

PUBLIC LAWYERS, PRIVATE VALUES: CAN, SHOULD, AND WILL GOVERNMENT LAWYERS SERVE THE PUBLIC INTEREST?

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Abstract: There is a widely shared perception among lawyers, judges, and various public officials that government lawyers have greater responsibilities to serve the public interest than lawyers in private practice. This perception is reflected in judicial opinions, lawyer professional responsibility standards, and numerous other legal writings. Nonetheless, a number of academic critics have attacked what is described here as the "public interest serving" role for government attorneys. This Article provides a defense of the public interest serving role against its critics. While the critiques addressed are diverse, they often make the mistake of importing values from the context of private litigation into the quintessentially public context of government litigation. The Article concludes by offering three examples of the most common forms of government litigation—criminal prosecutions, lawsuits against executive branch agencies, and civil enforcement proceedings—in an effort to demonstrate how the public interest serving role ought to be pursued.

INTRODUCTION

It is an uncontroversial proposition in mainstream American legal thought that government lawyers have greater responsibilities to pursue the common good or the public interest than their counterparts in private practice, who represent non-governmental persons and entities. Indeed, this proposition finds expression in numerous historical sources, including both primary sources such as judicial opinions and statutes, and secondary sources. Similarly, the proposition has been incorporated into formal statements of appropriate professional roles and responsibilities for attorneys such as model standards for attorney professional conduct and discipline. Perhaps the best known example of the proposition comes in the assertion

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that criminal prosecutors are to "seek justice" rather than convictions in particular cases, a view which has been endorsed by the United States Supreme Court in its famous decision in *Berger v. United States*,¹ as well as incorporated into the two most widely adopted codifications of appropriate attorney professional roles and responsibilities: the American Bar Association's Model Code of Professional Responsibility;² and its Model Rules of Professional Conduct.³

There appears to be a broad consensus among practicing lawyers, current and former public officials, and persons involved in legal policymaking at a variety of levels, that what will be referred to in this article as the "public interest serving" role for government attorneys is the appropriate professional role for such attorneys to play. Despite this consensus, the public interest serving role for government attorneys is controversial among, and indeed has generally been attacked and rejected by, the relatively small number of legal academics of who have written seriously about appropriate professional roles and responsibilities for government attorneys. These critics of the public interest serving role for government attorneys have argued that government attorneys cannot, should not, and will not work to advance the public interest to any greater degree than attorneys for non-governmental entities.

Some critics of the public interest serving role for government attorneys argue that government attorneys cannot work to pursue the public interest because the very concept of a "public interest" is unintelligible and cannot provide a workable guidepost for government attorneys with regard to the choices and decisions that they must make in their professional roles.⁴ Other critics argue that even if the concept of a public interest is sufficiently intelligible to provide guidance to government attorneys in their professional decision making, government attorneys should not attempt to pursue their conceptions of the public interest in their professional capacities.⁵ In the criminal context, such critics argue that efforts by prosecutors to serve the public interest rather than to do everything possible to secure convic-

¹ 295 U.S. 78, 88 (1945) [hereinafter *Berger*].

² MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1969).

³ MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 cmt. 1 (1983).

⁴ See, e.g., Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 48 (1991).

⁵ See, e.g., Geoffrey Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1294' (1987) [hereinafter Miller, *Government Lawyers*]; Peter L. Strauss, *The Internal Relations of Government: Cautionary Tales From Inside the Black Box*, 61 LAW & CONTEMP. PROBS. 155, 156-57 (1998) [hereinafter Strauss, *Internal Relations*].

tions will tip the balance in criminal trials in favor of defendants and their attorneys, who do not operate within similar constraints.⁶ In the civil context, the critics contend that it would be anti-democratic for government attorneys to pursue their particular determinations of the public interest with regard to any particular legal controversy, and that any determinations regarding how the public interest will best be served with regard to any legal controversy should be made by public officials who are more democratically accountable than government attorneys are.⁷ Finally, some critics of the public interest serving role for government attorneys argue that even if government attorneys can and should work to pursue the public interest they will not do so.⁸ Rather, this group of critics contends that government attorneys will work to advance their individual, financial, or career-related self interests at the expense of the broader public interest.

These critiques have not been made by an organized group of scholars. Although law and economics perspectives—including rational choice and public choice theories—predominate, the critiques have been informed by a variety of different theoretical perspectives. In any event, certain commonalities exist among the critiques, and certain broad thematic similarities can be discerned. Foremost is the primacy of what will be referred to here as “private” values. For purposes of this article, the term “private” values encompasses ideas such as individual choice, autonomy, and pursuit of economic self-interest. These values lie in contrast to what will be referred to throughout this paper as “public” values. For purposes of this article, the term “public” values encompasses ideas such as connection to others, community, collective action, group interaction, and discourse.

The purpose of this Article is to provide a defense of the public interest serving role for government attorneys against the above outlined critiques. The Article will examine traditional understandings and formal pronouncements regarding the public interest serving role for government attorneys in three specific contexts: criminal prosecutions; representation of government agencies; and government attorneys engaged in civil enforcement actions.⁹ In each context, the focus will be on lawsuits or litigation involving government

⁶ See, e.g., Dr. George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U. L. REV. 98, 119 (1975) (discussing actual prosecutors' attitudes).

⁷ See, e.g., Miller, *Government Lawyers*, *supra* note 5, at 1295.

⁸ See, e.g., Jonathon Macey & Geoffrey Miller, *Reflections on Professional Responsibility in a Regulatory State*, 63 GEO. WASH. L. REV. 1105, 1115–17 (1993).

⁹ See *infra* Part I.

entities, although many of the observations may apply equally well to other types of government legal work. The Article will then present a summary of the critiques as they pertain to each of the three government lawyering contexts addressed.¹⁰ Next, the Article will offer responses to each of the various critiques.¹¹ In doing so, the Article will draw some general conclusions regarding the inappropriateness of importing private values into quintessentially public lawyering contexts. Additionally, it will be presumed that given the firm establishment and longstanding recognition of the public interest serving role as the appropriate one for government attorneys, the burden of proof ought to lie with those who would abandon that role in favor of a different view of the appropriate professional role and responsibilities for government attorneys. It is hoped that through the above described analysis, a more concrete vision of appropriate government lawyer roles and responsibilities will emerge. This vision will finally be compared and contrasted to the competing vision offered by the critiques in the context of three particular government lawyering problems.¹²

I. TRADITIONAL UNDERSTANDINGS AND FORMAL STATEMENTS OF THE PUBLIC INTEREST SERVING ROLE

Both traditional understandings and formal statements of the professional role of government attorneys, whether serving as criminal prosecutors, attorneys for executive branch agencies, or attorneys engaged in civil enforcement of public protection laws, view serving the public interest as a significant component of that role. For example, courts and commentators from the earliest days of the American legal system to the present have viewed pursuit of the public interest as a critical function of the public prosecutor.¹³ It has long been the view in American law that the prosecutor's paramount duty is to serve justice, rather than to secure a conviction in a given case. As stated by the Supreme Court of Tennessee in an 1816 opinion:

[The prosecutor] is to pursue guilt; he is to protect innocence; . . . to combine the public welfare and the [safety] of citizens, preserving both, and not impairing either; he is to decline the use of individual passions and individual malevo-

¹⁰ See *infra* Part II.

¹¹ See *infra* Part III.

¹² See *infra* Part IV.

¹³ See *infra* notes 14-21 and accompanying text.

lence, when he cannot use them for the advantage of the public; he is to lay hold of them where public justice . . . requires it.¹⁴

In his famous 1854 essay, which is considered to represent one of the foundations of modern legal ethics codes,¹⁵ George Sharswood contrasted the role of defense attorneys, who are to do their utmost in defense of their clients, regardless of their own views regarding their clients' guilt or innocence, with that of public prosecutors, who must never prosecute a person known or believed to be innocent.¹⁶ No less an authority than the United States Supreme Court, in a frequently-quoted passage from its now-famous opinion in *Berger v. United States*, stated that the prosecution's interest "is not that it shall win a case, but that justice shall be done. . . ."¹⁷ More recently, the author of a leading book on prosecutorial ethics stated that "[a]lthough the government technically loses its case, it has really won if justice has been done."¹⁸

The formal rules of professional responsibility that govern the conduct of public prosecutors have codified the traditional view that the paramount duty of the prosecutor is to serve the public interest. The American Bar Association's Standards Relating to the Administration of Criminal Justice, The Prosecution Function, state that "[t]he duty of the prosecutor is to seek justice, not merely to convict."¹⁹ This language is identical to that which appears in Ethical Consideration 7-13 of the American Bar Association's Model Code of Professional Responsibility.²⁰ The comment to the more recent Model Rules of Professional Conduct similarly refers to prosecutors as "minister[s] of

¹⁴ *Fonte v. State*, 4 Tenn.(3 Hayw.) 98, 99 (1816), quoted in JOHN JAY DOUGLAS, *ETHICAL ISSUES IN PROSECUTION* (2d ed. 1993).

¹⁵ See Russell Pearce, *Rediscovering the Republican Origins of Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241, 243 (1992).

¹⁶ See HON. GEORGE SHARSWOOD, *AN ESSAY IN PROFESSIONAL ETHICS* (F.B. Rothman 5th ed. 1993) (1854), cited in Bruce Green, *Why Should Prosecutors Seek Justice?*, 26 FORDHAM URB. L.J. 607, 612-13 (1999) [hereinafter Green, *Seek Justice*].

¹⁷ 295 U.S. at 88. In *Berger*, the defendant's conviction for conspiracy to utter counterfeit notes was reversed on grounds of prosecutorial misconduct, including misstating facts and witness testimony in the cross-examination of witnesses, improper suggestions of personal knowledge on the part of the prosecutor, and improper jury argument. *Id.* at 84. Charles Wolfram refers to the *Berger* opinion as "the locus classicus of the extraordinary duties of a prosecutor." CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 760 (1986).

¹⁸ DOUGLAS, *supra* note 14, at 8.

¹⁹ STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, The Prosecution Function, 3-1.2(c) (1992).

²⁰ MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1969).

justice," and makes reference to the aforementioned ABA Standards for the prosecution function.²¹

Similarly, both traditional understandings and formal statements of the professional role of attorneys who represent executive branch agencies in civil litigation suggest that such attorneys should be much more concerned with pursuit of the public interest than their counterparts who represent private clients. Courts recognize increased responsibilities to serve the public interest on the part of government agency attorneys. For example, the Court of Appeals for the District of Columbia Circuit has stated that "government counsel have a higher duty to uphold [than private lawyers] because their client is not only the agency they represent but also the public at large."²² The same court also noted that "government attorneys . . . have special responsibilities to both this court and the public at large."²³ Indeed, in a 1992 opinion, then District of Columbia Circuit Chief Judge Mikva applied the principle set forth in the Supreme Court's *Berger* opinion to a case litigated on behalf of the Federal Energy Regulatory Commission (FERC).²⁴ Chief Judge Mikva excoriated FERC's attorney for pursuing an appeal after it had clearly become moot, and for "so unblushingly deny[ing] [at oral argument] that a government lawyer has obligations that might sometimes trump the desire to pound an opponent into submission."²⁵

Commentators have also discussed the fact that government agency attorneys have been thought to have a greater duty to serve the public interest than their counterparts in private practice. Prior to taking the bench, Judge Jack Weinstein wrote that the obligation of government lawyers to their agency clients is "tempered by the fact that [the lawyer] has a deeper obligation to the public. . . ."²⁶ Later, Judge Weinstein and another commentator similarly noted that "government lawyers represent not only the government entity, but also

²¹ MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 cmt. 1 (1983).

²² *Gray Panthers v. Schweiker*, 716 F.2d 23, 33 (D.C. Cir. 1983).

²³ *Douglas v. Donovan*, 704 F.2d 1276, 1279 (D.C. Cir. 1983).

²⁴ See *Freeport-McMoRan Oil & Gas Co. v. FERC*, 962 F.2d 45, 47 (D.C. Cir. 1992). After quoting the Supreme Court's language, Mikva noted that while "[t]he Supreme Court was speaking of government prosecutors [in *Berger*], . . . no one, to our knowledge (at least prior to oral argument) has suggested that the principle does not apply with equal force to the government's civil lawyers. . . ." *Id.*

²⁵ *Id.* at 48.

²⁶ Jack B. Weinstein, *Judicial Notice and the Duty to Disclose Adverse Information*, 51 IOWA L. REV. 807, 810 (1966).

the public. . . ."²⁷ And former Attorney General Griffin Bell once wrote that "[a]lthough our client is the government, in the end we serve a more important constituency: the American people."²⁸

A recent and noteworthy expression of the public interest serving conception of practice by government attorneys representing executive branch entities comes from Independent Counsel Kenneth Starr's grand jury investigation of President Clinton's relationship with Monica Lewinsky. Judge Starr sought to compel the grand jury testimony of Deputy White House Counsel Bruce Lindsey regarding certain conversations that Lindsey had with President Clinton.²⁹ Lindsey had refused to answer questions regarding such conversations on grounds of the attorney-client privilege.³⁰ While the Court of Appeals for the District of Columbia Circuit was willing to accept the existence of an attorney-client privilege that protects from disclosure certain communications between government attorneys and individuals working within executive branch agencies,³¹ the court was not willing to extend that privilege to the context of grand jury questions relating to the possible commission of federal crimes by government officials and others.³²

²⁷ Jack B. Weinstein & Gay A. Crosthwaite, *Some Reflections on Conflicts Between Government Lawyers and Clients*, 1 *TOURO L. REV.* 1, 4-5 (1985).

²⁸ Griffin Bell, *The Attorney-General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?*, 46 *FORDHAM L. REV.* 1049, 1069 (1978), quoted in William Josephson & Russell Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict?*, 29 *HOWARD L.J.* 539, 555 (1986).

²⁹ *In re Lindsey*, 148 F.3d 1100, 1102 (D.C. Cir. 1998), cert. denied sub nom. Office of President v. Office of Independent Counsel, 525 U.S. 996 (1998).

³⁰ *Id.*

³¹ See *id.* at 1105.

³² See *id.* at 1107. In contrast, the Court of Appeals for the Eighth Circuit had previously ruled that the White House could not invoke the attorney-client privilege to avoid a grand jury subpoena from the Independent Counsel for documents relating to a meeting involving White House lawyers and First Lady Hillary Rodham Clinton during the earlier stages of the Independent Counsel's investigation, which focused on the "Whitewater" real estate transaction. See *In re Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997), cert. denied sub nom. Office of President v. Office of Independent Counsel, 521 U.S. 1105 (1997). However, the dissenting judge essentially agreed with the view that would later be expressed by the D.C. Circuit in *In re Lindsey*, 148 F.3d at 1102, by contending that the White House should be afforded an attorney-client privilege, but that the privilege should give way in the context of a federal grand jury investigation of purported criminal activity. See *In re Subpoena Duces Tecum*, 112 F.3d at 925. For further discussion of these cases and issues surrounding a government attorney-client privilege, see Michael Stokes Paulson, *Who "Owns" the Government's Attorney-Client Privilege?*, 83 *MINN. L. REV.* 473 (1998); Adam M. Chud, Note, *In Defense of the Government Attorney-Client Privilege*, 84 *CORNELL L. REV.* 1682 (1999); and Bryan S. Gowdy, Note, *Should the Federal Government Have an Attorney-Client Privilege?*, 51 *FLA. L. REV.* 695 (1999).

The court based its reasoning, at least in part, on the view that government attorneys owe their primary allegiance to the public interest, rather than to the particular government officials they may be representing in a given case. In the words of the court: "The obligation of a government lawyer to uphold the public trust reposed in him or her strongly militates against allowing the client agency to invoke a privilege to prevent the lawyer from providing evidence of the possible commission of the criminal offenses within the government."³³ The court then went on to note that the government official's interest in engaging in full and frank communications with his or her lawyer, which admittedly might be chilled by the ruling, could be served by the official's retention of private counsel.³⁴ The Supreme Court declined to review the Court of Appeals' decision.³⁵

The traditional understanding of the public interest serving role for attorneys for governmental entities lies in sharp contrast to traditional understandings of the appropriate professional role for attorneys for private parties. While traditional understandings of the appropriate role for attorneys for private parties do acknowledge some responsibility on the part of such attorneys to take into account the public interest, this responsibility is greatly subordinated to the attorneys' responsibility to advance the individual self interests of their clients.³⁶ Indeed, a frequently quoted statement of the professional responsibility of the lawyer for a private party contends:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, . . . is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.

