

## THE ETHIC OF HIGH EXPECTATIONS

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“I understand as well as any one what people are saying . . . . But I can only do my duty by my client to the best of my judgment.”<sup>1</sup> So says Sir William Patterson, the hero of Anthony Trollope’s novel *Lady Anna*, at a time when he has come under severe criticism. He has just behaved in what seems a most unlawyerly fashion: he has persuaded his client to drop a case that, if successful, would have been worth a good deal of money. He has done so, the Bar believes, because “[i]n lieu of regarding his client, he had taken upon himself to set things right in general, according to his idea of right.”<sup>2</sup> As *Lady Anna* unfolds, however, it turns out that Sir William has been looking out both for “right in general” and for his client, on whom the opposing party later voluntarily settles a

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1. ANTHONY TROLLOPE, *LADY ANNA* 324 (Stephen Orgel ed., Oxford Univ. Press World’s Classic ed. 1990) (1874) [hereinafter *LADY ANNA*].

2. *Id.* at 323.

large sum of money. By moving the parties from litigation to trustful reciprocity, Sir William brings about the best possible outcome.

Although Trollope wrote *Lady Anna* in 1874, his portrayal of Sir William has great relevance today. There is perennial debate among legal ethicists about how lawyers should balance their duties to their clients with their responsibilities as moral persons within society.<sup>3</sup> In *Lady Anna*, Trollope reminds us that while this debate is an important one, there are also times when farsighted lawyers can fulfill their duties to their clients in ways that benefit everyone involved.

This Essay looks at one possible way that lawyers can achieve such outcomes. Under certain circumstances, lawyers can best serve both their clients and the broader good by practicing what I call the ethic of high expectations. A lawyer acting from the ethic of high expectations gives advice that will be fully effective only if both the lawyer's client and the other party voluntarily and independently relinquish legal rights in order to further the broader good. The lawyer succeeds by shifting the conversation from being about legal rights to being about right outcomes.

In defining and advocating the ethic of high expectations, I rely on two very different types of sources. The first is *Lady Anna*. Although Trollope's *Orley Farm* has fascinated present-day legal ethicists with its portrayals of lawyers,<sup>4</sup> *Lady Anna* has received virtually no attention.<sup>5</sup> Part I outlines the plot of *Lady Anna* and introduces the wonderful Sir William Patterson. Part II then analyzes Sir William's choices from a legal ethics standpoint. More specifically, this Part uses Sir William's conduct to frame the concept of the ethic of high expectations and further argues that, for the most part, this conduct would pass muster under the legal ethics regimes prevalent in the United States today.

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3. See, e.g., GEOFFREY C. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW 120–35 (1978) (noting that a lawyer needs “extraordinary technical skill [and] an unusually disciplined sense of probity” if he is to “be at once a champion in the forensic roughness and a guardian of the temple of justice”); DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 19–64 (2007) (discussing tension between “the morality of conscience” and “the claim that professional obligation can override it”); GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 24–61 (2d ed. 1860) (taking up question of “what are the limits of [a lawyer’s] duty when the legal demands or interests of his client conflict with his own sense of what is just and right”).

4. See, e.g., LUBAN, *supra* note 3, at 302 (“[*Orley Farm*] is a great novel about legal ethics . . . .”); Sanford H. Kadish, *Moral Excess in the Law*, 32 MCGEORGE L. REV. 63, 64 (2000) (describing *Orley Farm* as a “fine Victorian novel”); Thomas Shaffer, *The Profession as a Moral Teacher*, 18 ST. MARY’S L.J. 195, 209 (1986) (“My favorite legal example of contempt for the profession as moral teacher occurred . . . in Trollope’s *Orley Farm*.”); W. Bradley Wendel, *Legal Ethics as “Political Moralism” or the Morality of Politics*, 93 CORNELL L. REV. 1413, 1427–28 (2008) (commenting on Trollope’s characters from *Orley Farm*).

5. *Lady Anna* has won occasional praise in the legal world, but this praise dates far back in the past. See, e.g., Henry Drinker, *The Lawyers of Anthony Trollope*, in HENRY S. DRINKER, TWO ADDRESSES DELIVERED TO MEMBERS OF THE GROLIER CLUB (1950), reprinted in FED. LAW., Jan. 2008, at 50, 56–58 (discussing the character of *Lady Anna*’s Sir William Patterson); John H. Wigmore, *A List of Legal Novels*, 2 ILL. L. REV. 574, 592 (1908) (noting “Novel[s] in which a lawyer, most of all, ought to be interested” and including *Lady Anna* on his list).

A lawyer practicing the ethic of high expectations must have a client willing to act with good will toward the other party—and willing to gamble that the other party will reciprocate. Part III turns to a very different set of sources to show why clients might be willing to act in this way. In particular, this Part draws upon insights developed from experiments in the field of economics, particularly behavioral economics, regarding people's preferences for fairness and reciprocity and the ways in which their market norms relate to their social norms. Part III argues that these insights both support the feasibility of the ethic of high expectations under certain circumstances and enrich the understanding of how it can be sustained in practice.

Finally, Part IV considers the circumstances under which lawyers today could practice the ethic of high expectations. This Part does not suggest that the ethic of high expectations will work in all or indeed many cases. Nonetheless, the ethic of high expectations is underutilized, whether from lawyers' disinterest in thinking "outside the box," desire for business, fear of malpractice suits, or other motives. Part IV accordingly identifies characteristics of cases and areas of law where the ethic of high expectations might prove appropriate.

## I. TROLLOPE'S SOLICITOR-GENERAL

### A. *Lady Anna in Brief*

*Lady Anna* begins grimly. The nefarious Lord Lovel marries a young woman but tires of her shortly before the birth of their daughter Anna. He tells his lady that their marriage is a farce—that he has a prior wife already in Italy. It is unclear whether he is telling the truth, but his lady has no reliable way of verifying or refuting his claim. Lord Lovel then leaves England to live on the Continent. In his absence, his lady does everything she can to emphasize the validity of their marriage, including insisting that she be called the "Countess" and that Anna be known as "Lady" Anna. During these years, the Countess and Anna are taken in by a kindly tailor, Thomas Thwaite, who devotes a great deal of time and money to helping them.

Fast forward twenty years to Lord Lovel's death. Lord Lovel's title and modest landed property pass to his nearest male relative, whom I shall refer to as the young Earl, but it is unclear who will inherit his fabled wealth. Once some dust has settled, two viable claimants remain: Anna and the young Earl.<sup>6</sup> Anna will inherit if she is legitimate, and the young Earl will inherit otherwise. The burden of proof is on the young Earl.

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6. Two other possible claimants appear at various times. One is Lord Lovel's mistress at the time of his death—an Italian woman to whom he leaves his money in his will. See *LADY ANNA*, *supra* note 1, at 15–16. The will is invalidated on the grounds of insanity in the second chapter of *Lady Anna*, and that is the last we hear of this claimant. *Id.* at 20. The remaining claimant is a (different) Italian woman who claims to have married Lord Lovel before he "married" the Countess. See *id.* at 42–43. Her proofs of this marriage are extremely dubious. See *id.* at 42–44.

At this point, Trollope introduces the lawyers—and there is no shortage of them. For Anna, we have Mr. Goffe as solicitor and Mr. Mainsail as junior barrister, while the lead barrister, Serjeant Bluestone, is “a very violent man, taking up all his cases as though the very holding of a brief opposite to him was an insult to himself.”<sup>7</sup> For the young Earl, who has the deeper pockets, we have more prestigious lawyers: Mr. Flick the solicitor, Mr. Hardy, Q.C., as second barrister, and Sir William Patterson, the Solicitor-General of England, as lead barrister.<sup>8</sup> The case appears headed to court, as the Countess (who acts as Anna’s guardian) has angrily rejected an offer that Anna’s claim of legitimacy be abandoned in exchange for 30,000 pounds.

Mr. Flick goes to Italy to investigate the case. He returns with the unhappy impression that Anna is in fact legitimate. Some evidence suggests that Lord Lovel did have a prior wife in Italy, but the evidence further indicates, though not conclusively, that this woman died before Lord Lovel married the Countess.

Mr. Flick relays this information in guarded terms to Sir William. They conclude that the best result for their client will be for him to marry Anna. This will settle the suit and provide the young Earl with all the wealth he could hope to win. Anna will go along, they reason, because this approach would give her the certainty of her wealth, undisputed legal and social acceptance of her legitimacy, and a share in the young Earl’s title and land. After some difficulties with Serjeant Bluestone, who has “never heard anything more irregular in [his] life,”<sup>9</sup> they put the idea to the parties.

The young Earl, who is decent, attractive, and tractable, is willing enough, and the snobbish Countess is positively thrilled by the idea. But Anna initially resists. She likes the young Earl, but she has a prior secret engagement to Daniel Thwaite, a tailor who is the son of Thomas Thwaite. The rest of the book turns on two questions: First, will Anna’s resistance continue; and second, how will the inheritance dispute be resolved? The answer to the first question is a rather tedious yes. It is the second question that keeps the reader—or at least the lawyer reader—turning the pages eagerly.

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7. *Id.* at 48.

8. Prior to the 1890s, the Solicitor-General of England could take cases in private practice in addition to his work for the Crown. See Walter Preston Armstrong, *A Famous English K.C.*, 29 *YALE L.J.* 718, 727 (1920).

9. *LADY ANNA*, *supra* note 1, at 87 (internal quotation marks omitted). A letter from Anna’s lawyers to the young Earl’s lawyers expressed a similar sentiment:

Should the Earl of Lovel seek the hand of his cousin, the Lady Anna Lovel, and marry her . . . , we should be delighted at such a family arrangement; but we do not think that we, as lawyers,—or, if we may be allowed to say so, that you as lawyers,—have anything to do with such a matter.

*Id.* at 69. Mr. Hardy also resisted this approach, feeling that “it wasn’t law.” *Id.* at 92.

*B. The Unconventional Sir William Patterson*

So far, the character of Sir William is understandable enough. He is an exceptionally able lawyer, blessed with “the gift of seeing through darkness.”<sup>10</sup> He has the judgment to recognize a weak case and the imagination to identify a clever, if unusual, solution. He has the energy and confidence to pursue this solution despite the resistance of the other lawyers. Indeed, he is not above bending the rules a little: when Serjeant Bluestone refuses to put the marriage idea to his client, Sir William goes behind his back through a third party. And while affable, Sir William also has an advocate’s edge, as shown when he delicately warns the (poorer) other side that “if the law be allowed to take its course” then the matter “may,—I fear it must,—take years to prove.”<sup>11</sup> With his brilliance, his common sense, and his persuasiveness, he gains the respect of almost all the interested non-lawyers. Not long after Sir William suggests a settlement by marriage, the Countess has “already begun to have more faith in the Solicitor-General than in [her own lawyers] Mr. Goffe [and] Serjeant Bluestone.”<sup>12</sup>

But when Anna’s resistance to marrying the young Earl becomes clear, Sir William shows an unconventional side. On a personal level, he is the only person with any sympathy for Anna’s insistence that she will marry the lowly Daniel.<sup>13</sup> On a professional level, he acts in what seems like a very unlawyerly way: he persuades the young Earl to abandon his legal claim to the money. At the scheduled court hearing, Sir William argues that Anna *is* in fact legitimate and that judgment should be entered in her favor. This outrages the young Earl’s nearest relative, the rector of Yoxham, who goes “about declaring that the interests of the Lovel family had been sacrificed by their own counsel.”<sup>14</sup> And the rector is not alone:

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10. *Id.* at 46.

