NOTES
RETHINKING THE PROFESSIONAL RESPONSIBILITIES OF FEDERAL AGENCY LAWYERS

One of the most vexing problems in contemporary legal ethics is how to think about the professional responsibilities of government lawyers. The problem arises because of the tension between the government lawyer's public role and the private relationship basis of traditional conceptions of legal ethics. Traditional models of legal ethics are designed to constrain lawyer discretion in a specific role. In the classic case, there is one lawyer and one client; the lawyer is the client's agent and responsible for carrying out the client's instructions. The role of the government lawyer is quite different, however. First, there is no easily discernible client. Consequently, there is no one to provide the lawyer direction in those situations in which the traditional models require that the client exercise discretion. Second, traditional models of legal ethics assume a well-functioning adversary system as an important basis of their prescriptions. Much of the government lawyer's work, however, is nonadversarial. Finally, the morally and politically neutral ideal of traditional models is poorly suited to government lawyers who, as public servants, are expected to benefit society through their work.

A different approach is therefore needed. One candidate is a model of lawyers' ethics derived from critical legal writing. Because the critical model assumes neither an adversary system nor a morally uncommitted lawyer, it avoids many of the contradictions of the traditional models. Further, the critical model's flexible approach to client interests and greater acceptance of lawyer discretion make it especially helpful in analyzing problems unique to the government lawyer.

The difficulties with current approaches to government lawyers' ethics and the possible applicability of the critical model are explored in this Note. Because of the wide range of lawyers' duties in various levels and types of government organizations, this discussion is focused on the role of the lawyer in a federal administrative agency. Although the analysis is centered on this type of lawyering, many of its conclusions will be applicable to lawyering in other government settings.

I. CONVENTIONAL APPROACHES TO GOVERNMENT LAWYERS' RESPONSIBILITIES

A. Traditional Models of Lawyers' Ethics

Before examining the standard approaches to government lawyers' ethics, it is helpful to review briefly the basis of mainstream legal eth-
tics generally. Traditional models of legal ethics center on three interrelated duties: the duties of loyalty, zeal, and confidentiality. The lawyer's duties are meant to ensure that the lawyer remains faithful to the client's interests and takes all permissible steps to further those interests. These duties to the client are tempered by two separate duties: not to mislead the court and not to injure unduly the interests of third parties through advancement of the client's interests.

There are two traditional models of lawyers' ethics. The first conception, which may be called the "dominant" model, focuses on the first three duties to create a model in which the basis of ethical lawyering is fidelity to the client. This position informs the American Bar Association's Model Rules of Professional Conduct; it also enjoys a great deal of support among academic commentators. The prevailing concern of this model is that lawyers be constrained from using their power to dominate clients. The model begins from the libertarian premise that all client interests that are not illegal are legitimate, and that clients are entitled to legal representation to pursue those interests. The model avers that if lawyers were allowed to evaluate clients' objectives, then lawyers would position themselves to be the unelected governors of large spheres of private behavior.

Alongside the dominant model, traditional conceptions of lawyers' ethics also recognize what might be called the "public interest" model. This model, although still adopting as central the duties of loyalty, zeal, and confidentiality, puts relatively greater emphasis on the duties of the lawyer to the court and to innocent third parties. Advocates of the public interest model argue that untrammeled loyalty to the client's interests risks allowing lawyers to support manifest social injustice. These commentators often note the disparate access to quality legal representation between wealthy individuals and corporations on one hand, and the great majority of middle and lower class individuals

3 Id. at 73–82.
5 See Model Rules of Prof'l Conduct pml. (1986); see also Simon, supra note 4, at 8.
7 See FREEDMAN, supra note 2, at 57.
8 Pepper, supra note 6, at 617–18.
9 The term "public interest" also comes from Simon. Simon, supra note 4, at 8.
10 Id.
11 See generally DAVID LUBAN, LAWYERS AND JUSTICE (1986).
on the other. Some commentators draw on moral philosophy to argue that certain types of action that would likely be sanctioned by the dominant model are inherently wrong in a just society.

Although the emphases of the two models are distinct, they share several characteristics in their approach to legal ethics. First, both models start from the assumption that the client’s interests are fully formed and fixed prior to the start of the lawyer’s representation. In the traditional models, the lawyer’s role is morally and politically neutral toward the client’s interests; the lawyer’s only responsibility is to advance those predetermined interests within the equally predetermined bounds of the legal system. The dominant model in particular is wary of lawyer participation in the formation of client interests because of its concern with paternalism. Second, both models attempt to make predictable, categorical judgments about the ethical valence of certain actions. Although both models recognize that some questions are closer than others, neither model is comfortable with the idea that actions taken by lawyers cannot be classified as either ethical or unethical. The dominant model makes these categorical judgments by tying legal ethics to the content of the Model Rules: if a certain action falls within the prohibitions of those rules, it is unethical; if it does not, it is ethical. The public interest model expands the sphere of unethical activity to include some actions not specifically proscribed by the Model Rules, but continues to make categorical judgments nonetheless. A third, closely related, similarity is that both models seek to establish transsubstantive ethical principles, ostensibly in an effort to provide predictability in application of the ethical codes. A transsubstantive approach is thought to promote predictability because it prevents the determination of whether an action is ethical from turning on the unique factual circumstances of a given case.

12 See, e.g., id. at 306–10.
13 See, e.g., id. at 31–49.
15 Id. at 469. In thinking about the applicability of these models to government lawyers, it is important to note that one of these predetermined features is the adversary system.
16 Id. at 474–75.
17 SIMON, supra note 4, at 9. Categorical judgments refer to the models’ penchant for either/or ethical distinctions.
18 Id. In this context, transsubstantive means that a given action has the same ethical valence regardless of the factual context in which the action is taken.
19 Id.; see also A Gathering of Legal Scholars To Discuss Professional Responsibility and the Model Rules of Professional Conduct, 35 U. MIAMI L. REV. 639, 652–55 (1981) (presenting various views on whether it would be appropriate to find different ethical results in different factual situations).
B. Conventional Approaches to Agency Lawyering

The two traditional models of legal ethics run roughly parallel to the two major approaches to government lawyers’ ethics. The first approach, which can usefully be called the “agency loyalty” approach, basically follows the dominant model in that it sharply limits the realm in which the lawyer may permissibly attempt to exert influence over the client. According to this approach, the government lawyer’s client is the agency that employs the lawyer, and the lawyer owes the traditional duties of loyalty, zeal, and confidentiality to the agency just as the lawyer would to a private client. The other principal approach, which will here be called the “public interest” approach, has a close relationship to the public interest model of lawyering. The public interest approach to government lawyering, however, goes further than the public interest model of private lawyering because it makes serving the public interest the government lawyer’s primary duty and consequently values the interests of the lawyer’s agency only to the extent that those interests coincide with the public interest.

