

Legal Counseling in the Administrative State: How To Let the Client Decide

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The advice that lawyers give to their clients rarely becomes a public matter. Despite the increased legalization of American society in the last several decades, Americans seldom see how lawyers talk about laws within the confines of their offices. When President Clinton nominated Zoë Baird to be U.S. Attorney General,¹ however, the nation was provided with a replay of an attorney-client dialogue. Baird had to explain why she had violated the federal Immigration Reform and Control Act of 1986 (IRCA),² a statute that, like much law promulgated in recent years, is cumbersome to comply with and infrequently enforced. She relayed to the Senate Judiciary Committee the advice she said an immigration lawyer had given: "[I]t had been described to us as a technical violation and that there was a process we could use to regularize the situation."³

Baird—along with the President, members of Congress, and other Washington insiders—learned the hard way that the public did not consider her explanation satisfactory. The outcry against Baird resulted in President Clinton's asking her to withdraw as nominee.⁴ In hindsight, Baird said that

1. See Adam Pertman, *First Woman Attorney General Nominated as Clinton Sets Team*, BOSTON GLOBE, Dec. 25, 1992, at 1.

2. Pub. L. No. 99-603, 100 Stat. 3359 (1986) (the relevant provision is codified as amended at 8 U.S.C.A. § 1324a(a)-(n) (West 1970 & Supp. 1994)).

3. *Hearing of the Senate Judiciary Comm.; Subject: Confirmation Hearing for Zoë Baird*, Fed. News Serv., Jan. 19, 1993, available in LEXIS, Exec Library, Fednew File [hereinafter *Jan. 19 Morning Hearings*]. The "technical" violation was hiring two aliens who did not have green cards, in violation of IRCA, which prohibits an employer from hiring an individual without verifying that the person is authorized to work in the United States; and failing to complete an I-9 form documenting fulfillment of the verification requirement. The "process" that Baird said she and her husband, Paul Gewirtz, used to "regularize" the situation was attempting to sponsor the employees to secure permission to work in the United States. Under this process, an employer first seeks a certificate of need for an employee from the Labor Department. When that certificate is issued, the employer then seeks a green card for the employee from the Immigration and Naturalization Service. The process can take several years. Baird said the papers filed for this process explicitly stated that her husband was presently employing the workers. *Id.*; see also David Johnston, *Clinton's Choice for Justice Dept. Hired Illegal Aliens for Household*, N.Y. TIMES, Jan. 14, 1993, at A1.

When she informed the Judiciary Committee of this legal advice, Baird did not shun responsibility for her behavior. She said, "I don't say that to apologize for it." *Jan. 19 Morning Hearings, supra*.

4. See Michael Kelly, *Clinton Cancels Baird Nomination for Justice Dept.: Strong Opposition*, N.Y. TIMES, Jan. 22, 1993, at A1.

hiring the workers in violation of the law had been wrong.⁵ What remains unaddressed is whether the legal advice that Baird said her husband had received was proper.

According to press reports, a lawyer had advised that while "civil penalties are technically applicable" for hiring illegal aliens "no employer sanctions have ever been applied as a result of the employment of undocumented domestic workers in Connecticut."⁶ Legal ethics commentators who advocate the so-called "positivist" or "libertarian" view of counseling would likely contend that this advice was correct. That there is an abject lack of enforcement is exactly what the client needs to know, they would say. Commentators in the "purposivist" or "regulatory" camp, on the other hand, would argue that as an officer of the court a lawyer should encourage compliance with IRCA's goals, even in the absence of steady enforcement.⁷

This Note argues that each of these models, standing alone, is inadequate at best and dangerous at worst in a society animated simultaneously by liberal and communitarian tendencies.⁸ Rather than adhere to a model that presumptively favors either the individual or the state, the legal counselor should provide what this Note calls "full-picture counseling." By giving the client the full picture, the lawyer aims to enable the client to choose a course of action that the client, while aware of societal interests in the legal measure, considers appropriate. The client's choice might be narrowly self-interested, or fulfill the law's substantive purposes, or fall somewhere in between, but it is

5. Jan. 19 Morning Hearings, *supra* note 3.

6. David Johnston, *Clinton Not Fazed by Nominee's Hires*, N.Y. TIMES, Jan. 15, 1993, at A15. Baird was a resident of New Haven, Connecticut.

The reported advice was contained in a letter prepared by an attorney at the time of Baird's nomination, not when legal advice was actually relayed. The attorney prepared the letter at Gewirtz's request. Jill Smolowe, *How It Happened; The Baird Debacle Grew Out of a Selection Process in Which Clinton Aides Acted Hastily and Cavalierly in Brushing Aside an Early Warning*, TIME, Feb. 1, 1993, at 31.

7. The terms positivist and libertarian, and purposivist and regulatory, are taken from William Simon's descriptions of leading models of legal counseling. These models are thoroughly presented and criticized in William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29 [hereinafter Simon, *Ideology*]. See also William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1084-90 (1988) [hereinafter Simon, *Discretion*] (discussing libertarian and regulatory approaches, and indicating that they are analogous to positivist and purposivist models). Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, provides a recent and well-received defense of what Simon calls the libertarian view, and what Pepper calls the "amoral" role. Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988), offers a comprehensive defense of purposive lawyering. Gordon uses the term "liberal advocacy" to describe what Simon calls the positivist/libertarian approach and what Pepper calls the amoral approach. *Id.* at 10.

This Note primarily uses the terms positivist to refer to the positivist/libertarian/liberal advocacy/amoral approach to legal counseling, and the term purposivist to refer to the purposivist/regulatory approach. Though the terms have jurisprudential import, jurisprudence is relevant to, but not the focus of this Note. Rather, the terms positivist and purposivist are chosen solely for convenience. For a discussion of Simon's and this Note's use of the term "positivist legal counselor," see *infra* note 18.

8. For a discussion of these terms, see *infra* note 48 and accompanying text.

a choice that as nearly as possible is a product of the client's reflective judgment.

Under the full-picture model, the lawyer's primary role is to enhance the client's ability to make decisions.⁹ When a law does not readily exhibit a justification for the constraints that it imposes, the counselor should articulate to his client the purposes of the law. Because a client who recognizes a law's goals might be more apt to choose a path of action that would further those goals, it would be a disservice to the client, and to society, to fail to provide advice about those goals. At the same time, however, if the law is not enforced, or its legitimacy is questionable,¹⁰ the full-picture counselor would convey those aspects of the measure, even if it meant that a client so counseled would be more likely to breach. The first task—conveying purposes—would be inconsistent with the positivist counseling model; the latter task—focusing on problems—would be inconsistent with the purposivist counseling model. Together, both tasks would satisfy the full-picture counseling model. A valuable side benefit of the full-picture approach is that it helps keep the government accountable to the governed, as clients receive information that helps them understand the actions of those they have charged with governance.

The full-picture counseling model is especially appropriate given the increased legalization of American society.¹¹ Preservation of individual autonomy in a heavily regulated society requires legal counseling that does not limit a client's access to information about and assistance with the law.¹² At the same time, the justification for seemingly bureaucratic requirements, or for complex, centrally promulgated legal rules limiting behavior *mala prohibita*, may well be less apparent to a lay client than would the justification for rules

9. The full-picture model was conceived with the private practitioner in mind. This Note does not explore what different considerations would be applicable for government lawyers, public interest lawyers, or prosecutors and criminal defense lawyers.

10. See *infra* notes 89-98 and accompanying text (exploring idea of illegitimate laws).

11. Though an increase in legalization cannot be summarily quantified, this Note is referring generally, though not exclusively, to the vast economic and social regulatory initiatives of the New Deal and the 1960's and 1970's, and the concomitant increased involvement of courts in various aspect of American life. These changes have meant that a wide variety of decisions once left to the discretion of individual citizens, local governmental actors, and businesses are now subject to legal rules and processes. See generally R. SHEP MELNICK, *REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 3-10* (1983); CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* 2, 18-31 (1990); Geoffrey C. Hazard, Jr., *Four Portraits of Law Practice*, 57 UMKC L. REV. 1, 10-13 (1988); David Vogel, *The "New" Social Regulation in Historical and Comparative Perspective*, in *REGULATION IN PERSPECTIVE* 155 (Thomas K. McCraw ed., 1981). For further discussion of the regulatory measures passed in the 1960's and 1970's, the so-called "New Social Regulation," see *infra* note 66.

12. While much law aims to and does enhance the autonomy of some individuals without detracting from the autonomy of others, an increase in the pervasiveness of law can reduce autonomy by limiting the realm of legally acceptable behavior. See Hazard, *supra* note 11, at 10-11; CHARLES L. SCHULTZE, *THE PUBLIC USE OF PRIVATE INTEREST* 6 (1977) (noting "inevitable costs" posed by centralized regulations to "scope of individual choice"). Perhaps more important, individuals may need a full understanding of law to protect their rights and achieve their goals in a society in which most activities are controlled by law. Pepper makes this point in arguing that "in a highly legalized society such as ours, autonomy is often dependent upon access to the law." Pepper, *supra* note 7, at 617.

constraining behavior *mala in se*. Though an active enforcement presence would likely promote obedience even if a client did not understand or support a measure,¹³ laws in the modern regulatory regime often are not actively enforced.¹⁴ A lawyer who fails to convey purposes could deny a client the opportunity to embrace a measure's goals and in so doing could hinder the measure's chance for success. Finally, some regulatory measures have been attacked as deceitful, in that they claim to seek goals that they almost certainly will not achieve.¹⁵ A lawyer who fails to convey the "full picture" about such legal measures can cloak the legal system, and himself, with a veneer of legitimacy not wholly deserved.

Part I of this Note reviews the leading academic models of legal counseling. Part II elaborates on the full-picture counseling model. Part III uses the Baird case to show how full-picture counseling would work in practice.¹⁶

13. See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) ("A man who cares nothing for an ethical rule which is believed and practiced by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can.").

14. See SUSAN ROSE-ACKERMAN, *RETHINKING THE PROGRESSIVE AGENDA: THE REFORM OF THE AMERICAN REGULATORY STATE* 71 (1992) ("In the regulatory area, conflicts between budgetary stringency and statutory goals are a familiar feature of many current programs."); Barbara Presley Noble, *Breathing New Life into OSHA: More Muscle for the Same Money*, N.Y. TIMES, Jan. 23, 1994, at F25 (reporting Labor Secretary Robert Reich's acknowledgment that "an agency with a \$300 million budget and 2300 employees cannot police the nation's six million employers").

15. See, e.g., ROSE-ACKERMAN, *supra* note 14, at 44-47, 70-79 (criticizing statutes that are internally inconsistent, and those that are not supported by adequate appropriations).

16. This Note uses the Baird case to exemplify a paradigmatic situation faced by the modern legal counselor: counseling on compliance with a seemingly bureaucratic, largely unenforced rule. With that end in mind, certain simplifying assumptions are made about the nature of the attorney-client exchange in that case.

