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Susan P. Koniak

George M. Cohen

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# IN HELL THERE WILL BE LAWYERS WITHOUT CLIENTS OR LAW

*Susan P. Koniak\* and George M. Cohen\*\**

## I. INTRODUCTION

More than twenty years ago, moral philosopher Richard Wasserstrom framed the debate in legal ethics by asking two questions.<sup>1</sup> Does the lawyer's duty to zealously represent the client, constrained only by the bounds of the law, render the lawyer "at best systematically amoral and at worst more than occasionally immoral in . . . her dealings with the rest of mankind[?]"<sup>2</sup> And is the lawyer's relationship with the client likewise morally tainted in that it generally entails domination by the lawyer over the client rather than mutual respect?<sup>3</sup> Wasserstrom answered both questions affirmatively.<sup>4</sup> Though these questions have preoccupied legal ethics scholars ever since,<sup>5</sup> they are the wrong questions. They were off-base when posed and, if anything, are even more off-base today. The problem with Wasserstrom's questions is that

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\* Professor of Law, Boston University School of Law.

\*\* Edward F. Howrey Research Professor, University of Virginia School of Law.

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1. See Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 *HUM. RTS.* 1, 1 (1975).

2. *Id.*

3. *See id.*

4. Although Wasserstrom equivocates in answering these questions, his article read in its entirety answers both affirmatively, with an exception. *See generally id.* When it comes to criminal defense lawyers, Wasserstrom argues that knowing no bounds but the law may be moral. *See id.* at 6, 12.

5. *See, e.g.*, David Luban, *Paternalism and the Legal Profession*, 1981 *WIS. L. REV.* 454, 458 (arguing that a moral dilemma exists when a client's wishes do not meet with the attorney's approval or the attorney's assessment of the client's interests); Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 *WIS. L. REV.* 1529, 1529-30 (noting that "[s]ince Watergate, and maybe because of it," moral philosophers are increasingly interested in lawyers' ethics).

they presuppose individual clients and settled law. The truly troubling questions in legal ethics arise, however, when clients are entities and the law governing these clients and the lawyer's relationship to them is contested. Class actions, the subject of this Essay, raise perhaps the most troubling questions of all.

Wasserstrom wrote in the wake of Watergate. The involvement of so many lawyers in that scandal embarrassed the profession and prompted the American Bar Association ("ABA") to require that all law students receive instruction in legal ethics.<sup>6</sup> The ABA's legal ethics requirement helped spark scholarship in the field, and Wasserstrom's article was one of the first serious entries in what would soon become a burgeoning area of research. Strangely, however, Wasserstrom, who specifically referred to Watergate as an example of lawyer misconduct,<sup>7</sup> and many other legal ethics scholars who followed in his path focused on questions that had little connection to what the lawyers of Watergate infamy did wrong.<sup>8</sup>

The Watergate lawyers did not go wrong because professional ethics condoned all activity on the client's behalf short of actually breaking the law, Wasserstrom's first indictment of legal ethics.<sup>9</sup> They went wrong because their personal morality condoned even lawbreaking.<sup>10</sup> As for Wasserstrom's second indictment of legal ethics, the domination critique,<sup>11</sup> even if the Watergate lawyers had represented Richard Nixon in his personal capacity, the moral taint in that relationship would surely not have been that the lawyers imposed their will on their client. But even if they could have, none of the Watergate

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6. See ABA STANDARDS FOR THE APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, Standard 302(a)(iv) (1995), discussed in Roger C. Cramton & Susan P. Koniak, *Rule, Story, and Commitment in the Teaching of Legal Ethics*, 38 WM. & MARY L. REV. 145, 148 (1996).

7. See Wasserstrom, *supra* note 1, at 2-3.

8. See *id.* at 11.

9. See *supra* text accompanying note 2.

10. See, e.g., *United States v. Haldeman*, 559 F.2d 31, 51-52 (D.C. Cir. 1976) (per curiam) (affirming conviction of former Attorney General John Mitchell and other top advisors to President Nixon for conspiracy to obstruct justice and perjury); see also *United States v. Mardian*, 546 F.2d 973, 976 (D.C. Cir. 1976) (en banc) (reversing and remanding conspiracy conviction based on error in failing to sever his trial from the others, but noting that Mardian admitted to being "less than honest"); *United States v. Barker*, 514 F.2d 208, 211 (D.C. Cir. 1975) (en banc) (denying motion to withdraw guilty pleas and characterizing appellants as "the foot soldiers of the Watergate Break-in"); *United States v. McCord*, 509 F.2d 334, 339 (D.C. Cir. 1974) (en banc) (affirming conviction for "illegal interception of oral and wire communications," burglary, and conspiracy); *United States v. Liddy*, 509 F.2d 428, 432 (D.C. Cir. 1974) (en banc) (affirming conviction for conspiracy, burglary, and "unlawful endeavor to intercept oral and wire communications").

11. See *supra* text accompanying note 3.

lawyers were representing President Nixon in his personal capacity.<sup>12</sup> Those whose lawbreaking was even arguably undertaken as part of representing a client<sup>13</sup> had clients that the law had created, such as the United States or the Office of the President,<sup>14</sup> and thus had lawyer-client relationships not subject to Wasserstrom's paternalism critique nor amenable to his remedy: a relationship in which the lawyer listened more and dominated less.<sup>15</sup>

The questions articulated by Wasserstrom and accepted by so many legal scholars as central to legal ethics do not fit the patterns of later lawyer scandals any better than they fit Watergate. Just as in Watergate, lawyer involvement in the savings and loan debacle<sup>16</sup> and in the tobacco industry's longstanding pattern of deception<sup>17</sup> involved zealotry not

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12. See Wasserstrom, *supra* note 1, at 11.

13. Some of the Watergate lawyers were convicted for acts that were taken by them while acting not as lawyers but in some other capacity. See, e.g., *United States v. Chapin*, 515 F.2d 1274, 1277 (D.C. Cir. 1975). Donald Segretti, although a lawyer, was convicted for activity undertaken by him as a campaign worker, including:

such disruptive activities as printing and distributing large posters saying "Help Muskie Support Bussing [sic] More Children Now," supposedly distributed by the Mothers Backing Muskie Committee; writing a letter on Citizens for Muskie stationery accusing Senator Jackson of being a homosexual and Senator Humphrey of cavorting with prostitutes at the expense of lobbyists; and putting out a "Humphrey" press release stating that Representative Shirley Chisholm had been committed to a mental institution in the early 1950's after being detained in Richmond, Virginia as a transvestite and that she was still under psychiatric care.

*Id.* at 1277-78. Dwight L. Chapin, Nixon's Appointments Secretary, was also convicted of lying to the grand jury in their investigation of the "dirty tricks" undertaken by Segretti, Chapin, and others during Nixon's 1972 presidential campaign. See *id.* at 1277.

14. John Dean, who pleaded guilty to burglary, was Counsel to the President. In that role, his client could be conceived as the Office of the President and/or the United States government, but not as Richard Nixon, the individual. See *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 915, 922 (8th Cir. 1997) (holding that for White House Counsel, the client is "the White House" and the attorney-client privilege created by these lawyers cannot be asserted by the First Lady in her personal or professional capacity).

15. See Wasserstrom, *supra* note 1, at 21-23.

16. Some of the country's most prestigious law firms were implicated in the savings and loan scandal and were sued by both the government and individuals defrauded by thrift clients for having assisted their clients in committing fraud or for negligently failing to protect those clients from the misdeeds of the individuals managing the affairs of those entity clients. See, e.g., *In re Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig.*, 794 F. Supp. 1424, 1432-33, 1453 (D. Ariz. 1992) (denying summary judgment motion by Jones, Day, Reavis & Pogue in a case alleging misconduct arising out of representation of savings and loan controlled by Charles Keating); Susan Beck & Michael Orey, *They Got What They Deserved*, AM. LAW., May 1992, at 68, 68 (describing Kaye, Scholer's \$41 million settlement with the government arising out of its representation of Lincoln Savings and Loan).

17. See Milo Geyelin & Ann Davis, *Tobacco's Foes Target Role of Lawyers*, WALL ST. J., Apr. 23, 1998, at B1 (reporting that law firms have been named as codefendants with tobacco companies in several suits alleging a conspiracy to deceive the public about the dangers of tobacco).

within the bounds of law but outside those bounds. Similarly, all three situations involved not lawyers dominating individual clients but lawyers representing entities and deferring altogether too much, not too little, to dominant individuals acting in the name of those entity-clients.<sup>18</sup> To understand any of this conduct, we need different questions. We need to explore how difficult it is for those trained in law to maintain a belief in its boundaries. Have modern theories of jurisprudence made the notion that the law has boundaries harder for lawyers to accept? Or was it ever thus? As for the lawyer-client relationship, we need to concentrate more on how that relationship should be structured when the client is an entity. Are the entities that lawyers represent sufficiently similar to support one model of the lawyer-entity relationship—the approach reflected in the *ABA Model Rules of Professional Conduct*<sup>19</sup>—or are multiple models needed?

Class action abuse is a particularly interesting area in which to explore both when and why law might fail to affect lawyer conduct and the complexity of the lawyer-entity relationship. By class action abuse, we have in mind three related problems: collusive settlements, inadequate representation of class interests, and payoffs to objectors and their counsel. The law condemns collusive settlements and the lawyers who make them.<sup>20</sup> It demands that class counsel adequately represent the class.<sup>21</sup> Paying objectors and their counsel to drop their challenges to class settlements is, at best, legally questionable behavior and, at worst, evidence of collusion and inadequate representation.<sup>22</sup> If, as we contend, these practices have become commonplace, the law has proved a poor regulator of lawyer conduct. Why?

As to the complexity of the lawyer-entity relationship, class-clients differ significantly from partnership-clients and corporation-clients, to name just a few of the possible varieties of entity-clients. For example, class counsel plays an important, and sometimes exclusive, role in selecting and controlling the class representatives and shaping the size

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18. *See, e.g., Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig.*, 794 F. Supp. at 1450 (noting that there was insufficient indication that Jones Day had attempted “to ascertain whether their compliance advice was being heeded”).

19. MODEL RULES OF PROF'L CONDUCT R. 1.13 (2001) [*hereinafter* MODEL RULES].

20. *See, e.g., Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 331 (E.D. Pa. 1994) (linking the notion of collusion with an attorney's intent to defraud or “accomplish an improper purpose”), *vacated*, 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

21. *See* FED. R. CIV. P. 23(a)(4).

22. *See infra* notes 153-54 and accompanying text.

and purpose of the enterprise.<sup>23</sup> By contrast, lawyers representing other entities typically do not select or control the managing agents, nor do they define the nature of the firm. Other entities typically have chains of command, and they have agents authorized to hire and monitor the entity's lawyers;<sup>24</sup> classes typically have neither.<sup>25</sup> With respect to the scope of the lawyer's representation, the law generally presumes that corporate counsel represents the corporation and *not* its officers,<sup>26</sup> but class counsel necessarily represents both the class and its named representatives.<sup>27</sup>

## II. THE COMPLEX RELATIONSHIP BETWEEN LAWYERS AND LAW

The traditional approach to legal ethics assumes that the "bounds of the law" are known and focuses on the fact that these boundaries permit much undesirable behavior.<sup>28</sup> From this perspective, the moral dilemma for the lawyer is the conflict between promoting the client's interests within these known bounds and protecting the interests of society against client behavior that is lawful, but harmful.<sup>29</sup> But the premise underlying this dilemma is often false. By assuming that lawyers obey the law and concentrating on what more an ethic should demand of them, the traditional approach has contributed, however unwittingly, to the myth that law, unlike moral philosophy, is simple stuff. Even nonmoralists, such as legal economists, write as if legal rules are fixed in some meaningful sense, which leads them to focus on problems of over- and underdeterrence and to seek "optimal" rules to solve those problems.<sup>30</sup> Like the moralists, the economists thus view the problem of

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23. See DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 71 (2000).

24. MODEL RULES, *supra* note 19, R. 1.13 cmt. 3.

25. See *Developments in the Law: Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1450 (1981).

26. See MODEL RULES, *supra* note 19, R. 1.13(a), (e).

27. See *Developments in the Law*, *supra* note 25, at 1453.

28. See Wasserstrom, *supra* note 1, at 5.

29. See *id.* at 11.

30. See, e.g., Stephen McG. Bundy & Einer Elhauge, *Knowledge About Legal Sanctions*, 92 MICH. L. REV. 261, 265-66 (1993) (basing their analysis of client ignorance of law on "an optimal sanctioning regime"). While conceding that "[l]egal sanctions are inevitably imperfect," the authors nevertheless assert that "behaviorally optimal sanction regimes can, even in theory, achieve no greater perfection than reaching the optimal trade-off between the underdeterrence of undesirable behavior and the overdeterrence of desirable behavior." *Id.* at 267.

legal advice as stemming from the fact that lawyers will obey the law, but nonetheless may be able to give advice that is socially undesirable.<sup>31</sup>

Yet to accept, without discussion or qualification, that lawyers generally obey the law, one must first believe that for lawyers, if not for everybody, determining what the law demands is relatively easy. One must further believe that, having identified what the law demands, lawyers will determine that obedience is the appropriate course of action. Neither proposition is sustainable. Not only is law more complex than this account suggests, but the relationship between law and lawyers is more complex.

