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Paternalistic Interventions in Civil Rights and Poverty Law: A Case Study of Environmental Justice

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PATERNALISTIC INTERVENTIONS IN CIVIL RIGHTS AND POVERTY LAW: A CASE STUDY OF ENVIRONMENTAL JUSTICE

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AGAINST AUTONOMY: JUSTIFYING COERCIVE PATERNALISM. By *Sarah Conly*. New York: Cambridge University Press. 2013. Pp. viii, 194. Cloth, $95; paper, $32.99.

INTRODUCTION

Low-income communities of color in Miami and in cities across the nation both share aspirations of equal justice and democratic participation and suffer the burdens of legal underrepresentation and political disenfranchisement. Such burdens become crippling when, as in Miami, local legal aid offices, public interest organizations, and bar associations lack the resources to provide meaningful private access to justice or to muster significant public engagement in the political process.[1] These burdens become especially crippling when, again as in Miami, local and state governments adopt policies that engender inner-city neglect, economic displacement, and racial exclusion. In these circumstances, volunteer lawyers from private sector law firms sometimes constitute the last best hope for individual residents and neighborhood groups in need of legal and political representation.[2]

For many volunteer lawyers, the call of pro bono service comes from individual clients. For others, the call emanates from broader causes.[3] And

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1. *See* Karen E. Kelleher, *The Availability Crisis in Legal Services: A Turning Point for the Profession*, 6 GEO. J. LEGAL ETHICS 953, 960–62 (1993).

2. For a discussion of volunteer lawyers from private sector law firms in pro bono representation, see Scott Cummings, *The Market for Public Interest Law Services*, 19 AM. U. J. GENDER SOC. POL'Y & L. 1075 (2011), and Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1 (2004).

3. On pro bono cause lawyering, see Aaron Porter, *Norris, Schmidt, Green, Harris, Higginbotham & Associates: The Sociolegal Import of Philadelphia Cause Lawyers*, *in* CAUSE LAWYERING 151 (Austin Sarat & Stuart Scheingold eds., 1998), and Austin Sarat, *State*

for some, the call rises from a sense of place and history, from the experience—real or imagined—of community itself.[4] Whatever its source, for most, the call of pro bono service evokes a strong, discretionary sense of lawyer paternalism toward clients, their causes, and their communities.[5] By lawyer paternalism, I mean interventions that not only interfere with a client's "autonomous choices" but also disregard or override a client's value "commitments"—those commitments that animate the public and private dimensions of a client's life, giving meaning and imparting dignity.[6]

This Review considers the call of community representation for pro bono lawyers and their public interest cohorts,[7] as well as the moral–ethical issues of paternalism they may encounter.[8] Because a full account of such nettlesome issues is beyond the scope of this inquiry, the Review confines its analysis to three specific types of paternalistic lawyer intervention: coercive settlement counseling tactics, termination of representation threats, and censorious public disclosures. Against this backdrop, the Review explores Sarah Conly's provocative new book, *Against Autonomy: Justifying Coercive Paternalism*,[9] in search of the best moral–ethical justifications for a lawyer's discretionary, paternalistic use of coercive counseling, termination, and disclosure tactics.[10] By borrowing Conly's defense of government-sponsored policies of paternalistic regulation and engrafting its core libertarian and

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Transformation and the Struggle for Symbolic Capital: Cause Lawyers, the Organized Bar, and Capital Punishment in the United States, *in* Cause Lawyering and the State in a Global Era 186 (Austin Sarat & Stuart Scheingold eds., 2001).

4. Many pro bono lawyers are drawn to community-based work because of the pull of both *real* and *imagined* relationships, especially cross-racial and multicultural relationships. *See generally* Gerald P. López, Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice (1992). Real relationships stem from concrete, shared histories. *Cf.* Gerald P. López, Commentary, *Shaping Community Problem Solving Around Community Knowledge*, 79 N.Y.U. L. Rev. 59, 85–86 (2004). These relationships are lived and negotiated by and between *subjects*, a status defined by moral agency and personhood. In civil rights and poverty law cases, client–lawyer relationships are often unequal or nonmutual associations between a well-intentioned *subject* and a less powerful *object*, typically an indigent client or a struggling nonprofit. *See generally* Anthony V. Alfieri, Essay, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 Yale L.J. 2107 (1991) (discussing power dynamics in poverty lawyers' relationships with their clients).

5. On lawyers and paternalism, see David Luban, Lawyers and Justice 343–47 (1988) [hereinafter Luban, Lawyers and Justice], and David Luban, *Paternalism and the Legal Profession*, 1981 Wis. L. Rev. 454, 467–74.

6. David Luban, Lecture, *Lawyers as Upholders of Human Dignity (When They Aren't Busy Assaulting It)*, 2005 U. Ill. L. Rev. 815, 826–27.

7. *See generally* Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 Fordham Urb. L.J. 603 (2009) (discussing the role of public interest litigation in the struggle for social justice).

8. For an explanation of the concept of community representation, see *infra* notes 14–17 and accompanying text.

9. Sarah Conly is an Assistant Professor of Philosophy, Bowdoin College.

10. For critical commentary on *Against Autonomy*, see Cass R. Sunstein, *It's for Your Own Good!*, N.Y. Rev. Books, Mar. 7, 2013, at 8, *available at* http://www.nybooks.com/articles/archives/2013/mar/07/its-your-own-good/?pagination=false.

coercive theories on the lawyering process, we can illuminate the moral–ethical complexities and risks of community-based lawyering that pro bono attorneys face. Extending Conly's strong policy defense and its powerful moral–ethical justifications in this way joins and advances contemporary debates over improving access to legal services[11] and expanding civic participation in law and society.[12] The Review proceeds in three Parts. Part I sketches a framework for the study of community representation in the context of environmental justice advocacy. Part II explores Conly's arguments for greater state-instituted paternalism. Part III then considers the implications of Conly's arguments for the use of coercive lawyer tactics.

I. Community Environmental Justice: A Case Study

> "Sometimes the trees would catch fire and we'd have to put them out because the fire department wouldn't come."[13]

Studies of community-based environmental justice campaigns highlight the elastic legal–political nature of civil rights and poverty law advocacy. Community representation combines multiple forms of legal–political advocacy on behalf of a geographically situated and readily identifiable group of individuals or entities linked by common cultural, economic, and social interests.[14] In the context of inner-city Miami and other impoverished urban areas, this group typically comprises a range of prospective clients, including homeowners and tenants, parents and children within multigenerational families, low-wage workers and small-business owners, nonprofit groups, and clergy and church congregations. Advocacy on behalf of community-based clients and groups entails ongoing interdisciplinary collaborations and

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11. *See, e.g.*, Jeanne Charn, *Gideon* Symposium Essay, *Celebrating the "Null" Finding: Evidence-Based Strategies for Improving Access to Legal Services*, 122 Yale L.J. 2206 (2013).

12. *See, e.g.*, Martha F. Davis, *Gideon* Symposium Essay, *Participation, Equality, and the Civil Right to Counsel: Lessons from Domestic and International Law*, 122 Yale L.J. 2260 (2013).

13. Jenny Staletovich, *City Inaction on Polluted Soil Angers Residents*, Miami Herald (Sept. 7, 2013), http://www.miamiherald.com/2013/09/07/v-fullstory/3612664/city-inaction-on-polluted-soil.html (quoting longtime West Grove resident Jimmy Ingram) (internal quotation marks omitted).

