

2015

# The Law and the “Spirit of the Law” in Legal Ethics

Samuel J. Levine

*Touro Law Center*, [slevine@tourolaw.edu](mailto:slevine@tourolaw.edu)

Follow this and additional works at: <http://digitalcommons.tourolaw.edu/scholarlyworks>



Part of the [Legal Ethics and Professional Responsibility Commons](#), and the [Legal Profession Commons](#)

---

## Recommended Citation

2015 J. Prof. Law. 1 (2015)

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ Touro Law Center. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ Touro Law Center. For more information, please contact [ASchwartz@tourolaw.edu](mailto:ASchwartz@tourolaw.edu).

# The Law and the “Spirit of the Law” in Legal Ethics

Samuel J. Levine\*

## Introduction

In the preface to an important *Fordham Law Review* colloquium on ethics in corporate representation,<sup>1</sup> William H. Simon criticizes the “Enron-style transactions . . . undertaken solely to achieve the benefits of the client (or in the Enron case, the managers) that the lawyers, were they to make a judgment on the matter, would probably concede were inconsistent with the spirit of the law.”<sup>2</sup> Simon rejects “literal compliance” with the letter of the law as “justification for conduct that knowingly and flagrantly thwarts clear underlying purposes” of the law.<sup>3</sup> Instead, he calls for a greater degree of “public responsibility” among lawyers, expecting that they will “ask what [is] the underlying purpose of a transaction and compare that purpose to the underlying purpose of the relevant laws . . . .”<sup>4</sup>

Although Simon may be the most prominent advocate of a “purposive” approach to the lawyer’s professional responsibility,<sup>5</sup> other leading ethics scholars have likewise examined the work of lawyers through a letter-of-the-law/spirit-of-the-law dichotomy. For example, Fred Zacharias and Bruce Green ask: “[S]hould the justness of the client’s objectives be evaluated exclusively under a strictly legal standard, or should lawyers also refrain from pursuing judgments that violate the ‘spirit of the law’ . . . ?”<sup>6</sup> Similarly, Green and Russ Pearce refer to the

---

\* Professor of Law and Director of the Jewish Law Institute, Touro Law Center. Earlier versions of this essay were presented as a public lecture at Loyola University Maryland, at faculty workshops at Notre Dame Law School, the University of San Diego Law School, and Suffolk University Law School, and at the Legal Ethics Shmooze at Fordham Law School.

1. See *Colloquium: Ethics in Corporate Representation*, 74 *FORDHAM L. REV.* 947 (2005).

2. William H. Simon, *Introduction: The Post-Enron Identity Crisis of the Business Lawyer*, 74 *FORDHAM L. REV.* 947, 953 (2005).

3. *Id.*

4. *Id.* at 954.

5. See also William H. Simon, *Earnings Management as a Professional Responsibility Problem*, 84 *TEX. L. REV.* 83, 91 (2005); William H. Simon, *After Confidentiality: Rethinking the Professional Responsibilities of the Business Lawyer*, 75 *FORDHAM L. REV.* 1453 (2006).

6. Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 *GEO. WASH. L. REV.* 1, 11 (2005). For further examples of Green’s references to the spirit of the law in the context of the work of lawyers, see Bruce A. Green, *Lawyers’ Professional Independence: Overrated or Undervalued?*, 46 *AKRON L. REV.* 599, 609 (2013); Bruce A. Green, *Taking Cues: Inferring Legality from Others’ Conduct*, 75 *FORDHAM L. REV.* 1429, 1449 (2006); Bruce A. Green, *Thoughts About Corporate Lawyers After Reading The Cigarette Papers: Has the “Wise Counselor” Given Way to the “Hired Gun”?*, 51 *DEPAUL L. REV.* 407, 412, 424, 430-32 (2001). For an

lawyer's—and the client's—"civic obligations both under the law and beyond the law."<sup>7</sup> Thus, they distinguish between a lawyer who "[a]dvises the client to stay comfortably within the law (or to comply with the imperfectly expressed spirit or purpose of the law)" and one who "[e]ncourages the client to exploit legal loopholes or to test legal limits . . . ."<sup>8</sup>

This article aims to explore the notion of the lawyer's ethical responsibility to go "beyond" the letter of the law and to comply with the "spirit" or "purpose" of the law. The article suggests that, notwithstanding its promotion of admirable principles and goals, a spirit of the law model may prove inconsistent with basic legal and ethical obligations of lawyers. The lawyer's duties as fiduciary, as agent, and as zealous advocate, responsible for representing the best interests of the client, preclude the lawyer from focusing on the spirit and purpose of the law rather than on the aims of the client that can be achieved within the letter of the law. Moreover, as a jurisprudential matter, a model of lawyering that appeals to the spirit or purpose of the law faces the substantial—if not insurmountable—burden of identifying an

---

extensive list of Zacharias's references to the spirit of the law in the context of interpreting ethics codes, *see infra*, note 64.

7. Bruce A. Green & Russell G. Pearce, "Public Service Must Begin at Home": *The Lawyer as Civics Teacher in Everyday Practice*, 50 WM. & MARY L. REV. 1207, 1215 (2009). *See also id.* at 1214-15, 1218, 1226, 1228, 1231, 1236 n.175, 1237, 1238; W. Bradley Wendel, *Ethics for Skeptics*, 26 J. LEGAL PROF. 165 (2002) (analyzing "ethics beyond the rules"). For further examples of Pearce's references to the spirit of the law in the context of the work of lawyers, *see* Samuel J. Levine & Russell G. Pearce, *Rethinking the Legal Reform Agenda: Will Raising the Standards for Bar Admission Promote or Undermine Democracy, Human Rights, and Rule of Law?*, 77 FORDHAM L. REV. 1635, 1638 (2009); Russell G. Pearce, et al., *Revitalizing the Lawyer-Poet: What Lawyers Can Learn from Rock and Roll*, 14 WIDENER L.J. 907, 910 (2005); Russell G. Pearce & Eli Wald, *Rethinking Lawyer Regulation: How a Relational Approach Would Improve Professional Rules and Roles*, 2012 MICH. ST. L. REV. 513, 517, 522; Russell G. Pearce & Eli Wald, *The Relational Infrastructure of Law Firm Culture and Regulation: The Exaggerated Death of Big Law*, 42 HOFSTRA L. REV. 109, 130 (2013).

8. Green & Pearce, *supra* note 7, at 1215. *See generally* LEO KATZ, *WHY THE LAW IS SO PERVERSE* (2011); TANINA ROSTAIN & MILTON C. REGAN, JR., *CONFIDENCE GAMES: LAWYERS, ACCOUNTANTS, AND THE TAX SHELTER INDUSTRY* (2014); W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* (2010); Lynn A. Baker & Mitchell N. Berman, *Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke it to Do So*, 78 IND. L.J. 459 (2003); Noel B. Cunningham & James R. Repetti, *Textualism and Tax Shelters*, 24 VA. TAX REV. 1 (2004); Hanna Filipczyk, "Spirit of the Law" for Non-Believers: *Tax Avoidance and (Legal) Philosophy*, SOCIAL SCIENCE RESEARCH NETWORK (Nov. 1, 2014), <http://ssrn.com/abstract=2517906>; Joan T.A. Gabel et al., *Letter vs. Spirit: The Evolution of Compliance into Ethics*, 46 AM. BUS. L.J. 453 (2009); Kent Greenfield, *Corporate Ethics in a Devilish System*, 3 J. BUS. & TECH. L. 427 (2008); Richard Lavoie, *Am I My Brother's Keeper? A Tax Law Perspective on the Challenge of Balancing Gatekeeping Obligations and Zealous Advocacy in the Legal Profession*, 44 LOY. U. CHL. L.J. 813 (2013); Don Mayer, *Community, Business Ethics, and Global Capitalism*, 38 AM. BUS. L.J. 215 (2001); Daniel T. Ostas, *Deconstructing Corporate Social Responsibility: Insights from Legal and Economic Theory*, 38 AM. BUS. L.J. 261 (2001); Daniel T. Ostas, *Legal Loopholes and Underenforced Laws: Examining the Ethical Dimensions of Corporate Legal Strategy*, 46 AM. BUS. L.J. 487 (2009).

overriding spirit or purpose of a given legal principle, so significant as to compel a lawyer to ignore or subvert the letter of the law.<sup>9</sup>

At the same time, this article recognizes the aspirational value and, potentially, the practical significance of the spirit of the law, particularly in the work of lawyers. Thus, the article considers areas of legal practice in which it may be appropriate for lawyers to rely on the spirit of the law. Specifically, the article suggests that in the context of the law governing the work of lawyers, formulated in ethics codes, there may be greater latitude for lawyers to be permitted—perhaps even expected—to engage in conduct that goes beyond the letter of the law. In such cases, since the lawyer is acting in a more personal manner, implementing laws directed at the lawyer’s behavior rather than that of the client, the lawyer may have more autonomy and responsibility to identify and delineate the underlying purpose of the law, and to act accordingly. In addition, because many rules of professional conduct are accompanied by an official comment articulating the law’s underlying purpose, lawyers may not face the same jurisprudential challenge that, in the context of other areas of law, often impedes attempts to identify the overriding purpose of the law.

Part I of this article introduces and critiques Simon’s purposive approach to legal ethics, focusing on Simon’s view that a lawyer should not plead the statute of limitations when, in the lawyer’s view, doing so would fail to promote the underlying purpose of the statute. The article finds such a spirit of the law approach misplaced, not only in delineating the ethical obligations of a private attorney, whose primary duty is to represent the interests of the client, but also for a prosecutor, whose primary duty is to serve justice. In particular, in addition to rejecting Simon’s view in the context of the private attorney’s duty to plead the statute of limitations, this part suggests that a prosecutor need not apply a spirit of the law approach in the context of the duty to disclose exculpatory evidence to a criminal defendant.

Despite having critiqued the lawyer’s general reliance on a spirit of the law approach, Part II and Part III of the article consider two scenarios to explore the

---

9. As Justice Kennedy put it, “[t]he problem with spirits is that they tend to reflect less the views of the world whence they come than the views of those who seek their advice.” *Public Citizen v. United States Dep’t of Justice*, 491 U.S. 440, 473 (1989) (Kennedy, J., concurring). *Cf. Green & Pearce, supra* note 7:

The idea of the law’s “spirit” is itself ambiguous. One might understand its relevance to be simply as an aid to understanding the meaning of the law, as might be true of the law’s “purpose.” But our understanding of the concept is as a source of potential self-restraint beyond that which the law would be interpreted to impose.

*Id.* at 1218 n.54; Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 *GEO. J. LEGAL ETHICS* 19, 50 (1997) [hereinafter Green, *Personal Values*] (“No doubt, lawyers can debate whether certain propositions enjoy sufficient recognition to enter the pantheon of professional values. Further, lawyers may often find that different professional values point in different directions with respect to a given decision.”)

possible application of a spirit of the law analysis to the interpretation and application of ethics codes. The article first looks at the no-contact rule, which prohibits a lawyer representing a client in a matter from communicating with another party represented by a lawyer, absent the other lawyer's consent. Although the language of the rule does not address the *pro se* attorney—an attorney who is a party to a case and is self-represented—courts have almost uniformly interpreted the rule to include the *pro se* attorney as well. These courts have looked beyond the letter of the rule and have found that the purpose or spirit of the rule, aimed at protecting the vulnerable client against overreaching or abuse by an attorney, should likewise apply in the context of communications between a represented client and a *pro se* attorney.