First, because Baird discussed with the Judiciary Committee the legal advice relayed about IRCA, this Note assumes that Baird was the client, even though Baird said that only Gewirtz had had contact with lawyers. See *Jan. 19 Morning Hearings*, *supra* note 3; *Hearing of the Senate Judiciary Comm., Afternoon Session; Subject: Confirmation Hearing for Zoë Baird*, Fed. News Serv., Jan. 19, 1993, available in LEXIS, Exec Library, Fednew File [hereinafter *Jan. 19 Afternoon Hearings*]. The Note assumes further that Baird relied on the advice of one attorney, and it refers to this hypothetical lawyer as "Baird's lawyer." In fact, Baird said that the advice of more than one lawyer had been sought, both before and after the workers were hired. *Jan. 19 Morning Hearings*, *supra* note 3. Press reports, for example, indicate that the individual attorney quoted in the newspapers as having advised that civil penalties were technically applicable was first contacted by Gewirtz four months after the workers had been hired. Smolowe, *supra* note 6, at 31. Baird said, however, that the advice relayed from this quoted attorney was essentially the same advice received from attorneys before the hiring. *Jan. 19 Morning Hearings*, *supra* note 3; *Jan. 19 Afternoon Hearings*, *supra*. Finally, this Note assumes that the advice offered and Baird's reaction to it were the advice and reaction described in press reports and by Baird herself during her confirmation hearings—nothing more, nothing less.

Second, certain circumstances specific to the Baird situation should not detract from the argument of this Note. First, some might contend that a well-educated and sophisticated lawyer like Baird did not need to be told about the background of IRCA to understand its purposes. Even if this were true (and it is a questionable assumption, since many lawyers are unfamiliar with areas of law in which they do not practice) this Note assumes, unless it indicates otherwise, that the typical client may be unfamiliar with a constraining measure or its broader underlying purposes. Similarly, while individuals might be more likely to comply with IRCA in the wake of the Baird hearings, the full-picture counseling model is not limited to IRCA. Again, Baird's encounter with IRCA simply serves as an example.

Third, this Note recognizes that not all persons are as able as Baird to afford a lawyer. Yet, as Pepper cogently argues in support of his "first-class citizenship" model of legal counseling, described *infra* Part I.A., the distribution of legal services poses a different issue from "the content of what is distributed." A

I. THE LEADING MODELS OF LEGAL COUNSELING

This Part reviews three leading, established models of legal counseling: the positivist model, the purposivist model, and the discretionary model.¹⁷

A. The Positivist Model

The positivist model¹⁸ derives from the Hobbesian view that society consists of an aggregate of egoistic individuals, each possessing his or her own subjective values. The task of the sovereign is to provide order, and it does so by administering rules that are separate from social norms. The lawyer's role is "to explain how, and under what circumstances, the sovereign will intervene

lawyer's denying a client full information about the law is no solution to the problem that other individuals may not have access to legal services at all. Pepper, *supra* note 7, at 619-20. But see David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637, 643-45 (arguing that counseling model that does not account for differences in access to legal services can create "executive class citizenship" and "second class citizenship"); Simon, *Discretion*, *supra* note 7, at 1091-96 (arguing that because legal services are scarce, lawyer has duty to assess relative merits of potential client's claims and claims of others in deciding whether to represent client).

Fourth, this Note does not attempt to provide a comprehensive explanation of the withdrawal of Baird's nomination. Because this Note uses the Baird case simply as an example through which legal counseling models can be analyzed, it does not address other legal, social, or political questions that Baird's nomination raised. The Note does not, for example, explore whether Baird was held to a different standard because of her sex. See Anthony Lewis, *Abroad at Home; It's Gender, Stupid*, N.Y. TIMES, Feb. 8, 1993, at A17 (suggesting appointment process for Attorney General reflected attitude of "male-dominated society toward women"); Catherine S. Manegold, *Looking for an Attorney General: The Reaction; Women Are Frustrated by Failed Nominations*, N.Y. TIMES, Feb. 7, 1993, at A22 (discussing view that women were being held to higher standard in Clinton Administration's appointment process). Nor does it consider whether American society has failed to address adequately its child care needs. See Anna Quindlen, *Public & Private; Let's Anita Hill This*, N.Y. TIMES, Feb. 28, 1993, at D15 (pointing out that Baird case brought issue of child care to "national consciousness").

Finally, this Note does not analyze Baird and Gewirtz's failure to pay Social Security taxes on behalf of the workers, a legal violation for which Baird also came under fire. Baird had said that a lawyer had advised that they could not pay those taxes as long as the undocumented workers lacked Social Security numbers. *Jan. 19 Morning Hearings*, *supra* note 3. Because the tax issue was purportedly a matter of wrong advice, not ethically questionable advice, it is not considered in this Note. News reports, however, do indicate that many people knowingly fail to pay these taxes, even since the Baird nomination. See Lena Williams, *Relatively Few Taxpayers Are Jolted by the Nanny Scandal*, N.Y. TIMES, Nov. 4, 1993, at C8. To the extent that a lawyer was advising on this tax issue, this Note's counseling model would apply.

17. This Note uses the pronouns "he" and "him" when referring to the lawyer in the lawyer-client relationship, and "she" and "her" when referring to the client. The distinction was drawn for purposes of consistency and simplicity. The feminine pronouns were assigned to the client because the Note relies heavily on the Baird example and assumes she is the client.

18. The description of the positivist counseling model provided here is a highly condensed version of the description Simon provides. See Simon, *Ideology*, *supra* note 7, at 39-61; see also *id.* at 39 & n.24 (summarizing positivist legal theory as emphasizing "the separation of law from personal and social norms, the connection of law with the authoritative application of force, and the systematic, objective character of law"); Simon, *Discretion*, *supra* note 7, at 1084-85. Whether and to what extent Simon's concept of positivism comports with other commentary on legal positivism is beyond the scope of this Note, as this Note uses the term "positivist" counselor solely to characterize a practitioner's model that Simon presents. Again, that model has been presented under other labels by commentators who are less concerned with its jurisprudential foundations. See *supra* note 7.

For jurisprudential discussions of legal positivism, see RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 14-80 (1977); Jules L. Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139 (1982); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

in his client's life."¹⁹ The lawyer counsels on the premise that his client is akin to Holmes' "bad man," who simply wants to know about the nature of this intervention—"what the courts will do in fact, and nothing more pretentious."²⁰ Limited only by the explicit constraints of the legal system and concerned only with the client,²¹ the lawyer will not hesitate to manipulate the law in ways that frustrate the law's goals or run counter to his personal morals. Procedural tactics, for example, are fair game, perhaps even obligatory, as long as they further the client's ends.²² One critic has called this approach to counseling a philosophy of "'what's right is whatever you can get away with.'"²³

Not all adherents of this mode of counseling justify their view strictly by reference to positivist legal theory. Stephen Pepper, for example, has defended the above-described "amoral" role on grounds that only through such counseling can clients achieve the socially desirable "first-class citizenship" that comes with having full access to the law.²⁴

In Pepper's model, law sets a "floor" below which an individual's behavior should not fall, but above which an individual is free to behave as she chooses.²⁵ An "amoral technician," the lawyer does not "screen" access to the law by shaping his presentation to accord with his own moral view of a legal measure or his assessment of society's view of that measure. Similarly, in presenting a realist, amoral account of the law, a lawyer informs a client when

19. Simon, *Ideology*, *supra* note 7, at 41.

20. Holmes, *supra* note 13, at 461.

21. Simon, *Ideology*, *supra* note 7, at 41-42.

22. Simon, *Discretion*, *supra* note 7, at 1085; Gordon, *supra* note 7, at 10 (under liberal advocacy model, lawyers "are expected and even encouraged to exploit every loophole in the rules, take advantage of every one of their opponents' tactical mistakes or oversights, and stretch every legal or factual interpretation to favor their clients").

23. Luban, *supra* note 16, at 646.

24. Pepper, *supra* note 7, at 616-18.

This model has also been justified by reference to the constraints posed by the adversary system, particularly in the criminal defense context. The general argument is that the lawyer should concern himself only with protecting his client's rights, because the client is facing the ominous threat of state power, and because other participants in the adversary system, such as the judge and opposing counsel, will provide any necessary checks generated by concerns for third parties. *Id.* at 621; MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 9 (1975). Supporters of this view might criticize the full-picture model as being insufficiently sensitive to how such counseling might hurt the client in the rough-and-tumble of litigation, where other lawyers are focused solely on advocacy. The full-picture lawyer, however, will advocate zealously on behalf of his client after the client decides, upon contemplating the full picture, that she wants to pursue litigation.

Moreover, the adversary system justification has been criticized on the grounds, among others, that much of lawyers' work does not occur in the criminal defense, or even civil litigation context. Pepper, *supra* note 7, at 621-22; David Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER*, 83, 91 (David Luban, ed., 1983); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 *STAN. L. REV.* 589, 595 (1985). In keeping with this recognition, the full-picture model is designed primarily with the non-litigation or pre-litigation counseling situation in mind. The line between counseling and litigation is, however, arguably a fine one, and the full-picture model applies to both circumstances.

25. Pepper, *supra* note 7, at 617.

the law is not enforced.²⁶ If a lawyer does otherwise—that is, if the lawyer takes into account collective morality or his own personal morality in presenting the law to the client—then he substitutes these views for the client's in a realm in which the law has left room for private decisionmaking. Anything but amoral counseling, Pepper argues, denies the client the ability to achieve the autonomy, the “first-class citizenship,” that comes from having unfettered access to law.²⁷

Pepper does recognize that his model poses what he calls the “Problem of Legal Realism.”²⁸ When the lawyer provides an amoral presentation of the law that may include an account of the odds of enforcement, the lawyer might *foster* disobedience by presenting the law as amoral.²⁹ Pepper suggests that to counter this tendency, the lawyer should engage the client in a “moral dialogue.”³⁰ This dialogue would take place “aside from the law,”³¹ because, according to Pepper, the law is “instrumental and manipulable”³² and itself is “not a source of moral limits.”³³

B. *The Purposivist Model*

In contrast to the positivist counselors, the purposivist counselors start from the view that society is an association of people with shared experiences and norms. Law is meant to advance a common agenda, as well as to preserve order.³⁴ The lawyer is an “agent of social welfare,”³⁵ whose role is to help achieve the law's goals.³⁶ While the lawyer should be sensitive to the needs

26. *Id.* at 627-30. Pepper's view on this point is consistent with the Model Rules of Professional Conduct, which provide that “a lawyer may discuss the legal consequences of any proposed course of conduct with a client.” MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) (1983).

27. Pepper, *supra* note 7, at 617-18.

28. *Id.* at 624.

29. *Id.* at 627-28.

30. *Id.* at 630-32. Rule 2.1 of the Model Rules of Professional Conduct provides for the notion of a moral dialogue: “In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.” MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1983).