1. The Agency Loyalty Approach. — Although traditionally there has been a strong sense among the profession and the public that the government lawyer owes special duties to the public,\(^ \text{20} \) recent commentary on the ethics of government lawyers has mostly advanced the agency loyalty approach to government lawyering.\(^ \text{21} \) This approach proceeds from the seemingly straightforward proposition that the government lawyer’s employing agency is her client.\(^ \text{22} \) It then applies the same ethical constraints to government lawyers that are applied to lawyers in private practice. For example, according to this approach the government lawyer is duty-bound to press every nonfrivolous legal argument to support the agency’s position, regardless of the possible injustice in any given situation.\(^ \text{23} \) Similarly, the government lawyer according to this approach owes a strict duty of confidentiality to the employing agency and violates this duty if she discloses information to the public or to other government bodies, such as Congress.\(^ \text{24} \)


\(^ {22} \) The most complete exposition of the “agency as client” approach can be found in Lanctot, supra note 21, especially at 975–1012.

\(^ {23} \) Id.

The agency loyalty approach claims several benefits. First, it makes easier the application of the Model Rules to government lawyers. By stipulating the agency as the client and treating it as an organizational client, like a corporation, the agency loyalty approach is able to treat government lawyers no differently from their colleagues in private practice. This benefit is not small; government lawyers are bound by the ethical codes in force in the jurisdictions in which they practice, and consequently a clear theory of how those codes apply to government lawyers can eliminate a great deal of vagueness in the law. As a parallel, it is not surprising that when the Federal Bar Association promulgated its Model Rules of Professional Responsibility for Federal Lawyers it adopted the agency loyalty approach, albeit with some significant caveats. Thus, to the extent that society values the type of categorical ethical framework provided by the Model Rules, the agency loyalty model supports those values.

A second asserted benefit of the agency loyalty approach is that it provides clear lines of accountability. In the pure form of this approach, responsibility for discretionary judgments rests solely with the agency’s policymaking officials, and a government attorney may not reevaluate those decisions in the course of representation. The agency loyalty approach constrains the government lawyer’s discretion by making her actions always subject to review by agency officials. In this way, it limits the risks associated with “loose cannon” government attorneys who take their own view of the law without regard to the agency’s policy preferences.

A third suggested benefit, closely related to the second, is that the agency loyalty approach promotes democratic accountability. By making the government attorney absolutely accountable to agency superiors, the agency loyalty approach ostensibly moves final authority for the lawyer’s actions closer to politically appointed officials and, eventually, to the elected President. Relatedly, some commentators argue

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25 E.g., Lanctot, supra note 21, at 971-73.
26 The McDade Amendment makes government attorneys “subject to State laws and rules and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney’s duties.” 28 U.S.C. § 530B(a) (Supp. IV 1998).
27 See Fed. Bar Ass’n, Model Rules of Prof’l Conduct for Fed. Lawyers (1990). Although Federal Bar Association Model Rule 1.13 states “a Government lawyer represents [her] Federal Agency,” id. R. 1.13, the comment to the rule notes “the conclusion that the government lawyer’s client is the lawyer’s employing agency does not answer every ethical question.” Id. R. 1.13 cmt. The comment continues “for example, the Government lawyer has a responsibility to question the conduct of agency officials more extensively than a lawyer for a private organization would in similar circumstances.” Id.
28 See, e.g., sources cited supra note 21.
29 See Lanctot, supra note 21, at 1015; Macey & Miller, supra note 21, at 1116. Most adherents of the agency loyalty approach offer increased democratic accountability as the model’s primary benefit. See, e.g., Miller, supra note 24, at 1296–97.
that the agency loyalty model is also desirable because it is more likely to facilitate the implementation of executive policy.30 The reasoning is that if government lawyers do not have discretion to make substantial decisions related to the agency's legal positions, then the executive's policy choices are more likely to be implemented directly.31

A closer look shows, however, that there is reason to doubt that the agency loyalty approach can deliver its promised benefits. The first benefit of the model — that it makes the application of the standard ethical codes to government lawyers easier — is real enough, but it begs the question of the usefulness of those codes in the context of government lawyering. The application of the Model Rules to specific problems in government lawyering is beyond the scope of this Note. However, it may be noted that the Model Rules offer little guidance to lawyers for organizational clients when the organization's interests diverge from those of its representatives and no guidance at all in situations that are unique to government lawyering.32 Moreover, by emphasizing categorical ethical judgments, the Model Rules leave large areas of lawyers' discretion unregulated. To the extent that we are interested in a model of government lawyering that is useful in guiding the lawyer's actions on a daily basis and not just when a potentially sanctionable action is at issue, the easy applicability of the Model Rules is only a small boon.

Even the agency loyalty approach's supposedly greatest benefit — that it promotes democratic accountability — has serious shortcomings. First, it is far from obvious that even senior agency officials bear any real democratic accountability, especially when that accountability stems from a single election that in recent years has been won without the prevailing candidate receiving a majority of the popular vote.33 Second, the proposition that administrative agencies should be focused

30 Id. Miller, supra note 24, at 1296–97.

32 For example, a number of commentators have addressed the difficulties of applying Rule 1.13, which governs the representation of organizational clients. These difficulties are only exacerbated when the lawyer acts as an advisor or counselor, rather than as an advocate, as is often the case in the government context. See, e.g., Ann Southworth, Collective Representation for the Disadvantaged: Variations in Problems of Accountability, 67 FORDHAM L. REV. 2449, 2452–55 (1999). It is a common lament that the Model Rules offer little guidance to the government attorney. E.g., Steven K. Berenson, Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?, 41 B.C. L. REV. 789, 798–99 (2000); Lanctot, supra note 21, at 971–73.

