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Multiple Communities or Monolithic Clients: Positional Conflicts of Interest and the Mission of the Legal Services Lawyer

Cover Page Footnote
Professor of Law and Director, Immigration Clinic, St. Thomas University School of Law. B.A. 1978, Colgate University; J.D. 1981, Columbia Law School. I am grateful for conversations with Bruce Green, Esther Lardent, and Paul Tremblay. My experience as a member of the board of directors at Mobilization for Youth (MFY) Legal Services in New York City, along with the commitment, craft, and battle-scarred irony of its attorneys, informed the conception of the legal services mission which I offer here.
MULTIPLE COMMUNITIES OR MONOLITHIC CLIENTS: POSITIONAL CONFLICTS OF INTEREST AND THE MISSION OF THE LEGAL SERVICES LAWYER

Peter Margulies*

INTRODUCTION

Legal services lawyers are not supposed to have conflicts of interest. Indeed, many legal services lawyers got into that line of work so they could avoid the hired gun ethos that breeds conflicts. In contrast with the image of the private practitioner, legal services lawyers typically do not boast of being able to argue one position and then spin around to argue the opposite, like some legal Linda Blair. In place of these easily-shed commitments held in place by a retainer and hourly billing, legal services lawyers cite a sense of mission.

One can define this mission narrowly as the provision of legal access—access to an attorney for those previously unrepresented. In the alternative, one can define it more broadly as also entailing social access—access to resources and power for communities previously denied both. In considering what clients to serve and what legal arguments to make on their behalf, legal services lawyers use this

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1. See The Exorcist (Warner Brothers 1973); see also Lawrence Joseph, Lawyerland 74 (1997) (quoting an attorney as observing, “Remember, lawyers are the ones who invented spin”). While legal services lawyers may “spin” as much as other lawyers in representing a client, they are different from most other attorneys in tying their advocacy to a vision of legal and social equality.

sense of mission as a guide. The challenge for legal services lawyers is that efforts to define the community, or sort out its multiple interests, reveal the dynamic nature of the legal services mission. In addressing what the legal ethics literature commonly calls “positional conflicts of interest,” this Article offers a contextual approach to meeting that challenge.

The term “positional conflict” means different things to different lawyers. Technically, it refers only to situations in which a lawyer or her law firm argues one side of a legal issue in one case, and argues the opposing side in a different case. This Article calls such conflicts “doctrinal” conflicts. Many lawyers, however, understand the term to refer to a much wider category of situations in which making legal or factual arguments on behalf of one client will potentially offend another. Similarly, in the legal services context, where lawyers often have a strong sense of mission, we can refer to cases or arguments that appear to be in tension with that mission as presenting a “mission” conflict. This distinction between doctrinal and mission conflicts is helpful in the legal services context only when it is coupled with a more refined understanding of the meaning of the mission for legal services lawyers.

There is no shortage of definitions of this mission. The most familiar is the legal access rationale, which I call the “common carrier” conception. Friends and foes of legal services invoke the common carrier conception as a supposedly “apolitical” justification for legal services. They argue that this involves merely providing legal representation, without changing the underlying terms of social access—the allocation of power and resources in our society. The separation of law and politics contemplated by the common carrier model, however, is easier to...
invoke in rhetoric than to implement in reality. Conservatives, for example, supplement their common carrier rhetoric with a moralistic model of legal services that denies assistance to those deemed deviant such as welfare mothers, undocumented immigrants, and public housing tenants accused of drug trafficking. Liberals and progressives take the opposite tack. They invoke a monolithic model that treats low-income people as a homogeneous group, characterized by essential differences with the rich and middle-class. Intra-group differences, like those manifested by tenants concerned about drugs and crime, do not appear on the monolithic model radar screen. For advocates of the monolithic model, offering legal access to this sub-group of tenants conflicts with the legal services mission.\(^5\)

Where the monolithic model sounds the right chord is in its clear commitment to both the legal and social kinds of access. This Article rejects the common carrier approach, with its lofty but expedient claims to apolitical status. It also rejects the punitive tinge of the moralistic model. In adopting a contextual approach to positional conflicts of interest, it seeks to unite two crucial commitments: first, the commitment to both legal and social access manifested by the monolithic approach; and second, sensitivity to differences within the diverse community of people living in poverty that the monolithic model obscures.\(^6\) Working through this sensitivity, however, requires taking seriously the sense of mission articulated by the monolithic model. This sense of mission has ethical dimensions for legal services lawyers, even when the conflict of mission addressed may not technically qualify as an “ethical” conflict under the canons of professional responsibility as traditionally understood.

Part I of this Article outlines the values served by conflicts of interest doctrine, including loyalty, confidentiality, and access. In considering the value of social access, it stresses the importance of developing community institutions, employing a human capital model of development first suggested by legal services pioneers Edgar and Jean Camper Cahn.\(^7\) It then examines in greater depth the common carrier, moralistic, and monolithic models of legal services practice, and concludes with a discussion of the kinds of conflicts that are most challenging in legal services settings: mission conflicts, doctrinal conflicts,

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5. The difficulties of addressing such intra-group difference have not gone unnoticed in the literature. See Paul R. Tremblay, Toward a Community-Based Ethic for Legal Services Practice, 37 UCLA L. Rev. 1101, 1117-29 (1990) [hereinafter Tremblay, Community-Based Ethic].

6. This Article is part of a larger project, which has previously centered on representing survivors of domestic violence. See Peter Margulies, Representation of Domestic Violence Survivors as a New Paradigm of Poverty Law: In Search of Access, Connection, and Voice, 63 Geo. Wash. L. Rev. 1071, 1100 (1995) [hereinafter Margulies, Representation of Domestic Violence Survivors].

and resource conflicts. Part II discusses ways of dealing with these conflicts based on the extant models of legal services practice. Part III outlines a contextual approach, which seeks to address the flaws of each of the other approaches. Part IV applies this approach to mission conflicts, and part V applies it to doctrinal conflicts of interest. In addressing these issues, the contextual approach seeks to build on the virtues that have always informed the best legal services theory and practice.

I. VALUES, MISSIONS, AND CONFLICTS

This part describes the problems faced by low-income communities and how conflicts of interest affect those problems. It then explains the four different visions of the mission of legal services. Finally, it couples the visions of legal services with the values served by conflict of interest doctrine.

A. Values and Conflicts of Interest

The core premise of our system of legal representation is that the lawyer acts as the agent of the client. In this capacity the lawyer, as agent, pursues the interest of her client, the principal. Whenever client interests clash, the lawyer's role becomes a study in paradox: the lawyer becomes a force for the destruction of the client's interests, not their vindication. It is understandable, then, that the legal profession should seek to curb such conflicts of interest. The kinds of conflicts of relevance to legal services attorneys are discussed below; some are traditionally recognized as such by the legal profession, some are not.8 Prior to such discussion, however, it is useful to outline the core values served by conflicts of interest doctrine, including countervailing values that make the restrictions on conflicts less than absolute.

Three values inform the legal profession's view of conflicts of interests: confidentiality, loyalty, and access. Confidentiality dictates that lawyers should not share information gained from one client with others, absent the consent of the client imparting the information. Loyalty mandates that lawyers should not allow feelings of allegiance to one client to compromise vigorous representation of another. At the same time, overly-restrictive conflicts rules will, in the name of confidentiality and loyalty, impair the access of clients to the lawyers of their choice—which we call legal access. In the case of poverty lawyers, overly-restrictive conflicts rules will sometimes deprive the communities these lawyers serve of a broader access to resources and power—"social" access—which the lawyer could obtain were she not constrained by a narrower set of allegiances.

8. See infra Part I.C.
These two kinds of access, legal and social, merit further discussion. Legal access, the kind that comes most readily to mind when considering the effects of conflicts doctrine, deals with the access of poor people to the justice system and to legal representation. An overly restrictive conflicts policy deprives poor people of representation if they are "conflicted out" of being represented by a legal services office, because a legal services program is often the lawyer of first and last resort in low-income communities.

Social access, in contrast, is a less prominent element in traditional conflicts of interest analysis, because it makes the substantive empowerment of an entire client group or community central to the law office's mission. This focus is shared by many legal services and public interest law programs, but by only a small percentage of private law firms, like those representing labor unions or plaintiffs in employment cases. Social access is access to goods, services, and benefits that can combat the root causes of subordination, including poverty itself. This kind of access requires infusions of capital. As noted by Edgar and Jean Camper Cahn, pioneers of theory and action on legal services, the capital required is both financial and human in form. While financial capital is crucial, human capital—the investment of time and effort in education, organization, and institution-building—is also necessary. Both kinds of capital need replenishment in the communities.

10. See Tremblay, Community-Based Ethic, supra note 5, at 1141 n.142.
11. See Edgar S. Cahn, Reinventing Poverty Law, 103 Yale L.J. 2133, 2133-34 (1995); Cahn & Cahn, supra note 7, at 1016-24; cf. Donald N. McCloskey, The Rhetoric of Economics 77 (1985) (noting that the "metaphor" of human capital, popularized by Gary Becker, refined thought in two areas of economic thought: "Thought in both fields was improved—labor economics by recognizing that skills, for all their intangibility, arise from abstention from consumption; capital theory by recognizing that skills, for all their lack of capitalization, compete with other investments for a claim to abstention."). In invoking this conception of human capital, I do not slight the concerns of critics of law and economics that the rhetoric of economics can obscure, rather than illuminate, important elements of human interaction. See, e.g., Jane B. Baron & Jeffrey L. Dunoff, Against Market Rationality: Moral Critiques of Economic Analysis in Legal Theory, 17 Cardozo L. Rev. 431, 485-90 (1996) (arguing that utilitarian cost-benefit analysis undervalues harms to identity and personhood). The conception of human capital I employ here is not necessarily translatable into dollars and cents. Instead, it focuses in large part on the intangible images and rituals of solidarity which create community. One element of these images and rituals, however, is instrumental, or at least purposive—the notion of working together for a common goal. Frustration in achieving common goals will gradually lead to anomie and demoralization.
served by legal services. That replenishment should be a core element of the legal services mission.

To begin to understand how to replenish human and financial capital in low-income communities, it is important to appreciate why this type of capital is in short supply. Sociologists have theorized that the shortage of both financial and human capital in low-income communities stems from the interaction of macro and micro factors. These macro factors include racism, classism, and inequitable allocation of resources. Micro factors include the organizational difficulties confronted by institutions like the church, community-controlled businesses, and the family. In many communities served by legal services, macro and micro factors interact to form a downward spiral. When resources and capital from the larger society are not forthcoming, the arduous personal investment in human capital such as education seems like a sucker's bet to many in the community, particularly young people. Rather than invest time and effort building institutions that benefit the community in the long term, too many young people fall back on activities that pay off in the short term, including drugs and crime. "Mentoring" relationships form in those contexts, not in the context of productive social institutions. These concerted activities, which largely victimize other members of the community, further weaken the community's fragile institutional fabric. In a vicious cycle, the "social disorganization" which results from this downward spiral of macro and micro disinvestment offers a pat rationale for continued

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15. See Sampson & Groves, supra note 14, at 780-82.