Finally, the article looks at the more challenging scenario of the “Innocent Convict” who is going to be executed for a crime the lawyer's client has committed. Under the letter of the ethics codes in several states, the lawyer would be obligated to maintain the client's confidence, notwithstanding that disclosure would save the life of an innocent individual. In response, the article sets forth an alternative approach for interpreting the ethical duty of confidentiality pursuant to a spirit of the law analysis, thereby permitting the lawyer to disclose the confidential information to save an innocent life. In contrast to Simon's approach, which again seems to characterize the lawyer's conduct as defying the law in pursuing the preferable outcome, the article reaches a similar conclusion, in favor of disclosure, but arrives at that conclusion through an analysis that is premised upon a substantially different framework and that proceeds along a significantly different methodology.

## I. Lawyers and the “Spirit” of the Law

### A. The Contextual Model

American legal scholars have engaged in a seemingly perennial examination of the relationship between legal ethics and other sources of ethical guidance.<sup>10</sup> As Bill Simon has put it, “A longstanding dialectic in legal ethics scholarship

---

10. For just a few examples of leading contemporary ethics scholars who have addressed these issues, see, e.g., ANTHONY KRONMAN, *THE LOST LAWYER* (1995); *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* (David Luban ed., 1984); Daniel R. Coquillette, *Professionalism: The Deep Theory*, 72 N.C. L. REV. 1271 (1994); Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1985); Stephen Gillers, *Can a Good Lawyer Be a Bad Person?*, 84 MICH. L. REV. 1011 (1986); Robert W. Gordon, *The Citizen Lawyer: A Brief Informal History of a Myth with Some Basis in Reality*, 50 WM. & MARY L. REV. 1169 (2009); Green, *Personal Values*, *supra* note 9; Leslie Griffin, *The Lawyer's Dirty Hands*, 8 GEO. J. LEGAL ETHICS 219 (1995); Judith A. McMorro & Luke M. Scheuer, *The Moral Responsibility of the Corporate Lawyer*, 60 CATH. U. L. REV. 275 (2011); Russell G. Pearce, *Model Rule 1.0: Lawyers Are Morally Accountable*, 70 FORDHAM L. REV. 1805 (2002); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 11 AM. B. FOUND. RES. J. 613 (1986); William H. Simon, *Role Differentiation and Lawyers' Ethics: A Critique of Some Academic Perspectives*, 23 GEO. J. LEGAL ETHICS 987 (2010); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975); W. Bradley Wendel, *Legal Ethics and the Separation of*

concerns the relative primacy of legal norms on the one hand and ordinary moral norms of the other.”<sup>11</sup> However, as an alternative to the “law-versus-morals” analysis, Simon has proposed a “balancing-of-legal-values” theory,<sup>12</sup> developed at length in his landmark book, *The Practice of Justice*, viewing ethical dilemmas through the prism of “competing legal values” rather than “in terms of a conflict between law and morality.”<sup>13</sup> In such a framework, he explains, the “correct resolution . . . requires not the triumph of morals over law, but the vindication of more-fundamental over less-fundamental legal values.”<sup>14</sup> Among other compelling elements of Simon’s model, the focus on “justice” rather than on “morality” avoids “assertions of personal preferences” or “applications of ordinary morality,” in favor of “legal judgments grounded in the methods and sources of authority of the professional culture.”<sup>15</sup>

Nevertheless, while Simon prefers a “legalist” approach to a “moralist” approach, Simon’s emphasis on “legal values” rather than on the actual contours of the law leads him to find ethical dilemmas when a legal rule’s “underlying purpose . . . would be frustrated by the invocation of the rule . . . .”<sup>16</sup> In such cases, Simon advocates looking to the “spirit” of the law to determine the extent to which the letter of a law should govern a lawyer’s conduct.<sup>17</sup> Characterizing “Positivist” jurisprudential positions as drawing an unconvincing distinction between legal and nonlegal norms,<sup>18</sup> Simon asserts that “nearly all practicing lawyers reject [Positivism] implicitly in the way they argue cases, advise clients, and draft documents.”<sup>19</sup> Therefore, he reasons, they should reject a Positivist approach to legal ethics as well.<sup>20</sup> Likewise, Simon criticizes those who defend the sufficiency of compliance with the letter of the law based on the argument that lawyers have “a duty to exploit ‘loopholes’ in the law.”<sup>21</sup>

---

*Law and Morals*, 91 CORNELL L. REV. 67 (2005); Fred C. Zacharias, *Integrity Ethics*, 22 GEO. J. LEGAL ETHICS 541 (2009).

11. See William H. Simon, *The Past, Present, and Future of Legal Ethics: Three Comments for David Luban*, 93 CORNELL L. REV. 1365, 1368 (2008). For a notable recent article exploring this dialectic, see Geoffrey C. Hazard, Jr., *The Morality of Law Practice*, 66 HASTINGS L.J. 359 (2015).

12. Simon, *supra* note 11, at 1369.

13. *Id.* at 1368-69 (citing WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS* 26-52 (1998)).

14. *Id.* (citing SIMON, *supra* note 13, at 138-69).

15. SIMON, *supra* note 13, at 138.

16. Simon, *supra* note 11, at 1369.

17. Simon, *supra* note 2, at 953-54.

18. SIMON, *supra* note 13, at 36.

19. *Id.*

20. *Id.* at 37.

21. Simon, *supra* note 2, at 953. Cf. Green & Pearce, *supra* note 7, at 1215 (characterizing lawyers who “encourage[e] the client to exploit legal loopholes” as teaching “a different conception” of civil obligation from that taught by lawyers who “advise[e] the client to stay comfortably within the law (or to comply with the imperfectly expressed spirit or purpose of the law”).

On a number of levels, Simon's model appears inconsistent with basic elements of the lawyer's legal and ethical obligations to the client.<sup>22</sup> Most basically, a lawyer functions as the client's agent, and is thereby subject to the obligations of a fiduciary.<sup>23</sup> Thus, as Stephen Gillers puts it, "Lawyers must place their clients' interests above their own in the area of the representation and must treat their clients fairly. Words like 'honor,' 'integrity,' and 'trust' appear often in discussions of fiduciary duty."<sup>24</sup> In fact, as Gillers has observed, lawyers are not "run-of-the mill fiduciaries."<sup>25</sup> Rather, he notes, courts have made clear that "[s]ome fiduciaries have higher obligations than other fiduciaries, and lawyers have among the highest."<sup>26</sup> In the words of one court, "the relation between the lawyer and client is highly fiduciary in nature" and "has been described as one of *uberrima fides*, which means 'most abundant good faith.'"<sup>27</sup> Another court has described the "unique fiduciary reliance stemming from people hiring attorneys to exercise professional judgment on a client's behalf," resulting in a relationship that is "imbued with ultimate trust and confidence."<sup>28</sup>

Likewise, the lawyer is bound by obligations of loyalty and diligence to the client. Again, Gillers provides helpful articulations of the lawyer's duties: "The duty of loyalty requires the lawyer to pursue, and to be free to pursue, the client's objectives unfettered by conflicting responsibilities or interests[.]" while the "requirement of diligence imposes on the lawyer an obligation to pursue the client's interests without undue delay."<sup>29</sup> These duties are related, because "[d]ivided loyalties may undermine the lawyer's ability to be diligent in pursuit of the client's interests as well as threaten the lawyer's fiduciary position."<sup>30</sup>

The nature of the lawyer's ethical duty to promote the interests of the client may be best captured in the comment to Model Rule of Professional Conduct 1.3:

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or

---

22. For more extensive discussions, including critiques, of Simon's model, see, e.g., *Review Essay Symposium, The Practice of Justice by William H. Simon*, 51 STAN. L. REV. 867 (1999); Heidi Li Feldman, *Matter of Ethics Apparently Substantial, Oddly Hollow: The Enigmatic Practice of Justice*, 97 MICH. L. REV. 1472 (1999); Samuel J. Levine, *Taking Ethical Discretion Seriously: Ethical Deliberation as Ethical Obligation*, 37 IND. L. REV. 21, 37-45 (2003); W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1 (1999).

23. See STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 54 (10th ed. 2015).

24. *Id.*

25. *Id.*

26. *Id.*

27. *Perez v. Kirk & Carrigan*, 822 S.W.2d 261 (Tex. Ct. App. 1991), cited in GILLERS, *supra* note 23, at 26.

28. *Matter of Cooperman*, 633 N.E.2d 1069 (N.Y. 1994), cited in GILLERS, *supra* note 23, at 54.

29. GILLERS, *supra* note 23, at 55.

30. *Id.*

endeavor. A lawyer must also act with commitment and dedication to the interest of the client and with zeal in advocacy upon the client’s behalf.<sup>31</sup>

### **B. Lawyers and the “Spirit” of the Statute of Limitations**

To examine the ways in which Simon’s model provides for a departure from these obligations, it might be helpful to consider one of Simon’s primary examples of a case in which he finds the underlying purpose of a law may outweigh the letter of the law: the statute of limitations case. As Simon sets up the issue:

A creditor has brought suit for non-payment of money loaned the defendant and now past due. The defendant admits the debt and failure to repay it, and he is able to pay. However, the creditor has delayed bringing suit until after the statute of limitations has run. May his lawyer ethically plead the statute?<sup>32</sup>

It would seem that application of the lawyer’s obligations as the client’s agent leads to the conclusion that the lawyer may—and should—ethically plead the statute of limitations whenever it is available. Although a lawyer may personally object to the outcome, which ostensibly permits the defendant to avoid paying an otherwise valid debt, the lawyer’s fiduciary duty requires that the lawyer place the client’s interests above the lawyer’s preferences. In addition, the lawyer’s duties of loyalty and diligence mandate that the lawyer zealously serve the interests of the client without consideration of any of the lawyer’s conflicting personal interests. In short, failure to plead the statute of limitations would violate the most basic elements of the lawyer’s duties to the client, and would likely be grounds for both discipline and a malpractice suit against the lawyer.<sup>33</sup>

Simon, however, offers a different analysis. Simon reasons that this case involves:

two relevant legal norms—the substantive law that says that contracts like this one should be performed, and the statute of limitations that

---

31. MODEL RULES OF PROF’L CONDUCT R. 1.3, cmt. 1.

32. SIMON, *supra* note 13, at 29.

33. Of course, as Tom Shaffer and others have shown, the “best interests” of the client may not always entail zealous advocacy of the client’s legal advantages. Moreover, it may be proper, in some cases, for the lawyer to include broader considerations, including moral values, in counseling a client regarding what course of action would, in fact, best serve the client’s interests. *See, e.g.*, THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* (1994); Thomas L. Shaffer, *Inaugural Howard Lichtenstein Lecture in Legal Ethics: Lawyer Professionalism as a Moral Argument*, 26 GONZ. L. REV. 393 (1991); Thomas L. Shaffer, *Legal Ethics and the Good Client*, 36 CATH. U. L. REV. 319 (1987).