31. Pepper, *supra* note 7, at 630.

32. *Id.* at 627.

33. *Id.* at 626.

34. Simon, *Ideology*, *supra* note 7, at 62.

35. *Id.* at 73.

36. Simon, *Discretion*, *supra* note 7, at 1086. Adherents to the purposivist model are perhaps comfortable with assigning lawyers the task of facilitating statutory purposes because they have generally supported the rise of the regulatory state and its aims. The purposivist view of lawyering developed around support for the New Deal and the redistribution of wealth, and the Progressive politics of the 1960's and 1970's. See Bryant G. Garth, *Independent Professional Power and the Search for a Legal Ideology with a Progressive Bite*, 62 IND. L.J. 183, 186 (1987) (exploring whether “the 60's lawyers” can turn legal profession toward progressive political commitments); William H. Simon, *Babbitt v. Brandeis: The Decline of the Professional Ideal*, 37 STAN. L. REV. 565, 585 (1985) [hereinafter Simon, *Babbitt*] (recognizing effort of some corporate lawyers to express in their practice a “commitment to the liberal regulatory-welfare state”). But cf. Simon, *Discretion*, *supra* note 7, at 1085 n.3 (stating purposivist or regulatory approach “has no necessary connection to any particular type of economic system”).

of the individual, he has "an affirmative obligation to oppose his client's antisocial impulses."³⁷ The lawyer's task involves "contributing to the enforcement of the substantive law," and the lawyer looks to the purposes articulated in the law for guidance in this role.³⁸

The prototypical client in the purposivist model might be called the "good but confused" man.³⁹ This person would conform to a substantive legal norm if only she understood its purposes. The lawyer has "affirmative duties to share information and to correct misunderstanding,"⁴⁰ and to encourage compliance with legal norms.⁴¹ Finally, because he is committed to furthering those norms, the purposivist lawyer resists using procedural rules or "loopholes" on behalf of the client if the result would frustrate the law's substantive purposes.⁴²

C. *The Discretionary Model*

The discretionary model, advocated by William Simon, asserts that a lawyer should have professional discretion to consider the "internal merits" of a client's goals during the course of representation, and, regardless of whether those goals are legally permissible, assist the client only if the lawyer believes that doing so would "further justice" or "vindicate our legal ideals."⁴³ Though

37. Simon, *Ideology*, *supra* note 7, at 71.

38. Simon, *Discretion*, *supra* note 7, at 1086.

39. See Simon, *Ideology*, *supra* note 7, at 68. Criticizing Holmes' bad man image, Lon Fuller wrote: "[I]t is a peculiar sort of bad man who is worried about judicial decrees and is indifferent to extra-legal penalties, who is concerned about a fine of two dollars but apparently not about the possible loss of friends and customers." LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 93 (1940).

40. Simon, *Discretion*, *supra* note 7, at 1086. Consistent with this view, a narrow conception of the purposivist model—one that sanctions zealous advocacy in adjudication—has been justified on grounds that zealous presentation of opposing views leads to socially just results. See Rhode, *supra* note 24, at 594-96 (describing and criticizing defense of advocacy that contends that zealous partisanship by lawyers is an appropriate way to achieve what Rhode calls communitarian concern for "informed dispute resolution").

41. See Gordon, *supra* note 7, at 73 (advocating "right of the lawyer to encourage compliance with the law's purposes through persuasion"); see also *id.* at 25 (same).

42. Simon, *Discretion*, *supra* note 7, at 1086; Gordon, *supra* note 7, at 20-21, 73 (criticizing lawyers "who recommend only the most literal forms of compliance and widen every loophole far enough to drive a truck through" and those who "help in exploiting the law's ambiguities and procedural opportunities"). The Federal Office of Thrift Supervision took a purposive view of counseling with regard to its \$275 million suit against the New York law firm of Kaye, Scholer, Fierman, Hays & Handler in 1992. Then-Chief Legal Counsel Harris Weinstein had urged lawyers to "practice the 'whole law,' incorporating a reverence to the spirit and underlying purpose of a regulatory scheme that supersedes any plausible technical construction of a given provision." Robert G. Day, Note, *Administrative Watchdogs or Zealous Advocates? Implications for Legal Ethics in the Face of Expanded Attorney Liability*, 45 STAN. L. REV. 645, 645 n.2, 650 & n.32 (1993) (citing Colloquy, *Where Were the Lawyers? Ethical Obligations of Attorneys Representing Depository Institutions* 38 (1991) (on file with the Stanford Law Review) (remarks by Harris Weinstein, Chief Legal Counsel of the Office of Thrift Supervision, at roundtable sponsored by Administrative Conference of the United States)).

43. Simon, *Discretion*, *supra* note 7, at 1083-84. David Luban also advocates lawyers' "interpos[ing] themselves and their moral concerns as 'filters' of what legally permissible projects clients should be able to undertake." Luban, *supra* note 16, at 640-41; see also DAVID LUBAN, *LAWYERS AND JUSTICE* at xxii (1988) (advocating "morally activist" role for lawyers); David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 VAND. L. REV. 717, 738 (1988) (lawyers should "take it upon themselves to judge

closer to purposivist than positivist counseling, the discretionary model contends that the lawyer should not be constrained by the categorical nature of those approaches. That is, the lawyer is not limited by loyalty to the client, or to the state, but instead is dedicated to the fulfillment of broader notions of "legality and justice."⁴⁴ For Simon, for example, the fact that a client has a legal right is not enough to justify the lawyer's pursuing it on the client's behalf. "[S]ince there are rights on both sides," the lawyer should consider "which of the competing rights is more entitled to vindication."⁴⁵

II. AN EXPLANATION AND THE FULL-PICTURE ALTERNATIVE

This Note does not critique these models separately. Adherents of each have criticized the others in the course of articulating their own points of view.⁴⁶ What this Note offers instead is an explanation of why these models are incomplete, and an alternative to them that seeks to contend with their differences.

Specifically, this Note argues that in a society in which two contradictory strains of political philosophy have maintained a tense but continuous coexistence, a model of legal ethics should not privilege one over the other, as do the positivist and purposivist counseling models. Moreover, the existence of the conflict should not prompt lawyers to assume for themselves the duty and the right to make the tough calls, a task the discretionary model assigns them.⁴⁷ Instead, this uneasy but enduring coexistence should lead lawyers to

and shape client projects").

44. Simon, *Discretion*, *supra* note 7, at 1144. The purposivist lawyer is, as Simon says, "excessively subordinat[ed] . . . to the state" in that he looks to the substantive purposes of the laws as defining the limits within which he will assist the client. *Id.* But the purposivist lawyer still sees himself as a professional with a duty to serve the client's interests. The difference is that he will not assist the client in ways that would frustrate substantive purposes of laws. *Id.* at 1086.

45. *Id.* at 1124; *see also id.* at 1127 (approving of lawyer's willingness to decline to pursue a client's legally permissible claims because "any increase in the lawyer's capacity to frustrate client goals is exactly balanced by a reduction in the lawyer's capacity to frustrate goals of third parties and the public").

The Model Rules of Professional Conduct comprehend to some degree the exercise of discretion advocated by Simon. Rule 1.16(b)(3) states that a lawyer may withdraw from the representation of a client if "a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b)(3) (1983). Simon, however, says a lawyer's evaluation of a client's goals and whether to pursue them is not a "personal privilege" that the lawyer may exercise but a "duty" that the lawyer must exercise. Simon, *Discretion*, *supra* note 7, at 1094.

46. Pepper, for example, critiques the purposivist and discretionary models. *See* Pepper, *supra* note 7, at 617 (criticizing lawyer roles as judge (discretionary model) and facilitator (purposivist model)); *see also* Stephen L. Pepper, *A Rejoinder to Professors Kaufman and Luban*, 1986 AM. B. FOUND. RES. J. 657. Gordon critiques Pepper, along with the positivist/liberal advocacy counseling model generally. *See* Gordon, *supra* note 7; *see also id.* at 12 n.26. Luban does the same. LUBAN, *supra* note 43. Simon critiques both the positivist and purposivist counseling models. Simon, *Ideology*, *supra* note 7.

47. Simon emphasizes that the discretion his model authorizes is not the "personal privilege of arbitrary decision, but a professional duty of reflective judgment." Simon, *Discretion*, *supra* note 7, at 1083. Though this distinction may be a viable one, the result is still to privilege the lawyer's view of the just path over the client's when both are legally permissible. This Note does not adopt the view that a lawyer has a duty to judge a client's goals in deciding whether to pursue them. It instead adheres to the widely accepted position that the lawyer is a professional, serving largely as an agent for the client. *See* Pepper,

give clients the "full picture" in an effort to ensure that the *client* works through the tensions and evaluates the situation.

A. *An Explanation: Philosophies in Tension*

Though predominantly liberal, the American political tradition has long been influenced by communitarianism. Broadly speaking, liberalism privileges individual, subjective determinations of the "good life" and advocates the maintenance of a neutral state that preserves and fosters individuals' autonomy to make those determinations. Communitarianism emphasizes the notion that determination of the good life is a political endeavor; that individual preferences and claims of right must at times be subordinated to the public good; and that individual self-determination requires immersion in and understanding of one's role as citizen.⁴⁸

As Mark Tushnet points out, constitutional law theory demonstrates the coexistence of these two philosophies. Tushnet argues that the theories of originalism and neutral principles are a product of a liberal political view. In a society of individuals possessing subjective, idiosyncratic values, judges must be constrained from tyrannically imposing their own values apart from the dictates of the law. Otherwise, judges would upset the very promise of order that they, as part of the sovereign, are supposed to provide in a liberal polity.

supra note 7, at 615-16; Geoffrey C. Hazard, Jr., *How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct?*, 35 U. MIAMI L. REV. 669, 676 (1981). In this respect, this Note agrees with Pepper that the lawyer should privilege the client's interests over his own views. Pepper, *supra* note 7, at 616-19. This Note, however, contends that an "amoral" presentation of the law not only fails to meet a client's individual needs, but also undermines the lawyer's concurrent duty to society. That duty can be fulfilled without detracting from the client's autonomy vis-à-vis the lawyer by counseling that, when necessary, elaborates upon the law's purposes. Such efforts at explanation do not diminish client autonomy; clients should know purposes even if they choose to disregard them, and clients very well might embrace purposes upon understanding them. Cf. Gordon, *supra* note 7, at 20-21, 25 (suggesting that counseling akin to positivist approach could frustrate client purposes).

48. WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY* 199-207 (1990); STEPHEN MACEDO, *LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM* 13-20 (1990). These descriptions are summary and do not attempt to capture the many variations within these broad philosophical traditions. Liberalism is associated with the works of, among others, Thomas Hobbes, John Locke, John Stuart Mill, John Rawls, and Ronald Dworkin. Modern communitarianism (a term often, though not always, used interchangeably with civic republicanism), is associated with the works of, among others, Michael Sandel and Charles Taylor.