14. *See* John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*, 67 Fordham L. Rev. 1927, 1928–29, 1932 (1999) (discussing "cause lawyering"); Michael Diamond, *Community Lawyering: Revisiting the Old Neighborhood*, 32 Colum. Hum. Rts. L. Rev. 67, 82–110, 131 (2000) (discussing "client-centered lawyering" and other models of community lawyering); *see also* Mary Helen McNeal, *Slow Down, People Breathing: Lawyering, Culture and Place*, 18 Clinical L. Rev. 183, 221–23 (2011) (discussing the importance of examining "local lawyering culture" when representing marginalized clients). On competing interests and ethical tensions in community representation, see Shauna I. Marshall, *Mission Impossible?: Ethical Community Lawyering*, 7 Clinical L. Rev. 147 (2000); Amy M. Reichbach, *Lawyer, Client, Community: To Whom Does the Education Reform Lawsuit Belong?*, 27 B.C. Third World L.J. 131, 141–46, 152–58 (2007); and Paul R. Tremblay, *Counseling Community Groups*, 17 Clinical L. Rev. 389, 457–63 (2010).

shifting participatory roles.[15] Constructed from the historical strands of the civil rights movement, the practice of community economic development, and the pedagogy of clinical legal education,[16] community representation shares "affinities with both cause and client-centered lawyering," building on a body of academic work and a tradition of grassroots advocacy based on conceptions of community power and collaborative client–lawyer relations.[17]

Both pro bono and public interest lawyers face a familiar battery of moral–ethical issues in representing inner-city communities and their constituent groups. Rehearsed in the literature of multiple-client representation,[18] especially concerning class action[19] and aggregate litigation,[20] the issues include the formation of the client–lawyer relationship,[21] the objectives and scope of representation,[22] communication[23] and confidentiality,[24] conflicts of interest,[25] organizational counseling,[26] duties to prospective

15. *See* Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. Rev. 443, 490–94 (2001); Diamond, *supra* note 14, at 121–23; Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 Clinical L. Rev. 427, 438–40 (2000); Karen Tokarz et al., *Conversations on "Community Lawyering": The Newest (Oldest) Wave in Clinical Legal Education*, 28 Wash. U. J.L. & Pol'y 359, 362–64 (2008).

16. *See* Scott L. Cummings, Commentary, *Clinical Legal Education and Community Development*, 14 J. Affordable Housing & Community Dev. L. 208 (2005); Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 Stan. L. Rev. 399, 409–21 (2001); Scott L. Cummings & Gregory Volz, *Toward a New Theory of Community Economic Development*, 37 Clearinghouse Rev. 158 (2003).

17. Alan K. Chen & Scott L. Cummings, Public Interest Lawyering 304 (2012).

18. *See, e.g.*, Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 Va. L. Rev. 1103, 1128–34 (1992); Paul R. Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 UCLA L. Rev. 1101, 1124–29 (1990).

19. *See, e.g.*, Max Helveston, *Promoting Justice Through Public Interest Advocacy in Class Actions*, 60 Buff. L. Rev. 749, 773–79 (2012); Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 Stan. L. Rev. 1183, 1243–62 (1982); William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 Yale L.J. 1623, 1657–58 (1997).

20. *See, e.g.*, Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. Chi. Legal F. 519; Judith Resnik et al., *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. Rev. 296 (1996); Paul D. Rheingold, *Ethical Constraints on Aggregated Settlements of Mass-Tort Cases*, 31 Loy. L.A. L. Rev. 395 (1998).

21. *See* Restatement (Third) of the Law Governing Lawyers § 14 (2000).

22. *See* Model Rules of Prof'l Conduct R. 1.2 (2013).

23. *See* Model Rules of Prof'l Conduct R. 1.4 (2013).

24. *See* Model Rules of Prof'l Conduct R. 1.6 (2013).

25. *See* Model Rules of Prof'l Conduct R. 1.7 (2013); *see also* Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 Yale L.J. 470 (1976) (describing conflicts of interest between lawyers and clients in the context of school desegregation suits).

26. *See* Model Rules of Prof'l Conduct R. 1.13 (2013).

clients,[27] the lawyer's advisory role,[28] and the termination of representation.[29]

Community representation in civil rights and poverty law cases routinely implicates these sorts of moral–ethical issues, even when the interests of lawyers, lay activists, and clients converge within legal–political advocacy campaigns,[30] particularly in the expansive setting of environmental justice controversies.[31] Frequently, pro bono and public interest lawyers step into this larger setting from a spirit of collective obligation rather than a sense of individual or institutional loyalty. Accordingly, their motivations (e.g., access to justice and democratic participation) may be more civic-minded and their goals (e.g., environmental safety and public health) more universal in scale.

Consider, for example, the commitment of Florida pro bono lawyers to the low-income, historically segregated Jim Crow community of Coconut Grove Village West ("the West Grove") in Miami.[32] In 1925, the city erected a trash incinerator, called Old Smokey, in the West Grove beside residential homes and public schools.[33] For forty-five years until 1970, Old Smokey

27. *See* Model Rules of Prof'l Conduct R. 1.18 (2013); Restatement (Third) of the Law Governing Lawyers § 15 (2000).

28. *See* Model Rules of Prof'l Conduct R. 2.1 (2013).

29. *See* Model Rules of Prof'l Conduct R. 1.16(a) (2013).

30. For a discussion of interest convergence, see Derrick A. Bell, Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 Harv. L. Rev. 518, 522–28 (1980); Sheryll D. Cashin, *Shall We Overcome? Transcending Race, Class, and Ideology Through Interest Convergence*, 79 St. John's L. Rev. 253, 271–73 (2005) (discussing Bell, *supra*); and Lani Guinier, *From Racial Liberalism to Racial Literacy:* Brown v. Board of Education *and the Interest-Divergence Dilemma*, 91 J. Am. Hist. 92, 94 (2004) (same).

31. Environmental justice cases are expansive in two ways. They involve multiple clients, and they implicate wider concerns of public health and safety. *See* Colin Bailey, Advocacy Story, *Winning Against the Odds: Race-Conscious Community Lawyering and Organizing for Environmental Justice*, 46 Clearinghouse Rev. 456 (2013); Robert D. Bullard, *Environmental Justice for All*, *in* Unequal Protection: Environmental Justice and Communities of Color 3 (Robert D. Bullard ed., 1994). *See generally* Robert D. Bullard, Dumping in Dixie: Race, Class, and Environmental Quality (3d ed. 2000).

32. *See* Anthony V. Alfieri, *Fidelity to Community: A Defense of Community Lawyering*, 90 Tex. L. Rev. 635, 635–37 (2012) (book review); Anthony V. Alfieri & Angela Onwuachi-Willig, *Next Generation Civil Rights Lawyers: Race and Representation in the Age of Identity Performance*, 122 Yale L.J. 1484, 1555–56 (2013) (book review); *see also* Anthony V. Alfieri, Essay, *Educating Lawyers for Community*, 2012 Wis. L. Rev. 115.