33 In none of the most recent three presidential elections did the winning candidate garner a majority of the popular vote. See Nat'l Archives & Records Admin., U.S. Electoral College Electoral Results, http://www.nara.gov/fedreg/elctcoll/ (last visited Jan. 13, 2002).

That the winners of these elections did not receive a majority of the popular vote does not mean that they have no democratic accountability. It does, however, weaken the claim of some commentators, see, e.g., Miller, supra note 24, at 1298, that the executive acts in furtherance of an electorally sanctioned mandate.
on implementing presidential policy is not clearly indicated by the constitutional theory underlying the administrative state.\(^{34}\) The notion that the agency loyalty approach provides clear lines of accountability suffers from similar misunderstandings of agency processes. The approach presupposes that there is some person with authority to state the agency's position. While this may be true in some instances, more often the determination of the agency's position will fall to a variety of mid-level bureaucrats — of which the lawyer will likely be one — who are forced to determine the agency's position from some combination of institutional practices and officially adopted policy statements.\(^{35}\) Thus, it is not clear that shifting discretion from the lawyer to the agency will functionally put the discretion in different hands. This alleged benefit of the agency loyalty approach also presumes that agency decisions are made in a strictly hierarchical fashion. Again, while there is an element of truth in this characterization, it does not describe many instances of agency decisionmaking that are the product of a collaborative process between various agency actors.\(^{36}\)

Upon examination, it seems that the only advantage the agency loyalty model has to offer is its ease of application. However, given that the approach appears to rely on misunderstandings of the internal functioning of agencies and contestable propositions about the role of agencies in government, one may justifiably be skeptical of whether the approach will offer as much ease in practice as it does in theory.

2. The Public Interest Approach to Government Lawyering. — In contrast to the agency loyalty approach, the public interest approach holds that the government lawyer owes a duty to the public interest or the common good apart from any duty the lawyer may owe to the agency. This approach has traditionally been taken by the legal profession and is the one most frequently endorsed in judicial opinions.\(^{37}\) It is also consonant with the moral intuition that government lawyers owe additional duties to the public by virtue of their position as public servants.

The primary benefit of this approach is that it provides constraints on the government lawyer that may prevent abuses of the lawyer's position, even when those abuses are in the service of other agency objectives. Instead of making the government attorney solely accountable

\(^{34}\) The debate over this question is one of the most hotly contested in administrative law. For a thoughtful analysis, including substantial historical exegesis, see generally Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994).


to the agency, the approach puts the lawyer's primary loyalty to the public at large. Consequently, the public interest approach gives the government attorney a great deal of discretion to make judgments related to legal representation.\textsuperscript{38}

While most commentators agree that in a perfect world the government lawyer's actions would be aligned with public values, many of these commentators argue that "the public interest" is too indeterminate a concept to constrain the lawyer's discretion adequately. These commentators note that public values will always be contested in a democratic society and argue that conflicts between competing visions of the public good should not be resolved by unaccountable government lawyers.\textsuperscript{39} For these commentators, ethical constraints on the government lawyer's conduct must be made more definite by grounding them in positive ethical prescriptions.

The criticisms of the public interest approach are fairly convincing when applied to a great deal of commentary advocating the approach. As the critics imply, much of this writing can be reduced to a general exhortation to government lawyers to be mindful of the justice of their actions. Obviously, to the extent that terms like "justice" or "the public interest" are left undefined, they do little to guide attorneys. Also, there are powerful political process arguments that agencies should not be at the mercy of their lawyers' idiosyncratic judgments about the public good.\textsuperscript{40} It would potentially be quite difficult to implement a consistent and coherent agency policy if that policy were always subject to veto or modification by the agency's lawyers.

Recently, however, advocates of the public interest approach have made important advances by articulating a theory of the public interest that provides useful guidance for government attorneys. The best example of this new approach is Steven Berenson's \textit{Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?}.\textsuperscript{41} In this article, Berenson applies the work of William Simon to create a framework within which government lawyers can make discretionary judgments. The theory of this work is that certain public values are fairly inferable from traditional legal materials such as statutes, regulations, and court opinions.\textsuperscript{42} Berenson ar-


\textsuperscript{39} E.g., Lanctot, \textit{supra} note 21, at 1013; \textit{supra} note 24, at 1295.

\textsuperscript{40} E.g., Macey & Miller, \textit{supra} note 21, at 1116–20.

\textsuperscript{41} Berenson, \textit{supra} note 32; see also Bruce A. Green, \textit{Must Government Lawyers "Seek Justice" in Civil Litigation}, 9 WIDENER J. PUB. L. 235 (2000) (arguing that the same considerations that guide criminal prosecutorial discretion can guide government lawyers in civil contexts).

guessed that the notion of the public interest implicit in these materials provides the lawyer with sufficiently definitive standards to guide her judgment in making discretionary decisions.43

Berenson’s work is a significant step forward for public interest theories. Still, it has important weaknesses. First, much like the agency loyalty approach, it focuses on the lawyer in isolation without adequately accounting for the fact that the government lawyer is but one actor in the agency decisionmaking process. A consequence of this focus is that Berenson’s formulation leaves a great deal of authority for determining the public interest to the individual lawyer’s interpretation of the relevant sources, thereby undercutting some of the participatory aspects of the administrative process. Moreover, it assumes, like the traditional model, that the legal background is fixed rather than subject to modification by the lawyer’s work. Yet to the extent that the agency is pursuing a change in law or policy, a focus on existing sources of law may be inhibiting. Thus, although recent formulations of the public interest approach are improvements on earlier efforts, the approach, like the agency loyalty approach, still takes too little account of the lawyer’s role within the agency decisionmaking process and the political values associated with that role.

II. THE ROLE OF THE FEDERAL AGENCY LAWYER

The above analysis shows that neither of the two traditional approaches to government lawyers’ ethics provides a satisfying framework for approaching these questions. Before considering the problem further, it will be useful to develop an understanding of the lawyer’s role within the agency and the differences between the role of the agency lawyer and the lawyer in private practice.