16. Domestic violence is a good example of a social problem with macro and micro elements that impedes the development of human capital. Domestic violence hinders women from getting and keeping jobs, as men exercise power and control by prohibiting work by their partners, or harassing partners on the job. This kind of violence affects women and families on an individual basis, but stems from a spectrum of causes, including the pervasive power of patriarchal assumptions of privilege, as well as the effects in low-income communities of frustrations produced by lack of opportunity. See Linda L. Ammons, Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome, 1995 Wis. L. Rev. 1003, 1034-44; Kimberlé Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 Stan. L. Rev. 1241, 1245-51 (1991); Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581, 590-94 (1990).

17. See Hagan, supra note 14, at 82.

18. See Sampson & Groves, supra note 14, at 777-82. My focus here is on the relationship between drugs and violent crime on the one hand, and both micro and macro investments in human capital on the other. As Regina Austin has pointed out, some activities that are illegal or on the margins of legality, such as street-peddling, can become positive elements in community life. See Regina Austin, "The Black Com-
inequitable allocations of resources by bolstering arguments that more equitable resource allocations are either futile or counter-productive. This does not mean that a punitive approach is the best approach to solving this problem, as conservatives suggest. It does mean, however, that addressing the problem is an important element of the social access mission of legal services.

B. Models of Legal Services

We filter concerns about social access through four distinct visions of the mission of legal services. These are, first, the "common carrier" vision; second, the conservative "moralistic" vision; third, the progressive "monolithic" vision; and fourth, the contextual vision. These perspectives differ in how they define the mission of legal services, and how they treat differences within groups, and between groups.

1. Common Carrier Vision

Consider first the common carrier model, which stresses providing legal, as opposed to social, access to poor people. It suggests that legal services offices are a bit like the phone company. They must provide services to everyone, without regard to the goals of those seeking the services or consideration of whether those goals fit into any substantive vision of the goals of legal services. The basic limitation on internal access, as with many phone systems, is that a queue is set up in which those first in time receive services before those who sought access later.

A substantive or political agenda, according to this view, impermissibly ranks prospective clients on substantive grounds. Conservatives who have made an avocation of attacking legal services have argued that priority-setting is illegitimate because it involves policy-making by unelected usurpers of the silent majority's will, in much the same

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vein that activist judging, according to conservatives, creates the “counter-majoritarian difficulty.” Picking and choosing between constituencies, including the decision to represent poor tenants but not poor landlords (like those renting out a room or a single apartment in a their own residence), is a good example of what would not be permissible under the common carrier model. This attack on the legitimacy of legal services has led to the current evisceration of federally-funded legal services, not only in financial terms, but also in substantive limitations on the kind of litigation federally-funded programs can undertake, barring, for example, most class actions and challenges to “welfare reform” measures.

Yet, as a number of commentators have noted, this apolitical vision is basically an optical illusion. Everyone sooner or later returns to some kind of political conception of legal services. Conservatives adopt a “moralistic” view, which seeks to enforce their own restrictive conception of morality through statutory limits on whom legal services offices can represent. Many advocates of legal services adopt a “monolithic” view, which seeks to implement a one-dimensional view of social access through more informal limits on representation. The moralistic and monolithic visions have opposite views of class differences—differences within the class of people living in poverty, and differences between this group, the rich, and the middle class. I depict these opposing views in the chart below, and analyze them in the text.

### How Two Models of Legal Services Address Difference

<table>
<thead>
<tr>
<th>Intra-Group Difference</th>
<th>Inter-Group Difference</th>
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<tbody>
<tr>
<td>Conservative Moralistic Approach</td>
<td>Exaggerate</td>
</tr>
<tr>
<td>Progressive Monolithic Approach</td>
<td>Obscure</td>
</tr>
</tbody>
</table>

22. See the remarks of the always-reliable Howard Phillips, who described legal services in the 1970s as fulfilling a “radical social and political agenda,” planned and executed by “avowed Marxists” in legal services programs. See David Luban, Lawyers And Justice: An Ethical Study 299 (1988) (quoting the letter to conservatives sent by the “National Defeat Legal Services Committee,” signed by Howard Phillips).


24. Under the surface, the “common carrier” approach sets a mission tacitly, by upholding the distribution of power and resources characteristic of the status quo. Cf. Luban, supra note 22, at 306-10 (noting contradictions manifested by what Luban calls “equal access” arguments); Tremblay, Community-Based Ethic, supra note 5, at 1132-33 (same).
2. Moralistic Vision

The moralistic vision requires that legal services offices refrain from representing people challenging the conservative agenda, an agenda that conservatives argue embodies morality as we know it. As a result, the Republican Congress has tried to bar legal services offices from representing undocumented immigrants, welfare recipients challenging welfare reform, or tenants challenging evictions based on their alleged drug use. The moralistic view makes two moves with regard to group differences. It exaggerates differences within groups and it obscures differences between groups.

The moralistic view exaggerates differences among people living in poverty by insisting that one essential difference splits this group—some people are law-abiding, while others are not. Conservatives are eager to label people as belonging to one camp. The actual and figurative familial ties that bind people in each camp, as well as others who bridge the camps, are ignored in this account. At the same time, with its faith in formal equality—the notion that everyone, rich or poor, regardless of inequities in resource distribution, has an equal opportunity to succeed—the moralistic view downplays the importance of resource disparities in determining life chances. In this sense, the moralistic account obscures inter-group differences that resource disparities help create.

25. In this sense the moralistic agenda, like the common carrier agenda, is wary of the counter-majoritarian difficulty precipitated by going to law.


While conservatives pursue a moralistic agenda to justify restrictions on legal services practice, some progressives echo this approach in justifying their own views. We can isolate two strands of progressive thought on the mission of legal services: the monolithic view and the contextual view.

3. Monolithic Vision

The monolithic view inverts the moralistic take on class difference. It obscures differences among people living in poverty while heightening differences between this group and others. Under the monolithic view, differences among people living in poverty, and commonalities between the poor, the rich, and the middle classes, are invisible. In extreme versions, this view suggests that providing representation in cases where both parties are living in poverty, such as domestic relations or domestic violence work, is a perversion of the legal services mission at worst, and a futile “intra-class transfer of resources” at best. This view is also skeptical of ever representing anyone outside of the community hypothesized by the commentators, such as a landlord, even when the landlord: (1) is either a poor person herself, such as someone who sublets a room in a small apartment, or a non-profit organization; and (2) takes a position that dovetails with the wishes and interests of many of her tenants, such as seeking to evict a tenant who has victimized other tenants. The result is an unduly narrow conception of the mission of the legal services lawyer.

29. For a candid assessment of this proclivity from an academic on the Left, see William H. Simon, Visions of Practice in Legal Thought, 36 Stan. L. Rev. 469, 478 (1984) (“Activists . . . sometimes spoke in connection with the War on Poverty or the legal services program of the urban low income ‘community’ . . . as if it were a fully constituted entity with determinate, articulated, unitary interests.”). C.f Anthony V. Alfieri, Disabled Clients, Disabling Lawyers, 43 Hastings L.J. 769, 834 (1992) (describing the client base of disability lawyers as “diverse”). Conservatives, as well, do not hesitate to point out this monolithic tone in some progressive views of legal services. See Breger, supra note 21, at 1126 (criticizing the monolithic view of legal services case selection on the grounds that “[t]he heterogeneity of interests among eligible clients reflects the rich diversity of cultural and ethnic life in America”). The vulnerability of the conservative position, as noted above, is that conservatives also do not hesitate to jettison the common carrier model when it would require them to represent clients, like tenants accused of drug trafficking, whom they deem beyond the moral pale.

30. One can argue that this is an essentialist account of class difference, while agreeing that people living in poverty have both some interests in common, and some interests that are distinct from those of other classes. The contextual view, which I outline below, seeks not to obscure or exaggerate such differences, as do the moralistic and monolithic visions, but to acknowledge and address them. For a more nuanced account of common interests among people living in poverty, see Tremblay, Community-Based Ethic, supra note 5, at 1133 (“[T]he clients in fact are a community, in the sense of demonstrating similar needs and interests over time.”). Tremblay acknowledges that such clients may not “share experiences,” and “may disagree that they ‘belong’ to [the] poverty ‘community.’” Id.

and an incomplete view of social access that neglects human capital formation within low-income communities.

4. Contextual Vision

In contrast, consider the contextual view. The contextual view, unlike the moralistic and monolithic views, acknowledges both intra-group difference and inter-group commonality. According to this view, being engaged in a community means immersing oneself in a multiplicity of perspectives. No one category, be it class, legal position (landlord or tenant, merchant or consumer), gender, race, or disability status, either exhausts or wholly determines the range of human action and interest. While acknowledging the role of each of these factors, the contextual approach recognizes that local situations each have a dynamic that frustrates "preconceived categories," with the factors noted above, as well as others, interacting in contingent and unpredictable ways. The most vital social movements have always found commonalities beyond these facile rubrics. Yet this very contingency creates other imperatives for law and politics. Because we cannot always determine people's goals in advance by categorizing them as tenants, landlords, or the like, we need to provide space where people can organize and speak. In this space, people whom society has treated as invisible and inaudible appear and articulate their concerns to others. Progressive critics of legal services practice call what goes in such spaces "voice."

When we couple such a concept with some vision of personal and community development, we get closer to the conception of human capital discussed above. Of course, various kinds of violence can

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34. Albert Hirschman puts this incisively: "The architect of social change can never have a reliable blueprint. Not only is each house he builds different from any other that was built before, but it also necessarily uses new construction materials and even experiments with untested principles of stress and structure." See Donald N. McCloskey, *If You're So Smart: The Narrative of Economic Expertise* 82 (1990) (quoting Albert O. Hirschman, *The Search for Paradigms as a Hindrance to Understanding*, in Interpretive Social Science: A Reader 163, 179 (P. Rabinow & W.M. Sullivan eds., 1979)).


quash the development of voice and human capital, including the violence of inequitable allocation of resources; professional overreaching;\textsuperscript{38} crime and police brutality, with their inculcation of demoralizing fear;\textsuperscript{39} drugs, with both their link to violence and magnification of short-term sensation over long-term well being;\textsuperscript{40} and the frenzy of acquisition, which makes us all—rich, poor, and middle-class—discount human interaction and exalt the accumulation of things. Although random or self-destructive violence is a liability to the development of both voice and human capital, conflict about community mission and how to pursue it is not only inevitable but desirable for the legal services attorney.\textsuperscript{41} Otherwise, the attorney is not engaged in the context of the community, but is using abstract constructs like “tenants” or “consumers” to avoid grappling with diversity.