³³ *In re Lindsey*, 148 F.3d at 1109. The Eighth Circuit similarly relied, at least in part, on a conception of the public interest serving role of government agency attorneys, in refusing to extend the attorney-client privilege to the White House in the context of that matter. See *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 920 (stating: "[T]he general duty of public service calls upon government employees and agencies to favor disclosure over concealment. The difference between the public interest and the private interest is perhaps, by itself, reason enough to find *Upjohn* [Co. v. United States, 449 U.S. 383 (1981)] (recognizing an attorney-client privilege for corporations)] unpersuasive in this case").

³⁴ See *In re Lindsey*, 148 F.3d at 1112.

³⁵ See *Office of President v. Office of Independent Counsel*, 525 U.S. 996 (1998) (denying *sub nom.* writ of certiorari).

³⁶ See Steve Berenson, *Politics and Plurality in a Lawyer's Choice of Clients: The Case of Stropnick v. Nathanson*, 35 SAN DIEGO L. REV. 1, 40-46 (1998).

Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.³⁷

An instructive example of the different professional roles traditionally accorded to government and private lawyers lies in the Solicitor General's practice of "confessing error" before the Supreme Court. Pursuant to this practice, the Solicitor General will, on occasion, admit that a lower court decision in favor of the government entity represented by the Solicitor General was erroneous and should be vacated.³⁸ David Strauss properly points out that confessions of error by attorneys on behalf of private parties are "essentially unheard of."³⁹

To the extent that they address the question at all, formal statements of attorney professional responsibility vary a good deal in terms of their formulation of the appropriate professional role to be served by lawyers for government entities.⁴⁰ Often, these differences are discussed in terms of identification of "the client" of the government lawyer. The number of possible answers to the question of "who is the client of the government lawyer" suggests the difficulty of arriving at a single, correct answer to the question. Roger Cramton has suggested five possible "clients" of the government attorney: (1) the public interest; (2) the government as a whole; (3) the branch of government in which the lawyer is employed (e.g., executive, legislative, or judicial); (4) the particular agency or department in which the lawyer works; and (5) the responsible officers who make decisions for the agency.⁴¹ Another possible answer exists where the lawyer is employed

³⁷ WOLFRAM, *supra* note 17, at 580, (quoting 2 TRIAL OF QUEEN CAROLINE 8 (1821)). For a detailed discussion of the context within which Lord Brougham uttered this statement, as well as a discussion of the debate among scholars whether the sentiments expressed continue to represent the prevailing view of current lawyers, see Catherine J. Lancot, *The Duty of Zealous Representation and the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 960 & nn.27-30 (1991).

³⁸ See Thomas W. Merrill, *High Level, "Tenured" Lawyers*, 61 LAW & CONTEMP. PROBS. 83, 96 (1998); David A. Strauss, *The Solicitor General and the Interests of the United States*, 61 LAW & CONTEMP. PROBS. 165, 169 (1998) [hereinafter Strauss, *The Solicitor General*]; David M. Rosenzweig, Note, *Confession of Error in the Supreme Court by the Solicitor General*, 82 GEO. L.J. 2079 (1994).

³⁹ Strauss, *The Solicitor General*, *supra* note 38, at 169.

⁴⁰ A number of commentators have noted the paucity of consideration given to government lawyers in formal codes of professional responsibility. See, e.g., Lancot, *supra* note 37, at 967; James Harvey III, Note, *Loyalty in Government Litigation: Department of Justice Representation of Agency Clients*, 37 WM. & MARY L. REV. 1569, 1592 (1996).

⁴¹ Roger C. Cramton, *The Lawyer as Whistleblower: Confidentiality and Government Lawyer*, 5 GEO. J. LEGAL ETHICS 291, 296 (1991).

by a different agency from the one that is represented as a party to the litigation; for example, where a lawyer who works for the Department of Justice or a state attorney general's office provides legal representation to another executive branch agency that is a party to a lawsuit.⁴² In such circumstances, the client might be viewed as being the employing "legal" agency rather than the agency party to the case.⁴³ Additionally, it has been suggested that the President might, in fact, appropriately be viewed as the client whenever a federal agency is involved in litigation.⁴⁴

Support can be found for a number of these conflicting positions in formal opinions and codes of attorney professional responsibility. For example, in an early effort to answer the question of who is the client of the government attorney, the Federal Bar Association's Committee on Professional Ethics, in a 1973 Opinion, stated that the government lawyer's client "is the agency where he is employed."⁴⁵ The Federal Bar Association (FBA) carried forward this view in its subsequent Federal Ethical Considerations,⁴⁶ which were intended to supplement the ABA Model Code of Professional Responsibility as it pertained to lawyers involved in federal practice, including federal government lawyers,⁴⁷ as well as in its later Model Rules of Professional Conduct for Federal Lawyers,⁴⁸ which were similarly intended to supplement the provisions of the ABA Model Rules of Professional Conduct as they pertain to federal lawyers.⁴⁹

As pointed out above, this formulation leaves open the question of whether the client is the Department of Justice or the litigant agency in the situation where an attorney employed by the Department of Justice provides legal representation to another executive branch agency. A comment to the most recent draft of the Restatement of the Law Governing Lawyers seems to resolve this difficulty by suggesting that in most cases the client of the government lawyer will

⁴² See *Lancot*, *supra* note 37, at 1003-04 & n.204.

⁴³ See *Harvey*, *supra* note 40, at 1570.

⁴⁴ See *id.*

⁴⁵ Federal Bar Ass'n Comm. on Professional Ethics, Op. 73-1 (1973).

⁴⁶ Federal Bar Ass'n Federal Ethical Considerations (1973), in C. Normand Poirier, *The Federal Government Lawyer and Professional Ethics*, 60 A.B.A.J. 1541, 1542-44 (1974).

⁴⁷ See *id.* FEC 5-1 (stating: "The immediate professional responsibility of the federal lawyer is to the department or agency in which he is employed").

⁴⁸ MODEL RULES OF PROFESSIONAL CONDUCT FOR FEDERAL LAWYERS (Federal Bar Ass'n 1990), reprinted in *SELECTED STATUTES, RULES AND STANDARDS ON THE LEGAL PROFESSION* 568 (West 1994).

⁴⁹ See *id.* Rule 1.13 (entitled: "The Federal Agency as the Client") (stating: "[A] Government lawyer represents the Federal Agency that employs the Government lawyer").

be the agency involved in the underlying dispute.⁵⁰ Similarly, the comment to the FBA's Model Rule on confidentiality seems to suggest that the agency party is the client.⁵¹ On the other hand, the most widely adopted source of professional responsibility standards for lawyers, the ABA Model Rules of Professional Conduct,⁵² appear to take the position that the government lawyer's client is the government as a whole.⁵³ And by carrying forward its "seek justice" language from the context of criminal prosecutions to the context of civil litigation,⁵⁴ the ABA's Model Code of Professional Responsibility caused at least one writer to conclude that the Code recognizes the client of the government lawyer to be the public interest.⁵⁵

There is some logic in attempting to define the appropriate professional role for lawyers for government entities by first identifying the lawyer's client. As Roger Cramton points out, it is common to view identification of the lawyer-client relationship as a predicate to determining the lawyer's duties.⁵⁶ For example, the lawyer's fiduciary duties, as well as the lawyer's duties of competence, confidentiality, diligence, and loyalty are all viewed to flow from the establishment of an attorney-client relationship.⁵⁷ However, it may be the case, given the numerous and sometimes conflicting duties placed upon lawyers for government entities,⁵⁸ that identification of the client is not critical, or even helpful, in determining the government lawyer's appropriate professional role. Indeed, one commentator has effectively argued that the question of who is the client of the government lawyer

⁵⁰ RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 156 cmt. c (Tentative Draft No. 8, 1997) (entitled "Representing Governmental Client"). The Restatement suggests that a definitive answer regarding who is the client of the government attorney may vary according to the circumstances. *See id.*

⁵¹ MODEL RULES OF PROFESSIONAL CONDUCT FOR FEDERAL LAWYERS, *supra* note 48, Rule 1.6 cmt. (stating: "Generally, a federal agency is the government lawyer's client for purposes of this Rule").

⁵² "As of July 1999, 41 states and the District of Columbia had adopted some version of the Model Rules." GEOFFREY C. HAZARD, JR. ET AL., *THE LAW AND ETHICS OF LAWYERING* 15 (3rd ed. 1999).

⁵³ MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 cmt. (1983) (stating: "Although in some circumstances the client may be a specific agency, it is generally the government as a whole").

⁵⁴ MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-14 (1969) (stating: "A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice").

⁵⁵ *See* Harvey, *supra* note 40, at 1594.

⁵⁶ *See* Cramton, *supra* note 41, at 296.

⁵⁷ *See id.*

⁵⁸ *See id.* at 297.

has obfuscated, rather than clarified, the important issues surrounding attorney representation of government entities.⁵⁹

Thus, it is not important to demonstrate conclusively that the public interest is "the client" of the attorney representing governmental entities in order to show that formal pronouncements of attorney professional responsibility incorporate the public interest serving role for government lawyers. What is clear from a review of these pronouncements is that all of these codes contemplate a greater duty on the part of government attorneys to serve the public interest than is imposed upon attorneys for private parties. For example, in addition to the Model Code's admonition to civil government attorneys to "seek justice,"⁶⁰ the Preamble to the Model Rules states that lawyers for government agencies "may have authority to represent the 'public interest' in circumstances where a private lawyer would not be authorized to do so."⁶¹ Both the FBA's Federal Ethical Considerations⁶² and its Model Rules for Federal Lawyers⁶³ expressly recognize special duties to serve the public interest on the part of government lawyers. And the comment to the Restatement of the Law Governing Lawyers notes the fact that "[c]ourts have stressed that a lawyer representing a government client must seek to advance the public interest in the representation."⁶⁴ Thus, while it may be debated whether a particular code embodies a stronger or weaker version of the public interest serving role for government attorneys, it is beyond doubt that all such codes encompass some version of the public interest serving role for attorneys for government entities.

In addition to the situation in which government attorneys represent particular governmental entities in litigation, government attor-

⁵⁹ See Robert P. Lowry, *Who is the Client of the Federal Government Lawyer?: An Analysis of the Wrong Question*, 37 FED. BAR. J. 61 (1978).

⁶⁰ See *supra* notes 19-20.

⁶¹ MODEL RULES OF PROFESSIONAL CONDUCT Preamble ¶ 16 (1983).

⁶² See Federal Ethical Considerations, *supra* note 46, FEC 6-1 (stating that the federal lawyer's duty to represent a client competently must "be fulfilled with special regard to the public interest").

⁶³ MODEL RULES OF PROFESSIONAL CONDUCT FOR FEDERAL LAWYERS, *supra* note 48, Preamble (stating: "In addition to the high standards of conduct expected of all Federal lawyers, the Government lawyer has a specific responsibility to strive to promote the public interest").

⁶⁴ RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 156 cmt. f (Tentative Draft No. 8, 1997) (entitled: "Representing Governmental Client").

neys frequently act to enforce laws that have been enacted to protect the public from harms in a variety of areas, including civil rights and environmental and consumer protection enforcement. In such circumstances, traditional understandings and formal pronouncements regarding the government attorney's responsibility to serve the public interest are even clearer than in the contexts discussed previously. Perhaps the traditional understandings of the public interest serving role of the government attorney who enforces public protection laws do not have as lengthy a history as those relating to criminal prosecutors and attorneys for executive branch entities. Following from the tradition of the British Attorney General, the earliest American public lawyers were seen in the role of "apolitical" and "elite" legal counsel for the government.⁶⁵ However, as the role of American government in general expanded through the New Deal and Great Society periods of the 1930s and 1960s to encompass a wide range of public protection functions not previously seen to be within its ambit, so too has the role of government attorneys who work in similar areas.⁶⁶ Not only is this true at the federal level, but state attorneys general have come to play an increasingly large role in the enforcement of state laws designed to protect the public in areas ranging from child support enforcement, consumer protection, antitrust action, and rate and utility regulation and advocacy, to the provision of services to crime victims and environmental enforcement.⁶⁷

Formal pronouncements similarly recognize the public interest serving role of civil enforcement government attorneys in a variety of settings. Although the statutes that define the authority and role of the United States Attorney General are very broad and quite vague, title 28, section 518, of the United States Code states that the Attorney General may argue any case in any court in the United States when the Attorney General believes doing so is in the interests of the United States.⁶⁸ Both constitutional provisions and statutes establishing the authority of the primary government attorneys at the state

⁶⁵ See CORNELL W. CLAYTON, *THE POLITICS OF JUSTICE: THE ATTORNEY GENERAL AND THE MAKING OF LEGAL POLICY* 11 (1992).

⁶⁶ See *id.* at 4-5.

⁶⁷ See generally *STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES* (Lynne M. Ross ed., 1990).

⁶⁸ 28 U.S.C. § 518 (1998).

level, state attorneys general,⁶⁹ as well as other government lawyers,⁷⁰ similarly incorporate the public interest serving perspective.

II. THE CRITIQUE OF THE PUBLIC INTEREST SERVING ROLE

Numerous commentators have questioned whether government lawyers are capable of advancing the public interest. The commentators' critiques of the effectiveness of the public interest serving role for government attorneys fall into three general categories. First, some commentators assert that the concept of the public interest is unintelligible and therefore cannot provide a workable guide to government attorney conduct in particular cases.⁷¹ Second, other commentators argue that even if government attorneys are capable of acting to advance the public interest, it is inappropriate for them to do so.⁷² Third, arguing from the perspective of rational choice theory, other commentators contend that government lawyers will not place the public interest (even to the extent that it is intelligible) ahead of their individual self interests in the context of particular cases.⁷³ Each of these critiques will be explored with regard to the three categories of government attorneys that are the focus of this article.

A. *Government Attorneys Cannot Serve the Public Interest*

Numerous commentators have argued that the concept of the public interest is too ill-defined to be particularly useful in establishing appropriate professional roles for government lawyers. Fred Zacharias advances this thesis in an important article regarding the ethics of prosecutorial trial practice.⁷⁴ Zacharias, who refers to prosecutors' duty to serve the public interest as the "do justice standard,"

⁶⁹ See, e.g., 15 ILL. COMP. STAT. 205/6.5 (West 1997) (creating Consumer Utilities Unit within the Office of the Attorney General, with the power to intervene in, or initiate proceedings relating to the provision of electric power, when the Attorney General determines that doing so is in the interest of Illinois' citizens); MASS. GEN. LAWS ANN. ch. 93A, § 4 (West 1997) (authorizing State Attorney General to enforce state consumer protection act in order to protect the public interest).

⁷⁰ See, e.g., FLA. STAT. ANN. § 350.0611 (West 1999) (establishing "Public Counsel" to represent the public interest in proceedings before the Florida Public Service Commission involving the setting of utility rates); FLA. STAT. ANN. § 408.40 (West 1999) (establishing "Public Counsel" to promote the public interest in proceedings before the Florida Agency for Health Care Administration).

⁷¹ See *infra* notes 74-95 and accompanying text.

⁷² See *infra* notes 96-112 and accompanying text.

⁷³ See *infra* notes 113-137 and accompanying text.

⁷⁴ See Zacharias, *supra* note 4, at 48.

contends that the standard "establishes no identifiable norm."⁷⁵ He contends that the standard's "vagueness leaves prosecutors with only their individual sense of morality to determine just conduct."⁷⁶ This ambiguity, he concludes, makes the likelihood that prosecutors will in fact advance the public interest completely unreliable.⁷⁷

Zacharias recommends replacing the "do justice standard" with the requirement that prosecutors assure "adequate adversarial process" in criminal trials.⁷⁸ To do this, prosecutors must assure that the essential elements of the adversary process do not fail.⁷⁹ For example, a failure of one of the essential elements of a fair criminal trial takes place where the defendant lacks adequate counsel.⁸⁰ According to Zacharias, in cases where the defendant is not being represented adequately, the prosecutor may have a duty to inform either defense counsel or the trial judge of defense counsel's inadequate performance in order to restore proper adversarial balance to the case.⁸¹ On the other hand, in situations where the essential elements of adversarial balance are in place, the prosecutor may go all out for a conviction without regard to the substantive fairness of such a result.⁸²

The purported unintelligibility of the public interest serving role has also been decried in the context of government attorney representation of executive branch entities. For example, Cramton quotes from the report of a special committee of the District of Columbia Bar Association appointed to study application of the Model Rules of Professional Conduct to government lawyers,⁸³ stating that "the public interest [is] too amorphous a standard to have practical utility in regulating lawyer conduct."⁸⁴ According to Professor Geoffrey Miller,

⁷⁵ See *id.*

⁷⁶ *Id.*; see also George T. Frampton Jr., *Some Practical & Ethical Problems of Prosecuting Public Officials*, 36 MD. L. REV. 5, 8 (1976) (stating that "more often than not, the prosecutor is thrown back on his own subjective values").