Commentary in political theory and legal scholarship has explored variants of each tradition, what attributes are essential to each, and how, and even whether, the traditions actually conflict with each other. See, e.g., MACEDO, *supra*, at 1-8 (describing, in response to communitarian critique, positive "liberal virtues" by which liberals may affirm and improve liberal communities); Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685 (1992) (exploring different meanings of communitarianism in political theory and legal discourse and considering which communitarian claims are at odds with liberalism); Nomi Maya Stolzenberg, *"He Drew a Circle That Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581, 646-66 (1993) (discussing areas of consistency and disagreement among liberalism, communitarianism, and civic republicanism). Detailed exploration of these subtleties and their impact on ethics in legal counseling is not attempted in this Note. Rather, this Note simply recognizes the affiliation between these two political philosophic traditions and leading legal counseling models and aims to provide a different legal counseling model that allows clients to pursue actions consistent with either view.

The theories of originalism and neutral principles aim to constrain judges by requiring them to decide cases by reference to framers' intentions and to apply general principles across cases consistently.⁴⁹

Tushnet argues, however, that these approaches cannot provide the determinacy and neutrality they purport to offer in the absence of shared social understandings of history and the meaning of words and rules.⁵⁰ Yet, to acknowledge the existence of such shared understandings is to reject the liberal premises of subjectivity that provide the very need for these judicial restraints. Tushnet thus concludes: "The liberal account of the social world is inevitably incomplete, for it proves unable to provide a constitutional theory of the sort that it demands without depending on communitarian assumptions that contradict its fundamental individualism."⁵¹

In so concluding, however, Tushnet does not repudiate liberalism. Rather, he states: "[J]ust as the republican tradition correctly emphasizes our mutual dependence, the liberal tradition correctly emphasizes our individuality and the threats we pose to one another. It may be that we live in a world of tension, in which no unified social theory but only a dialogue between the traditions is possible."⁵²

Whether one agrees with Tushnet, that only a "dialogue" between these two philosophies can exist, or one instead believes that a "winner" will eventually emerge, one must at least recognize that communitarianism and liberalism have substantially influenced the American political tradition.⁵³ The question then becomes how the lawyer should deal with the tension posed by their coexistence.

Legal ethics commentators have generally eschewed the middle ground in formulating academic models of legal counseling. The models of positivist and purposivist legal counseling privilege, perhaps foster, one philosophical tradition over the other. Consistent with liberalism, for example, the positivist or amoral counselor pursues his client's rights without hesitation, even if doing so challenges or frustrates any purported common perception of the good.⁵⁴

49. MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 22-23 (1988). This argument of the book is developed in Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

50. TUSHNET, *supra* note 49, at 22-23.

51. *Id.* at 22.

52. *Id.* at 23.

53. The influence of the republican tradition at the founding is discussed in J.G.A. Pocock, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969). For examples of the recent import of republican ideas in legal scholarship, see TUSHNET, *supra* note 49, at 4-17; Frank I. Michelman, *The Supreme Court 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

54. See Pepper, *supra* note 7, at 616-17 (emphasizing liberal tenets of liberty, autonomy, free choice, and diversity in arguing for lawyer's amoral role); see also David Luban, *The Legal Ethics of Radical Communitarianism*, 60 TENN. L. REV. 589, 593 (1993) (reviewing THOMAS L. SHAFFER & MARY M. SHAFFER, *AMERICAN LAWYERS AND THEIR COMMUNITIES* (1991)) (discussing authors' attack on liberal individualism and adversary ethic).

Because the neutral state aims only to foster autonomy, the counselor fulfills what duty he has to the state by pursuing his client's goals.⁵⁵ The purposivist counselor, in contrast, attempts to show the client how her interests align with the public perception of the good, as evidenced by a law's substantive purposes; if the client nevertheless insists on pursuing her "rights," the counselor may decline to assist if doing so would frustrate the shared goals that the law aims to achieve.⁵⁶

Yet, for legal counseling models to make such choices is to presume the dominance of, indeed to favor, one political philosophy, at the high cost of foregoing the values that the other brings to bear. The full-picture lawyer, in contrast, accepts the communitarian notion that individuals' values and identities may be influenced by social goals and participation, and he counsels against that background. But he simultaneously accepts the liberal view that ultimately, it is the individual's determination that the lawyer should further, and that determination may well disregard social considerations. By giving the full picture, as described below, the lawyer aims to put the client in a position in which she can best fulfill her goals—whatever they might be—and foster, directly or indirectly, her view of society and her role in it. In so doing, the lawyer fulfills his duty to the client, society, and himself.

B. *The Alternative: Full-Picture Counseling*

Giving the full picture contemplates three main tasks: (i) describing the rule and the likely consequences of its violation, while communicating that violation of a legal rule is morally problematic in a society governed by law; (ii) describing the rule's purposes; and (iii) describing the practical problems the rule poses. The following discussion of these tasks will show why they are critical given the increased legalization of American society.

1. *Describing the Rule and the Consequences of Violation*

The full-picture model requires the lawyer, as an officer of the legal system, to impart that violation of the law is morally problematic; in this

55. Pepper, *supra* note 7, at 617 ("If the conduct which the lawyer facilitates . . . is not unlawful . . . then . . . what the lawyer does is a social good."). Pepper does suggest that his emphasis on autonomy does not preclude the possibility that the individual is committed or connected to communities. Pepper, *supra* note 46, at 663 n.26. Yet, Pepper does not explore the individual's connection to her political community, and the implication that such a connection poses for counseling on compliance with laws that in some way reflect the bonds of that community.

56. See Gordon, *supra* note 7, at 14-19 (arguing that to compensate for liberalism's individualistic excesses, lawyers should encourage compliance with laws' purposes); see also *id.* at 29 (arguing that lawyers should not present law as "completely divorced from their own and their clients' membership in a common political community").

respect the model does not differ from other models.⁵⁷ The more controversial question is the degree or way in which the lawyer should discuss enforcement probabilities. Such predictions are the bread and butter of the positivist counselor. Indeed, for the ultra-realist, "law without enforcement is rendered meaningless."⁵⁸ The purposivist, if he discusses enforcement possibilities at all, de-emphasizes these possibilities when they are low and urges compliance regardless of the odds.⁵⁹ The discretionary lawyer would decline to reveal the odds of enforcement if he thought that this approach would promote justice.⁶⁰

The full-picture lawyer comes down on the side of information in this debate. Giving clients the full picture means giving them accurate information on enforcement probabilities.⁶¹ While the result here might be the same as with the positivist or purposivist counselor, the goals are not. Whereas the positivist counselor sees the likelihood of enforcement as the information most relevant to the client—how the sovereign will interfere in the client's life—the full-picture lawyer considers this fact to be one part of a larger picture. Whereas the purposivist gives this information only reluctantly, if at all, the full-picture counselor relays it without hesitation.⁶² He knows that sharing that information can increase the likelihood of breach, but he considers his client to be entitled to the information that he possesses.⁶³

57. See Simon, *Ideology*, *supra* note 7, at 42 ("The [positivist] lawyer cannot legitimately recognize any limitation on this pursuit [of his client's ends] aside from the rules of the legal system."); cf. Gordon, *supra* note 7, at 73 ("lawyers do indeed have an official status as licensed fiduciaries for the public interest, charged with encouraging compliance with legal norms").

The reference in the text, *supra*, to "violation of the law" does raise the question of the meaning of that phrase. As Geoffrey Hazard has pointed out: "'Illegality' is itself a matter of degree." Hazard, *supra* note 47, at 672. Hazard's article on that subject is perhaps the most comprehensive attempt, on a practitioner's level, to describe the various types of conduct that fit within the rubric of illegality, and to consider the propriety of a lawyer's assisting a client's conduct depending on the degree of illegality. Broad jurisprudential questions about the nature of law are treated by, among others, Hart and Dworkin. See H.L.A. HART, *THE CONCEPT OF LAW* (1961); DWORKIN, *supra* note 18; see also Coleman, *supra* note 18, at 139-48 (discussing debate between Hart and Dworkin over the nature of a rule of recognition).

58. Pepper, *supra* note 7, at 628.

59. See Simon, *Discretion*, *supra* note 7, at 1086 (regulatory model "sees the lawyer's basic function as contributing to the enforcement of the substantive law").

60. See Luban, *supra* note 16, at 647 (arguing that a lawyer should not counsel a client that antipollution standards are rarely enforced and therefore need not be obeyed); see also Stephen McG. Bundy & Einer Elhauge, *Knowledge About Legal Sanctions*, 92 MICH. L. REV. 261, 263 (1993) (stating that "Simon concludes that lawyers should deny advice—that is, refuse to disseminate accurate information about the law—in any setting in which such advice would not 'promote justice.'").

61. See 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* § 1.2:511, at 62 (1993) (acknowledging problem that client who is told "realist" story about regulation is more likely to breach, but nevertheless contending that if lawyer fails to advise of lack of enforcement then "lawyer has not given fully competent advice and has broken faith by distrusting the client to process the information though [sic] the right filters").

62. Once the counseling goes beyond merely conveying this information, the counselor could be assisting in illegal conduct. Hazard explores this issue as well. See Hazard, *supra* note 47; see also *id.* at 671.

63. The ethical issues posed by a lawyer's giving advice about sanctions are succinctly reviewed by Bundy & Elhauge. See Bundy & Elhauge, *supra* note 60, at 304-12 (describing how advice about risk of sanctions has been justified on grounds of individual autonomy and dignity, fairness, and idea that such advice can actually lead to desirable social consequences; and discussing opposing arguments). The authors'

2. Describing the Law's Purposes

The full-picture lawyer does not stop after describing the rule and the consequences of its violation. Like the purposivists, he relays the law's purposes to the client. But again, in so doing he proceeds with different goals than either the purposivist or the positivist counselor; and his presentation varies from those models.

The full-picture lawyer recognizes that most laws are animated by some social purpose or purposes.⁶⁴ He recognizes further the possibility that a person subject to a measure might be more likely to comply after learning of purposes, either because she supports them, or because she feels compelled to subordinate her immediate interest to avoid frustrating social purposes, even if she does not agree with them. Moreover, even if a client were already inclined to comply, the client might feel better about having to bear a law's burden if she felt its goals were worthy. With these concerns in mind, the full-picture counselor recognizes and acts upon the possibility of the "good but confused man" within the client. Finally, the lawyer realizes that as an expert in a highly complex legal system, he may have more access to information about purposes than does his client.⁶⁵

All of these reasons for imparting purposes are especially compelling given the highly legalized nature of our society today. Since the passage of the so-called New Social Regulation and the creation of agencies to administer it, for example, the federal government has imposed itself in numerous arenas of American society in which it had not actively intervened previously.⁶⁶

contribution to the discussion is their conclusion that a general standard prohibiting the dissemination of advice leading to "undesirable consequences" would unduly restrict the availability of desirable advice because of overdeterrence problems. A lawyer might, for example, hesitate to give advice that he expected would lead to desirable consequences if he feared that he would be judged *ex post*, and sanctioned, for having given undesirable advice. *Id.* at 312-15.