For the purposes of this analysis, however, we can posit the situation in which the client has made clear that the goal is to employ any legal claim that will further the possibility that the client will win the case. In Simon’s framework, the lawyer is then faced with the question of whether to assert a legally valid claim that the lawyer concludes will assist the client in winning the case but will not promote justice.



says that, if the suit is not filed until a specified period after the debt is due, and the defendant pleads the statute, the court will dismiss the suit.<sup>34</sup>

Having characterized the case as involving competing legal values, Simon engages in a purposive interpretation of the statute of limitations: the statute “might be based on the idea of repose—that after the passage of a certain time a debtor should not have to worry about debts incurred in the remote past,” or “the statute might be based on the notion that, because evidence becomes unreliable and disappears over time, courts cannot reliably determine claims after specified periods.”<sup>35</sup>

Under this analysis, the lawyer’s ethical decision-making depends on the lawyer’s determination regarding which of these alternatives captures the purpose of the statute of limitations. According to Simon, “A lawyer who concluded that repose was the underlying principle might decide that pleading the statute was appropriate simply because of the passage of the prescribed period.”<sup>36</sup> However, “a lawyer who concluded that the basic principle of the statute was to spare judicial determination of claims on unreliable evidence might infer it inappropriate to plead the statute.”<sup>37</sup> After all, Simon emphasizes, “there is no difficulty for the lawyer to determine the merits of this particular claim once the client has admitted [to the lawyer] the validity of the debt.”<sup>38</sup>

Thus, Simon’s analysis is premised on the argument that a lawyer should depart from the letter of the law of the statute of limitations to promote the goal that the lawyer identifies as the underlying purpose of the statute. In this view, the lawyer’s sense of whether it would be “appropriate” to plead the statute outweighs the

---

34. SIMON, *supra* note 13, at 32.

35. *Id.*

36. *Id.*

37. *Id.* The issues revolving around pleading the statute of limitations have captured the attention of leading ethics scholars, from David Hoffman and George Sharswood to contemporary commentators. See e.g., Michael S. Ariens, *Legal Ethics in an Age of Anxiety*, 40 ST. MARY’S L.J. 343, 368-70 (2008) (discussing Hoffman and Sharswood); Green & Pearce, *supra* note 7, at 1216-17 (stating that “[w]hether the lawyer advises the . . . client to pay the debt . . . , as a matter of civic obligation, or instead accept the representation and invokes the legal defense, teaches the client, for better or for worse, about how to regard legally unenforceable agreements made to others in the community”). See also RICHARD POSNER, *THE PRAGMATICS OF MORAL AND LEGAL THEORY* (1999):

Judges often must choose between rendering substantive justice in the case at hand and maintaining the law’s certainty and predictability. The trade-off—posed most starkly in cases in which the statute of limitations is asserted as a defense—will sometimes point to sacrificing substantive justice in the individual’s case to consistency with previous cases or within statutes or, in short, the well-founded expectations necessary to the orderly management of society’s business. . . .

*Id.* at 242.

38. SIMON, *supra* note 13, at 33 (italics omitted).

interests of the client. Even more strikingly, Simon would have the lawyer reach this conclusion on the basis of access to “material information unavailable to the other decisionmakers in the system.”<sup>39</sup> In fact, Simon asserts that “disabling [the lawyer] from acting on [this information] to the detriment of the client . . . impedes a potential contribution to the vindication of the legal merits.”<sup>40</sup>

Of course, Simon is aware that this model differs substantially from prevailing models of lawyering. Simon laments the emergence of the “Dominant View” of lawyers, which he characterizes by the principle that “the lawyer must—or at least may—pursue any goal of the client through any arguably legal course of action and assert any nonfrivolous legal claim.”<sup>41</sup> As an alternative, Simon proposes the “Contextual View,” rooted in the “basic maxim . . . that the lawyer should take such actions as, considering the relevant circumstances of the particular case, seem likely to promote justice.”<sup>42</sup>

As Simon acknowledges, the Contextual Model appears to blur—even to “collapse”<sup>43</sup>—the distinction between the role of the private lawyer and those of the prosecutor and judge, who are charged, respectively, with the responsibility to serve justice and to mete out justice. Nevertheless, Simon insists that this model “incorporates much of the traditional lawyer role, including . . . zealous pursuit of the client’s goals.”<sup>44</sup> If anything, however, Simon’s purposive analysis of the statute of limitations case seems to place the judge in a position relatively more attentive to the client’s goals, while the client’s own lawyer is expected to focus on a just outcome. After all, while a judge might, in some cases, look to the purpose or spirit of a law or issue a decision on the basis of broad considerations of justice, the judge who is presented with a statute of limitations claim is presumably bound by the letter of the law. If the defendant’s claim is legally sufficient, the judge must dismiss the suit, even if the “underlying purpose” or “spirit” of the statute of limitations does not support such an outcome. In striking contrast, Simon permits—and apparently expects—the lawyer to take into account the goals of promoting justice before deciding whether to plead the statute on behalf of the client.

### C. The “Spirit” of the Prosecutor’s Duty to Disclose Exculpatory Evidence

Likewise, it is not clear that a prosecutor, whose express duty is to serve justice, would be subject to—or permitted to abide by—the demands of the spirit of the law that Simon imposes on the private lawyer. To be sure, the prosecutor’s obligation to serve justice often entails the need to balance competing legal

---

39. *Id.*

40. *Id.*

41. *Id.* at 7.

42. *Id.* at 9.

43. *Id.* at 54.

44. *Id.* at 11.

values and interests, requiring the kinds of complex judgments and deliberations Simon expects of private lawyers.<sup>45</sup> In fact, the prosecutor has a duty to protect the constitutional rights of a criminal defendant and to exercise prosecutorial power and discretion in a manner that promotes the interests of society in ensuring substantive and procedural justice. At the same time, however, the obligation to serve justice includes the fundamental duty to effectively prosecute criminal defendants who are deserving of punishment. The prosecutor would arguably be expected to employ the letter of the law as a means toward successful prosecution, notwithstanding possible conflicts with the spirit of the law.<sup>46</sup>

---

45. See, e.g., R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor's Ethical Duty to "Seek Justice"*, 82 NOTRE DAME L. REV. 635 (2006); Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607 (1999); Maureen A. Howard, *Taking the High Road: Why Prosecutor's Should Voluntarily Waive Peremptory Challenges*, 23 GEO. J. LEGAL ETHICS 369 (2010); Samuel J. Levine, *Taking Prosecutorial Ethics Seriously: A Consideration of the Prosecutor's Ethical Obligation to Seek Justice in a Comparative Analytical Framework*, 41 HOUSTON L. REV. 1337 (2004); Melanie D. Wilson, *Prosecutors "Doing Justice" Through Osmosis—Reminders to Encourage a Culture of Cooperation*, 45 AM. CRIM. L. REV. 67 (2008); Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223 (1993) [hereinafter Zacharias, *Specificity in Professional Responsibility Codes*]; Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45 (1991) [hereinafter, Zacharias, *Can Prosecutors Do Justice?*].

46. Cf. Zacharias, *Can Prosecutors Do Justice?*, *supra* note 45:

[A] noncompetitive approach to prosecutorial ethics is inconsistent with the professional codes' underlying theory. The codes. . .do not exempt prosecutors from the requirements of zealous advocacy. . . . [T]he codes signal that prosecutors can achieve justice while operating within the adversary system's rules. . . . [A]dvocates are meant to do their best. To the extent prosecutors temper advocacy. . . , they call into question the essential assumptions of the very system the rules codify.

*Id.* at 52 (footnote omitted).

See also Green, *supra* note 45:

[A] prosecutor is a representative of, as well as a lawyer for, a government entity that has several different, sometimes seemingly inconsistent, objectives in the criminal context. Of these, convicting and punishing lawbreakers is only one, and it is no more important than others, such as avoiding the punishment of innocent people and ensuring that people are treated fairly. As the government's surrogate, the prosecutor's job is to carry out all these objectives and resolve the tension among them. . . . This is also the understanding to which prosecutors should be more receptive, since it does not imply that they should "pull their punches" or otherwise act to level the playing field between themselves and the defense. On the contrary, it encourages their instinct to do battle. It implies, however, that prosecutors must not only battle lawbreakers, in furtherance of the government's objective of convicting the lawless. Additionally, prosecutors must resist various forces that would undermine the government's other aims.

*Id.* at 642-43; Bruce A. Green, *The Ethical Prosecutor and the Adversary System*, 24 CRIM. L. BULL. 126, 129-30 (1988) ("A prosecutor is not supposed to be neutral and detached. It is not the prosecutor's duty to present both sides of a criminal case. Nor is it the prosecutor's duty to urge the jury to draw inferences in favor of the defendant.").

Questions regarding the prosecutor’s obligations to consider the spirit of the law were at the center of a 1978 case decided by the New York Court of Appeals, *People v. Jones*.<sup>47</sup> In *Jones*, after the prosecutor and defendant had commenced plea negotiations, the prosecutor learned of the death of the complaining witness. Without disclosing this information to the defendant, the prosecutor continued to engage in plea negotiations, culminating in the defendant’s decision to accept a guilty plea rather than proceed to trial.<sup>48</sup> Upon learning that the complaining witness had died prior to the plea agreement, the defendant moved to withdraw the guilty plea, arguing that the prosecution had been under an obligation to disclose the fact of the complaining witness’s death.

As a threshold matter, the court concluded that the prosecutor did not violate the letter of the law that requires disclosure of exculpatory material. As the court observed, “proof of the death of this witness . . . would not have constituted exculpatory evidence,” and therefore information regarding the death of the witness did not qualify as *Brady* material.<sup>49</sup> In fact, the court noted, defense counsel did not claim otherwise. Instead, the defendant argued that “in the spirit of *Brady v. Maryland*,”<sup>50</sup> the prosecution was under an obligation to disclose “information in its possession which . . . is highly material to the practical, tactical considerations which attend a determination to plead guilty, but not to the legal issue of guilt itself.”<sup>51</sup> Accordingly, as the court explained, rather than posing a question of the prosecutor’s legal obligation of disclosure under *Brady*, the case turned on the question of whether the prosecutor’s conduct violated the defendant’s due process rights.

Turning, then, from the letter of *Brady* to broader due process considerations, the court cited at length the Supreme Court’s famous articulation of the unique position the prosecutor occupies in the American justice system. Specifically, the prosecutor’s “interest . . . is not that it shall win a case, but that justice shall be done.”<sup>52</sup> Therefore, the prosecutor

may prosecute with earnestness and vigor—indeed he should do so. But while he may strike hard blows, he may not strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.<sup>53</sup>

In applying these principles, the court rejected the defendant’s due process argument, which hinged upon the purported spirit of the law. Instead, the court

---

47. 375 N.E. 2d 41 (N.Y. 1978).

48. *Id.* at 42.

49. *Id.* at 43.

50. *Id.* (citing 373 U.S. 83).

51. *Id.*

52. *Berger v. United States*, 295 U.S. 78, 88 (1935).

53. *Id.*

returned to the letter of the law, surveying the case law in which a prosecutor was found to have engaged in deceitful conduct to obtain a guilty plea from a defendant. The court observed that “[a]ll the reported instances of deceitful persuasion appear to have involved positive misstatements or misrepresentations; none has considered the effect to be accorded silence only.”<sup>54</sup> Therefore, the court concluded, the prosecutor did not violate the defendant’s due process rights in remaining silent rather than disclosing that the complaining witness had died.

Ultimately, the court emphasized that the information regarding the death of the complaining witness constituted “tactical data” rather than exculpatory information.<sup>55</sup> As the court explained, “notwithstanding that the responsibilities of a prosecutor for fairness and open-dealing are of a higher magnitude than those of a private litigant, no prosecutor is obliged to share his appraisal of the weaknesses of his own case (as opposed to specifically exculpatory evidence) with defense counsel.”<sup>56</sup> The court’s articulation of the prosecutor’s obligations carefully tracked the Supreme Court’s classic statement: the prosecutor has a duty to prosecute the case “earnest[ly]”—if not quite zealously, and to use “every legitimate” tactic—including silence—permitted by the letter of the law, in an effort to bring about a just conviction.

In short, *Jones* illustrates a powerful rejection of the notion that prosecutors are bound, under the “spirit” of the law, to forego tactical decisions otherwise permitted under the letter of the law. Rather than mandating that the prosecutor go “beyond the law” in protecting the rights of the criminal defendant, the duty to “seek justice” entails an obligation to employ effective means to achieve an appropriate conviction.<sup>57</sup> In contrast, notwithstanding Simon’s claim that the Contextual Model incorporates the traditional role of the private lawyer as a zealous advocate of the client’s interests, Simon’s proposal places a higher premium on the private lawyer’s obligations to abide by the spirit of the law, potentially at the expense of loyalty to the legally permissible goals of the client.