⁷⁷ See Zacharias, *supra* note 4, at 48.

⁷⁸ See *id.* at 60.

⁷⁹ See *id.*

⁸⁰ See *id.* at 66. Other failures of essential elements of a fair criminal trial identified by Zacharias include: grossly unequal resources between the prosecution and the defense; biased and overactive tribunals; decisions based on nonevidentiary considerations; improper jury selection procedures; improper denials of access to witnesses; and improper opening and closing arguments. See *id.* at 74, 85, 88, 90, 95.

⁸¹ See *id.* at 72.

⁸² See Zacharias, *supra* note 4, at 53.

⁸³ Report by the District of Columbia Bar Special Committee of Government Lawyers and the Model Rules of Professional Conduct [hereinafter D.C. Bar Report], reprinted in THE WASH. LAWYER, Sept.-Oct. 1988, at 53.

⁸⁴ Cramton, *supra* note 41, at 299 (quoting D.C. Bar Report, *supra* note 83, at 10).

the "notion that government attorneys represent some 'transcendental public interest' is incoherent."⁸⁵ Similarly, Professors William Josephson and Russell Pearce contend "that for a government lawyer, the 'public interest or community at large . . . is a vague and meaningless abstraction. It is impossible to represent the community which is always divided.'"⁸⁶ Following up on this view, Professor Catherine Lanctot asks, if the government attorney is to represent "the people" or the public interest, which "people" does the attorney actually represent?⁸⁷ Is it those people who would not want their tax dollars wasted on litigation that is unlikely to be successful?⁸⁸ Or is it the people who voted for the present administration and would presumably support the agency's position on the matter in issue?⁸⁹

The argument that the public interest serving position is incoherent can also be made in the context of civil enforcement proceedings initiated by government lawyers. This version of the unintelligibility argument can be made using the terminology of public choice theory. Simply stated, public choice theory rejects the notion of an overriding public interest. Individual interests are not viewed as being amenable to aggregation in any fair sense.⁹⁰ At most, what occurs is the aggregation of collections of similar individual interests into "interest groups" or "factions" (to use Madison's term).⁹¹ Within our governmental system, policymaking (including the making of policy through civil enforcement proceedings) is subject to "capture" by such interest groups, resulting in policies that favor the minority of the population represented by the particular interest groups, rather than the majority of the population, or the broader public interest, which is shut out of the policymaking process.⁹² For example, it has been argued that the Federal Trade Commission has been "captured" by the business interests it regulates, resulting in antitrust enforcement policies that unduly favor producers over consumers and the

⁸⁵ Geoffrey Miller, *Government Lawyers*, *supra* note 5, at 1294.

⁸⁶ Josephson & Pearce, *supra* note 28, at 564 (quoting Douglas Sale, *The City Attorney's Relationship with Council and Staff: Determining Who is the Client in Day-to-Day Affairs*, 11 *CURRENT MUN. PROBS.* 10, 11 (1984)).

⁸⁷ See Lanctot, *supra* note 37, at 1005.

⁸⁸ See *id.*

⁸⁹ See *id.*

⁹⁰ See Frank Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 *HARV. L. REV.* 1328, 1339 (1994) (citing KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 2-6, 59-60, 89 (2d ed. 1963)).

⁹¹ See *id.* at 1333.

⁹² See *id.* at 1341.

public interest.⁹³ It has also been argued that the meat and poultry industries have captured the United States Department of Agriculture and the Food Safety Inspection Service by preventing the enactment of meat and poultry inspection regulations,⁹⁴ and that certain Environmental Protection Agency contractors have captured the Superfund program.⁹⁵

B. *Government Attorneys Should Not Attempt to Serve the Public Interest*

Even if we assume for the moment that government attorneys are capable of identifying and pursuing a coherent public interest, a number of commentators argue that government attorneys should not attempt to do so. This argument takes different forms in the context of criminal and civil government litigation. In the context of criminal prosecutions, the normative argument against the public interest serving or "do justice" role for public prosecutors is based largely on the adversarial system. This argument focuses on the fact that, whether appropriately or inappropriately, defense attorneys will use virtually all means available to secure acquittals for their clients.⁹⁶ On the other hand, prosecutors face a number of systemic impediments to their ability to obtain convictions. Of course, the greatest such impediment is the requirement in criminal cases that prosecutors prove the defendant's guilt beyond a reasonable doubt.⁹⁷ Additional impediments include the requirements that criminal charges be based on probable cause, that defendants be informed of their right to counsel, that prosecutors not seek to obtain waivers of important pretrial rights from unrepresented defendants, and that prosecutors disclose exculpatory evidence or evidence that would tend to mitigate punishment of the defendant.⁹⁸ The normative argument

⁹³ See, e.g., *id.* at 1342.

⁹⁴ See generally Dion Casey, *Agency Capture: The United States Department of Agriculture's Struggle to Pass Food Safety Regulations*, 7 KAN. J.L. & PUB. POL'Y 142 (1998).

⁹⁵ See generally Bradford C. Mank, *Superfund Contractors and Agency Capture*, 2 N.Y.U. ENVTL. L.J. 34 (1993).

⁹⁶ See generally William Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703 (1993) (endorsing some, but not all, examples of what the author refers to as aggressive defense). See also Green, *Seek Justice*, *supra* note 16, at 618.

⁹⁷ See *In re Winship*, 397 U.S. 358, 364 (1970) (stating: "we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").

⁹⁸ See Green, *Seek Justice*, *supra* note 16, at 615-16 & nn.29-36. On the other hand, it is equally clear that prosecutors enjoy a number of systemic advantages that tend to counteract the advantages enjoyed by defendants in criminal litigation. Such prosecutorial advantages include the ability to conduct grand jury and police investigations, unique prestige

against the public interest serving role for prosecutors contends that in order to preserve balance in our adversarial system and to ensure that guilty defendants are in fact convicted, prosecutors must "fight fire with fire" and counter aggressive defense tactics with vigorous efforts to secure convictions.⁹⁹ To such commentators, the public interest serving role for prosecutors unduly tilts the playing field in favor of aggressive defendants.

The argument that lawyers for government agencies ought not attempt to serve the public interest is largely based on notions of democratic accountability and separation of powers. With regard to the former, it has been argued that because attorneys who represent government entities in litigation are generally appointed it would be anti-democratic for such attorneys to advance their own determinations of how the public interest will best be served in the context of a given case over those of other executive branch officials who are also involved in the case, and who are more democratically accountable to the electorate.¹⁰⁰ With regard to separation of powers issues, it has been argued that the government attorney who follows the public interest serving role usurps the authority of the legislative and judicial branches of government.¹⁰¹ For example, the government attorney who refuses to pursue litigation on grounds that the agency's position is contrary to prior court decisions usurps the role of the judicial branch.¹⁰² Similarly, the attorney who refuses to defend agency action on grounds that the agency has exceeded the scope of its authority usurps the legislative function of delegating authority to the executive branch agency to act in the first place.¹⁰³

A final argument why government attorneys should not attempt to serve the public interest can be illustrated in the context of civil enforcement proceedings. Simply stated, efforts by government attorneys to serve the public interest may backfire. Peter Strauss offers

and symbolic power with judges and jurors, and great advantages in available resources (at least when compared to the typical criminal defendant). See Zacharias, *supra* note 4, at 59; see also Green, *Seek Justice*, *supra* note 16, at 625-26.

⁹⁹ There is certainly evidence that as a descriptive matter, many prosecutors in fact believe that they must abandon the public interest serving role and do whatever possible to secure convictions, in order to maintain balance in the criminal justice system. See generally Dr. George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 Sw. U. L. Rev. 98 (1975) (empirical study showing tendency of prosecutors to view conviction as the ultimate end to be pursued).

¹⁰⁰ See, e.g., Josephson & Pearce, *supra* note 28, at 565; Lanctot, *supra* note 37, at 985.

¹⁰¹ See Cranton, *supra* note 41, at 298.

¹⁰² See Miller, *Government Lawyers*, *supra* note 5, at 1296.

¹⁰³ See *id.*

an example from the extensive litigation regarding the transportation of radioactive waste from the Brookhaven National Laboratory on Long Island through New York City during the 1970s and 1980s.¹⁰⁴ New York City, through its Health Code, had enacted an ordinance that would have prohibited the transportation of radioactive waste through the City from the National Laboratory.¹⁰⁵ According to Strauss, who served as the Nuclear Regulatory Commission's General Counsel at the time, this action both obstructed interstate commerce and threatened the existence of a national laboratory.¹⁰⁶ Thus, there was at least some basis for direct judicial relief.¹⁰⁷ On the other hand, the Hazardous Materials Transportation Act had granted the Department of Transportation the authority to issue regulations regarding the transportation of hazardous materials such as those at issue in the dispute, as well as the authority to preempt any conflicting state or local regulations.¹⁰⁸ The Department, although it had not yet acted pursuant to its statutory authority, was in the process of doing so.¹⁰⁹ Thus, allowing the statutorily-created administrative process to run its course existed as an alternative to a direct judicial enforcement action against the New York City rules. According to Strauss, the decision whether to file suit fell into the hands of a relatively inexperienced Assistant United States Attorney in the United States Attorney's office for the Southern District of New York.¹¹⁰ Despite considerable public and political support in favor of the City's policies, the AUSA decided to sue and, not surprisingly, lost.¹¹¹ The litigation continued for more than a dozen years, without the federal government gaining further ground.¹¹²

C. Government Attorneys Will Not Serve the Public Interest

Even if government attorneys can and should work to serve the public interest, a number of commentators have argued that govern-

¹⁰⁴ See Strauss, *Internal Relations*, *supra* note 5, at 156-57. Reported decisions in this saga include: *New York v. United States Dept. of Trans.*, 539 F. Supp. 1237 (S.D.N.Y. 1982), *rev'd*, 715 F.2d 732 (2d Cir. 1983), *cert. denied and appeal dismissed*, 465 U.S. 1055 (1984); and *New York v. United States Dept. of Trans.*, 700 F. Supp. 1294 (S.D.N.Y. 1988).

¹⁰⁵ See Strauss, *Internal Relations*, *supra* note 5, at 156.

¹⁰⁶ See *id.*

¹⁰⁷ See *id.*

¹⁰⁸ See *id.*

¹⁰⁹ See *id.*

¹¹⁰ See Strauss, *Internal Relations*, *supra* note 5, at 157.

¹¹¹ See *id.*

¹¹² See *id.*

ment lawyers will not do so.¹¹³ Such arguments are largely based on rational choice and other economic theories, and they contend that government attorneys will act to pursue their own individual self interests, which often conflict with—rather than advance—the public interest. In the context of criminal prosecutions, the argument has frequently been made that prosecutors seek to advance their own careers at the expense of the “do justice” ideal.¹¹⁴ More than thirty years ago, in a seminal article criticizing the practice of plea bargaining, Albert Alschuler argued that the practice of plea bargaining serves the individual interests of prosecutors rather than the interests of justice.¹¹⁵

James Eisenstein, in his study of United States Attorneys’ offices, states that “the overwhelming majority of Assistant United States Attorneys seek the position not for the inherent rewards of public service, but for the boost it can give subsequent careers.”¹¹⁶ One author offers as a particularly egregious example of this practice then-United States Attorney for the Southern District of New York Rudolph Giuliani’s insider trading prosecutions of high-flying Wall Street financiers Michael Miliken and Ivan Boesky.¹¹⁷ Daniel Fischel contends that Giuliani went after Miliken and Boesky to curry favor with more traditional Wall Street powers who resented having been routed by Miliken and Boesky.¹¹⁸ In turn, these Wall Street powers allegedly supported Giuliani in his successful campaign to become Mayor of the City of New York.¹¹⁹

Even at a less rarefied level, the argument has been made that lawyers in local district attorney’s offices will work to advance their personal interests rather than the public interest.¹²⁰ For example, it

¹¹³ See, e.g., Macey & Miller, *supra* note 8, at 1115–17 (offering several reasons why government agency attorneys will advance their own personal interests rather than the public interest).

¹¹⁴ See, e.g., Albert Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 105 (1968–69); Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 966 (1997); Stephen J. Schulhofer, *Criminal Justice Discretion in a Regulation System*, 17 J. LEGAL STUD. 43, 50–52 (1988).

¹¹⁵ See Alschuler, *supra* note 114, at 105.

¹¹⁶ JAMES EISENSTEIN, *COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS* 174 (1978).

¹¹⁷ See DANIEL R. FISCHER, *PAYBACK* 98, 111–12 (1995).

¹¹⁸ See Daniel M. Kahan, *Reinterpreting Interpretive Criminal-Lawmaking Power Within the Executive Branch*, 61 LAW & CONTEMP. PROBS. 47, 52 (1998).

¹¹⁹ See *id.*

¹²⁰ See, e.g., Alschuler, *supra* note 114, at 106; Richman, *supra* note 114, at 966; Schulhofer, *supra* note 114, at 50–52.

has been argued that because advancement and promotions within such offices are often based upon conviction rates, prosecutors will seek to maximize convictions rather than "do justice."¹²¹ Similarly, elections for prosecutorial positions have been said to involve discussion of conviction rates so that candidates for prosecutorial offices will also seek to maximize convictions rather than do justice.¹²²

The argument that government lawyers will not work to advance the public interest has also been made in the context of attorneys who represent government agencies.¹²³ In their article *Reflections on Professional Responsibility in a Regulatory State*, Jonathan Macey and Geoffrey Miller offer several reasons why government agency attorneys will advance their own personal interests rather than the public interest.¹²⁴ First, because market forces do not operate on government attorneys the way they do on attorneys in the private sector, government agency attorneys are likely to engage in inefficient activities such as being overly litigious and engaging in career building.¹²⁵ Young lawyers, who join the government in an effort to gain valuable experience, are more likely to litigate cases than would be the case in the private sector, where easily identified clients and other market constraints would prevent them from doing so.¹²⁶ Furthermore, agency attorneys who desire to go on to careers in the private sector are likely to be "captured" by the law firms that appear before them, and offer unduly favorable treatment to such firms and their clients at the expense of the public interest.¹²⁷ Additionally, consistent with theories of "turf-building" by agencies, Macey and Miller argue that government attorneys will work to expand the power of the agencies they work within *vis-à-vis* other governmental entities, and that government attorneys will unduly favor legal solutions to public problems so as to enhance their own importance within the agencies in which they work.¹²⁸ Of course, neither of these activities is likely to serve the public interest.

Finally, the argument that government attorneys will not work to pursue the public interest has also been made in the context of civil

¹²¹ See Alschuler, *supra* note 114, at 106; Richman, *supra* note 114, at 966; Schulhoffer, *supra* note 114, at 50-52.

¹²² Richman, *supra* note 114, at 966.

¹²³ See Macey & Miller, *supra* note 8, at 1115-17.

¹²⁴ See *id.*

¹²⁵ See *id.* at 1115-16.

¹²⁶ See *id.* at 1117.

¹²⁷ See *id.*

¹²⁸ See Macey & Miller, *supra* note 8, at 1119.

enforcement actions.¹²⁹ In his recent article, *Public v. Private Enforcement of Civil Rights: The Case of Housing and Employment*, Michael Selmi compared the results attained by government and private attorneys in cases brought under fair housing and anti-employment discrimination legislation.¹³⁰ Based on an empirical analysis of the results in numerous cases brought within these categories, Selmi contends that while government attorneys generally win a higher percentage of the cases they bring in these areas, private attorneys tend to obtain higher damage awards in the cases that they do win.¹³¹ This leads Selmi to conclude that at least in the context of civil rights enforcement, government attorneys bring small claims in insignificant areas of the law, whereas their private sector counterparts bring more "cutting edge" and large-scale cases.¹³²

Selmi accounts for these differences, at least in part, in terms of government attorneys placing their own personal interests ahead of the public interest in strong civil rights enforcement.¹³³ For example, Selmi claims that attorneys who are interested in becoming career government attorneys seek to avoid controversial cases, and instead seek cases "to which the government would not likely object or about which the government is unlikely to come under political scrutiny or pressure."¹³⁴ This usually means small-scale and uncomplicated cases.¹³⁵ On the other hand, attorneys who go to work for the government primarily to obtain experience with the intent of moving into private practice after a few years, will similarly prefer smaller cases because they are more likely to be given substantial responsibility with regard to such cases than with regard to larger-scale and more complicated cases.¹³⁶ In short, Selmi argues that the personal priorities of individual government attorneys cause them to be less effective in serving the public interest implicated by civil rights laws than attorneys in the private sector are.¹³⁷

¹²⁹ See, e.g., Michael Selmi, *Public v. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1404 (1998).