64. Pepper acknowledges, albeit implicitly, that some purpose, informed by some social notion of morality, animates laws. Pepper says explicitly that law is designed as "(a) neutral structuring mechanisms to increase individual power . . . (b) a floor delineating minimum tolerable behavior rather than moral guidance, and (c) morally neutral regulation." Pepper, *supra* note 7, at 627. But Pepper's argument implicitly recognizes that moral choice affects decisions about what behavior should come within the law's bounds. In arguing, for example, that the lawyer should not decline to assist a client in legal conduct, Pepper says: "If the conduct is sufficiently 'bad,' it would seem that it ought to be made explicitly unlawful." *Id.* at 618. As Luban points out in his response to Pepper, "Pepper's defense assumes that the law itself reflects a society's moral beliefs and the relative intensities of its moral judgments." Luban, *supra* note 16, at 646. If this assessment is correct, and if, as Pepper points out, "meaningful access to the law requires the assistance of a lawyer," Pepper, *supra* note 7, at 617, then shouldn't Pepper's expert legal "technician" describe the moral beliefs that animate the rule, even if he does not personally agree with those purposes or think that all others in society agree?

65. *But see* Simon, *Babbitt*, *supra* note 36, at 573 n.20 (suggesting that citizens are as likely to have as immediate an understanding of the law as lawyers do, and citing as support for this view the existence of the principle that "ignorance of the law is no excuse" and the argument that legal discourse cannot be differentiated from moral and political discourse).

66. As Vogel describes, significant federal initiatives occurred in the areas of environmental, employee, and consumer protection in the late 1960's and 1970's. These measures have been called the "new" social regulation because they are less concerned with the regulation of economic activity *per se*, such as the

Because these new measures often depart from, rather than codify, custom, their substantive purposes could be unclear to the individual lay client, either because of a measure's technical or complex nature, or because the law's apparent aim does not reveal its broader underlying purpose, such as amelioration of market failures, egalitarianism, or notions of redistributive justice.⁶⁷

Regulatory measures, for example, often forbid offenses *mala prohibita*, not necessarily *mala in se*.⁶⁸ The fact that some of these offenses may be punishable by criminal sanction communicates that the legislature has associated some degree of wrongdoing with the behavior, but it might not be obvious why the behavior has been deemed criminal. As Pepper says, "criminal law has become the vehicle for an infinity of regulatory provisions which lack intuitive moral content."⁶⁹ A civil sanction lends even less guidance on legislative judgment, since it is inherently ambiguous.⁷⁰ When such measures are not an outgrowth of custom, it is perfectly likely that one

control of prices and outputs, than they are with the social consequences of such activity. See Vogel, *supra* note 11, at 155 n.1. To implement these regulatory measures, 10 federal agencies were created in this period, including the Equal Employment Opportunity Commission (1964), the Environmental Protection Agency (1970), the Occupational Safety and Health Administration (1970), and the Consumer Product Safety Commission (1972). *Id.* at 161. For additional accounts of the proliferation of federal regulation in this period, see SCHULTZE, *supra* note 12, at 7-15; William Lilley III & James C. Miller III, *The New "Social Regulation,"* PUB. INTEREST, Spring 1977, at 49.

67. See STEPHEN BREYER, REGULATION AND ITS REFORM 15-35 (1982) (describing justifications for economic regulation); ROSE-ACKERMAN, *supra* note 14, at 88-89 (criticizing "distributive justice" rationale for risk regulation); SCHULTZE, *supra* note 12, at 6 (noting equity and income-distribution goals animating regulation).

68. The term *mala in se* generally connotes conduct clearly considered immoral, aside from the fact that it is prohibited by law. Offenses *mala prohibita* are "legal wrongs" in which the conduct itself is not necessarily instinctively immoral. See Hazard, *supra* note 47, at 672-73. A similar distinction is that between "customary" and "authoritarian" law. The notion that some, but not all, laws are a product of popular custom was described by anthropologist Leopold Pospisil. When people violate customary law they feel guilty, whether or not they are caught. Authoritarian law, by contrast, is imposed top-down by authorities. People comply because they fear being penalized. LEOPOLD J. POSPISIL, THE ETHNOLOGY OF LAW 64-69 (2d ed. 1978). Traditional criminal law exemplifies customary law. See John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 YALE L.J. 1875, 1876 (1992) (describing criminal law as tool by which society may "focus censure and assign blame with . . . moral force"). Regulatory law, in contrast, could be characterized as authoritarian. See SCHULTZE, *supra* note 12, at 12 ("The single most important characteristic of the newer forms of social intervention is that their success depends on affecting the skills, attitudes, consumption habits, or production patterns of hundreds of millions of individuals, millions of business firms, and thousands of local units of government. The tasks are difficult . . . because they aim ultimately at modifying the behavior of private producers and consumers.").

69. Pepper, *supra* note 46, at 671.

70. See Michael C. Durst, *The Tax Lawyer's Professional Responsibility*, 39 U. FLA. L. REV. 1027, 1059-64 (1987) (civil penalties run gamut from being "quasi-criminal" to representing user fee or "effluent charge"). Though the statutory civil penalty had been used before the increase in social regulation, see Legislation, *Statutory Penalties—A Legal Hybrid*, 51 HARV. L. REV. 1092 (1938), it became widely used in the 1970's, after a report of the Administrative Conference of the United States urged agencies to seek authority from Congress to impose the penalty, 1 C.F.R. § 305.72-6 (1993). For information on the penalty's proliferation in this period, see Colin S. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 COLUM. L. REV. 1435 (1979). For an analysis of more recent uses of the penalty, see Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795 (1992).

subject to their constraints would need assistance understanding their purposes. Without such advice, a client might, at first blush, consider a requirement to be a "mere" technicality or bureaucratic burden. Again, it is not that rules that appear as such necessarily lack moral content, but that such content is not, as Pepper says, "intuitive."⁷¹

The full-picture lawyer, then, feels it is his duty—to both the client and society—to relay to the client the purposes of the measure to which she is subject. In so doing, however, the full-picture counselor proceeds with goals different from those of the purposivists. The full-picture lawyer does not presume that statutes reflect society's general norms, that his client's "true interests converge[] with the public interest,"⁷² or that it is his duty to align those interests.⁷³ Whether those interests can be aligned, the full-picture lawyer presupposes, can only be determined when a client learns about and reacts to the measure and its purposes. The full-picture lawyer aims to explicate, not to encourage fulfillment of, substantive purposes.⁷⁴

If, upon being presented with the law's purposes, the client does not perceive them to be aligned with hers, then the full-picture lawyer would not hesitate to advocate on the client's behalf a legally permissible interpretation, or to "exploit"⁷⁵ a loophole that would further his client's goals. That he would do so, however, is not inconsistent with the concerns posed by a highly complex legal system. While the nature of certain rules in such a system may warrant an articulation of their purposes, their existence simultaneously counsels for sensitivity on the part of the lawyer to the client's idiosyncratic needs and goals. As Pepper notes, a premise (for Pepper, "the" premise)⁷⁶ of

71. Pepper, *supra* note 46, at 671. Some have suggested that the lawyer's regulatory role has become "obsolete," because clients, specifically corporate clients, have come to understand and accept the social goals evidenced in regulation. Such clients do not need lawyers to explain the purposes of laws, or to channel their behavior towards those purposes, because they are already predisposed to them. This suggestion would be consistent with the purposive ideal that laws do not diverge from but reflect society's moral norms. See Simon, *Babbitt*, *supra* note 36, at 571-76 (commenting on Robert Nelson's study of attitudes of lawyers at four large, elite law firms representing corporate clients; Robert L. Nelson, *Ideology, Practice and Professional Autonomy: Social Values and the Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503 (1985)). To the extent a lawyer knew that a client well understood a measure's purposes, then an articulation of purposes would not be necessary. If, of course, the lawyer knew the client was fully aware of methods of compliance and the consequences of violation, the lawyer would not need to apprise the client of these aspects either.

72. Simon, *Ideology*, *supra* note 7, at 68.

73. Cf. Gordon, *supra* note 7, at 17-18 ("One function of lawyers . . . in addition to pursuing their clients' particular interests, is to give advice that will help align those interests with the set of general social norms.").

74. Simon argues that the norms of individuality and community are interdependent, and that counseling should respect and foster the communitarian values that individuals do hold. Simon argues further that even if individuals do not hold such values, a lawyer should still engage in an advocacy style that "would make possible the development of such values." Simon, *Ideology*, *supra* note 7, at 131 n.236. This Note agrees with Simon's conclusion that a lawyer should permit an individual to act on her communitarian values; but it does not assume that individuals hold those values or that the lawyer should play an active role in developing them.

75. Gordon, *supra* note 7, at 73.

76. Pepper, *supra* note 46, at 663 (emphasis added).

the American political system is individual autonomy, expressed in part by "a distrust of the majority's or government's decisions, including decisions as to what is morally right."⁷⁷ A highly legalized society is a society that intensely asserts normative considerations; a lawyer should not discourage an individual who seeks to check that tendency.

Just as the full-picture lawyer, then, recognizes the possibility that the client might embrace the public interest, as voiced in the statute, he also recognizes that in a heterogeneous society that values and fosters individualism, the client might not. He attempts to present the law in a way that assists the client in making the appropriate determination.⁷⁸

At this point, adherents of positivist counseling might contend that by attempting to convey the purposes of a measure, a lawyer necessarily imposes his own view of the common good, or his own personal morals, onto the client at the high cost of denying the client an unfettered range of choices necessary to individual autonomy.⁷⁹ This result is possible, but it is a possibility that exists in the presentation of the law under any model.⁸⁰ As Pepper acknowledges, law is "complex, with issues of enforcement often inextricably entwined with issues of application and interpretation."⁸¹

Given this inevitable exercise of judgment, the question is, to what guiding principle should the lawyer adhere or aspire in making his presentation? For Pepper and the positivist counselors, that principle is to provide amoral advice, despite the fact, which Pepper appears implicitly to recognize, that some moral basis generally infuses legal measures.⁸² For the purposivists, the principle is to encourage compliance with the substantive norms articulated in the law, despite the fact that measures leave room, legally, for the exercise of alternative, perhaps idiosyncratic behavior.⁸³ For the full-picture lawyer, the principle is to relay purposes to the point that the lawyer feels the client has the information to contemplate her own interest and its relation to the public interest.

77. *Id.*; see also Pepper, *supra* note 7, at 617 ("The theory of our law is to leave as much room as possible for private, individual decisions concerning what is right and wrong, as opposed to public, collective decisions.")