---

54. *Jones*, 375 N.E. 2d at 44. Likewise, the court noted, formal ethics codes and ABA ethical guidelines do not prohibit the prosecutor from remaining silent unless there is an affirmative duty to provide information to the defendant. *See id.*

55. *Id.*

56. *Id.* at 43-44.

57. For a rhetorical analysis of *Jones* and its implications for articulating the role of prosecutors, see Samuel J. Levine, *Judicial Rhetoric and Lawyers’ Roles*, 90 NOTRE DAME L. REV. 1989 (2015). For further discussion see Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 1155-59 (1998) [hereinafter Zacharias, *Justice in Plea Bargaining*]. For an apparently contrary position, in the context of a civil case, see *Virzi v. Grand Trunk Warehouse & Cold Storage Co.*, 571 F. Supp. 507, 512 (E.D. Mich. 1983). *See* Zacharias, *Justice in Plea Bargaining*, *supra*, at 1158-59 n.114-15; Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1345 n.145 (1995) [hereinafter Zacharias, *Reconciling Professionalism*] (characterizing *Virzi* as “extrapolating from the spirit of the codes”); Zacharias & Green, *supra* note 6, at 60-63; Simon, *supra* note 10, at 994 n.16.

#### D. Jurisprudential Concerns

The expectation that lawyers should focus on the spirit of a law raises a variety of other concerns as well. Indeed, throughout his book, Simon acknowledges and responds to various objections to his model. Although a full consideration of these concerns is beyond the scope of this article, it may be worth noting at least one of the jurisprudential implications of a spirit of the law approach. Specifically, the effort to identify the purposes of a given law often proves elusive, if not impossible, under even the most thoughtful analysis. Resorting to the spirit of a law to determine its just application takes this challenge several steps further, apparently requiring a determination that of the various purposes arguably underlying a particular law, one of these purposes definitively represents the essential spirit of the law and militates for a particular implementation of the law.<sup>58</sup> Moreover, these determinations are expected of the practicing lawyer, who may not have access to the various resources and opportunities necessary to engage in such an analysis. Finally, under Simon’s model, the lawyer who identifies the essential spirit of the law must be so certain of this determination as to permit—or require—disregarding both the letter of the law and the legal goals of the client, in the interest of pursuing this underlying purpose of the law.

Simon associates these concerns with the jurisprudential position he characterizes as the “Positivist premise,” which he dismisses as not reflective of either the views of most legal philosophers or the work of most practicing lawyers.<sup>59</sup> To demonstrate the drawbacks of positivism, Simon asserts that “legal norms cannot be applied to specific cases without some exercise of judgment.”<sup>60</sup> Specifically, “The texts of legal norms contain gaps, ambiguities, and contradictions that must be filled, clarified, and reconciled in order to bring them to bear on specific cases.”<sup>61</sup> Though Simon’s thesis, such as it is, presents a convincing explanation for the necessity to look beyond the letter of the law—perhaps to the spirit or purpose of the law—to engage in judgments crucial to the application of legal norms in the face of gaps, ambiguities, or contradictions, it may not follow that such judgments are necessary to determine the application of a clear and comprehensive law.

Recognizing the general distinction between ambiguous laws and those clear on their face, Simon argues that in some cases, “even rules that are categorical in

---

58. An illustration of these challenges may be found in debates over the exclusionary rule. These debates are premised upon competing conceptions of the purpose or purposes ostensibly underlying the rule. Accordingly, the debates present correspondingly competing approaches to the appropriate application of the rule. *See, e.g.*, Akhil Reed Amar, *The Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994); David Gray, *A Spectacular Non Sequitur: The Supreme Court’s Contemporary Fourth Amendment Exclusionary Rule Jurisprudence*, 50 AM. CRIM. L. REV. 1 (2013); John B. Rayburn, *What is “Blowing in the Wind”? Reopening the Exclusionary Rule Debate*, 110 W. VA. L. REV. 793 (2008); James Boyd White, *Forgotten Points in the “Exclusionary Rule” Debate*, 81 MICH. L. REV. 1273 (1983);

59. SIMON, *supra* note 13, at 37.

60. *Id.*

61. *Id.*

form and potentially susceptible to literal interpretations are and should be interpreted in light of the applicable background values.”<sup>62</sup> Nevertheless, Simon seems to undermine his own theory by relying primarily on cases of “legal norms [that] take the form of open-ended, unspecified general terms that obviously require resort to implicit background understandings.”<sup>63</sup> While these examples provide insights into the extent to which, at times, the letter of the law resorts explicitly to discretionary forms of judgment, which may in turn require investigation into the law’s spirit or purpose, it is not apparent that similar forms of judgment should be used to interpret and apply laws that, on their face, do not call for such considerations.

## II. The “Spirit” of Ethics Codes: The No-Contact Rule and the *Pro Se* Lawyer

As an alternative to the thesis that lawyers should generally look to the spirit of a law to determine the extent to which the client’s goals are consistent with promoting justice, perhaps a more promising approach would limit the purposive analysis to the lawyer’s implementation of ethics codes, through a “spirit of the rule” analysis.<sup>64</sup> Indeed, characteristics of ethics codes may suggest that ethics

---

62. *Id.* at 39.

63. *Id.*

64. Among other prominent ethics scholars, Fred Zacharias may stand out in the degree to which and the consistency with which he referenced the lawyer’s duty to abide by the “spirit” of ethics codes, though he did not offer a general justification or methodology for interpreting ethics rules on the basis of their spirit or purpose. *See, e.g.*, Kevin Cole & Fred C. Zacharias, *The Agony of Victory and the Ethics of Lawyer Speech*, 69 S. CAL. L. REV. 1627, 1642, 1644 & n.77, 1652 n.105, 1672 n.167 (1996); Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265, 296, 318 (2006). Zacharias & Green, *supra* note 6, at 11, 19 n.126, 28 & n.170, 59, 62; Fred C. Zacharias, *A Nouveau Realist’s View of Interjurisdictional Practice Rules*, 36 S. TEX. L. REV. 1037, 1040 n.14 (1995); Fred C. Zacharias, *Can Prosecutors Do Justice?*, *supra* note 45, at 72, 94; Fred C. Zacharias, *Effects of Reputation on the Legal Profession*, 65 WASH. & LEE L. REV. 173, 178, 198 (2008); Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 346 (1994); Zacharias, *Justice in Plea Bargaining*, *supra* note 57, at 1185; Fred C. Zacharias, *Lawyers As Gatekeepers*, 41 SAN DIEGO L. REV. 1387, 1392 (2004); Fred C. Zacharias, *Limits on Client Autonomy in Legal Ethics Regulation*, 81 B.U. L. REV. 199, 225 n.134, 232 (2001); Fred C. Zacharias, *Practice, Theory, and the War on Terror*, 59 EMORY L.J. 333, 364 (2009); Fred C. Zacharias, *Professional Responsibility, Therapeutic Jurisprudence, and Preventive Law*, 5 PSYCHOL. PUB. POL’Y & L. 909, 915 (1999); Zacharias, *Reconciling Professionalism*, *supra* note 57, at 1377; Fred C. Zacharias, *Reform or Professional Responsibility as Usual: Whither the Institutions of Regulation and Discipline?*, 2003 U. ILL. L. REV. 1505, 1512 n.32 (2003); Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 391 (1989) [hereinafter Zacharias, *Rethinking Confidentiality*]; Fred C. Zacharias, *Steroids and Legal Ethics Codes: Are Lawyers Rational Actors?*, 85 NOTRE DAME L. REV. 671, 695, 703 (2010) [hereinafter Zacharias, *Steroids and Legal Ethics Codes*]; Fred C. Zacharias, *The Future Structure and Regulation of Law Practice: Confronting Lies, Fictions, and False Paradigms in Legal Ethics Regulation*, 44 ARIZ. L. REV. 829, 849, 853 (2002); Fred C. Zacharias, *The Humanization of Lawyers*, 2002 PROF. LAW. 9, 10 n.10 (2002); Fred C. Zacharias, *The Images of Lawyers*, 20 GEO. J. LEGAL ETHICS 73, 79-80, 99 (2007)

rules are more susceptible to the kinds of contextual judgments that would take into account the underlying purpose of the law.<sup>65</sup>

First, ethics codes constitute a body of law aimed directly and exclusively at lawyers. To be sure, the manner in which the lawyer applies ethics rules will often—inevitably—implicate the interests of the client. Nevertheless, unlike a scenario in which the lawyer fails to apply the letter of general laws that support the goals of the client, the lawyer’s adherence to the spirit of ethics codes may be understood to have only a derivative—albeit, at times, significant—effect on the client’s interests. Second, although ethics codes share some qualities, in both form and substance, with other statutory and regulatory schemes,<sup>66</sup> by their

---

[hereinafter Zacharias, *Images of Lawyers*]; Fred C. Zacharias, *The Lawyer as Conscientious Objector*, 54 RUTGERS L. REV. 191, 197 (2001); Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147, 1184 n.163 (2009); Fred C. Zacharias, *The Preemployment Ethical Role of Lawyers: Are Lawyers Really Fiduciaries?*, 49 WM & MARY L. REV. 569, 596 (2007); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 772, 778 (2001); Fred C. Zacharias, *The Restatement and Confidentiality*, 46 OKLA. L. REV. 73, 77 (1993); Fred C. Zacharias, *What Lawyers Do When Nobody’s Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules*, 87 IOWA L. REV. 971, 1016 (2002); Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1, 25 (2009); Fred C. Zacharias & Shaun Martin, *Coaching Witnesses*, 87 KY. L.J. 1001, 1011 (1999).

65. See, e.g., *E.E.O.C. v. Hora, Inc.*, Civ. A. 03-CV-1429, 2005 WL 1387982 (E.D. Pa. June 8, 2005), at \*10 (“[C]alculating one’s behavior to merely comply with the wording of the professional rules, while doing violence to their spirit, is fundamentally inconsistent with a lawyer’s responsibilities to the parties, to the community at large and to the Court.”); Jon Bauer, *Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers’ Ethics*, 87 OR. L. REV. 481 (2008) (analyzing MODEL RULES OF PROF’L CONDUCT R. 3.4(f)); Samuel J. Levine, *Taking Ethics Codes Seriously: Broad Ethics Provisions and Unenumerated Ethical Obligations in a Comparative Hermeneutic Framework*, 77 TULANE L. REV. 527 (2003) (analyzing MODEL CODE OF PROF’L RESPONSIBILITY DR 1-102(A)(5), DR 1-102(A)(6), and Canon 9, and MODEL RULES OF PROF’L CONDUCT R. 8.4(d)); Andrew M. Perlman, *Untangling Ethics Theory From Attorney Conduct Rules: The Case of Inadvertent Disclosures*, 13 GEO. MASON L. REV. 767 (2005) (analyzing MODEL RULES OF PROF’L CONDUCT R. 4.4(d)); Dennis J. Tuchler, *Teaching Legal Profession: Ethics Under the Model Rules*, 51 ST. LOUIS U. L.J. 1161, 1171 n.35 (2007) (analyzing MODEL RULES OF PROF’L CONDUCT R. 1.3). Cf. *Lake v. City of Phoenix*, CA-CV 07-0415, 2009 WL 73256 (Ariz. Ct. App. Jan. 13, 2009) (analyzing whether metadata is “public record” under ARIZ. REV. STAT. ANN. §§ 39-121 to 39-121.03); Scott W. Cockerham, Note, *Lake v. City of Phoenix: Is Metadata a Public Record?*, 51 ARIZ. L. REV. 517 (2009).