11. LADY ANNA, *supra* note 1, at 66 (internal quotation marks omitted).

12. LADY ANNA, *supra* note 1, at 88.

13. The Countess is horrified to the point of abusiveness at the thought of Anna marrying Daniel. *See id.* at 213. As for the other lawyers, the following exchange sums it up:

“The marriage would be too incongruous,” said Mr. Hardy.

“Quite horrible,” said the Serjeant.

“It distresses one to think of it,” said Mr. Goffe.

“It would be much better that she should not be Lady Anna at all [i.e., legitimate], if she is to do that,” said Mr. Mainsail.

“Very much better,” said Mr. Flick, shaking his head, and remembering that he was employed by [the young Earl] and not by the Countess—a fact of which it seemed to him that the Solicitor-General altogether forgot the importance.

“Gentlemen, you have no romance among you,” said Sir William. “Have not generosity and valour always prevailed over wealth and rank with ladies in story?”

*Id.* at 318.

14. *Id.* at 323.

There were very many who . . . agreed with the rector in thinking that the Earl's case had been mismanaged. There was surely enough of ground for a prolonged fight to have enabled the Lovel party to have driven their opponents to a compromise. There was a feeling that the Solicitor-General had been carried away by some romantic idea of abstract right, and had acted in direct opposition to all the usages of forensic advocacy as established in England. What was it to him whether the Countess were or were not a real Countess? It had been his duty to get what he could for the Earl, his client. There had been much to get, and with patience no doubt something might have been got. But he had gotten nothing. Many thought that he had altogether cut his own throat, and that he would have to take the first "puny" judgeship vacant. "He is a great man,—a very great man indeed," said the Attorney-General, in answer to someone who was abusing Sir William. "There is not one of us can hold a candle to him. But, then, as I have always said, he ought to have been a poet!"<sup>15</sup>

Despite all the criticism, Sir William's choice proves inspired. Anna eventually offers half of her wealth to the young Earl. With Sir William's approval, he accepts the gift. Sir William's work does not stop here, however. He then persuades the young Earl to host the wedding of Anna and Daniel "exactly as though [the young Earl's family was] all proud of the connection."<sup>16</sup> Sir William further persuades Daniel (who has a proud Radical side) to accept this arrangement. The book closes with the wedding, and even here "[t]he hero of the day was the Solicitor-General."<sup>17</sup> Sir William has manufactured the best possible outcome.<sup>18</sup> The young Earl now has money to support his title—something that Trollope, who was no radical, presumably viewed as a socially valuable outcome.<sup>19</sup> Anna has Daniel, substantial wealth, and undisputed legitimacy. Finally, the two sides have developed a warm family relationship. While an arms-length settlement could have achieved some of these outcomes, it seems impossible that such a settlement could have resulted in the young Earl's getting so much money, in Anna's legitimacy being as widely accepted socially,

15. *Id.* at 348.

16. *Id.* at 493.

17. *Id.* at 507.

18. Once all is said and done, Sir William receives much praise. *See id.* at 508. His client is thrilled, observing that "[i]f we had gone on quarrelling and going to law, where should I have been now? I should never have got a shilling out of the property." *Id.* at 489 (internal quotation marks omitted). Pleasingly, however, Trollope leaves one dissenter: the rector of Yoxham remains convinced to his dying day that "[i]f the lawyers had persevered as they ought to have done, it would have been found out that the Countess was no Countess, that the Lady Anna was no Lady Anna, and that all the money had belonged by right to the [young] Earl." *Id.* at 495 (internal quotation marks omitted).

19. *See* ANTHONY TROLLOPE, AN AUTOBIOGRAPHY 142 (Univ. Cal. Press 1947) (1883) (displaying a distinct preference for the upper class).

and in the two ending up with such a cordial cousinly relationship. Sir William has brought happiness beyond what the law could have provided.

## II. SIR WILLIAM DECONSTRUCTED

Why does Sir William act the way he does? Why does he persuade his client to abandon a suit that has some chance of success? In hindsight, the choice is a brilliant one, but at the time it seems like a most improbable decision. In this Part, I first explore what motivates Sir William to act as he does and argue that he acts primarily from his sense of duty to his client, although this is leavened with a strong desire for a good outcome all around. This Part then turns to the question of how Sir William achieves his motives and argues that, in choosing to drop the suit, he relies on what I call the ethic of high expectations. Finally, this Part considers whether Sir William's ethic of high expectations would pass muster under the ethical rules prevalent in the United States today.

### A. *The Motives of Sir William*

Sir William's decision to drop the lawsuit "in direct opposition to all the usages of forensic advocacy"<sup>20</sup> lies at the heart of *Lady Anna*. It is a puzzling choice, but the text suggests four possible motives.

First, Sir William at one point suggests that the decision is not his: he is simply following the instructions of the young Earl, who is convinced that Anna is in fact legitimate.<sup>21</sup> This explanation does not seem compelling, however, in light of all the influence that Sir William has over his extraordinarily docile client. The young Earl is "inclined to be submissive in everything to his great adviser"<sup>22</sup> and throughout the novel he follows Sir William's advice. If the young Earl has instructed Sir William to drop the case, it is because Sir William has advised him to do so.

Second, there is the possibility that Anna will still come around and marry the young Earl (a possibility that surely would have been lost had the young Earl persisted in legally disputing her legitimacy). Perhaps due to hasty drafting,<sup>23</sup>

20. LADY ANNA, *supra* note 1, at 348.

21. See *id.* at 324 (explaining to Mr. Hardy that "[I]et an advocate be ever so obdurate, he can hardly carry on a case in opposition to his client's instructions" (internal quotation marks omitted)).

22. *Id.* at 437.

23. A quick writer and a light editor, Trollope frequently has inconsistencies in his writings. See VICTORIA GLENDINNING, TROLLOPE 331 (1992) ("Critics complained of carelessness and infelicities of style and grammar."); TROLLOPE, *supra* note 19, at 287 ("Every word of [*Lady Anna*] was written at sea . . . and was done . . . for eight weeks, at the rate of 66 pages of manuscript in each week, every page of manuscript containing 250 words."). *Lady Anna* itself contains obvious inconsistencies. See Drinker, *supra* note 5, at 58 (describing inconsistencies in Trollope's portrayal of Sir William's character). Compare LADY ANNA, *supra* note 1, at 190 (describing how Sir William shows full knowledge of the debt owed by the Countess to Thomas Thwaite), with *id.* at

Trollope offers conflicting accounts of Sir William's views here. At one point late in the book, Sir William holds out hope that this marriage will happen after all.<sup>24</sup> But immediately after the trial, Sir William expresses grave doubts about the likelihood of this marriage—he observes that Anna “seems to have a will of her own, and that will is bent the other way.”<sup>25</sup> This observation seems truer to Sir William's usual perspicuity than does the passage in which Trollope describes Sir William as holding out hope for the marriage. Because of this—and because the decision to drop the case is more interesting if Sir William has low hopes for a marriage—I consider that the prospect of a marriage between the cousins did not substantially motivate Sir William's decision to abandon the lawsuit.

Third, there is the motive that the rector of Yoxham and the profession at large attribute to Sir William: that he acts out of “some romantic idea of abstract right.”<sup>26</sup> This motive is more plausible. Throughout *Lady Anna*, Sir William displays sympathy and understanding toward all persons concerned in the case. He comes to believe that Anna is, in truth, legitimate and asks “[w]ho would wish to rob the girl of her noble name and great inheritance if she be the heiress? Not I, though the [young] Earl be my client.”<sup>27</sup> Perhaps Sir William persuades his client to give up his lawsuit simply because it is the morally right thing to do.

Fourth, there is the possibility that Sir William is just doing what lawyers ordinarily do—acting in the best interest of his client. On this theory, Sir William has made a calculated determination that the young Earl has a better chance of financial success if he drops the suit and trusts Anna's generosity than if he pursues the suit. Again, this motive is plausible. Sir William does not think much of his client's odds at trial, and he is aware that Anna may be generous. Just after the decision to drop the suit, he observes that “I do think that a settlement may be made of the property which shall be very much in the [young] Earl's favour.”<sup>28</sup>

There are two plausible motives, then: that Sir William acts out of some romantic idea of abstract right and that he acts to further the best interests of his client. These two motives ultimately prove compatible in this case, and Sir William seems to have a healthy dose of each. But which motivation is primary? As an author, Trollope is celebrated for his ability to leave interesting questions open for his readers to wrestle with,<sup>29</sup> and this is one of those questions. Critics

317 (describing how Sir William first learns of the amount of the debt owed by the Countess to Thomas Thwaite).

24. See *LADY ANNA*, *supra* note 1, at 413–14 (describing Sir William as “still of [the] opinion that the two cousins might ultimately become man and wife if matters were left tranquil and the girl were taken abroad for a year or two”).

25. *Id.* at 325 (internal quotation marks omitted).

26. *Id.* at 348.

27. *Id.* at 92 (internal quotation marks omitted).

28. *Id.* at 325 (internal quotation marks omitted).

29. See, e.g., LUBAN, *supra* note 3, at 318, 328 (arguing that in *Orley Farm*, Trollope takes an “agnostic” stance on core moral questions related to the main character's forgery of a codicil to a



of *Lady Anna* have taken different views on the issue. English professor R.D. McMaster reads Sir William as motivated mainly by the greater good.<sup>30</sup> He argues that “[t]he complaints of [Sir William’s] colleagues, that he appeals to ‘the light of his own reason’, to ‘his idea of right’, to ‘something of his own’, indicate that, unlike most Trollopian lawyers, and in accord with Trollope’s ideals, [Sir William] consults an inner light of truth.”<sup>31</sup> By contrast, Henry Drinker, a mid-twentieth-century Philadelphia lawyer, legal ethicist, and Trollopian,<sup>32</sup> portrays Sir William as focused primarily on the interests of his client.<sup>33</sup>

Sir William was not only able to look into the future, but having done so, could weigh accurately the different alternatives, with but one consideration—the best interest of his clients; never permitting the *gaudium certaminis*—the craving to accomplish the immediate objective—to divert him from his primary duty to serve the client.