33. *See* Nick Madigan, *In the Shadow of 'Old Smokey,' a Toxic Legacy*, N.Y. Times, Sept. 23, 2013, at A10, *available at* http://www.nytimes.com/2013/09/23/us/old-smokey-is-long-gone-from-miami-but-its-toxic-legacy-lingers.html?hpw; Zachary Lipshultz, Anthony Alfieri & Steven Lipshultz, *Miami's West Grove: 'Old Smokey' Incinerator Remains Health Hazard*, Miami Herald (July 19, 2013), http://www.miamiherald.com/2013/07/19/3509485/miamis-west-grove-old-smokey-incinerator.html; Staletovich, *supra* note 13. The placement of Old Smokey in a Jim Crow neighborhood during the early twentieth century raises serious questions of environmental racism. For a discussion of environmental racism, see Robert D. Bullard et al., United Church of Christ, Toxic Wastes and Race at Twenty: 1987–2007 (2007); Regina Austin & Michael Schill, *Black, Brown, Poor & Poisoned: Minority Grassroots Environmentalism and the Quest for Eco-Justice*, 1 Kan. J.L. & Pub. Pol'y 69 (1991); Robert D. Bullard

emitted carcinogenic chemicals (e.g., arsenic, benzo(a)pyrene, cadmium, and lead) and discharged toxic waste (e.g., ash). Long-term exposure to toxic emissions and waste dump sites contributed to the contamination of soil and groundwater in the West Grove and in public parks in adjoining Coconut Grove and elsewhere.[34]

Summoned to the West Grove for individual aid and institutional assistance, pro bono volunteer lawyers have their own motivations and goals that consciously and unconsciously shape the formation of client–lawyer relationships, inform the objectives and scope of representation, and dictate the means of representation. The formation, scope, and means of pro bono representation in local environmental justice controversies confront pro bono lawyers with a bundle of hard choices. Consider three such choices[35]: first, the choice of counseling a client to reject a settlement offer for individual monetary relief in order to negotiate a community-wide benefits agreement calling for the comprehensive assessment and cleanup of contaminated soil and groundwater;[36] second, the choice of discontinuing or terminating the representation of a client because she opts for an individual monetary settlement prior to the negotiation of a community benefits agreement;[37] and third, the choice of publicly disclosing a client's independent monetary settlement (i.e., a party-to-party settlement negotiated without the lawyer's knowledge[38]), even though such a revelation might result in the public ostracism or shunning of the client.

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et al., *Toxic Wastes and Race at Twenty: Why Race Still Matters After All of These Years*, 38 ENVTL. L. 371 (2008); and Kelly Michele Colquette & Elizabeth A. Henry Robertson, *Environmental Racism: The Causes, Consequences, and Commendations*, 5 TUL. ENVTL. L.J. 153, 154–56 (1991).

34. *See* Madigan, *supra* note 33; Lipshultz, Alfieri & Lipshultz, *supra* note 33; Staletovich, *supra* note 13.

35. The instant choice situations presume conditions of scarcity in the indigent legal services marketplace, thereby affording prospective clients little or no access to the civil justice system outside of pro bono representation. *See generally* Jeffrey Selbin, Jeanne Charn, Anthony Alfieri & Stephen Wizner, *Service Delivery, Resource Allocation, and Access to Justice: Greiner and Pattanayak and the Research Imperative*, 122 YALE L.J. ONLINE 45 (2012), http://yalelawjournal.org/2012/07/30/selbin-charn-alfieri&wizner.html.

36. The community benefits agreement contemplated here includes the comprehensive assessment and remediation of the incinerator site, the implementation of a grassroots health education and screening campaign, and the formation of a government-funded disease registry and clinical study. For a discussion of community benefits agreements, see Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?*, 77 U. CHI. L. REV. 5 (2010); Alex Geisinger, *The Benefits of Development and Environmental Injustice*, 37 COLUM. J. ENVTL. L. 205, 240–43 (2012); William Ho, *Community Benefits Agreements: An Evolution in Public Benefits Negotiation Processes*, 17 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 7 (2007–2008); and Stephen R. Miller, *Legal Neighborhoods*, 37 HARV. ENVTL. L. REV. 105, 155–56 (2013).

37. Discontinuing or terminating the representation of a client in this instance withdraws legal assistance for purposes of negotiating a settlement, drafting a release, and ensuring future enforcement.

38. Direct party-to-party settlement negotiations undertaken without the knowledge of counsel may indirectly run afoul of the American Bar Association's "no contact" rule. *See* MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. (2013).

Well hewn by civil rights and poverty law practitioners, these sometimes controversial paternalistic interventions are neither new nor surprising. Read plainly, the conventions of lawyer counseling permit independent, candid advice regarding the moral, economic, social, and political considerations relevant to a client's situation.[39] Similarly, the conventions of the client–lawyer relationship permit a lawyer to withdraw from representation if the client insists on taking action with which the lawyer harbors a fundamental disagreement.[40] Moreover, the same conventions permit the lawyer to reveal information that is either unrelated to the representation of a client or necessary to carry out the representation.[41] Nonetheless, the hard choices molded by the conventions of practice import an extensive body of cautionary commentary from the fields of legal ethics and professional regulation.[42] That commentary challenges the propriety of a lawyer's paternalistic use of coercive settlement counseling tactics, termination of representation threats, and censorious public disclosures. To test the propriety of such lawyer interventions and to salvage their tactical use in environmental justice campaigns, let us turn to Conly's analysis of state-sponsored paternalism.

II. Paternalistic Interventions

> "What we need to do is to help one another avoid mistakes so that we may all end up where we want to be." (p. 2)

Conly's defense of paternalistic interventions clashes with some of the fundamental tenets of classical liberalism. In particular, her defense departs from the normative centrality of individual autonomy, freedom of choice, and liberty of decisionmaking. Intrigued by significant developments in the fields of psychology and behavioral economics, she moves beyond accepted liberal values to embrace paternalism in its libertarian and coercive forms. Turn first to paternalism.

A. *Paternalism*

The starting point for a defense of paternalistic lawyer interventions in the form of coercive counseling, termination, and disclosure tactics is a critique of autonomy. Conly argues that "autonomy is not all that valuable," certainly "not valuable enough to offset what we lose by leaving people to their own autonomous choices" (p. 1). For Conly, people "don't reason very well," and hence she finds no justification for leaving people to struggle with their own inabilities and to suffer the consequences of sometimes irreparable

39. *See* Model Rules of Prof'l Conduct R. 2.1 (2013).

40. *See* Model Rules of Prof'l Conduct R. 1.16(b)(4) (2013).

41. *See* Model Rules of Prof'l Conduct R. 1.6(a) (2013).

42. *See, e.g.*, Luban, Lawyers and Justice, *supra* note 5, at 341–57 (discussing the ethical dilemmas of class action and group representation); John D. King, *Candor, Zeal, and the Substitution of Judgment: Ethics and the Mentally Ill Criminal Defendant*, 58 Am. U. L. Rev. 207 (2008) (exploring paternalism in criminal law and mental health counseling).

harm (p. 1). More striking, she finds that the adverse consequences of "letting people choose poorly" under a stock liberal respect-for-autonomy rationale constitute a harsh "justification for inhumanity" at the expense of equality and mutual respect (p. 2).