66. See, e.g., Benjamin H. Barton, *The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 N.C. L. REV. 411 (2005); Mary C. Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by U.S. and Foreign Lawyers*, 32 VAND. J. TRANSNAT’L L. 1117 (1999); Bruce A. Green, *Doe v. Grievance Committee: On the Interpretation of Ethical Rules*, 55 BROOK. L. REV. 485 (1989); Geoffrey C. Hazard Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239 (1991); Levine, *supra* note 65; Richard W. Painter, *Rules Lawyers Play By*, 76 N.Y.U. L. REV. 665 (2001); Ellen S. Podgor, *Criminal Misconduct: Ethical Rule Usage Leads to Regulation of the Legal Profession*, 61 TEMP. L. REV. 1323 (1988); Tanina Rostain, *Ethics Lost: Limitations of Current Approaches to*



nature, ethics regulations are designed, at least in part, to incorporate ethical aspirations and considerations. Accordingly, a spirit of the law analysis may appropriately play a central role in the interpretation and application of ethics rules. Third, ethics codes—in particular the ABA models that for decades have established the template for the rules enacted by courts—include comments expressly stating the rationale behind many of the rules, thus greatly facilitating the lawyer's ability to accurately—and often definitively—identify the underlying purpose of an ethics provision.<sup>67</sup>

To explore the possible relevance of a spirit of the law analysis to ethics codes, it may be illustrative to consider the letter and the spirit of the “no-contact” rule, an ethical duty that finds its origins in the 1908 Canons of Professional Ethics<sup>68</sup> and has taken a more expansive form in contemporary ethics codes. The current version of Model Rule of Professional Conduct 4.2 reads:

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 or is authorized to do so by law or court order.<sup>69</sup>

The scope of rule applies unambiguously to the overwhelming majority of cases, in which the parties in a matter are represented by lawyers. In such cases, the rule clearly prohibits communication between one party's attorney and a person known to be represented in the case by another attorney, absent the consent of the other attorney. The rule is intentionally drafted to exclude the less common scenario, in which a party is proceeding *pro se*. In this scenario, addressed by Model Rule 4.3,<sup>70</sup> a lawyer representing a person in the matter is permitted to communicate with an unrepresented person, subject to various provisions designed to

---

*Lawyer Regulation*, 71 S. CAL. L. REV. 1273 (1988); Irma S. Russell, *The Evolving Regulation of the Legal Profession: The Costs of Indeterminacy and Certainty*, 2008 J. PROF. LAWYER 137 (2008); Murray L. Schwartz, *The Death and Regeneration of Ethics*, 1980 AM. B. FOUND. RES. J. 953; Serena Stier, *Legal Ethics: The Integrity Thesis*, 52 OHIO ST. L.J. 551 (1991); Maura Strassberg, *Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics*, 80 IOWA L. REV. 901 (1995); Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics—I. Origins*, 8 U. CHI. L. SCH. ROUNDTABLE 469 (2001); Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics—II The Modern Era*, 15 GEO. J. LEGAL ETHICS 205 (2002); Zacharias, *Specificity in Professional Responsibility Codes*, *supra* note 45.

67. TEX. DISCIPLINARY RULES OF PROF'L CONDUCT, Preamble (“The Comments also frequently illustrate or explain applications of the rules, in order to provide guidance for interpreting the rules and for practicing in compliance with the spirit of the rules.”).

68. See ABA CANONS OF PROF'L ETHICS NO. 9 (1908) (“A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel.”), *cited in* Geoffrey C. Hazard, Jr. & Dana Remus, *Toward a Revised 4.2 No-Contact Rule*, 60 HASTINGS L.J. 797, 799 (2009).

69. MODEL RULES OF PROF'L CONDUCT R. 4.2.

70. MODEL RULES OF PROF'L CONDUCT R. 4.3.

protect the unrepresented individual from potential misunderstanding and to prevent the lawyer from taking unfair advantage of the situation.<sup>71</sup>

However, neither Model Rule 4.2 nor Model Rule 4.3 expressly addresses a case in which a lawyer is proceeding as a *pro se* party to a matter. Specifically, the rules seem to leave unanswered the question of whether a lawyer who is proceeding *pro se* may communicate with another person involved in the matter, without obtaining consent from that person’s lawyer.<sup>72</sup> Courts, bar associations, and scholars have offered a strikingly diverse range of opinions on this question: Some categorically prohibit such communication,<sup>73</sup> others universally permit such communication,<sup>74</sup> while still others propound various intermediate positions on the issue.<sup>75</sup> Notably, these widely ranging outcomes are likewise accompanied

---

71. *See id.*:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

*Id.*

72. In some states, the no-contact rules have expressly addressed the *pro se* lawyer. *See, e.g., In re Conduct of Knappenberger*, 108 P.3d 1161, 1163 (Or. 2005) (citing OR. CODE OF PROF’L RESPONSIBILITY DR 7-104(A)(1)) (“This prohibition includes a lawyer representing a lawyer’s own interests.”); *Fishelson v. Skorupa*, 13 Mass. L. Rptr. 458 (2001), at \*1 (noting that Comment to Rule 4.2 extends no-contact rule to *pro se* lawyers); CAL. RULES OF PROFESSIONAL CONDUCT, R. 2-100, Discussion (“[T]he rule does not prohibit a member who is also a party to a legal matter from directly or indirectly communicating on his or her own behalf with a represented party.”); MINN. RULES OF PROF’L CONDUCT R. 4.2.

73. *See, e.g., Comm. on Legal Ethics of the West Virginia State Bar v. Simmons*, 399 S.E.2d 894 (W. Va. 1990); *In re Haley*, 126 P.3d 1262 (Wash. 2006); *In re Lucas*, 789 N.W.2d 73 (N.D. 2010); *In re Schaefer*, 25 P.3d 191 (Nev. 2001); *Medina Cty. Bar Assn. v. Cameron*, 958 N.E.2d 138 (Ohio 2011); *Runsvold v. Idaho State Bar*, 925 P.2d 1118 (Idaho 1996); *Sandstrom v. Sandstrom*, 880 P.2d 103 (Wyo. 1994); *In re Segall*, 509 N.E.2d 988 (Ill. 1987); *Vickery v. Commission for Lawyer Discipline*, 5 S.W.3d 241 (Tex.App.1999). *See also* Alaska Bar Ass’n Ethics Comm., Ethics Op. 7 (1995); D.C. Ethics Op. 258 (1995); Haw. Disciplinary Bd., Formal Op. 44 (2003); S.C. Bar Ethics Advisory Comm., Op. 86-10 (June 16, 1986); State Bar of Nev. Standing Comm. On Ethics & Prof’l Responsibility, Formal Op. 8 (1987); *The Ethics Committee: Can Pro Se Lawyer Speak with a Represented Party Over the Objection of the Party’s Lawyer?*, 39 MD. B.J. 57 (2006); Margaret Raymond, *Professional Responsibility for the Pro Se Attorney*, 1 ST. MARY’S J. LEGAL MAL. & ETHICS 2 (2011).

74. *Pinsky v. Statewide Grievance Comm.*, 578 A.2d 1075, 1079 (Conn. 1990); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 99(1) (b).

75. *See, e.g.,* Jessica J. Berch & Michael A. Berch, *May I Have a Word With You: Oops, Have I Already Violated the No-Contact Rule?*, 6 PHOENIX L. REV. 433 (2013); George M. Cohen, *Beyond the No-Contact Rule: Ex Parte Contact by Lawyers with Nonclients*, 87 TUL. L. REV. 1197 (2013); Hazard & Remus, *supra* note 68; Stephen J. Langs, *Legal Ethics: The Question*

by very different approaches to both the underlying purpose of the no-contact rule and, perhaps more significantly, the relevance of the rule's ostensible purpose to the interpretation and application of the rule. Accordingly, an examination of the no-contact rule may provide a helpful exercise for considering the relationship between the letter of the law and the spirit of the law in legal ethics, particularly in the context of interpreting and applying ethics codes.

In one of the first reported cases deciding this issue, *Pinsky v. Statewide Grievance Committee*, the Supreme Court of Connecticut held that the no-contact rule does not prohibit communications between a lawyer proceeding *pro se* and a represented party to the matter.<sup>76</sup> The court found that “[t]he language of Rule 4.2 and the comments thereto, limit the restriction on communications with represented parties to those situations where the attorney is ‘representing a client.’ Here, the plaintiff was not ‘representing a client.’”<sup>77</sup> In addition to relying on the text of the rule, the court referred to an official comment to the rule, which states that “parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so.”<sup>78</sup>

Notably the court acknowledged the appeal of an approach that would broaden the scope of the no-contact rule to cover the lawyer who is acting *pro se*. As the court put it, “The purpose of [the no-contact rule] is to preserve the integrity of the lawyer-client relationship by protecting the represented party from the superior knowledge and skill of the opposing lawyer. The rule is designed to prevent situations in which a represented party may be taken advantage of by opposing counsel.”<sup>79</sup> As such, applying the rule to the *pro se* lawyer would seem to promote the purpose of the rule. Moreover, the court characterized the lawyer's communication with the opposing party as “less than prudent.”<sup>80</sup> Nevertheless, the court concluded, the lawyer's conduct “did not violate Rule 4.2.”<sup>81</sup> Thus, rather than resorting to a spirit of the rule analysis to impose more expansive—and perhaps more attractive—ethical duties, the court limited the scope of the lawyer's ethical obligations to those duties mandated by the letter of the rule.

In the years since *Pinsky* was decided, however, every other court faced with this issue has apparently adopted a contrary approach, relying on the purpose of the no-contact rule as a basis for applying the rule to the *pro se* attorney.<sup>82</sup> As the

---

*of Ex Parte Communications and Pro Se Lawyers under Model Rule 4.2-Hey, Can We Talk?*, 19 W. NEW ENG. L. REV. 421 (1997); Carl A. Pierce, *Variations on a Basic Theme: Revising the ABA's Revision of Model Rule 4.2 (Part II)*, 70 TENN. L. REV. 321 (2003).

76. *Pinsky*, 578 A.2d at 1079.

77. *Id.* (quoting CONN. RULES OF PROF'L CONDUCT, R. 4.2 & cmt.).

78. *Id.* (quoting CONN. RULES OF PROF'L CONDUCT, R. 4.2, cmt.) (italics omitted).

79. *Id.*

80. *Id.*

81. *Id.*

82. Margaret Raymond has noted that *Pinsky* involved a lawyer who, as a party to the case, was also represented by counsel, and thus was not a *pro se* lawyer. See Raymond, *supra* note 73,

Supreme Court of North Dakota observed in the 2010 case *In re Lucas*, “Most courts have rejected *Pinsky*, reasoning ‘the policies underlying [Rule 4.2] are better served by extending the restriction to lawyers acting *pro se*.’”<sup>83</sup> Quoting from the official comment to the North Dakota Rules of Professional Conduct, which in turn was adopted verbatim from the Comment to the Model Rules, the court explained that the purpose of the rule is to protect “a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the lawyer-client relationship, and the uncounseled disclosure of information relating to the representation.”<sup>84</sup> In light of this purpose, the court characterized the view that the rule should not apply to *pro se* lawyer as “too narrow.”<sup>85</sup> Instead, like nearly every court and bar committee before it, the Supreme Court of North Dakota took a more expansive view of the rule.

Significantly, the court’s analysis in *Lucas* was premised, in part, on the threshold conclusion that “[t]he rule does not specify whether it applies to attorneys representing themselves.”<sup>86</sup> Based on this reading, the court proceeded immediately to the spirit of the rule, dispensing with any need for interpretation or application of the letter of the rule. The court’s analysis implies that because the language of the rule does not expressly include a *pro se* attorney, the rule should be understood in way that is consistent with its purpose. Therefore, having determined that the letter of the rule failed to provide any guidance regarding *pro se* lawyers, the *Lucas* court relied entirely on a spirit of the rule analysis. The *Pinsky* court, in contrast, characterized the rule’s language as limiting the prohibition to a lawyer who is “representing a client,”<sup>87</sup> thus expressly excluding a *pro se* lawyer. Consequently, according to the court in *Pinsky*, any interest in advancing the ostensible purpose of the rule, albeit possibly admirable, is insufficient to override the application of the letter of the rule.