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. . . [Sir William] knew that he might rely on Lady Anna’s generosity, on the adequacy of the estate to care for them all, and on Lady Anna’s pride in her family, as appealing forces which would induce her to make adequate provision for the head of the family, so that the title might be supported with becoming dignity and splendor.<sup>34</sup>

The practicing lawyer Drinker thus takes Sir William as focused primarily on his client’s interest,<sup>35</sup> while the English professor McMaster reads Sir William as motivated mainly by a sense of right.<sup>36</sup>

will and subsequent confession); William H. Simon, *The Past, Present, and Future of Legal Ethics: Three Comments for David Luban*, 93 CORNELL L. REV. 1365, 1372 (2008) (considering that *Orley Farm* is best read as leaving in equipoise the tension between legal and moral norms); cf. R.D. MCMASTER, *TROLLOPE AND THE LAW* 6 (1986) (“As many scholars have observed, however, [Trollope’s] novels are singular for the degree to which they sympathetically present all sides of an issue . . .”).

30. See MCMASTER, *supra* note 29, at 131.

31. *Id.*

32. See Austin W. Scott, Book Review, 64 HARV. L. REV. 522, 522 (1951) (describing Drinker’s background as a Trollopian). See generally HENRY S. DRINKER, *LEGAL ETHICS* (1953) (“To many lawyers it has . . . seemed essential that our lawyers and law students should have a modern book on [legal ethics] which would apply the eternal principles to present conditions, embody those dealing with the new developments, . . . and also make available a summary of the principles established by the many written decisions which have been rendered during the past thirty years by the ethics committees of the different bar associations construing the Canons.”).

33. See Drinker, *supra* note 5, at 56–57.

34. *Id.* at 57.

35. See *id.* at 50, 56–57.

In my view, the two motives are closely connected. I agree with Drinker that Sir William's primary motivation is his duty to his client. After all, Sir William himself says so, telling Mr. Hardy that "I understand as well as any one what people are saying . . . . But I can only do my duty by my client to the best of my judgment."<sup>37</sup> But it is Sir William's sense of abstract right that enables him to form the view that dropping the suit will be good for his client. This sense tells him in the first instance that Anna should be recognized as legitimate. It tells him more, however—it also tells him that it would be good for the young Earl to have some money to support his title and for the family members to be on harmonious terms with each other. Once Sir William has come to this broad vision of abstract right, he recognizes that it will be in his client's best interests to achieve it, and he acts accordingly. His moral sense has thus shaped his judgment as to how he can best serve his client.

### *B. The Ethic of High Expectations*

When his initial idea of resolution by marriage fails, Sir William has the greatness to imagine a fallback solution that is good for all parties and satisfying in the abstract. Perhaps even more impressively, however, he brings this solution to pass. He does not do so through the conventional machinery of law or settlement. Instead, he practices what I will call "the ethic of high expectations": he gives advice that will only be effective if his client and the other party voluntarily and independently relinquish legal rights in order to further the broader good. Sir William's vision will only come true if the young Earl abandons his legal suit, if Anna then offers the young Earl money, and if the young Earl then treats Anna and Daniel as family. There is no contractual tit-for-tat in these exchanges; instead, each party acts honorably and generously, trusting that the other party will in turn be honorable and generous.

I use the term "ethic" to reflect the fact that, as discussed in the prior section, Sir William's course of action is rooted in a view not only of what is good for his client, but also of what satisfies the broader good. This is an imprecise use of the word, but it captures the moral force of Sir William's vision. It also conveys the point that Sir William's "high expectations" for the parties are rooted in his confidence in his vision. Sir William gambles that the fundamental rightness of his vision will be evident to his client and to Anna as well. He himself has stepped away from the role of a lawyer, read narrowly, and he trusts that the young Earl and Anna will similarly step out of their roles as clients interested only in what they can get. He has asked them to abandon litigation and hard-nosed settlement negotiations in favor of fairness and trust.

Sir William does not practice the ethic of high expectations in a vacuum. By the time he persuades the young Earl to drop the suit, he has had a chance to

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36. See MCMASTER, *supra* note 29, at 131.

37. LADY ANNA, *supra* note 1, at 324.

observe both parties. He knows that the young Earl is a decent sort, and one who will respect his advice. He has some sense of Anna's personality as well. Her decision to stand by Daniel rather than accept the very appealing young Earl suggests not only that she is true to her word, but also that she honors her debts (for Daniel's father Thomas supported Anna and the Countess for many years). Sir William also knows that, despite the bad blood between the two branches of the family, Anna and the young Earl have grown to like and respect each other as individuals. The young Earl finds Anna beautiful and appealing,<sup>38</sup> while Anna considers the young Earl "not a lover, but simply the pleasantest friend that fortune had ever sent her."<sup>39</sup>

These factors no doubt influence Sir William's willingness to rely on the ethic of high expectations. Nonetheless, Anna is not Sir William's client and he has no control over her actions. In trusting her generosity, Sir William is making a bold gamble. While Drinker thinks that Sir William "knew" that Lady Anna would end up giving the young Earl money,<sup>40</sup> I think this point is less certain and thus more interesting. Sir William himself only says that he thinks this "may" happen.<sup>41</sup> He is betting on Anna's ethical sense, but he knows that he is betting. His decision to take a chance and trust to the decency of the other party is so unusual that it flummoxes both the other attorneys around him and non-law onlookers like the rector of Yoxham.

### C. *The Ethics of the Ethic of High Expectations*

In Sir William's day, barristers absorbed their ethical training during pupilages at the Inns of Court and did not practice under written ethical codes.<sup>42</sup> By contrast, lawyers in the United States today typically act subject to state-based written rules of ethics.<sup>43</sup> In this section, I consider whether Sir William's ethic of high expectations would pass muster under these rules, since only if that is the case can this ethic have practical relevance for American lawyers today. More specifically, I evaluate Sir William's actions in relation to the American

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38. See *id.* at 242–43.

39. *Id.* at 155.

40. Drinker, *supra* note 5, at 57.

41. LADY ANNA, *supra* note 1, at 325.

42. See Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385, 1401 (2004) (citing Anthony Thornton, *The Professional Responsibility and Ethics of the English Bar*, in LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY 53, 55 (Ross Cranston ed., 1995)). Not until 1980 did English barristers have a written code of conduct. See *id.* at 1402 n.131.

43. See *Links to Other Legal Ethics and Professional Responsibility Pages*, A.B.A., <http://www.abanet.org/cpr/links.html#States> (last visited Dec. 12, 2010) (providing links to the state ethics codes).

Bar Association's Model Rules of Professional Conduct (Model Rules), since most state rules are based on these Model Rules.<sup>44</sup>

The Model Rules recognize that lawyers can act in various roles, each of which gives rise to different obligations. Lawyers can have single clients, they can act for multiple clients, or they can be third-party neutrals, such as arbitrators or mediators.<sup>45</sup> Sir William fits readily into the first category. Although his sympathy and vision give him a whiff of acting more broadly, as a formal matter he is a lawyer with one client—the young Earl—and must be evaluated as such.<sup>46</sup>

For lawyers acting for clients, the Model Rules prioritize “the lawyer’s obligation zealously to protect and pursue a client’s legitimate interests, within the bounds of the law.”<sup>47</sup> This position is by no means as absolute as Lord Brougham’s famous dictum that “an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client,”<sup>48</sup> but it undeniably takes a client-centric approach.<sup>49</sup> Lawyers are there to look out for their clients’ legitimate interests, whether or not these interests are compatible with what I am terming (admittedly loosely) the broader good. Of course, lawyers can try to shape their clients’ understandings of their interests. Model Rule 2.1 advises that “[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s

44. See *Model Rules of Professional Conduct, Dates of Adoption*, A.B.A., [http://www.abanet.org/cpr/mrpc/alpha\\_states.html](http://www.abanet.org/cpr/mrpc/alpha_states.html) (last visited Dec. 12, 2010) (providing a list of dates when states adopted the Model Rules and showing California as the only state absent from the list); *Proposed Rules of Professional Conduct*, ST. B. OF CALI., <http://www.calbar.org/proposedrules> (last visited Dec. 12, 2010) (covering proposed revisions to the California Rules).

45. See MODEL RULES OF PROF'L CONDUCT R. 1.7, 2.4 (2010).

46. Sir William is thus distinct from what Justice Brandeis called a “lawyer for the situation,” see HAZARD, *supra* note 3, at 58–59, and what, prior to its deletion in 2002, Model Rule 2.2 described as the role of “intermediary,” compare MODEL RULES OF PROF'L CONDUCT R. 2.2 cmt. (2000) (amended 2002) (discussing the situation where a lawyer “represents two or more parties with potentially conflicting interests” and “seek[s] to establish or adjust a relationship between clients on an amicable and mutually advantageous basis”), with MODEL RULES OF PROF'L CONDUCT R. 2.2 (2010) (indicating that the rule was deleted in 2002). Nonetheless, Sir William acts rather like Geoffrey Hazard’s ideal of a “lawyer for the situation”—he undertakes “forms of intercession suggested by the models of wise parent or village elder” and acts “on implicit principles of decision that express commonly shared ideals in behavior rather than strict legal right.” HAZARD, *supra* note 3, at 64–62; see also David Luban, *Heroic Judging in an Antiheroic Age*, 97 COLUM. L. REV. 2064, 2067 (1997) (“[T]he lawyer for the situation . . . seem[s] to be stretching the conventional definition of [the] role[], almost to the edge of legitimacy.”). Hazard seems to view these modes of acting as limited to the “lawyer for the situation,” see HAZARD, *supra* note 3, at 61–67, while I suggest in this Essay that, under certain circumstances, a lawyer with a specific type of client can undertake them.

47. MODEL RULES OF PROF'L CONDUCT pmb1. para 9 (2010).

48. 2 TRIAL OF QUEEN CAROLINE 3 (1874).

49. See DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 159 (1988).

situation.”<sup>50</sup> But when push comes to shove, the “lawyer shall abide by a client’s decisions concerning the objectives of representation.”<sup>51</sup>

As discussed earlier, Trollope leaves open whether Sir William considers his primary obligation to be to his client or to achieving a just outcome. If the latter, then Sir William’s conduct would not be in keeping with the client-centric approach that animates the Model Rules. As I argued in the prior section, however, I read Sir William as prioritizing his duty to his client. While he has a vision of the broader good—and a decided preference for giving advice of the non-legal sort that is included in Model Rule 2.1<sup>52</sup>—he believes that he is pursuing the interests of the young Earl to the best of his abilities. His greatness comes not from disregarding the client-centric model of lawyering (a model that I do not question in this Essay) but rather from achieving his client’s objectives by using the ethic of high expectations.