Understanding what the law demands may sometimes be a simple matter: when the light is red, the law demands that you stop. But that is certainly not always so. Lawyers presumably advised Microsoft that the way it was responding to its competitors did not violate the antitrust laws, but the Justice Department's lawyers believed otherwise.<sup>32</sup> Whether or not Microsoft's business practices were legal or illegal was the subject of an intense courtroom battle. There was a final judgment on the matter,<sup>33</sup> but that judgment does not end the difficult questions about the limits of lawful responses to competitors. It is not that there is no law on the matter—antitrust law exists—but its contours are not easy to discern; thus, obedience is no simple task.

Antitrust law is not uniquely uncertain. Uncertainty is inherent in law, if only because lawmakers cannot identify and address all possible problems in advance. Thus, the meaning of a legal rule in a particular situation almost always demands a conscious act of interpretation, the creation of a story about the rule. Stories connect legal rules to facts, and in the process give meaning to both the law and the facts. A court decision, for example, embodies a story that explains what happened; what the law says should have happened; and whether what happened diverges enough from what the law demands to constitute an illegal act.

In counseling clients, lawyers must do more than read legal rules; they must use the stories embodied in court opinions, legislative debates

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31. See, e.g., *id.* at 265-66 (noting that “sanctions will necessarily result in some overdeterrence of desirable behavior and some underdeterrence of undesirable behavior”); Louis Kaplow & Steven Shavell, *Legal Advice About Information to Present in Litigation: Its Effects and Social Desirability*, 102 HARV. L. REV. 565, 586 n.49 (1989) (noting that not only can desirable behavior sometimes result in legal liability, but also that “noncompliant” acts may in fact be socially desirable).

32. See *United States v. Microsoft Corp.*, 253 F.3d 34, 47 (D.C. Cir.), *cert. denied*, 122 S. Ct. 350 (2001).

33. See *id.* at 46-47 (affirming, vacating, and remanding in part the district court's judgment finding that Microsoft violated the Sherman Antitrust Act).



and executive agency pronouncements to assess their client's proposed or past conduct. In assessing whether that conduct is legal or illegal, the lawyer must extrapolate and interpret. After all, the client's conduct will rarely, if ever, be precisely the same as the conduct that has already been ruled on by the courts or specifically contemplated by the legislature in enacting a rule. Thus, the lawyer is required to construct her own story—a story about stories told by others. In doing so, the lawyer in a sense makes law for the client.

To understand the inherent uncertainty of law is to begin to understand the complexity of the lawyer's relationship to law. Lawyers are not only trained to understand that the law's boundaries are uncertain, but they "practice" by constructing stories, thereby helping to shape the law's boundaries.<sup>34</sup> Lawyers are thus a part of, not apart from, the law's boundaries, a fact of which they are all too well aware from their legal training and practice.

This knowledge, however, may lull lawyers into a false belief that law's boundaries either do not exist at all, or do not apply to them.<sup>35</sup> In particular, lawyers may think that there are no constraints on their helping clients to do things that the lawyers imagine are lawful, only to find a court reaching the conclusion that the client's actions were unlawful and, worse yet, that the lawyers should have realized this based on existing law. At some level, of course, lawyers know that the law's limits are real; they affect events. Up close and on a regular basis, lawyers see damages awarded and fines and prison terms imposed in the name of those limits. Good lawyers understand that the ethical practice of law involves lawyers simultaneously shaping legal boundaries, and recognizing the real limits to this manipulation.<sup>36</sup> The most significant ethical dilemma for lawyers is therefore not the one traditionally posed by legal ethics scholarship, in which lawyers use their knowledge of certain legal boundaries to assist in legal, though morally questionable, acts.<sup>37</sup> Rather, it is that lawyers sometimes let their awareness of legal

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34. See David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 476 (1990) (noting that a lawyer's job often involves challenging legal boundaries at the request of specific clients).

35. See *id.* at 483-84 (discussing how the indeterminacy of law, as espoused by legal realism, renders "the bounds of the law" an ineffective ethical constraint on the lawyer's zealous advocacy).

36. See *id.* at 514 ("Legal ethics . . . must incorporate a form of dialectical tension in which individual discretion is acknowledged as both necessary and necessary to constrain.").

37. See Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1395-96 (1992); David B. Wilkins, *In Defense of Law and Morality: Why Lawyers Should Have a Prima Facie Duty To Obey the Law*, 38 WM. & MARY L. REV. 269, 293 (1996) ("[S]imple allegiance to 'law' will sometimes involve the lawyer in immoral conduct.").

uncertainty delude them into thinking that they have more control over constructing legal boundaries than they in fact do.<sup>38</sup> In this sense, the bounds of the law are inextricably intertwined with what lawyers are allowed to do in shaping those bounds.

The recent savings and loan scandal, in which lawyers were forced to pay millions in settlements arising out of their representation of savings and loans that became insolvent, provides a concrete example of this phenomenon.<sup>39</sup> The harsh response of many courts to lawyer conduct in the scandal represents a collective refusal to allow the fuzziness of the law governing corporate fraud to become a rationalization for lawyers' complicity in such fraud.<sup>40</sup> But in many other lawyering contexts—the class action situation we discuss below being the most notable—courts have frequently failed to apply the brakes.<sup>41</sup>

The problem of legal uncertainty casts doubt on a proposition that so many legal ethicists take for granted: lawyers simply obey the law.<sup>42</sup> Legal uncertainty, however, is only one aspect of the complex relationship lawyers have with law, including the law governing lawyers. Not only do lawyers in their role as counselors interpret law for their clients and themselves, but in their roles as advocates and public citizens they also occupy a privileged position in the construction of the legal meaning articulated by courts, and in the construction of the legal rules to which meaning must be attached.<sup>43</sup> In these latter roles, lawyers act in a very public way to help determine just what the “bounds of the law” are.

With respect to judge-made law, lawyers are uniquely empowered by the state to present judges with alternative interpretations of what the law demands.<sup>44</sup> Most of the time, most judges consider the competing legal meanings offered by the lawyers in a case and simply adopt one, albeit generally with some modification, as that court's official interpretation of the law.<sup>45</sup> Although judges are free to invest law with a meaning no lawyer advocated or imagined, they rarely do so.<sup>46</sup> And even

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38. See Wilkins, *supra* note 34, at 505.

39. See *supra* note 16 and accompanying text.

40. See, e.g., *In re Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig.*, 794 F. Supp. 1424, 1453 (D. Ariz. 1992) (noting that “[c]lient wrongdoing . . . cannot negate an attorney's fiduciary duty” to urge cessation of conduct that entails regulatory violations).

41. See *infra* notes 122-45 and accompanying text.

42. See Koniak, *supra* note 37, at 1396.

43. See Carrie Menkel-Meadow, *Ethics and Professionalism in Non-Adversarial Lawyering*, 27 FLA. ST. U. L. REV. 153, 154 (1999); Wilkins, *supra* note 34, at 471 n.8.

44. See Wilkins, *supra* note 34, at 483.

45. See *id.* at 476.

46. See *id.* at 477.

when a judge adopts her own interpretation, because lawyers frame the questions courts decide, the lawyers will still have significantly influenced the law-building process, a role that extends far beyond a particular client's case.<sup>47</sup>

The special role lawyers play in constructing law is not limited to courtroom practice. Lawyers still dominate legislatures and other rulemaking bodies.<sup>48</sup> In voluntary organizations, most notably the American Law Institute, lawyers draft model statutes, which legislatures often subsequently enact, and purport to codify the common law developed by judges in Restatements (themselves acts of interpretation that often go beyond pure restating), which judges often rely on in later cases. As to the law governing themselves, lawyers in other voluntary organizations, most notably the American Bar Association, draft model ethics rules, which almost every jurisdiction in the country has adopted as law.<sup>49</sup> Although official lawmakers are free to, and often do, modify or (more rarely) reject these proposed statutes, Restatements, and ethics rules, lawyers' influence in promulgating these rules, like their influence in courtroom advocacy, is enormous.<sup>50</sup>

The fact that lawyers occupy a privileged position in the construction of legislative and judicial law complicates lawyers' obedience to the law in at least two ways. First, lawyers, at least when a significant number of them act as a group, occupy a privileged position in constructing new statutes and new interpretations to counter or nullify existing official law.<sup>51</sup> Other groups may propose new law; however, lawyers have a leg up on transforming their proposals into the real thing. This advantage is particularly troubling when lawyers use their privileged status to counter extant law directed at their own conduct. For example, many lawyers were unhappy with court rulings that forced them to testify before grand juries about matters such as their clients' fees.<sup>52</sup> In response, various bar groups constructed and sought the adoption of an ethics rule making it unethical for prosecutors to demand

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47. *See id.*

48. *See, e.g.*, MODEL CODE OF PROF'L RESPONSIBILITY EC 8-8 (1986).

49. *See* STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS xxiii (2001).

50. *See, e.g.*, MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 1 (1990) ("[C]ourts increasingly are turning to ethical rules as sources of law.").

51. *See, e.g.*, Wilkins, *supra* note 34, at 471 n.8 (discussing MODEL CODE OF PROF'L RESPONSIBILITY EC 8-1 (1980)); Wilkins, *supra* note 37, at 274 (noting that lawyers "have been given a monopoly by the state to occupy a position of trust, both with . . . clients" and within the "legal framework").

52. *See* Koniak, *supra* note 37, at 1398-99.

such appearances without first obtaining court approval and meeting other hurdles.<sup>53</sup> Second, lawyers may refuse to play their part in the construction of official law, encouraging the maintenance of “free zones” in which the law plays little, if any, role in regulating conduct.<sup>54</sup> This path is the one lawyers have taken in the class action area, as we will discuss shortly. The bar’s rhetoric on the right of “self-regulation” can also be understood in this way, as a call for the state to leave most lawyer conduct unregulated by law.<sup>55</sup>

Finally, the lawyer’s relationship to law is complicated by the bar’s understanding of its obligation to resist the state on behalf of clients and in the name of preserving the independence of the bar itself, an independence that sustains our democracy, at least according to the bar’s ethos.<sup>56</sup> If resisting the state is noble, obeying the law may sometimes be wrong. Ethics opinions and commentary to the ethics rules, both promulgated by the bar, reflect a strong sense of noble resistance to official law. For example, a Statement of Policy adopted by the ABA House of Delegates on the duties to comply with the securities law in 1975 proclaimed:

[A]ny principle of law which, except as permitted or required by the [*Model Code of Professional Responsibility*, a code written by the ABA and not itself official law], permits or obliges a lawyer to disclose to the [Securities and Exchange Commission] otherwise confidential information should be established only by statute after full and careful consideration of the public interests involved and should be resisted unless clearly mandated by law.<sup>57</sup>

This statement calls on lawyers to resist law embodied in something other than a clear statutory provision, for example, administrative regulations and court opinions interpreting the statute, when that law conflicts with the bar’s self-generated rules of conduct.<sup>58</sup> In a similar vein, the comment to Model Rule 1.6 of the ABA *Model Rules of Professional Conduct* states that lawyers “must comply with the final orders of a court or other tribunal of competent jurisdiction

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53. *See id.* at 1398-1401 (describing the actions taken by the bar); *see also id.* at 1423-24 (listing other examples of how ethics rules have impacted changes in the law).

54. *See id.* at 1397.

55. *See id.*

56. *See id.* at 1448.

57. *House of Delegates Meets in Montreal*, 61 A.B.A. J. 1079, 1085-86 (1975) (reprinting the statement of policy adopted by the House of Delegates “regarding responsibilities and liabilities of lawyers in advising with respect to the compliance by clients with laws administered by the Securities and Exchange Commission”).

58. *See Koniak, supra* note 37, at 1483.

requiring the lawyer to give information about the client.”<sup>59</sup> Significantly, the rule does not say that a lawyer must comply with statutes, like the federal tax code, that require lawyers to disclose material that would otherwise be protected by the bar’s ethics rule.<sup>60</sup> The bar’s rhetoric of resistance to official law is more than just talk. Many lawyers have refused to comply with statutes that require disclosure of material the bar believes lawyers should not be forced to disclose, on the theory that their acts of resistance fulfill their ethical obligations.<sup>61</sup>

Lawyers’ skepticism about law’s limits, their special role in the construction of law, and their ethic of noble resistance to law all help to undermine simplistic assumptions about lawyers living within the bounds of the law. How lawyers understand law, what it means to obey law, and when disobedience to law is justified are subjects that have been pushed off center stage by such simplistic assumptions. Only by concentrating on the many complexities in the lawyer’s relationship to law can we adequately understand the lawbreaking that pervades the major lawyer scandals from Watergate to the present, and indeed the nature of law itself.