A similar diversion in approaches to the letter and spirit of the no-contact rule underlies the various divisions between justices of the Supreme Court of Washington in the 2006 case, *In re Disciplinary Proceeding Against Haley*.<sup>88</sup> The majority of the court interpreted the no-contact rule to include a lawyer who is proceeding *pro se*, but the court applied this interpretation only prospectively, because it found that the language of the rule was “impermissibly vague” with respect to *pro se* lawyers.<sup>89</sup>

---

at 14 n.41. See also *In re Haley*, 126 P.3d 1262, 1268-69 (Wash. 2006). Nevertheless, according to most courts, this factual distinction does not result in a legal difference. Instead, these courts have understood *Pinsky* to apply to unrepresented lawyer-parties as well. See, e.g., *In re Lucas*, 789 N.W.2d 73, 76 (N.D. 2010) (citing cases).

83. *In re Lucas*, 789 N.W.2d at 76 (quoting *In re Haley*, 126 P.3d 1262, 1267 (Wash. 2006))

84. *Id.* at 76 (quoting N.D. RULES OF PROF’L CONDUCT 4.2, cmt. 1)

85. *Id.*

86. *Id.* at 75.

87. *Pinsky v. Statewide Grievance Committee*, 578 A.2d 1075, 1079 (Conn. 1990).

88. *In re Haley*, 126 P.3d 1262, 1267 (Wash. 2006).

89. *Id.* at 1267-69.

In dissent, Chief Justice Alexander agreed with the majority's interpretation of the rule, but argued that the rule should be applied to *pro se* lawyers retrospectively as well.<sup>90</sup> Finally, in a concurring opinion, Justice Sanders, who was joined by Justice Madsen in a separate concurrence, argued that the rule should not apply to *pro se* lawyers, finding that "[t]he plain language of [Rule of Professional Conduct] 4.2 unambiguously exempts self-represented lawyers."<sup>91</sup>

The majority in *Haley* adopted the position that has likewise been articulated by a majority of courts deciding this issue, including the *Lucas* court: because the letter of the no-contact rule does not address lawyers who are acting *pro se*, the question turns on an analysis of the purpose or spirit of the rule. After quoting the extensive comment to Model Rule 4.2,<sup>92</sup> the court added concisely that "[t]he rule's purpose is to prevent situations in which a represented party is taken advantage of by adverse counsel."<sup>93</sup> Accordingly, the court found that "the policies underlying the rule are better served by extending the restriction to lawyers acting *pro se*."<sup>94</sup> Nevertheless, the court decided to extend the rule only prospectively, observing that some authorities had interpreted the rule otherwise, and thus holding that the language of the rule was "impermissibly vague" for the purposes of retroactive applicability.<sup>95</sup>

Despite dissenting from the majority opinion, Chief Justice Alexander offered a similar interpretive approach, likewise concluding that the no-contact rule should extend to a *pro se* lawyer.<sup>96</sup> He disagreed, however, with the majority's decision to extend the rule only prospectively.<sup>97</sup> Notably, though Chief Justice Alexander's approach was also premised on a purposive analysis, he looked beyond the purpose underlying the no-contact rule, instead focusing on the more general purpose of attorney discipline. Quoting from Washington Supreme Court precedents, Chief Justice Alexander declared that "our purpose in disciplining attorneys is to protect the public and to preserve confidence in the legal system."<sup>98</sup> Accordingly, he found that it would be appropriate to discipline the attorney in *Haley* for violating the no-contact rule, in order to achieve the purpose of protecting the public.<sup>99</sup>

Justice Sanders' concurring opinion operates under a fundamentally different premise. Although Justice Sanders did not cite *Pinsky*, his analysis mirrors

---

90. *Id.* at 1275-76 (Alexander, C.J., dissenting).

91. *Id.* at 1272 (Sanders, J., concurring).

92. *Id.* at 1266-67 & n.5 (quoting ABA ANNOTATED MODEL RULES, R. 4.2, cmt. 1).

93. *Id.* at 1267 (quoting *In re Disciplinary Proceeding Against Carmick*, 48 P.3d 311 (Wash. 2002)) (internal citation omitted).

94. *Id.*

95. *Id.* at 1269.

96. *Id.* at 1275 (Alexander, C.J., dissenting).

97. *Id.* at 1275-76 (Alexander, C.J., dissenting).

98. *Id.* at 1277 (Alexander, C.J., dissenting) (quoting *In re Disciplinary Proceeding Against Curran*, 115 801 P.2d 962 (Wash. 1990)) (internal quotations omitted).

99. *Id.* at 1277 (Alexander, C.J., dissenting).

the contrary approach of the Connecticut Supreme Court, finding it not only unnecessary but also unjustified to rely on the rule’s purpose to support an interpretation that—according to Justice Sanders—runs contrary to the letter of the rule. Throughout his concurrence, Justice Sanders repeatedly references the “plain language” of the rule<sup>100</sup> found in the opening words of the rule: “In representing a client . . .”<sup>101</sup> By direct implication, according to Justice Sanders, the letter of the rule excludes a *pro se* lawyer, who does not represent a client. Therefore, in Justice Sanders’ view, “the majority’s reliance on the ‘purpose’ of [the rule] is misplaced.”<sup>102</sup> In short, as he put it, “[w]hatever the purpose of RPC 4.2(a), it cannot extend to persons and actions its plain language excludes.”<sup>103</sup>

The methodologies courts have employed to expand the scope of the no-contact rule to include *pro se* lawyers exemplify the potential relevance of a spirit of the law approach for the interpretation of ethics codes. First, courts have emphasized that the no-contact rule aims to protect the interests of both individual clients and the public by preventing overreaching and interference by a skilled lawyer who is advancing adversarial interests. Therefore, the obligations imposed by the rule are directed at all lawyers, including not only those representing clients but also those proceeding *pro se*, who likewise are prohibited from interfering with another party’s attorney-client relationship. Second, in the process of identifying the purpose of the no-contact rule, courts have consistently turned to the official comments to ABA Model Rule 4.2, as well as comments incorporated into the ethics codes enacted by state courts. Thus, rather than speculating about the possible rationale for a law or its relevance to the law’s operation, courts have relied on the statements of the bodies that promulgate and enact ethics rules. Finally, applying the no-contact rule to the *pro se* lawyer, notwithstanding the rule’s reference to a lawyer who is “representing a client,” is premised on an understanding of ethics codes as promoting and imposing broad ethical aspirations for lawyers, expanding upon the obligations expressly mandated in the language of the rules. Thus, the no-contact rule provides a notable instance in which judges have looked beyond the letter of ethics codes, instead offering an analysis that identifies and adopts the underlying purposes and functions of the rules as a primary means for interpreting and applying the rules.

Still, despite the significance of the spirit of the rule analysis offered by judges to interpret the no-contact rule, there may be limitations to its relevance in the context of other ethics rules. For example, courts that applied the spirit of the no-contact rule rejected the premise that their interpretation contradicted the plain meaning of the rule. Instead, in the view of these courts, the expansive interpretation of the no-contact rule merely placed additional ethical obligations

---

100. *Id.* at 1272-75 (Sanders, J., concurring) (referring ten times to the “plain language” of the rule).

101. *Id.* at 1272-75 (Sanders, J. concurring) (quoting WASH. RULES OF PROF’L CONDUCT R. 4.2(a))

102. *Id.* at 1272 (Sanders, J., concurring).

103. *Id.* at 1272 (Sanders, J. concurring).

on lawyers, rather than applying the spirit of the rule to subvert the rule's mandates. Similarly, expanding the duties of the *pro se* lawyer further safeguards an attorney-client relationship—in this case, that of the adversarial lawyer and client—rather than having the possible consequence of impinging upon the sense of trust and loyalty that exists between a lawyer and client.

A more robust and generally relevant spirit of the rule analysis might involve a more complex and more challenging application of the spirit of an ethics rule, in which: the spirit of the rule is invoked to contradict the letter of the rule; the interpretation results in excepting lawyers from an ethical obligation otherwise mandated by the rule; and, as a further result, the conduct permitted of the lawyer might negatively impact that lawyer's attorney-client relationship. Thus, to more fully illustrate the potential relevance of a spirit of the rule analysis to the interpretation of ethics codes, it may be instructive to explore one of the most important and, at times, most controversial subjects of ethics regulation: the lawyer's duty of confidentiality. Specifically, perhaps the spirit of the law of confidentiality should serve as a basis for interpreting the rule of confidentiality in a manner that expands upon the exceptions expressly carved out in the rule. Such an interpretation would subvert the letter of the rule, thereby exempting lawyers from the more general prohibition delineated in the rule, and, as a result, would have a negative effect on the attorney-client relationship.

In fact, the effort to engage in a more expansive interpretation of the exceptions to a lawyer's duty of confidentiality plays a central role in Bill Simon's contextual approach to legal ethics. Accordingly, an analysis of the spirit of the rule of confidentiality may offer an additional setting to evaluate Simon's approach, while at the time providing a context for considering an alternative spirit of the rule approach. Although the two approaches achieve a somewhat similar result, they are premised upon substantially different frameworks and proceed along significantly different methodologies.

### III. The “Spirit” of Ethics Codes: The Duty of Confidentiality and the Innocent Convict

#### A. Simon's Approach

The organized bar has consistently characterized the duty to maintain client confidences as one of the central components of the attorney-client relationship.<sup>104</sup> However, the broad scope of the letter of the rules of confidentiality requires that the lawyer ignore not only the inherently—and predictably—

---

104. See MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (“A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation.”). See also Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. Rev. 1389, 1427-47 (1992) (examining the “centrality and power of the norm of confidentiality in the bar's nomos” and referring to confidentiality as a “constitutional norm” in the bar's nomos); *id.*:

detrimental effect on the interests of the client’s adversary, but also, under most circumstances, any negative effect on innocent and uninvolved third parties. Although the Model Rules permit lawyers to reveal confidences in certain exceptional scenarios,<sup>105</sup> in most situations the lawyer is obligated to maintain confidentiality without concern for considerations of promoting justice or the spirit of the law. These sometimes troubling aspects of confidentiality have led ethics scholars to question both the primacy and the scope of the lawyer’s duty of confidentiality.<sup>106</sup> Simon articulates the question poignantly: “why do we value the improvement in legal advice to the client that confidentiality facilitates above the prevention of injustices to others that confidentiality inhibits?”<sup>107</sup>

Indeed, it may not be surprising that the duty of confidentiality features prominently in alternative views of the lawyer’s role, including Simon’s model that emphasizes the lawyer’s duty to serve the interests of justice. At a number of points in his book, Simon returns to the case of the “Innocent Convict”.<sup>108</sup> In a conversation with the lawyer, the client admits to having committed a crime for which someone else has been wrongly convicted. Although amendments to the Model Rules would arguably permit the lawyer to disclose this confidential information,<sup>109</sup> many states retain a version of the rule that does not permit disclosure of the client’s past crimes, even when necessary to prevent death or serious physical harm to another.<sup>110</sup> As the former version the Model Rule

---

so central to group definition . . . that the group perceives threats to the norm as threats against . . . the group’s very existence; that the group sees proposals to change the norm as proposals to change the . . . group itself; and consequently that the group feels extreme action in defense of the norm is justified.

*Id.* at 1427. See generally Zacharias, *Rethinking Confidentiality*, *supra* note 64.