Not only does Sir William satisfy the general balance struck in the Model Rules between a lawyer’s duty to his client and to broader principles, but he also conducts himself in keeping with most of the more specific Model Rules. He is diligent and prompt in accordance with Model Rule 1.3<sup>53</sup>—even breaking up an August trip to return to London to meet with his client.<sup>54</sup> He communicates amply with the young Earl as called for under Model Rule 1.4.<sup>55</sup> He is a little loose about client confidences, but his behavior may still pass muster under Model Rule 1.6.<sup>56</sup> He has no conflicts of interest that might violate Model Rule 1.7.<sup>57</sup>

50. MODEL RULES OF PROF’L CONDUCT R. 2.1 (2010).

51. MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (2010).

52. See MODEL RULES OF PROF’L CONDUCT R. 2.1 (2010).

53. See MODEL RULES OF PROF’L CONDUCT R. 1.3 (2010) (“A lawyer shall act with reasonable diligence and promptness in representing a client.”).

54. See LADY ANNA, *supra* note 1, at 188–89.

55. See MODEL RULES OF PROF’L CONDUCT R. 1.4 (2010) (“A lawyer shall . . . promptly inform the client of any decision or circumstance with respect to which the client’s informed consent . . . is required by these Rules . . .”); LADY ANNA, *supra* note 1, at 190–91 (discussing his plan for the case with the young Earl).

56. See MODEL RULES OF PROF’L CONDUCT R. 1.6 (2010) (“A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . .”). This issue arises after Anna tells the young Earl about her secret engagement to Daniel. See LADY ANNA, *supra* note 1, at 166. The young Earl requests Anna’s permission to tell Sir William about this, but implies that he does not intend to tell anyone else. *Id.* at 186. Upon hearing the news, Sir William “disregarded altogether his client’s injunctions as to secrecy,” feeling that “in a matter of so great importance it behoved him to look to his client’s interests, rather than his client’s instructions.” *Id.* at 204. On its face, this incident seems contrary to Model Rule 1.6’s bar on a lawyer’s “reveal[ing] information relating to the representation of a client unless the client gives informed consent [or] the disclosure is impliedly authorized in order to carry out the representation.” MODEL RULES OF PROF’L CONDUCT R. 1.6 (2010). But Sir William has explicitly warned the young Earl that he will disclose this information, telling the young Earl that “[t]he matter is too heavy for secrets.” LADY ANNA, *supra* note 1, at 192. The Earl’s silence in the face of this warning, see *id.*, combined with Sir William’s need to reveal the information thus could well amount to an implied authorization under Rule 1.6. In any event, the incident is not crucial to the

In at least one respect, however, Sir William's conduct sits uneasily with the requirements of the Model Rules. The Model Rules set forth clear constraints on communications between an attorney for one client and other parties. Model Rule 4.2 bars a lawyer from communicating with a represented party without the permission of that party's attorney,<sup>58</sup> and Model Rule 4.3 requires that a lawyer neither imply disinterest in the case when communicating with non-represented third parties nor give advice to persons whose interests have a reasonable possibility of conflicting with his client's interests.<sup>59</sup> Sir William pushes the boundaries of these rules—and in some instances violates them—in the course of his constant communications with all interested parties. Early in *Lady Anna*, he acts in a way that would violate Model Rule 4.2 by going behind Serjeant Bluestone's back to put the idea of settlement-by-marriage to Anna via an intermediary.<sup>60</sup> He does this after Serjeant Bluestone has refused to put the idea of settlement-by-marriage to Anna (a refusal that in turn would amount to a violation of Model Rule 1.4(a)(1)).<sup>61</sup> With regard to non-represented parties such as the Countess and Daniel, Sir William does not repudiate their views of him as an honest broker, which indeed in some sense he is. He also doles out advice to them, although this occurs after the young Earl has formally abandoned his legal claim to the money.<sup>62</sup>

Lawyers practicing under the Model Rules cannot duplicate Sir William's free-wheeling approach to communications with other parties. At the very least, a lawyer today would have to clear any communications with the opposing party with that party's counsel,<sup>63</sup> clarify her interests to non-represented parties,<sup>64</sup> and avoid advising parties with potential conflicts.<sup>65</sup> These obligations do not directly conflict with the ethic of high expectations, but they do make it harder

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plot, and the secret itself is hardly the usual client confidence since it is the secret of Anna (the opposing party) rather than the young Earl.

57. See MODEL RULES OF PROF'L CONDUCT R. 1.7 (2010) (providing guidelines for lawyers "if the representation [of a client] involves a concurrent conflict of interest").

58. See MODEL RULES OF PROF'L CONDUCT R. 4.2 (2010) ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer . . .").

59. See MODEL RULES OF PROF'L CONDUCT R. 4.3 (2010).

60. See *LADY ANNA*, *supra* note 1, at 69–71, 81–82. Comment 4 to Model Rule 4.2 specifies that "[a] lawyer may not make a communication prohibited by this Rule through the acts of another." MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 4 (2010).

61. See MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. 2 (2010) ("[A] lawyer who receives from opposing counsel an offer of settlement in a civil controversy . . . must promptly inform the client of its substance . . ."); *LADY ANNA*, *supra* note 1, at 68–69. Eventually, Serjeant Bluestone is so overwhelmed by Sir William that he consents in allowing Sir William to communicate directly with Anna. See *LADY ANNA*, *supra* note 1, at 240–41, 277.

62. See *LADY ANNA*, *supra* note 1, at 428, 499–502.

63. See MODEL RULES OF PROF'L CONDUCT R. 4.2 (2010).

64. See MODEL RULES OF PROF'L CONDUCT R. 4.3 (2010).

65. See MODEL RULES OF PROF'L CONDUCT R. 1.7 (2010).

for a lawyer to get a handle on the character of the opposing party and to communicate the lawyer's vision of a just solution to all the interested parties.

I will come back to this point later in this Essay,<sup>66</sup> but first I take up a more fundamental concern, one that lies at the border of ethics and practicality. Model Rule 1.1 requires that “[a] lawyer shall provide competent representation to a client.”<sup>67</sup> In hindsight, at least, it is plain that Sir William provides his client with more than competent representation. The young Earl ends up rich and is very pleased with the outcome. But Sir William and his client are fictional, and Sir William succeeds by throwing a court case. If the ethic of high expectation is to work in reality—in other words, if it can indeed be practiced by competent lawyers—then there must be some real-life justification for its efficacy. It is to this that I turn next.

### III. *LADY ANNA* AS AN ECONOMIC GAME

Sir William's ethic of high expectations depends on the good will of his client and the client on the other side. For this ethic ever to be appropriate, there must be some basis for assuming that, under certain circumstances, clients will independently surrender rights in the interests of the broader good. In this Part, I draw upon insights from behavioral economics literature to offer such a basis. Specifically, I rely on evidence that people exhibit substantial tastes for fairness and reciprocity and that they respond to situations quite differently based on whether they perceive these situations as involving social norms or market norms. This evidence, which parallels *Lady Anna* in interesting respects, validates the practicality of the ethic of high expectations under certain conditions.

#### A. *Fairness and the Dictator Game*

An experiment known as “the dictator game” demonstrates that people have social preferences for fairness rather than being purely interested in maximizing their own profits.<sup>68</sup> The basic structure of the dictator game is quite simple. There are two players and a pot of money (say \$10). The first player (the dictator) decides how to divide up the money, and then the money is divided up between the two players according to that allocation.<sup>69</sup> The game is played only once between the players.<sup>70</sup>

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66. See *infra* Part IV.A.

67. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2010).

68. See Robert Forsythe et al., *Fairness in Simple Bargaining Experiments*, 6 GAMES & ECON. BEHAV. 347, 362–63 (1994).

69. *Id.* at 350.

70. *Id.* at 349.

If everyone was driven by pure profit maximization, then in the dictator game the dictator would keep the entire pot of money.<sup>71</sup> In practice, a large percentage will in fact keep the entire pot, but the rest will give something to the other player, with a substantial minority giving fully half away. For example, in one study 36% of participants gave away nothing, 22% gave away an equal share or more, and the other 42% gave some amount in between.<sup>72</sup> The decision to deviate from the purely selfish choice is thought to arise at least partially from norms of fairness.<sup>73</sup>

The evidence from the dictator game partially validates the practicality of Sir William's ethic of high expectations. Although it is hard to know how much carries over from the simple experimental setting, the dictator game provides an empirical basis for finding it plausible rather than wholly naïve to expect that people are motivated by fairness, even in one-shot transactions where they face no repercussions from being greedy. Indeed, the second half of *Lady Anna* resembles a large-scale dictator game. Sir William effectively hypothesizes that after the case is dropped and the money is entirely in Lady Anna's hands, she will behave like a benevolent dictator and offer a substantial portion of her fortune to the young Earl—even though, like the dictators in the dictator game, she is under no formal obligation to do so. Sir William guesses correctly, and in giving the young Earl half her money, Anna acts like the most generous of the dictators.<sup>74</sup>

Two variants on the dictator game offer additional insights for the ethic of high expectations. First, studies show that the more dictators feel entitled to their money, the less willing they are to part with it. A dictator who becomes the dictator based on superior performance to the other player—such as a better score on a pop quiz—is significantly more stingy on average than a dictator who

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71. See *id.* at 348.

72. See *id.* at 362 (describing a \$5 dictator game). In a \$10 dictator game, 21% gave nothing, another 21% gave an equal share, and the rest gave an amount in-between. See *id.*; Elizabeth Hoffman et al., *Social Distance and Other-Regarding Behavior in Dictator Games*, 86 AM. ECON. REV. 653, 653–54 & fig.1 (1996) (testing six different variants of the \$10 dictator game and finding that, depending on the variant, from 18% to 64% of dictators gave nothing, while between 8% and 32% gave \$4 or more).

73. See Linda Babcock & Greg Pogarsky, *Damage Caps and Settlement: A Behavioral Approach*, 28 J. LEGAL STUD. 341, 366–67 (1999) (finding in an experiment aimed at simulating settlement negotiations that people show preferences for fairness, although they are somewhat self-interested in how they frame fairness); Forsythe, *supra* note 68, at 363; cf. Colin Camerer & Richard H. Thaler, *Anomalies: Ultimatums, Dictators and Manners*, 9 J. ECON. PERSP. 209, 216 (1995) (“We conclude that the outcomes of ultimatum, dictatorship and many other bargaining games have more to do with manners than altruism.”).