¹³⁰ *Id.*

¹³¹ See *id.* at 1419-20, 1434.

¹³² See *id.* at 1404.

¹³³ Other reasons that Selmi gives for the differences in litigation outcomes include lack of incentives for government attorneys to pursue large damage awards that they will not personally profit from and frustration with government work that will cause "true believers" in civil rights to leave government employment. See *id.* at 1443-44.

¹³⁴ See Selmi, *supra* note 129, at 1444.

¹³⁵ See *id.*

¹³⁶ See *id.* at 1445.

¹³⁷ See *id.* at 1443-45.

D. Public Lawyers, Private Values

As can be seen from the above discussion, the scholarly critique of the public interest serving position has not been offered by an organized group of scholars and encompasses a variety of approaches and theoretical orientations. However, there are certain commonalities among the critiques. For purposes of discussion, I will label these commonalities in terms of a primacy of private over public values.¹³⁸ By using the term private values, I simply refer to value schemes that place the individual at the center of the scheme.¹³⁹ Such schemes tend to view persons as being "individualistic, self-interested and in a state of undeclared war [with one another]."¹⁴⁰ By contrast, public value schemes, as that term is used here, place persons acting together at the center of the scheme.¹⁴¹ Such schemes tend to view

¹³⁸ In using this terminology, I do not intend to make any grand statements as to the viability of the public/private distinction. I am well aware of the longstanding, voluminous, and often highly effective critique that has been launched regarding the public/private distinction. It has been nearly two decades since the Pennsylvania Law Review published its influential symposium edition regarding the distinction, see Symposium, *The Public/Private Distinction*, 130 U. PA. L. REV. 1289-1602 (1982), in which Professor Duncan Kennedy artfully noted that "[w]hen people hold a symposium about a distinction, it seems almost certain that they feel it is no longer a success. Either people can't tell how to divide situations up between categories, or it no longer seems to make a difference on which side a situation falls." Duncan Kennedy, *The Stages of Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1349 (1982). Since that time, additional writings have served to further undermine the distinction. See generally Alan Freeman & Elizabeth Mensch, *The Public/Private Distinction in American Law and Life*, 36 BUFF. L. REV. 237 (1987); Donald Pongrace, *A Symposium of Critical Legal Study: Stereotypification of the Fourth Amendment's Private/Public Distinction: An Opportunity for Clarity*, 34 AM. U. L. REV. 1191 (1985). Nonetheless, even if the distinction no longer holds at its margins, or even well inside of them, the distinction provides a useful descriptive device for analyzing some of the important differences between the critiques of the public interest serving position discussed previously, and the defense of the public interest serving position that will be discussed. Cf. generally Ruth Gavison, *The Public/Private Distinction in Feminism*, 45 STAN. L. REV. 1 (1992) (suggesting that complete rejection of the public/private distinction may be counterproductive).

¹³⁹ It is important to be precise about what one has in mind when using the public/private terminology. Karl Klare identified at least four different sets of connotations that can be associated with the terms public and private. See Karl Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1358 & n.2 (1982). These are: (1) open versus intimate; (2) the realms of work and government versus the realms of social and family life; (3) personal versus that which concerns others; and (4) the state versus civil society. *Id.* Ruth Gavison, in turn, also identifies four senses in which the terms can be used: (1) accessible versus inaccessible; (2) freedom versus interference; (3) individual versus society; and (4) a complex clusters of senses combining the previous three in various ways. Gavison, *supra* note 138, at 6. Of all of these formulations, Gavison's third sense is probably closest to the usage here.

¹⁴⁰ See Pongrace, *supra* note 138, at 1194 & n.16.

¹⁴¹ See *id.*

persons as essentially cooperative and communal, focus on other-regarding rather than self-regarding activities, and contend that individual preferences can be transformed through engagement with others.¹⁴²

For example, with regard to the claim that prosecutors cannot serve the public interest, Professor Zacharias' rejection of the "do justice" maxim and his advocacy for the "assure adequate adversarial process" standard,¹⁴³ are based upon his acceptance of adversarial process as the fundamental principle underlying the American trial system.¹⁴⁴ While some have argued that the greatest value served by the adversarial system is its truth-producing function,¹⁴⁵ the more persuasive arguments in favor of the adversarial system have to do with its ability to protect the individual rights and dignity of the accused.¹⁴⁶ The "fight fire with fire" argument against government prosecutors attempting to serve the public interest similarly takes an adversarial approach in advocating for the prosecutor's need to counter aggressive defense tactics with similarly aggressive tactics in order to have an adequate chance to secure convictions.¹⁴⁷ Thus, arguments against the public interest serving role for criminal prosecutors that are based on the adversary ethic display a primacy of private over public values.

With regard to the claim that civil government lawyers cannot serve the public interest, the very notion that there can be collective interests—as opposed to individual interests—is challenged.¹⁴⁸ At most, public choice theory is willing to acknowledge certain aggregations of individual interests, although there is no acknowledgment that the process of aggregation will in fact have an effect on the interests being aggregated.¹⁴⁹ This argument is taken a step further in the context of the claim that civil government attorneys should not at-

¹⁴² See *id.* at 1194 & n.15.

¹⁴³ See *supra* notes 74–82 and accompanying text.

¹⁴⁴ See Zacharias, *supra* note 4, at 53–56.

¹⁴⁵ See, e.g., DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 68 (1988); Zacharias, *supra* note 4, at 54.

¹⁴⁶ See, e.g., GEOFFREY HAZARD, ETHICS IN THE PRACTICE OF LAW 129 (1978); LUBAN, *supra* note 145, at 74, 85; Zacharias, *supra* note 4, at 55. Note that Luban ultimately rejects both the truth seeking and protection of individual rights and dignity justifications for the adversary system, but nonetheless argues that the adversary system is justified, because it is not significantly worse than any other system designed to determine truth and protect individual rights, and therefore, the costs of switching to another system would not be warranted. See LUBAN, *supra* note 145, at 92.

¹⁴⁷ See *supra* notes 96–99 and accompanying text.

¹⁴⁸ See *supra* notes 83–89 and accompanying text.

¹⁴⁹ See *supra* notes 90–95 and accompanying text.

tempt to serve the public interest. If individual interests are not amenable to mediation through governmental processes, then the only democratically legitimate means of governmental decision making is the plebiscite. However, because it would be impossible to hold a plebiscite regarding every decision that must be made in the context of government litigation, the next best solution is to move responsibility for those decisions to those persons who are most subject to control by plebiscite—elected officials.

Finally, with regard to the argument that both criminal and civil government attorneys will not work to serve the public interest, rational choice theory offers the starkest example of the primacy of private values. Because government attorneys, along with everyone else, will inevitably and necessarily work to pursue their own individual self interests, we cannot rely on them to serve the public interest even if we thought it were a good thing for them to do.

III. IN DEFENSE OF THE PUBLIC INTEREST SERVING ROLE

Of course, the dispute over whether there are such things as collective interests, as opposed to individual interests, is unlikely to be resolved here. However, it seems that if there is *any* context in which the notion of collective interests is viable, it ought to be in the context of democratic governance. Almost by definition, democratic governmental action necessarily involves a transformation of claims of individual interest to claims of public entitlement.¹⁵⁰ And if that is so, an account of the appropriate professional role and responsibilities for government attorneys would require a greater concern for public values than the critiques of the public interest serving role seem to provide.

Additionally, there is reason to doubt the wisdom of importing whole cloth, into the context of government lawyering, the conception of attorney professional role and responsibility that has been developed in the context of representation of individual persons. As I have discussed in more detail elsewhere, the primacy of private values that exists within traditional conceptions of attorney professional role and responsibility when representing individual clients is based upon "notions of individual 'dignity, privacy and autonomy.'"¹⁵¹ However,

¹⁵⁰ See Hanna F. Pitkin, *Justice: On Relating Private and Public*, 9 POL. THEORY 327, 344 (1981); see also ANTHONY KRONMAN, *THE LOST LAWYER* 28–34 (1994).

¹⁵¹ Berenson, *supra* note 36, at 41–42 (quoting Naomi R. Cahn, *Inconsistent Stories*, 81 GEO. L.J. 2475, 2497 n.98 (1993) (quoting Deborah L. Rhode, *Ethical Perspectives on Legal*

such notions have little place where the represented entity is not an individual person.¹⁵² And where the represented entity is the government, which is in at least one sense nothing more than the representative of *all* of the people, the supplanting of public values with private ones seems particularly inappropriate.

Finally, responses are available to each of the critiques of the public interest serving role discussed in Part II. Some of these responses are presented below. In reviewing these responses, the notion of burden of proof should be kept in mind. Part I of this article summarized the longstanding and widespread acceptance of the public interest serving position by American lawyers, judges, scholars, and public officials. Unless we are prepared to accept that all of these persons are seriously misguided, then the burden ought to be on those who argue against acceptance of the public interest serving role. As will be demonstrated below, the above-discussed critics have failed to carry this burden.

A. *Lawyers Can Serve the Public Interest as It Relates to Their Role as Government Attorneys*

Certainly, it is unlikely that government lawyers will be able to identify some sort of overarching, all-purpose definition of the public interest that will apply generally across the full range of human affairs. Indeed, there is no reason to believe that lawyers will be more successful than philosophers, who are trained to address such momentous questions, in bridging centuries of disagreement regarding identification of "the good" or the appropriate ends of human endeavors.¹⁵³ However, it is not necessary for lawyers to be able to identify such a grand, overarching conception of the public interest in order for them to serve the public interest in their role as government attorneys. Rather, lawyers only need to be able to identify the public interest in regard to the particular legal problems faced by them in their work as government attorneys.

Practice, 37 STAN. L. REV. 589, 605 (1985) [hereinafter Rhode, *Ethical Perspectives*]]; see generally Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 4 AM. B. FOUND. RES. J. 613 (1986).

¹⁵² See *infra* note 252 and accompanying text.

¹⁵³ See generally ALASDAIR MACINTYRE, *AFTER VIRTUE* (1981). See also W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1, 95-100 (1999) (noting that plurality of values affects questions of legal ethics as well broader questions of moral philosophy).

Take, as an example, the prosecutor's duty as set forth by the "do justice" standard. In his article supporting the "do justice" standard as an appropriate guide for the professional conduct of criminal prosecutors, Bruce Green contends that the "do justice" standard in fact comprises a series of more specific objectives, which are largely implicit in our constitutional and statutory scheme and follow from our notions "of what it means for the sovereign to govern fairly."¹⁵⁴ Green states:

Most obviously, these [objectives] include enforcing the criminal law by convicting and punishing some (but not all) of those who commit crimes; avoiding punishment of those who are innocent of criminal wrongdoing (a goal which, as reflected in the "presumption of innocence," is of paramount importance); and affording the accused, and others, a lawful, fair process. Additionally, most would agree, the sovereign has at least two other aims. One is to treat individuals with proportionality; that is, to ensure that individuals are not to be punished more harshly than deserved. The other is to treat lawbreakers with rough equality; that is similarly situated individuals should generally be treated in roughly the same way.¹⁵⁵

Green acknowledges that these various objectives will sometimes be in tension.¹⁵⁶ However, he contends that prosecutors are capable of resolving such tensions in the context of individual cases in order to carry out the sovereign's objectives.¹⁵⁷

As suggested above, Green locates the source of the prosecutor's duty to seek justice in the prosecutor's role as representative of the

¹⁵⁴ See Green, *Seek Justice*, *supra* note 16, at 634.

¹⁵⁵ *Id.* Of course, these still broad objectives have been translated into a series of more specific rules governing appropriate prosecutorial practice, including the requirements that prosecutors: refrain from prosecuting charges that the prosecutor knows are not supported by probable cause; make efforts to assure that unrepresented criminal defendants are aware of the right to counsel and that opportunities to obtain counsel are made available; and do not seek to obtain waivers of important pre-trial rights from unrepresented defendants. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8(a)-(c). Prosecutors must similarly disclose evidence that tends to exculpate the defendant or mitigate the defendant's culpability. See *id.* Rule 3.8(d); see also Green, *Seek Justice*, *supra* note 16, at 615-16 & nn.33-36.

¹⁵⁶ See Green, *Seek Justice*, *supra* note 16, at 634.

¹⁵⁷ See *id.*; accord Wendel, *supra* note 153, at 119 (arguing that conflicts among plural values in questions of legal ethics can be resolved through the exercise of professional judgment and the method of casuistry).

sovereign "—in this country, typically a state or the United States."¹⁵⁸ By contrast, Green contends that Professor Zacharias erroneously locates the source of the prosecutor's special responsibilities in the advantage in power enjoyed by prosecutors relative to defendants.¹⁵⁹ This mistake leads Zacharias to adopt the "assure adequate adversarial process" standard discussed previously.¹⁶⁰ Green effectively argues that a role-based conception of the prosecutor's professional responsibilities is more consistent with historical and contemporary understandings of prosecutorial responsibilities than the power-based conception.¹⁶¹ Moreover, Green persuasively argues that the "assure adequate adversarial process" standard that follows from the power-based conception allows for plainly unacceptable results; for example, it could allow for the conviction of an innocent defendant so long as fair procedures have been followed.¹⁶² By contrast, Green's role-based conception of the "do justice" standard would not tolerate the substantively unfair result of conviction of an actually innocent person, regardless of the fairness of the procedures used to arrive at such a result.¹⁶³

From the perspective of this article, what is also laudable about Green's defense of the "do justice" standard is its focus on the exercise of public authority by criminal prosecutors. Because of this, Green similarly focuses on the public values that are at the core of our criminal justice system.¹⁶⁴ By contrast, in focusing on the adversarial aspect of our justice system, Zacharias necessarily focuses on values of the individual that underlie the system, such as individual rights¹⁶⁵ and dignity.¹⁶⁶ While such values may be an appropriate basis for a conception of the appropriate professional role for attorneys who serve individual defendants in the criminal justice system,¹⁶⁷ they are not an adequate basis for a conception of the appropriate profes-

¹⁵⁸ Green, *Seek Justice*, *supra* note 16, at 633.

¹⁵⁹ *See id.* at 629.

¹⁶⁰ *See supra* notes 78–82 and accompanying text.

¹⁶¹ *See* Green, *Seek Justice*, *supra* note 16, at 634–36.

¹⁶² *See id.* at 635.

¹⁶³ *See id.* at 638–41.

¹⁶⁴ *See supra* note 138 and accompanying text.

¹⁶⁵ *See* LUBAN, *supra* note 145, at 74.

¹⁶⁶ *See id.* at 85; Simon, *The Ethics of Criminal Defense*, *supra* note 96, at 1712.

¹⁶⁷ This fact may account for the generally accepted notions of the vastly different professional roles accorded to criminal prosecutors and defense attorneys. *See, e.g.,* LUBAN, *supra* note 145, at 58–66; Rhode, *Ethical Perspectives*, *supra* note 151, at 605; Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. Q. 1, 12 (1975).

sional role for attorneys for *all* of the people, in the form of the sovereign.¹⁶⁸

Not only can the "do justice" standard serve as a basis for determining the appropriate professional role for public prosecutors despite criticisms regarding its vagueness, but the "do justice" standard can also serve as an important source for determining the appropriate professional role for government lawyers in civil litigation contexts. Indeed, William Simon has gone so far as to contend that the "do justice" standard can provide an appropriate basis for determining the proper professional role for public and private civil lawyers alike.¹⁶⁹ In response to the indeterminacy critique, Simon contends that most lawyers firmly believe that they are able to make grounded judgments about notions of legality and justice.¹⁷⁰ The fact that lawyers may not always agree about such judgments does not render them illegitimate or arbitrary, as the above-described criticism of the "do justice" standard suggests. Rather, even where lawyers disagree as to the outcome of such judgments, such disagreements are generally ascribed to incorrect application of the norms and practices that ground legal judgment, as opposed to an arbitrary application of subjective preferences.¹⁷¹

Within Simon's model of legal ethics, attempts by an attorney to identify justice or legal merit or the public good in legal decision making are based on the familiar tools of legal practice, such as interpreting and applying judicial decisions, statutory and constitutional interpretation, and understanding and applying the broader norms of legal culture.¹⁷² This contrasts with a model that calls upon lawyers to base judgments of justice and merit on broader philosophical principles.¹⁷³ The former relies on the tools that are the stock and trade of lawyers, whereas the latter perhaps relies upon the skills of the moral

¹⁶⁸ Hence the practice of referring to the "plaintiff" in criminal cases as "the people" of the state of x.

