

RESPONSE TO PAINTER

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INTRODUCTION

PROFESSOR Painter's excellent article argues that interjecting lawyers into the regulatory game played by firms and governmental agencies might foster socially-desirable cooperation.¹ In particular, he demonstrates that regulators can manipulate the *payoffs* awarded to attorneys to provide them with incentives to influence their clients to behave better. Even though Painter may use the adjectives "game-theoretic" and "contractarian" to organize his two major arguments, it might be clearer and perhaps more parallel, to distinguish between "reputational" (or non-legal) and "legal" determinants of lawyers' cooperative payoffs.

In a nutshell, the "game-theoretic" section of the article emphasizes that because lawyers need to represent multiple clients, lawyers will want to establish cooperative reputations. Painter applies this analysis not only to firm lawyers who would fear that defecting from cooperation in one case will undermine their ability to effectively represent other clients dealing with a particular agency,² but also to agency lawyers. Even agency attorneys who currently represent only one (agency) client may wish to establish a reputation for being neither a "pushover" nor a "jerk"—so that they can improve their future job prospects. The core game-theoretic idea is that the structure of lawyers' payoffs—because of the multi-client reputational concern—might facilitate cooperation especially when "(i) firm lawyers and agency lawyers are repeat players who deal with each other on multiple occasions, (ii) noncooperative conduct by either is easy to detect, and (iii) information about lawyers' reputations is readily available."³

Painter is careful, however, not to be too Panglossian about these reputational effects. He acknowledges that if these three preconditions fail, lawyers may still aid their clients in defecting, or fail to sufficiently discourage client defection.⁴

Because the reputational effects on lawyers' payoffs are not always sufficient to foster cooperative behavior, Painter also considers more

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1. Richard W. Painter, *Game Theoretic and Contractarian Paradigms in the Uneasy Relationship Between Regulators and Regulatory Lawyers*, 65 *Fordham L. Rev.* 149, 150 (1996).

2. Painter's argument may not hold as strongly for in-house counsel who do not represent other clients. I imagine that in this case Painter would argue that the lawyers would want to maintain their option of seeking employment elsewhere.

3. Painter, *supra* note 1, at 167.

4. *Id.* at 171-73.

direct ways that professional responsibility law could give lawyers better incentives to cooperate. Painter refers to this argument as “contractarianism” because he envisions lawyers and agencies contracting for professional responsibility duties that are tailored to the specific characteristics (a.k.a. structure) of the industry.⁵

Thus, while the title speaks of an “uneasy relationship between regulators and regulatory lawyers,” there is no uneasy relationship between the game-theoretic and contractarian arguments; both are accounts of how lawyers’ conditional payoffs, that is their payoffs for cooperation versus defection, affect cooperative behavior. I am deeply sympathetic with Painter’s enterprise, but as I am thrust in the role of commentator, I will offer a few criticisms of his game-theoretic and of his contractarian analysis.

I. THE GAME-THEORETIC PARADIGM

The first half of the article extends and applies a prisoner’s dilemma model of the “regulation game,” originally formulated by John Scholz.⁶ John Braithwaite and I extended the model simply by examining how “capture” would effect the equilibrium of the game.⁷ We modified the prisoner-dilemma setup by assuming that when firms capture the “hearts and minds” of agencies, they alter the agency’s payoffs to become more like the firm’s payoffs. Like Painter, we were interested in how changed payoffs would affect cooperation. Our book, however, was relatively ungrounded compared to Painter’s analysis. Consequently, many of the difficulties that Painter encounters exist because he sets himself the harder task of relating a reductive game-theory model to a richer set of stylized facts.⁸

Having said this, I am still concerned that Painter never explicitly includes lawyers in his game-theoretic models. After painstakingly setting out a game played by “firms” and “agencies,” he never explicitly models firm or agency lawyers. Painter’s crucial assertion comes more than one-quarter of the way into the piece: “Because lawyers play their games at the same time as they advise clients on how to play

5. *Id.* at 178-80.

6. John T. Scholz, *Cooperation, Deterrence, and the Ecology of Regulatory Enforcement*, 18 L. & Soc’y Rev. 179, 180-82 (1984).