74. An interesting consideration, which I will not explore further, is how Anna's gender may relate to her benevolence as a dictator. One study of the dictator game has found that on average female dictators share twice as much as do male dictators. See Catherine C. Eckel & Philip J. Grossman, *Are Women Less Selfish Than Men?: Evidence from Dictator Experiments*, 108 ECON. J. 726, 730 (1998).



is assigned to the role by chance.<sup>75</sup> This fact has several implications for the ethic of high expectations. First, it implies that the ethic of high expectations is likely to be more effective in cases where people feel a lower sense of entitlement to the rights they are giving up. Second, it suggests that the ethic of high expectations has the greatest potential early on in cases. The more rulings there are by the court (e.g., on motions to dismiss or on summary judgment), the more entitled the winning party is likely to feel and thus the less likely it is to give rights up independently and voluntarily.

A second set of variants on the dictator game shows that social distance affects the generosity of the dictator. Where the amount a dictator offers is unknown to everyone but the dictator, then dictators become stingier, with one study finding that fully 64% of dictators kept all the money.<sup>76</sup> By contrast, the more contact there is between the dictator and the experimenter, the more the dictator is likely to give.<sup>77</sup> Similarly, the more the dictator knows about the recipient (e.g., name, photograph, face-to-face encounter), the more the dictator is likely to give.<sup>78</sup> In some ways, this bodes well for the ethic of high expectations, as parties headed toward legal disputes are likely to know each other. Indeed, in *Lady Anna*, Sir William does not advise the young Earl to abandon the lawsuit (and thus trust Anna's generosity) until Anna and the young Earl have had ample time to get to know and like each other. But the amicable personal relations between Anna and the young Earl are undoubtedly far from the norm in cases that are litigated. It is unclear whether decreased social distance is an advantage where the social relations at issue are tense rather than neutral or positive.

The dictator game thus provides modest support for the ethic of high expectations. It affirms the principle that many people will act altruistically out of a sense of fairness even when they are under no obligation to do so and would

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75. See Karl Schurter & Bart J. Wilson, *Justice and Fairness in the Dictator Game*, 76 S. ECON. J. 130, 133–34, 136 tbl.3 (2009) (finding that dictators gave away an average of 18% when picked based on seniority, 24% when picked based on superior performance on a quiz, 34% when picked by a dice roll, and 35% when assigned the role without explanation).

76. Hoffman et al., *supra* note 72, at 653.

77. See *id.* at 658 (“Our data supports the hypothesis that as social isolation increases there is a further shift toward lower offers.”); cf. Mary Rigdon et al., *Minimal Social Cues in the Dictator Game*, 30 J. ECON. PSYCHOL. 358, 359 fig.1, 363 (2009) (finding that male dictators give more in the presence of three dots that look like “watching eyes” than in the presence of three dots arranged in a neutral shape).

78. See Iris Bohnet & Bruno S. Frey, *Social Distance and Other-Regarding Behavior in Dictator Games* 89 AM. ECON. REV. 335, 336–37 (1999) (finding that dictators offered more when they and the recipients were identified and told to make eye contact than when they did not know the identity of the recipients); Terence C. Burnham, *Engineering Altruism: A Theoretical and Experimental Investigation of Anonymity and Gift Giving*, 50 J. ECON. BEHAV. & ORG. 133, 136, 138 tbl.1 (2003) (finding that dictators give more when they see pictures of the second players); Gary Charness & Uri Gneezy, *What's in a Name? Anonymity and Social Distance in Dictator and Ultimatum Games*, 68 J. ECON. BEHAV. & ORG. 29, 31, 32 tbl.1 (2008) (finding that dictators gave a mean of approximately 27% where they knew the family name of the second player but only approximately 18% where they did not know the name).

face no repercussions from doing otherwise. But the dictator game also raises concerns for the ethic of high expectations, since many dictators keep all the money to themselves, others give only a little, and variants on the study suggest that generosity will be more limited where dictators feel stronger senses of entitlement. Moreover, nothing about the dictator game suggests that it leads to better results for the second player than a bargain would. Indeed, in a similar game known as “the ultimatum game” in which the second player has the power to decline the first player’s offer such that no one gets any money, the first players offer more money on average to the second players than they do in the dictator game.<sup>79</sup> If the ethic of high expectations ever has advantages over pure horse-trading, then support for these advantages must come from elsewhere.

### B. *Reciprocity and the Trust Game*

An experiment called “the trust game” suggests that people have social preference for reciprocity. In this two-player game, which is similar to “the investment game,” the first player (the investor) is given some amount of money (say \$10). She can invest any amount of this money with the second player (the trustee). When the money goes to the trustee, it increases (say triples) in value, and the trustee can then decide how much, if any, to return to the investor.<sup>80</sup> In effect, once the investor has sent the money to the trustee, the trustee is in the same position as the dictator in the dictator game.<sup>81</sup>

If all actors acted out of pure self-interest, then trustees would keep all money sent to them.<sup>82</sup> And investors would anticipate this, so they would not send trustees any money in the first place.<sup>83</sup> In fact, investors typically send substantial amounts of their money to trustees, and trustees typically return substantial amounts back to investors.<sup>84</sup> In one study in which each investor had \$10 and any part of that sent to the trustee would triple in value, investors sent an average of \$5.16 to trustees, who returned an average of \$4.66 to investors.<sup>85</sup> Of the 28 trustees in this study who received money, there was wide variability in the responses: 12 sent back \$0 or \$1, 11 sent back more than the investors’ initial

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79. See Camerer & Thaler, *supra* note 73, at 210, 213; Forsythe, *supra* note 68, at 349, 362.

80. See Joyce Berg et al., *Trust, Reciprocity, and Social History*, 10 GAMES & ECON. BEHAV. 122, 123 & n.1 (1995) (citing David M. Kreps, *Corporate Culture and Economic Theory*, in PERSPECTIVES ON POSITIVE POLITICAL ECONOMY 90, 100 fig.1 (James E. Alt & Kenneth A. Shepsle eds., 1990)). The trust game I describe here is played once between players, *see id.*; it can be played multiple times as well, however. See Brooks King-Casas et al., *Getting to Know You: Reputation and Trust in a Two-Person Economic Exchange*, 308 SCI. MAG. 78, 78 (2005) (studying the changes in subjects over the course of repeated trust games).

81. See Berg et al., *supra* note 80, at 127.

82. *See id.* at 126.

83. *See id.*

84. *See id.* at 131, 134.

85. *See id.* at 124, 131; *cf. id.* at 132, 134 (describing another experiment in which, after subjects were given information about the first experiment, the investors sent an average of \$5.36 and the trustees returned an average of \$6.46).

investments, and the remaining 5 sent back money less than or equal to the initial investments.<sup>86</sup> Another study has found that trustees are significantly more willing to return money to the investors when the investors have voluntarily trusted them with money than when the investors have been required to invest money.<sup>87</sup> These studies suggest that people are willing both to trust and to reciprocate, with reciprocation being stronger where trustees can infer that investors have trusted them.

*Lady Anna* has even more parallels to the trust game than to the dictator game. The first half of *Lady Anna* is somewhat like the first stage of a trust game: the young Earl acts like a trusting investor in surrendering his own legal claim to the money and instead recognizing Anna's claim to it. The results of the basic trust game provide support for Sir William's intuitions that the young Earl can be persuaded to act as he does (because most investors do in fact choose to make investments)<sup>88</sup> and that Anna may reciprocate (because although many trustees keep all the money, many other trustees do reciprocate generously). As discussed earlier, *Lady Anna* does indeed prove to be a generous trustee/dictator and gives half her money to the young Earl. Her incentives to act this way not only include fairness as discussed earlier in relation to the dictator game but also reciprocity in response to the young Earl's trust in her. We then see one further round of the trust game, in which the young Earl reciprocates Anna's generosity by hosting her wedding and thus cementing her social place in the Lovel family.

In the trust game, trust and reciprocity help capture the potential increase in the investment despite the absence of any contract between the investor and the trustee.<sup>89</sup> The absence of a contract in the trust game is due to necessity: there is no opportunity for the investor and the trustee to communicate other than through their money-transferring choices, and thus no opportunity to form a

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86. *Id.* at 131.

87. See Kevin A. McCabe et al., *Positive Reciprocity and Intentions in Trust Games*, 52 J. ECON. BEHAV. & ORG. 267, 272 fig.3, 273 fig.4 (2003) (finding that in a study where trustees entrusted with \$20 could either return \$25 to the investor and keep \$25 for themselves or return \$15 to the investor and keep \$30 for themselves, 65% of trustees chose the generous \$25/\$25 approach where the investor had been given a choice about whether to make the \$20 investment, while 67% of trustees chose the less generous \$15/\$30 approach where the investor had no choice but to make the \$20 investment).

88. See Berg et al., *supra* note 80, at 137 (noting that investors sent money fifty-five out of sixty times). Because the young Earl's likelihood of success on the legal merits is substantially weaker than Anna's, see *LADY ANNA*, *supra* note 1, at 91, his "investment" further resembles the investments in the trust game in holding out the prospect of increased returns, see Berg et al., *supra* note 80, at 124–25.

89. Of course, reciprocity plays significant roles in the formation of contracts, including settlement agreements. See, e.g., Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOTIATION L. REV. 1, 40–41, 51–52 (1999) (discussing the psychological role of reciprocity in negotiating civil settlements); Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789, 1822 (2000) ("A common negotiating tactic is to make an extreme opening offer, perhaps one that is far outside of the bargaining zone, in the hopes of then invoking the reciprocity norm to reach an advantageous deal point.").

contract.<sup>90</sup> While this kind of situation can arise naturally, as shown in the facts of the famous case of *Webb v. McGowin*,<sup>91</sup> in almost all cases involving lawyers, the parties will have ample chances to settle by contract. Thus, while the trust game provides more insights into why the ethic of high expectations might work in practice, it still does not show that the ethic of high expectations might sometimes be superior to a negotiated settlement.

### C. *Market Norms and Social Norms*

An interesting line of experiments suggests that framing exchanges in social terms will sometimes generate better outcomes than framing exchanges as bargains. In a study that Dan Ariely and James Heyman conducted, participants were divided into three groups and asked to perform the same exercise over and over on the computer screen for five minutes, namely, dragging a circle into a square, at which point that circle would disappear and a new circle would appear.<sup>92</sup> At the beginning of the experiment, one group's members were told they would be paid 50¢ for their time, one group's members were told they would be paid \$5 for their time, and one group's members were asked to perform the exercise as a favor.<sup>93</sup> Surprisingly, the third group—the group that was not paid—dragged the most circles on average (168), while the group paid \$5 dragged an average of 159 circles, and the group paid 50¢ dragged a measly average of 101 circles.<sup>94</sup>

In explaining this result, Ariely considers that “we live simultaneously in two different worlds—one where social norms prevail, and the other where market norms make the rules.”<sup>95</sup> In the market world, “[t]he exchanges are sharp-edged . . . [and] imply comparable benefits and prompt payments,” while in the social world the pleasure of giving and receiving favors and a sense of community motivate us.<sup>96</sup> In his experiment, the unpaid subjects outperformed the paid subjects because their social-world-based motivations were greater than the market-world-based motivations of the paid subjects (who, after all, were not being paid all that much). A real-life example comes from the AARP's attempt

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90. See Berg et al., *supra* note 80, at 128–29.