78. This conclusion should not be taken as an argument in favor of so-called "client-centered counseling," a model that advocates "great resistance to the lawyer giving the client her opinion as to what action the client should take." Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 509 (1990). The full-picture model does not preclude such advising. It only seeks to ensure that the lawyer is not predisposed to an individual-privileged or state-privileged outcome. The full-picture counselor would give the client advice on how to proceed if, after having given the full-picture, the lawyer senses that such advice is what the client seeks.

79. See Pepper, *supra* note 7, at 617-18.

80. See Gordon, *supra* note 7, at 25-26 ("political judgments are virtually inescapable").

81. Pepper, *supra* note 46, at 671.

82. See *supra* note 64.

83. See Gordon, *supra* note 7, at 73 (recognizing "right of the lawyer to encourage compliance with the law's purposes through persuasion").

This same reasoning provides whatever answer can be offered to the difficult question of what constitutes a law's "purposes." As Susan Rose-Ackerman notes, for example, a measure's preamble may differ from its details.⁸⁴ Similarly, an administrative rule or action might arguably be at odds with an authorizing statute.⁸⁵ Legislative history is notoriously ambiguous.⁸⁶ Yet, uncertainty should not, as Robert Gordon says, be cause for "paralysis."⁸⁷ Again, the question is what the guiding principle should be. For Gordon the principle is "trying to develop and act on a commitment to a particular view of legal purposes" while "avoiding dogmatism" and "taking account of the views of opponents."⁸⁸ For the full-picture counselor, the principle would instead be presenting the perspectives that the counselor thinks necessary to inform the client adequately.

3. *Describing the Law's Problems*

Finally, the full-picture counselor will inform the client of certain kinds of problems that he perceives with the law in question. Problems a lawyer might encounter may be classified, in admittedly overbroad terms, as two types: policy and legitimacy. With policy problems, the lawyer might think a law is perfectly legitimate, but he might disagree with the policy it furthers.⁸⁹ The lawyer does not have a duty to inform the client that he considers a law to be bad policy (though he may, of course, do so). Our legal system does not generally recognize a right of a person to ignore laws because she does not agree with them. And if a client feels that the policy of a law is so "wrong" that the law does not warrant her obedience, her own morals should lead her to that conclusion. After being informed of a law's purposes, she should not need the lawyer's help in discerning the substantive immorality of the measure.⁹⁰

84. ROSE-ACKERMAN, *supra* note 14, at 44.

85. See, e.g., Robert Pear, *States Rebelling at Federal Order To Cover Abortion*, N.Y. TIMES, Jan. 5, 1994, at A1 (discussing states' objection to federal directive interpreting Medicaid appropriations measure as requiring states to help pay for abortions in cases of rape or incest; state representatives claim Congress intended for states to have the option to finance abortions under such circumstances).

86. See Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) ("[C]iting legislative history is still, as my late colleague Harold Leventhal once observed, akin to 'looking over a crowd and picking out your friends.'").

87. Gordon, *supra* note 7, at 74.

88. *Id.*

89. An example is the so-called "marriage penalty" that the income tax code imposes on married couples. I.R.C. § 1(a) (1988). A lawyer might consider the notion that a pair of individuals has to pay higher taxes because they are married to be bad policy, while still considering the rule to be rational and legitimate. See *Druker v. Commissioner*, 697 F.2d 46, 50-51 (2d Cir. 1982), *cert. denied*, 461 U.S. 957 (1983) (while acknowledging that higher tax on married couples could have adverse effect on marriage, finding the congressional policy of maintaining horizontal equity between married couples, no matter how income was earned between spouses, to be rational).

90. Hart recognized the possibility that one subject to a law could find it to be immoral. "[W]e say that laws may be law but too evil to be obeyed. This is a moral condemnation which everyone can understand and it makes an immediate and obvious claim to moral attention." Hart, *supra* note 18, at 620; see also LUBAN, *supra* note 43, at 32-35 (arguing that there is a "moral obligation" to obey the law "when

With legitimacy problems, the lawyer believes that in some respect the rule is not legitimate, that it is not fully worthy of obedience.⁹¹ Under this circumstance, the lawyer should communicate that difficulty to the client. To see why, it is necessary to revisit the lawyer's duty to relay the purposes of a rule.

In relaying a rule's purposes, the lawyer not only aids the client and society but legitimizes his own role. When the lawyer perceives some valid purpose behind the law's effort to restrain conduct, he will likely feel justified in communicating that limitation to the client. At the same time, if the client can understand the reasons for the rule, she will be receptive to the lawyer's authority in communicating it. By attempting to show the client how some notion of social morality informs what might otherwise be perceived as a seemingly bureaucratic rule, the lawyer affirms to the client, and to himself, that he is more than a vessel parroting the dictates of an arbitrary officialdom.⁹²

When the lawyer, however, does not regard a rule to be legitimate, he would be equally remiss in failing to convey that concern. If he declined to bring the issue to his client's attention, he would be lending his authority, as an officer of the legal system, to a cause he adjudged to be not fully worthy of the obedience of the subjects of that system.

Such circumstances do arise. In her recent book *Rethinking the Progressive Agenda: The Reform of the American Regulatory State*, Rose-Ackerman has raised the problem of the opacity generated by the internal inconsistency of

it is not evil, unfair or stupid"; in those cases "disobedience is in order"). On the practical level there is precedent for and social acceptance of test case litigation and civil disobedience. The lawyer's duty in these situations is discussed in 1 HAZARD & HODES, *supra* note 61, at 64-65, and in Rule 1.2(d) of the Model Rules of Professional Conduct. (The *Druker* case, in fact, is an example of test case litigation. See *Druker*, 697 F.2d at 47-48.)

91. Because the client can determine for herself whether she considers a law to be substantively "evil," I am talking here about what might be called procedural or administrative illegitimacy, a concept recognized by both Hart and Fuller in their 1958 debate on positivism. See Hart, *supra* note 18; Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958). In this jurisprudential dialogue, both scholars recognize some procedural or administrative prerequisites to a legal system's legitimacy. See Hart, *supra*, at 603, 623-24; Fuller, *supra*, at 645-57 (describing need for "internal morality of law"). Fuller elsewhere elaborates upon these ideas. He offers several ways in which a legal system could lose its authority as a legal system: (i) failing to design rules at all, (ii) failing to inform the affected party of the rule she is expected to observe; (iii) abusively applying a rule retroactively; (iv) failing to make rules understandable; (v) enacting contradictory rules; (vi) requiring conduct unachievable by the affected party; (vii) changing a rule so frequently that a party cannot adjust her behavior accordingly; and (viii) failing to maintain consistency between a rule as announced and a rule as administered. LON L. FULLER, *THE MORALITY OF LAW* 39 (1964).

The agreement between Hart and Fuller, of course, only goes so far. Fuller, for example, develops the ideas of preconditions to legality, as stated above, more comprehensively than Hart does. See Fuller, *supra*, at 645-46 (saying Hart makes "brief mention" of the issue). They differ as well upon the basic role of a legal system. See Hart, *supra*, at 623 (suggesting that a legal system should aim to foster "survival in close proximity to our fellows," rather than "pursuit of knowledge, justice to . . . fellow men"). Though vast and jurisprudential, these issues need not be lost on the practicing legal counselor. The full-picture model envisions that the lawyer informs the client adequately so that she will be equipped to act upon and contribute *her* view as a member of society.

92. I am indebted to Professor Geoffrey C. Hazard, Jr., for helping me develop this idea.

congressional regulatory measures.⁹³ Rose-Ackerman argues, in effect, that provisions of statutes that are internally inconsistent are illegitimate. Courts, she says, should invalidate any provision in a statute inconsistent with its preamble or statement of purpose.⁹⁴ Rose-Ackerman argues further that courts should "publicize" any situation in which Congress passes a measure but fails to appropriate the funding necessary to administer it.⁹⁵ The goal of both proposals, Rose-Ackerman says, is "greater honesty and clarity of purpose in the drafting of substantive, policymaking laws,"⁹⁶ and "an increase in the accountability of Congress to the voters."⁹⁷

One might contend that even if one were to support a proposal like Rose-Ackerman's, there is a big difference between what a judge and lawyer can do when faced with a law each perceives as illegitimate (for Rose-Ackerman's reason or for another reason).⁹⁸ When the lawyer is making the evaluation, the lawyer recognizes that the law is still the law, and upon the lawyer's portraying it as less than legitimate, the client might be more likely to breach, indeed might feel compelled to do so. Yet, to decline to convey the illegitimacy is not only to deny the client the opportunity to evaluate the situation for herself, but to *relieve* her of that duty.

While a regulator, for the sake of propriety, personal reputational concerns, or less-than-public purposes, might want to shield from view the more unpalatable sides of government activity, a lawyer should not. In a self-governing society, it is critical that those subject to laws not only are fully informed of the laws' scope and efficacy, but also assume some responsibility for them. The lawyer's obligation to discuss the illegitimacy of a measure extends to the client—and to society, as its members must depend on each other to keep the government accountable.⁹⁹

93. See ROSE-ACKERMAN, *supra* note 14, at 44. Opacity could violate Fuller's requirement that a measure be understandable. See FULLER, *supra* note 91, at 39.

94. ROSE-ACKERMAN, *supra* note 14, at 46.

95. *Id.* at 73.

96. *Id.* at 70.

97. *Id.* at 44.

98. Rose-Ackerman advocates passage of a statute to authorize judicial review of the internal consistency of statutes and the adequacy of appropriations. Though she states that "strong arguments are available" to support the view that the Constitution authorizes her proposal, she does not attempt to craft a constitutional argument. *Id.* at 44-45.

99. This same reasoning provides yet another line of support for the proposition that a lawyer should describe to the client enforcement consequences. See *supra* Part II.B.1. As administrative law commentators have recognized, Congress often does not appropriate the funding necessary to achieve the goals it sets in various policymaking laws. See ROSE-ACKERMAN, *supra* note 14, at 73-74; Michael S. Greve, *Private Enforcement, Private Rewards: How Environmental Citizen Suits Became an Entitlement Program*, in ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS 105, 116-17 (Michael S. Greve & Fred L. Smith, Jr. eds., 1992). Whether this disparity is a "resources" problem, an inability of image-minded congresspersons to face budgetary questions from the outset, or a sort of "tragic choice" by which society at large would rather declare broad goals than actually fulfill them, see GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES (1978), individuals are entitled to know how their government goes about making policy.