Under the contextual view, formulating the legal services office’s mission as serving the interests of tenants does not necessarily require representing any tenants or only tenants. The contextual view is in accord with the monolithic view, and opposed to the common carrier view, in arguing that routinely representing landlords seeking eviction, particularly on grounds of nonpayment of rent, constitutes a mission conflict.\textsuperscript{42} The contextual view also differs from the common carrier model, and perhaps the monolithic model as well, in holding that some tenants, particularly those who credible evidence suggests victimize other tenants or traffic in drugs, will not be appropriate clients in light of this mission. The contextual view also differs from the monolithic view in holding that some landlords, such as community groups, may be appropriate clients when they seek eviction of tenants who victimize other tenants.

\textsuperscript{38} See id. at 2590-96; see also Theresa Glennon, Lawyers and Caring: Building an Ethic of Care into Professional Responsibility, 43 Hastings L.J. 1175, 1182 & n.35 (1992) (discussing the arrogance of education professionals in dealing with issues involving children with disabilities); Mark Spiegel, Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession, 128 U. Pa. L. Rev. 41, 72-73 (1979) (arguing for greater client participation in the development of legal strategy and arguments).

\textsuperscript{39} See Meares, Place and Crime, supra note 20, at 671.

\textsuperscript{40} The great jazz trumpeter Miles Davis, who kicked the heroin habit after a relatively short period of addiction in his twenties, starkly describes the influence of drugs:

\begin{quote}
Shooting heroin changed my whole personality from being a nice, quiet, honest, caring person into someone who was the complete opposite. It was the drive to get the heroin that made me that way. I’d do anything not to be sick, which meant getting and shooting heroin all the time, all day and all night.
\end{quote}


\textsuperscript{42} Cf. David B. Wilkins, Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?, 63 Geo. Wash. L. Rev. 1030, 1060-64 (1995) (arguing that a black lawyer cannot simultaneously represent the NAACP and the KKK).
Proponents of the contextual view, however, must also take care that they do not slide into a kinder, gentler version of the moralistic view. A legal services office, therefore, has an obligation to fight evictions based on what it believes to be hasty or unfounded allegations of violence or drug trafficking, and to contest any proposed procedure that would permit evictions on such a summary basis. Such vigilance is an important vehicle for resisting the racism and classism that undergird public demands for such procedures, and which sabotages social access. While other tenants may be willing, out of desperation, to tolerate such truncations of procedural rights, the views of other tenants should not be dispositive here. The tenants' desperation may be a kind of short-term reaction that frustrates the long-term goal of human capital development, and unduly discounts the long-term importance of procedural rights to community stability. The other tenants' views may also represent a moralistic "politics of distinction" that exaggerates differences between members of the community, too glibly separating worthy from unworthy. A lawyer who takes community stability as her goal has an obligation to resist such hasty judgments. For the contextual lawyer, then, there are no easy answers to questions about whom the legal services office should represent. Answers necessarily will vary with the situation "on the ground."

C. Types of Conflicts in Legal Services Offices

Our goal here is to see how the visions of legal services described above fare when coupled with the values identified in part I.A. To facilitate this analysis, we also need to identify the kinds of conflicts, not all of which necessarily have the same degree of ethical import, which arise in legal services practice: client conflicts; positional conflicts, which I divide into mission and doctrinal conflicts; and resource conflicts.

In a client conflict, a lawyer represents one client, while the same lawyer, or another lawyer with the same firm, represents another client on the opposite side of a case or transaction from the first client. The threat to the duties of confidentiality and loyalty are clear. Intentionally or inadvertently, confidential information from one client may end up being disclosed to the other, or being used against the first. At the same time, because of financial or other incentives, the lawyer may soft-pedal her representation of one client to appease the other.

43. In this respect, I argue, David Luban defers too readily to the perceived will of the community majority. See Luban, supra note 22, at 339-40 (arguing that the lawyer's acquiescence in such rights violations is permissible if the community's representatives agree); cf. Spence v. Reeder, 416 N.E.2d 914 (Mass. 1981) (holding that an agreement drafted by a legal services office providing for summary evictions was void because it violated state statutory rights and tenants at risk of eviction were not adequately represented by the office).

44. See Austin, supra note 18, at 145.
While some courts have allowed access concerns to influence consideration of the appropriate remedy here, particularly where the law firm did not create the conflict, typically the remedy here is disqualification of the lawyer and, on an imputed basis, the lawyer's entire firm.

The next kind of conflict is the positional conflict. Here, some care is useful in defining terms. The broad view of positional conflicts suggests that such a conflict occurs whenever the law office takes a case involving a client or position that, without being directly adverse to an existing or former client, may create some tension with existing clients, be offensive to those clients, or run counter to the culture of representation in the law office. Law firms have traditionally invoked such concerns to avoid doing work, pro bono or otherwise, involving consumer law, environmental law, or plaintiff's securities law, on the theory that such work may embarrass paying corporate clients. Legal services offices have refused representation to some groups based on a similarly broad view of positional conflicts. Most legal services offices declined to represent landlords, even small landlords who met legal services income eligibility guidelines, despite some pressure from conservatives invoking the common carrier model. In the family law parental rights area, some offices only represent children, while others only represent parents. While we may view the law firm's refusal as a business decision in ethics clothing, in the legal services setting it seems reasonably clear that a reluctance to represent certain client groups, such as landlords, stems from a definition of the "mission" of legal services.

If one adopts a monolithic view of the legal services mission, it is easy to conclude that representing a landlord in an eviction proceeding, regardless of the community ties of the landlord or the conduct of the tenant, is beyond the pale. The theory behind this decision is indeed compelling in many instances. The tenant will almost always be the party with less wealth and power in such a contest, although the question may be a closer one if the landlord is a senior citizen on a fixed income who owns a modest home and has sublet a room. The attorney can argue further that stability in housing is a fundamental need and right that legal services lawyers must struggle to preserve.

45. For a comparison of the broad and more narrow views of positional conflicts, see Spaulding, supra note 4, at 1395-99.
46. See Breger, supra note 21, at 1135 n.90; Spaulding, supra note 4, at 1415.
47. See Breger, supra note 21, at 1134-35.
48. Id.
49. One can make similarly compelling arguments about representing parents in parental rights proceedings. Stability is crucial to the family, and parental rights are among the most cherished and basic in our society. Furthermore, parents, particularly poor parents, are a substantially underrepresented group in parental rights proceedings, while children often have better representation, often from non-profit or appointed private counsel whose moralistic default position may be favoring the removal of the child from her parents. See Martin Guggenheim, A Paradigm for Determining the Roles of Counsel for Children, 64 Fordham L. Rev. 1399, 1420 (1996).
In some cases, however, this rationale is undercut. A tenant who victimizes other tenants also threatens stability in housing. Indeed, sufficiently egregious behavior can amount to a kind of constructive eviction of other tenants. These difficult cases suggest that the monolithic view is too quick to discern mission conflicts, at the price of ignoring context.

The other kind of positional conflict is the doctrinal conflict. Here, a lawyer argues a legal, not factual, position on behalf of one client that is inconsistent with a legal position argued simultaneously in another case. Here, too, law firms and legal services offices have sometimes wanted to broaden the definition, while conservatives seeking control over legal services priority-setting have sought to limit it. The ethical implications of this kind of conflict have been recognized only fairly recently. The comments to the Model Rules address the issue, although the rules themselves are largely silent. Local bar associations have been more active. The Model Rules' comments' position is a fairly narrow one, namely, that lawyers and their firms should not simultaneously argue inconsistent doctrinal positions in the same court in the same jurisdiction.\textsuperscript{50} The chief value served by this rule seems to be loyalty—not only loyalty defined by the lawyer's efforts on the client's behalf, but loyalty defined by the attitudes that the lawyer's inconsistency may engender among third-party decisionmakers, such as courts, confused by the clash in the lawyer's positions. Yet, these loyalty concerns seem most salient when: (1) the conflict is personal to a particular attorney, not imputed to her entire firm or office; and (2) the law office has a financial incentive to soft-pedal arguments on one side of the issue.\textsuperscript{51}

When these factors are not present, it seems more difficult to justify the restrictions on legal and social access imposed by a broad reading of doctrinal conflicts.\textsuperscript{52} A broad reading hinders legal access by depriving a client who wishes to press a particular cause with the lawyer of her choice. It also hinders social access if it prematurely classifies a doctrinal dispute as a zero-sum game, instead of a process of dialogue between different community members which can lead to growth, change, and mutually beneficial results. A hasty determination that a doctrinal conflict exists thus impedes the development of democratic

\textsuperscript{50} See Model Rules of Professional Conduct Rule 1.7 cmt. (1998).

\textsuperscript{51} Confidentiality may also be a concern in particular cases. See Dzienkowski, supra note 4, at 522. Absent financial incentives, however, screening devices should be adequate to address this problem.

\textsuperscript{52} Here, as with mission conflicts, legal and social access often go together. See also Simon, supra note 29, at 490-501 (criticizing rigid distinctions between working inside and outside of the system); cf. Brian Z. Tamanaha, The Internal/External Distinction and the Notion of a "Practice" in Legal Theory and Sociolegal Studies, 30 L. & Soc'y Rev. 163, 176-80 (1996) (arguing that the conception of a practice as both making and reflecting meaning helps bridge the gap between external and internal perspectives).
decisionmaking. This is particularly true because a viewpoint not rep-
resented by a legal services office may struggle vainly to acquire other
advocacy resources. By silencing intra-group difference, a broad read-
ing of doctrinal conflicts hampers the reframing of issues, freezing old
dichotomies and frustrating the serendipitous discovery of common

ground.