¹⁶⁹ See generally WILLIAM SIMON, *THE PRACTICE OF JUSTICE* (1998) [hereinafter SIMON, *THE PRACTICE*]; William Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988) [hereinafter Simon, *Ethical Discretion*]. Simon's complete formulation is that "[l]awyers should take actions that, considering the relevant circumstances of the particular case, seem likely to promote justice." SIMON, *THE PRACTICE*, *supra*, at 138.

¹⁷⁰ See Simon, *Ethical Discretion*, *supra* note 169, at 1119.

¹⁷¹ See *id.*

¹⁷² See SIMON, *THE PRACTICE*, *supra* note 169, at 18.

¹⁷³ The best known and most articulate proponent of the latter view is David Luban. See generally LUBAN, *supra* note 145.

philosopher—skills which lawyers are not trained in and are ill-equipped to employ.¹⁷⁴

However, it is not enough to rely generally on attorneys' capacity to identify the public interest in determining whether government attorneys can serve the public interest. One must also account for the "government" part of the "government attorney" role. Fortunately, there are also established theories of public administration and bureaucratic ethics that identify ways in which civil servants and other government employees can serve the public interest. Perhaps the best known and most respected of such theorists is Dennis Thompson.¹⁷⁵ Thompson advances a participatory model of bureaucracy as the best means to reconcile the necessity of bureaucracy to modern government and democratic values.¹⁷⁶ It is only through the widespread participation of citizens in the important decisions of government that such decisions begin to address the actual needs of citizens, as well as provide for democratic legitimacy for such decisions.¹⁷⁷

The participatory model of bureaucracy envisions a variety of techniques to be employed to involve citizens in the administrative decision making process. Such techniques include public opinion polling, notice, comment, and hearing provisions relating to administrative regulations and even citizen representation on governmental committees.¹⁷⁸ Of course, such techniques are not often employed by government attorneys in trying to determine how the public interest will best be served by specific decisions that such officials must make

¹⁷⁴ See SIMON, *THE PRACTICE*, *supra* note 169, at 18.

¹⁷⁵ See generally, e.g., AMY GUTMANN & DENNIS F. THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996); DENNIS F. THOMPSON, *ETHICS IN CONGRESS* (1995); DENNIS F. THOMPSON, *POLITICAL ETHICS AND PUBLIC OFFICE* (1987).

¹⁷⁶ Dennis F. Thompson, *Bureaucracy and Democracy* [hereinafter Thompson, *Bureaucracy*], in *DEMOCRATIC THEORY AND PRACTICE* 235, 237-50 (Graeme Duncan ed., 1983). Thompson presents the participatory model as one of four dominant theories that attempt to reconcile bureaucratic and democratic values. The other three he refers to as the hierarchical, professionalist, and pluralist models. Under the hierarchical model, most closely associated with Max Weber, bureaucrats are responsible for executing the policies dictated to them by their politically accountable superior officials. See *id.* at 237-41. Under the professional model, through expertise and education bureaucrats apply the skills and values necessary to the proper pursuit of the public good through the large measure of discretion afforded to them in bureaucratic practice. See *id.* at 241-44. Finally, under the pluralist model, bureaucrats respond to interested individuals and groups who are afforded opportunities to influence bureaucratic decision making. See *id.* at 244-45. Thompson ultimately rejects each of these models as failing to provide adequately for democratic responsibility in the conduct of bureaucracy. See *id.* at 246-47.

¹⁷⁷ See *id.* at 246-47.

¹⁷⁸ See *id.*

in the course of their work. Nonetheless, it is possible to envision how such techniques might be employed by governmental legal bureaucracies in determining how to best serve the public interest. Indeed, a number of legal scholars have commented on how such techniques might be profitably employed by lawyers, albeit in other contexts. For example, Deborah Rhode has suggested that lawyers use public opinion polling to discover the interests of class members in class action litigation.¹⁷⁹ Likewise, Lawrence Grossberg has suggested electing representative class members to a governing committee that will help make important decisions regarding class action litigation.¹⁸⁰ Finally, William Rubenstein has suggested a variety of techniques for encouraging involvement by class members in decision making regarding class action litigation.¹⁸¹ Similar techniques could be employed by government attorneys to encourage citizen participation in their decisions, so as to improve the ability of such decisions to serve the public interest.

Critics of the participatory model of bureaucracy contend that to the extent it has been employed, it has only fostered participation in administrative decision making by middle class and elite persons and interests.¹⁸² To the extent this is true, the participatory model risks converging with the pluralist model, in which representatives of highly organized elites (interest groups) tend to dominate the opportunities for participation in administrative decision making.¹⁸³ While Thompson and other supporters of the participatory model provide a variety of approaches intended to encourage a more egalitarian form of participation in administrative decision making, there is reason to be skeptical of the effectiveness of such approaches.

However, one strain of the professional model of bureaucracy provides a promising avenue to address the problem of unequal access through the participatory model.¹⁸⁴ Proponents of the "new public administration" school of bureaucratic governance suggest that public officials ought to pay particular attention to serving the needs of disadvantaged members of society, who may not be able to benefit

¹⁷⁹ See Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1256 (1982).

¹⁸⁰ See Lawrence M. Grossberg, *Class Actions and Client-Centered Decisionmaking*, 40 SYRACUSE L. REV. 709, 768-69, 778 (1989).

¹⁸¹ See generally William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623 (1997).

¹⁸² See Thompson, *Bureaucracy*, *supra* note 176, at 247.

¹⁸³ See *id.* at 245.

¹⁸⁴ See *supra* note 176.

fully from the opportunities for access presented by the participatory model.¹⁸⁵ Proponents of the new public administration argue for the introduction of egalitarian principles into administrative decision making. They do so based largely on the Rawlsian notion that just policies must, at a minimum, benefit the least well off in society.¹⁸⁶

Critics of the new public administration argue that bureaucrats are incapable of determining the interests of disadvantaged members of society for purposes of administrative decision making.¹⁸⁷ They argue that the result will be the implementation of individual bureaucrat's personal policy preferences.¹⁸⁸ Of course, this argument is virtually identical to the argument addressed above that lawyers are incapable of defining terms such as justice and the public interest in the context of their legal work. Just as lawyers, using the standard tools of legal analysis, are capable of making grounded and legitimate judgments regarding questions of justice and legal merit,¹⁸⁹ so too are government officials capable of making grounded decisions regarding the public interest in policy decisions through use of their training in and the methods of public administration. At a minimum, through a combination of the justice-seeking approach to legal analysis, the new public administration approach to egalitarian administrative decision making, and employment of the techniques of the participatory model of bureaucracy, I contend that government lawyers can make legitimate determinations of how the public interest will be served by particular decisions made within the context of particular governmental legal problems.

As discussed above, the "do justice" standard from the criminal context has in fact been broken down into a series of general principles and an even more specific set of rules governing appropriate prosecutorial conduct.¹⁹⁰ Similar steps can be taken in the context of civil governmental litigation in order to ensure that efforts by government attorneys to serve the public interest are neither arbitrary, inconsistent, nor merely expressive of the personal policy preferences of the individual lawyers involved. For example, in the context of enforcement of federal securities laws, a former commissioner of the

¹⁸⁵ See Thompson, *Bureaucracy*, *supra* note 176, at 243-44.

¹⁸⁶ See generally, e.g., H. GEORGE FREDERICKSON, *THE SPIRIT OF PUBLIC ADMINISTRATION* (1997).

¹⁸⁷ See Thompson, *Bureaucracy*, *supra* note 176, at 244.

¹⁸⁸ See *id.*

¹⁸⁹ See SIMON, *THE PRACTICE*, *supra* note 169, at 18.

¹⁹⁰ See *id.*

Securities and Exchange Commission has written that serving the public interest in securities litigation requires taking whatever actions are necessary to assure investor confidence in the public securities market.¹⁹¹ And the Federal Trade Commission was even more specific in adopting guidelines for interpreting the meaning of the previously undefined statutory terms "unfair"¹⁹² and "deceptive"¹⁹³ for purposes of enforcing its consumer protection mandate under the Federal Trade Commission Act.¹⁹⁴ Armed with such specific criteria, along with the general principles discussed above, government attorneys can serve the public interest in the litigation of individual cases.

B. *Government Lawyers Should Attempt to Serve the Public Interest*

A response can also be made to the argument that government lawyers should not attempt to serve the public interest. Given that different arguments are presented in the criminal and civil contexts in support of the proposition that government attorneys ought not attempt to serve the public interest, separate responses will be provided here as well.¹⁹⁵ In the context of criminal cases, as discussed above, the argument that government attorneys should not attempt to advance the public interest takes the form of a "fight fire with fire" argument.¹⁹⁶ Because defense attorneys will take all available actions to secure acquittals for their clients, the argument goes, prosecutors must similarly be willing to take any actions necessary to secure convictions in order to ensure balance in the criminal justice system.¹⁹⁷ However, the "fight fire with fire" argument is only persuasive if one assumes that securing convictions is the appropriate end of criminal prosecutions. On the other hand, if one agrees with the "do justice" standard, then it is not a fatal criticism if prosecutors' efforts to serve the public interest result in fewer convictions than would otherwise be the case. To the contrary, the fact that other values may be placed ahead of obtaining convictions in certain cases is consistent with the

¹⁹¹ See Roberta S. Karmel, *Creating Law at the Securities and Exchange Commission: The Lawyer as Prosecutor*, 61 LAW & CONTEMP. PROBS. 33, 35 (1998).

¹⁹² See *International Harvester Co.*, 104 F.T.C. 949, 1071-76 (1984). Congress subsequently added a definition of the term "unfair" to the statute that is consistent with the F.T.C. Policy Statement. See 15 U.S.C. § 45(n) (1994).

¹⁹³ See *Cliffdale Assoc., Inc.*, 103 F.T.C. 110, 174-84 (1983).

¹⁹⁴ 15 U.S.C. § 41 (1999).

¹⁹⁵ See *supra* notes 96-112 and accompanying text.

¹⁹⁶ See *supra* notes 96-99 and accompanying text.

¹⁹⁷ See *supra* notes 96-99 and accompanying text.

fundamental objectives of our criminal justice system.¹⁹⁸ Given that the "do justice" standard is supported by historical and contemporary understandings of the appropriate objectives of our criminal justice system,¹⁹⁹ the "fight fire with fire" argument fails. The fact that, in some circumstances, defense attorneys may have tactics available to them that are not similarly available to prosecutors is not an inappropriate imbalance, but rather an acceptable result of the underlying priorities of our criminal justice system.

In the context of civil litigation involving government agencies, the argument that government lawyers should not attempt to pursue the public interest, as pointed out above, is based on notions of democratic accountability and separation of powers.²⁰⁰ With regard to the former, the argument is made that executive branch officials are more democratically accountable than the lawyers they work with, and therefore, such officials should make important policy decisions, such as the decisions that must be made in the course of litigation, rather than the involved lawyers.²⁰¹ However, it is far from clear that the agency officials responsible for a particular lawsuit are any closer to the source of democratic legitimacy—namely, the electorate—than are the lawyers involved in those cases.

It is true that federal government agency heads are generally appointed by the President, who is directly accountable to the voters. However, in only a very small number of the most important cases will the agency head be involved in the wide range of decisions that must be made in the context of a lawsuit. Rather, it will usually be the case that some subordinate agency official, likely appointed by the agency head, will be assigned responsibility for the lawsuit. Thus, this person will be at least two steps removed from the President, three from the electorate, or even more in large agencies. In many cases, the decision maker may be a "career bureaucrat" with some form of civil service protection or tenure, and therefore difficult to remove from office²⁰² and almost completely insulated from democratic accountability.

¹⁹⁸ See *supra* note 155 and accompanying text.

¹⁹⁹ See *supra* notes 154–157 and accompanying text.

²⁰⁰ See *supra* notes 100–103 and accompanying text.

²⁰¹ See *supra* note 100 and accompanying text.

²⁰² For example, Thomas Merrill points out that for fiscal year 1990, 99.97% of federal civil service employees went through the year without any adverse employment action being taken against them. See Thomas W. Merrill, *High-Level, "Tenured" Lawyers*, 61 LAW & CONTEMP. PROBS. 83, 85 & n.13 (1998).

If the agency is one that represents itself in litigation, then there is no reason to believe that the particular agency lawyer or lawyers working on the case are any nearer to, or further from, the sources of democratic authority than are the other agency personnel assigned to work on the case. And if it is a federal agency that is being represented by the Department of Justice, then there is similarly no reason to believe that the assistant attorneys general working on the case are any further removed from the Attorney General, who, like most agency heads, is appointed by the President, than the agency personnel assigned to the case are from the relevant agency head. In fact, given that the Department of Justice is a relatively "flat" organization in terms of its bureaucratic structure, it may be that the attorney working on the case is even "closer" to the electorate than the agency personnel working on the case. And at the state level, where the government entity is represented by the state Attorney General's office, the attorney may even more clearly be "closer" to the electorate than the agency personnel working on the case, because the attorneys general in the vast majority of states are elected, rather than appointed.²⁰³ Therefore, it is simply a fallacy to suggest that the agency personnel who work on lawsuits involving the agency are more democratically accountable than the lawyers who work on those cases.

Additionally, even if it were the case that agency personnel working on lawsuits were closer to the electorate than the lawyers involved in the case, any theory of bureaucratic accountability must also consider the expertise or capability of the relevant bureaucratic actor to engage in the action taken on behalf of the people.²⁰⁴ Judgments must be made regarding which lawsuits and issues are worth pursuing, and which disputes ought to be resolved extra-judicially.²⁰⁵ It is lawyers who, through their experience in reviewing precedent and their familiarity with legal procedures, are in the best position to make judgments regarding the likelihood of success of a particular lawsuit, as well as the costs that will likely be incurred through pursuit of that lawsuit.

²⁰³ Attorneys General are voted on by the electorate in 38 states. See COUNCIL OF STATE GOV'TS, *THE BOOK OF THE STATES* 33-34 (1996).

²⁰⁴ Cf. J. Patrick Dobel, *Personal Responsibility and Public Integrity*, 86 MICH. L. REV. 1450, 1450 (1988) (stating that "a coherent theory of public integrity should accommodate the range of prudential judgments that individual officeholders must make to perform their jobs fairly and efficiently") (reviewing DENNIS F. THOMPSON, *POLITICAL ETHICS AND PUBLIC OFFICE* (1987)).

²⁰⁵ See Harvey, *supra* note 40, at 1597.

This is not to suggest that lawyers will be in the best position to make all of the policy decisions that must be addressed in the context of any lawsuit. To the contrary, government lawyers are likely to be less well trained in the art of policy analysis than other agency personnel.²⁰⁶ This seems to point in the direction of the traditional means/ends distinction employed in the individual legal representation context, by which lawyers are said to have authority with regard to the means employed in litigation, while the clients retain authority with regard to the ultimate ends to be pursued through the litigation.²⁰⁷ And it does seem that the context in which a lawyer represents a government agency by working with agency personnel who have been designated to speak on behalf of the entity, most closely resembles the context of private legal representation of any that is likely to arise in the government context.

Nonetheless, for reasons already discussed,²⁰⁸ we should resist the temptation to import the ethics of the private legal representation context into the government lawyering context. Moreover, the efficiency and effectiveness components of bureaucratic accountability demand a different allocation of responsibility. For example, under the traditional view of private litigation, the client is reserved the authority to determine whether or not to accept a settlement offer.²⁰⁹ As described earlier, this allocation of authority is based primarily on notions of individual autonomy which are not present in the context of representation of a government agency. Therefore, it seems perfectly appropriate that lawyers, who are in the best position to predict the likely outcome of litigation, play a larger role in the decision whether or not to settle a case in the government litigation context than would be appropriate in the private litigation context. Government attorney efforts to serve the public interest, in the form of having substantial input in determining whether or not to pursue litigation on behalf of government agencies, pose no particular threat to democratic accountability and are, in fact, required by it.