91. See *Webb v. McGowin*, 168 So. 196, 196–97 (Ala. Ct. App. 1935) (requiring an heir to continue making payments to a former employee of the decedent where, years earlier, the employee was seriously injured in saving the decedent's life and the decedent then promised to pay the employee a bi-weekly stipend for the rest of the employee's life).

92. See DAN ARIELY, *PREDICTABLY IRRATIONAL* 69–70 (2008).

93. See *id.* at 70.

94. *Id.* at 70–71. A less contrived experiment by Uri Gneezy and Aldo Rustichini reaches a similar result. See Uri Gneezy & Aldo Rustichini, *Pay Enough or Don't Pay at All*, 115 Q.J. ECON. 791, 798–800 (2000) (finding that high school students asked to volunteer their time in collecting money for charity ended up collecting more than students who were paid for their time with a percentage of the donations).

95. ARIELY, *supra* note 92, at 68.

96. *Id.*

to find lawyers willing to represent needy retirees: When the AARP asked lawyers if they would be willing to take on such clients at the reduced rate of \$30 an hour, the lawyers declined, but when asked to take on these clients for free, the lawyers agreed to do so.<sup>97</sup> Ariely explains that the lawyers reacted in market-norm mode to the \$30-an-hour proposal and accordingly did not think it was a good deal, but they reacted in social-norm mode to the request that they freely give their time and therefore responded generously.<sup>98</sup>

In *Lady Anna*, Sir William can be described as moving the parties from market-norms mode into social-norms mode. At the beginning of the book, the discussions between the parties are purely in market terms, as shown by the attempt to get the Countess to surrender Anna's claim for 30,000 pounds. By the end of the book, however, Sir William has transitioned the parties' relations to the social sphere, and they have acted generously and high-mindedly towards each other.

The differences between social norms and market norms also help explain two reasons why unnegotiated reciprocal gestures may, at times, be better than settlement agreements. First, it may be that such gestures can reduce transaction costs. The hassle and expense of litigation have always been with us: As George Sharswood put it long ago, "[i]t happens too often at the close of a protracted litigation that it is discovered, when too late, that the play has not been worth the candle, and that it would have been better, calculating everything, for the successful party never to have embarked in it—to have paid the claim, if defendant, or to have relinquished it, if he was plaintiff."<sup>99</sup> While negotiated settlements can reduce transaction costs in comparison to litigation to final judgment, these costs can remain significant, particularly if there is a lot of pre-settlement litigation, such as discovery or back-and-forth during the settlement process. Moreover, people are prone to biases that make settlement more difficult to achieve. Among other things, they suffer from what economists call "a self-serving bias—to conflate what is fair with what benefits oneself."<sup>100</sup> I have not seen studies on whether people are less prone to these biases when acting in social mode than when in market mode, but that might well be the case. In any event, unnegotiated reciprocal gestures with regard to certain aspects of a case may reduce transaction costs for a negotiated settlement of the remainder (for example, by increasing trust).<sup>101</sup>

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97. See *id.* at 71.

98. See *id.*

99. SHARSWOOD, *supra* note 3, at 52–53.

100. See Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON. PERSP. 109, 110 (1997). Recognition of this bias existed well before the term "self-serving bias" was coined. See SHARSWOOD, *supra* note 3, at 51 ("[I]t is often very hard to persuade a man that he has not the best side of a lawsuit: his interest blinds his judgment . . .").

101. See Korobkin, *supra* note 89, at 1830 (noting that trust increases negotiating power).

Second, and more significantly, unnegotiated reciprocal gestures can generate surplus. In the unpaid version of Ariely's study, everyone is better off than in the paid version: the experimenters get their circles dragged for free, while the subjects gain satisfaction from doing the favor that is greater than the satisfaction of the subjects who make \$5 or 50¢ (as shown by their comparative work ethics).<sup>102</sup> In *Lady Anna*, similarly, the move from market mode to social mode creates surplus. It is possible to imagine a bargain that "I won't contest your legitimacy if you give me half the money." But such a bargain would leave whispers open about Anna's legitimacy and would hardly further close family relations.

Surplus from non-market exchanges can arise even in the course of relationships that are largely market-based. In a seminal paper, George Akerlof proposed the idea that labor markets can involve partial gift exchanges.<sup>103</sup> Akerlof was trying to explain why a group of workers with little chance of promotion worked harder than the minimum work standards (though with substantial variation across workers).<sup>104</sup> Akerlof concluded that the best explanation was that the workers developed "sentiment" for their company such that they gave the "gift" of superior work, and the company in return gave them the gift of wages above what they might have received elsewhere.<sup>105</sup> Akerlof convincingly explains why this added exchange should be viewed not as a contract but as the exchange of reciprocal gifts and further why this reciprocal exchange of gifts benefits both the company and the workers.<sup>106</sup> While not all market relationships will incorporate such social norms, and while not all social norms will create surplus,<sup>107</sup> the widespread mixing of market and social norms does provide further support for the feasibility of the ethic of high expectations.<sup>108</sup>

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102. See ARIELY, *supra* note 92, at 70–71.

103. See George A. Akerlof, *Labor Contracts as Partial Gift Exchange*, 97 Q.J. ECON. 543, 549 (1982).

104. See *id.* at 543.

105. *Id.* at 543–44.

106. See *id.* at 549–55. Evidence of the mixing of market norms and social norms has been observed in settings as widely varied as day care arrangements and firefighter benefits. See Uri Gneezy & Aldo Rustichini, *A Fine is a Price*, 29 J. LEGAL STUD. 1, 15 (2000) (discussing how introducing fines for late child pickup in day-care centers increased the amount of late pickups); Tess Wilkinson-Ryan, *Do Liquidated Damages Encourage Breach? A Psychological Experiment*, 108 MICH. L. REV. 633, 636 (2010) (discussing issue in the context of firefighters' sick-leave policy).

107. See Wilkinson-Ryan, *supra* note 106, at 664–65 (arguing that liquidated damages clauses can promote efficient breach by moving parties from a social norm against breaking agreements to a market norm).

108. Moreover, this surplus can disappear through the process of settlement negotiations through a phenomenon known as "crowding out." See *id.* at 665. The very act of trying to bargain over or monetize something viewed as a social norm can cause people to change their views and treat it as something in the market sphere. See ARIELY, *supra* note 92, at 77; Gneezy & Rustichini, *supra* note 106, at 14; cf. Richard Birke, *Neuroscience and Settlement: An Examination of Scientific Innovations and Practical Applications*, 25 OHIO ST. J. ON DISP. RESOL. 477, 510 (2010)

The dictator game, the trust game, and studies on social norms and market norms do not fully validate Sir William's decisions. Not all dictators are benevolent; not all people trust or are worthy of trust in the trust game; and social norms will not affect parties to many cases. Nonetheless, these experiments provide some support to the ethic of high expectations and offer insights into when it can succeed. They suggest that fairness, trust, and reciprocity can sometimes occur without negotiated agreements among complete strangers and that unconditional reciprocal exchanges can sometimes generate better results than formal contracts. They thus suggest that, at times, the ethic of high expectations can "temper[] the innocence of the dove with the wisdom of the serpent."<sup>109</sup> The trick is determining when it can do so.

#### IV. THE ETHIC OF HIGH EXPECTATIONS IN PRACTICE

In the prior parts, I have defined the ethic of high expectations and argued that insights from behavioral economics provide qualified support for its feasibility. In this Part, I consider the circumstances under which the ethic of high expectations might be effective in lawyering today. I look first at characteristics of cases where the ethic of high expectations may apply, and then identify three sample areas of law where these characteristics can be found.

In considering possible applications of the ethic of high expectations today, I include weaker applications of this ethic than that which occurs in *Lady Anna*. While *Lady Anna* provides a crisp (and delightful) illustration of the ethic of high expectations, we cannot expect many cases where one party voluntarily abandons all legal claims at issue, the other side generously reciprocates by splitting wealth evenly with the first party, and the two sides have cordial relationships thereafter. Nor can we expect many lawyers to have the greatness of Sir William Patterson. Accordingly, I include situations where a client on one side could unilaterally and unconditionally abandon only certain rights (rather than all relevant rights) in the hope of triggering a similar gesture of reciprocity from the client on the other side that furthers a good outcome.

My understanding of the ethic of high expectations is otherwise the same as discussed in Part II.B above. In particular, it includes three limitations that I hinted at in that section, but which I will specify in more detail here. First, the right at issue should be one that lies primarily with the client rather than the lawyer. In the course of most litigations, lawyers make unilateral and unconditional concessions to each other—for example, in not opposing requests for extensions of time<sup>110</sup>—that promote civility and mutual appreciation and may

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(discussing the pressure to monetize all interests in the course of settlement negotiations). It then becomes hard to return the matter to its original social-norm status. See ARIELY, *supra* note 92, at 77; Gneezy & Rustichini, *supra* note 106, at 14.

109. LADY ANNA, *supra* note 1, at 113.

110. Indeed, standards of ethics often require such courtesies. See, e.g., OKLA. BAR ASS'N, STANDARDS OF PROFESSIONALISM § 3.4(a) (2006), available at <http://www.okbar.org/ethics/>

therefore reduce both the cost and the stress of litigation. But such modest gestures lie between lawyers and do not involve expectations for either a lawyer's client or the client on the opposing side. Second, the abandonment of the right should be unilateral and unconditional. The experimental evidence I discussed above relating to fairness and reciprocity has relevance in the context of best tactics and conditional offers in settlement negotiations, and there is indeed substantial literature on how lawyers can make use of social preferences for fairness and reciprocity in the course of settlement negotiations.<sup>111</sup> But the ethic of high expectations as I have defined it is about unconditional gestures of trust. Third, the abandonment should come with the expectation of a reciprocal gesture from the other party. Many reasons exist for lawyers to counsel clients to abandon rights—as where the likely costs are not worth the likely gains or where exercise of the rights would be morally indefensible.<sup>112</sup> Indeed, Elihu Root reportedly once said that “[a]bout half the practice of a decent lawyer is telling would-be clients that they are damned fools and should stop.”<sup>113</sup> But my interest here is in reciprocity and in when lawyers should counsel clients to abandon legal rights in the hopes of benefiting from reciprocal gestures.