The fourth conflict, which is rarely considered ethical per se, but
may be the one most relevant to legal services practice, is the resource
conflict. By the term resource conflict, I refer not so much to the con-

flict between client groups embodied in the conception of mission

conflict, but to the conflict about how to meet the needs of a given

client group in a situation of resource scarcity. Resource conflicts

were one focus for the early theorizing about legal services and human
capital. Edgar and Jean Camper Cahn, for example, wrote early on
that public interest law had to be about not only legal consumption,
but also legal investment.53 That is, providing legal services on a
"common carrier" basis to individual clients was not alone a strategy
for promoting the access that the Cahns identified as vital.54 Getting a
lawyer, without more, would keep subordinated people in a reactive
role, only this time with a lawyer to protect them and serve as at least
a modest buffer from, or perhaps a fig leaf for, the depredations of the
powerful.55 Instead, social access, which would give subordinated
people a more proactive role in the decisions about power within both
their communities and society as a whole, was vital.56 Communities of
people living in poverty had to, according to the Cahns, "invest" legal
resources in this kind of external access, and not merely expend those
resources on servicing reactively.57

What the Cahns recognized was that resource scarcity necessitates
making difficult choices about the most effective way to help the larg-
est number of people. In the classic example, doing law reform or
impact work can help many members of, say, the tenant client group.
The lawyers who established the warranty of habitability gave many
current and future tenants a defense against eviction, where much less
in the way of defenses had previously been available. The lawyer's
time spent on class actions and law reform is an investment of human
capital, which requires abstaining from helping people who are being
evicted right now, as the law reform suit winds its way through the
courts.58 For conservatives, this loss of resources for service, as op-

53. See Cahn & Cahn, supra note 7, at 1013-14.
54. See id.
55. See id. at 1024.
56. See id.
57. See id. at 1012-14.
58. The Cahns bluntly criticized law offices with a predominantly service caseload
as "cater[ing] to present needs, present demands, immediate gratification and imme-
diate consumption." See id. at 1013.
posed to impact work, represents a deprivation of access to legal services, in contravention of the common carrier model.\textsuperscript{59}

As we have seen, however, for legal services lawyers, access has a broader meaning. The kind of legal access that the conservatives stress means for legal services lawyers not only access to individual case representation, but also access to the law reform machinery that monied clients, such as large corporations, employ.\textsuperscript{60} In addition, legal services offices rely on the social conception of access—access to goods, services, and institutions—that may be better served by law reform, class action, or community-organizing work in some situations.

Because the contextual vision shares with the monolithic vision this part of the formulation of both legal and social access, it is sympathetic to the difficult choices legal services offices make in resolving resource conflicts. The contextual view also recognizes that the results of those difficult choices, which often involve the law office’s declining to prevent evictions, repossessions, or benefit cut-offs, are not radically different from the results of a less monolithic, more contextual approach to mission conflicts, which might lead the law office to seek the eviction of a tenant who was victimizing other tenants. In this respect, both the monolithic and contextual vision make hard choices to promote legal and social access.

II. Consequences of Approaches to Conflicts

Exploring how lawyers’ values and models of legal services interact in the conflicts of interest arena is important because these difficult choices have profound consequences. Focusing on mission and doctrinal conflicts, this part considers those consequences for the communities served by legal services programs.

The monolithic approach resolves conflicts by magnifying inter-group differences, while minimizing intra-group differences. Consider a law office which says, “We only represent tenants (as opposed to

\textsuperscript{59} The conservatives’ position is at odds with other cornerstones of traditional conservative rhetoric, which celebrate the rigor of investment and savings over the undisciplined orgy of consumption. See John Maynard Keynes, The General Theory of Employment Interest and Money 128-31 (1935) (critiquing the traditional conservative view that governmental deficit spending was pernicious because it encouraged consumption while hindering investment). The inconsistency becomes more acute as one realizes that it is itself a product of the moralist vision of conservatives, which views investment as being desirable for those who are already wealthy, but threatening if it involves mobilization by the poor.

\textsuperscript{60} By suppressing this kind of systemic legal access through curbs on law reform litigation, class actions, and lobbying, conservatives of a moralistic bent also obscure inter-group differences. If people living in poverty lack the legal resources to challenge systemic inequality, conservatives can more readily assert that such inequality does not really exist.
landlords),”61 or “We only represent parents, not children.” While there are persuasive arguments for both positions, there are also costs for the goals of legal and social access.62

One kind of cost stems from the exaggeration of inter-group differences characteristic of the monolithic approach. Exaggerating inter-group differences narrows the repertoire of options available to resolve disputes. By demonizing the opposing party, it skews dispute resolution toward an adversarial approach, instead of using adversarial strategies as only one important element in a dispute resolution repertoire.63 Monolithic decisions about who to represent further skew proceedings toward an adversarial mode by eliminating representation options for the opposite party. For example, if offices decline to represent children, that representation may be provided by lawyers who assume a moralistic stance and favor removal of children

61. Another less stark way to resolve these conflicts is to adopt a “functional” view. This view, which may capture the practice of many legal services offices, is to pursue different functions for different client groups, avoiding performing the same function for groups which may end up in opposition. For example, a legal services office will do transactional work for community development groups, but will avoid litigation, which might place it at odds with the interests of tenants, who live in community development housing, or consumers, who purchase the products of community businesses. See generally Susan R. Jones, Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice, 4 Clinical L. Rev. 195 (1997) (discussing the importance of economic development work to social access). The functional approach is a safe approach to conflicts issues. This Article argues, however, that a purely functional approach does not do justice to intra-group diversity in low-income communities.

62. My own conversations with clinical teachers in the family law area suggest that for many, though not all, an exclusive focus on representing parents is less a reaction to a perceived mission conflict, and more a pragmatic decision. Pragmatic reasons for focusing on representing parents include the degree of underrepresentation of parents, and the difficulties associated with teaching law students about the lawyering role through the representation of children in parental rights cases, where the temptation to make decisions for the client as a kind of de facto guardian is very strong. See Telephone Interviews with Martin Guggenheim, New York University School of Law (1997-1998); Guggenheim, supra note 49, at 1408; Peter Margulies, The Lawyer as Caregiver: Child Client’s Competence in Context, 64 Fordham L. Rev. 1473, 1485-94 (1996) (offering contextual model for representation of children); see also Joan L. O’Sullivan et al., Ethical Decisionmaking and Ethics Instruction in Clinical Law Practice, 3 Clinical L. Rev. 109, 130-32 (1996) (detailing the pull of paternalism and moralism in representation of a teenager); cf. Model Rules of Professional Conduct Rule 1.14 (1995) (stating that a lawyer should presume that a client possesses the requisite decisionmaking capacity to direct the course of representation upon receipt of the lawyer's advice); Recommendations of the Conference on Ethical Issues in the Legal Representation of Children, 64 Fordham L. Rev. 1301, 1312-13 (1996) (applying the same analysis in the representation of a child). To the degree that this view is itself more contextual than monolithic, it is less susceptible to the criticisms offered here.

from the family, instead of by lawyers who see the issue in a more contextual fashion.

The second kind of cost of the monolithic approach stems from its obscuring of intra-group differences. As we noted earlier, social access reflects the interaction of macro-processes of resource allocation throughout society, and reflects micro-processes of community organization and human capital formation. The monolithic approach's obscuring of intra-group differences has led to a neglect of these micro-processes by legal services.

Consider the case of housing, where the disinvestment of finance and human capital in communities served by legal services has had devastating consequences. Housing, for any community, represents not just a physical structure, but a haven of belonging, commitment, and memory. Tragically, the disinvestment of both financial and human capital has threatened this larger role of housing. Here, as elsewhere, legal services and public interest lawyers have paid attention to the macro issues of resource allocation, while paying less mind to micro issues of human capital. On the macro side, public interest lawyers have litigated vigorously against the segregation of low-income housing in low-income communities. This economic segregation has deprived young people not only of economic opportunity, but also of concrete examples of the value of investment in education and other sources of human capital. Lawyers for poor people, however, including legal services lawyers, have done much less to deal with the micro issues. The concerted activities of drug trafficking and violent crime have made much housing for poor people, including public housing in cities like Chicago, into a place of peril rather than a haven. The violence of the drug trade destroys the space residents require to assemble without fear—to get out of their residences, discuss neighborhood and national politics, and organize. The effect of

65. For a discussion of how the overall environment in some public housing projects, including the physical environment, contributes to crime, instability, and the decline of community institutions, see Rebekah L. Coley et al., Where Does Community Grow? The Social Context Created by Nature in Urban Public Housing, 29 Env’t & Behav. 468, 488-90 (1997); cf. Pam Belluck, Razing the Slums to Rescue the Residents, N.Y. Times, Sept. 6, 1998, at A1 (reporting that a mother did not allow her children to play outside her apartment “because gang violence made even hallways dangerous”).
67. See Belluck, supra note 65.
this shrinking of the public sphere may not be as dramatic as the eviction of a family from housing altogether, but is in some ways more insidious.69

The above discussion suggests that the monolithic approach to positional conflicts does not fully serve the goal of promoting legal and social access for low-income communities. The moralistic and common carrier models do far worse. While the monolithic model obscures class differences, the moralistic model exaggerates them, by barring representation to prospective clients merely accused of being unworthy. In addition, while the monolithic model neglects the adverse effects of drugs and violence on micro-processes of community self-government, the moralistic model neglects macro issues of resource allocation. The common carrier model focuses on legal access, but has little room for either a macro or micro account of social access. We turn, then, to the possibilities afforded by the contextual model.

drugs and public housing has been most prominent in Chicago. See Peter Kendall & Terry Wilson, In CHA Homes, Hope Wears Thin: Families Are Left to Adapt to the Decay, Chi. Trib., June 4, 1995, at 1. The dire situation in Chicago led to proposals for warrantless searches of housing project apartments, and helped set the stage for a federal takeover of the Housing Authority. Although residents of public housing in Chicago supported the goal of drug-free public housing purportedly served by these measures, residents also were wary of "top-down" measures like the federal takeover, which proceeded with little input from the residents themselves. See Larry Bennett, Do We Really Wish to Live in a Communitarian City?: Communitarian Thinking and the Redevelopment of Chicago's Cabrini-Green Public Housing Complex, 20 J. Urb. Aff. 99, 112-13 (1998). Legal services, as an institution charged with representing tenants in public housing, could have filled that void, arguing both for a proactive drug policy and for protections of tenants' rights. For example, legal services could have filed nuisance suits against drug traffickers who made sidewalks, hallways, and stairwells places of peril for other tenants, and could have sought orders of protection prohibiting drug traffickers from congregating near other tenants on the public housing property. Instead, legal services offices concentrated virtually exclusively on representing tenants accused of drug trafficking, leaving the formation and implementation of drug policy to more conservative forces who acted without community input.