To be sure, Conly concedes the normative importance of respecting autonomy and affirms the foundational belief that "all people have intrinsic value" (p. 2). Yet she dismisses the claim that we are "morally bound to allow people to choose when it comes to determining how they themselves want to live."[43] For evidentiary support, she cites research in the fields of psychology and behavioral economics to refute the contention "that we are pre-eminently rational agents, each of us well suited to determining what goes in our own life" (p. 2). Research from both fields, according to Conly, suggests a "much higher" incidence of irrationality infecting day-to-day decisionmaking than the Enlightenment tradition of liberal autonomy admits.[44] Irrationality lays the groundwork for the rightly motivated justification of coercive paternalism, or more precisely, for the interventions and "laws that force people to do what is good for them."[45]

In defense of state-sanctioned, paternalistic intervention in "people's personal lives," Conly opines that the government "should save people from doing things that are gravely bad for them when they do that only as a result of an error in thinking" (p. 3). By defining intervention in terms of government-enacted laws and limiting intervention to "cases of obvious harm," Conly posits a paternalist system "that forces people to act, or refrain from acting, according to their best interests" (p. 3). As imagined by Conly, such a system might alternately force people to do "the right thing" or prevent them from doing "the wrong one" (p. 4). The task in each case is "to isolate

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43. P. 2. On liberal autonomy claims, Conly observes:

> It is said that to control people's choices in such ways fails to respect their autonomy, because we interfere with their ability to direct their lives according to their own reasoning. If some people choose poorly, that is unfortunate for them, but it is their own responsibility, and interfering, even with the most benevolent intent and the most beneficent effect, ignores that these are rational agents who have the right to make their own choices.

P. 1.

44. P. 2. Conly remarks that liberalism "respects our decision making abilities" but "leaves us 'free' to be confounded by error and to end up in places we never wanted to be, and which may furthermore be situations that diminish the very agency liberalism wants to celebrate." P. 32. The function of government under liberalism, Conly adds, "is to try to guarantee freedom of action, to eliminate disinformation, and, in some cases, provide helpful information." P. 8.

45. P. 3. Conly recommends that we "save people from themselves by making certain courses of action illegal." P. 1. To illustrate this point, she cites the ban on cigarettes and trans fats, as well as the requirement that restaurants reduce portion sizes. P. 1; *see also* James Bennet, *The Bloomberg Way*, Atlantic Monthly, Nov. 2012, at 66, *available at* http://www.theatlantic.com/magazine/archive/2012/11/the-bloomberg-way/309136/ (interview documenting Mayor Bloomberg's attempts to limit soda sizes in New York City); Sarah Conly, Op-Ed., *Three Cheers for the Nanny State*, N.Y. Times, Mar. 25, 2013, at A23, *available at* http://www.nytimes.com/2013/03/25/opinion/three-cheers-for-the-nanny-state.html?_r=0&pagewanted=all (defending the attempts to limit soda sizes in New York City).

what exact degree of harm is required to justify the paternalistic intervention" (p. 5).

To ascertain the degree of harm required to trigger public (government) intervention or, as in this case study, private (lawyer) intervention, Conly differentiates between "hard" and "soft" paternalism. Hard paternalism, she explains, "advocates making some actions impossible."[46] Soft paternalism, by comparison, "merely recommends incentivizing certain preferable options."[47] Despite this classification, Conly struggles to distinguish "between being informed and not being informed," remarking that "a neutral account of what it means to be informed is unavailable" (p. 6). Lacking a clear-cut or natural account of full or perfect deliberative information, she discovers no identifiable or reliable point separating rational and irrational decisionmaking or voluntary and involuntary action (p. 6). The absence of such boundary points blurs the distinction between hard, prohibition-based paternalism and soft, incentive-based paternalism for legal advocates and governmental actors weighing interference in the decisions of others. For clarity and direction, Conly turns to the scales of cost–benefit analysis (p. 7).

Under Conly's analysis, paternalistic intervention is a function of psychological and social cost. In fact, according to her calculus, cost "is the only determinant of acceptability" (p. 7). Conly links psychological cost to individuality and personhood, highlighting the interventionist risks of alienation and inauthenticity. By contrast, she ties social cost to politics, the public sphere, and the diminution of private values.

To gauge the psychological costs of intervention, Conly carefully considers the impact of paternalistic legislation on individuality. Contrary to proponents of classical liberalism,[48] she argues that people possess natural, self-subverting tendencies toward "social conformity" and "poor instrumental reasoning."[49] Paternalistic interventions, she admits, may exacerbate these tendencies, inducing a sense of alienation marked by a "psychological loss" of control (p. 10). In the same way, interventions may engender a sense of inauthenticity manifested by a loss of affect or the ability to discern one's own best interest (pp. 10–11).

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46. P. 5. Conly mentions that "the hard paternalist may impose actions the agent would not want even if aware of the facts." P. 5.

47. P. 5. Conly comments that "the soft paternalist merely imposes what the agent would want if informed." P. 5.

48. For her discussion of classical liberalism, Conly critically extends the work of John Stuart Mill. *See* chapter 2; *see also* JOHN STUART MILL, ON LIBERTY (Michael B. Mathias ed., Pearson Longman 2007) (1859). Significantly, Conly differs with Mill on the costs and benefits of intervention, decrying both Mill's belief that people will be efficient in developing their individual and authentic characters and in pursuing their own goals "without government controls" and his belief "that government intervention would always be a conservative influence, imposing the social conventions of the majority and repressing innovation." P. 55.

49. P. 9. Conly points out that the government "can intervene in ways that help us reach our own, individual goals better than we would do if left to our own devices." P. 10. She adds that such intervention "can help to free us of the conformity of social opinion" and enable us to "become better at choosing wisely with the help of paternalistic legislation." P. 10.

To measure the broader social costs of intervention, Conly considers the political dangers of the public imposition of "foreign" (i.e., extrinsic) values on private citizens wedded to deep-seated, intrinsic values of self-direction (pp. 11–12). Attentive to the public–private tensions embedded in liberal democratic regimes, she points to the political dangers stemming from public enforcement of private value compliance through punitive sanctions and privacy invasions (pp. 12–15). She advocates the type of paternalistic interventions that militate against these palpable dangers by directing people to "act according to their own values" (pp. 11–12). In impoverished communities bound up in environmental justice disputes, public–private value concordance often evolves around equal access to justice norms and participatory political process norms asserted by clients, reinforced by community stakeholders, and affirmed by lawyers and lay advocates.[50] This evolution is a function of, and a grassroots response to, entrenched legal underrepresentation and political disenfranchisement.

Despite the psychological and social costs of intervention, either through governmental legislation or lawyer discretion, Conly argues that "preserving our liberty of action is not worth the costs of exercising choice" in certain distinct situations, especially when "autonomous action" may prove "detrimental" to individual happiness, material survival, and the promotion of justice, equal treatment, and liberty (p. 16). Her argument casts intervention as a moral obligation to prevent autonomous action "in the interests of better living" across unlimited areas of personal choice.[51] The logic of moral intervention rests on the behavioral or psychological predicate of cognitive bias, flawed instrumental reasoning, and nonrational choice (pp. 16, 20–23). From this predicate, Conly stresses the need for "external guidance" and "constraints" on liberty of action "through regulation, law, and institutional design" (p. 23). To that end, she investigates three pathways to channeling personal liberty and guiding individual decisionmaking.