105. See MODEL RULES OF PROF’L CONDUCT R. 1.6(b).

106. See, e.g., Roger C. Cramton & Lori P. Knowles, *Professional Secrecy and its Exceptions: Spaulding v. Zimmerman Revisited*, 83 MINN. L. REV. 63 (1998); Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1 (1998); Steven Shavell, *Legal Advice About Contemplated Acts: The Decision to Obtain Advice, Its Social Desirability, and Protection of Confidentiality*, 17 J. LEGAL STUDIES 123 (1988); Dru Stevenson, *Against Confidentiality*, 48 U.C. DAVIS L. REV. 337 (2014); Zacharias, *Rethinking Confidentiality*, *supra* note 64; Fred C. Zacharias, *Rethinking Confidentiality II: Is Confidentiality Constitutional?*, 75 IOWA L. REV. 601 (1990). See also Mario J. Madden, *The Indiscrete Role of Lawyer Discretion in Confidentiality Rules*, 14 GEO. J. LEGAL ETHICS 603, 606 (2001).

107. SIMON, *supra* note 13, at 55.

108. See *id.* at 4-5, 17, 40, 54, 222 n.9, 163-64.

109. See MODEL RULES OF PROF’L CONDUCT R. 1.6(b) (1) (permitting disclosure “to prevent reasonably certain death or substantial bodily harm”).

110. See, e.g., AL. RULES OF PROF’L CONDUCT R. 1.6(b)(1) (“A lawyer may reveal such information to the extent the lawyer reasonably believes necessary [t]o prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm”); ARK. RULES OF PROF’L CONDUCT R. 1.6(b)(1) (“A lawyer may reveal such information to the extent the lawyer reasonably believes necessary [ ] to prevent the commission of a criminal act”); CA. RULES OF PROF’L CONDUCT R. 3-100(B) (“A member may, but is not required to, reveal confi-



stated, “A lawyer may reveal [confidential] information . . . to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.”

Rather than accepting the outcome apparently mandated by this rule, Simon looks to the spirit of the duty of confidentiality. Employing a purposive analysis, Simon challenges a number of rationales offered in support of a strict application of confidentiality, finding them not merely unconvincing,<sup>111</sup> but “dogmatic and incoherent.”<sup>112</sup> Accordingly, consistent with the principles of promoting justice

---

dential information relating to the representation of a client to the extent that the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.”); CONN. RULES OF PROF’L CONDUCT R. 1.6 (b) (“A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm.”); D.C. RULES OF PROF’L CONDUCT R. 1.6 (c) (1) (“A lawyer may reveal client confidences and secrets, to the extent reasonably necessary [ ] to prevent a criminal act that the lawyer reasonably believes is likely to result in death or substantial bodily harm absent disclosure of the client’s secrets or confidences by the lawyer”); HAW. RULES OF PROF’L CONDUCT R. 1.6 (b) (1) (“A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary [ ] to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another”); MICH. RULES OF PROF’L CONDUCT R. 1.6 (c)(4) (“A lawyer may reveal [ ] the intention of a client to commit a crime and the information necessary to prevent the crime.”); N.J. RULES OF PROF’L CONDUCT R. 1.6 (b)(1) (“A lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client or another person [ ] from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another”); R.I. DISCIPLINARY RULES OF PROF’L CONDUCT R. 1.6 (b) (1) (“A lawyer may reveal such information to the extent the lawyer reasonably believes necessary [ ] to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm”); S.D. RULES OF PROF’L RESPONSIBILITY R. 1.6(b)(1) (“A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary [ ] to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm”); TEX. DISCIPLINARY RULES OF PROF’L CONDUCT R. 1.05(c)(7) (“A lawyer may reveal confidential information [w]hen the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act”); VT. RULES OF PROF’L CONDUCT R. 1.6(b) (1) (“A lawyer must reveal information relating to the representation of a client when required by other provisions of these rules or to the extent the lawyer reasonably believes necessary [ ] to prevent the client or another person from committing a criminal act that the lawyer reasonably believes is likely to result in the death of, or substantial bodily harm to, a person other than the person committing the act”); VA. RULES OF PROF’L CONDUCT R. 1.6 (c) (1) (“A lawyer shall promptly reveal [ ] the intention of a client, as stated by the client, to commit a crime and the information necessary to prevent the crime . . . .”); WY. RULES OF PROF’L CONDUCT FOR ATTORNEYS AT LAW R. 1.6(b) (1) (“A lawyer may reveal such information to the extent the lawyer reasonably believes necessary [ ] to prevent the client from committing a criminal act”).

111. SIMON, *supra* note 13, at 54-62.

112. *Id.* at 164.

that form the core element of the Contextual Model, Simon concludes that the lawyer should disclose confidential information in this case, to prevent “substantial injustice.”<sup>113</sup>

---

113. *Id.* at 62. Similarly, some proponents of a religious lawyering model point to the excesses of the rules of confidentiality as an area of legal practice that requires rethinking through a lens other than the zealous representation of the interests of the client. The scenario of the Innocent Convict—particularly the innocent convict on death row—has served as a prime example for scholars who have decried the disconnect between the results permitted or mandated by the Model Rules and those prescribed under many religious systems. Some scholars have rejected the notion that fidelity to the ideals of confidentiality should lead a lawyer to allow an innocent individual to remain wrongfully incarcerated, while many have insisted that lawyers should breach confidentiality to save the life of an innocent death-row inmate. *See Levine, supra* note 22, at 21, 38 nn.113-15 (2003) (citing sources).

Notably, Monroe Freedman, who is perhaps the preeminent scholar identified with the traditional model of zealous advocacy, and whose vision of the duty of zealous advocacy—particularly in the work of the criminal defense attorney—generally adopts a client-centered view of lawyering that goes beyond the contours incorporated into the Model Rules, *see* MONROE H. FREEDMAN, *LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM* (1975), was a leading voice in the successful effort to amend the Model Rules to permit disclosure of confidential information to prevent the execution of an innocent death-row inmate. Freedman expressly acknowledged his religious faith as the basis for this position, which in some ways seems to run contrary to his general insistence on protecting the rights of the client. *See* Monroe Freedman, *Legal Ethics from a Jewish Perspective*, 27 *TEX. TECH L. REV.* 1131 (1996).

Of course, arguments for revealing confidences to save the life of the innocent third party are not exclusively religious in nature. After all, many value systems would likely reach a similar result, as would Simon’s Contextual View. Instead, religious lawyering may be seen as but one example of lawyers appealing to their own moral conscience as a guide to their ethical decision making. However, in relying upon the lawyer’s duty to self, religious lawyering appeals to values different from those underlying both the client-centered view and Simon’s model of promoting justice. *See* Samuel J. Levine, *Taking the Ethical Duty to Self Seriously: An Essay in Memory of Fred Zacharias*, 48 *SAN DIEGO L. REV.* 285 (2011).

For more on religious lawyering, *see, e.g.*, Russell G. Pearce & Amelia J. Uelmen, *Religious Lawyering in a Liberal Democracy: A Challenge and an Invitation*, 55 *CASE W. RES. L. REV.* 127 (2004); Howard Lesnick, *Riding the Second Wave of the So-Called Religious Lawyering Movement*, 75 *ST. JOHN’S L. REV.* 283 (2001); Robert K. Vischer, *Heretics in the Temple of Law: The Promise and Peril of the Religious Lawyering Movement*, 19 *J.L. & RELIGION* 427 (2004). For examples of conferences and programs exploring the relationship between religion and the practice of law, *see* *AALS Section on Professional Responsibility 2006 Annual Meeting Papers*, 21 *J.L. & RELIGION* 265 (2005-2006); Colloquium, *Can the Ordinary Practice of Law be a Religious Calling?*, 32 *PEPP. L. REV.* 373 (2005); Symposium, *Rediscovering the Role of Religion in the Lives of Lawyers and Those They Represent*, 26 *FORDHAM URB. L.J.* 821 (1999); *Faith and the Law Symposium*, 27 *TEX. TECH L. REV.* 911 (1996); Symposium on *Law & Politics as Vocation*, 20 *NOTRE DAME J.L. ETHICS & PUB. POL’Y* 1 (2006); Symposium on *Lawyering and Personal Values*, 38 *CATH. LAW.* 145 (1998); Symposium, *The Relevance of Religion to a Lawyer’s Work: An Interfaith Conference*, 66 *FORDHAM L. REV.* 1075 (1998); *Touro Law Center hosts the 2012 Conference of Religiously Affiliated Law Schools*, TOURO LAW CENTER, <http://www.tourolaw.edu/News/?pageid=631> (last visited July 9, 2015) (focusing on “The Place of Religion in the Law School, the University and the Practice of Law”); Samuel J. Levine, *Foreword: Conference on Religious Legal Theory: RLT IV: Expanding*

Again, however, Simon's approach may be vulnerable to the criticism that, in spite of the appeal of both the ideals he expresses and the outcome he advocates, his analysis veers too far beyond the realm of legal values and arguments, relying instead on notions more similar to the kinds of "moral values" he purports to avoid. Indeed, Simon accepts the possibility that, contrary to his analysis, it remains "unavoidable" that the letter of the law prohibits disclosure even to protect the Innocent Convict.<sup>114</sup> Simon further concedes: that "[e]ven if the arguments for categorical confidentiality safeguards are not strong, we have to acknowledge that many people, including people with authority over the matter, accept them"; that "the norms have been recently enacted, often after substantial public debate"; that "the bar's rules are consistent in important respects with the attorney-client privilege in the law of evidence"; and that "professional responsibility norms are ultimately enacted by courts."<sup>115</sup>

Thus, while he rejects the law's conclusions in this case, Simon appears to recognize that perhaps the letter of this law should not be so readily supplanted by the spirit of seeking justice. Indeed, perhaps the letter of the law of strict confidentiality incorporates underlying purposes unidentified or underappreciated by Simon. Conversely, perhaps the bar and bench were aware of Simon's concerns about justice but found them insufficient to override the underlying purposes of confidentiality. In short, perhaps Simon too readily dismisses the letter of the law without providing adequate legal justification for applying the spirit of the law in its place.

It may be telling that, ultimately, Simon's arguments for disclosure seem to take on the form of moral outrage rather than legal analysis. Simon refers to the "substantive absurdity" of applying confidentiality in the case of the Innocent Convict, asserting that if "disclosure would probably save an innocent life without posing a demonstrable threat to important rights of others . . . it would be grotesque not to disclose them." Finally, he concludes, if the law cannot be interpreted to allow for disclosure, "the lawyer should defy the rule, not as an act of lawlessness, but as an act of principled commitment to legal values more fundamental than those that support the rule."<sup>116</sup> Thus, Simon relies on the claim that an outright violation of the terms of the rule is not in fact lawless, because it is justified by the values it promotes. Though he couches this argument in legal terms, Simon seems to blur the distinction between "legal" and "moral" values; he does not explain how his preference for disclosure is based in the law rather than in morality.<sup>117</sup>

---

*the Conversation*, 30 *TOURO L. REV.* 1, 2-3 (2014) (discussing panel on Religion and the Practice of Law).

114. SIMON, *supra* note 13, at 164.

115. *Id.*

116. *Id.*

117. Indeed, a number of Simon's admirers, who agree with the outcome he advocates in the case of the Innocent Convict, find unconvincing his claim that his analysis is based in legal, rather than moral, considerations. See Levine, *supra* note 22, at 38-39 n.115 (citing sources).