Nor do efforts by government attorneys to serve the public interest violate the principle of separation of powers. As pointed out above, it has been argued that a decision by an attorney in the context of litigation involving a government agency not to pursue a particular law-

²⁰⁶ See Peter H. Schuck, *Lawyers and Policymakers in Government*, 61 LAW & CONTEMP. PROBS. 7 (1998).

²⁰⁷ See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 cmt. 1 (1983).

²⁰⁸ See *supra* notes 150-152 and accompanying text.

²⁰⁹ See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983).

suit because to do so would conflict with prior judicial decisions would amount to a usurpation of the judicial function.²¹⁰ This argument seems completely counterintuitive. Rather than usurping the judicial function, the involved government attorney has exercised fidelity to the judicial role by following settled judicial decisions. This would not be the case if the attorney went forward with the litigation in the face of settled adverse precedent. Similarly, it has been argued that refusing to defend agency action on grounds that the agency action falls outside of the scope of the agency's authority would amount to a usurpation of congressional power to delegate authority to the agency.²¹¹ However, this argument also seems counterintuitive. Self-directed efforts by attorneys for government agencies to ensure that the agencies operate within the scope of their delegated authority would seem to indicate fidelity, rather than hostility, to such congressional exercises of authority.

Additionally, the suggestion that government attorneys, in the context of representing government entities in litigation, can and should hermetically separate any vestiges of legal interpretation from their law executing function²¹² seems unworkable, impractical, undesirable, and inconsistent with seven decades of legal interpretations in the field of administrative law. First, it must be acknowledged that, by necessity, members of each branch of government engage, at least to some degree, in some of the functions that are reserved to the other branches in the above-described junior high school civics level understanding of the principle of separation of powers. For example, in legislating, it is absolutely impossible for legislators to completely avoid engaging in interpretation of the Constitution²¹³—a task said to be the exclusive province of the judiciary.²¹⁴ By the same token, executive branch prosecutors necessarily interpret the law in deciding whom to charge under criminal statutes, despite the mantra that legal interpretation is the province of the judiciary.²¹⁵ And, although there is widespread disagreement regarding the degree and appropriateness of such conduct, all would agree that judges engage in some degree of

²¹⁰ See *supra* notes 101–102 and accompanying text.

²¹¹ See *supra* note 103 and accompanying text.

²¹² These terms simply come from a junior-high level civics class understanding of the functions of the three branches of government; namely, that the legislative branch makes the law, the judicial branch interprets it, and the executive branch executes it.

²¹³ See, e.g., John C. Woo, *Lawyers in Congress*, 61 LAW & CONTEMP. PROBS. 1, 5 (1998).

²¹⁴ See generally, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

²¹⁵ See, e.g., Kahan, *supra* note 118, at 47.

law making in addition to their traditionally understood law interpreting function.²¹⁶

Just as lawyers representing executive branch agencies have been criticized for usurping legislative and judicial functions when representing agencies in litigation, the agencies themselves were historically attacked on similar grounds for purportedly violating principles of separation of powers.²¹⁷ Particularly, at the time of the beginning of the modern administrative state, in the context of President Franklin Delano Roosevelt's "New Deal," legal challenges were brought against executive branch agencies for allegedly improperly exercising judicial and/or legislative functions.²¹⁸ Such challenges were largely unsuccessful, and the result has been the development of modern administrative agencies, which have indisputably exercised functions that include activities considered to be within the traditional provinces of all three branches of government, a result which is an accepted feature of our present constitutional structure.²¹⁹ To argue that government lawyers for administrative agencies violate the principle of separation of powers when they engage in hybrid functions that have been firmly established to be constitutionally permissible when engaged in by other agency personnel seems quixotic at best.

Moreover, to deprive lawyers for executive branch agencies the authority, in the name of separation of powers, to settle litigation that is likely to be unsuccessful given existing precedents, or to reject proposed regulations that are likely to be struck down for being beyond the scope of the agency's authority, seems both wasteful and inefficient. Recall the argument made above that administrative agencies' democratic legitimacy depends, at least in part, on the agencies' ability to efficiently and effectively carry out their functions. To compel a lawyer to conduct litigation that the lawyer knows, based upon her training, experience, judgment, and expertise, is likely to be unsuccessful, wastes both judicial and executive resources and is unfair to the other parties to the litigation. This is also the case with regard to the promulgation of regulations that are likely to be struck down, with the corresponding costs imposed on the agency, the courts, and the regulated parties. Rather than violating the principle of separa-

²¹⁶ See *id.* at 61 n.23 (citing Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985)).

²¹⁷ See Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2080 (1990).

²¹⁸ See *id.*

²¹⁹ See *id.* at 2080-82.

tion of powers, our system of democratic accountability requires that government attorneys use their talents to serve the public interest by making their best judgments with regard to the conduct of litigation involving government agencies.

Nor does that fact that government attorneys will not always be successful in seeking to advance the public interest provide an adequate reason for abandoning the public interest serving role. It is true that balancing the numerous and multifarious interests that are implicated in litigation involving government agencies requires a great degree of skill, judgment, and experience.²²⁰ Perhaps the young Assistant United States Attorney in the Brookhaven Nuclear Laboratory case was not up to the difficult task of balancing the numerous competing interests in that case.²²¹ However, that case involved a breakdown of the hierarchical structures of authority that must be in place in order to ensure that more experienced government attorneys share their wisdom and judgment with newer government attorneys in making the difficult choices that are involved in government litigation.

The lines of authority in cases of litigation on behalf of governmental entities are often more convoluted and harder to discern than might normally be the case in other bureaucratic and institutional settings.²²² However, the Assistant United States Attorney involved in the Brookhaven matter should have had to obtain the approval of the local United States Attorney and at least one or more levels within the Department of Justice in Washington before going forward with the ill-fated litigation.²²³ It is true that, at times, these hierarchical support arrangements fail to function properly and that much can be done to improve their reliability.²²⁴ Nonetheless, systems to ensure the participation of experienced and capable government attorneys in the most significant decisions to be made in the course of government litigation should help to limit erroneous actions. Of course, given the inevitable fact of human fallibility, even the most reliable systems will not be able to eliminate all mistaken judgments. But it certainly seems preferable that government attorneys should attempt to serve the

²²⁰ Cf. Wendel, *supra* note 153, at 100, 107 (discussing the importance of judgment and deep contextual consideration to ethical legal decision making).

²²¹ See *supra* notes 104–112 and accompanying text.

²²² See H.W. Perry, Jr., *United States Attorneys—Whom Shall They Serve?*, 61 LAW & CONTEMP. PROBS. 129, 136 (1998).

²²³ See *id.* at 137.

²²⁴ See *id.* at 147.

public interest, rather than abandoning that effort entirely merely because on some occasions they will fall short of that objective.

C. *Government Lawyers Will Work to Serve the Public Interest*

The argument that government attorneys will not serve the public interest essentially boils down to the contention that government attorneys will "sell out" the public interest in an effort to advance their own careers. Thus, prosecutors, who are rewarded for high conviction rates, will adopt a "conviction psychology" rather than internalizing the "do justice" standard.²²⁵ Similarly, attorneys for executive branch agencies will be overly litigious so they can later cash in on their trial experience, or they will be unduly timid in their dealings with opposing counsel who are seen as prospective future employers.²²⁶ Civil enforcement attorneys who envision future careers in the private sector will act similarly.²²⁷ On the other hand, civil enforcement attorneys who seek to become career bureaucrats will unduly seek to avoid career-threatening controversial cases.²²⁸ However, each of these arguments may well overestimate the impact that such purportedly self-aggrandizing activities will have on the future careers of the government attorneys who engage in such activities.

In a recent article focusing on the Department of Justice's Honors Program, Nicholas Zeppos challenges the common notion that government lawyers "invest" in their future careers through government legal work.²²⁹ Noting that new lawyers who go to work at the Justice Department rather than at large Washington, D.C., firms give up approximately \$35,000 per year in salary,²³⁰ Zeppos offers three reasons why such lawyers will not make back that "investment" when they move on to careers in the private sector. First, Zeppos contends that the relatively short tenure of new DOJ attorneys makes it unlikely that they will in fact gain significant experience during their periods of government service.²³¹ Second, Zeppos contends that there is no rea-

²²⁵ See *supra* notes 121-122 and accompanying text.

²²⁶ See *supra* notes 123-126 and accompanying text.

²²⁷ See *supra* notes 129-132 and accompanying text.

²²⁸ See *supra* note 134 and accompanying text.

²²⁹ See Nicholas S. Zeppos, *Department of Justice Litigation: Externalizing Costs and Searching for Subsidies*, 61 LAW & CONTEMP. PROBS. 171, 173-75 (1998).

²³⁰ See *id.* at 173.

²³¹ See *id.* at 174. Zeppos points out that DOJ Honors Program participants are required to make a three year commitment to the positions, but notes that the commitment is frequently violated without sanction. See *id.*

son to believe that the Department of Justice provides better training for its new lawyers than do private law firms.²³² To the contrary, he suggests that the Department may provide poor training for the type of work that most attorneys perform in the private sector and for the manner in which most law firms staff their cases.²³³ Finally, and most importantly, Zeppos points out that the available data suggests that few government lawyers in fact earn back the wages forgone by the entry into government service when they do move into the private sector.²³⁴ Indeed, most law firms offer a salary scale for associates based upon the year of graduation from law school. Thus, former government lawyers who move to associate positions in law firms will likely earn no more than their classmates who went directly into private practice.²³⁵ And when such former government lawyers become partners, they may earn less than their colleagues because they will have had less time to devote to developing a client base, which is a crucial determinant of compensation for law firm partners.²³⁶ In fact, it seems that seniority within the firm is the greatest determinant of the compensation of partners in law firms.²³⁷

Because DOJ Honors Program attorneys are unlikely to make back the income forgone by not going to work in the private sector initially, Zeppos suggests that we ought to think of such persons' time as government attorneys not as a form of investment, but rather as a form of "consumption." Such attorneys trade off income for other goods, which Zeppos particularly identifies as responsibility, intellectual challenge, and autonomy, all of which Zeppos contends are more available to new Justice Department lawyers than to their counterparts in private firms.²³⁸ If Zeppos is right, and his argument is highly persuasive, then his argument provides strong support for the contention that government attorneys will work to serve the public interest. Particularly, to the extent that attorneys entering government service seek the substantial responsibility that comes along with taking on cases of public import, they will be more willing to engage in the

²³² See *id.*

²³³ See *id.* at 174-75.

²³⁴ See Zeppos, *supra* note 229, at 175.

²³⁵ See *id.*

²³⁶ See *id.*

²³⁷ See *id.*

²³⁸ See *id.* at 176-179. Zeppos also acknowledges possible trade-offs between income and personal benefits such as leisure. See *id.* at 176 & n.22. However, Zeppos believes that the workload for new Justice Department lawyers is sufficient to eliminate this as a significant motivation for choosing the public over the private sector. See *id.*

difficult consideration and balancing of the numerous relevant interests that makes the task of the government attorney so challenging.

Additionally, what both Zeppos and the critics of the public interest serving position fail to acknowledge is that idealism, or a desire to serve the public interest, might indeed be a significant motivating factor in lawyers' decisions to seek to work in public service.²³⁹ To the extent that this is the case, it presents a strong counter-argument to the suggestion that government lawyers will not work to serve the public interest. Indeed, there is empirical evidence to suggest that persons who go into government work are more idealistic than persons who become private sector lawyers, business administrators, or even social workers.²⁴⁰ This data comports with my own experience in more than five years as an Assistant Massachusetts Attorney General. By and large, I found that my government lawyer colleagues were attracted to their positions by a sincere desire to serve the public interest, and that their conduct in conjunction with the cases they litigated was significantly guided by that desire. Of course, this anecdotal evidence is far too narrow and localized to use as a basis for drawing any grand conclusions about government attorneys' willingness to serve the public interest. However, I find this evidence to be at least as reliable as the unsupported assumptions about human nature that underlie the rational choice theory that forms the basis for many of the arguments why government attorneys will not work to serve the public interest.

D. *Public Lawyers, Public Values*

At first glance, it seems that the empirical data provided by Michael Selmi provides the strongest support for the argument that government lawyers will not work to serve the public interest.²⁴¹ Selmi's contention is that government attorneys are unduly conservative in pursuit of the enforcement of civil rights because such attorneys either wish to avoid controversy to prolong their careers or can obtain

²³⁹ But see Jonathan R. Macey, *Lawyers in Agencies: Economics, Social Psychology and Process*, 61 LAW & CONTEMP. PROBS. 109, 111-12 (1998) (acknowledging that law students may be more idealistic than the general population, and that this tendency may be even more pronounced with regard to law students who seek to enter government service).

²⁴⁰ See generally Nalbandian & Edwards, *The Values of Public Administration: A Comparison with Lawyers, Social Workers and Business Administrators*, 4 A REV. OF PUB. ADMIN. 114 (1983).

²⁴¹ See Selmi, *supra* note 129, at 1419-20, 1443-45.

more concrete experience in litigating smaller-scale cases.²⁴² Certainly, if one agrees with Selmi's unstated assumption that civil rights attorneys ought to focus their enforcement efforts on novel or cutting-edge cases that may potentially result in large damage awards for the government, then it is hard to argue with his figures suggesting that private attorneys do a better job than government attorneys in pursuing such ends. However, perhaps Selmi too has made a mistake in ascribing private values to public lawyers.

Keeping in mind that, as government officials, government lawyers are representatives of all of *the people*, it is clear that at least one ground for the democratic legitimacy of the actions of government attorneys would be widespread consensus regarding the appropriateness of the ends pursued by the government attorneys. This is not the only source of democratic legitimacy for the actions of government officials, but it is certainly the least controversial.²⁴³ In any event, when this fact is taken into account, it may be perfectly appropriate for government attorneys to focus their civil rights enforcement efforts on the types of discrimination upon which there is broad societal consensus opposing such discrimination,²⁴⁴ rather than on types of discrimination upon which there is no such societal consensus in favor of prohibition. This seems especially true in the areas that Selmi focuses upon, where there also exists a private right of action so that private attorneys can continue to "push the envelope" in new and developing areas of civil rights law, while government attorneys continue to focus on "bread and butter" civil rights enforcement issues.²⁴⁵ Moreover, as a matter of policy, it might well be the case that a larger number of

²⁴² See *supra* notes 134–137. But see *supra* notes 229–237 and accompanying text (discussing why the "resume-building" value of such experience may be overstated).

²⁴³ For example, one version of constitutional theory holds that government officials may legitimately act to protect the rights of disenfranchised minority groups. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 99–100 (1980).

²⁴⁴ One example of this type of discrimination would be housing discrimination against families with children. Selmi is particularly critical of the Department of Justice's apparent focus on this type of case. See Selmi, *supra* note 129, at 1421, 1445.

²⁴⁵ Drawing a distinction between government attorneys and "private attorneys general," may present a particularly weak example of the public/private distinction. In his article *The Secret Life of the Private Attorney General*, 61 *LAW & CONTEMP. PROBS.* 179 (1998), Jeremy Rabkin points out that the creation of such private rights of action merely represents a public decision by Congress as to which rights are to be recognized and which advocacy groups (such groups being like quasi-governmental entities in such instances) will have the right to enforce them. See *id.* at 179–80. Nonetheless, there does seem to be a distinction with difference between government attorneys bringing an action in the name of the United States or an individual state, and private attorneys bringing actions on behalf of individual parties.

smaller-scale civil rights enforcement proceedings will have a greater deterrent effect on discrimination than a smaller number of the more complex and uncertain types of actions that Selmi would like to see pursued. Thus, rather than demonstrating an abdication of enforcement authority, the government attorneys that Selmi criticizes may be making appropriate judgments as to the most efficient use of their limited public resources. The fact that such judgments might in practice prove to be erroneous is not, as argued above, a good reason for abandoning the public interest serving role entirely.