The first of Conly's three pathways to guided choice and channeled decisionmaking is education. Conly refers to education as the "standard liberal response to poor choice" (p. 25). Liberal education, she notes, preserves liberty and supplies "better conditions for making choices"—for example, by informing "the choosers about the dangers involved in some options" (pp. 24–25). At the same time, educated "choosers" are vulnerable to standard informational and means–ends difficulties, including cognitive bias, errant instrumental reasoning, and nonrational instinct.[52]

In search of help, particularly in areas where poor judgments are common and the costs of such judgments "are very high and, often, irreparable,"

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50. *See* Sheila R. Foster & Brian Glick, *Integrative Lawyering: Navigating the Political Economy of Urban Development*, 95 CALIF. L. REV. 1999, 2053–72 (2007).

51. Pp. 17–20. Conly acknowledges "some limits on the sorts of things paternalistic policies can be used for," although she claims "no a priori restrictions on behaviors that can be subject to coercive paternalism." P. 182.

52. Conly observes, "No matter what direction we want to go in, we can't get there if we can't adequately assess the information we need in order to choose the best means to achieve our goals." P. 29.

Conly explores a second pathway to guided choice and channeled decision-making (p. 29). This pathway endorses "outside interference" in the form of libertarian paternalism (p. 29). Like liberal education, libertarian paternalism allows the decisionmaker to exercise a "full range of options" (p. 24). Unlike liberal education, however, it designs the relevant institutional choice architecture to "mak[e] bad choices more difficult and good choices more attractive" (p. 24).

Troubled by the lasting presence of bad choices under libertarian-paternalism systems, Conly shifts to a third, more interventionist pathway called coercive paternalism. This bluntly purposeful form of paternalism actually prevents some choices (p. 24). In practice, both libertarian paternalism and coercive paternalism "doubt" personal judgments of best interest and posit that third parties, namely experts, may be more competent to render such judgments (p. 37). Conly warns that this "substitution of judgment" mechanism implies neither inequality nor class or caste superiority (pp. 36–37). Instead, she contends, the substituted judgments of paternalism reasonably and realistically accept the fact of "shared fallibility" in decisionmaking (pp. 37–41). For Conly, recognizing human error, cognitive inability, or nonrational limitations in decisionmaking signals nothing degrading about or disrespectful of a person's status (pp. 39–41). Recognition of human frailty merely signals the workings of sympathy and compassion and, by extension, invites a positive duty to interfere in the best interest of others (p. 188). Turn next to a fuller account of libertarian paternalism.

B. *Libertarian Paternalism*

Libertarian paternalism employs unconscious structural means to manipulate or "nudge" people into making "beneficial" decisions while safeguarding their personal liberties.[53] Conly explains that libertarian paternalists, out of respect for autonomy and deference to behavioral realism, deploy both rational argumentation and cognitive bias to recommend (i.e., "push") preferred outcomes in specific choice situations (p. 8). This push or nudge seeks to "bypass" or "outmaneuver" conventional reasoning and instead appeal to cognitive biases to reach good results (p. 30). Put differently, libertarian paternalism "entices[ ] people to do what they themselves would want, if they knew the facts" (p. 45).

By combining rational persuasion and nonrational "choice architecture," libertarian paternalists strive to preserve a person's "freedom to choose" among all available "options" in a particular situation, including even the option to choose "badly" (pp. 30–31). In this respect, Conly remarks, libertarian paternalism "preserves the option for error."[54] In spite of

53. P. 8. For a recent account of libertarian paternalism, see Richard H. Thaler & Cass R. Sunstein, Nudge: Improving Decisions About Health, Wealth, and Happiness (rev. & expanded ed., Penguin Books 2009) (2008).

54. P. 32. Conly admits,

> [S]ince a libertarian paternalist system allows individuals the ability to act contrary to the nudge, those for whom the default option, and so forth, are not good choices could

this autonomy safeguard, Conly contends that the less invasive, manipulative framework of libertarian paternalism fails to sufficiently "respect people's decision-making ability," especially given its foundational commitment to moral agency (pp. 30–31). Equally important, this framework also fails to optimize desired outcomes (pp. 30–31). Turn next to her more intrusive account of coercive paternalism.

C. *Coercive Paternalism*

Coercive paternalism seeks to advance "beneficial outcomes" by forcibly constraining or prohibiting certain options (pp. 8–9). In this way, coercive paternalists discount a person's ability to choose accurately and appropriately, restrictive choice architecture notwithstanding (p. 33). Distrust of this kind, Conly argues, neither devalues nor degrades a person. Rather, it respects the value of personhood by "trying to help people live fruitful lives in which they are able to achieve their own ultimate goals" (p. 9).

To Conly, coercive paternalism operates to "constrain people's actions" (p. 45) when their "choices of instrumental means are confused" (p. 43). Selection confusion indicates that the efforts of libertarian paternalists to incentivize "good actions" may prove insufficient to obtain good results (p. 45). It does not, Conly insists, imply inequality or inferior judgment (pp. 37–38). Nevertheless, to impose instrumentally rational decisions "upon people that they themselves would not choose, even if properly informed," requires specific, generalizable criteria (pp. 45, 150). Conly recommends four such criteria (p. 150).

From the outset, in formulating generalizable criteria, Conly maintains that paternalistic intervention is justified only when the activity or conduct to be prevented "really is one that is opposed to our long-term ends" and then "only when [the interference] reflects individuals' actual values, not the values we might like them to have" (p. 150). Moreover, she asserts that interventionist "measures actually have to be effective," in terms of serving both "an immediate goal" (e.g., a comprehensive neighborhood environmental assessment and cleanup) and "an ultimate goal to which that immediate goal is to lead" (e.g., improving neighborhood public health and enhancing neighborhood political interest group representation) (pp. 150–51). Further, she contends that the material benefits at stake have to be "greater" than the measurable costs in material and psychological terms.[55] Finally, Conly claims that the intervention "needs to be the most efficient way to prevent the activity," judged by "the greatest margin of benefits over costs" (p. 151). Given these criteria, consider the paternalistic interventions

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bypass the nudge to hit upon a choice more appropriate to their own particular case, and thus would benefit from the freedom this system allows.

P. 31.

55. P. 151. By way of example, Conly notes that "a measure that greatly improves health . . . could in fact be so psychological [*sic*] painful, over the long run, as not to be worth it." P. 151.

of coercive settlement counseling tactics, termination of representation threats, and censorious public disclosures presented in the instant environmental justice case study.

III. Objections to Paternalistic Interventions

> "If interference has more costs than benefits, then, obviously, it is not a good idea." (p. 102)

Revisit for a moment the previously discussed commitment of Florida pro bono lawyers to Miami's low-income, segregated West Grove neighborhood.[56] For the purposes of this case study, assume that the Environmental Justice Project ("EJP") housed at the University of Miami School of Law's Historic Black Church Program helps recruit a pro bono team of volunteer lawyers to represent West Grove residents and nonprofit entities in addressing the environmental and public health depredations of Miami's Old Smokey incinerator.[57] Assume that the team builds on the interdisciplinary research of EJP law students to marshal a state[58] and federal[59] litigation campaign seeking a court-mandated, community-wide benefits agreement requiring the comprehensive assessment and cleanup of contaminated neighborhood soil and groundwater.

Furthermore, assume that scarce resources (e.g., inadequate time, staffing, and funding) compel the pro bono team to limit the formation of its West Grove client–lawyer relationships, narrow the objectives and scope of its representation, and restrict its means of representation to the pursuit of a community-wide benefits agreement rather than compensatory or punitive damages.[60] To that end, assume that the legal team advises all prospective clients that it will counsel them to reject a settlement offer for individual monetary relief if the offer omits a community-wide benefits agreement.