7. Ian Ayres & John Braithwaite, *Responsive Regulation* (1992).

8. Notably, Painter is extraordinarily careful and generous in his treatment of our book—especially, the bottom-line result that some types of capture might be socially valuable, because capture might help firms and regulators avoid the inefficient joint defection equilibrium. In fact, Painter is so faithful to our analysis that I feel somewhat estopped from criticizing his work. Unfortunately, I have already stated that too many prisoner dilemma models exist—even though I have also contributed to the glut. Accordingly, most of the criticism that follows should *a fortiori* be considered criticism of Ayres and Braithwaite. Ian Ayres, *Playing Games with the Law*, 42 Stan. L. Rev. 1291, 1294-95 (1990) (“Law review articles continue to be mindlessly mired in the game theory ‘technology’ of the fifties. Countless articles rearticulate the Prisoner’s Dilemma, but few even proceed to other bi-matrix games.”).

the underlying firm/agency games, lawyer strategies influence client strategies and vice-versa."⁹ While this claim has superficial appeal, the argument would be much stronger if the mechanisms of influence were more tightly specified. If we stick with the dichotomous choice between defecting or cooperating, it is unclear how we should model lawyers' influence on clients' behavior. For example, should we assume that a firm lawyer's threat of whistle blowing can force firms to cooperate when the firm would prefer to defect?¹⁰ Focusing on the influence mechanism might have yielded valuable insights. By illustration, it might be that lawyers find it more difficult to force firms to defect (rather than forcing firms to cooperate) so that lawyer influence tends to ratchet firms toward cooperation. Alternatively, given Painter's detailed knowledge of the interaction, he might have been able to break out of the simple prisoner's dilemma dichotomy and tell a richer story of the ways lawyer strategies influence client behavior.

One trivial way that lawyers might have been included in the game would have been simply to relabel the axes of the matrix to make the prisoner's dilemma game between the firm lawyers and the agency lawyers.¹¹ The twist would be to argue that the lawyers' reputational interest gives them a lower discount rate than their clients, and thus might encourage them to act more cooperatively.¹² I am unsure, however, that the explicit game-theory model is crucial enough to justify its inclusion. The basic reputational argument is that "because lawyers representing agencies and lawyers representing firms play the 'regulatory game' with each other on a frequent basis . . . cooperative play between them can have substantial benefits for both."¹³ But this thesis was well understood without formal game theory.¹⁴ Painter

9. Painter, *supra* note 1, at 166 (footnote omitted).

10. Lawyers' commitment to confidentiality—via the attorney/client privilege and the work product rule—weakens lawyers' ability to credibly threaten whistle blowing.

11. Surprisingly, Painter did not make more than a fleeting reference to Ronald Gilson and Robert Mnookin's prisoner-dilemma motivated discussion of lawyers. See Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 Colum. L. Rev. 509, 511-34 (1994) [hereinafter Gilson & Mnookin, *Disputing Through Agents*]; Painter, *supra* note 1, at 161-62 n.44.

12. Lawyers near the end of their careers, such as Clark Clifford, may not face such prospective reputational constraints.

13. Painter, *supra* note 1, at 150.

14. Several authors have stressed that repeated interaction with government will tend to make public defenders more cooperative. See, e.g., Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 Harv. L. Rev. 670, 685 (1992) ("Even the career criminal is not as frequent a repeat player in the criminal adjudication process as a defense attorney."); Daniel C. Richman, *Cooperating Clients*, 56 Ohio St. L.J. 69, 75, 93 (1995) ("[D]efense attorneys who seek to aid the government either out of a misplaced sense of public spirit or for personal gain—perhaps so that they can market themselves as 'deal makers.'"); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1922-23 (1992) ("Both [prosecutor and defense counsel] are typically repeat players who deal with each other and with the system regularly. This means that the bargaining

persuasively argues: "Because lawyers play their own games cutting across client representations at the same time as they participate in formulation of client strategies, firm lawyer/agency lawyer games influence the outcome of the underlying firm/agency games."¹⁵ This persuasiveness, however, does not arise from the explicit game theory.