It is in this latter respect that the full-picture model differs from the discretionary model. In his willingness to contemplate the legitimacy of a law beyond its four corners, the full-picture lawyer behaves similarly to Simon's discretionary lawyer who is trying to "further justice." Simon writes, for example, that a lawyer with his perspective

believes that a legal system must meet certain normative preconditions to be entitled to respect and compliance, and perhaps even to be considered a system of law. Thus, legal ideals may require that a person repudiate norms that violate such preconditions even when promulgated by otherwise legally authoritative institutions. Such repudiation is the opposite of lawlessness; it moves the system closer to being worthy of respect as lawful.¹⁰⁰

By discussing such questions of illegitimacy with his client, the full-picture lawyer behaves in what Simon would probably call a discretionary—as opposed to role-determined—fashion, in that he does not accept the articulated purposes in the law at face value. The difference between Simon's approach and the full-picture approach is the identity of the final decisionmaker. The discretionary lawyer posited by Simon privileges his view of what resolution furthers justice over that of his client. The full-picture counselor, in contrast, considers and reveals his belief that a measure is illegitimate because he is attempting to help the client make an informed assessment for herself.¹⁰¹

The full-picture counselor, then, adheres to the role morality Simon criticizes, in that he is willing to pursue a legally permissible goal on behalf of a client, even if he questions whether that act would "further justice." The difference between the full-picture model and the other models in which the lawyer has a duty to further the client's interests is that the lawyer attempts to ensure that the *client* engages in moral contemplation before acting; again, he does not assume that for the client the moral path is that path designated in the statute's substantive purposes.

A counseling session need not, of course, be a civics lesson. Yet, every encounter a person has with the legal system is necessarily a learning experience about it, whether the legal participant intends it to be one or not. Given that fact, the question becomes whether the lawyer should leave the client with an unjustifiably rosy view of the system, or a candid one.

100. Simon, *Discretion*, *supra* note 7, at 1115 (citing Fuller, *supra* note 91, at 647).

101. Similarly, Simon argues that a lawyer should exercise his ethical discretion to "nullify" laws, just as a judge should nullify obsolete statutes under Guido Calabresi's rubric of judicial discretion. Simon contends that lawyer nullification might be appropriate in those instances where a judge might want to nullify a statute but for political reasons would not do so. In such instances the lawyer might be the legal participant best positioned to resolve the matter. Simon, *Discretion*, *supra* note 7, at 1116-17 (citing GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982)). Part III of this Note should not be understood as making a parallel argument in favor of lawyer nullification of IRCA. See *infra* Part III. The full-picture lawyer would not urge compliance with an obsolete or symbolic law. But he also would not encourage client violation, as to do so would be to lend his approval to the notion that disrespect for law is tolerated, perhaps expected. Instead, he would present the client with these difficult issues.

III. A FULL-PICTURE APPROACH TO THE BAIRD CASE

The full-picture approach ascribes to the lawyer a duty to be prepared to undertake three tasks: (i) describe the rule and the likely consequences of its violation; (ii) describe its purposes; and (iii) describe problems that cast doubt on its legitimacy. This Part will show how the full-picture approach would have worked in a case like Baird's, where a lawyer had to counsel on the employer sanctions provision of IRCA.¹⁰² To do so, it is necessary to provide some background on IRCA.

A. *The Employer Sanctions Provision*

Enacted in 1986, IRCA represented, in large part, an attempt to increase legal immigration into the United States. Among other things, it provided the opportunity for amnesty to workers, including agricultural workers, and Cuban and Haitian immigrants.¹⁰³ In order to ensure passage of this "pro-immigration" legislation, however, reformers had to satisfy concerns of organized labor, which had long favored restrictions on immigration.¹⁰⁴ Politicians wanted assurance that the legislation would be "closing the back door" to illegal immigration as it was "opening the front door" to legal immigration in larger numbers.¹⁰⁵ The closing of the back door was to be accomplished by implementing employer sanctions.¹⁰⁶ This IRCA provision requires employers to ask all new hires for documentation of their status and to complete and keep on file an I-9 form reflecting this documentation.¹⁰⁷

While employer sanctions were considered politically necessary for the passage of IRCA, they were attacked by business interests, which wanted

102. The ultimate worth of the full-picture model cannot, of course, be demonstrated by its application in one instance. A more comprehensive examination would show how the model would function in a variety of counseling circumstances, as did Simon's presentation of the discretionary model. This Note relies heavily on the Baird case because this single example highlights several of the difficult issues the modern legal counselor faces; and it shows how a counselor can allow a client to act on liberal or communitarian values, while the counselor fosters government accountability.

103. Peter H. Schuck, *The Politics of Rapid Legal Change: Immigration Policy in the 1980s*, 6 *STUD. AM. POL. DEV.* 37, 60 (1992).

104. *Id.* Labor interests favored restrictions because of "ethnic tensions, status anxieties, and fear of competition over jobs, housing, and public services." *Id.* at 64.

105. *Id.* at 57-58 (citing *U.S. Immigration Policy and the National Interest: The Final Report and Recommendations of the Select Commission on Immigration and Refugee Policy with Supplemental Views by Commissioners* (U.S. Government Printing Office 1981) [hereinafter *SCIRP Final Report*]).

106. Congress considered and rejected an exception for employment of domestic workers. See *Jan. 19 Afternoon Hearings*, *supra* note 16 (Senator Simpson discussing congressional debate on issue); Tamar Lewin, *Laws Often Disregarded for Household Workers*, *N.Y. TIMES*, Jan. 15, 1993, at B16 (describing Congress' rejection of so-called "Beverly Hills" exception for domestic workers).

107. IRCA imposes civil penalties for violation of the employer sanctions provision, ranging from \$100 to \$10,000. A "pattern or practice" of violations can result in criminal penalties. 8 U.S.C.A. § 1324a(e)(4)-(5), (f) (West 1970 & Supp. 1994).

continued access to cheap immigrant labor.¹⁰⁸ Moreover, the Reagan Administration was reluctant to impose law enforcement tasks on employers by requiring them to verify the legal status of their employees.¹⁰⁹ As a result of these pressures, the final version of the employer sanctions provision was so weak as to be almost certainly, and perhaps even intentionally, ineffective.¹¹⁰

The IRCA provision makes it easy for employers to “comply” with the law while hiring illegal aliens. The law prohibits only the “knowing” hire of an undocumented worker. If a worker presents an employer with a document that appears “on its face to be genuine,” and the employer in “good faith” accepts it and completes an I-9 form, then the employer is protected from prosecution, even if the worker’s document is a sham.¹¹¹ Instances of outright employer breach are unlikely to be rooted out, since INS officials expressly acknowledged, at the time the sanctions provision passed, that enforcement would be minimal—voluntary compliance was contemplated.¹¹² Kitty Calavita, who has done empirical research on the efficacy of employer sanctions, has persuasively argued that the provision Congress adopted was so weak that it was “solely symbolic” in that it had “little impact on prevailing conditions” but served “the purpose of placating certain groups.”¹¹³ Calavita writes: “Congress constructed a law that made employers virtually immune to the ‘knowing hire’ clause and simultaneously guaranteed widespread violations.”¹¹⁴

A lawyer counseling on this measure is placed in a bind. On the one hand, important social values led to the passage of the law, namely, protection of citizens who compete with immigrants for jobs and services.¹¹⁵ At the same

108. Schuck, *supra* note 103, at 63 (growers of perishable commodities “exercised enormous influence over IRCA”; though growers had hoped to defeat employer sanctions entirely, they eventually adopted and achieved the more limited goal of weakening them).

109. *Id.* at 46 n.26.

110. *Id.* at 64; Kitty Calavita, *Employer Sanctions Violations: Toward a Dialectical Model of White-Collar Crime*, 24 L. & SOC. REV. 1041, 1057-60 (1990).

111. Calavita, *supra* note 110, at 1057-60; 8 U.S.C.A. § 1324a(a)(1)(A)-(B), (a)(3) (West 1970 & Supp. 1994). Document fraud by workers was recognized as a problem in the *SCIRP Final Report* prepared for Congress. Calavita, *supra* note 110, at 1057-58.

112. Calavita, *supra* note 110, at 1060.

113. *Id.* at 1046 & n.6 (citing, for the term “solely symbolic,” MURRAY EDELMAN, *THE SYMBOLIC USES OF POLITICS* 7 (1964)).

114. Calavita, *supra* note 110, at 1065; *see also* Peter T. Kilborn, *Law Failed To Stem Illegal Immigration, Panel Says*, N.Y. TIMES, Feb. 11, 1993, at A28 (reporting on study by Commission on Agricultural Workers, submitted to Congress in February 1993, that found widespread illegal immigration; article calls IRCA a “mockery,” and reports that “Workers have easy access to fraudulent work documents, and the Government has been reluctant or unable to track down most violators.”); Schuck, *supra* note 103, at 64 (“[T]he sanctions were widely viewed as weak, readily undermined by a combination of document fraud by workers, broad defenses by employers, and an anticipated lack of official zeal in prosecuting such cases.”).

115. Calavita says that employer sanctions were “overwhelmingly” supported by the American public at about the time that SCIRP recommended its reform proposal in 1981. Calavita, *supra* note 110, at 1057 (citing George Gallup, *Most U.S. Citizens Favor a Hard Line Toward Illegal Aliens*, SAN DIEGO UNION, Nov. 30, 1980, at A22).

time, the enforcement scheme that legislators devised virtually guaranteed that the law would be ineffective. In so doing, the scheme compromised the legitimacy of the measure.¹¹⁶ Those who are unable to find workers with papers, or those who do not want to encourage their workers to secure fraudulent papers,¹¹⁷ are asked to assume the burden of compliance with a measure whose goal almost inevitably will not be achieved.

B. *The Counseling Task*

The first thing this difficult case shows is that a lawyer needs to discuss enforcement probabilities with his client. Consistent with the positivist model, Baird's lawyer informed Baird that the government had never sanctioned an employer for employing undocumented domestic workers in Connecticut.¹¹⁸ According to the full-picture model, he not only was justified in providing that information, but he would have been delinquent had he not done so.¹¹⁹ In seeking legal assistance, Baird was entitled to know as much about the law as her lawyer did. Baird, like any other client, was entitled to contemplate a course of conduct that the President was later to view as so innocuous that it did not preclude him from nominating a knowing violator as chief law enforcement officer.¹²⁰ It was up to Baird, not her lawyer, to decide whether to risk the penalty. On another level, as a citizen to whom the government is ultimately accountable, Baird was entitled to know that the INS, perhaps with implicit congressional approval, was not actively enforcing recently promulgated legislation.¹²¹

Where the full-picture counselor would depart from Baird's lawyer's approach, in the first instance, is with his characterization of IRCA's civil

116. Fuller explicates well the conflict this type of law poses: "It may not be impossible for a man to obey a rule that is disregarded by those charged with its administration, but at some point obedience becomes futile—as futile, in fact, as casting a vote that will never be counted." FULLER, *supra* note 91, at 39. Fuller then explains that there is a "bond of reciprocity" between a government and its citizens in which the government implicitly says to its citizens:

"These are the rules we expect you to follow. If you follow them, you have our assurance that they are the rules that will be applied to your conduct." When this bond of reciprocity is finally and completely ruptured by government, nothing is left on which to ground the citizen's duty to observe the rules.

Id. at 39-40 (citation omitted).

117. Calavita studied the application of IRCA to 103 "immigrant dependent" employers in southern California. In interviews with workers at these firms, 35% of the workers said they had purchased or borrowed fraudulent documents, and six workers said their employers had told them to obtain false papers. Calavita, *supra* note 110, at 1051.