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56. *See supra* note 32 and accompanying text.

57. On the genesis of the Historic Black Church Program, see Anthony V. Alfieri, *Community Education and Access to Justice in a Time of Scarcity: Notes from the West Grove Trolley Garage Case*, 2013 Wis. L. Rev. 121.

58. On state environmental justice campaigns, see David Deganian, *Environmental Justice on My Mind: Moving Georgia's Environmental Protection Division Toward the Consideration of Environmental Justice in Permitting*, 2 Earth Jurisprudence & Envtl. Just. J. 33 (2012); Hillary Gross et al., *Environmental Justice: A Review of State Responses*, 8 Hastings W.-Nw. J. Envtl. L. & Pol'y 41 (2001); Jeanne Marie Zokovitch Paben, *Approaches to Environmental Justice: A Case Study of One Community's Victory*, 20 S. Cal. Rev. L. & Soc. Just. 235, 246–52 (2011); and Chasid M. Sapolu, Comment, *Dumping on the Wai'ânae Coast: Achieving Environmental Justice Through the Hawai'i State Constitution*, 11 Asian-Pac. L. & Pol'y J. 204 (2010).

59. On federal environmental justice campaigns, see Rachael D. Godsil, Note, *Remedying Environmental Racism*, 90 Mich. L. Rev. 394, 397–408 (1991), and Joseph Ursic, Note, *Finding a Remedy for Environmental Justice: Using 42 U.S.C. § 1983 to Fill in a Title VI Gap*, 53 Case W. Res. L. Rev. 497, 498–501 (2002).

60. *See generally* Restatement (Third) of the Law Governing Lawyers § 21 cmt. c (2000) ("Contracts between clients and lawyers . . . may specify procedures for making decisions as well as the person who is to decide.").

The team also advises all prospective clients that it will discontinue or terminate its representation of any client who opts for an individual monetary settlement prior to the negotiation of a community-wide benefits agreement. In addition, the team advises all prospective clients that it will publicly disclose the content of a client's individual monetary settlement, to the extent that the information becomes openly available and widely disseminated, if that settlement is negotiated independently of the team (i.e., party-to-party negotiations outside the client–lawyer relationship). Finally, despite the controversial nature of the pro bono team's advice, assume that all of the prospective clients consent to the prescribed terms of the representation.

Having surveyed Conly's moral and political accounts of paternalism, consider the grounds for objection to the Old Smokey legal team's interventionist use of coercive settlement counseling tactics, termination of representation threats, and censorious public disclosures. Consider in particular Conly's recommended criteria for assessing the costs and benefits of coercive paternalistic interventions. In assessing the reasonableness and suitability of government-sponsored regulatory policy interventions—e.g., in the form of trans-fat bans or food-stamp soda bans or restaurant portion-size regulation—recall that Conly's framework of analysis entails four determinations: first, whether the interventions advance people's long-term ends and reflect their actual values; second, whether the interventions prove effective in serving people's immediate and ultimate goals; third, whether the material benefits of the interventions outweigh their measurable costs; and fourth, whether the interventions constitute the most efficient way of achieving people's long-term goals.[61] For Conly, the outcome of these determinations indicates the permissibility of paternalistic interference in particular factual contexts (pp. 177, 179). Turn first to an examination of coercive counseling tactics.

A. *Coercive Counseling Tactics*

The pro bono legal team's coercive counseling tactic of advising prospective West Grove clients that it will counsel them to favor a community-wide benefits agreement over individual monetary relief resembles a well-intentioned, "soft" intervention closer to liberal and libertarian paternalism than to coercive paternalism. Although the conventions of legal counseling permit candid advice regarding the moral, economic, social, and political considerations of a client's situation,[62] legal ethics commentary traditionally objects to more coercive forms of intervention.[63] This objection stems from the concern that coercive counseling tactics may curb a client's individual autonomy, inhibit her decisionmaking, and restrain her liberty of choice,

61. *See supra* Section II.C.

62. *See* Model Rules of Prof'l Conduct R. 2.1 (2013).

63. *See, e.g.*, Restatement (Third) of the Law Governing Lawyers § 18 (2000) (explicating rules governing client–lawyer contracts); *id.* § 22 (clarifying rules governing the authority reserved to a client).

especially in matters of settlement.[64] A fair account of this objection requires assessing the costs and benefits of coercive counseling tactics that entice, nudge, or push clients toward what here amounts to an informal prospective settlement waiver.

In assessing the reasonableness and suitability of "soft" prospective settlement waivers—waivers that rely on education, rational argument, and cognitive bias to push clients to reject anticipated settlement offers—recall Conly's initial framework of analysis for coercive paternalism. For paternalistic intervention to be permissible under that analysis, the coercive counseling tactic of nudging or pushing clients toward prospective settlement waivers must not only advance the long-term ends and reflect the actual values of West Grove clients but also prove effective in serving their immediate and ultimate goals. Paternalistic interventions prove effective, according to Conly, when they are "very, very likely to make a person better off" (p. 47). On this logic, the person's standing improves because interference in her freedom of choice will advance her "long run" goals without undervaluing her "actual decision-making abilities" (p. 47).

Here, many West Grove clients may share the immediate goals (i.e., comprehensive environmental assessment and cleanup), ultimate goals (i.e., improved environmental safety and public health), and long-term ends (i.e., increased legal access to justice and enhanced participation in the political process) advanced by the pro bono team's coercive counseling tactic of encouraging soft prospective settlement waivers. To the extent that this tactic neither devalues nor degrades the clients, it effectively affirms their long-held values of legal equality and political inclusion. Yet, inevitably, one or more of these clients may not share the same immediate goals, ultimate goals, or long-term ends championed by the pro bono team. Indeed, it seems likely that the economic interests of one or more clients may diverge from the political interests and policy preferences of the larger class of clients, resulting in an expressed willingness to accept a settlement offer for individual monetary relief. Resolving this interest divergence or competition remains difficult without further resort to even more pronounced coercive counseling tactics, such as direct client-to-client or client–community "political" counseling outside the presence of legal counsel.

Further, under Conly's applied analysis, the material benefits of the paternalistic intervention tactic at issue must outweigh its measurable costs and must be the most efficient way of achieving the long-term goals of West Grove clients. Here, material benefits include both immediate goals (i.e.,

64. *See* ABA/BNA Lawyers' Manual on Professional Conduct § 31:304 (2012) ("A lawyer may not add a provision to a fee agreement usurping the client's authority to make settlement decisions."); Carol A. Needham, *Advance Consent to Aggregate Settlements: Reflections on Attorneys' Fiduciary Obligations and Professional Responsibility Duties*, 44 Loy. U. Chi. L.J. 511 (2012) (discussing lawyers' duties and client autonomy in the context of aggregate settlements); *see also* Robert F. Cochran, Jr., *Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice for the Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation*, 47 Wash. & Lee L. Rev. 819, 840–46 (1990) (discussing the hazards of client control over legal representation).

comprehensive environmental assessment and cleanup) and ultimate goals (i.e., improved environmental safety and public health). By contrast, measurable costs include the cost to individual welfare (e.g., the opportunity cost of forgoing settlement monies) "sacrificed for the sake of others" and the harmful effect of infantilization on individual decisionmaking skills in law and politics (pp. 65–68).