In fairness, Painter does try to build on the non-intuitive result of the Ayres/Braithwaite capture model—by showing that there are multiple forms of capture, including a welfare-enhancing form. Painter argues that agency lawyers have "a lower susceptibility to inefficient and zero-sum capture" but are "prone to efficient capture."¹⁶ Making this distinction provides some justification for trotting out the big technological guns of a game-theory model. Painter's ultimate distinction, however, turns on a rather strong assumption about what he refers to as a "reputational paradigm" which posits that agency lawyers "invest substantial human capital in building a reputation for thoroughness, integrity, and zealous representation of their [agency] clients."¹⁷ While Painter helpfully lists several aggressive government attorneys who have flourished in private practice, I am aware of several non-zealous lawyers who have found think-tank sinecures waiting for them at the end of their government service.¹⁸ At the end of the

range is likely to be both small and familiar to the parties, as both prosecutors and defense attorneys have a great deal of information about customary practices."); William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 Va. L. Rev. 761, 832-33 (1989) ("Many defense lawyers are repeat players with whom the government must deal often."); Mark Tushnet & Jennifer Jaff, *Critical Legal Studies and Criminal Procedure*, 35 Cath. U. L. Rev. 361, 374 (1985) ("The ultimate disposition of a particular [criminal] case reflects 'patterns of cooperation and conflict between different organizations.'").

Likewise, because prosecutors are often repeat players in appellate tribunals, appellate judges (many of whom are themselves former prosecutors) are reluctant to impose sanctions on prosecutors. See Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct With Financial Incentives*, 64 Fordham L. Rev. 851, 912 (1995).

Forces of cooperation are also well documented in mass tort cases, where repeat players, such as plaintiffs lawyers, often want to settle their large inventory of existing cases. See Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 Cornell L. Rev. 1159, 1181 (1995). "[P]laintiffs' lawyers . . . are faced with a practical and classical prisoners' dilemma: whether to cooperate with other plaintiffs' lawyers in terms of strategy and information gathering, or to adopt a course that maximizes their own share of the tort claims market or captures a greater proportion of attorneys' fees." *Id.* at 1180. Mass tort plaintiffs' lawyers contend that "concurrent representation is 'common practice,' similar to criminal defense lawyers." *Id.* at 1182.

For a discussion of the most explicit game-theoretic descriptions of this point, see Ronald J. Gilson & Robert H. Mnookin, *Foreword: Business Lawyers and Value Creation for Clients*, 74 Or. L. Rev. 1 (1995) [hereinafter Gilson & Mnookin, *Business Lawyers*]; Gilson & Mnookin, *Disputing Through Agents*, *supra* note 11.

15. Painter, *supra* note 1, at 167.

16. *Id.* at 168, 169 (emphasis omitted).

17. *Id.* at 168.

18. Unlike Painter, I will not helpfully name these bureaucrat/lawyers whom I consider to be non-zealous.

day, Painter persuasively argues that repeated interaction between firm and agency lawyers may foster cooperation, but I am unsure that the explicit game theory served to illuminate the phenomenon.

II. THE CONTRACTARIAN PARADIGM

The second half of the paper is an ambitious attempt to: (i) describe the ways agencies contract with firm lawyers for tailored professional responsibility duties, and (ii) envision how a more explicit contractual regime might be implemented. Painter's argument for professional duties that have three core attributes may be summarized as follows:

1. Tailored (instead of untailored) duties. The duties should be tailored to the needs of the particular representation context. Agency-specific, tailored duties can better serve the public interest than untailored (a.k.a. "one-size-fits-all" or "off-the-rack") duties.
2. Default (instead of immutable) duties. The parties should have a mechanism to contract around presumptive or default duties to allow even more tailoring.
3. Rules (instead of standards). Clarity is a primary value in creating enforceable ethical duties.¹⁹

Combining these attributes, Painter argues for tailored, agency-specific, but precise, rule-like default duties. While Painter makes a powerful case for agency-specific duties, he might have more effectively defended his arguments for default, instead of immutable duties, and for rules, instead of standards. As a theoretical matter, these three dichotomous choices give rise to eight possible permutations.²⁰ One way to frame my criticism is that I am not sure that Painter has sufficiently considered all of the individual permutations.