A. The Role of the Government Attorney

The role of attorneys in agencies is two-fold. First, government lawyers are the agencies’ legal experts; they are responsible for providing the information and analysis necessary to understand the legal consequences of proposed courses of action.44 Second, government lawyers are responsible for performing the legal work necessary to implement the agencies’ policies. Because these duties are essential to the functioning of agencies, lawyers are integral to agencies’ ability to carry out their missions successfully.

Agencies seek expert legal advice from their lawyers in numerous situations, including ascertaining the requirements of legislation, de-

43 Berenson, supra note 32, at 817–21.
treated the legality of proposed actions, and evaluating possible avenues of enforcement. If one presumes that agencies generally endeavor to comply with the law, the effect of the government lawyer's opinion in these situations can be significant. Consequently, the government lawyer's discretion in formulating opinions can ultimately make a genuine difference in the agency's policy choice. On one hand, this discretion could be seen as harmful because it effectively allows lawyers who have little direct accountability to the public to control partially the ability of agencies to act. To the extent one worries about this power of government attorneys, one might try to use ethical guidelines that require the government lawyer to resolve doubts in favor of the agency's policy position when drafting opinions. On the other hand, because — at least in most cases — some resolutions of the question will be legally "better" than others, one might see lawyer independence in passing on the merits of various resolutions as a good thing. One might expect that the lawyer's independent judgment of which solution best comports with the relevant legal authorities will be more reliable than one dictated by non-lawyer policymakers. Regardless of how one resolves this issue, it is clear that lawyers' expert opinions, no less than the opinions of other experts employed by the agency, will have an enormous impact on how the agency goes about the task of policymaking.

Government lawyers help to implement agency policy in two principal ways. First, government attorneys engage in those activities that are normally associated with private lawyering: drafting documents and litigating. In particular, agency attorneys (or their Department of Justice (DOJ) counterparts) are responsible for prosecuting enforcement actions and defending against court challenges to agency policy. Second, government attorneys play a vital role in facilitating public participation with the agency. Administrative agencies derive their legitimacy in part from the active participation of the public in their

45 Id.
46 E.g., Lanctot, supra note 21, at 1013-14.
47 E.g., Berenson, supra note 32, at 822.
48 In the federal government, DOJ generally is the only agency authorized to litigate in court. In most cases, a DOJ attorney will litigate a case on behalf of the agency in question with input and assistance from the agency's in-house lawyers. Although this arrangement creates a number of difficult questions, see generally James R. Harvey III, Note, Loyalty in Government Litigation: Department of Justice Representation of Agency Clients, 37 WM. & MARY L. REV. 1569 (1996), those questions do not bear directly on the analysis presented here, and DOJ attorneys will be treated no differently from other agency lawyers in this Note.
49 Id. at 1573-74.
50 Herz, supra note 44, at 146.
decisionmaking processes. The task of implementing the participation process often falls to agencies' attorneys.

No less than in the advisory context, government lawyers exercise considerable discretion in implementing agency policy. Government lawyers will often prosecute routine actions with little direct supervision. Thus, those lawyers will have to make most of the decisions related to the litigation. Lawyers implementing participatory processes will often have a similar degree of leeway. For example, § 553 of the Administrative Procedure Act requires agencies to receive public comment in the course of informal rulemaking. The Act provides few specific requirements about how the agency will receive this comment, however. Because agency lawyers are the only agency actors with genuine expertise in administrative procedure, agencies often give great discretion to the lawyers implementing those procedures.

B. Government Lawyers Compared with Private Lawyers

Many of the aspects of the government lawyer's role described above coincide with the duties of private attorneys. Private attorneys, much like government attorneys, are responsible for advising clients on the current state of the law, helping them to form legal positions, and then advancing those positions. Beyond this surface similarity, however, the government lawyer's role is considerably different from that of the private attorney. The most important difference is that, as part of the agency decisionmaking process, the government attorney is responsible for the positions the agency takes in a way that private lawyers are not. It is this — admittedly partial — responsibility for the agency's policy that gives rise to additional duties that private attorneys do not share.

A number of commentators have missed this aspect of the government lawyer's professional responsibilities because they have attempted to analyze the government attorney's responsibilities by trying to identify the government lawyer's client. This effort misunder-

51 For a thorough analysis of public participation in agency decisionmaking, see Dennis Thompson, Bureaucracy and Democracy, in DEMOCRATIC THEORY AND PRACTICE 235, 237-50 (Graeme Duncan ed., 1983).
52 McGarity, supra note 36, at 24-26.
54 See id.
56 Discussions of the role of private attorneys in this Note are based on the role assumed by the dominant model. Many commentators question this definition of the private lawyer's role. See generally Susan Sturm, From Gladiators to Problem-Solvers: Connecting Conversations about Women, the Academy, and the Legal Profession, 4 DUKE J. GENDER L. & POLY 119 (1997).
57 See, e.g., Geoffrey C. Hazard, Jr., Conflicts of Interest in Representation of Public Agencies in Civil Matters, 9 WIDENER J. PUB. L. 211, 219-22 (2000); William Josephson & Russell Pearce,
stands the role of the agency lawyer, however. First, there are a number of legitimate potential answers to the question — for example, the government generally, the agency, the President, the public interest — each of which describes a part of the government lawyer’s role. Second, identity of the client is inherently indeterminate because it presumes that the lawyer and the agency occupy independent spheres when in fact the lawyer is part of the agency.58 Of course it should be remembered that while the government lawyer is part of the agency, the government lawyer is not the agency. Thus, the lawyer does not bear full responsibility for the agency’s final outcome; rather, the lawyer bears responsibility for faithfully fulfilling her role in the process.

A second and more fundamental difference is that because agency lawyers work on behalf of the government, actions taken by those lawyers must be legitimate in a democratic society. In other words, government lawyers’ actions must comport with democratic values. The term “democratic values” is, of course, ambiguous. The term is not synonymous with the “public interest” or the “public good.” These terms generally (although perhaps not inevitably) connote a single, transcendent outcome that would best serve community welfare without reference to democratically expressed preferences. “Democratic values,” by contrast, connotes those aspects of agency decisionmaking that promote the agency’s legitimacy in a democratic system of government. These democratic values include conformity with established law, public participation, and sensitivity to discernible public preferences; other items could doubtless be mentioned.59 A fully elaborated discussion of this term is beyond the scope of this Note; however, the point should be stressed that democratic values do not entail a specific outcome, but rather a commitment to promoting the legitimacy of the administrative process.