For Conly, the loss of individual welfare, here calculated in terms of a monetary settlement, "is not typically a major one" and "does not typically involve . . . an inalienable right" (p. 65). Yet again, one or more of the affected West Grove clients may regard the economic loss of an individual monetary settlement as a "major" loss of individual welfare. Without deciding whether the refusal of a monetary settlement denotes a major or a minor loss of individual welfare, the right to bargained-for compensable relief for personal harm seems if not inalienable then nearly so. Still, for Conly, the loss of decisionmaking skills is more serious insofar as it may involve the erosion of the "intellectual skills" and "emotional strength" underlying personhood.[65] Conly attempts to mitigate the risk of infantilization by lessening the adverse impact of "dependency" and by insisting that the decisionmaking qualities of discernment and emotional maturity develop through external "guidance."[66]

In this case, the material benefits for West Grove clients are a negotiated comprehensive environmental assessment and cleanup, improved environmental safety and public health, and increased legal access to justice and enhanced participation in the political process, all of which would derive from the pro bono team's coercive counseling tactic of encouraging soft prospective settlement waivers. These benefits arguably outweigh the measurable welfare costs, which include sacrificing individual monetary settlements and risking the reinforcement of psychological infantilization and dependency. Whether this tactic offers the most efficient way of achieving the long-term goals of West Grove clients by expanding legal access to justice and increasing participation in the political process depends on the availability, benefits, and costs of alternative tactics, such as a broad formal prospective settlement waiver. Turn next to a second intervention: termination of representation threats.

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65. Pp. 66–68. Conly comments,

> The act of making a decision, of having to make up our minds, with its requirements that we consider the options, speculate as to the most likely outcomes and their desirability, and then make ourselves act as a result of this consideration, is something that we get used to and in many ways get better at.

P. 67.

66. Pp. 69–72. Conly claims,

> Paternalis[tic interventions] in some areas will not cause our abilities to atrophy. [They] will not lead to social conformity. [They] can in fact work against the inertia and conservatism to which we are naturally prone, and in so doing leave us better able than we would otherwise be to develop our own characters according to our own choices.

P. 73.

B. *Termination of Representation Threats*

The Old Smokey pro bono legal team's termination of representation threat, aimed at West Grove clients who opt for an individual monetary settlement prior to the negotiation of a community benefits agreement, also resembles a "soft" intervention more akin to libertarian paternalism and its restrictive choice architecture, albeit with a "hard" punitive and invasive edge. The intervention is punitive because it threatens and imposes sanctions on the client. The intervention is invasive because it demands information from, and monitoring of, the client.

Like the interventions of libertarian paternalism, a lawyer's threats to terminate representation stop short of expressly or overtly prohibiting settlement. Under a client–lawyer relationship defined by libertarian paternalism, a client retains her freedom to enter into a settlement. In fact, she may opt for an individual monetary settlement prior to the negotiation of a community benefits agreement.[67] In our scenario, however, opting out of a community benefits agreement will result in the lawyer's withdrawal or termination of representation, a punitive action Conly seems likely to eschew, even under the more compulsory systems of coercive paternalism. Opting out will also likely implicate client privacy concerns, an area of freedom Conly seeks to protect even under strict systems of coercive paternalism.[68] Predictably, investigating a client's opt-out choice during pretrial or posttrial settlement negotiations entails monitoring client conduct and increases the risk of privacy invasion.

Although the conventions of the client–lawyer relationship permit a lawyer to withdraw from a representation if the client insists on taking action with which the lawyer fundamentally disagrees,[69] legal ethics commentary customarily objects to coercive forms of interventionist choice architecture that limit a client's individual autonomy, constrain her decisionmaking, and restrict her liberty of choice in settlement.[70] A full account of this objection warrants an assessment of the costs and benefits of threats to terminate representation that strongly nudge, push, or steer clients away

67. On the history and structure of community benefits agreements, see Scott L. Cummings & Benjamin S. Beach, *Further Consideration: Community Benefits Agreements*, *in* Community Economic Development Law 322–33 (Susan D. Bennett et al. eds., 2012).

68. *See, e.g.*, pp. 12–14.

69. *See* Model Rules of Prof'l Conduct R. 1.16 cmt. 7 (2013) ("The lawyer may . . . withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement."); ABA/BNA Lawyers' Manual on Professional Conduct § 31:303 (2012) ("[T]he Commission believes that disagreements between a lawyer and client about means must be worked out by the lawyer and client within a framework defined by the law of agency, the right of the client to discharge the lawyer and the right of the lawyer to withdraw from the representation if the lawyer has a fundamental disagreement with the client[.]" (first alteration in original) (quoting Am. Bar Ass'n, A Legislative History 55 (2006)) (internal quotation marks omitted)).

70. *See supra* notes 63–64 and accompanying text; *see also* Jane Y. Kim, Note, *Refusing to Settle: A Look at the Attorney's Ethical Dilemma in Client Settlement Decisions*, 38 Wash. U. J.L. & Pol'y 383 (2012).

from individual monetary settlements prior to the negotiation of a community benefits agreement.

Assessing the reasonableness and suitability of termination of representation threats—i.e., threats that rely on privacy invasion and the punitive withdrawal of representation—returns us to Conly's framework of analysis. To be permissible under her analysis, paternalistic termination threats aimed at preventing premature, self-regarding cash settlements must advance the long-term ends and reflect the actual values of West Grove clients while effectively serving their immediate and ultimate goals. From a collective rather than an individual standpoint, West Grove clients share the immediate goals (i.e., comprehensive environmental assessment and cleanup), ultimate goals (i.e., improved environmental safety and public health), and long-term ends (i.e., increased legal access to justice and enhanced participation in the political process) that the pro bono team intends to safeguard through its threats to terminate representation. Unless they prove degrading to or disrespectful of clients, such threats may effectively foster the collective client values of legal equality and political inclusion.

Additionally, to be permissible under Conly's analysis, the material benefits of termination of representation threats must outweigh their measurable costs and must be the most efficient means of achieving the long-term goals of West Grove clients. Here, as before, the material benefits—comprehensive environmental assessment and cleanup, improved environmental safety and public health, and increased legal access to justice and enhanced participation in the political process—of the pro bono team's termination of representation threats arguably outweigh the measurable costs, which include declining individual monetary settlements and encouraging psychological infantilization and dependency. Conly underscores the psychological health effects of paternalistic legislation and policies on how people "feel" and "think." She fears not only the experience of alienation (e.g., depression or anger) but also the loss of the introspective skill of authenticity and critical reflection embodied in personal autonomy.[71] Yet she contends that "the dangers of paternalistic regulation per se for psychological health are not great" (p. 89), and she mentions that legislation of this sort will actually "help us to hone introspective skills and achieve psychological coherence" (p. 87). Once more, whether this tactic offers the most efficient way of achieving the long-term goals of West Grove clients— expanding legal access to justice and increasing participation in the political process—hinges on the feasibility, benefits, and costs of alternative tactics, such as a prior agreement to refrain from communicating settlement offers below a certain monetary threshold.[72] Turn last to the paternalistic intervention of censorious public disclosures.