*A. Circumstances Lending Themselves to the Ethic of High Expectations*

A song about gambling advises, “You got to know when to hold ‘em, know when to fold ‘em, know when to walk away and know when to run.”<sup>114</sup> As with good gamblers, good lawyers must have the judgment to play their cards well, and this is particularly true of lawyers who seek to invoke the ethic of high expectations. Like acting as a “lawyer for the situation,” practicing the ethic of high expectations is “a tricky business . . . requir[ing] skill, nerve, detachment, compassion, ingenuity, and the capacity to sustain confidence.”<sup>115</sup> It goes against the conventional grain of adversarial lawyering and will draw every eye for its daring. If it succeeds, as with Sir William, it is likely to succeed spectacularly, but if it fails, then it is likely to fail with a bang.

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standards.htm (“We will agree, consistent with existing law and court orders, to reasonable requests for extensions of time when the legitimate interests of our clients will not be adversely affected.”); SANTA CLARA CNTY. BAR ASS’N, CODE OF PROFESSIONALISM § 4 (2007), *available at* <http://www.sccba.com/about/professionalism.cfm> (“Consistent with existing law and court orders, a lawyer should agree to reasonable requests for extensions of time when the legitimate interests of his or her client will not be adversely affected.”).

111. *See, e.g.*, Birke & Fox, *supra* note 89, at 40–41, 51–52 (discussing the psychological role of reciprocity in negotiating civil settlements); Korobkin, *supra* note 89, at 1830 (discussing the role of the reciprocity norm in legal negotiation).

112. Stephen Gillers, *Is Law (Still) an Honorable Profession?*, 19 PROF’L LAWYER, no. 2, 2009 at 23, 25.

113. *Id.* at 25 (citing *Amstar Corp. v. Envirotech Corp.*, 730 F.2d 1476, 1486 n.12 (Fed. Cir. 1984)).

114. KENNY ROGERS, *The Gambler*, on THE GAMBLER (United Artists 1978).

115. HAZARD, *supra* note 3, at 65.



In deciding whether a particular situation lends itself to the ethic of high expectations, there is no substitute for good judgment. But good judgment does not lend itself to characterization, and I will not attempt that here. Instead, what I offer here is meant as a supplement to good judgment: namely, three characteristics that are usually necessary for the competent exercise of the ethic of high expectations.

First, *the ethic of high expectations must offer hope of value for both sides beyond what a negotiated settlement could provide.* If a negotiated settlement will do the trick, then there is no reason for a lawyer to invoke the ethic of high expectations and all its attendant risks. As I discussed in Part III.C, however, the ethic of high expectations can sometimes reduce transaction costs or generate surplus beyond what a negotiated agreement would do. Unconditional partial gestures can also at times jump-start negotiations, as has proven the case in matters as significant as the Northern Ireland peace process.<sup>116</sup> For the ethic of high expectations to be advisable, a lawyer must believe that it offers one or more of these advantages over a negotiated agreement and that the client could receive at least some of the benefits of these advantages.

Second, *both parties must share a sense of a broader good.* At a minimum, they should both think that there is a fair outcome that is not fully in line with their own interests, even if they do not agree on exactly what this fair outcome looks like. More powerfully, they should recognize that the situation is one where positive value will come out of reciprocity, and they should be willing to relate in social-norms mode as opposed to just market-norms mode. Only if a lawyer has reason to believe that both parties share a sense of the broader good—and therefore that the opposing party is likely to behave like a trustworthy trustee in the trust game—should the lawyer invoke the ethic of high expectations. By invoking the ethic of high expectations, the lawyer also increases the odds that the parties will live it up to it. Just as people are more likely to play cooperatively in a game if it is called the “Community Game” rather than the “Wall Street Game,”<sup>117</sup> so they are more likely to fulfill high expectations if they are in fact confronted with these expectations.

Third, *communication between the parties and the lawyers must be strong, clear, and respectful.* For the ethic of high expectations to work in practice, the lawyer must first have a client who is willing to listen to advice that goes beyond the four corners of the law. But this is just the beginning. The lawyer must also

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116. See Christine Bell, *Peace Agreements: Their Nature and Legal Status*, 100 AM. J. INT'L L. 373, 376–377 (2006) (discussing the role of the Downing Street Declaration in the Northern Ireland peace process).

117. See Varda Liberman et al., *The Name of the Game: Predictive Power of Reputations Versus Situational Labels in Determining Prisoner's Dilemma Game Moves*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 1175, 1177 (2004) (“It is equally clear that the name of the game exerted a considerable effect on the participants’ choices. When playing the Community Game, 67% of the most likely to cooperate nominees and 75% of the most likely to defect nominees cooperated on the first round. When playing the Wall Street Game, 33% of participants with each nomination status cooperated . . .”).

have good relations with the lawyer on the other side (or the other party if unrepresented). If opposing counsel seems unlikely to act in a manner sympathetic to the ethic of high expectations, this ethic is unlikely to work. And because our ethical rules prevent lawyers from communicating directly with represented parties as freely as did Sir William,<sup>118</sup> the lawyer also needs confidence that the party on the other side will have a clear understanding of what is going on and feel some pressure to make a reciprocal gesture. This confidence could come from direct communication in the course of meetings between all parties and lawyers, from client-to-client communications, or from a belief that the lawyer for the other party will present matters to her client in a way that furthers the ethic of high expectations. As the variants on the dictator game and the trust game suggest, the party on the other side is more likely to act generously if there is less social distance between the parties and if that party understands clearly that the other party has placed trust in her.<sup>119</sup> Finally, relations between the clients should be respectful. The parties will probably not be on good terms with each other—indeed, the ethic of high expectations is partly about bringing the parties to such terms—but strong personal dislike or distrust likely makes all but the smallest gestures of trust unfeasible.

It may seem rare indeed that these three conditions are met. The first condition runs contrary to the classic view of litigation as a zero-sum game;<sup>120</sup> the second condition calls for positive views of clients in contradiction to the “bad man” assumption that underlies much of legal reasoning;<sup>121</sup> and the third condition requires cordial communications between legal adversaries. A lawyer may well think that these conditions are so unlikely to be met in practice that it is not worth ever considering the matter—particularly if that lawyer is reluctant to think “outside the box” or is overly cautious about the risk of malpractice suits.<sup>122</sup> But as I will suggest in the next section, these conditions occur more often than one might think, especially in certain areas of law. Indeed, the ethic

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118. See *supra* Part II.C.

119. See *supra* Part II.A–B.

120. See Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 16 (1998).

121. See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) (“If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.”); cf. Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO. J. LEGAL ETHICS 103, 104 (2010) (“In the world of legal ethics, clients are most often constructed as cardboard figures interested solely in maximizing their own wealth or freedom at the expense of others.”). But see Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1088 (1976) (examining the case of the lawyer who has a bad client, although acknowledging that “in very many situations a lawyer will be advising a client who wants to effectuate his purposes within the law, to be sure, but who also wants to behave as a decent, moral person”).

122. I say “overly” because a lawyer who practices the ethic of high expectations properly will lay out its risks clearly to the client and therefore have a good shield against a possible malpractice suit in the event that the other side fails to reciprocate.

of high expectations is already flourishing in some areas and has potential to be used more widely in others.

*B. Some Contexts in Which the Ethic of High Expectations Could Apply*

The ethic of high expectations could apply in many different contexts. At the transactional stage, the company lawyer might remind her client that, along the lines of Akerlof's argument, paying wages above the going rate can lead to even more valuable increases in worker productivity under the right conditions.<sup>123</sup> This lawyer might also urge her client to make good on a disputed loss with a long-time buyer in the hope that the buyer will then remain a loyal customer. Because social norms play a significant role in ordinary business dealings, advice that takes these norms heavily into account should hardly occasion much controversy.

The ethic of high expectations proves more interesting in cases that are in litigation or headed there. Of course, there are some areas of law where a lawyer will virtually always be better off focusing on traditional settlement rather than on the ethic of high expectations—such as in straight commercial disputes between parties with no continuing relationship. In other areas of law, however, a lawyer would do well to consider invoking the ethic of high expectations as a substitute or supplement to settlement. I briefly identify three such areas here.

*1. Government Investigations of Corporations*

Perhaps the most common use of the ethic of high expectations occurs in relation to government investigations into corporate behavior. On receiving notice of government investigations in the antitrust or securities context, lawyers now routinely encourage their clients to cooperate from the start.<sup>124</sup> They often do so without explicit deals but with the hope that the government will reciprocate down the road by dropping the investigation or accepting a more modest settlement than it would if confronted with full-fledged adversarial resistance.<sup>125</sup>

These cases typically satisfy the criteria I identified in the prior section. Corporate cooperation followed by governmental leniency can lower transaction costs by reducing the amount of legal work that both sides have to put into a case.<sup>126</sup> It also generally increases surplus for the company because cooperation

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123. See *supra* notes 103–08 and accompanying text.

124. See Sarah Helene Duggin, *The McNulty Memorandum, the KPMG Decision and Corporate Cooperation: Individual Rights and Legal Ethics*, 21 GEO. J. LEGAL ETHICS 341, 344–47 (2008).

125. See *id.* at 371–72; cf. Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 321–26 (2007) (discussing use of deferred prosecution agreements, which are specific contracts).

126. See Griffin, *supra* note 125, at 340–42.

is better than resistance from a reputational standpoint, and for the government because it would prefer that companies shape up rather than be driven out of business.<sup>127</sup> In terms of the broader good, the government clearly has an interest in this principle,<sup>128</sup> and companies presumably desire to act legally either out of principle or reputational interests. Lines of communication will probably be strong, particularly because government attorneys act as proxies for their client.<sup>129</sup>

Because the government is a repeat player with long-term incentives, corporate lawyers can have substantial confidence that the government will reciprocate cooperative gestures.<sup>130</sup> Indeed, official government pronouncements make clear that cooperation will be rewarded.<sup>131</sup> The incentives for corporations to cooperate are extremely strong—so strong that their voluntariness has been questioned and adversarial resistance has been recognized as the riskier strategy.<sup>132</sup>

## 2. *Divorce*

The movie *Wedding Crashers* begins with a scene from a divorce mediation.<sup>133</sup> The parties are at an angry stand-still until the mediators ask what the wedding was like.<sup>134</sup> The parties soften, and suddenly the husband offers the frequent flyer miles to the wife—a gesture that opens the door to resolution of the entire case.<sup>135</sup>

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127. See *id.* at 327, 330 (citing Press Release, Dep't of Justice, America Online Charged with Aiding and Abetting Securities Fraud; Prosecution Deferred for Two Years (Dec. 15, 2004), [http://www.usdoj.gov/opa/pr/2004/December/04\\_crm\\_790.htm](http://www.usdoj.gov/opa/pr/2004/December/04_crm_790.htm)) (explaining how, particularly in the wake of the collapse of Arthur Anderson, companies wish to avoid indictments and the government wishes to avoid inflicting significant harm).