The importance of democratic values for government lawyers’ ethics is a consequence of the insight that government lawyers cannot be partisan advocates for any single position. Quite the opposite, government lawyers must pay heed to a range of parties and interests when undertaking any action. The government lawyer’s primary goal should always be reconciliation — or at least accommodation — of as many interests as possible, rather than vindication of any single interest. Both the agency’s policy position and abstract notions of the pub-

To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict?, 29 HOW. L.J. 539, 539–41 (1986); Lanctot, supra note 21, at 967; Harvey, supra note 48, at 1570.

58 The Preamble to the Model Rules seems to recognize this point when it states that in the case of the government lawyer many of the decisions normally made by the client will be made by the lawyer instead. MODEL RULES OF PROF’L CONDUCT pmbl. (1986).

lic good will have an important bearing on the lawyer’s actions, but neither can demand the lawyer’s unqualified allegiance.

These differences show that from a systemic point of view, government lawyers play a role that is substantially different from their private counterparts. Nonetheless, much of government lawyers’ daily work resembles that done by private attorneys. Unfortunately, traditional analyses of legal ethics largely ignore the role of the lawyer in the legal system and instead focus on the client-lawyer relationship. Thus, conventional analyses of the responsibilities of government lawyers often overlook these important differences and consequently fail to establish helpful ways of analyzing government lawyer discretion.

III. THE CRITICAL MODEL

If the traditional approaches to the problem of government lawyers’ professional responsibilities are unable to address adequately the ethical problems of government lawyers, then how should the problems be analyzed? One possibility is a third model of professional responsibility developed in the last twenty years by scholars, particularly William Simon, to apply the insights of critical legal studies to legal ethics.60 Because this model is not premised on a binary client-lawyer relationship in an adversary system, it is particularly well suited to the complex role of government lawyers.

A. Critique of the Traditional Models of Legal Ethics

Central to the critical model is a rejection of the three shared premises of the dominant and public interest models: the fixed and preformed interests of the client; the desirability of categorical judgments; and the possibility of transsubstantive ethical principles. The central insight of the critical model is that the interests of participants in the legal system are both fluid and context-dependent. The model seeks to establish a framework in which the lawyer mediates these interests while retaining accountability.

The primary difference in the critical model’s approach is the claim that, contrary to the supposition of the traditional models, clients do

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60 Simon first developed the model in two articles: The Ideology of Advocacy, 1978 WIS. L. REV. 29, 1 ➔ Visions of Practice in Legal Thought, supra note 14. Subsequent scholarly work has applied the model in particular settings. See, e.g., Shauna Marshall, Mission Impossible?: Ethical Community Lawyering, 7 CLINICAL L. REV. 147 (2000) (applying aspects of the model to poverty law practice). Additionally, other scholars have provided parallel critiques without addressing the critical model per se. See, e.g., Lucie E. White, Mobilization on the Margins of the Lawsuit: Making Space for Clients To Speak, 16 N.Y.U. REV. L. & SOC. CHANGE 535 (1987–88) (arguing that litigation should focus on education and organizing as well as classroom success). Because Simon’s work remains the only comprehensive systematic elaboration of the model, the description of the model in this Note is drawn primarily from his writings.
not come to the experience of representation with their interests and goals already well-formed and fixed. Rather, the critical model suggests that clients begin the experience of representation with a vague sense of their interests, and that those interests only become crystallized in the course of representation.\textsuperscript{61} This understanding stems from the observation that a client’s interests will depend in large part on the law, which the client will only come to know in the course of representation.\textsuperscript{62} The critical model also posits that the client’s interests will not remain fixed throughout the representation, but will evolve in response to the experience of representation.\textsuperscript{63} The critical understanding of client interests can be illustrated with an example: many people consult lawyers because they are unsure whether they have incurred a legally cognizable injury. In the process of reinterpreting the client’s experience in the language of the law and legal rights, the lawyer inevitably helps to shape the client’s interests. Similarly, as the client’s interests develop through the process of representation and the client receives new information in the form of legal advice and, perhaps, new factual information about the situation, it is likely that the client’s interests will change.

The critical claim that client interests are fluid has an important bearing on legal ethics because it means that the lawyer will inevitably exert an influence on the client’s goals. In other words, the critical model asserts that the traditional model’s wholesale condemnation of all lawyer influence as paternalism is misguided because influence is inevitable.\textsuperscript{64} It argues that a client whose interests are inchoate does not suffer a loss of autonomy when the lawyer intervenes to clarify those interests; instead, such intervention provides beneficial support by assisting the client to understand and develop her goals.\textsuperscript{65} In a sense the critical model puts to the fore the lawyer’s role as counselor, a role the Model Rules have downplayed.

It is important to note that while the critical model rejects the traditional approach to paternalism, it does not sanction coercion. No less than the traditional model, the critical model rejects the notion that the lawyer should be free to substitute her judgment for that of the client.\textsuperscript{66} Rather, the critical model is simply more tolerant of lawyers’ attempts to influence the client, perhaps by introducing considerations that might not be relevant to the representation narrowly de-
fined. In the private context, the lawyer's goal in the critical model is to create a non-hierarchical relationship with the client in which the power differential inherent in the client-lawyer relationship is neutralized and the client becomes capable of holding the lawyer accountable. As will be further elaborated below, this approach can be applied to the government context by replacing the ideal of non-hierarchical community with the ideal of promoting democratic values. In this formulation, the government lawyer strives to ensure that the lawyer and the lawyer's agency are accountable to the public.

The critical model also challenges the traditional model's emphasis on categorical judgments. As noted above, the traditional model — in either its dominant or public interest forms — attempts to divide the universe of lawyer activity into ethical and unethical, and to sort actions into these categories. By contrast, the critical model argues that the ethical valence of a given action may have both ethical and unethical aspects, which must be balanced when deciding how to proceed. In other words, the critical model applies the principle, familiar in other legal contexts, of multiple causation. A given action may have significantly different ethical values depending on the perspective from which it is viewed, and the critical model sees this multiplicity of values as inevitable. Unlike the traditional model, however, the critical model does not attempt to solve the problem of multiple values by assigning a duty always to privilege the client's perspective or the public's perspective. Rather, the critical model suggests that, because the client's interests are fluid, those interests are subject to alteration by the presence of other ethical perspectives.

