that partners are vicariously liable for each other's misconduct.<sup>104</sup> Given this kind of rule conflict, sophisticated actors can shape their conduct to their advantage.

### C. Competition

Regulators sometimes do more than simply enact conflicting standards. In some instances, they actively compete for regulatory dominance. This competition is not always harmful. Professor Silver, for example, notes that competition within the liability insurance industry is likely to blunt some of the more wide-ranging regulatory effects of this form of control predicted by Davis.<sup>105</sup> Similarly, Professor Painter hypothesizes that allowing individual contracting between regulatory lawyers and those who represent regulated entities can create a market for lawyers with a reputation for cooperation.<sup>106</sup>

Nevertheless, there are also dangers inherent in regulatory competition. Professor Zacharias captures these dangers in his detailed description of the war between the ABA and the Justice Department

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101. See Zacharias, *Federalizing Legal Ethics*, *supra* note 27.

102. See *id.* at 373-79.

103. See Schneyer, *Foreword*, *supra* note 2, at 55, 57-58.

104. See John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 Rutgers L. Rev. 101, 142 (1995) (arguing that because of the move towards limited liability, "little . . . remain[s] of vicarious liability in practice").

105. See Silver, *Response to Davis*, *supra* note 36, at 243-44.

106. See Painter, *Game Theoretic*, *supra* note 33, at 189-90.

over the no-contact rules.<sup>107</sup> As he demonstrates, neither of these two regulators has adequately taken account of the legitimate interests of the other. Instead, the two sides have simply sought to maximize their own interests. This danger is particularly acute in circumstances where the regulator has been captured by those whom it was designed to regulate.

#### D. Capture

The phenomenon of agency capture is well documented in administrative law literature.<sup>108</sup> Two of the contributions to this Symposium apply this concept to the field of professional regulation.

Professor Brickman highlights the familiar dark side of agency capture. In his view, the ABA's Committee on Ethics and Professional Responsibility has been captured by an alliance of plaintiffs' and defendants' lawyers intent on maximizing their own fees.<sup>109</sup> Whether one agrees with Brickman's assessment, his analysis underscores the degree to which disciplinary controls and other self-regulatory devices are particularly susceptible to capture.

Professor Painter, on the other hand, reminds us that agency capture is not always inefficient.<sup>110</sup> In circumstance where mistrust and lack of communication lock agencies and firms in a cycle of mutual defection, agency capture may actually produce more compliance at less cost than a regime characterized by regulatory independence.

Whether capture is likely to result in the harmful effects predicted by Professor Brickman or the beneficial ones described by Professor Painter is a function of the particular interactions between regulators and lawyers. Indeed, Professor Painter goes so far as to argue that in order to maximize the chances of achieving "efficient" capture, we should move to a regime of individual contracting. Such a regime, however, would bring the issue of fragmentation into sharp relief.

#### E. Fragmentation

Professor Painter's celebration of individually negotiated ethical rules recalls William Simon's powerful arguments in favor of individual discretion in lawyering and Ted Schneyer's criticism that categorical rules do not provide answers to all aspects of all cases within those categories. Nevertheless, there are dangers in moving towards an exclusively individualist approach.

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107. See Zacharias, *Response to Little*, *supra* note 3, at 460-61.

108. See, e.g., John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 Harv. L. Rev. 713, 741 (1986) (proposing the use of "capture theory to design a more selective rule of [federal] preemption" in antitrust policy).

109. See Brickman, *Contingency Fees*, *supra* note 19, at 257-59.

110. See Painter, *Game Theoretic*, *supra* note 33, at 163-64. Painter's analysis builds on the pioneering work of Ayres and Braithwaite. See Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992).

Individualist systems, whether based on contract or conscience, are subject to a number of limitations. Such schemes are more likely to undermine a particular lawyer's commitment to collective projects that, although of minimal benefit to any individual lawyer, are in the best interest of the profession. In addition, a workable system of professional regulation must account for such traditional rule of law values as constancy, fairness, and predictability. All of these goods are harder to guarantee in a regime of case-by-case decision making. Nor, as I indicated above, is such a system likely to produce much publicly available information about lawyer conduct. Finally, a truly individualist regime would have to account for an almost infinite number of variations of lawyers, clients, and regulatory settings.

These challenges must be balanced against the benefits, outlined by Professor Painter and others, of reaching increasingly refined contextual judgments about the effectiveness or desirability of various forms of professional regulation. Future analysis in this field must seek to understand how this balance should be struck.

### III. THE FUTURE OF COMPARATIVE INSTITUTIONAL ANALYSIS

Professor Schneyer concludes his Foreword with a call for a richer body of scholarship addressing institutional choices in the field of professional regulation.<sup>111</sup> I wholeheartedly join this call. Institutions lie between the generality of formal rules and the particularism of individual decision making. As a result, in fields ranging from economics to political theory, scholars have increasingly focused on institutions as the arena in which the abstract commands of legal rules and the disparate goals of individuals intersect and are given meaning and expression.<sup>112</sup>

With respect to lawyers, institutions both collect and mediate among the objectives of different groups of practitioners. Sometimes this institutional effect highlights the extent to which in certain settings, contextual distinctions that might be seen as fragmenting legal ethics are in reality overlapping and mutually reinforcing. For example, lawyers who represent regulated clients before federal administrative agencies tend to work in similar kinds of law firms and devote most of their professional energy to a few well-defined and highly specialized tasks.<sup>113</sup> Focusing on the unique problems these lawyers face is, therefore, more likely to generate real consensus about the ethical rules that should apply in this context than to conduct an abstract in-

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111. Schneyer, *Foreword*, *supra* note 2, at 35.

112. See Rubin, *supra* note 88, at 1411-24.

113. See John N. Heinz & Edward O. Laumann, *Chicago Lawyers: The Social Structure of the Bar* 324 (1982). I make this point with respect to banking lawyers and tax lawyers, in Wilkins, *Making Context Count*, *supra* note 29, at 1212, and Wilkins, *Legal Realism*, *supra* note 34, at 519-20, respectively.

vestigation into the norms that should apply to all lawyers in all contexts.

On other occasions, focusing on the institutions in which lawyers work provides a framework for determining which contextual factors are relevant in any given analysis. Thus, to borrow another example from the Symposium, focusing on whether and on what grounds *courts*, as opposed to disciplinary agencies, should disqualify lawyers from representing conflicting interests provides both a framework and a set of criteria for evaluating the feasibility and desirability of regulating conflicts that are not present when we move to the more general question of defining the obligations that lawyers owe to present and former clients. Once again, placing institutions at the center of the analysis allows us to make sense of the actions of diverse individuals and provides a set of criteria for evaluating their conduct.

Finally, institutions determine the extent to which individualized ethics based on either conscience or contract are feasible and/or desirable. Certain institutional structures are more conducive to individual initiative and decision making. Others impose high costs (individually, systemically, or both) on such projects. To borrow from the Symposium for a final time, the structure of corporate firms representing regulated clients and the dynamics of the plaintiff's personal injury market may make it substantially more difficult to develop the kind of individualized responses to regulating lawyers in these two areas proposed by Professors Painter and Brickman.

The study of the legal profession, therefore, must center around the "microanalysis of . . . institutions."<sup>114</sup> *Who Should Regulate Lawyers?* was an attempt to set out the general parameters for this kind of analysis. The contributions to this Symposium, however, demonstrate the need to apply these tools to specific problems and institutions. I look forward to participating in the further development of this work.

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114. Rubin, *supra* note 88, at 1425.