69. Cf. Luban, supra note 22, at 339 (arguing that lawyers considering whether or not to challenge summary eviction procedures for violent tenants should consider the advice of their client or constituency group on "the problems posed by violence in public housing"). Legal services offices have sometimes recognized this concern. That is why Greater Boston Legal Services (GBLS) negotiated with representatives of the Boston Housing Authority to formulate summary eviction procedures for tenants charged with violence. See Tremblay, Community-Based Ethic, supra note 5, at 1126 n.91. When a tenant subject to the new procedure challenged it, the Supreme Judicial Court of Massachusetts held that his interests had not been adequately represented by GBLS. See Spence v. Reeder, 416 N.E.2d 914, 921 (Mass. 1981); see also infra notes 98-101 and accompanying text (discussing Spence).
The contextual approach, with its commitments to the interaction of macro and micro factors, as well as the mission of legal and social access, is tailored to the evolving challenges facing legal services. It permits the representation of clients, such as community non-profit landlords in eviction cases, that the monolithic model would reject on mission conflict grounds. At the same time, the contextual approach argues that the indifference of the canons of the profession to mission conflicts\textsuperscript{7} unduly discounts the importance of this issue to socially-committed legal services lawyers. The contextual approach argues, moreover, that as cutbacks in Legal Services Corporation funding spur cultivation of more diverse funding sources, analysis of conflicts of interest in legal services should address the impact of financial incentives on attorneys' duty of loyalty. To accomplish these goals, the contextual approach relies on the following factors.

A. Acuteness of Conflict in Mission or Doctrine

The first question for either mission or doctrine conflicts is whether the conflict is acute. An acute conflict is one in which the representation of two different client groups (in the case of a mission conflict), or the advocacy of two different legal arguments (in the case of a doctrinal conflict), constitutes a zero-sum game, such that a gain to one client or cause inevitably causes harm to another. If this harm is not inevitable, and the lawyer can harmonize client interests, the conflict is not acute.

B. Asymmetrical Financial Incentives

If the conflict is determined to be acute, further inquiry is needed. Asymmetrical financial incentives are the first factor that will trigger a disqualifying conflict of interest. Such incentives for a legal services office could involve a funding source, such as a government agency or foundation, which has a concrete stake in the outcome of the controversy, even though the funding source is not technically a client of the legal services office. If the client arrayed on the other side of the controversy offers no comparable financial incentives, the incentives are asymmetrical. For a legal services office operating on a tight budget, this asymmetry triggers duty of loyalty concerns.

\textsuperscript{7}See Model Rules of Professional Conduct Rule 1.7 cmt. (1995) (discussing only what this Article refers to as a kind of doctrinal conflict, in which a lawyer argues inconsistent legal positions before the same appellate court).
C. Attorney’s Personal, as Opposed to Imputed, Conflict

Without asymmetrical financial incentives, a disqualifying conflict can still arise if an acute mission or doctrine conflict is coupled with advocacy on both sides of the controversy not just by the same office or program, but by the same attorney. Imputed disqualification is not called for in this setting, absent confidentiality concerns. The perceptions of clients and tribunals, however, can become unacceptably skewed when the same attorney does work on both sides, prompting internal and external queries, such as, “Which side are you on?”

D. Confidentiality Concerns

In some situations, for example, when lawyers for one client attend group strategy sessions for other clients who are similarly-situated, confidential information can be shared intentionally or inadvertently. In these situations, even absent financial incentives and a personal, as opposed to imputed, conflict on the part of the attorney, disqualification should be required unless in the imputed case the office has a screening mechanism to deal with the issue.71 The following sections apply this analysis to mission conflicts and doctrinal conflicts, respectively.

IV. MISSION CONFLICTS

This part applies the contextual approach to mission conflicts. It first addresses the acuteness of the mission conflict. Next, it breaks down two separate types of mission conflicts, financial and personal. Finally, it discusses confidentiality issues.

A. Acuteness of the Conflict

The inquiry about the acuteness of the conflict reflects the presumption of zero-sum results at the heart of present conflicts law. By zero-sum, I mean that current conflicts doctrine generally views differences within groups as fatal to shared legal representation.72 Under this view, which both the monolithic and moralistic accounts of legal services implicitly accept, differences within groups necessarily means that one must break up the group into smaller groups along the lines of these differences. Otherwise, the zero-sum position goes, any gains for one sub-group will inevitably come at the cost of losses for the other sub-group.

71. For a useful discussion of confidentiality, see Dzienkowski, supra note 4, at 512-14.
72. See Simon, supra note 29, at 477-78; see also Naomi Cahn & Robert Tuttle, Dependency and Delegation: The Ethics of Marital Representation, 22 Seattle L. Rev. 97, 99 (1998) (examining the conflicts issues that arise when representing a married couple in which one spouse gives decision-making authority to the other).
This model assumes that representing individuals is the core situation of legal representation.\textsuperscript{73} It then views with suspicion any situation, such as those involving shared representation, that departs from the individualist model. The trouble here is that the zero-sum conception of individual versus group representation echoes the fallacies of the monolithic view. Here, the zero-sum approach obscures differences within each individual and exaggerates differences between individuals and groups. In obscuring differences within individuals, the zero-sum view takes individual preferences as fixed, neglecting the internal conflict, introspection, and learning that can change individual preferences over time.\textsuperscript{74} At the same time, the zero-sum view obscures the positive effects of group conflict, which can make groups more accountable and democratic,\textsuperscript{75} refine shared objectives, and promote surfacing of new objectives as the context of disputes changes over time.\textsuperscript{76} Both the monolithic and moralistic views rely on the zero-sum formulation with regard to the issues addressed in this Article, and thereby lose some of the benefits of shared representation. Each utilizes its own variation of the zero-sum approach to define away the consequences of difference for shared representation.

This defining away is most obvious for the monolithic view. By exaggerating inter-group difference, the monolithic view sees landlords of whatever socio-economic status as a different class and, by obscuring intra-group difference, sees tenants worried about violence and drug trafficking as the landlord's unwitting allies against the authentic interests of the poor. As a result, it declines representation to these groups. The moralistic view does the reverse. By viewing landlords as necessarily serving the interests of the poor, it obscures inter-group differences, and as a result offers representation to landlords through legal services offices or reimbursed private attorneys in a "judicare" system. Because the moralistic view regards those tenants accused of violent crime, drug-trafficking, and immigration offenses, and those suffering from welfare "reform" measures as radically separate from the "worthy" poor, it declines representation to this group through statutory bars on representation by Legal Services Corporation grantees.

A contextual view challenges the zero-sum perspective on conflicts of interest. If one takes a positive-sum perspective, gains for one group can expand the pie for everyone, at least in some situations. Adopting this view will defuse many superficially acute conflicts and

\textsuperscript{73} See generally John Leubsdorf, \textit{Pluralizing the Client-Lawyer Relationship}, 77 Cornell L. Rev. 825, 825-26 (1992) (expanding on this paradigm).
\textsuperscript{74} See Anthony T. Kronman, The Lost Lawyer Failing Ideals of the Legal Profession 128-34 (1993).
\textsuperscript{75} See Simon, supra note 29, at 482.
\textsuperscript{76} Cf id. at 482-84 (noting that civil rights litigation can shift client attitude from one of deference to authority and fear of resistance to one of solidarity against authority's overreaching).
allow shared or common representation. The contextual view, with its greater commitment to looking for positive-sum solutions, rejects the denials of service required under the more rigid moralistic and monolithic views. It recognizes that sometimes shared representation is necessary, including representation by a single Legal Services program of groups whose interests at first might seem to be in acute conflict. This shared representation may be the only way to engage with the multiplicity of interests in the community being served.

To illustrate the limitations of the zero-sum approach, consider the case of Fiandaca v. Cunningham, in which the First Circuit, finding a client conflict, disqualified a legal services office from representing both a class of female prisoners challenging inadequate conditions at a correctional facility, and a class of persons with developmental disabilities challenging similarly inadequate conditions at a state school. The nub of the conflict in Fiandaca was that the state had sought to settle the prisoners' lawsuit by offering them space on the campus of the state school for persons with developmental disabilities. As the court noted, the developmentally disabled class was adamantly opposed to sharing space with prisoners, who might in some cases be dangerous. The court never seriously considered, however, whether the prisoners also felt that this was an inadequate solution, or whether the entire settlement offer was merely a state gambit to disqualify counsel, which both groups should unite to resist. Instead, the court viewed the clients as having interests that were mutually exclusive, devoid of a common stake in resisting state overreaching.

77. The case law indeed recognizes the possibility of such gains and the artificiality of the zero-sum model when it limits application of conflicts doctrine in legal aid settings to personal, not imputed, attorney conflicts. By declining to order vicarious disqualification of an entire legal services or legal aid office because of the conflict experienced by an individual attorney, the case law recognizes that common representation, at least on the legal office level, has benefits. Most obviously, these benefits include promotion of legal access, which would be compromised if the client "conflicted out" had to seek out alternative sources of legal assistance. Courts also recognize that the lack of financial incentives to breach the duty of confidentiality distinguishes the legal aid from the private firm setting. See United States v. Reynoso, 6 F. Supp. 2d 269, 271 (S.D.N.Y. 1998).
78. 827 F.2d 825 (1st Cir. 1987).
79. See id. at 828-31.
80. Id. at 829.
81. See id. at 828-31.
82. Although the circumstances of the state's offer gave rise to a legitimate inference that the state was merely trying to get rid of obstinate counsel, even without any reasonable likelihood that the court would approve the settlement they had offered, the court insisted on a "smoking gun" on this point, which was not available. See id. at 830-31. For a recent decision that took a needlessly acute view of an entirely speculative conflict in a situation where the party moving for disqualification clearly had its own agenda, see United States v. Lanoue, 137 F.3d 656, 663-64 (1st Cir. 1998) (upholding the disqualification of a defense attorney who had previously gained an acquittal for a co-defendant, where the government said it might call the co-defendant as a witness on a factual point about which the co-defendant denied any knowledge).
In contrast, the contextual approach's focus on such common stakes permits a legal services office to represent the full multiplicity of the community it serves. To find a common stake, the office would have to determine that, on balance, the representation furthered the community's interest in social access—in developing viable institutions that provide services and goods such as housing, consumer products, or employment, or combating forces of social disorganization like crime and drugs. The office would be obliged to decline representation in matters that reinforce either macro or micro barriers to capital formation by exacerbating inequitable resource allocations or stereotypes that bolster subordinating images of groups.  

Representing multiplicity without acute mission conflicts is easiest when the scope of the representation entails service work based largely on the facts of the case, instead of impact or law reform work raising issues of legal doctrine. Impact litigation can trigger doctrinal conflicts, while representing one group largely in a service capacity will minimize these dilemmas. For example, absent asymmetrical financial incentives, no acute conflict would result from a legal services office representing a non-profit community group seeking to evict a violent tenant, while also representing a tenant in another building who asserts that he has been wrongfully accused of violent behavior.