### III. THE COMPLEXITIES OF THE LAWYER-ENTITY RELATIONSHIP

Undoubtedly, much of the work that lawyers do involves the representation of entities, as opposed to individuals, though quantifying how much is difficult. The representation of corporations alone represents a significant percentage of the work of all lawyers, and if one adds to that all the work lawyers do representing partnerships (and, more recently, limited liability companies), labor unions, formal and informal associations, governments and classes, there can be little question that the representation of entities is at the heart of what many, if not most, lawyers do. Although the *Model Rules of Professional Conduct*

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59. MODEL RULES, *supra* note 19, R. 1.6 cmt. 19.

60. *See id.* at cmt. 20 (noting that “a presumption should exist against” a “supersession” of ethics rules by other provisions of law).

61. *See, e.g.,* Koniak, *supra* note 37, at 1479 (discussing the need to resist the state’s infringement of confidentiality rules); Susan P. Koniak, *When Courts Refuse to Frame the Law and Others Frame It to Their Will*, 66 S. CAL. L. REV. 1075, 1078-79 (1993) (using the example of Kaye, Scholer’s settlement with the government to illustrate the clash between the state and the bar as regards client confidentiality); David Luban, *Legal Ideals and Moral Obligations: A Comment on Simon*, 38 WM. & MARY L. REV. 255, 259 (1996) (noting that “lawyers are often better positioned than nonlawyers to realize the unfairness or unreasonableness of a law” and thus “should be among the first to violate or nullify it”); William H. Simon, *Should Lawyers Obey the Law?* 38 WM. & MARY L. REV. 217, 228 (1996) (noting that a “categorical duty of obedience” is “radically incompatible” with the lawyer’s ethic).

represents an improvement over its predecessor *Model Code of Professional Responsibility* in addressing the relationship between lawyers and their entity-clients,<sup>62</sup> the Model Rules are woefully inadequate to the complexity of the task at hand.<sup>63</sup> Policymakers and legal ethics scholars have similarly neglected the problems of entity representation. How does the representation of entity-clients in general differ from the representation of individual clients? How do entity-clients differ from one another? Do the ethics rules adequately deal with the representation of partnerships, or associations, or classes? These questions have received too little attention.<sup>64</sup> Our attention has been diverted to where the ball is not.

The less one's entity-client resembles a large, publicly held corporation, the less sense the ethics rules make. The only rule specifically applicable to entity representation, Model Rule 1.13, addresses a particular crisis in the lawyer's relationship to an entity-client: what a lawyer should do when she discovers that a constituent of the organization is violating duties to the organization or violating the law in a manner that might be imputed to the organization.<sup>65</sup> In the

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62. Compare MODEL RULES, *supra* note 19, R. 1.13, with MODEL CODE OF PROF'L RESPONSIBILITY EC 5-18 (1982). See also GILLERS & SIMON, *supra* note 49, at 136 ("There was no counterpart to [Rule 1.13] in the Disciplinary Rules of the Model Code."); James R. McCall, *The Corporation as Client: Problems, Perspectives, and Partial Solutions*, 39 HASTINGS L.J. 623, 627 (1988) ("The Code's discussion of the corporation as client is limited to one paragraph in a document of over fifty pages").

63. See Fred C. Zacharias, *Reconceptualizing Ethical Roles*, 65 GEO. WASH. L. REV. 169, 192-94 (1997).

64. For some recent exceptions, see James M. Fischer, *Representing Partnerships: Who Is/Are the Client(s)?* 26 PAC. L.J. 961, 961 (1995); Zacharias, *supra* note 63, at 171; Frederic L. Smith, Jr., Student Commentary, *Partnership Representation: Finding the Client*, 20 J. LEGAL PROF. 355, 355 (1995-96).

65. See MODEL RULES, *supra* note 19, R. 1.13(b)-(c). The applicable provisions read:

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

- (1) asking reconsideration of the matter;
- (2) advising that a separate legal opinion on the matter be sought for presentation to the appropriate authority in the organization; and

representation of large, publicly held corporations this is *the* crisis: the rogue manager or, worse yet, the rogue officers or directors. With its singular focus on this crisis, Rule 1.13 implies that in other situations, representing an entity is not much different from representing a person or at least so simple a matter that no particular guidance is required. When the client is a corporation, this position is at least tenable, because in the absence of lawless management, it is reasonable for a lawyer to defer to directions from management or the board just as the lawyer would defer to directions from an individual client. Such a stance is consistent with and, indeed vindicates, the corporate form—a form that presumes that shareholders invest management and the board with the power to direct corporate activities, and insists that managers and directors act as faithful fiduciaries in exercising that power.<sup>66</sup> The ethics rule on entity representation presupposes, and depends upon, the checks and balances that have evolved as a matter of corporate and agency law.<sup>67</sup> To take an important example, corporate law is fuzziest when the corporation is on the verge of bankruptcy. With no clear answer in law on who speaks for the corporation in this situation, Rule 1.13 is of little use, as lawyers representing failing savings and loans discovered to their detriment.<sup>68</sup> In general, however, the comprehensive legal backdrop makes it tenable to posit that only when management breaches its fiduciary duties must the lawyer cease to treat the decisions of managers as if they were comparable to the decisions of an individual client.

Not all entity-clients are corporations, however. They do not all share the same central crisis and, when an analogous crisis does present itself, lawyers for other entity-clients may find that the remedial measures dictated by Rule 1.13 make little sense, despite the bold insistence of the rule's comment that the lawyer's duties "apply equally to unincorporated associations."<sup>69</sup>

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(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.

*Id.*

66. See 18A AM. JUR. 2D *Corporations* § 732 (1985); 18B AM. JUR. 2D *Corporations* § 1345 (1985).

67. See McCall, *supra* note 62, at 632.

68. See *supra* note 16 and accompanying text.

69. MODEL RULES, *supra* note 19, R. 1.13 cmt. 1.

Let's start with partnerships. Two of the central crises in the representation of partnerships involve seemingly analogous situations to the crisis most likely to occur in corporate representation. When a majority of the general partners breach fiduciary duties owed the minority of general partners and when general partners breach fiduciary duties to limited partners, the lawyer for the partnership is in an analogous position to that of the corporate lawyer who discovers a manager engaged in illegal conduct.<sup>70</sup> Rule 1.13, however, provides much more guidance to the corporate lawyer and is relatively unhelpful to her partnership-lawyer counterpart. The Rule presumes a formal hierarchy of control within the entity-client, which the lawyer may use to help protect the entity from the lawlessness of its agents.<sup>71</sup> In plain language, the Rule tells a lawyer to make her way up the entity's chain of command, bringing the misconduct to ever-higher levels of authority in an effort to bring the lawless agent into line. When general partners act in breach of fiduciary duties to limited partners or to a minority of their peers, to whom should the lawyer appeal? The partnership lawyer is likely to begin at the place Rule 1.13 marks as an end: advising the highest authority designated to act on behalf of the entity—typically all general partners—to abide by the law, and in all likelihood meeting resistance.

Many scholars criticized Rule 1.13, as adopted by the ABA, for prohibiting corporate lawyers from speaking out to the government or shareholders in the event that the corporation's highest authority, the board, refused to act in accordance with law.<sup>72</sup> Rule 1.13's resolution of the "lawless board" problem is that the corporate lawyer should resign and remain quiet about the violation of law.<sup>73</sup> Whether this resolution strikes the right balance is subject to debate, if for no other reason than the fact that following it may leave lawyers vulnerable to liability.<sup>74</sup> The

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70. *But see* Fischer, *supra* note 64, at 967-69 (discussing the difficulties posed by extending rules applicable to the corporate structure to situations involving partnerships).

71. *See* MODEL RULES, *supra* note 19, R. 1.13 cmt. 3.

72. *See, e.g.,* Stephen Gillers, *Model Rule 1.13(c) Gives the Wrong Answer to the Question of Corporate Counsel Disclosure*, 1 GEO. J. LEGAL ETHICS 289, 304 (1987); McCall, *supra* note 62, at 637-38.

73. *See* MODEL RULES, *supra* note 19, R. 1.13(c); George H. Brown, *Financial Institution Lawyers as Quasi-Public Enforcers*, 7 GEO. J. LEGAL ETHICS 637, 661 (1994); Gillers, *supra* note 72, at 304-05; McCall, *supra* note 62, at 637.

74. *See, e.g.,* H. Lowell Brown, *The Dilemma of Corporate Counsel Faced with Client Misconduct: Disclosure of Client Confidences or Constructive Discharge*, 44 BUFF. L. REV. 777, 777 (1996) (noting that a lawyer's silence in face of client wrongdoing is increasingly resulting in personal liability); Stanley Pietrusiak, Jr., Comment, *Changing the Nature of Corporate Representation: Attorney Liability for Aiding and Abetting the Breach of Fiduciary Duty*, 28 ST.



Rule requires a lawyer to leave her vulnerable client, the corporation, and that client's most vulnerable constituents, the shareholders, at the mercy of unfaithful agents.<sup>75</sup> The power of this objection, however, is significantly muted as long as one assumes that in almost all cases the corporation's highest authority will comply with the lawyer's advice. Thus, as long as the corporation's central crisis takes place below board level, it is reasonable to require lawyers to work their way up the chain of command. The partnership's analogous crises, however, are much more likely to involve misconduct at the top,<sup>76</sup> and, as a consequence, Rule 1.13 adds little to the general rule requiring all lawyers to resign if necessary to avoid assisting a client in unlawful conduct.<sup>77</sup>

More troublesome, the crises central to the representation of other entity-clients, like classes, are simply not analogous to those that plague corporations. In class actions, the big problem is not that those designated to represent the class as typical plaintiffs or defendants (the named representatives) are likely to act lawlessly and thereby harm the class; the problem is that class lawyers will subordinate the class's interest to their own.<sup>78</sup> In fact, the class is entirely a creation of the lawyer: class counsel control its beginning, its end, its shape, and its conduct.<sup>79</sup> Rule 1.13 assumes that a well-defined entity exists with a hierarchical structure protected by legal checks and balances, and that an agent other than the lawyer is available to monitor the lawyer and direct the lawyer's effort.<sup>80</sup> The Rule, therefore, simply does not speak to the problem of lawyer domination of the entity-client, which is at the core of all the difficult situations that confront class counsel.

Class actions are merely an extreme example of a more general point about the lawyer-entity relationship. That relationship depends on the law that structures or fails to structure the entity-client. The more that internal and external rules structure an entity, for example, by designating the agents authorized to speak, listen, and act on behalf of that entity, the easier it is for lawyers, authors of ethics rules, commentators, and courts to conceptualize how lawyers should act in

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MARY'S L.J. 213, 216-18 (1996) (discussing how liability may be imposed on attorneys even where no law has been violated). *But see* Brown, *supra* note 73, at 661 (arguing that "[i]f avoiding malpractice liability . . . is the lawyer's goal, then the lawyer's best bet is probably to remain silent in the face of management's violations of law, and withdraw from the representation if necessary").

75. *See* McCall, *supra* note 62, at 638.

76. *See supra* note 70 and accompanying text.

77. *See* MODEL RULES, *supra* note 19, R. 1.16(a).

78. *See* HENSLER ET AL., *supra* note 23, at 79.

79. *See id.* at 74-75.

80. *See* MODEL RULES, *supra* note 19, R. 1.13(b)(3) & cmt. 3.

representing those entities, and to envision and address the crises likely to plague particular entities. On the other hand, the more formless the entity—the less defined it is by internal or external law—the more difficult it is to speak coherently about what lawyers should and should not do. In this regard, it is at least interesting, if not disturbing, that following the savings and loan crisis—and at least in part because of it—we have seen the blossoming of a dizzying array of new limited-liability business entities,<sup>81</sup> which create whole new areas of legal uncertainty in entity representation. This uncertainty exists not only because the statutes governing these entities are so new and unexplored,<sup>82</sup> but also because the entities themselves are hybrids of partnerships and corporations, raising questions of how courts will interpret the rules applicable to them.

Thus, to some extent the two neglected questions in professional responsibility are related. The question of how lawyers should deal with their entity-clients is a question that requires not simply philosophical musings, but legal analysis and theoretical and empirical inquiry into the lawyer's relationship to the law, in particular the law—both old and new—governing entity-clients, as well as the law governing lawyers. That is the lesson we should have learned from previous lawyer scandals. It is the lesson we might learn now from the disgrace that class action practice has become. We turn to that subject now.