Closely related to the critique of categorical judgments is the critique of transsubstantiative judgments. Just as the critical model argues that the ethical valence of a given action cannot be neatly sorted into two categories because of the presence of competing ethical perspectives, it also avers that the ethical quality of a given action cannot be determined ex ante because that quality will depend on the context in which the act is taken. Thus, the same action, for example disclosing

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70 SIMON, supra note 4, at 139-56.
71 Cf. e.g., Oliver Wendell Holmes, The Path of the Law, 10 HARV. L. REV. 457, 460-61 (1897) (discussing the phenomena of multiple causes in the context of tort law). Multiple causation, in this context, means that there are a variety of factors and effects that contribute to the ethical quality of an action. How these effects are organized and prioritized will determine whether the action is seen as ethical or unethical.
72 SIMON, supra note 4, at 144.
73 SIMON, supra note 4, at 35-37.
some piece of information about the client to an opposing side, may be ethical in one context but not ethical in another.\textsuperscript{75} This criticism is also obliquely related to the idea that the client’s interests are fluid; because the client’s interests are always subject to change, the lawyer cannot judge the quality of a given action in relation to the client’s interests until those interests are determined in reference to a given factual situation. As noted above, the traditional model seeks to make transsubstantive judgments as a way of making the application of legal rules more predictable, thereby encouraging fidelity to those rules.\textsuperscript{76} The critical model asserts that such judgments are impossible, and that by attempting to impose them the traditional model privileges the positive content of the Model Rules over other considerations that might bear on the ethical quality of a given action.\textsuperscript{77}

Taken together, these three critiques of the traditional model suggest an approach to lawyers’ ethics that is willing to make highly contextual judgments. Although this approach sacrifices a degree of predictability in order to achieve greater flexibility, it need not surrender to ad hoc or idiosyncratic judgments. It merely argues that the set of considerations at stake in deciding ethical questions is larger and more varied than the traditional model allows.\textsuperscript{78} Consequently, the judgments themselves become more complex and contestable. Yet the critical model asserts that if the positivistic reliance on the Model Rules is taken as the baseline for ethical judgments, then the judgments produced by the critical model are no more arbitrary than those produced by the Model Rules.\textsuperscript{79}

\textbf{B. Critical Government Lawyering}

In Part II it was suggested that the government lawyer is an integral actor in the agency’s decisionmaking process. As such, the government lawyer is always in a position to influence the agency’s policy choices. Because the critical model recognizes that lawyers will always influence client interests, the critical model is particularly suitable for thinking about the responsibilities of government lawyers.

\textit{1. Critical Analysis of Traditional Approaches to Government Lawyering.} — The critical model allows us to describe the deficiencies in the traditional approaches to government lawyering in another way. Conventional analyses of the problem of government lawyer discretion create unnecessarily stark ethical tradeoffs by posing the issue in terms of a false dilemma. For proponents of the traditional approaches, the

\textsuperscript{75} Id.
\textsuperscript{76} See supra p. 1172.
\textsuperscript{77} SIMON, supra note 4, at 43-44.
\textsuperscript{78} See id. at 195-97.
\textsuperscript{79} See id.
choice is whether, in cases of conflict, the agency’s position or the lawyer’s position will prevail. The dilemma is false because it presumes that the agency comes to the situation with a preformed position that is potentially in conflict with the lawyer’s. But agencies’ interests, no less than those of individual clients in the private sphere, are not already formed and crystallized at the outset of representation. The inchoate nature of the agency’s interests prior to the lawyer’s involvement is to be all the more expected because of the integral role government lawyers play in assisting the agency to form its position.

The influence of this notion of stark conflict is particularly evident in the agency loyalty model. Because adherents of that model almost universally reject the possibility of an identifiable public interest outside of the lawyer’s idiosyncratic views, they generally argue that any position taken by the lawyer other than the agency’s can only be ascribed to the lawyer’s personal prejudices. The critical model, however, suggests that because the lawyer has a role to play in helping the agency to develop its interests, the position ultimately adopted is the agency’s, despite the fact that it may be substantially influenced by the views of the lawyer. Moreover, recent work by supporters of the public interest approach convincingly shows that when the lawyer acts to influence agency decisionmaking, legal standards exist to guide the lawyer’s actions. Thus, the claim that such influence is born solely of the lawyer’s idiosyncratic views is overstated.

The existence of this conflict in the public interest approach is more complex, but is present nonetheless. In essence, the public interest approach posits that there is a fixed “public interest” against which agency action should be judged. When the lawyer identifies a conflict between the agency’s proposed action and the public interest, the lawyer is duty bound to act in accordance with the public interest. Thus, the conflict is no less stark; the public interest approach merely suggests that the conflict will be between the agency and the public interest rather than between the agency and the lawyer. Again, the critical model rejects this conflict because it rejects the idea that the public interest is predetermined. Proponents of the agency loyalty model are correct insofar as they argue that the “public interest” is a contestable idea. In the critical view, however, the government lawyer draws on the numerous sources from which the public interest can be extrapolated to help the agency define its position in light of those values. In

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80 See supra pp. 1177–78.
81 Note that the critical approach’s rejection of transsubstantive judgments, see supra p. 1185, also applies here. Because the critical model suggests that ethical values are context-dependent, the content and application of the public interest will necessarily vary according to the situation.
other words, the public interest becomes defined at the same time the agency’s position becomes defined.82

At first blush, enforcement actions present a somewhat different scenario. In these cases the lawyer appears to be advocating for the agency’s position. Thus there seems to be no reason why this position could not be fixed prior to the lawyer’s activities. As detailed above, the critical model casts serious doubt on whether preformed client interests are possible as a theoretical matter. In any case, it is doubtful as a practical matter that an agency will ever have a preformed position on a specific enforcement action. Enforcement actions range from the routine to the extraordinary. For an action to be of exceptional importance, it will almost certainly have to present some unique policy issue that justifies the attention of an agency’s top officials. In this case, the very importance of the issue suggests that the agency will either not have a preformed position or will be closely reevaluating its position, and the government lawyer will play the same integral role that she plays in assisting the agency to make any other policy. In the case of a routine enforcement action, the agency will at best have general policy statements on how the lawyer should prosecute the action. In applying these policy statements to the specific situation, the government attorney will have to use judgment to determine how the general statements apply.