The strength of this contextual inquiry is not that it avoids hard choices, but rather that it confronts them. Representing a non-profit

83. Stereotypes have both a macro and micro dimension. They discourage more equitable resource allocations and, as they are internalized by members of those groups, make mobilization more difficult.

84. See discussion infra Part IV.B.1.

85. This range of clients reflects the contextual approach's commitment to representing the community in all its diversity. Because I argue that the landlord-as-client situation requires a more contextual analysis, I disagree with Paul Tremblay's conclusion that such representation invariably creates a mission conflict. See Tremblay, Community-Based Ethic, supra note 5, at 1125. The situation here may be closer to a resource conflict, i.e., a claim that representing landlords is less of a priority for the office than representing tenants. The resources conflict claim is in this setting clearly a matter of office policy, not ethical requirements. More importantly, adopting such a monolithic view ignores the situations where eviction of violent tenants serves the interests of other tenants who bear the brunt of the violence. Tremblay in fact takes a more contextual view of such tenant concerns when addressing the issue of under what circumstances legal services offices should decline to represent tenants accused of violence. See id. at 1126 & n.91.

The same commitment to diversity, however, also mandates representation for tenants accused of violence or drug trafficking, where a significant possibility exists that the charges are unfair or unfounded. Indeed, as I will discuss in the context of doctrinal conflicts, see infra Part V, a legal services office should even be permitted to represent a tenant accused of violence who challenges summary eviction procedures, even though it has advocated for such procedures in a related case. A legal services office should not be required to deny service to clients advocating either cause—timely and certain eviction procedures for tenants victimizing others, or procedural fairness for tenants so accused. Loyalty concerns, however, would bar the same attorney from personally taking both doctrinal positions. In addition, screening devices would be necessary to allay confidentiality concerns.
community group seeking to evict a violent or drug-trafficking tenant would be appropriate under the standard articulated above, because it would promote social access by restoring public space for mobilization, conversation, and play. Inequitable resource allocation and negative stereotypes, however, may have influenced the actions of the tenants whose eviction the legal services office is seeking. If the legal services office, in consultation with community representatives, determines that the welfare of the community outweighs these concerns, the lawyers still should seek to mitigate the impact of eviction on the tenants in question by seeking services and alternative housing for them.86

86. Although advocating for eviction even in this narrowly circumscribed situation serves social access goals, it should not be done without careful reflection about alternatives. Eviction profoundly disrupts the lives of tenants subject to this remedy, and may jeopardize their health as well, if they are at risk of becoming homeless. Cf. Barbara Bezdek, Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process, 20 Hofstra L. Rev. 533, 575-97 (1992) (describing the consequences of a lack of representation of tenants in eviction proceedings); Ann Shalleck, Constructions of the Client Within Legal Education, 45 Stan. L. Rev. 1731, 1740 (1993) (noting the profound impact of eviction on families). It may be helpful, given this concern, to put the issue into perspective with analogies from legal services practice.

The first analogy stems from the realm of resource conflicts. Legal services offices tacitly accept evictions on an ongoing basis, as they resolve resource conflicts about the most effective way to help a particular group, such as tenants, or to help other groups clearly within the legal services mission. See supra notes 57-60 and accompanying text. In what Paul Tremblay has aptly identified as a tragedy of legal services practice, the limited nature of legal assistance makes difficult choices necessary. See Paul R. Tremblay, A Tragic View of Poverty Law Practice, 1 D.C. L. Rev. 123, 132-42 (1992); cf. Paul R. Tremblay, Practiced Moral Activism, 8 St. Thomas L. Rev. 9, 28-42 (1995) (discussing ethical dilemmas in poverty law practice). A legal services office might decide, for example, that some lawyers who might otherwise provide legal access to tenants in eviction proceedings instead assist in organizing rent strikes, or pursue impact litigation in the landlord-tenant arena, while other attorneys promote social access by, for example, offering counsel on incorporating non-profits, or obtaining financing for micro-enterprises. Declining to make these choices brings us back to the fictive formal equality of the common carrier model. In this sense, recognizing that the needs of the poor are not monolithic, and that tensions and tradeoffs exist in low-income communities as well as elsewhere in society, is a necessary ingredient of a legal services strategy that aims to promote both legal and social access.

While one could argue that tacit acceptance of evictions is different from affirmatively seeking this remedy, even this argument does not wholly reflect legal services practice. For example, when legal services lawyers represent survivors of domestic violence in securing injunctive relief against batterers, they frequently ask judges to order the abuser to leave the family residence. Cf. Margulies, Representing Domestic Violence Survivors, supra note 6, at 1085-92 (discussing approaches to lawyering for survivors of domestic violence). Ordering the abuser to leave is not technically an eviction. The consequences for the batterer, however, are the same. Legal services lawyers will press for this relief when protecting the life and health of the survivor of abuse renders it imperative. In cases involving eviction based on documented violence or a pattern of drug trafficking, danger to other tenants similarly is a compelling rationale. Health and safety concerns also rebut the resource conflict argument that eviction in cases of clearly-demonstrable violence or drug trafficking is simply not a high enough priority to justify allocation of attorney time.
Another difficult question involves the legal services office's position on income eligibility for public housing. Lawyers for the homeless helped change eligibility guidelines in the 1980s to reserve most units for people with the least financial resources. From the standpoint of an individual applying for public housing, this position seems to mitigate the impact of inequitable resource allocations. From a community social access perspective, however, the changed policy was problematic. It exacerbated economic segregation, depriving communities of buying power and children of role models in the market sphere. Balancing these two perspectives, legal services offices could argue for including economic integration as a factor in allocating new and vacant units, while fighting attempts to evict the poorest tenants or relocate them against their will.87

Under this standard, some decisions about representation would trigger an acute mission conflict. Examples of cases which reinforce the first barrier—inequitable resource allocations—include most evictions based on nonpayment of rent or consumer collection cases.88

87. In some cities, housing authorities are razing old public housing projects that exacerbated racial and economic segregation. See Belluck, supra note 65. Legal services lawyers should not encounter an acute mission conflict in supporting such measures if they also insist on (1) workable and welcome housing options for displaced tenants and (2) genuine economic integration, rather than gentrification, on redeveloped public housing sites such as Cabrini-Green in Chicago, which are adjacent to highly valued commercial and residential properties. See Bennett, supra note 68, at 112-13 (noting the suspicions of Cabrini-Green residents that they are being relocated to make way for more profitable development).

88. Conservative moralists, as well as their sometime allies in the law and economics movement, might question such distinctions. They might argue that a true conception of social access would contemplate taking the side of landlords and merchants all of the time. On this reasoning, any nonpayment or default makes it more difficult for the merchant or landlord to do business, and therefore incrementally reduces access to housing or consumer goods. Some conservative non-profit law programs take comparable views, arguing, for example, that any environmental regulation harms business by raising costs and therefore adversely affects consumers. There are three problems with this position. First, such a rationale completely ignores the tangible harm done to the environment without regulation, or the even more immediate harm to a tenant or consumer who is evicted, has wages garnished, or has a product repossessed. Second, like the view of the monolithic client espoused by some progressive legal services advocates, it pays insufficient attention to the myriad textures of individual cases. Some kinds of regulation that purport to benefit consumers or tenants generally may have unintended untoward effects. However, the exact nature and extent of such effects, if any, await a close investigation of the circumstances and context. In many situations, regulation may be salutary, promoting consumer or tenant health and well-being with no effects on the supply of the good. See Hirschman, supra note 19, at 40 ("[T]he bias favoring the perception of negative side effects makes for a rush to judgment."). Hirschman offers the example of economists in the 1970s who argued that car safety measures, such as speed limits and seat belts, would lead drivers to feel "invulnerable," and therefore to drive more aggressively, or pedestrians to feel that they need not be as vigilant of cars, as with a speed limit the cars would be traveling in any case at a lower rate of speed. Id. at 40 n.6 (citing Sam Peltzman, The Effects of Automobile Safety Regulation, 83 J. Pol. Econ. 677 (1975)). Hirschman notes that such dire forecasts were not realized. See id.; cf. Simon, supra note 29, at 480 n.30 ("[T]he interests involved in suits seeking public
For most tenants in non-payment eviction proceedings, lack of resources has fashioned a monthly menu of impossible choices, topped by the question: Which goes first—food, clothing, or shelter? Examples of the cases which reinforce the second kind of barrier—invidious stereotypes—include representation of batterers in domestic violence matters. In representing batterers, a lawyer will find it difficult to proceed without impeaching the survivor's credibility, through lines of questioning that, for example, elicit information that abuse supposedly occurred previously, and then ask why, if the abuse was so severe, the survivor did not leave. The "why didn't she leave" question inevitably buttresses images of women as either deceitful, passive, or downright masochistic. These images, even in individual cases, contribute to the micro structures of discourse and dominance which sustain patriarchy. In other situations, lawyers will often be able to harmonize interests to avoid an acute conflict.

B. Financial and Personal Interests

Even when a conflict is not acute, tensions can arise. This section addresses two factors which heighten those tensions: asymmetrical fi-
ncial incentives and personal, as opposed to imputed, conflicts of interest.

1. Asymmetrical Financial Incentives

A lawyer’s financial stake in keeping one client happy is a driving force in conflicts of interest. If the legal services office receives substantial funding from a government agency or foundation identified with a particular position, representing clients whose interests are perceived as inconsistent with that position will create tensions. If these clients, like the typical legal services client, receive services free of charge, asymmetrical financial incentives emerge. The lawyers taking the less financially-favorable position, like lawyers in a comparable situation in a private firm, may well come under some pressure to smooth over their position to safeguard the office’s funding.\(^9\) In this sense, funders of public interest work, although not technically clients of the attorneys they support, can exert market power like that exerted by corporate clients of a law firm, who often explicitly or implicitly influence the law firm’s pro bono case selection.\(^9\)

While asymmetrical financial incentives are most troubling in the doctrinal conflict setting, they can also create problems in the area of mission conflicts. Consider a foundation concerned about violence in public housing, which funds a legal services office to develop a legal strategy for victimized tenants involving seeking injunctions like those entered against batterers in domestic violence cases. When a legal services office also represents tenants accused of violence or drug dealing in eviction proceedings, funders may be puzzled by the seeming inconsistency.

Such tensions are troubling, but not necessarily dispositive. As noted earlier, tension can be constructive, because it shakes up settled assumptions and opens up new avenues for conversation and accord. For tension to be constructive in the funding scenario, a legal services office applying for funding would have to disclose up front its multiple commitments in the community it serves, including both its commitment to combat violence and victimization and its commitment to assist tenants at risk of eviction because of unfair or unfounded accusations. Funding received subsequent to such disclosure would constitute acknowledgment of the legal services office’s multiple roles.