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81. The new business forms are limited liability companies ("LLCs"), limited liability partnerships ("LLPs"), and limited liability limited partnerships ("LLLPs"). All states have adopted statutes permitting the creation of LLCs and LLPs. See J. DENNIS HYNES, AGENCY, PARTNERSHIP, AND THE LLC: IN A NUTSHELL 7-8 (2d ed. 2001). Law firms themselves have increasingly begun to use limited liability entities to protect their members, raising some of the questions of lawyers' advantage in constructing law that were raised *supra* notes 43-55 and accompanying text. See Robert W. Hamilton, *Registered Limited Liability Partnerships: Present at the Birth (Nearly)*, 66 U. COLO. L. REV. 1065, 1069 (1995) (arguing that the LLP came about as a response to huge damages awards against accounting and law partnerships stemming from the savings and loan crisis, among other events); see also Martin C. McWilliams, Jr., *Limited Liability Law Practice*, 49 S.C. L. REV. 359, 359 (1998) (noting the link between increased lawyer liability and the rise of LLPs and LLCs); Michael J. Lawrence, Note, *The Fortified Law Firm: Limited Liability Business and the Propriety of Lawyer Incorporation*, 9 GEO. J. LEGAL ETHICS 207, 207 (1995) (discussing how attorneys were able to persuade state legislatures to adopt laws permitting LLPs in the wake of the savings and loan crisis).

82. See Hamilton, *supra* note 81, at 1081-84 (discussing some of the legal problems posed by the LLP structure and noting that it "may affect allocations of partnership interests and . . . decisions in unpredictable ways").

## IV. CLASS ACTION ABUSE

The world of class action practice we see is one in which abuse flourishes.<sup>83</sup> It is a world in which lawyers make fabulous fees for achieving very little, if anything, on behalf of their clients; defendant-corporations make sweetheart deals to dispose of serious liability at bargain-basement rates; and absent class members end up with useless coupons or pennies on the dollar as compensation for their alleged injuries.<sup>84</sup> While we believe abuse is rampant, others believe it is relatively rare: the exception, not the rule.<sup>85</sup> There is no way to establish to a certainty which belief more accurately reflects the current state of class actions. There is no common definition of abuse. Many, although no one knows how many, court opinions in class action cases are not published.<sup>86</sup> In those cases in which detailed court opinions are available, information critical to the determination of whether the settlement is abusive may not appear on the surface of the opinion, and the underlying record is likely to be either unavailable, skimpy, or, at the other extreme, too voluminous to make an assessment of many cases a practical undertaking.<sup>87</sup> Despite these difficulties, we need to begin by setting out the reasons for our conviction that abuse in class actions is pervasive. We have two: the incentives built into the present system, and available empirical and anecdotal evidence.

The incentives built into the current class action system suggest that abuse is pervasive.<sup>88</sup> "All lawyer-client relationships create [conflicts] because the interests of lawyers and clients are not perfectly aligned[,] a situation economists call an "agency problem[]." <sup>89</sup> Lawyers have a keen interest in the size of their fees, while "[c]lients are interested primarily in the size of their recovery."<sup>90</sup> To the degree lawyers dominate the lawyer-client relationship, there is a danger that they will "engage in conduct that increases their fees . . . at the expense of the client's recovery."<sup>91</sup> Class actions exacerbate agency problems considerably.<sup>92</sup>

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83. See Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1055-56 (1996). Much of the following discussion draws from this article.

84. See *id.* at 1053-54.

85. See *id.* at 1054-55.

86. See *id.* at 1081-83.

87. See *id.*

88. See *id.* at 1103.

89. *Id.*

90. *Id.*

91. *Id.* at 1103-04.

92. See *id.* at 1104.

In ordinary lawyer-client relationships, clients can deal with the agency problem in two ways: by a contract between the lawyer and client that limits the lawyer's fee or ties it to the client's recovery, or by monitoring the lawyer's performance carefully as the representation proceeds.<sup>93</sup> These solutions, imperfect enough in the ordinary client setting (especially when clients are unsophisticated individuals), are even more ineffective in the class action setting: "The reason is that absent class members, by definition the majority of the class, neither contract with the lawyer, nor . . . monitor the lawyers' actions."<sup>94</sup> Class representatives, chosen and controlled by class counsel, are in no position to make restrictive fee contracts with class counsel.<sup>95</sup> Nor have courts in general insisted that the class representatives be consulted about the progress of the suit.<sup>96</sup> Indeed, they regularly approve class settlements even though the class representative has only the vaguest idea of what the settlement provides.<sup>97</sup> Thus, client monitoring of lawyer performance is effectively unavailable in almost all class actions.

Defendants and their lawyers in class action suits understand the agency problem just discussed and have every incentive to exploit it.<sup>98</sup> Defendants have a strong interest in minimizing their liability exposure through a settlement.<sup>99</sup> They "care only about the total amount they must pay out in settlement, not how the payoff is distributed between class members and the class lawyer."<sup>100</sup> Thus, defendants have a strong incentive to offer class counsel a deal in which the defendants accede to increased class counsel fees in return for the class counsel's agreeing to

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93. *See id.*

94. *Id.*

95. *See id.* at 1112. In fact, some class actions are so far beyond the comprehension and control of clients that they border on unconscionable. *See id.* at 1078-80; *see also* HENSLER ET AL., *supra* note 23, at 80 (noting that in some class actions, "there are . . . no real clients to make demands").

96. *See* Koniak & Cohen, *supra* note 83, at 1104 n.176.

97. *See, e.g.,* Lewis v. Curtis, 671 F.2d 779, 789 (3d Cir. 1982) (finding representation to be adequate despite the fact that class representative "displayed a complete ignorance of facts concerning the transaction that he was challenging"); Eggleston v. Chi. Journeymen Plumbers' Local Union No. 130, 657 F.2d 890, 896 (7th Cir. 1981) (stating that the class representative's role is limited, and citing Surowitz v. Hilton Hotels Corp., 383 U.S. 363 (1966), for the proposition that it is not sufficient to defeat class certification where the named plaintiff did not understand the complaint or the nature of the lawsuit); J/H Real Estate, Inc. v. Abramson, No. 95-4176, 1996 U.S. Dist. LEXIS 1546, at \*7 n.3 (E.D. Pa. Feb. 9, 1996) ("[C]lass counsel, not the class representative, guide and orchestrate the litigation."); Heastie v. Cmty. Bank of Greater Peoria, 125 F.R.D. 669, 676-77 (N.D. Ill. 1989) (accepting as adequate a named plaintiff who was unfamiliar with the details of the claim).

98. *See* Koniak & Cohen, *supra* note 83, at 1111-12.

99. *See id.* at 1111.

100. *Id.*

a lower recovery for class members. There is every reason to believe that many class action settlements involve the trade of a smaller recovery pie for a larger fee slice.<sup>101</sup> We call this a collusive deal.

Of course, honorable class counsel could try to resist the collusive settlement offers of defendants and their lawyers.<sup>102</sup> But if class counsel “balk at the prospect of selling out their clients,” the defendant can try auctioning off the right to bargain on behalf of the class to lawyers more willing to cooperate.<sup>103</sup> The fact that defendants have effective control over which lawyers represent the class may seem surprising. Defendants get that control because they have a very important bargaining chip: the ability to challenge class certification.<sup>104</sup> In most mass tort cases, the defendant’s agreement not to fight class certification is crucial, because the heterogeneity of the class would prevent certification if the defendant decided to challenge it.<sup>105</sup> Even in class suits not involving mass torts, the threat to challenge certification and impose high costs on uncooperative class counsel gives defendants great leverage.<sup>106</sup> A lawyer who wages an expensive fight to get a class certified for trial and loses gets no fees.<sup>107</sup>

The collusion between class counsel and defendants can and does take a variety of forms. One strategy is to make the class as big and undivided as possible, which means bigger fees for class counsel, greater finality for defendants, and fewer competing plaintiffs’ lawyers to muck things up.<sup>108</sup> This strategy can disadvantage some members of the class—for example, those few with relatively strong claims relative to others. But dividing the class into subgroups of people, known as subclasses, is not in the interest of class counsel or defendants.<sup>109</sup>

Another strategy is to find methods to lock class members into settlements, thereby defeating the ordinary right of absent class members

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101. *See id.* at 1111-12.

102. *See id.* at 1113.

103. *See id.*; *see also* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1354 (1995).

104. *See* Koniak & Cohen, *supra* note 83, at 1113.

105. *See id.* at 1113 n.204.

106. *See id.* at 1113.

107. *See* Robert B. Gerard & Scott A. Johnson, *The Role of the Objector in Class Action Settlements—A Case Study of the General Motors Truck “Side Saddle” Fuel Tank Litigation*, 31 LOY. L.A. L. REV. 409, 416 (1998); Koniak & Cohen, *supra* note 83, at 1114.

108. *See* Coffee, *supra* note 103, at 1350 n.21 (citing *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141 (S.D. Ohio 1992), *appeal dismissed*, 995 F.2d 1066 (6th Cir. 1993), a class action involving a defective heart valve where defendants insisted the class be extended from nationwide to global).

109. *See In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 741-45 (2d Cir. 1992) (discussing the need for and complexities of dividing a class into subclasses, specifically in the context of an insolvent defendant), *modified sub nom. In re Findley*, 993 F.2d 7 (2d Cir. 1993).

to “opt out.”<sup>110</sup> Transforming opt-out classes into non-opt-out classes is another way of ensuring as much finality as possible for defendants.<sup>111</sup> The collusion here can take one of two forms. First, the defendant can get class counsel to tack a request for an injunction onto a class complaint for money damages.<sup>112</sup> When a class action is brought to ask for an injunction to help the whole class, the rule does not give class members the right to opt out.<sup>113</sup> The defendant tells the class lawyer that the defendant would settle the class’s claims for money damages on the condition that class counsel include a request for a makeweight injunction—for example, one ordering the defendant to put up a plaque to commemorate those who died as a result of the defendant’s product. That ensures that no one in the class can refuse to accept what the class settlement offered her in money damages (or coupons) and elect to sue as an individual.<sup>114</sup>

The second method that has been developed to lock in the class is for the defendant and class counsel to agree to tell the court that the defendant’s assets should be treated as if they were too small to pay all class members.<sup>115</sup> Class action law allows the locking in of class members when there is a designated pot of money from which all claims must be paid and that pot is too small to pay everyone in the class all that they might be owed.<sup>116</sup> It follows that, if the defendant and compliant class lawyers are free to designate the available pot of money, they can always designate an amount that is too small, which means they can always lock in all class members.

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110. See *Coffee*, *supra* note 103, at 1382.

111. See *id.*

112. Injunctions are court orders directing a party to do or stop doing something. See BLACK’S LAW DICTIONARY 788 (7th ed. 1999).

113. See FED. R. CIV. P. 23(c)(2); see also *Coffee*, *supra* note 103, at 1427. The lack of an opt-out right for a (b)(2) class is based on the notion that the injunction will necessarily affect all members of the class. Therefore, all members should be included in the suit to ensure that the interests of all will be taken into account in issuing and framing the injunction or in denying it. See *id.*; see also *id.* at 1411-12 (describing how such a tactic was used in *Hayden v. Atochem N. Am., Inc.*, No. H-92-1054 (S.D. Tex. Apr. 10, 1995) (notice of pendency of class action)).

114. See *Coffee*, *supra* note 103, at 1382.

115. See *id.* at 1403 (describing a situation where defendant succeeded in limiting its pool of assets to insurance proceeds, thereby “contribut[ing] only a trivial proportion of its own assets to the settlement fund”). Bankruptcy is also used as a way to limit funds accessible to class action suits. See *id.* at 1409-10 (describing the strategy used by Dow Coming in *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, No. CV 92-P-10000-S, 1994 U.S. Dist. LEXIS 12521, at \*17 (N.D. Ala. Sept. 1, 1994)).

116. See *Coffee*, *supra* note 103, at 1410 (“Used together, the combination of bankruptcy and a class action effectively convert[s] a standard Rule 23(b)(3) opt out class action into a de facto mandatory class action.”).

Recognizing this problem, the United States Supreme Court, in *Ortiz v. Fibreboard Corp.*,<sup>117</sup> reversed a district court's approval of a class action settlement, which had been upheld by the Fifth Circuit, in which this collusive technique was used.<sup>118</sup> The Court rejected the settlement in part because the only evidence that the pot of money—mostly insurance money—was insufficient was the settlement agreement between the defendant and class counsel, and an accompanying settlement between the defendant and its liability insurance companies.<sup>119</sup> It is too soon to tell, however, whether *Ortiz* will succeed in killing off this collusive technique or whether class action participants will succeed in finding effective substitutes.<sup>120</sup>

Courts in class actions are supposed to thwart collusive efforts, as the Supreme Court did in *Ortiz*, by fulfilling the monitoring role that the client cannot.<sup>121</sup> Rule 23(e) of the Federal Rules of Civil Procedure requires district court approval of class action settlements:<sup>122</sup>

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117. 527 U.S. 815 (1999).