Thus there is always still the opportunity for government lawyers to exercise discretion. And the presence of this discretion means that the lawyer cannot avoid making judgments that will have policy consequences. Moreover, even if it were possible for the lawyer adhere to the amoral ideal of the dominant model and act merely as the instrument of the agency’s policy choices, such a system would only shift responsibility for the discretion to another agency actor, who may or may not have greater public accountability than the lawyer. Yet the critical model suggests that agency lawyers have a well-defined role to fulfill in exercising this discretion, and that successful execution of this role will comport both with agency loyalty and with notions of the public interest.

82 The suggestion that the public interest is a contingent value to be defined in the process of agency decisionmaking may seem odd to those who view the public interest as a fixed and discoverable concept. However, as many commentators have noted, the definition of the public interest will always be in dispute. Given this fact, “the public interest” as defined in the critical model refers to the provisional resolution of the competing claims on the public good arrived at through accepted government processes. That the government declares some action to be in the public interest is not sufficient to legitimate that claim, however. The legitimacy of any declaration of the public interest is directly related to the legitimacy of the process by which it is reached. Thus, by attending to democratic values and procedural legitimacy, the government lawyer serves the public interest by contributing to the legitimacy of the agency’s action.
2. **Critical Approaches to Government Lawyering.** — From the critique of the traditional approaches, it is possible to develop a model of government lawyer responsibility that better fits the role lawyers play within agencies. The touchstone of this approach is that the government lawyer's primary responsibility is to help the agency develop its position in a way that is consistent with democratic values. Thus, the critical approach differs from the traditional approaches because, in the critical approach, the government lawyer does not act ethically by simply complying with a supposedly fixed and preformed interest, be it that of the agency or that of the public good. Instead, the lawyer's concern when presented with an ethical question is to use her discretion to further the agency's democratic legitimacy.

In fulfilling her duties under the critical approach, the government lawyer must work in a dialogue with other members of her agency. As part of this dialogue, the lawyer must determine at the outset of her work the agency's provisional objectives on a given issue. The lawyer must then independently evaluate those objectives from her perspective as the agency's legal expert. The lawyer's evaluation will necessarily include determining whether the proposed objectives are legal within established understandings of the law. The lawyer's evaluation should not stop there, however. The lawyer should also consider whether the objectives are consistent with the underlying purposes of the law; whether they comport with executive and congressional policy; whether they can be justified in terms of commonly accepted values; and whether they treat the affected parties justly. The lawyer's evaluation, though independent, should not be solitary. To achieve the goal of developing the agency's position with reference to the public interest, the lawyer must communicate with other members of the agency and with relevant members of the public. The lawyer must do so always bearing in mind that the lawyer's role is not to pass judgment on the agency's objectives, but to help the agency understand and realize those objectives.

When the lawyer has completed her evaluation, she communicates her analysis to the agency and seeks revision if warranted. After the agency responds, the lawyer may begin the evaluation process again. This dialogue can be repeated until the lawyer and the agency agree that the agency has come to the best position in light of all relevant factors or until no time remains for further revision. Although the process is described sequentially, it will actually occur as more of a continuous dialogue. The continuity of the process stems from the fact

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83 The use of the term "realize" is purposeful because it simultaneously conveys an act of discovery, of bringing into being, and of achievement, all of which are goals of the government lawyer in the critical model.
that the lawyer conducts her evaluation by facilitating discussion within the agency and between the agency and the public. The lawyer’s continued independence is crucial, however, because it helps to ensure that favored perspectives do not become privileged in the process of crystallizing the agency’s position.

It is difficult to describe how this approach to government lawyering will operate in practice because application of the model will be highly context-dependent. Nonetheless, it may be helpful to illustrate the approach with a few examples. In the case of activities over which the lawyer has almost complete control — such as the prosecution of routine enforcement actions — the lawyer also bears the greatest responsibility for independently evaluating the government’s position. For example, in an action to discontinue Social Security benefits the government lawyer will start with whatever policy statements the Social Security Administration has on bringing such actions. During the course of her investigation, the lawyer will determine how the policy statements apply to the case and develop any further positions in a way that is consistent with the facts of the case, agency policy, law, and other relevant considerations. Throughout the action, the government attorney must continually reevaluate the position taken at the outset to determine whether it is still in conformity with all relevant factors. If the lawyer determines that the initial position is no longer supportable, she must make appropriate alterations.

The duty to play a continuous role in shaping agency interests also extends to the government lawyer’s role as facilitator of participatory processes. To help the agency develop its position, the government lawyer must make sure that all relevant perspectives are brought to bear on the question. This duty means that the government lawyer should not simply implement any standard participation plans, but should analyze the situation critically and determine which segments of the public most need to provide input and how that input should be provided. In discharging this duty, the government lawyer should exercise independent judgment. Consequently, if other actors within the agency attempt to exclude segments of the public that the lawyer feels are central to developing an accurate picture of the situation, the government lawyer should insist on the inclusion of those perspectives. If necessary, the lawyer should take action by contacting the relevant groups directly.

The hardest questions arise when the government lawyer feels that the agency is acting in bad faith and is not responding to her attempts to shift the agency’s position. In these cases, the critical model suggests that the correct response is to publicize the attorney’s discontent with the agency’s action in an effort to create public awareness. Thus, in the critical model the government attorney is not a “loose cannon” with a commission to ensure agency fidelity to public values. The lawyer is, however, a whistleblower who alerts other entities who have
a legitimate claim to authority over the agency — for example Congress, the courts, and the public — to the perceived problem.\textsuperscript{84} At this point, the ball is in these actors' court and it is their responsibility to discipline the agency. If they choose not to act, then the lawyer can only comply with the agency's course of action or refuse to participate and accept whatever sanctions the agency may legally impose.