2. Personal or Imputed Attorney Conflict

This factor, whether it is the same attorney or merely the same law office that is representing each group in a possible mission conflict, reflects the distinct but not limitless loyalty which a client can expect

\(^9\) See Spaulding, supra note 4, at 1400-22.
\(^9\) Id. at 1412-20. In private practice, moreover, non-client funding sources such as insurers exert substantial control over the course of representation.
from a lawyer. Generally, this factor is less important for mission conflicts than for doctrinal conflicts. This is true for two reasons. First, cases that present mission conflicts do not place the lawyer's own credibility on the line in the way that doctrinal conflicts do. Second, barring the same lawyer from representing different groups in a possible mission conflict reduces legal access, by depriving all clients of the valuable experience that lawyers acquire through representing a diverse range of clients. I discuss these points in turn.

In mission conflicts, cases turn on facts, for example, whether the tenant engaged in violent acts that violated the terms of the lease. Each case brings different facts. Therefore, an attorney's appearance on behalf of a member of one group on one set of facts, and another group on a different set of facts, says nothing about the merits of either case. In theory, the attorney is transparent in this process, marshaling facts, not inventing them or testifying to them. As a result, the attorney's personal credibility with the tribunal and with clients is not directly relevant.94

A contrary result would deprive all clients of an important kind of legal access. Obviously, one group is denied access completely, because the lawyer cannot represent them if she is representing another group with interests that appear to be in tension. In addition, however, the legal access of the remaining pool of clients suffers, because those clients are deprived of the experience that the lawyer would have gained in representing the other side. Such experience will allow the lawyer to more competently represent all clients, by informing her assessment of her adversary's case, and giving her clients advice on when to settle cases if the evidence is too strong. Of course, representing the "other side" is not the only way for lawyers to develop this competence. It is, however, one valuable way, and the profession should not bar it without a good reason. Confidentiality may furnish such a justification in particular cases, as we see in the next subsection.

C. Confidentiality Issues

Confidentiality issues can trump all of these factors. In some cases, the office may have to take measures to guard against disclosure of a client's identity. For example, in domestic violence cases, if an office wishes to represent both batterers and survivors, a risk arises that a survivor's wish to take legal action against an abusive partner, which she wishes to keep secret, will be disclosed if she encounters a friend of her partner whom the office is defending against charges of spousal abuse, and the friend tells the abusive partner. An office should represent both survivors and alleged abusers only if it addresses this is-

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94. This is not to deny that, in practice, the reactions of a tribunal or fact-finder to the attorney's personality have an impact. My only point here is that there is no reason to suppose that the attorney's appearance in one case will prejudice his client in the other.
sue, through separate offices in separate locations, different intake
days, or other measures.

V. DOCTRINAL CONFLICTS

Doctrinal conflicts are susceptible to analysis with the same factors
described above, although the dilemmas are sharper and involve more
trade-offs with client loyalty concerns. The client loyalty factor helps
explain, for example, the heightened role for questions about the
acuteness of the conflict and about whether the possible conflict is
personal to the attorney or merely imputed. These issues are ex-
plained below.

A. Acuteness of the Conflict

The acuteness factor becomes more salient in the area of doctrinal
conflicts. In the mission conflict sphere, our premise is that either one
or both of the cases evaluated for mission conflicts is a fact-based case,
with no novel legal issues. Generally then, neither case will have a
direct impact on the other. The essence of the mission conflict is the
intuition that, even in the fact-based case such as an eviction based on
drug trafficking or violence, the respondent is a kind of virtual client
of the legal services office because of her residence in the community.
In contrast, doctrinal conflicts threaten harm to actual, as well as vir-
tual clients. Because both kinds of clients are important to the legal
services mission, however, our view of the acuteness of a conflict
should still reject the presumption of a zero-sum game and look first
to mutually-advantageous solutions.

As an example of a doctrinal conflict which is not acute, consider a
legal services office that represents homeless people discharged from
public psychiatric institutions, who seek residences and services in the
community. Suppose that the office wishes to bring a suit to establish
a state obligation to provide such residences and services. At the
same time, the office is approached by representatives of a low-in-
come community, which wants to argue that the state cannot site a
disproportionate number of facilities for the homeless in any one com-

95. High profile cases, even those which turn exclusively on facts, can have a sub-
stantial impact. See Margulies, Identity on Trial, supra note 27, at 52-62. This impact,
while significant, is less direct and more diffuse. The possibility of impact even in
mission conflict cases is one reason that they are worth analyzing from a legal ethics
perspective, as this Article has tried to do. Analysis is even more important in a
doctrinal conflict case, where the impact is by definition more direct.

96. See Peter Margulies, Building Communities of Virtue: Political Theory, Land
Use Policy, and the 'Not in My Backyard' Syndrome, 43 Syr. L. Rev. 945, 966-68
political opposition will be less powerful, and where property values are already low, allowing for the ready purchase of land. Under traditional "zero-sum" conceptions of conflicts law, these positions would almost certainly be in conflict.

One could consider each of those positions in my hypothetical on community housing, however, as complementary. The homeless clients are arguing for a general right to residences and services. They are not necessarily arguing that the state should be able to discharge its obligation free from community input. Indeed, one could argue that facilities in which communities themselves feel that they have a stake, and which communities feel are part of an obligation shouldered equally by other communities, will have the greatest chance of success.

While this interpretation defuses the conflict, a modification of the facts in the hypothetical creates a conflict that is less amenable to reconciliation. Suppose that the community in its lawsuit to stop siting of the group home went beyond the "fair share" argument, and instead argued that the state in fact had no legal obligation to provide residences and services for discharged psychiatric patients. A victory by the community on that doctrinal point would materially reduce the options available for ex-patients in the community. This scenario enacts a zero-sum game, and therefore creates an acute conflict.97

One context we have considered throughout this Article, namely the problem of tenants victimizing other tenants, can also precipitate acute conflicts. Consider Spence v. Reeder,98 where a legal services office, Greater Boston Legal Services (GBLS), initially assisted a tenant who sought to challenge the summary eviction policy that GBLS had helped draft on behalf of a plaintiff class of tenants settling an earlier case on conditions in public housing.99 GBLS's representation of the tenant risked an acute doctrinal conflict100 in which it would have had to argue, on behalf of the plaintiff class, that the summary eviction procedure was legal, while it argued that the procedure was illegal on behalf of the tenant facing eviction.

This situation was particularly serious because, in addition to a doctrinal conflict, it arguably created a client conflict and a mission conflict. One could readily view a lawyer's representation of a person challenging an agreement, which a lawyer has helped draft on another clients' behalf, as also embodying a client conflict. GBLS's drafting of the agreement on summary evictions also amounted to a mission con-

97. Because a holding that the ex-patients were not entitled to placement and services in the community would reduce the social access afforded this group, advocating for such a result would also constitute an acute mission conflict.
100. The conflict was defused only by the tenant eventually obtaining substitute counsel. See Tremblay, Community-Based Ethic, supra note 5, at 1141 n.142.
Conflict, because a summary eviction process permits stereotypes, in the form of unfounded or unfair accusations, to determine access to housing, a crucial social good.\footnote{Such stereotypes play a role in administrative eviction decisions. Cf. Moundsville Hous. Auth. v. Porter, 370 S.E.2d 341 (W. Va. 1988) (reversing a decision upholding the eviction of a tenant who "allowed" herself to be beaten by her boyfriend).}

Advocates of the monolithic approach can cite the GBLS dilemma as a warning about what happens when legal services offices try to address differences in their tenant client base, instead of shaping their mission around tenants' broad interest in fighting eviction (at least their own) whenever possible. For the contextual approach, however, positing such broad interests amounts to wishing away intra-group difference, not addressing it. The contextual approach to this mission conflict addresses two distinct time periods: first, the period involving drafting of the policy; and second, the period involving litigation challenges to the policy, once drafted.

In the drafting stage, the contextual approach would contemplate legal services lawyers assisting in drafting a drugs-and-violence policy that took adequate account of both perspectives—the standpoint of tenants concerned about violence and the standpoint of tenants concerned with arbitrary and hasty eviction decisions. Most tenants might, upon reflection, hold both values dear. A policy might, for example, satisfy concerns about timeliness by providing that a hearing had to take place within a specified, relatively short time of the administrative eviction recommendation. In addition, devices like discovery, which offer the potential for delay, could be streamlined. The respondent, however, would still receive a pre-eviction hearing. This kind of harmonization of values, while not possible in every case, can occur only if lawyers give inter-group difference its due.

Of course, this approach to the policy drafting stage does little to ameliorate conflicts for a law office that has already drafted a policy that seems skewed, and now must consider its role in a court challenge to the policy. Here, as we have seen, an acute conflict exists. Nevertheless, the contextual approach would allow the legal services office to represent both the majority of the tenant class, who support the policy as drafted, and the tenant challenging it, if the office could satisfy the other criteria highlighted in the approach: no asymmetrical financial incentives; no personal (as opposed to imputed) attorney conflict; and no confidentiality concerns.\footnote{See infra notes 103-09 and accompanying text; cf. Tremblay, \textit{Community-Based Ethic}, supra note 5, at 1140-41 (arguing against disqualification in the legal services setting, even when positional conflicts exist); see also Federal Defenders of San Diego, Inc. v. United States Sentencing Comm'n, 680 F. Supp. 26, 30-31 (D.D.C. 1988) (holding, in a case in which a federal public defender's office argued that it faced a conflict of interest in challenging the Federal Sentencing Guidelines in individual cases because some of its clients benefitted from the Guidelines, that no conflict existed because arguments for the constitutionality of the Guidelines would be made by the other side).} In addition, the legal serv-
ices office would have had to clearly disclose to both clients upon commencement of the representation that such a conflict might occur. This outcome addresses loyalty and confidentiality issues, while also respecting intra-group differences. Justifying it requires a closer look at the other criteria governing doctrinal conflicts under the contextual approach.

B. Financial and Personal Interests

This section examines specific factors that come into play in doctrinal conflicts. The two factors it discusses are financial incentives and personal conflicts.