118. *See id.* at 828-30.

119. *See id.* at 848. The Court held that “in an action such as this the settling parties must present not only their agreement, but evidence on which the district court may ascertain the limit and the insufficiency of the fund, with support in findings of fact following a proceeding in which the evidence is subject to challenge.” *Id.* at 849; *see also id.* at 864 (stating that, assuming the Court would allow such a settlement at all, “it would be essential that the fund be shown to be limited independently of the agreement of the parties to the action”).

120. Despite its broad statements that the class settlement agreement could not establish a limited fund, the Court's opinion contains language that appears not to rule out the possibility completely. In *Ortiz*, the alleged “limited fund” consisted mostly of insurance policies with no aggregate limits on their face, but whose applicability to the class' claims was being sharply contested by the insurance companies in pending state court litigation. *See id.* at 850-51. Because of the uncertain outcome of the insurance coverage litigation, the class counsel and defendant had argued that the value of the insurance policies was not unlimited, but a discounted “settlement value.” *Id.* at 851. The Court stated that the settlement value of insurance policies might be sufficient to establish that a limited pot of money existed, but found such a position acceptable only:

if one can assume that parties of equal knowledge and negotiating skill agreed upon the figure through arms-length bargaining, unhindered by any considerations tugging against the interests of the parties ostensibly represented in the negotiation. But no such assumption may be indulged in this case, or *probably* in any class action settlement with the potential for gigantic fees.

*Id.* at 852 (emphasis added). The Court found that class counsels' agreement to the insurance settlement value was inherently suspect because they had a conflict of interest: they had separately settled claims of their individual clients at the same time as, and contingent on, the class action settlement, and so had a great incentive to agree to any settlement that could win court approval. *See id.* This language implies that it remains an open question what the Court would do if class counsel did not suffer from such a severe conflict.

121. *See Koniak & Cohen, supra* note 83, at 1104; Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 45 (1991).

122. *See* FED. R. CIV. P. 23(e).

Ostensibly, the court stands in for the client as a fiduciary to ensure that the settlement is fair to the client and does not merely serve the lawyer's interest. But this arrangement simply replaces one imperfect agent (class counsel) with another (the court). Although the court has no monetary interest in the settlement, its interests are not perfectly aligned with the interests of class members.<sup>123</sup>

Courts generally favor settlements because they clear crowded dockets. The alternatives—trying the class action or, worse yet, trying the multitude of suits that make up the class action individually—are particularly burdensome, taking up significant court time and resources.<sup>124</sup> Judge Henry Friendly observed that “[a]ll the dynamics conduce to judicial approval of [the] settlement[.]” once the adversaries have agreed.<sup>125</sup> Although the case law may require full and elaborate judicial review before a settlement is approved, it is doubtful that courts have much incentive to be very demanding. Their deferential attitude is probably best expressed by one recent decision which acknowledged that “[i]n deciding whether to approve [a] settlement proposal, the court starts from the familiar axiom that a bad settlement is almost always better than a good trial.”<sup>126</sup> Even if courts did not face these incentives, they may lack the information necessary to make an informed evaluation of the settlement.<sup>127</sup> Moreover, the court's institutional role as neutral arbiter limits its ability to serve as an effective fiduciary.<sup>128</sup> Courts are not and cannot be advocates for the class.<sup>129</sup> Although courts provide some constraint on collusive behavior, for the reasons just given it is predictable that courts would be generally unreliable monitors of class counsel's performance and ineffective protectors of class members' interests, and that they will resist the broader implications of cases like *Ortiz*.

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123. Koniak & Cohen, *supra* note 83, at 1122.

124. See John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 714 n.121 (1986); Macey & Miller, *supra* note 121, at 45-46; Sylvia R. Lazos, Note, *Abuse in Plaintiff Class Action Settlements: The Need for a Guardian During Pretrial Settlement Negotiations*, 84 MICH. L. REV. 308, 308 nn.1-2 (1985).

125. *Alleghany Corp. v. Kirby*, 333 F.2d 327, 347 (2d Cir. 1964) (Friendly, J., dissenting), *aff'd en banc by equally divided court*, 340 F.2d 311 (2d Cir. 1965), *cert. dismissed*, 384 U.S. 28 (1966).

126. *In re Warner Communications Sec. Litig.*, 618 F. Supp. 735, 740 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986).

127. See Coffee, *supra* note 124, at 714 n.121; Macey & Miller, *supra* note 121, at 46.

128. See Koniak & Cohen, *supra* note 83, at 1127.

129. See *id.*



Judges do have “an interest in promoting their reputation for fairness,” which at least “should encourage them to safeguard the interests of absent class members.”<sup>130</sup> However, individual judges are unlikely to suffer negative reputational effects among the general public from approving bad class deals. The press and academia have imperfect access to class settlements, and even when settlement documents are readily accessible, they are likely to be so complex that sorting out what happened is very difficult.<sup>131</sup>

Class settlements are, if nothing else, heavily lawyered affairs, and discerning fraud through reams of legalese drafted to conceal any such activity requires effort few reporters . . . and few academics have thus far made. To the extent the general public, media or academics blame anyone for the abuse they perceive, albeit find difficult to document, that blame tends to land on the doorstep of lawyers, not the judiciary. . . . And . . . judges understand all of this . . . .<sup>132</sup>

More important, courts worry not only about their reputation among the general public, but also about their reputation among other judges and lawyers.<sup>133</sup> Rejecting a settlement that clears not only one’s own docket but the dockets of colleagues is not apt to win a judge the praise of fellow judges. Nor should a judge expect to win praise from the bar for rejecting the efforts of lawyers and firms.<sup>134</sup> The judge who has to work with these lawyers on a continual basis would be understandably reluctant to reject a settlement on the grounds that those lawyers colluded. Moreover, state judges who must stand for election may depend on lawyers for campaign contributions, and all judges, whether elected or appointed, may depend on the bar for endorsements.<sup>135</sup> Judges may be wary of academic criticism, but this has far less practical impact. Indeed, academic criticism can be—and often is in the class action area dismissed as idealistic musing by people not sufficiently grounded in the “real world.”<sup>136</sup> More important, many legal academics are hesitant to

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130. *Id.* at 1125.

131. *See id.* at 1125-26; *see also id.* at 1057-68 (describing a particularly egregious class action settlement that received notoriety because one of the authors of the article figured out what had gone on by going through all of the court documents, and then notified the press).

132. *Id.* at 1126.

133. *See id.* at 1127.

134. *See id.*

135. *See id.* at 1127 n.237.

136. *See* David R. Barnhizer, *Prophets, Priests, and Power Blockers: Three Fundamental Roles of Judges and Legal Scholars in America*, 50 U. PITT. L. REV. 127, 183-84 (1988) (discussing Francis Bacon’s conclusion that judges most often seek “useful” knowledge and “it is generally necessary to confine judicial thinking to . . . ‘immediate causes’”); *see also* Kenneth F. Ripple,

criticize at least federal judges, perhaps because they hope someday to join their ranks, or for whatever reason. Legal academics have also developed something of a stake in the class action system by, for example, serving as special masters in evaluating settlements, who get paid only if a settlement is approved.<sup>137</sup>

It is possible that trial courts' enthusiasm for settlement could be tempered by the possibility of reversal on appeal in cases like *Ortiz*. Appellate judges, "one step removed from the mess," presumably have less interest in approving every class settlement that comes up on appeal.<sup>138</sup> "But being one step removed also means that appellate judges are to a large extent necessarily dependent on the findings of the trial judge as to the fairness of the terms, the adequacy of the representation and the appropriateness of the request for attorney's fees."<sup>139</sup> That distance explains why appellate courts review such matters under the abuse of discretion standard,<sup>140</sup> which seems appropriate but which also will never lead to a high rejection rate.<sup>141</sup> Cases like *Ortiz* may simply demonstrate that appellate courts are able to act only when the facts are egregious and apparent. If, in response to *Ortiz*, district courts acquiesce in the papering over of difficulties, appellate courts may not be in a good position to do anything about it.

The available empirical evidence supports the claim that courts are extremely reluctant to reject proposed class action settlements. A recent empirical study conducted by the Federal Judicial Center of class action practice in four federal district courts finds that of the 117 proposed class action settlements, around 90% were approved without changes.<sup>142</sup> The

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*Judges on Judging: The Judge and the Academic Community*, 50 OHIO ST. L.J. 1237, 1237 (1989) (quoting a member of the Judicial Committee of the British House of Lords as saying, "we believe there is very little room for philosopher kings in our legal system").

137. See, e.g., Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159, 1163 (1995) (describing a typical mass tort class action as including "a local law professor of national reputation who has served as a 'special master' to assist the judge in evaluating the formulas of settlement").

138. Koniak & Cohen, *supra* note 83, at 1124.

139. *Id.*; see also *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30, 34 (3d Cir. 1971) (noting that "[g]reat weight" is to be given to the trial judge's opinion "because he is exposed to the litigants, and their strategies, positions and proofs").

140. See *Ace Heating*, 453 F.2d at 34; JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 13.4, at 608 (2d ed. 1993) (noting that "any rulings that are within the discretion of the trial judge will be reviewed under an abuse of discretion standard"). Abuse of discretion is the most deferential standard of review available.

141. See Koniak & Cohen, *supra* note 83, at 1124.

142. See THOMAS E. WILLGING ET AL., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 58 (1996).

percentage of approved settlements jumps to 98% if one includes settlements in which the judge conditioned approval on some change, however minor.<sup>143</sup> As for attorneys' fees, although the study found that objections were made in 21 (18%) of the cases, in 19 of those cases the court awarded the full fee requested.<sup>144</sup> Thus, not only are proposed settlements routinely approved without change, but so are the proposed attorneys' fees. Of the settlements approved in the study, only three were appealed, and only one of those three—the only appeal filed by objectors—was reversed.<sup>145</sup>

Moreover, if judges had no bias in favor of accepting class settlements and the standard on appeal were much more stringent, it is reasonable to believe that the vast majority of class settlements would still be approved no matter how dirty the conduct was that surrounded the settlement. The reason: most hearings on the fairness of class settlements are not adversarial proceedings.<sup>146</sup> The Federal Judicial Center study found that in the four districts studied 42% to 64% of the fairness hearings were concluded without any presentation of objections to the proposed settlement by “class members and other objectors.”<sup>147</sup> The study provides no information on whether, in the cases where objectors made written objections or appeared at the hearing, they were represented by counsel or appeared pro se, but it is probably safe to assume that many of those objections were raised pro se.<sup>148</sup> In the absence of a trained advocate to present problems with a proposed settlement, the likelihood that a judge could ferret out corruption or

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143. See *id.*

144. See *id.*

145. See *id.* at 191 tbl.51, 193 tbl.53. The settlement reversed on appeal—based on improper certification of class and abuse of discretion by the lower court in determining that the settlement was fair and adequate—was *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 779 (3d. Cir. 1995). With respect to attorneys' fees, ten appeals were filed, including in the *General Motors* case. See WILLGING ET AL., *supra* note 142, at 77. Of the other nine appeals, two courts affirmed the fee award, two courts dismissed the appeal, one court reversed a denial of fees, one court reversed a trial court's reduction of fees, one court remanded for reconsideration, and two other appeals were pending at the time of the study. See *id.* at 77, 191-94 tbls.51-54.

146. See HENSLER ET AL., *supra* note 23, at 88 (“The judge's ability to assess the value of the settlement is constrained because a case that settles before trial has, by definition, not been the subject of a full-fledged, comprehensive evidentiary hearing involving fact and expert witnesses, cross-examination, and documentary evidence.”).

147. WILLGING ET AL., *supra* note 142, at 57; see also *id.* at 178 tbl.38.

148. See, e.g., *id.* at 57 (noting that “filing written objections to the settlement was far more frequent than . . . appearing at the settlement hearing”).

illegality surrounding a settlement that is presented jointly by class counsel and defendant's counsel as fair, legal, and just is quite small.<sup>149</sup>

The current system provides little incentive for lawyers to seek out corruption or illegality in proposed settlements. Objecting lawyers stand little chance of receiving fees or even reimbursement of expenses incurred in mounting a challenge.<sup>150</sup> When a court *rejects* a settlement, there is by definition no common fund from which to award attorneys' fees to objecting counsel.<sup>151</sup> To award counsel fees to objecting counsel who exposed a settlement as the product of collusion and thus unworthy of approval would require the courts to find some other source of funds from which to pay those fees. Thus far, no court has taken that step.<sup>152</sup> Lawyers are sometimes motivated to challenge proposed settlements in

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149. See *supra* note 127 and accompanying text. A proposed revision to Rule 23(e) which would authorize judges to refer settlement proposals to magistrate judges or special masters for independent evaluation would not solve this problem. Neither a judge nor a special master is an advocate. Thus, the proposed rule change would simply replicate the "judge" problem at a different level.