I am particularly worried that Painter's analysis at times conflates the tailoring and default dimensions—so as to overlook the possibility of tailored immutable rules. For example, Painter characterizes the SEC's holding in *In re Carter & Johnson*²¹ as "infer[ing] a 'quasi contractual' understanding from its relationship with an entire group of lawyers, those who practice securities law."²² As Painter explains, the

19. See Painter, *supra* note 1, at 187-89.

20. Along these dimensions the eight ethical duties permutations might be framed as:

- (1) Tailored, Immutable, Rule;
- (2) Tailored, Immutable, Standard;
- (3) Tailored, Default, Rule;
- (4) Tailored, Default, Standard;
- (5) Untailored, Immutable, Rule;
- (6) Untailored, Immutable, Standard;
- (7) Untailored, Default, Rule; and
- (8) Untailored, Default, Standard.

21. Exchange Act Release No. 17,597 [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,847, at 84,172 (Mar. 25, 1981).

22. Painter, *supra* note 1, at 181.

opinion imposes heightened ethical duties on lawyers who take on "significant responsibilities" with respect to SEC filings. These heightened duties are at times described as quasi-contractual, but at other times are more like an "implied-in-fact" contract based upon "implied understandings between regulators and lawyers."²³ Beyond the doctrinal difference that quasi-contracts are implied-in-law instead of implied-in-fact, Painter's analysis fails to capture the core dimensions of the decision—that it established a tailored, immutable standard. Painter persuasively argues that the standard-like nature of this immutable duty did "not provide lawyers with clear guidance for future conduct,"²⁴ but he fails to show why tailored immutable rules would not have been more appropriate. It mischaracterizes this line of cases to think of the heightened duty as the byproduct of some type of "quasi-contractual understanding." Rather, it is an immutable, albeit fuzzy duty that is unilaterally imposed by the lawmaker.

Initially it is difficult to conceive of agencies engaging in *ex ante* negotiations over ethical duties, but Painter imaginatively begins to consider what such a world would look like. He did not, however, fully take advantage of the opportunity to discuss the mechanisms for contracting around default ethical duties. For example, the article does not say whether the corporate clients, as well as individual attorneys, and the attorneys' partners, would be necessary parties to the ethical contract. It also does not address whether government attorneys would be subject to contractible ethical duties. Given the importance of government attorneys in inducing cooperation in the first half of the article, it is somewhat incongruous that these attorneys play such a minor role in the second half.

But Painter does consider an interesting menu of "default rules for lawyers to choose among."²⁵ The agency here would not individually bargain *ex ante*, but would give firm lawyers a unilateral option to choose among a restricted list of ethical duties. I could imagine allowing a lawyer to disclaim certain ethical duties and thus signal the SEC that it cannot rely on the attorney as whistle blower.²⁶

23. *Id.* at 185.

24. *Id.*

25. *Id.* at 188-89.

26. This signaling mechanism would be comparable to the "noisy withdrawal" possibility under Model Rule 1.6. See Model Rules of Professional Conduct Rule 1.6 (1995). This Model Rule allows counsel to disseminate a "noisy" notice of withdrawal and disavowal of any opinion or document if counsel learns that her efforts have been used to further client misconduct. See *id.*; see also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 366 (1992) (interpreting this "noisy withdrawal" provision); Mark A. Riekhof, *Fraud, Withdrawal & Disclosure: What to Tell the Lawyer Who Steps into My Shoes*, 34 Santa Clara L. Rev. 1235, 1261 (1994) (recognizing that "the lawyer is allowed to send 'signals' to third parties that his or her former client committed criminal or fraudulent acts") (footnote omitted); Ronald D. Rontunda, *The Notice of Withdrawal and the New Model Rules of Professional Conduct: Blowing the Whistle and Waving the Red Flag*, 63 Or. L. Rev. 455, 484 (concluding that

Painter misses the mark most notably, however, in his tentative analysis of default choice. Early on he makes the bold and interesting claim that duties should be contractible because default duties are more likely to be cast as clear rules, instead of fuzzy standards.²⁷ His argument that defaults should be rule-like instead of standard-like is at bottom a conventional, though not therefore necessarily wrong, argument about clarity:

[I]mmutable rules can be very unclear when drafted in circumstances where different constituencies that participate in the rule-making process cannot agree on the proper scope of a lawyer's responsibilities. The result may be convoluted language that reflects search for compromise rather than clarity By contrast, lawyers and regulators have less at stake in default rules and are likely to value clarity in such rules over content, knowing that they can probably contract around a rule they dislike This clarity alone is a substantial benefit to those lawyers, perhaps a majority of lawyers, who are not as concerned about the rules' substance as they are concerned about knowing what the rules are.²⁸

I want to pause to praise this quotation as a persuasive and new predictive argument about the likely content of immutable and default rules. Painter's conclusion that immutable duties are not likely to be helpful standards is persuasive. His implicit conclusion, however, that default standards would be less helpful than default rules does not necessarily follow.

First, Painter does not consider that default standards might be valuable because they might induce more explicit contractual tailoring. Painter acknowledges that "penalty default" rules might be appropriate "to encourage lawyers to negotiate their own tailor-made rules with the agency,"²⁹ but he does not recognize that the uncertainty caused by such a standard-like duty might induce lawyers to contract. Painter repeatedly argues that the rules that lawyers and agencies agree to substitute for default rules are likely to be clear and easy to follow, and given the high value that Painter places on tailoring, this penalty default justification for default standards deserves more consideration.

although Model Rules forbid blowing the whistle on a client, a lawyer can disaffirm his or her own prior representations and thereby put everyone on notice). As with the "noisy withdrawal," disclaiming certain ethical duties by contract signals that the government might need to rely more on direct investigation rather than on the lawyer-as-gatekeeper.

27. Default rules are likely to be clearer and thus easier to follow than immutable rules. Painter, *supra* note 1, at 152-53.

28. *Id.* at 191-92 (footnotes omitted).

29. *Id.* at 188; Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *Yale L.J.* 87 (1989).

Second, Michael Klausner and I have each offered non-penalty justifications for default standards in the corporate context.³⁰ We argued that contracting parties may have a much more difficult time contracting for standard-like duties than contracting for rule-like duties. The utility of standards relies much more on building a thick common-law precedent of interpretation. It may be harder to develop such precedent if private parties independently choose a variety of ambiguous provisions in order to contract around a precise default rule. Painter has not convinced me that some substantial minority of contractors (attorneys/firms/agencies) would not jointly prefer to have attorneys bound by some open-ended standards that attorneys must act "reasonably," "in good faith," or "not overreach." While each of these standards is imprecise, it may allow attorneys to assure their clients and the agencies that they will not in some sense "defect." Indeed, returning to Painter's "game-theoretic" analysis, if we reintroduce the repeated reputational contact with the agencies, firm lawyers need not be nearly as frightened by exposing themselves to the open-ended liability of a standard because the reputational constraints might deter egregious agency opportunism in its interpretation of such standards. Even if only ten percent of the contracting parties jointly prefer to be bound by a standard, it might be best to choose the standard as a default, so that a thick interpretive precedent could most easily form, and allow the remaining ninety percent to explicitly contract for the clarity they prefer.

CONCLUSION

Professor Painter's fine article reminds us that discussions of regulatory enforcement often ignore the prominent role that both agency and firm lawyers can play in inducing cooperative reliance. Attention to the structural/reputational influence and more direct legal influence on lawyers' incentives can yield better policy. In game-theoretic terms, Painter's attention to lawyers' "payoffs" thus has an important payoff of its own. The Article's foray into game-theoretic and contractual analysis has few professional responsibility antecedents.³¹ Painter, however, has made out more than a *prima facie* case for further application of these tools to the difficult problems of legal ethics.

30. Ian Ayres, *Making a Difference: The Contractual Contributions of Easterbrook and Fischel*, 59 U. Chi. L. Rev. 1391 (1992); Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 Va. L. Rev. 757 (1995).

31. Ronald Gilson, however, is a recidivist in these genres. See Gilson & Mnookin, *Business Lawyers*, *supra* note 14; Gilson & Mnookin, *Disputing Through Agents*, *supra* note 11; Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 Md. L. Rev. 869 (1990); Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 Yale L.J. 239 (1984).