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71. Pp. 74–75, 77, 80–83. Conly observes, "We need to avoid inauthenticity, with its superficiality of affect, and to promote personal autonomy, insofar as that signifies engagement in critical reflection on one's values and goals." Pp. 84–85.

72. *See generally* MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 3 (2013) ("At the outset of litigation representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation."); MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt.

C. *Censorious Public Disclosures*

The Old Smokey pro bono legal team's censorious public disclosure threat in advising prospective West Grove clients that it will openly disclose generally known information about a client's independent monetary settlement (i.e., a party-to-party settlement negotiated without the team's knowledge or participation) relies on the manipulative choice architecture of "soft" libertarian paternalism coupled with the "hard" punitive sanctions and privacy invasions of coercive paternalism. The sanctions—public ostracism and shunning—are designed to deter a client's independent monetary settlement outside the lawyer-negotiated framework of a community benefits agreement. The efficacy and enforcement of this tactic are contingent on discovering information regarding clandestine party-to-party settlement negotiations. Discovering such information requires the invasive acts of investigating and monitoring a client's private conduct.

Like termination of representation perils, censorious public disclosure threats make no direct effort to halt or prohibit self-regarding, independent client settlements. Consistent with the choice architecture of libertarian paternalism, the client preserves her freedom to negotiate a settlement for individual monetary relief outside the parameters of a community benefits agreement. Exercising this freedom, however, will result in public disclosure of the settlement, a punitive result Conly ordinarily disfavors, even under the most compulsory systems of coercive paternalism. The same freedom will almost certainly encroach on client privacy, a sphere of liberty Conly labors hard to protect from coercive invasion.[73]

Although the conventions of the client–lawyer relationship permit a lawyer to reveal information unrelated to the representation of a client or information necessary to carry out the representation,[74] legal ethics commentary routinely condemns coercive forms of interventionist choice architecture that check a client's individual autonomy, restrain her liberty of choice, or invade her privacy.[75] Standard regulatory conventions may fairly treat public (i.e., nonconfidential) information of an independent party-to-party settlement, by a client that third parties with direct knowledge of the transaction voluntarily provided, as information unrelated to the representation—i.e., as a separate collateral transaction outside the bounds of the client–lawyer relationship and, therefore, beyond the strictures of confidentiality or privilege. In the alternative, to the extent that discovering nonconfidential information of an independent party-to-party settlement by a client prompts the permissible withdrawal of her lawyer, and to the extent

2 (2013) ("For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy . . . must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer.").

73. *See, e.g.*, pp. 12–14.

74. *See* Model Rules of Prof'l Conduct R. 1.6(a) (2013).

75. *See supra* note 63 and accompanying text; *see also* Fred C. Zacharias, *Coercing Clients: Can Lawyer Gatekeeper Rules Work?*, 47 B.C. L. Rev. 455 (2006).

applicable court rules require notice of this withdrawal, regulatory conventions may allow the public disclosure of the settlement in court proceedings or filings precisely to enable the lawyer to carry out the withdrawal of representation in full compliance with ethics codes and court rules. A thorough account of the criticism gleaned from these settled regulatory conventions involves assessing the costs and benefits of censorious public disclosure threats that nudge or push clients to spurn individual monetary settlements negotiated independently of the client–lawyer relationship.

To assess the reasonableness and suitability of censorious public disclosure threats—i.e., threats that rely on the invasive monitoring and public shunning of clients—return again to Conly's framework of analysis. Under her permissibility criteria, censorious public disclosure threats fashioned to deter independent party-to-party monetary settlements must support the long-term ends and reflect the values of West Grove clients while effectively facilitating their immediate and ultimate goals. Here, as before, the immediate goals (i.e., comprehensive environmental assessment and cleanup), ultimate goals (i.e., improved environmental safety and public health), and long-term ends (i.e., increased legal access to justice and enhanced participation in the political process) of West Grove clients and the pro bono team roughly converge in the counseling medium of censorious public disclosure threats. Absent excessive punishment or harmful privacy invasion, these threats may work to promote legal equality and political inclusion within the legitimate ambit of paternalism.

Even so, to satisfy Conly's test, the material benefits of censorious public disclosure threats must outweigh their measurable costs and must afford the most efficient means of accomplishing the West Grove clients' long-term goals. Here, the material benefits of the pro bono team's censorious public disclosure threats may outweigh the potential costs of punitive shunning and privacy invasion. By definition, punitive shunning and privacy invasion are susceptible to abuse—a consequence that Conly fears and works to avert (pp. 100–02). Repeatedly, she warns against excessive and undeserved impairment- or imprudence-induced sanctions (pp. 126–29). She also warns that the loss-of-privacy risk from the intrusive, constant monitoring of individual behavior poses a distinct harm and a potentially dangerous infringement on personal autonomy (pp. 132–36, 141–44). For Conly, whether the tactic of censorious public disclosure threats can survive these warnings and supply an efficient way of meeting the long-term goals of expanding legal access to justice for West Grove clients and increasing their participation in the political process is an "empirical" rather than a normative question.[76]

Conclusion

Low-income communities of color like Miami's West Grove carry the aspiration of both equal justice and democratic participation, as well as the burden of legal underrepresentation and political disenfranchisement. Given

76. *See* p. 102.

their scarce resources, legal aid offices, public interest organizations, and bar associations offer such communities little to fulfill this aspiration or lift this burden, despite their institutional efforts to provide meaningful access to justice and a fair opportunity to engage in the political process. Surprisingly, given such desperate circumstances, it is volunteer lawyers from private sector law firms who oftentimes come to the aid of individual residents and neighborhood groups in need of legal–political advocacy assistance. Some of these lawyers come to pro bono service in search of community and a shared sense of place and history. Their call to service, however, quickly embroils them in long-standing and seemingly intractable moral–ethical issues, including the formation of the client–lawyer relationship, the objectives and scope of representation, communication and confidentiality, conflicts of interest, organizational counseling, duties to prospective clients, the lawyer's advisory role, and even the termination of representation.

Implicating civil rights and poverty law, this far-reaching set of issues presents stark moral–ethical choices for lawyers in neighborhood-wide environmental justice controversies concerning public health and safety. Consider, for example, the expanding West Grove controversy over Old Smokey's carcinogenic chemical emissions and toxic waste dumps and the resulting contamination of neighborhood soil and groundwater in Coconut Grove. The need to negotiate a court-mandated community benefits agreement requiring the comprehensive assessment and cleanup of the West Grove and elsewhere informs the hard choices facing pro bono lawyers. These choices include counseling clients to reject settlement offers for only individual monetary relief, threatening to discontinue or terminate representation should the clients opt for individual monetary settlements prior to the negotiation of a community benefits agreement, and publicly disclosing clients' independent monetary settlements, even though such revelations might result in their widespread public ostracism or shunning.

Familiar to civil rights and poverty law practitioners, these paternalistic counseling interventions challenge many of the dominant conventions of the lawyering process and its ethical regulation. Conly's *Against Autonomy: Justifying Coercive Paternalism* rises to this challenge and, by extension, cogently justifies the paternalistic use of coercive settlement counseling tactics, termination of representation threats, and censorious public disclosures. To an extent, this engrafted justification strains Conly's closely tailored defense of government-sponsored policies of paternalistic regulation. At the same time, it usefully illuminates the moral–ethical complexities and risks of community-based lawyering for pro bono attorneys who stand up in defense of impoverished communities.