A famous example of actions consistent with the critical model is the actions of the Solicitor General's office in the Bob Jones University tax case.\textsuperscript{85} In that case, the Internal Revenue Service under the Nixon administration had denied Bob Jones University a 501(c)(3) tax exemption on the ground that the University engaged in racially discriminatory practices.\textsuperscript{86} While the case was in the courts, President Reagan was elected and the political leadership of DOJ changed.\textsuperscript{87} The new Administration determined that the United States would no longer support the IRS's action and would instead argue that Bob Jones University was entitled to the tax exemption.\textsuperscript{88} Acting Solicitor General Lawrence Wallace, a career government attorney, was instructed to file a brief to this effect in the Supreme Court. After Wallace was unsuccessful in convincing the Administration that this position was the wrong one to take, he complied with his instructions, but included a statement indicating that the brief did not reflect the views of the Acting Solicitor General.\textsuperscript{89} Although a relatively small act, the statement was conspicuous because of its unusualness and because of the unique role of the Solicitor General in the Supreme Court. Ultimately, the Court rejected the Administration's position.\textsuperscript{90}

Adherents of the agency loyalty approach would likely consider Wallace's action an abuse of discretion. By contrast, advocates of the public interest view might fault Wallace for ultimately conceding to the agency's position. In the critical view, however, this action struck the right balance because it highlighted, when the other approaches would have downplayed, significant disagreement within the agency, thereby providing an opportunity for other branches of government to resolve the conflict.

\textsuperscript{84} Federal law sanctions this role for the government lawyer by providing protection from adverse employment consequences for lawyers who call attention to agency misconduct. See Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (codified as amended in scattered sections of 5 U.S.C.); see also Roger C. Cramton, The Lawyer as Whistleblower: Confidentiality and the Government Lawyer, 5 GEO. J. LEGAL ETHICS 291 (1991) (analyzing the application of the act to government attorneys).
\textsuperscript{85} Bob Jones Univ. v. United States, 461 U.S. 574 (1983).
\textsuperscript{86} PHILIP B. HEYMANN & LANCE LIEBMAN, THE SOCIAL RESPONSIBILITIES OF LAWYERS 139 (1988).
\textsuperscript{87} Id. at 139–40.
\textsuperscript{88} Id. at 147–49.
\textsuperscript{89} Id. at 181.
\textsuperscript{90} Id.
This resolution seems contradictory if one views the lawyer merely as a partisan advocate. However, if one understands the lawyer's duty as assisting the agency to develop its position fully, then the lawyer's duty can only be fulfilled by ensuring that all perspectives are heard, even if the agency would rather not hear them. With the possible exception of national security issues, such actions by the government lawyer are fully consistent with values of democratic accountability and transparent government. To the extent that an agency is seeking to implement policy by avoiding public input, those preferences need not be respected. Moreover, authorizing the lawyer to take independent action to inform concerned constituencies may actually save social resources because it will lessen the need for protracted litigation or congressional oversight after the action has been taken.

Thus, the critical model of agency lawyering can be summarized as one in which the lawyer attempts actively to influence the agency's position by fulfilling the government lawyer's dual roles as legal expert and facilitator of public participation. Because the critical model does not, at least in most instances, encourage the agency attorney to take independent action that might not comport with general agency preferences, it does not raise concerns about lawyers taking idiosyncratic action that might frustrate agency programs. At the same time, because it does not rely on the agency to control the ethical action of the lawyer, it allows for consideration of the effects of the agency's actions on the public. Thus, the lawyer is not held accountable by an easy measure of fidelity to some independent interest; rather, the lawyer is accountable to the idea of developing the agency's interests.

IV. CONCLUSION

Traditional approaches to the responsibilities of government lawyers have failed to provide a robust framework for analyzing the question of how government lawyers should exercise their discretion. To a large extent, this failure is a result of an attempt to apply a model of legal ethics that is ill-suited to the unique role of government attorneys. The critical model, by contrast, has the potential to break the impasse created by traditional models. Because the critical model is concerned primarily with guiding lawyer discretion, rather than constraining it, the model escapes many of the seemingly irreconcilable conflicts posed by traditional approaches and offers greater insight into the situation of government attorneys.

91 Not only does the general need for agency legitimacy suggest that efforts on the agency's part to evade public scrutiny are illegitimate, but Congress has also chosen to protect those agency employees who bring such action to light. See supra note 84.
Application of the critical model to government lawyers offers several potential benefits. It reconciles the need for agency lawyer accountability with the strong moral intuition that government lawyers should bear some responsibility for considering public values in carrying out their duties. By specifying that the incorporation of public values into the government lawyer’s duties takes place in the context of the lawyer’s responsibility to shape the agency’s position, the critical approach has the further benefit of potentially making agencies themselves — not just their lawyers — more responsive to public values. Further, by insisting on an independent role for lawyers to evaluate both the legality of agency action and the means by which public participation is sought, a critical approach to government lawyering may have the added benefit of providing an internal check on agency discretion to complement the external checks of judicial review and congressional oversight. Because this check operates before the agency has reached a final decision, it is also likely to be a more efficient means of ensuring that the agency complies with its congressionally sanctioned mandate.

The primary deficiency of the critical model is that it does not provide the government lawyer with definitive rules to guide her conduct. However, a large part of the government lawyer’s expertise can be characterized as the ability to make difficult judgments with reference to law and democratic values. Thus, to the extent that discretion in agency lawyering is inescapable, the critical model places that discretion with the actor in the best position to exercise it. In addition, because the critical model does not encourage the lawyer to “go it alone” but rather to pursue her vision of the best course of action within the agency decisionmaking process, the lawyer’s discretion is constrained by the need to convince others of the correctness of her view. Moreover, despite its absence of rules, the critical model does provide considerations that, if taken seriously, will narrow the range of the government lawyer’s discretion.

The exercise of discretion by government officials — including government lawyers — is necessary for a responsive and effective government. Approaches to government lawyers’ ethics that try to deny or displace that discretion can therefore never adequately address the difficult questions of these lawyers’ responsibilities. The very nature of discretion requires an approach that is able to consider context and to balance competing considerations. The critical model is such an approach. By contrast, it is the very contingency necessary to a consideration of ethics in a discretionary environment that traditional approaches have tried to avoid. Nevertheless, to the extent that one is interested in developing roles for government lawyers that support good government, rather than simple compliance with abstract ethical codes, one would do well to consider the critical model.