150. In the Federal Judicial Center study, the researchers found "no fee awards to, and few fee requests by, counsel other than plaintiffs' counsel." WILLGING ET AL., *supra* note 142, at 68. We have found no case in which a court has awarded attorneys' fees to objecting counsel for raising arguments that caused the court to disapprove a class action settlement. In *approving* a settlement, courts sometimes award fees to objectors upon a finding that the objectors conferred a monetary benefit upon the class by raising objections that resulted in the court modifying some part of the settlement (usually class counsel's request for attorneys' fees). See *Useton v. Commercial Lovelace Motor Freight Inc.*, 9 F.3d 849, 855 (10th Cir. 1993) (awarding fees to objecting counsel because the court found that the objection was valid and conferred a net benefit on the class); *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30, 35 (3d Cir. 1971) (holding that an objecting attorney should not be denied reasonable compensation for a benefit conferred on the class); *Bowling v. Pfizer, Inc.*, 922 F. Supp. 1261, 1285 (S.D. Ohio 1996) (awarding attorneys' fees to objectors for their role in improving the settlement for the class); 1 ALBA CONTE, ATTORNEY FEE AWARDS § 2.25, at 91-92 (2d ed. 1993). *But see* *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 126-27 (8th Cir. 1975) (denying objector fees); *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co.*, 481 F.2d 1045, 1053-54 (2d Cir. 1973) (denying objector fees); *Milstein v. Werner*, 58 F.R.D. 544, 552 (S.D.N.Y. 1973) (denying objector fees); *Newman v. Stein*, 58 F.R.D. 540, 543-44 (S.D.N.Y. 1973) (denying fees to settlement objectors who conferred no class benefit).

151. See WILLGING ET AL., *supra* note 142, at 69 & n.249 (noting that courts award attorneys fees under the common-fund doctrine, which holds that a person cannot benefit from a lawsuit without contributing to its costs); see also *Milstein*, 58 F.R.D. at 552 (noting that an objector cannot be paid except where the objector has helped to create the fund from which to draw payment).

152. A possible way to calculate such objectors' attorneys' fees might be the lodestar method, "under which the fee award is calculated by multiplying the hours reasonably expended times the reasonable hourly rates." WILLGING ET AL., *supra* note 142, at 70; see also *id.* at 69-71 (contrasting the common fund doctrine with the lodestar method). However, in recent years, courts have moved away from using the lodestar method even for attorneys who have conferred a benefit on the class. See *id.* "The Supreme Court never formally adopted the lodestar method in a common fund case," *id.* at 70 n.251, and at least one Circuit Court of Appeals—the Eleventh—has held that attorneys' fees must be paid from the fund established for the benefit of the class, see *id.* at 70 n.255 (quoting *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991)).

the hope of reaping some later economic benefit, such as success in one's own bid to be class counsel in a later suit or continued income from individual suits, which would be more lucrative than processing people through a claims procedure set up for class members under a proposed settlement. However, because the chances of convincing a trial judge to reject a settlement are so slim, and the chances on appeal are not much greater and entail added expenses, the expected benefit of derailing the settlement would have to be enormous to make it rational to launch a serious challenge.<sup>153</sup> Even when objectors and their lawyers have sufficient incentive and funding to challenge the class settlement, however, they are often motivated not by the chance to protect the class from a sellout settlement but by the prospect of being paid off by class counsel and/or the defendant to drop their objections and walk away.<sup>154</sup>

The situation is thus ripe for abuse. It is in the interest of all the participants in the class action—save the absent members of the class—to settle class actions by collusively transferring money from the class to class counsel.<sup>155</sup> As long as some plaintiffs' lawyers are willing to act in a self-interested way, they will be rewarded by defendants with extraordinary fees funded at the expense of the class.<sup>156</sup> Courts will not effectively monitor the abuse because of their interest in seeing cases settled.<sup>157</sup> Because abuse—by which we mean fraud and negligence as to the class's interest—is in the interest of the participants, it is reasonable to expect abuse to be pervasive. Combined with our experience and the available evidence of class action practice, our understanding of the incentives built into the present system sustains our conviction that collusion and inadequate representation are everyday features of the class action world—a scandalous state of affairs.

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153. It happens. *See, e.g.*, *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 617 (3d Cir. 1996), *vacating* 157 F.R.D. 246 (E.D. Pa. 1994), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). However, the economics suggest that it will happen rarely.

154. For examples of cases in which objecting counsel switched sides to become cooperating class counsel or mysteriously disappeared, see *Bowling v. Pfizer, Inc.*, 922 F. Supp. 1261, 1265, 1271-73 (S.D. Ohio 1996) (noting that most of the objecting lawyers subsequently became Special Counsel for the class and requested attorneys' fees); *Price v. Ciba-Geigy Corp.*, No. 94-0647-B-S, slip op. at 45 (S.D. Ala. Apr. 3, 1995) (noting that all objecting counsel ultimately dropped their objections following minor changes to the settlement).

155. *See supra* notes 98-109 and accompanying text.

156. *See supra* notes 98-104 and accompanying text.

157. *See supra* notes 121-37 and accompany text.

## V. NO THERE, THERE

If we are correct that collusion and inadequate representation are rampant in class actions, what does that say about Wasserstrom's two questions and our reframing of them?<sup>158</sup> Let's start with the "bounds of the law" of class actions. That law condemns both collusion and inadequate representation; at least that's what the court opinions say.<sup>159</sup> "[T]he proponents [of a proposed class action settlement] have the burden of proving that . . . the settlement is not collusive but was reached after arm's length negotiations."<sup>160</sup> The court is supposed to reject the settlement if that burden is not met.<sup>161</sup> And the absence of collusion is not enough: Again, according to the law that courts purport to be applying, no class settlement may be approved unless the court finds that the class has been afforded adequate representation by counsel.<sup>162</sup> The courts have interpreted the Constitution's Due Process Clause to guarantee the class adequate representation by the named plaintiffs and by counsel.<sup>163</sup> Moreover, the guarantee is so important that the initial court's determination of this issue may be reexamined not just on appeal but even after all appeals have been exhausted.<sup>164</sup> In other words, an absent class member may sue the defendant at some later point in time and claim that the class settlement should be treated as a legal nullity because, despite what the trial and appellate courts ruling on the settlement said, the lawyers who proposed the settlement did not adequately represent the class. While recently some academic commentators have argued strenuously against this two-bites-at-the-

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158. See *supra* notes 1-5 and accompanying text.

159. See, e.g., *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 801 (3d Cir. 1995) (noting the "special need" to assure that settlement classes are adequately represented); *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 331 (E.D. Pa. 1994) (defining collusion as an agreement "to defraud a person of his rights by the forms of law"), *vacated*, 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom.* *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

160. See *Int'l Union of Elec. Workers v. Unisys Corp.*, 858 F. Supp. 1243, 1264 (E.D.N.Y. 1994).

161. See *id.*

162. See, e.g., *General Motors*, 55 F.3d at 800 (holding that the adequacy of representation requirement of FED. R. CIV. P. 23(a) has two components: whether named plaintiff's interests are aligned with absent members, and whether counsel is qualified to represent the class).

163. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985); *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940).

164. See, e.g., *Guthrie v. Evans*, 815 F.2d 626, 628 (11th Cir. 1987) (recognizing that "under circumstances of inadequate representation," class members may pursue relief in a collateral proceeding); *Gonzales v. Cassidy*, 474 F.2d 67, 75 (5th Cir. 1973) (noting that the class is bound by the effects of *res judicata* "unless the party attacking the judgment can show that the class was inadequately represented").

apple treatment of the guarantee of adequacy,<sup>165</sup> courts, at least thus far, maintain that a second (or what lawyers call a collateral) attack on adequacy is allowed.<sup>166</sup>

But a court (or, for that matter, any institution or individual) may say something is law and treat it as if it were not. To be law, as opposed to a string of words, the phrases courts repeat must “mean” something.<sup>167</sup> For words to mean something, two things must be true about them: they must divide actions that occur in the world into valid and void, lawful and unlawful; and they must entail real consequences. If any and all conduct meets a particular “standard,” or if the violation of the standard never results in tangible consequences to the violator, we put it to you that the “standard” is no “standard” and certainly not a rule of law. It is at most a mantra, something that is repeated no matter what the circumstances. It is mumbo-jumbo, not law.

“Class counsel has adequately represented the class” is a mantra. Some form of that phrase can be found in virtually every class action settlement opinion, seemingly without regard to what class counsel has actually done.<sup>168</sup> In most cases, the court does not even bother to construct a story describing class counsel’s activities. Instead, courts content themselves by summarizing class counsel’s resume in the most laudatory terms and by making conclusory statements about how well-

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165. See, e.g., Marcel Kahan & Linda Silberman, *The Inadequate Search for “Adequacy” in Class Actions: A Critique of Epstein v. MCA, Inc.*, 73 N.Y.U. L. REV. 765, 766 (1998) (“[A]n unfettered ability to collaterally attack ‘adequacy’ is not a well-designed solution . . .”).

166. “Federal courts . . . recognize that absent class members hold a due process right to attack collaterally the res judicata effects of a class action judgment if the absent class members establish that the class representatives inadequately represented the interests of the class.” *Tompkins v. Ala. State Univ.*, 15 F. Supp. 2d 1160, 1163 (N.D. Ala. 1998), *aff’d*, 174 F.3d 203 (11th Cir. 1999). *But see Epstein v. MCA, Inc.*, 179 F.3d 641, 648 (9th Cir. 1999) (declining to allow collateral attack where court certifying the class action made sufficient findings on adequacy).

167. See 15A AM. JUR. 2D *Common Law* § 1 (2000).

168. For a small sampling, see *Thomas v. Albright*, 77 F. Supp. 2d 114, 119 (D.D.C. 1999) (“The Court, in approving the settlement, expressly found that class counsel adequately represented the plaintiffs . . .”), *aff’d sub nom. Thomas v. Powell*, 247 F.3d 260 (D.C. Cir.), *cert. denied*, 122 S. Ct. 347 (2001); *Garza v. Sporting Goods Prods., Inc.*, No. SA-93-CA-1082, 1996 U.S. Dist. LEXIS 2009, at \*18 (W.D. Tex. Feb. 6, 1996) (“[T]he Court is satisfied class counsel has adequately represented the class.”); *Ahearn v. Fibreboard Corp.*, 162 F.R.D. 505, 524 (E.D. Tex. 1995) (“[T]he Court is satisfied that Class Counsel adequately represented the class.”); *Bartolomeo v. State Farm Mut. Auto. Ins. Co.*, No. 92-5581, 1993 U.S. Dist. LEXIS 9545, at \*5 (E.D. Pa. July 14, 1993) (noting that plaintiffs were bound by earlier class action settlement in part because “class counsel had adequately represented the class”); *Hammon v. Barry*, 752 F. Supp. 1087 app. at 1121 (D.D.C. 1990) (attaching in Appendix II the Consent Decree, item 36 of which reads, “Class Counsel have adequately represented the class.”); see also *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 293-94 (E.D. Pa. 1994), *vacated*, 83 F.3d 610 (3d Cir. 1996), *aff’d sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), discussed in more detail *infra* note 169.

respected, talented and above reproach class counsel is.<sup>169</sup> In most cases, in other words, courts are too busy heaping praise on class counsel to describe what they have done to represent the class, to elaborate on what the rule of adequacy demands of class counsel or to explain why it makes sense to hold that what class counsel did satisfies the law. It is true that some courts discuss class counsel's actions at length.<sup>170</sup> But this is almost always to respond to an objector who has a lawyer to present a case challenging what class counsel has done, and that is a rare occurrence for reasons we explained earlier.<sup>171</sup> More important, even in those cases, the courts manage not to create any law of adequacy, leaping as they do from the actions of counsel to the conclusion that those actions are adequate without pausing to explain the content of the standard they purport to be applying.<sup>172</sup>

Conduct described by class action lawyers and stamped as adequate has included the following: negotiating a class settlement that leaves some members of the class paying more in attorneys' fees than they receive in recovery;<sup>173</sup> negotiating a deal for the class that is worse than the deal simultaneously negotiated by the same lawyers for identically

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169. See, e.g., *Georgine*, 157 F.R.D. at 246, 293-94. The court not once but repeatedly praised class counsel: reciting the credentials of class counsel and emphasizing their long experience as leaders of the asbestos plaintiffs' bar, see *id.* at 293-94; finding class counsel to be "highly respected for their skills and experience in the asbestos litigation" and to "have the knowledge and credibility necessary to negotiate on behalf of future asbestos victims," *id.* at 294; noting that "[a]ll three Class Counsel were unquestionably experienced, highly respected leaders of the plaintiffs' asbestos bar," *id.* at 329; describing class counsel as "extraordinarily competent and experienced" and "highly respected," and asserting that "it is clear to this Court that they intended to negotiate this settlement in compliance with the ethical rules," *id.* at 335; see also *S.C. Nat'l Bank v. Stone*, 139 F.R.D. 325, 331 (D.S.C. 1991) ("Plaintiffs' counsel have now practiced before this court in a number of securities fraud class actions, and the court is aware from first-hand experience of their competency in this complex area of law. The court is satisfied that the plaintiffs and their class counsel will fairly and adequately protect the interests of the class."); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 720 F. Supp. 1379, 1392 (D. Ariz. 1989) ("Both Class counsel and counsel for Chemical Bank deem the settlements to be fair, reasonable, adequate and deserving of the Court's approval. Counsels' opinions warrant great weight both because of their considerable familiarity with this litigation and because of their extensive experience in similar actions.").