All this having been said, perhaps the strongest argument against the public interest serving role comes not from its academic critics, but from the behavior of certain government attorneys themselves. All lawyers can probably cite examples of government attorneys whose conduct in litigation seems to be the antithesis of a good faith effort to serve the public interest. A disturbing example comes from litigation in which a colleague of mine at Nova Southeastern University's Shepard Broad Law Center was recently involved. The case involved a class action lawsuit challenging conditions in the foster care system in Broward County, Florida.²⁴⁶ The case followed a separate grand jury investigation and investigative reports in both of South Florida's major newspapers exposing numerous instances of physical and sexual abuse and neglect in foster care placements under the control of the Florida Department of Children and Families.²⁴⁷ In short, the evidence of atrocious conduct within the system and the need for reform was both overwhelming and indisputable.²⁴⁸

Despite this fact, the attorneys from the Florida Attorney General's Office who represented the Department took something of a "scorched earth" or "bunker mentality" approach to defense of the lawsuit. They refused to respond to reasonable discovery requests in a timely manner, backed out of a negotiated settlement, and refused to stipulate to indisputably true facts for purposes of narrowing the is-

²⁴⁶ The case's primary sponsor was the San Francisco based Youth Law Center. See Sally Kestin, *Foster Care Lawsuit Filed; Advocacy Group Seeks Safe Havens*, SUN-SENTINEL, Oct. 21, 1998, at 1A [hereinafter Kestin, *Foster Care Lawsuit*]. Local counsel included Fort Lauderdale attorneys Howard Talenfeld, David Bazerman, and Nova Southeastern University Law School Professor Michael Dale.

²⁴⁷ See Karla Bruner, *Child Care System Fails; Report Faults State Bureaucracy, Public*, MIAMI HERALD, Nov. 17, 1998, at 1A; Sally Kestin, *Foster Care Crisis Putting Kids at Risk; Children Are Physically Harmed, Molested, Raped in Homes and Shelters That Are Supposed to Be Havens*, SUN-SENTINEL, May 31, 1998, at 1A.

²⁴⁸ See Bruner, *supra* note 247, at 1A; Kestin, *Foster Care Lawsuits*, *supra* note 246, at 1A.

sues to be presented to the court at trial.²⁴⁹ Certainly, these were not the actions of government attorneys engaged in a good faith effort to serve the public interest.²⁵⁰

Of course, if it is simply the case that there are a few "bad apples" among the many good and dedicated government lawyers, then examples such as the one cited above do not pose a fundamental threat to the public interest serving position. And, as suggested above, empirical evidence regarding the idealism of government officials suggests that such "bad apples" are the exception rather than the rule.²⁵¹ Nonetheless, I also believe that such examples of bad faith litigation tactics on the part of government attorneys can be attributed, at least in part, to the inappropriate application of private values to public lawyers.

As discussed above, the notions of autonomy that underlie legal ethics in the individual client representation setting, when taken to extreme, can lead to the kind of "scorched earth," or "win at all cost" tactics described in the context of the Florida foster care case.²⁵² And, despite the firm foundation for the public interest serving role for government attorneys in both traditional understandings and formal pronouncements of the appropriate professional role to be served by government attorneys, the importation of private values into the public lawyering context is more than a merely academic exercise.²⁵³

I believe there are two major reasons why some government attorneys inappropriately bring private litigation values into their work as public lawyers. First, many government lawyers actually start their careers in private practice and therefore develop their understandings of appropriate attorney behavior in that context. Unless such attorneys modify their view of appropriate attorney conduct upon moving into government attorney positions, the result may be conduct such as that described in the Florida foster care case.²⁵⁴ To prevent this prob-

²⁴⁹ Interview with Michael Dale, Nova Southeastern University Law School Professor, in Fort Lauderdale, Fla. (Feb. 25, 2000).

²⁵⁰ Despite the defense lawyers' "stonewalling" tactics, a settlement was eventually entered into in the case that all parties are optimistic will lead to improved conditions within the Broward County foster care system. See Shana Gruskin, *Deal Reached in DCF Suit; Child Advocates, State Avoid Trial*, SUN-SENTINEL, Feb. 16, 2000, at 1B.

²⁵¹ See *supra* note 240.

²⁵² See *supra* notes 151-152 and accompanying text.

²⁵³ See *supra* Part I.

²⁵⁴ Michael Dale also points out that it is increasingly common for government and private lawyers to work together in the representation of government entities in litigation. I was involved in at least a couple such "public/private" partnerships during my tenure as an Assistant Massachusetts Attorney General. The most well known such partnership oc-

lem, lawyers need to move understandings of the public interest serving role from the sometimes hortatory and aspirational level of codes of professional responsibility, to the operational level within the government entities in which government attorneys work. Doing this successfully will involve adopting the kind of "mid-level rules" in the context of government lawyering that David Wilkins has argued are necessary to the regulation of lawyers generally.²⁵⁵ As pointed out above, some such steps have been taken in the criminal context, in order to particularize the "do justice" standard into a series of more definite principles and rules that are capable of guiding the conduct of public prosecutors in individual cases.²⁵⁶ Similarly, though to a lesser extent, such steps have been taken in the context of civil government litigation as well.²⁵⁷ Nonetheless, more needs to be done to implement a set of operational guidelines that can direct the conduct of government attorneys in individual cases, in pursuit of the public interest serving role.

A second difficulty, and perhaps a more significant one, is the low regard in which government lawyers are held generally. Within the legal profession, despite often sterling professional credentials and experience, government attorneys are viewed as being inferior to attorneys in private practice. As a result, government lawyers sometimes feel that they need to prove themselves in the eyes of their private sector counterparts. Sometimes, this results in an undue desire to "win" cases (as opposed to serving the public interest). Or, this may result in efforts to show that the government attorney can engage in "hardball" litigation tactics just as effectively as their private sector opponents in litigation, even if the result fails to best serve the public interest. Any effort to ensure further entrenchment of the public interest serving position will definitely have to involve educating the rest of the bar as to the different role of government attorneys, so as to ensure that

curred when, due to resource limitations, our office joined with a number of private law firms in order to pursue litigation against the tobacco industry. Dale suggests that the private lawyers' values may come to predominate in such partnerships. See Interview with Michael Dale, *supra* note 249.

²⁵⁵ See generally David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468 (1990). Wilkins, in turn, borrowed the concept of "mid-level rules" from Dennis Thompson's writings in the field of political ethics. See *id.* at 516, n. 210 (citing DENNIS F. THOMPSON, *POLITICAL ETHICS AND PUBLIC OFFICE* 8 (1987)).

²⁵⁶ See *supra* notes 154-157 and accompanying text.

²⁵⁷ See *supra* notes 169-174 and accompanying text.

government attorneys are accorded appropriate professional respect for their execution of such a role.²⁵⁸

IV. EXAMPLES

What follows are discussions of some examples of how government attorneys might comport themselves in pursuit of the public interest serving role as described here. The examples are borrowed from the literature regarding appropriate attorney role, and are presented according to each of the primary areas of governmental litigation discussed in this article; namely, criminal prosecutions; representation of government agencies; and civil enforcement actions.

A. Criminal Prosecutors

How criminal prosecutors might go about comporting themselves with the public interest serving role will be explored in the context of the well known United States Supreme Court case *Wheat v. United States*.²⁵⁹ *Wheat* has come to stand for the proposition that trial judges have broad discretion to disqualify a defendant's counsel of choice on grounds of potential conflicts of interest on the part of the attorney.²⁶⁰ A great deal has been written about *Wheat* in its aftermath.²⁶¹ Most of this commentary has focused on the tension between a defendant's right to counsel of choice, and the court's interests in providing a fair trial process and in the finality of its decisions.²⁶² By contrast, relatively little has been written regarding the appropriateness of the prosecu-

²⁵⁸ Michael Dale additionally points out that electoral politics, including changes in administrations and therefore agency personnel during the course of pending litigation, may also influence the manner in which government attorneys litigate cases. See Interview with Michael Dale, *supra* note 249.

²⁵⁹ 486 U.S. 153 (1988).

²⁶⁰ See, e.g., Bruce A. Green, "Through the Glass Darkly": How the Court Sees Motions to Disqualify Criminal Defense Lawyers, 89 COLUM. L. REV. 1201, 1202 (1989) [hereinafter Green, *Through the Glass Darkly*].

²⁶¹ See generally *id.*; Randall L. Klein, *Sixth Amendment-Paternalistic Override Of Waiver Of Right To Conflict-Free Counsel At Expense Of Right To Counsel Of One's Choice*, *Wheat v. United States* 108 S.Ct. 1692 (1988), 79 J. CRIM. L. & CRIMINOLOGY 735 (1988); Vanessa Caston-Porter, Comment, *The Wheat Decision: Patently Incorrect*, 19 S.U. L. REV. 491 (1992); Michael E. Lubowitz, Note, *The Right To Counsel Of Choice After Wheat v. United States: Whose Choice Is It?*, 39 AM. U. L. REV. 437 (1990); Margaret J. Ryan, Casenote, *The Sixth Amendment Right To Counsel: A Criminal Defendant's Right To Counsel Of Choice v. The Courts' Interest In Conflict-Free Representation: Wheat v. United States*, 486 U.S. 153 (1988), 14 S. ILL. U. L.J. 657 (1990).

²⁶² See generally Green, *Through the Glass Darkly*, *supra* note 260; Klein, *supra* note 261; Ryan, *supra* note 261.

tion's efforts to achieve disqualification of defense counsel in *Wheat*.²⁶³ It will be the prosecutors' conduct that will be the focus of the following discussion.

In *Wheat*, the defendant was charged along with numerous other co-defendants as part of a widespread conspiracy to import illegal narcotics into the United States.²⁶⁴ Shortly before trial, attorney Eugene Iredale notified the trial court that Wheat wished to substitute Iredale as his attorney or to add Iredale to his defense team.²⁶⁵ Apparently, Wheat was pleased with the work that Iredale had done in representing two other defendants charged as part of the same conspiracy, Juvenal Gomez-Barajas and Javier Bravo. Iredale had previously obtained an acquittal for Gomez-Barajas on charges similar to those filed against Wheat. In order to avoid trial on a second set of charges, Iredale had entered into a favorable plea agreement with prosecutors on behalf of Gomez-Barajas, although that agreement had not yet been approved by the court at the time Wheat sought to add Iredale to his defense team.²⁶⁶ Iredale had also entered into a plea agreement with prosecutors regarding Bravo, which had already been approved by the court.²⁶⁷

Prosecutors objected to the addition of Iredale to Wheat's defense team on grounds that Iredale's representation of Wheat would create two potential conflicts of interest. First, the government argued that if the court rejected Gomez-Barajas' pending plea agreement, a trial would have to be held, during which there would be some likelihood that Wheat would be called as a witness against Gomez-Barajas.²⁶⁸ In that instance, Iredale might be required to cross-examine former client Wheat in the trial of current client Gomez-Barajas. The prosecution's second argument against adding Iredale to Wheat's defense team involved Bravo. The government contended

²⁶³ However, it does appear that following *Wheat*, many prosecutors stepped up their efforts to disqualify defense counsel on grounds of potential conflicts of interest. See STEPHEN GILLERS, REGULATION OF LAWYERS 243 (1999); RICHARD A. ZITRIN & CAROL M. LANGFORD, LEGAL ETHICS IN THE PRACTICE OF LAW 140 (1995). The post-*Wheat* trend toward increased efforts to disqualify defense attorneys has been the subject of critical commentary. See, e.g., Bennett L. Gershman, *Symposium: The New Prosecutors*, 53 U. PITT. L. REV. 393, 402 & n.61 (1991); Matthew D. Forsgren, Note, *The Outer Edge of the Envelope: Disqualification of White Collar Criminal Defense Attorneys Under the Joint Defense Doctrine*, 78 MINN. L. REV. 1219 (1994).

²⁶⁴ See 486 U.S. at 154.

²⁶⁵ See *id.* at 155.

²⁶⁶ See *id.*

²⁶⁷ See *id.*

²⁶⁸ See *id.* at 155-56.

that Bravo might be called as a witness against Wheat, and in fact had offered to modify its position at Bravo's upcoming sentencing hearing in exchange for his testimony.²⁶⁹ Therefore, Iredale might be in a position to cross examine a current client at the trial of another current client.

In support of Wheat's request to add Iredale to his defense team, Wheat, Gomez-Barajas, and Bravo all agreed to waive their rights to conflict-free counsel.²⁷⁰ Despite this fact, the trial judge sided with the prosecution and denied Wheat's request to add Iredale to his trial team.²⁷¹ Wheat was subsequently convicted on a number of the charges, and the Court of Appeals for the Ninth Circuit affirmed the convictions.²⁷² The United States Supreme Court granted certiorari regarding the denial of Wheat's request to add Iredale to his defense team²⁷³ and affirmed the lower courts' decisions.

Writing for the five justice majority, Chief Justice Rehnquist concluded that trial judges must be granted broad discretion to deny defendants' their counsel of choice where the potential exists for conflicts of interest.²⁷⁴ The Court was unpersuaded by Wheat's willingness to waive any claims arising from a conflict of interest on the part of Iredale. The Court noted that defendants may nonetheless claim on appeal that they received constitutionally deficient representation as a result of their lawyers' conflicts, despite previously agreeing to waive such claims.²⁷⁵ The Court reasoned that trial judges' legitimate interests in not having their decisions reversed on appeal outweigh criminal defendants' already limited right to the counsel of their choice where the potential for a conflict of interest is demonstrated.²⁷⁶

Justice Marshall wrote a dissenting opinion on behalf of himself and Justice Brennan.²⁷⁷ Justice Marshall took issue with the deferential standard the majority applied in reviewing the lower court's refusal to allow Iredale to join Wheat's defense team.²⁷⁸ Justice Marshall thought

²⁶⁹ See *Wheat*, 486 U.S. at 156.

²⁷⁰ See *id.*

²⁷¹ See *id.* at 157.

²⁷² See *id.*

²⁷³ See *id.* at 157-58 & nn.1-2.

²⁷⁴ See *Wheat*, 486 U.S. at 163.

²⁷⁵ See *id.* at 151-52.

²⁷⁶ See *id.* at 163.

²⁷⁷ See *id.* at 165. Justice Stevens wrote a separate dissent on behalf of himself and Justice Blackmun. *Id.* at 172.

²⁷⁸ See *id.* at 165.

such deference was particularly inappropriate in light of the very low probability of an actual conflict of interest arising in Wheat's case. He noted that the government had presented no evidence to suggest the highly unusual occurrence of a trial court's rejection of Gomez-Barajas' pending plea agreement.²⁷⁹ Moreover, even in the unlikely event that the plea agreement were rejected, Gomez-Barajas had already been acquitted on the charges that overlapped with those against Wheat. And there was no reason to believe that Wheat would present any evidence relevant to the second set of charges against Gomez-Barajas.²⁸⁰

As far as Bravo was concerned, Justice Marshall pointed out that Bravo and Wheat both contended that neither knew the other, and that Bravo could not identify Wheat nor offer any relevant evidence against him.²⁸¹ Moreover, since Wheat sought as one alternative to add Iredale to his existing defense team, one of his other lawyers could easily have conducted any necessary cross examination of Bravo during Wheat's trial. Finally, Justice Marshall noted that the last minute addition of Bravo to the government's witness list, following Wheat's request to add Iredale to his trial team, might well have indicated an effort by prosecutors to "manufacture" a potential conflict of interest in order to keep Iredale, who had been successful against them in the past, out of the case.²⁸²

Chief Justice Rehnquist's majority opinion and Justice Marshall's dissent both look at the decision whether to permit a defendant to waive their right to conflict-free counsel largely from the perspective of the trial judge faced with that decision. And, as stated above, most commentators who have discussed the case have evaluated it on similar grounds.²⁸³ However, as a portion of the *Wheat* trial judge's opinion quoted in Justice Rehnquist's opinion makes clear, the trial judge relied on the prosecutor's argument that Iredale ought not be permitted to join the defense team, rather than on an independent judicial analysis of the competing interests involved.²⁸⁴ Therefore, it is appropriate to inquire as to whether the prosecutors involved acted appropriately in opposing Wheat's efforts to add Iredale to his defense team.

²⁷⁹ See *Wheat*, 486 U.S. at 169.

²⁸⁰ See *id.* at 169-70.

²⁸¹ See *id.* at 170.

²⁸² See *id.* at n.3.

²⁸³ See *supra* note 262.

²⁸⁴ See *Wheat*, 486 U.S. at 157.