128. See *id.*

129. See generally Kimberly E. O'Leary, *When Context Matters: How To Choose an Appropriate Client Counseling Model*, 4 T.M. COOLEY J. PRAC. & CLINICAL L. 103, 106, 114 (2001) (discussing how some government attorneys act in a traditional manner as a proxy for their clients).

130. See Griffin, *supra* note 125, at 316.

131. See *id.* at 316–21 (citing U.S. SENTENCING COMM'N, CORPORATE CRIME IN AMERICA: STRENGTHENING THE "GOOD CITIZEN" CORPORATION 19 (1995), available at [http://www.usssc.gov/Research/Symposium\\_Proceedings/Corporate\\_Crime/WCSYMPO\\_opt.pdf](http://www.usssc.gov/Research/Symposium_Proceedings/Corporate_Crime/WCSYMPO_opt.pdf)); Memorandum from Paul J. McNulty, Deputy Att'y Gen., on Principles of Federal Prosecutions of Business Organizations 7, available at [http://www.justice.gov/dag/speeches/2006/mcnulty\\_memo.pdf](http://www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf); Memorandum from Larry D. Thompson, Deputy Att'y Gen., on Principles of Federal Prosecutions of Business Organizations 7 (Jan. 20, 2003), available at [http://www.usdoj.gov/dag/cftf/business\\_organizations.pdf](http://www.usdoj.gov/dag/cftf/business_organizations.pdf)).

132. See Duggin, *supra* note 124, at 345 (“[R]esistance is not always futile, but it may be fatal”); Griffin, *supra* note 125, at 313, 333–40, 351 (citing Memorandum from Paul J. McNulty, *supra* note 131, at 10) (raising concerns that incentives for companies to cooperate are so strong that the rights of individual employees are harmed).

133. WEDDING CRASHERS (New Line Cinema 2005).

134. See *id.*

135. See *id.*

This fictional example sheds light on the very mixed potential for the ethic of high expectations in divorce cases. On the one hand, the parties are likely to start with acrimonious personal relations and deep skepticism as to each other's fairness and trustworthiness. On other hand, divorce cases have perhaps the most to gain in terms of surplus from unnegotiated reciprocal gestures that build trust, since a good relationship with a former spouse has significant psychological value to a client and will prove of enormous assistance in easing their continuing connections, especially if there are children.<sup>136</sup> Traditional lawyering does little to create this surplus; indeed, lawyers can even go so far as to advise clients that they should try to "screw" their former spouses.<sup>137</sup>

A recent trend known as "collaborative law" tries to steer divorcing parties toward trusting and respecting relations in ways that bear similarities to the ethic of high expectations.<sup>138</sup> In collaborative law, the lawyers and parties commit to good-faith negotiations, to the disclosure of all relevant information even if not requested, and to switching to new counsel should either party decide to litigate.<sup>139</sup> Clients who go through this process point to the impact on the children as their main reason for doing so,<sup>140</sup> suggesting that they recognize the surplus that comes from a comparatively amicable divorce process.

The development of collaborative divorce demonstrates that at least in some cases, divorcing parties can draw upon principles of fairness, trust, and reciprocity, and indeed some want to do so. The unconditional surrender of certain interests by one party (even, *Wedding Crashers* suggests, interests as small as frequent flyer miles) may well generate reciprocal gestures and move the case toward a more successful resolution from all perspectives.

### 3. *Personal Injury*

The ethic of high expectations may also have potential in personal injury cases. A much-cited example involves the Veterans Affairs Medical Center

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136. See generally Gwyneth I. Williams, *Looking at Joint Custody Through the Language and Attitudes of Attorneys*, 26 JUST. SYS. J. 1, 5–6 (2005) (discussing benefits of amicable settlements in divorce cases).

137. Austin Sarat & William L. F. Felstiner, *Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction*, 22 LAW & SOC'Y REV. 737, 757 (1988) (internal quotation marks omitted) (describing a conversation between a lawyer and client in which the client expresses an interest in making concessions and the lawyer responds that if she does that, she'll "have 40, 50, 60 years to say, 'Gee whiz, why didn't I want to screw him?'"').

138. See William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351, 358 (2004).

139. See *id.*

140. See *id.* at 378 ("To gain insight into what interests clients bring to the process, they were presented with eight possible factors and asked to rank these in order of importance to their decision to try [collaborative law]. The most frequently ranked factor was 'impact on children,' selected by 44% of clients . . .").

(Center) in Lexington, Kentucky.<sup>141</sup> In 1987, the Center switched from a “deny and defend” approach to medical errors to a policy of apologizing for errors and in certain cases offering compensation,<sup>142</sup> a change that has saved the Center money.<sup>143</sup> Here, we see the ethic of high expectations in operation: the apology has created surplus by its psychological benefits, reduced transaction costs by making the parties more trusting and thus more likely to settle earlier, promoted principles of fairness, and helped the parties have relatively good relations. Several other hospitals have adopted a similar approach with similar results.<sup>144</sup> At least one set of studies suggests that apologies will also reduce the amount of monetary compensation plaintiffs deem adequate in personal injury contexts other than medical malpractice.<sup>145</sup> In sum, although more studies and examples would be valuable, there is reason to think that the ethic of high expectations can work as a practical matter in the personal injury context.<sup>146</sup>

In identifying these three subject areas, I do not mean to suggest that all cases within these areas will prove good candidates for the ethic of high expectations. Nor do I mean to suggest that the ethic of high expectations cannot be invoked in other areas of law. Rather, I offer these three very different areas as examples of when the ethic of high expectations will sometimes serve the lawyers and the parties well.

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141. See, e.g., Jonathan R. Cohen, *The Culture of Legal Denial*, 84 NEB. L. REV. 247, 257–58 (2005) (discussing the Veterans Affairs Medical Center example); Jennifer K. Robbennolt, *Attorneys, Apologies, and Settlement Negotiation*, 13 HARV. NEGOT. L. REV. 349, 360 (2008) (same); Jonathan Todres, *Toward Healing and Restoration for All: Reframing Medical Malpractice Reform*, 39 CONN. L. REV. 667, 714 n.232 (2006) (citing Steve S. Kraman et al., *John M. Eisenberg Patient Safety Awards: Advocacy: The Lexington Veterans Affairs Medical Center*, 28 JOINT COMMISSION J. QUALITY IMPROVEMENT 646, 646 (2002)) (same).

142. See Cohen, *supra* note 141, at 257–58 (internal quotation marks omitted) (citing Jonathan R. Cohen, *Apology and Organizations: Exploring an Example from Medical Practice*, 27 FORDHAM URB. L.J. 1447, 1451–53 (2000)); Robbennolt, *supra* note 141, at 360.

143. See Cohen, *Apology and Organizations*, *supra* note 142, at 1453 (noting that since the change, the Center has had relatively low overall payouts compared to other veterans’ medical centers and that its cases have comparatively low litigation costs because they settle quickly).

144. See Robbennolt, *supra* note 141, at 360. Robbennolt also provides an interesting discussion about the rise of state laws limiting or excluding the use of apologies in litigation. See *id.* at 356–57.

145. See *id.* at 361–63 (citing Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 484, 515 (2003); Jennifer K. Robbennolt, *Apologies and Settlement Levers*, 3 J. EMPIRICAL LEGAL STUD. 333, 341 (2006)) (describing a set of studies in which participants were asked to assume that they were injured in a pedestrian–bicycle collision and noting that apologies “influence[d] judgments that [were] directly related to legal settlement decision making”).

146. One further experiment by Robbennolt suggests that while injured persons may be willing to accept less monetary compensation where they have also received an apology, plaintiffs’ attorneys do not view apologies as reducing the appropriate settlement value—indeed, if the apologies are admissible evidence, they view these apologies as increasing the settlement value. See *id.* at 376–77. This experiment suggests that plaintiffs’ attorneys either consider that plaintiffs should get all the benefits of the surplus generated by the apology or do not view the apologies as generating surplus.

## V. CONCLUSION

There is an old story of an English barrister who, upon hearing that a contentious inheritance dispute had settled, exclaimed in disgust, “Settled! Settled! Think of it! All that magnificent estate frittered away on the beneficiaries.”<sup>147</sup> This cynical view is just one of countless negative portrayals of lawyers from ancient times to the present.<sup>148</sup> But against the cynics lies an equally long line of defenders of the legal profession, many of whom are not only lawyers but also great historical figures. To give but two examples, Abraham Lincoln considered that “[a]s a peacemaker[,] the lawyer has a superior opportunity of being a good man,”<sup>149</sup> and Louis Brandeis claimed that the practice of law offers “an opportunity for usefulness which is probably unequalled.”<sup>150</sup>

In Sir William Patterson, Anthony Trollope has given us a model of the lawyer-as-peacemaker par excellence: a “lawyer’s lawyer, one to whom most other lawyers, past middle age, with ambition, ideals and common sense, would point as representing what they themselves would like to be.”<sup>151</sup> Unlike the barrister in the story above, Sir William seeks a resolution that will do the most for the parties and the least for the lawyers. His methods are also unlike that of the barrister in the story—while that barrister relishes the prospect of a court battle, Sir William succeeds by moving the parties away from litigation through his ethic of high expectations.

I have suggested in this Essay that lawyers today have something to gain from studying Sir William’s tactics. Long before dictator games, trust games, and formal distinctions between social norms and market norms, Trollope used Sir William to show that sometimes the best result for a client can be obtained by stepping away from legal rights and explicit negotiations and instead focusing the parties on principles of fairness, trust, and reciprocity. Even if it is only pulled out in a modest subset of cases, this ethic of high expectations belongs in every lawyer’s briefcase.

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147. JUSTICE IN ENGLAND 62 (Victor Gollancz Ltd. 1938) (internal quotation marks omitted); see also HAZARD, *supra* note 3, at 133 (telling this story with slightly different wording).

148. See generally Deborah L. Rhode, *The Professionalism Problem*, 39 WM. & MARY L. REV. 283, 283–89 (1998) (recounting numerous examples of negative perspectives on lawyers starting with the ancient Greeks).

149. Abraham Lincoln, Fragment: Notes for a Law Lecture, in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 81, 81 (Roy P. Basler ed., 1953).

150. Louis D. Brandeis, *The Opportunity in the Law*, Address before the Harvard Ethical Committee (May 4, 1905), in LOUIS D. BRANDEIS, BUSINESS: A PROFESSION 313, 327 (August M. Kelley reprint 1971) (1914).

151. Drinker, *supra* note 5, at 56.