170. See, e.g., *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 801-04 (3d Cir. 1995).

171. See *supra* notes 145-53 and accompanying text.

172. See generally Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045, 1057, 1090-92 (1995) (noting that standards of adequacy, because they are not well defined, can often be manipulated by class counsel).

173. See *Kamilewicz v. Bank of Boston Corp.*, 92 F.3d 506, 508 (7th Cir. 1996) (describing lower court's decision in *Hoffman v. BancBoston Mortgage Corp.*, No. 91-1880 (Ala. Cir. Ct. Jan. 24, 1994)). *Kamilewicz*, the subsequent malpractice suit by a class member against class counsel and the defendant bank's lawyers, affirmed dismissal on procedural grounds without considering the merits of the claims against the lawyers. See *id.* at 512. See Koniak & Cohen, *supra* note 83, at 1057-84, for a comprehensive discussion and critique of these cases.



situated people outside the class;<sup>174</sup> negotiating a deal that gives members of the class with no viable claims as good a recovery as those with viable, even strong, claims;<sup>175</sup> negotiating a deal without conducting any discovery;<sup>176</sup> and devising settlement notices that the average citizen could not hope to understand.<sup>177</sup>

In one recent case, the Ninth Circuit Court of Appeals broke from the pack and put some teeth in the standard of adequate representation.<sup>178</sup>

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174. See *Ahearn v. Fibreboard Corp.*, 162 F.R.D. 505, 524-25 (E.D. Tex. 1995), *aff'd sub nom. In re Asbestos Litig.*, 90 F.3d 963 (5th Cir. 1996), and *vacated and remanded*, 521 U.S. 1114 (1997), and *aff'd*, 134 F.3d 668 (5th Cir. 1998), and *vacated and rev'd sub nom. Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). For a discussion and critique of this case, see George M. Cohen, *The "Fair" is the Enemy of the Good: Ortiz v. Fibreboard Corporation and Class Action Settlements*, 8 SUP. CT. ECON. REV. 23 (2000). See also *Georgine*, 157 F.R.D. at 298.

175. See, e.g., *In re Paine Webber Short Term U.S. Gov't Income Fund Sec. Litig.*, No. 94 Civ. 3820, 1995 U.S. Dist. LEXIS 12029, at \*8 (S.D.N.Y. Aug. 18, 1995) (approving settlement in which those with claims barred by the statute of limitations were provided the same relief as those without time-barred claims); *Broin v. Philip Morris Cos.*, 641 So. 2d 888, 891 (Fla. Dist. Ct. App. 1994) (describing settlement providing that those flight attendants with claims barred by the statute of limitations would have the statute waived to allow them the same relief as those without time-barred claims).

Susan Koniak, one of the Authors of this Essay, testified as an expert witness in the *Paine Webber* fairness hearing on behalf of the objectors. She was paid for the time she spent preparing to testify and testifying. In her testimony, she criticized the settlement, *inter alia*, on the ground that those with time-barred claims were treated as if they were similarly situated to those with timely claims. The court rejected her testimony on this and other points.

176. A practice known as "confirmatory discovery" has developed in the settlement of class actions. Confirmatory discovery refers to the discovery that class counsel conducts *after* agreeing to a settlement on behalf of the class. See, e.g., Michael A. Riccardi, *Phila. Lawyers Negotiate \$30 Million Settlement in Securities Class Action*, LEGAL INTELLIGENCER, Sept. 5, 1997, at 1 ("The company said that 'confirmatory discovery' must take place as well as the negotiation of a detailed settlement stipulation."); *Micro Warehouse, Inc. Settles Class Action Lawsuit*, PR NEWswire, Sept. 3, 1997 ("The agreement [to pay thirty million dollars] is contingent on completion of confirmatory discovery."), available at LEXIS, PR Newswire File; *SFX Broadcasting Announces Settlement of Lawsuits*, BUS. WIRE, Mar. 18, 1998 ("The settlement is conditioned on the consummation of the merger, the completion of confirmatory discovery, and approval of the court."), available at LEXIS, Business Wire File.

177. See, e.g., *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 177 F.R.D. 216, 231-32 (D.N.J. 1997) (asserting that notice is adequate as long as it satisfies "the necessary requirements," but that it does not need to be "unduly specific"). *But see Zimmer Paper Prods., Inc. v. Berger & Montague, P.C.*, 758 F.2d 86, 93 (3d Cir. 1985) (recognizing a cause of action by a class member against class counsel for negligence in providing notice).

178. See *Epstein v. MCA, Inc.*, 50 F.3d 644 (9th Cir. 1995) [*Epstein I*], *rev'd sub. nom. Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996); see also *Epstein v. MCA, Inc.*, 126 F.3d 1235 (9th Cir. 1996) [*Epstein II*] (*Epstein I* on remand), *withdrawn and replaced*, 179 F.3d 641 (9th Cir. 1999) [*Epstein III*]. Shareholders for a corporation acquired in a tender offer brought two related actions, the first one making claims under state corporate law and filed in Delaware, and the second making claims under the federal securities laws and filed in federal court. See *Epstein III*, 179 F.3d at 643. The trial court in the federal case granted the acquiring corporation's summary judgment motion. See *id.* While the shareholders' appeal in that suit was pending, the Delaware Chancery Court approved a settlement extinguishing the shareholders' state and federal claims, even

In a very detailed opinion, the court explained what class counsel had done and why that conduct fell short of the standard.<sup>179</sup> This glaring exception to the otherwise cavalier approach to adequacy demonstrated by our courts was soon relegated to the scrap heap by the very court that issued the opinion, however. Months after the decision was issued, the Ninth Circuit panel ordered reargument in the case and issued a new opinion on the matter of adequacy, vacating the prior opinion, with one judge from the prior panel switching his vote.<sup>180</sup> The new opinion effectively immunizes from collateral attack the cursory treatment courts typically give to adequate representation.<sup>181</sup>

On the other hand, the Supreme Court this term in *Ortiz* undertook to pour some meaning into adequate representation.<sup>182</sup> Recognizing that conflicts of interest among class members translate into a conflict of

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though the state court did not have jurisdiction over the federal claims. *See id.* Although the Ninth Circuit reversed that approval, *see Epstein I*, 50 F.3d at 648, the Supreme Court reversed the Ninth Circuit, holding that the state court's judgment approving the settlement had preclusive effect in the federal courts under the Full Faith and Credit Act. *See Matsushita*, 516 U.S. at 369, 387. On remand, the Ninth Circuit held that the Supreme Court had left open the issue of whether the settlement could be collaterally attacked on grounds of inadequate representation. *See Epstein II*, 126 F.3d at 1237-38, 1240. The Ninth Circuit further held in *Epstein II* that the adequate representation issue was not fully and fairly litigated in the state court suit, and so the consideration of the issue was not precluded in the federal suit; that the objectors' participation in the state settlement hearing did not bind absent class members on the adequate representation issue; that the shareholders could collaterally attack the adequacy of their representation at the state settlement hearing; that a conflict of interest between class counsel in the state court action and the plaintiff class rendered representation inadequate; and that the state class counsel's failure to vigorously pursue the class members' federal claims was inadequate representation. *See id.* at 1240-52.

179. *See id.* at 1251-55.

180. *See Epstein III*, 179 F.3d at 642-43. The two judges in the majority did not agree on the rationale for reversing the prior decision. One judge concluded that the Supreme Court, in its opinion holding that the state court judgment approving the settlement was entitled to full faith and credit in the federal courts, had already implicitly held that the state court judgment did not violate due process; thus, there could be no collateral attack on the judgment. *See id.* at 644. The judge who switched his vote did not agree that the Supreme Court had conclusively resolved the due process issue, but nevertheless found that the state courts had fully and fairly litigated the adequacy of representation, despite his personal reservations about the settlement. *See id.* at 650 (Wiggins, J., concurring). The full and fair litigation consisted of the state court's conclusory statement that the settlement was in the best interest of the class despite the charges of inadequate representation that several objectors had raised. *See id.* at 651.

181. *See, e.g.,* Patrick Woolley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 TEX. L. REV. 383, 384 (2000) (noting that recent circuit court decisions, notably *Epstein*, have ignored or rejected the rule enunciated by the Supreme Court in *Hansberry v. Lee*, 311 U.S. 32 (1940), that absent class members have a right of collateral attack on the class judgment for inadequate representation).

182. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856-59 (1999).

interest problem for class counsel,<sup>183</sup> and that class counsel conflicts are relevant to whether or not the class has received adequate representation, the Court held that if these conflicts are severe enough the class must be divided into subclasses with separate representation to insure adequate representation.<sup>184</sup> Specifically, the Court held that two such conflicts existed in *Ortiz*: the conflict between holders of present and future claims, and the conflict between claimants exposed to asbestos before and after the expiration of the defendant's most significant insurance policy.<sup>185</sup> Although we find the Court's attempt to put some meaning into adequate representation encouraging, the Court did not give much guidance about what other kinds of conflicts might create problems of adequate representation.<sup>186</sup> At this point it is uncertain what impact the Court's opinion will have on class action practice and the lower courts.

The extant "law" prohibiting collusion is as illusory as that guaranteeing adequacy.<sup>187</sup> One must search high and low for a court decision rejecting a class settlement on the ground that it was collusive.<sup>188</sup> Unlike adequacy, collusion is sometimes defined by the courts.<sup>189</sup> Nevertheless, the definition sets such a high bar for "collusive" conduct, equating it with acts that would constitute criminal fraud, that the definition itself seems to guarantee the "no collusion" result.<sup>190</sup> After all, most judges would be highly unlikely to accuse class counsel and the defendant of the equivalent of criminal conduct on the basis of the

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183. See *id.* at 856 n.31 ("[T]he adequacy of representation enquiry is . . . concerned with the 'competency and conflicts of class counsel'") (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 n.20 (1997)).

184. See *Ortiz*, 527 U.S. at 856.

185. See *id.* at 856-57. According to the Court, "[w]hile at some point there must be an end to reclassification with separate counsel, these two instances of conflict are well within the requirement of structural protection recognized in *Amchem*." *Id.* at 857.

186. See *id.* at 856 (stating that "class settlements must provide 'structural assurance of fair and adequate representation for the diverse groups and individuals affected'" but failing to explain what such assurance would entail (quoting *Amchem*, 521 U.S. at 627)).

187. The discussion in this paragraph is based in part on Koniak, *supra* note 172, at 1117-20.

188. For instance, in the Federal Judicial Center study cited earlier, "collusion with the opposing party" was raised the least often of all objections during settlement hearings in the districts surveyed. See WILLGING ET AL., *supra* note 142, at 178 tbl.38. If collusion is raised so infrequently as an objection, it is even less likely that a settlement will be rejected on that basis. See also Koniak, *supra* note 172, at 1120 n.349.

189. See, e.g., *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 331 (E.D. Pa. 1994) (citing *Point Pleasant Canoe Rental, Inc. v. Tincum Township*, 110 F.R.D. 166, 169 (E.D. Pa. 1986) which in turn quotes BLACK'S LAW DICTIONARY 240 (5th ed. 1979), to define "collusion"), *vacated*, 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); see also Koniak, *supra* note 172, at 1118.

190. See Koniak, *supra* note 172, at 1119 (asserting that while colluders are generally guilty of a crime, it is impractical to hold criminal conduct as the threshold for disqualifying class counsel).

scanty information likely to be available to the court on what these lawyers actually did in negotiating a class settlement and what their intent was in doing what they did.<sup>191</sup> Whether the high bar for collusion is primarily responsible or not, the fact is that the collusion standard does not work any better than the adequacy standard to mark conduct as lawful or unlawful.<sup>192</sup> Put another way, when nothing is collusive, the collusion prohibition is not functioning as law.