As discussed earlier, prosecutors have numerous interests to consider in the conduct of their work. Of course, their paramount interest is to see that persons guilty of committing crimes are convicted and sanctioned. Prosecutors must also stay in touch with public understandings of the severity of different crimes for purposes of determining enforcement priorities and for recommendations for proportionate sentencing. They must consider the interests and desires of the victims of crime, although that consideration is muted in "victimless" crimes such as the drug trafficking at issue in *Wheat*. Prosecutors also have a duty to ensure fair trial processes, including a duty to act, in some instances, where conflicts of interest on the part of defense counsel imperil the defendant's likelihood of receiving a fair trial.²⁸⁵ On the other hand, defendants' right to choose their own counsel, given the importance of confidence and trust to the client-attorney relationship, must also be respected—as must defendants' entitlement to the highest quality defense available. Finally, prosecutors also have duties to conserve public resources by ensuring that trial results are final and are not likely to be overturned on appeal or through collateral attack.

Despite these numerous and often conflicting considerations, it is hard to see how, given the extreme remoteness of the possible conflicts raised by the prosecution in *Wheat*, the prosecutors' efforts to deprive Wheat of his counsel of choice can be said to have been consistent with the public interest serving position. As noted by Justice Marshall, the "eleventh hour" nature of the prosecutors' decision to call Bravo as a witness at Wheat's trial highlights the questionable nature of the prosecution's decision to oppose Iredale's addition to the defense team.²⁸⁶ Unfortunately, from all of the circumstances, it appears that the prosecutors in *Wheat* substituted the "win at all costs" or

²⁸⁵ In his article *Her Brother's Keeper?: The Prosecutor's Responsibility When Defense Counsel Has a Conflict of Interest*, 16 AM. J. CRIM. L. 323 (1989) [hereinafter Green, *Her Brother's Keeper*], Bruce Green argues that the prosecutor's first steps upon becoming aware of a conflict of interest on the part of defense counsel should be to inform defense counsel of the conflict, and then the court if defense counsel fails to take adequate steps to address the conflict. See *id.* at 364. Only if the court is unwilling to consider defense counsel's potential conflict should the prosecutor file a motion to disqualify defense counsel. See *id.* And then, if the defendant is willing to waive the right to conflict-free representation, the prosecutor should withdraw the disqualification motion except in rare and extraordinary circumstances. See *id.* Such circumstances might exist, for example, if the defense attorney were going to be required to be a material witness at trial. See *id.* at 358. For other examples of extraordinary situations that Green contends would justify prosecutors in pressing for disqualification despite the defendant's waiver, see *id.* at 353–62.

²⁸⁶ See *Wheat*, 486 U.S. at 170 n.3.

"conviction psychology" ethic for the public interest serving position. And, subsequent prosecutors' use of *Wheat* as a sword to remove skilled defense attorneys from cases shows that more must be done to ensure that the public interest serving perspective moves from the level of judicial pronouncements and professional responsibility codes to that of a guiding principle for actual prosecutorial conduct.²⁸⁷ As a final point, it is hard to see how the public interest is served by efforts to deprive defendants of high quality legal representation, absent the existence of a substantial likelihood of a serious impediment to a fair trial process. To the extent that the presence of skilled defense counsel makes less likely the conviction of even guilty defendants (one of the prosecutors' legitimate interests mentioned above), this is an appropriate price to pay for the preservation of defendants' rights, which is such an important part of our criminal justice system, and for the appearance of fairness and balance that is so important to public respect and confidence in our criminal justice system.

B. Agency Counsel

In his article *Government Lawyers' Ethics in a System of Checks and Balances*, Geoffrey Miller presents a hypothetical case in which an attorney in the Department of Education is asked to perform legal work relating to a program to provide federal funds to parochial schools for asbestos removal.²⁸⁸ The problem further provides that in a recent 6-3 decision, the Supreme Court struck down, on Establishment Clause grounds, a program that provided funds to parochial schools to build fire escapes.²⁸⁹ Miller also posits that an opinion was rendered by an attorney general to a prior administration concluding that the program proposed by the Department would be both unconstitutional and beyond the Department's statutory authority.²⁹⁰ Miller asks whether it would be unethical for the attorney to work on the case.²⁹¹ Miller concludes that not only would it be permissible for the attorney to work on the case, but that it would be unethical for the attorney to refuse to do so, despite the above-described precedents, as well as the

²⁸⁷ A relevant step in this direction might be accomplished by adopting Bruce Green's suggestion that prosecutors' offices establish written guidelines governing the decision whether to file a disqualification motion. See Green, *Her Brother's Keeper*, *supra* note 285, at 353.

²⁸⁸ See Miller, *Government Lawyers*, *supra* note 5, at 1293.

²⁸⁹ See *id.*

²⁹⁰ See *id.*

²⁹¹ See *id.*

attorney's personal conviction that rigid separation of church and state is crucial to the well being of the American constitutional system.²⁹²

Miller starts out by rejecting the notion that the lawyer ought to serve the public interest as implicated by this situation.²⁹³ Consistent with the "government lawyers cannot serve the public interest" position articulated above, Miller contends that it would be impossible for the attorney to identify some sort of "transcendental public interest" that would apply in this case.²⁹⁴ He rightly points out that persons have legitimate disagreements as to the advisability of the separation of church and state as articulated in current legal doctrine, and for the hypothetical attorney to follow either position would be arbitrary.²⁹⁵ However, if we follow Professor Simon's articulation of serving the public interest as being consistent with legal merit and the values and conceptions of justice that underlie our justice system, as implemented through conventional techniques of legal analysis and merit, determination of the public interest in this case does not seem nearly so difficult or arbitrary.²⁹⁶ Given the hypothetical Supreme Court's recent rejection of a position virtually identical to that of the Department, as well as the attorney general opinion rejecting the proposed program as both unconstitutional and beyond statutory authority, under the view of government attorney professional responsibility advocated here, it would be improper for the attorney not at least to attempt to get the Department to reverse its position. Such action would not be, as Miller suggests, an example of the government attorney following her or his own subjective policy preferences; but rather, it would be a classic example of the role of an attorney within our justice system to determine what the law requires based on conventional techniques of legal analysis and interpretation.

Professor Miller's condemnation of any efforts by his hypothetical government attorney to get his or her superiors to reconsider their misguided policy also conflicts with the conception of bureaucratic accountability discussed above, pursuant to which government attorneys must similarly comport their conduct.²⁹⁷ As part of his hypo-

²⁹² See *id.* at 1298.

²⁹³ See Miller, *Government Lawyers*, *supra* note 5, at 1294-95.

²⁹⁴ See *id.* at 1295.

²⁹⁵ See *id.*

²⁹⁶ See SIMON, *THE PRACTICE*, *supra* note 169, at 18; Simon, *Ethical Discretion*, *supra* note 169, at 1119.

²⁹⁷ See *supra* notes 175-194 and accompanying text.

thetical, Miller mentions that one of the primary reasons why the Secretary of Education supports providing federal funds to parochial schools for asbestos removal is to gain political support among the parents of parochial school children.²⁹⁸ Certainly, selecting such a narrow interest group as the beneficiary of government largesse raises questions of democratic accountability, especially where the motivation is to advance a particular official's political aims. This is especially so where the group benefited cannot be considered to be an historically disadvantaged group that might otherwise be isolated from participation in bureaucratic decision making.²⁹⁹

Miller further rejects attorney compliance with the seemingly clear precedents of the hypothetical Supreme Court and Attorney General on separation of powers grounds.³⁰⁰ First, Miller argues that by suggesting that the agency comply with the recent Supreme Court precedent, the attorney becomes an advocate for the judicial, rather than the executive, branch of government, thereby violating the principle of separation of powers.³⁰¹ This argument seems to fundamentally misconceive the role of the attorney. One of the primary reasons persons hire lawyers is to tell the clients whether conduct is likely to violate existing law. An affirmative answer hardly implies any disloyalty on the part of the attorney. To the contrary, an unduly rosy assessment of the client's rights would more likely be considered a violation of professional responsibility, particularly if the client went ahead with the proposed conduct and suffered legal detriment as a result.

Similarly, it can hardly be said that the lawyer in Miller's example has served his or her agency client's interests if the agency is advised to go forward with a program that is subsequently struck down on constitutional grounds after the investment of substantial resources in the program, not to mention the resources expended in defense of the program. It can hardly be said that the notion of checks and balances requires the right of renegade agencies to conduct policies in clear violation of law. Miller argues correctly that the possibility of a change in the law would be precluded if the attorney were not permitted in this case to advocate for adoption of the proposed program.³⁰² However, Miller fails to recognize the familiar distinction between frivolous legal positions and "good faith argument for

²⁹⁸ See Miller, *Government Lawyers*, *supra* note 5, at 1293.

²⁹⁹ See *supra* notes 184-186, and accompanying text.

³⁰⁰ See Miller, *Government Lawyers*, *supra* note 5, at 1295.

³⁰¹ See *id.*

³⁰² See *id.* at 1297.

extension, modification or reversal of existing law."³⁰³ Such determinations are part of the stock and trade of lawyers that is contemplated to be considered by the above-described version of the public interest serving position. In the hypothetical case, it seems that failure to attempt to dissuade the agency from going forward with its proposed program in the face of such precedent would be bad lawyering in the least and also improper under any reasonable view of the responsibility of government lawyers.

For similar reasons, Miller's argument that a recommendation that the agency not pursue the proposed policy on grounds that to do so would be beyond the scope of its statutory authority would somehow amount to a usurpation of the legislative role³⁰⁴ ought to be rejected as well. Again, interpreting statutes to determine whether proposed conduct falls within or outside of the statute's authorization is precisely what lawyers do. To suggest that it would be inappropriate for a lawyer to do so just because the proposed actor is a government agency seems to ignore the value lawyers can contribute to public policy decision making.

In his article, Miller suggests that those who embrace the public interest serving view and conclude that the public interest would be served by opposition to the proposed program would take the position that it would be unethical for the government attorney in the hypothetical situation to assist the Secretary of Education with the proposed program, in the sense that the assisting government attorney should be disciplined for doing so.³⁰⁵ I make no such contention. I readily concede that different attorneys may reasonably reach different conclusions regarding how the public interest will be advanced in the context of particular legal disputes under the public interest serving position. Thus, it would certainly be permissible for an attorney, who in good faith determines that working for the proposed program is consistent with the public interest serving position, to be able to do so without fear of sanction. But by the same token, an attorney who determines that the public interest serving role requires attempting to dissuade the agency from pursuing the proposed policy ought to be able to do so as well without fear of retaliatory action. We ought not tolerate shooting the messenger bearing bad news in the context of democratic government.

³⁰³ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983).

³⁰⁴ See Miller, *Government Lawyers*, *supra* note 5, at 1297.

³⁰⁵ See *id.*

Miller seems to suggest further that those who adhere to the public interest serving position and conclude that the attorney in his hypothetical case ought to work to dissuade the agency from adopting its proposed policy would similarly approve covert efforts by the government attorney to "sabotage" the proposed policy if the attorney were unable to persuade the agency to abandon the policy.³⁰⁶ For example, Miller states that the attorney might leak details of the policy to the press or the ACLU so that the policy is politically stymied, or the attorney might "sneak" "fine-print restrictions" into the policy that would torpedo its objectives.³⁰⁷ I unequivocally reject the notion that such conduct on the part of the government attorney is appropriate or ought to be tolerated. The public interest serving position articulated here has no place in it for such deceitful and underhanded conduct. As articulated above, the public interest serving position incorporates good faith efforts to engage in conventional legal analysis and interpretation, and such covert conduct on the part of government attorneys would plainly be prohibited by existing laws, norms, and standards of bureaucratic accountability.

C. Civil Enforcement

Finally, an example relating to the civil enforcement context comes from a speech given by then-Professor and future Judge Jack B. Weinstein, regarding his prior experiences serving as County Attorney to Nassau County, New York.³⁰⁸ The particular problem involved condemnation proceedings initiated by the county.³⁰⁹ Though the condemnation context seems to be somewhat different from the classic modern examples of civil enforcement—including civil rights, environmental or consumer protection enforcement—in each case, government lawyers initiate legal proceedings in the name of some public objective.³¹⁰ Therefore, the analogy is close enough to be useful for discussion purposes.

In Weinstein's example, his negotiators had come to him with a proposed settlement of the condemnation case of a value of approximately one-third of what the county's appraisers had determined the

³⁰⁶ See *id.* at 1293.

³⁰⁷ See *id.*

³⁰⁸ See generally Jack B. Weinstein, *Some Ethical and Political Problems of a Government Attorney*, 18 ME. L. REV. 155 (1966) [hereinafter Weinstein, *Political Problems*].

³⁰⁹ See *id.* at 169.

³¹⁰ See, e.g., U.S. CONST. amend. V ("[N]or shall private property be taken for public use without just compensation") (emphasis added).

land to be worth.³¹¹ The condemnees were an elderly couple who had purchased the land many years earlier, had no idea what the land was worth, and were not represented by counsel.³¹² Weinstein stated in his speech that after speaking directly with the couple, he was able to convince them that the land was worth much more than they had agreed to receive for it pursuant to the proposed settlement.³¹³ Though it is not clear from Weinstein's speech how the matter was finally resolved, it is reasonable to conclude that the county ended up paying the couple significantly more for the property than it would have under the original settlement proposal.³¹⁴

Plainly, if Weinstein had engaged in similar conduct in a private context without the permission of a private client involved in a land purchase transaction, he would have been guilty of violating both his duty of loyalty³¹⁵ and his duty of confidentiality³¹⁶ to his client. However, as an advocate of the public interest serving position, Weinstein believed that he owed duties to the condemnees as citizens and constituents, as well as to the county government and to the other members of the public who might benefit from a larger sum of money remaining in the county's coffers. Just as the public prosecutor under the "do justice" maxim owes a duty to the defendant to work towards a substantively fair outcome to the proceedings,³¹⁷ so too does the civil government litigator owe a duty of substantive fairness to the defendants in a condemnation action. Perhaps, in Weinstein's case, that duty could have been discharged by recommending that the condemnees retain counsel, thereby avoiding involving the government attorney in the apparent conflict of giving advice to both sides to a single controversy.³¹⁸ However, I agree that if the condemnee's attorney in that instance was either unable or unwilling to obtain a fair settlement for the condemnees, the government attorney would retain an independent responsibility to assure a substantively fair outcome.³¹⁹

³¹¹ See Weinstein, *supra* note 308, at 169.

³¹² See *id.*

³¹³ See *id.*

³¹⁴ See *id.*

³¹⁵ See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt. (1983).

³¹⁶ See, e.g., *id.* Rule 1.6.

³¹⁷ See *supra* notes 154–157 and accompanying text.

³¹⁸ See MODEL RULE OF PROFESSIONAL CONDUCT Rule 1.7(a) (1983).

³¹⁹ This is similar to the distinction between Zacharias' "assure adequate adversarial process" model, see Zacharias, *supra* note 4, at 60, and Green's "do justice" model, see Green, *Seek Justice*, *supra* note 16, at 634.

CONCLUSION

For reasons discussed above, the critics of the public interest serving position have failed to carry their burden of persuasion that traditional understandings and formal pronouncements of the public interest serving role for government attorneys ought to be abandoned. While numerous reasons have been presented for rejection of these critics' views, a common theme among the arguments presented is that these critics have frequently and improperly imported values from the context of private litigation into the context of the quintessentially public enterprise of government litigation.

Despite the fundamental soundness of the traditional understandings and formal pronouncements of the public interest serving role for government attorneys, more must be done to assure that the values implicated by this view are implemented at the operational level in government litigation, as well as at the formal, theoretical, and rhetorical levels. For example, career advancement in prosecutors' offices should be based on richer measures of compliance with the "do justice" standard, rather than simply on conviction rates. Similarly, lawyers who represent government agencies in litigation ought to be rewarded for settling cases involving indefensible policies, rather than being regarded as being less aggressive or loyal than their private sector counterparts for doing so.

Finally, the point must clearly be made that execution of the public interest serving role for government attorneys is not the equivalent of attorneys following their individual policy preferences as implicated in the context of lawsuits involving the government. Rather, application of the standard techniques of legal analysis and merit, bureaucratic accountability, and democratic governance, as embodied in specific rules and procedures, can provide adequate constraints against government lawyers running amok in pursuit of their personal policy preferences. Additionally, hierarchical structures of accountability must be put in place so that idealistic, if inexperienced, new government attorneys can benefit from the wisdom, judgment, and experience of senior government attorneys in considering and weighing the numerous, and often conflicting, considerations that must be taken into account in government litigation decision making. When taken together, such measures will ensure that public values take precedence in public lawyering contexts.