1. Asymmetrical Financial Incentives

Asymmetrical financial incentives, which may come into play with mission conflicts, are even more important in the doctrinal conflict arena because of their impact on loyalty. In the public housing tenant victimization scenario, for example, a legal services office might apply for funds from a government agency or foundation to develop an anti-violence strategy relying on enactment of a summary eviction procedure. If the office subsequently represented a tenant challenging that procedure, funders might become quite confused. The tenant might receive less vigorous representation because of concern that funding organizations would terminate or deny financial support. Similar

Justice Department, not the Public Defender, and the number of clients who would benefit from the Guidelines was so small that there was little danger of chilling the ardor of individual attorneys arguing that the Guidelines were unconstitutional); Dzienkowski, supra note 4, at 475 n.82 (discussing Federal Defenders).

103. This concern should also help shape decisions about representation by law firms. A law firm which does employment work for corporations should be free to take on pro bono employment work for employees. It should not argue both sides of a legal issue, however, in the course of such representation. For example, a law firm should not simultaneously argue in any forum on behalf of an employer that a single incident cannot constitute a hostile environment under sexual harassment doctrine, while arguing in any forum for an employee that a single incident can constitute a hostile environment. Cf. Spaulding, supra note 4, at 1422-31 (arguing for a narrow interpretation of positional conflicts). Pressure from the employer could compromise loyalty to the employee in the other case, particularly because the representation in the pro bono matter was probably done largely by associates, wary of offending a partner who might be heading the representation of the employer.

Having clients who are both employers and employees, while arguing only one side of a doctrinal issue, is more akin to a possible mission conflict. One can defuse such a conflict here with the argument that a law firm representing an employee on such a legal issue is well-equipped to counsel employers on how to create a sexual harassment policy that will obviate the need of such litigation. Barring representation in such cases could pose inconsistencies with the lack of comprehensive ethical bars on making legal arguments contrary to the prospective legal interests of former clients, for example, when criminal defense attorneys become prosecutors, or vice versa. Re-thinking the latter policy would greatly reduce legal access by preventing many clients from retaining the attorney of their choice. It would also diminish the value of the access available, by depriving attorneys of valuable experience and information.
concerns might arise if the summary eviction procedure, agreed to as part of a settlement of a lawsuit, was crucial to a court determination that the office represented a "prevailing party" in the litigation, and was thus entitled to a hefty award of attorney's fees.

2. The Personal or Imputed Nature of the Attorney's Conflict

Even absent asymmetrical financial incentives, there are still significant loyalty concerns when the same attorney argues two sides of the same legal issue for two different clients, albeit in two different cases. These concerns, which involve the reactions of both tribunals and clients, do not apply to the same degree in cases where members of the same law office, but not the same lawyer, argue each side. I discuss the tribunal's reaction first, followed by analysis of the clients' reaction.

A tribunal's reaction to a doctrinal conflict implicates the attorney's duty of loyalty. A lawyer who appears before the same tribunal within a short period of time, making inconsistent doctrinal arguments, runs the risk of confusing the tribunal. One client will likely suffer, with attendant compromise to the duty of loyalty. The spectacle of the same lawyer arguing conflicting legal positions before the same court within a short span of time could be disorienting, even to judges trained to consider legal positions dispassionately. As merely human creatures, judges will find it difficult to suppress musings about which side the lawyer "sincerely" endorsed, as manifested by certain aspects of the lawyer's brief or oral argument. Absent financial incentives or confidentiality concerns, however, extending this concern to the lawyer's colleagues seems unduly restrictive. Courts cannot reasonably presume that a group of lawyers, in private or non-profit practice, necessarily hold identical opinions. Most private law firms do not "stand" for anything as entities, apart from providing competent legal representation for a fee. There is no intrinsic reason why non-profit organizations, even though they often have a stated mission, should be held to a monolithic account of that mission by courts. Particularly because most legal services clients have nowhere else to turn, such restrictions impinge severely on legal access.

104. See Rosen, supra note 4, at 75.
105. This human confusion could also unduly distract judges from the merits of the arguments, impairing the soundness of judicial decisionmaking as well as the duty of loyalty to clients. Cf. Dzienkowski, supra note 4, at 495-96 (discussing the effects of doctrinal conflicts on the integrity of the justice system).
106. But see Spaulding, supra note 4, at 1422-25 (arguing that some firms view themselves as having a "thick," rather than "thin," positional identity, tied to representing, for example, the timber industry or other interests).
Clients should not feel any differently, at least if the law office puts them on notice upon commencement of the representation that they are entitled to the doctrinal allegiance of the lawyer or lawyers they work with, but not to the doctrinal allegiance of all lawyers from that office, or from other branch offices of the same legal services program. Historically, at least, client ties to lawyers have been personal and affective in nature. Corporate clients may try to purchase doctrinal or mission loyalty from law firms seeking their business. Such exercises of market power create economic pressures, not ethical imperatives.

C. Confidentiality Concerns

Imputed attorney conflicts should, however, be sufficient to require disqualification or withdrawal when they implicate confidentiality concerns. Confidentiality concerns can readily transform a doctrinal conflict into a client conflict. This can occur because it is quite likely that the attorney handling each side, precisely because the legal issue she is arguing has a significant impact, will participate in many meetings, email lists, and phone conferences with lawyers for third parties who may be engaged in parallel litigation or advocacy efforts. Such fora are ripe occasions for inadvertently disclosing confidential information. If the law office has a doctrinal conflict, i.e., is arguing the other side of the legal issue in another case, it is quite possible that the law office’s adversary in that case is also a participant in such strategy sessions.

To illustrate the potential for breaches of confidentiality, suppose, for example, that one lawyer in a legal services office represents a small residential treatment center for former drug abusers that wishes to have the right to summarily evict suspected current drug abusers. In a different case in the same court, other lawyers from the office represent a resident of the drug facility. These lawyers want to argue that community treatment facilities are the only alternative to the street for residents, and therefore the drug facility should be viewed as a mall or “company town” under state or federal constitutional law, standing in the shoes of the government. Viewing the conduct of the drug facility as “state action” would trigger a whole array of procedural and substantive protections for residents. The inadvertent disclosure of the theory at a strategy session for drug treatment providers’ attorneys, along with disclosure of the residents’ lawyers’

107. See Kronman, supra note 74, at 128-34. But see Spaulding, supra note 4, at 1408-09 (arguing that corporate clients have expanded their conception of loyalty to the level of the firm).

108. I have participated in many such meetings over the years, involving benefits, disability, and immigration issues. “War stories” about individual clients—sometimes with identifying information edited out, sometimes not—along with vigorous discussion of legal strategy, are a staple of such meetings.
views about the strengths and weaknesses of the argument, would constitute confidential information that could materially assist the providers and injure the residents’ legal prospects. To guard against this possibility, not only are personal conflicts to be avoided, but screening devices are a necessity.

Conclusion

Addressing conflicts of interest is always difficult, and is particularly wrenching in the legal services context. Legal services lawyers rightly see themselves as embarked on a mission to enhance legal and social access in the communities they serve. In a landscape already altered by drastic federal restrictions and cutbacks, conflicts of interest make this mission even harder to discern and fulfill. The complexity introduced by conflicts of interest can be viewed as tragedy or as challenge. This Article chooses the latter course.

Meeting the challenge is important because of the flaws in current approaches’ treatment of the link between access and class difference. We can divide access into legal access—access to a lawyer—and social access—access to human and financial capital, goods, and services. Legal access is always problematic in the poverty law setting, because the need for legal assistance exceeds supply. Social access involves the interaction of macro factors, including inequities in the allocation of resources, and micro factors, including issues of social disorganization within low-income communities. Class difference, as I use the term here, involves two kinds of diversity. Differences within a socio-economic class are intra-group differences. Differences between rich, poor, and middle-class people are inter-group differences. The dominant approaches to legal services—the common carrier, moralistic, and monolithic approaches—each fail to address one or more of these points.

Flaws in current approaches to the mission of legal services run the ideological spectrum. The common carrier approach, sometimes promoted by conservatives, stresses legal access while rejecting enhanced social access as a mission of legal services. As a result, the common carrier approach leaves existing inequities in place, and merely dispenses an endless string of legal band-aids that fail to treat underlying problems. Conservatives resort to a moralistic approach when they find the common carrier approach inadequate for fulfilling their ideological agenda. The moralistic approach restricts legal access because it deems certain groups, such as undocumented immigrants, tenants accused of drug abuse, or welfare mothers, unworthy of representation. In the course of making such judgments of worth, the moralistic approach exaggerates differences among low-income people, while ar-

109. Cf. Dzienkowski, supra note 4, at 512-14 (discussing legal strategy as covered by the duty of confidentiality).
arguing that formal equality of opportunity eliminates differences between the rich, poor, and middle-class.

The monolithic approach, which progressives press, inverts the moralistic approach. Its formulation of mission focuses on the macro dimension of social access, concerned with inequality of resources, but leaves micro issues of social disorganization largely unaddressed. As a result, the monolithic approach obscures intra-group differences, homogenizing low-income people into abstract entities like “tenants” or “consumers” whose interests invariably diverge from affluent or middle-class people. Consequently, the monolithic approach effectively denies legal access to some low-income people, like tenants victimized by the violence or drug trafficking of other tenants, whose requests for legal assistance trigger a mission conflict.

In contrast, the contextual approach acknowledges intra-group difference. Unlike the monolithic approach, it does not abstract intragroup difference out of existence. Unlike the moralistic view, it does not magnify inter-group difference to justify a punitive approach to the “unworthy” poor. This acknowledgment of difference allows the contextual view to preserve the macro commitment to social access of the monolithic view, address micro issues of social organization, and provide legal assistance to clients, like tenants victimized by other tenants, for whom the monolithic approach lacks a ready category. The contextual approach’s treatment of positional conflicts reflects this commitment to diversity, as well as both continuity and change in the landscape of legal services. It honors the notion of mission, which progressives have envisioned for poverty lawyers, by examining mission conflicts with the same care that the profession devotes to conflicting advocacy about legal doctrine. To accomplish these goals, it considers a number of factors, including the acuteness of the conflict, asymmetrical financial incentives, the personal or imputed nature of the attorney’s conflict, and confidentiality issues.

Consistent with the contextual approach, legal services attorneys should engage actively with the diverse interests of the community they serve, instead of shutting out difference through finding mission or doctrinal conflicts. This engaged posture permits representation on legal and factual issues of both tenants victimized by other tenants’ violence and tenants accused of violence seeking procedural fairness. The commitment to diversity tracks legal services’ historical concern with all community members as at least virtual clients. Tempering this commitment are concerns about confidentiality; harm to credibility before tribunals and clients that is posed by personal, if not imputed, attorney conflicts; and financial pressures on the duty of loyalty, which come with legal services’ increasing reliance on a patchwork quilt of funding sources. Addressing these factors as part of a contextual approach will protect legal services offices’ pursuit of legal and social access for the multiple communities they serve.