This state of class action law is, of course, not lost on class counsel and other lawyers in the class action world.<sup>193</sup> Once again, their dilemma is not that they are tempted to act within the bounds of the law, yet immorally. Nor is their dilemma simply that class action law is uncertain, and so lawyers are tempted to go beyond the bounds they convince themselves do not exist (or at least do not exist for them). Rather, their ethical problem is that in a very real sense they are operating in a world without law as we generally understand it.<sup>194</sup> Their representation knows no bounds.

The absence of law to control lawyer conduct in class action cases extends much further than we have thus far suggested. Class action "law" imposes little structure on the entity of the class, and to the extent it fails to do so, it leaves class counsel with what amounts in practice to virtually unlimited discretion to create, control, and manipulate her client: the class.<sup>195</sup> A class is a unique entity in our legal system.<sup>196</sup> Its true "owners," the class members, do not voluntarily form the entity.<sup>197</sup> In fact, unlike any other legal entity, there is no law of class formation, save for the skimpy requirements of Rule 23.<sup>198</sup> Only recently did the

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191. *See id.* at 1119 n.346.

192. *See id.* at 1119-20.

193. Some of the class action's most strident critics are within the legal profession itself. *See* HENSLER ET AL., *supra* note 23, at 83-84 (describing criticisms of class action attorneys by fellow attorneys and the reaction of one plaintiff's attorney whose firm chose not to take on a potentially meritorious consumer class action because the high attorneys' fees compared to the small damage award would "make the firm 'look bad'").

194. *See id.* at 79; *see also supra* notes 167-72, 186-92 and accompanying text.

195. *See* HENSLER ET AL., *supra* note 23, at 71-72.

196. *See* David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 917 (1998) (describing the class as "an entity in itself for the critical purposes of determining the nature of the lawsuit, the role of the lawyer and the judge, and the significance of the disposition").

197. *See id.* at 921.

198. FED. R. CIV. P. 23(a). Rule 23(a) states the prerequisites to a class action:

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the

Supreme Court suggest that these requirements could not be bargained away as part of a compromise settlement.<sup>199</sup> Nor, unlike any other legal entity, is there any law of “authority”—that is, decision-making power—within the class.<sup>200</sup> Without this structural law as a foundation, ethics has nothing on which to build.

Let us be concrete. While class action law demands that each class have named representatives, the law nowhere defines what the responsibilities of those representatives are either in relation to the rest of the class or in relation to class counsel.<sup>201</sup> The little courts do say about the responsibilities of the named representatives suggests that these “responsibilities” are nonexistent. For example, as we have already discussed, courts have said that named representatives may be adequate despite the fact that they know little, if anything, about the claims asserted on the class’s behalf, the settlement negotiated by counsel, or the actions or conflicts of interests of counsel for the class.<sup>202</sup> Moreover, courts have held that class counsel may advocate and a court may approve a settlement of a class action despite the objections of some or even all of the named representatives.<sup>203</sup>

In *Amchem Products, Inc. v. Windsor*,<sup>204</sup> the Supreme Court referred to the “representational responsibilities” of the named representatives and insisted that separate named representatives be appointed for subgroups within the class with differing interests ostensibly so that the named representatives could fulfill their “responsibilities” to those subgroups without being burdened by the need to advocate (or do whatever named representatives are supposed to do) on behalf of groups with widely divergent interests.<sup>205</sup> But the Supreme Court never said what those representational responsibilities were. What point is there in

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representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

*Id.*

199. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (noting that Rule 23(a) requirements may be even more important in the settlement context).

200. See Shapiro, *supra* note 196, at 919 (noting that the “individual autonomy” of class members is “severely limit[ed]”).

201. See Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13, 45 (1996) (noting that pending reform bills “implicitly reflect the view that class member-representatives do not adequately fill the role of client”).

202. See *supra* note 97 and accompanying text.

203. See, e.g., *TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456, 462 (2d Cir. 1982) (explaining that the opposition of a majority of the class “cannot serve as an automatic bar to a settlement . . . determin[e]d to be manifestly reasonable”).

204. 521 U.S. 591 (1997).

205. See *Amchem*, 521 U.S. at 627 (citing *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 742-43 (2d Cir. 1992)).

insisting that separate named representatives be appointed for subgroups within a class, if class counsel need not follow the direction of the named representatives or even keep the named representatives informed of the case's progress? The Supreme Court's decision is coherent if one assumes, as the Court has since held in *Ortiz*, that the Court meant that separate *lawyers* would be necessary to represent subgroups with divergent interests within a larger class—as long, that is, as the courts take seriously the notion that adequate counsel must advocate for the interests of the class or subclass that she represents.<sup>206</sup> But the Court's decision is incoherent if read against the backdrop of “law” that demands nothing of the named representatives and gives those people no power to affect what happens to the class.

Not only does class action law fail to structure the responsibilities or powers of the named representatives, it says virtually nothing about the relation of objectors to the class or to class counsel.<sup>207</sup> Although courts do say that the number of objectors is a factor to be considered by the court, again class counsel is permitted to advocate and a court is free to approve a settlement objected to by many or even most of the class.<sup>208</sup> Objectors are technically still members of the class, but the case law is silent on whether that means that objectors continue to be clients of class counsel, despite their representation by others (in the rare case when objectors appear through counsel), and is equally silent on what class counsel's duties, if any, are to objectors, whether one imagines them to be clients or not.<sup>209</sup> Must class counsel give some *Miranda*-like warning

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206. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999); *Amchem*, 521 U.S. at 626 n.20.

207. The Supreme Court recently granted certiorari on the question of whether objectors must intervene in the proceeding to have standing to appeal. See *Scardelletti v. Debar*, 265 F.3d 195 (4th Cir.), cert. granted *sub nom.* *Devlin v. Scardelletti*, 122 S. Ct. 663 (2001). It is amazing that the question of an objector's relation to the proceeding and standing to appeal has remained uncertain for so long. For an argument that absent class members should have to object to the adequacy of class counsel at the fairness hearing or lose their chance to raise this issue later on collateral attack, see *Kahan & Silberman, supra* note 165, at 792. But see *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985) (stating that absent class members, unlike parties, need not do anything to preserve their rights).

208. For example, courts have approved class action settlements in which the sole value exchanged was warrants, even over the objections of class members. See, e.g., *Blank v. Talley Indus., Inc.*, 64 F.R.D. 125, 128, 135 (S.D.N.Y. 1974); *In re Brown Co. Sec. Litig.*, 355 F. Supp. 574, 576, 590 (S.D.N.Y. 1973).

209. In fact, courts are often more likely to find that there is not a conflict of interest between objectors and the class with respect to adequate representation by counsel. See, e.g., *John C. Coffee, Jr., Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 407-08 (2000) (discussing a case, *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581 (3d Cir. 1999), wherein the court found the asserted conflict of interest insufficient to disqualify class counsel despite an objector class of over 380 people, including three of the four named class representatives); *Menkel-Meadow, supra* note 137, at 1192 (noting that the “analytic question”

to unrepresented objectors, who all would have received notice that class counsel will represent their interests?<sup>210</sup> There is no answer in law. May class counsel help objectors to get a different and better deal from the defendant to encourage the objectors to remain mute in court on the problems the objectors have with the settlement offered to the class? May class counsel help objectors to opt out of the class action after the opt-out period has passed? Although both of these practices occur, we believe, with some regularity, no law speaks to their propriety, as far as we have been able to ascertain.<sup>211</sup>

The emptiness of the legal concepts of adequacy and collusion, together with the law's failure to define the rights and responsibilities of class counsel and the various constituent members of the class (named representatives, objectors, opt-outs and absent members), combine to create a free-zone of activity in which class lawyers can essentially do what they please.<sup>212</sup> If one understands that in class action practice, defense counsel and plaintiffs' counsel have much to gain by cooperating to ensure that class counsel has wide discretion to dispose of the claims of the absent class, it is fairly easy to understand how this lawless state of affairs might result.<sup>213</sup> Put simply, no subgroup within the bar has a strong interest in seeing any other subgroup involved in this area of practice constrained by the rule of law. With no subgroups within the bar to argue for or construct law constraining lawyer conduct in this field, we find no such law.

A better understanding of the relationship of lawyers to the law and the complexity of the lawyer-client relationship is helpful not only in illuminating what is happening in the world, but in identifying solutions that might have a chance at working as well as sifting out those that seem less promising. Expecting courts to develop the law of class actions in a manner sufficiently protective of the class would, for example, seem quite optimistic. Courts, even more than legislatures, are dependent on the assistance of lawyers in the construction of sensible

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involved in this dilemma is "whether class counsel can reasonably conclude that there is no materially adverse interest among groups of clients and claimants because they (counsel) are so good and able that they can negotiate effectively for all").

210. Compare this with the standard set for an organizational entity in MODEL RULES, *supra* note 19, R. 1.13(d): "In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."

211. *But see supra* notes 146-54 and accompanying text for a discussion of how the system operates to discourage attorneys from acting on behalf of objectors.

212. *See supra* notes 54-55 and accompanying text.

213. *See supra* notes 98-120 and accompanying text.

law. Courts construct law, as we discussed earlier, largely by relying on the arguments of lawyers.<sup>214</sup> With lawyers dedicated to preserving a lawless environment in which to operate, it is not surprising that class action law has developed in so anemic a fashion. Similarly, the Advisory Committee on the Rules of Civil Procedure, a committee of the Federal Judicial Center, would seem to be ill-suited to constructing class action law because it is too dependent on input from class action lawyers in framing its class action rules and too sensitive to the concerns of those lawyers.<sup>215</sup> Indeed, the Advisory Committee's class action "reform" proposals have been aimed at increasing, not decreasing, the free-zone of activity now enjoyed by lawyers in this field.<sup>216</sup> Legislatures, although also dependent on lawyers, are in a relatively more independent position. Not all legislators are lawyers and the legislature is more accessible than the courts or the Advisory Committee to nonlawyers and their concerns.<sup>217</sup> If anything is to be done about class action abuse, the legislature is, in short, most likely to do it.

As to what needs to be done by the legislature and, in the meantime, by responsible judges willing to rely less on lawyers to help them construct law, the first step is to continue down the path the Supreme Court started in *Amchem* and continued in *Ortiz*: to exorcise the notion that the fact of a settlement is sufficient to determine either the settlement's reasonableness, the lawyers' adequacy, or the absence of collusion.<sup>218</sup> To develop a standard that can serve as law, courts and the legislature cannot look only to existing class action practice, which, as we have argued, is effectively lawless.<sup>219</sup> Instead, lawmakers must extrapolate from, and draw analogies to, practices in areas where law

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214. See *supra* notes 43-47 and accompanying text.

215. See Koniak & Cohen, *supra* note 83, at 1134-40 (discussing the proposal of the Advisory Committee to amend Rule 23).

216. See *id.* at 1139.

217. See Shapiro, *supra* note 196, at 949 n.102 (noting that "'legislative' action is more appropriate than judicial development for a major departure from traditional and accepted values"); see also David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 521 (1988) (noting that "in a society committed to the value of self-determination, courts should be reluctant to act for paternalist reasons in the absence of legislative direction" and "legislatures should be freer than courts to embark on paternalist courses, subject only to *popular will* and to limited constitutional restraints") (emphasis added).

218. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 848-49 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619-20 (1997) (noting in both cases that certification in a settlement context may even demand "heightened attention").

219. See *supra* notes 167-206 and accompanying text.



binds and lends confidence, such as the law governing other types of entities.<sup>220</sup>

Moreover, understanding that a lawyer's responsibilities to her entity-client will inevitably be a function of that entity's structure helps provide some direction. To decide what a class lawyer is supposed to do—what constitutes adequate representation—the relationship of the various components of a class to one another and then to the lawyer must be fleshed out. The more ephemeral the client, the more abstract and ultimately empty the lawyer's duty to that client will be. In short, class action abuse will thrive as long as the components of a class are as ill-defined as they are now.<sup>221</sup> When one's client is unknowable or incoherent, one's duty will always be unclear. The law needs to make the class client coherent by explicating how its parts fit together and how they are designed to interact with the lawyer. With meaningless law and shapeless clients, the lawyer's self-interest is her only guide. The unchecked self-interest of lawyers drives class action practice today. That needs to change, and asking the right questions is the first step.

In hell there will be lawyers without clients or law.<sup>222</sup> It is time legal ethics scholars talked about that.

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220. See *supra* notes 65-69 and accompanying text for a discussion of how ethics rules apply when dealing with a corporation as a client.

221. See *supra* notes 194-213 and accompanying text.

222. This warning (repeated in the title of this Essay) is inspired by Grant Gilmore's famous closing to his book, *The Ages of American Law*: "In Heaven there will be no law, and the lion will lie down with the lamb. . . . In Hell there will be nothing but law, and due process will be meticulously observed." GRANT GILMORE, *THE AGES OF AMERICAN LAW* 111 (1977).

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