118. Johnston, *supra* note 6, at A15. For an account of Baird's and Gewirtz's actions with regard to the hiring and sponsoring of the workers, see *supra* note 3. The simplifying assumptions this Note makes in using the term "Baird's lawyer" are discussed *supra* note 16.

119. See *supra* Part II.B.1.

120. The day after the infraction became public, the *New York Times* quoted the President's press secretary as saying "He [the President] considered it [the IRCA violation] and did not think it was a problem." Johnston, *supra* note 6, at A15.

121. See *supra* notes 112-14 and accompanying text.

penalties as “technically applicable.”¹²² This labelling suggested that the law lacked any purpose, that the hiring of undocumented workers was improper only in the formal sense that it conflicted with a written rule.¹²³

It is, of course, possible that Baird’s lawyer might have thought that no substantive harm was being done because Baird was “regularizing” the situation by informing the government, through the sponsorship process, that she had hired the undocumented workers.¹²⁴ But this view depends on the premise that the client can rest easy, so long as the enforcing officials tacitly approve of her behavior. The purposivist lawyer would not proceed on this view, and neither would the full-picture counselor.¹²⁵

The full-picture lawyer would not characterize the violation as technical, as one that could be “regularized” away. He instead would explain the purposes of the measure, in addition to the enforcement probabilities. He might have said, for example, “The employer sanctions were originally designed to take away the carrot for potential illegal immigrants and in that way preserve jobs for U.S. citizens. Though Congress considered an exception for domestic workers, they did not include one in the statute.”

The purposivist lawyer would likely stop here. Indeed, he might have described simply the rule and its purposes, not the enforcement probabilities, as his goal would have been to persuade Baird to comply with IRCA. But if a lawyer were to give the estimated odds of enforcement and the purposes, in this case the client still would not have the full picture. Taken together, those two items of information could give the impression that if all employers complied with the law, the illegal immigration tide could be stemmed. In fact, however, the enforcement scheme—by design—made that result virtually unattainable.

122. See Johnston, *supra* note 6, at A15.

123. *Black’s Law Dictionary* defines “technical,” in relevant part, as: “Immaterial, not affecting substantial rights, without substance.” BLACK’S LAW DICTIONARY 1463 (6th ed. 1990).

124. According to media reports, Gewirtz not only informed the Labor Department, through the sponsorship process, that he had hired an illegal alien, but also informed the INS in seeking a green card. No penalties were imposed until Baird’s nomination. See Sidney Blumenthal, *Adventures in Babysitting*, NEW YORKER, Feb. 15, 1993, at 53, 55.

125. Some have suggested that in a democracy, enforcement is an accurate indicator of public sentiment; therefore, a person who proceeds in keeping with regulators’ expectations is most likely fulfilling broader social expectations. See, e.g., Greve, *supra* note 99, at 116 (“A ‘lack of resources’ means that we prefer to spend existing revenues on something else and that we are unwilling to impose a tax to finance additional enforcement. In other words, the existing level of governmental enforcement reflects the costs that we are willing to pay to improve the environment.”). The Supreme Court, however, has contravened this argument by making clear that judicial review of executive decisions not to institute enforcement proceedings is presumptively unavailable. See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (civil and criminal decisions not to prosecute “generally committed to an agency’s absolute discretion”); see also *Air Transp. Ass’n of Am. v. Department of Transp.*, 900 F.2d 369, 377 (D.C. Cir. 1990) (“[T]he public has no legitimate interest in influencing an agency’s ‘discretionary deployment of enforcement resources’—a classic ‘internal’ matter, essential to how an agency constitutes itself . . .” (quoting *American Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1057 n.4 (D.C. Cir. 1987))).

This conflict within the law precluded the possibility that a counselor could feel that he was properly performing his role simply by conveying the purposes of the law, without more. To leave unexplained, or to de-emphasize, the difference between appearance and reality would be to become party to the facade of moral impeccability that officialdom was promoting.¹²⁶ Rather than avoid or downplay these issues, the full-picture counselor would present them to the client. He would not urge compliance in spite of them, nor would he urge noncompliance because of them. Rather, he would give the full picture to the client so that the client would be adequately equipped to make her decision.

The counselor might have said:

This law was designed to place the enforcement burden on employers, who are to check and document the status of hires. Because workers often present fraudulent documents, the statute makes it easy for the employer to 'comply' while still hiring workers who are actually undocumented. Congress knew about the fraudulent document problem when it passed the law. Moreover, it was intended that compliance would be largely voluntary and that INS enforcement efforts would be minimal. No employer sanctions have ever been applied as a result of the employment of undocumented domestic workers in Connecticut.

If the lawyer had specific information showing that the statute had been ineffective, he could share it with the client.¹²⁷ This information might well increase the likelihood of breach, but that fact does not make the client any less entitled to it.

C. *Regularizing the Breach*

In the end, even if Baird's lawyer had taken all of these suggested steps, Baird might well have pursued the same course of action. And for her it might have been the correct choice. Baird might have considered the goals of the statute, the fact that those goals were not being achieved, and her personal

126. See *supra* Part II.B.3. Even after Baird's confirmation hearings, Senator Alan Simpson, a sponsor of IRCA, was singing the praises of the employer sanctions provision, although noting that it was less effective than "I had hoped." Alan K. Simpson, *Letter to Editor*, N.Y. TIMES, Feb. 10, 1993, at A22.

127. See Kilborn, *supra* note 114, at A28 (reporting on government study showing ineffectiveness of IRCA); Schuck, *supra* note 103, at 48 & n.35 (citing studies concluding that three years after enactment of employer sanctions "the law had yet to bring about broad compliance or to stem significantly the tide of undocumented migration to the U.S.") (citation omitted). Calavita's study showed widespread hiring of undocumented workers by industrial and service firms in southern California. About 48% of employers interviewed said that they "thought" they had undocumented workers on their work force; 11% said they "did not know," and 11% said that they knew that they had hired undocumented workers. Calavita, *supra* note 110, at 1042, 1050-51. The law had no better success in its application to domestic workers. See Deborah Sontag, *Increasingly, 2-Career Family Means Illegal Immigrant Help*, N.Y. TIMES, Jan. 24, 1993, at A1.

need for child care. After weighing these concerns, she might have decided to hire the workers in violation of IRCA.

There is a critical difference, however, between this kind of deliberation by the client and the kind that Baird actually appears to have conducted. Baird consulted a lawyer to learn of her rights and responsibilities, but in the process she managed to be relieved of the latter. Her lawyer seems to have couched his advice in such a way as to have given Baird comfort that she was not doing anything wrong by hiring the domestic workers. Rather than say that the conduct violated a law that was unenforced, and explain the law's purposes and problems, he said that hiring the workers was a "technical violation," and that a "process" was available to "regularize the situation."¹²⁸ Coming from an officer of the legal system, this statement in a sense could have "regularized" Baird's illegal conduct, and thereby fostered it.

Counseling that takes this form of regularizing might well allay the concerns of both the client and the lawyer. But it can have dangerous consequences. By regularizing the illegal conduct, Baird's lawyer helped Baird avoid addressing directly the moral and social choices with which she was faced. In so doing, the lawyer weakened the influence of a critical check on the process of making and administering the law—the check of citizen outrage. The more a law is flouted, the less lawmakers can be charged with political responsibility for the law's effects. It is those who consider law in general to be worthy of compliance who have the greatest stake in furthering its fairness, evenhandedness, and integrity. In this respect, legal counseling that does not elicit thoughtful consideration of the law's requirements perpetuates a system in which "solely symbolic" laws may flourish.¹²⁹

With IRCA, Congress failed to muster the discipline to enact a measure with which compliance could be reasonably expected and that would achieve the law's purported goals. Instead, Congress skirted the tough issues. When Baird, as someone subject to the law, did the same, the governing elite was unbothered, the tacit consensus being that "we never expected compliance anyway."¹³⁰ In response, a vocal part of the American people made clear that

128. See *Jan. 19 Morning Hearings*, *supra* note 3.

129. See *supra* note 113 and accompanying text.

130. Members of the Senate Judiciary Committee, for example, waffled about the import of the breach. Utah Republican Orrin Hatch called the violation "no big deal." Clifford Krauss, *A Top G.O.P. Senator Backs Nominee in a Storm*, N.Y. TIMES, Jan. 16, 1993, at A7. The immigration law, Hatch said, was "an important law, but nevertheless a technical law" that was "very difficult to comply with," and anybody who thought that Baird's violating the law should disqualify her was being "hypertechnical themselves." *Jan. 19 Morning Hearings*, *supra* note 3. Committee Chairman Joseph Biden was indecisive: "[T]here are some . . . who have indicated that . . . this is not a big deal. This is like a parking ticket. To me this is a big deal, personally, and I suspect it is to a lot of Americans. . . . I, for one, do not know exactly how I'm going to deal with this." *Id.*

Senator Simpson, who sponsored IRCA, said he thought the violation was not, as Baird had described it, technical. Technical, he said, was the "guy in the little town" with "one chief of police" who knows there is a zoning ordinance against fences more than six feet high but builds one anyway to keep his "nutty neighbor and the nutty neighbor's dog out of his hair." *Jan. 19 Afternoon Hearings*, *supra* note 16. Yet,

they thought otherwise. And when officials saw that the public took seriously the mandates that government had imposed, they sacrificed Baird in a last-ditch effort to display that they, too, thought the law was legitimate. Full-picture counseling might have helped avoid such a sorry end.

CONCLUSION

Zoë Baird's case does not lend itself to easy answers for lawyers, but that should come as no surprise. A society that attempts to solve its most difficult problems through law places the messengers of its rules at the crux of conflict between the legal system's aspirations and its integrity.¹³¹ Necessarily immersed in that conflict, a lawyer should not presume that the outcome in his client's case should favor the individual or the state. Nor should he presume for himself the duty to resolve the tension. He should instead provide his client with a full picture of the rule, its purposes, and its problems. Such counseling allows the lawyer to maintain his own legitimacy in a system whose ultimate legitimacy depends not solely on preserving individual autonomy or on fostering commonalities, but on keeping government accountable to its citizens and citizens accountable to each other.

even Simpson did not declare his opposition to Baird's nomination until the second day of the hearings, a full week after the news of the violation became public. *Id.*; *Hearing of the Senate Judiciary Comm., Afternoon Session; Subject: Confirmation Hearing for Zoë Baird*, Fed. News Serv., Jan. 21, 1993, available in LEXIS, Exec Library, Fednew File; see also Adam Clymer, *Baird Endures Difficult Day Adrift at the Senate Hearing*, N.Y. TIMES, Jan. 22, 1993, at A14 (describing Simpson's shifting stance on nomination).

131. Cf. Hazard, *supra* note 11, at 10-13 (suggesting that as public legal process has replaced other systems of political power and authority, lawyers have become "visible instruments for organizing and deploying political force in fundamental social conflicts").