## B. An Alternative Approach

Although Simon’s approach to the rule of confidentiality in the case of the Innocent Convict has been characterized and criticized by many scholars as resorting to notions of morality rather than legal principles, Simon’s instincts, ideals, and insights may help form the basis of an alternative framework that seeks to balance the demands of the letter of the law and the spirit of the law. Indeed, Simon’s analysis, identifying an ethical rule of confidentiality that, on its face, promotes a betrayal of the values of the law, may serve as a helpful starting point for further analysis. Unlike Simon’s approach, however, an alternative model would be premised upon a distinction between ethics rules, such as those delineating the lawyer’s duty of confidentiality, and general areas of the law, such as statutes of limitations. Although the lawyer’s work is conducted in a legal universe governed by both of these kinds of laws, ethics rules are susceptible to a form of application that pays closer attention to the spirit of the law, including its underlying purposes, while at the same time respecting the integrity of the letter of the law. This analysis may support an application of a strict general rule of confidentiality, based in principles expressed by and embodied in ethics codes, while leaving room for a spirit of the law analysis permitting disclosure in cases such as the Innocent Convict.<sup>118</sup>

---

To the extent that Simon’s arguments are ultimately based in morality rather than legal principles, they may be subject to the defense of the rule offered by scholars such as Abbe Smith: “it is more important to maintain and preserve the principle of confidentiality . . . than it is to affirm individual lawyer morality.” MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS’ ETHICS* 154 (3d. ed. 2004). Cf. Levine, *supra*, at 41 n.118 (citing views of scholars who offer arguments for confidentiality in the case of the Innocent Convict).

118. Cf. Green, *Personal Values*, *supra* note 9:

[O]n the rare occasions when lawyers encounter this extreme situation, they are able to “interpret” the confidentiality rule in the applicable professional code to allow disclosure. An implied exception to the confidentiality requirement might be justified for any of several reasons, such as the argument that the interests protected by the rule are outweighed by the interest in protecting an innocent life or that the general rule must be interpreted in light of reason or necessity. . . . That there is no published bar association ethics opinion or judicial decision forbidding a lawyer from disclosing a confidence in a situation such as this one supports the argument that this is not, in fact, an example where professional norms foreclose a lawyer from acting in accordance with personal belief, because the black letter of the confidentiality rule does not accurately capture the professional understanding.

*Id.* at 30; W. William Hodes, *Introduction: What Ought to Be Done—What Can Be Done—When the Wrong Person Is in Jail or About to Be Executed? An Invitation to a Multi-Disciplined Inquiry, and a Detour About Law School Pedagogy*, 29 *LOY. L.A. L. REV.* 1547, 1576 & n.115 (1996) (“If an exception did apply, it could only have been an informal or ad hoc exception . . . .”); Robert P. Lawry, *Damned and Damnable: A Lawyer’s Moral Duties with Life on the Line*, 29 *LOY. L.A. L. REV.* 1641, 1652 (1996) (considering an “implicit exception” to the rules of confidentiality in the case of the Innocent Convict).

On a number of levels, lawyers relate to ethics rules in a manner different from the way they relate to other laws. Unlike general laws, ethics rules are laws that are aimed directly and exclusively at lawyers. In addition, unlike other forms of legislation, every ethics code in the country is based largely, in substance and typically in form, on the model drafted by the ABA, reflecting the view of the organized bar. Finally, judges—who are part of the legal profession—enact and enforce ethics codes, often with the assistance of other lawyers. Therefore, in interpreting ethics codes, perhaps lawyers should not simply apply the law mechanically to further the goals of the client. Instead, lawyers are uniquely invested in the meaning and implementation of the rules. Accordingly, lawyers may be equipped with an additional degree of autonomy, accompanied by an additional degree of responsibility, to respond to ethics rules in a manner attentive to the spirit of the rules as well.

Under this framework, contrary to Simon's theory, a lawyer would not be justified in forgoing the advantages of the letter of a statute of limitations law, against the wishes of the client, in deference to the spirit of the law; such an attitude would violate principles of zealous advocacy and client autonomy. However, when confronted with the case of the Innocent Convict, the lawyer may view the ethical duty of confidentiality as primarily implicating the lawyer's own choice of conduct, notwithstanding that disclosure might potentially have a secondary adverse effect on the interests of the client. In short, in carrying out ethics rules, lawyers act not merely as agents of their clients, but in a manner and capacity reflective of their independent selves.<sup>119</sup> Accordingly, the lawyer might offer a degree of justification for looking beyond the letter of the duty of confidentiality, deciding instead to abide by the spirit of the law.<sup>120</sup>

In addition, unlike the application of the spirit of most laws, which often requires the elusive—if not impossible—task of identifying an overriding purpose of the law so significant as to supplant the letter of the law, attempts to apply the spirit of ethics rules may be facilitated by the ABA's official comments often explaining the scope and underlying purpose of ethics provisions. To the extent that an official explanation of an ethics rule supports a purposive reading of the rule, a lawyer may be further justified in applying the spirit of the rule.

---

119. See generally Levine, *supra* note 113 (considering the lawyer's "ethical duty to self").

120. Cf. Zacharias, *Steroids and Legal Ethics Codes*, *supra* note 64, at 695 ("Some socialized lawyers also may implement the confidentiality exceptions because they interpret the provisions according to their underlying spirit."); Zacharias & Green, *supra* note 6, at 59 ("Arguably, however, one can interpret the permissive confidentiality exception as being governed by the professional conscience; absent compelling reasons, the spirit of the exception and its imperative that the lawyer consider the third-party interests may, in the particular case, require the lawyer to disclose."). See also SIMON, *supra* note 13, at 164 ("While a rule forbidding disclosure would be degrading for any actor, it is particularly so for a lawyer, since it compels him to acquiesce in a monumental violation of a core commitment of his role."); Zacharias, *Images of Lawyers*, *supra* note 65, at 80.

In the context of the case of the Innocent Convict, the ABA’s official comments suggest that a spirit of the law analysis is particularly appropriate. For example, the Preamble to the Model Rules includes the statement that “a lawyer can be sure that preserving client confidences ordinarily serves the public interest . . . .”<sup>121</sup> Including this statement in the general introduction to the Model Rules emphasizes the correlation between the purposes of the duty of confidentiality and the goals of lawyer’s duty to the public interest, while at the same time implicitly acknowledging that in some cases, these aims may not be easily reconciled. The official comment to the former version of the rule governing confidentiality explains, in a similar manner, the rationale behind a general preference for confidentiality, even when the client intends to harm others:

In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client’s purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.

The ABA’s express identification of the underlying purpose of confidentiality rules as protecting the public and the public interest may facilitate a spirit of the law analysis. A lawyer would not be justified in asserting that the underlying purpose of the statute of limitations is clearly to protect the public and the public interest, and that therefore, consistent with the spirit of the law, a statute of limitations claim should be applied only when it would protect the public interest. However, the lawyer would justifiably conclude, on the basis of the ABA’s official statements, that the purpose of the duty of confidentiality is to protect the public. Accordingly, in the case of the Innocent Convict, in which the public is not protected by the lawyer’s maintaining the client’s confidence regarding a past crime, the spirit of the law would favor disclosing the confidence to protect the innocent third party who has been wrongly convicted for the crime the client committed.

Finally, though ethics codes consist of legal rules, it is not irrelevant that the rules are designed to embody ethical principles as well. In contrast, most other laws serve a variety of societal functions—perhaps, at times, including the promotion of ethical values—but ethical considerations play a less central role in the development and formulation of these laws. In contrast, the ethical component of an ethics rule is central to the essence of the rule, and therefore the application of the rule may appropriately call for a degree of attention to ethical purposes that underlie the spirit of the rule. In combination with other justifications for applying the spirit of the duty of the confidentiality to the case of the

---

121. MODEL RULES OF PROF’L CONDUCT, Preface, par. 8.

Innocent Convict, the fundamental nature of ethics rules suggests a particular need for adherence to the spirit of the law.

## Conclusion

The letter-of-the-law/spirit-of-the law dichotomy has long played an important role in the interpretation and application of legal rules and principles, both within the American legal system<sup>122</sup> and beyond.<sup>123</sup> In the 1892 case *Church*

---

122. See, e.g., *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892) (“It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers.”); *Public Citizen v. United States Dep’t of Justice*, 491 U.S. 440 (1989):

Where it is clear that the unambiguous language of a statute embraces certain conduct, and it would not be patently absurd to apply the statute to such conduct, it does not foster a democratic exegesis for this Court to rummage through unauthoritative materials to consult the spirit of the legislation in order to discover an alternative interpretation of the statute with which the Court is more comfortable. . . . The problem with spirits is that they tend to reflect less the views of the world whence they come than the views of those who seek their advice.

*Id.* at 473 (Kennedy, J., concurring); *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618, 642 (2007) (“Ledbetter’s policy arguments for giving special treatment to pay claims find no support in the statute and are inconsistent with our precedents. We apply the statute as written . . . .”); *id.* at 659, 660 (Ginsburg, J., dissenting) (criticizing “how far the Court has strayed from interpretation of Title VII with fidelity to the Act’s core purpose” and stating that “[t]he Court’s approbation of these consequences is totally at odds with the robust protection against workplace discrimination Congress intended Title VII to secure.”) (citations omitted).

See also ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 18 (Amy Guttmann ed., 1997) (characterizing *Holy Trinity* as “the prototypical case involving the triumph of supposed ‘legislative intent’ (a handy cover for judicial intent) over the text of the law.”); Carol Chomsky, *Unlocking the Mysteries of Holy Trinity: Spirit, Letter, and History in Statutory Interpretation*, 100 COLUM. L. REV. 901 (2000); William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509 (1998); Richard H. Fallon, Jr., *Three Symmetries Between Textualist and Purposivist Theories of Interpretation—And the Irreducible Roles of Values and Judgment Within Both*, 99 CORNELL L. REV. 685 (2014); Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833 (1998).

123. For discussions of the spirit of the law in the Jewish legal system, see, e.g., AARON KIRSCHENBAUM, *EQUITY IN JEWISH LAW: HALAKHIC PERSPECTIVES IN LAW: FORMALISM AND FLEXIBILITY IN JEWISH CIVIL LAW* (1991); MOSES L. PAVA, *BUSINESS ETHICS: A JEWISH PERSPECTIVE* 141-58 (1997); Saul J. Berman, *Lifnim Mishurat Hadin*, 26 J. JEWISH STUD. 86 (1975); Saul J. Berman, *Lifnim Mishurat Hadin II*, 28 J. JEWISH STUD. 181 (1977); J. David Bleich, *Is There an Ethic Beyond Halakhah?*, in *STUDIES IN JEWISH PHILOSOPHY: COLLECTED ESSAYS OF THE ACADEMY FOR JEWISH PHILOSOPHY* 527 (Norbert Samuelson, ed. 1985); Ari Hironven, *Promising Justice: Derrida With Jewish Jurisprudence*, 12 LAW & CRITIQUE 159, 177-79 (2001); Samuel J. Levine, *Jewish Legal Theory and American Constitutional Theory: Some Comparisons and Contrasts*, 24 HASTINGS CONST. L.Q. 458-61 (1997); Samuel J. Levine, *Unenumerated Constitutional Rights and Unenumerated Biblical Obligations: A Preliminary Study in Comparative Hermeneutics*, 15 CONST. COMMENT. 511 (1998); Levine, *supra* note 22, at 46 n.137; Levine, *supra* note 65, *passim*; Aharon Lichtenstein, *Does Jewish Tradition Recognize an Ethic Independent of Halakha?*, in *MODERN JEWISH*

of the *Holy Trinity v. United States*, Justice Brewer famously—or notoriously—declared: “It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers.”<sup>124</sup> Justice Brewer’s assertion has been the subject of considerable debate and substantial criticism. In a 1997 study on legal interpretation, Justice Antonin Scalia harshly characterized *Holy Trinity* as “the prototypical case involving the triumph of supposed ‘legislative intent’ (a handy cover for judicial intent) over the text of the law.”<sup>125</sup> As Justice Kennedy put it, in the 1989 case, *Public Citizen v. United States Dep’t of Justice*,<sup>126</sup> “The problem with spirits is that they tend to reflect less the views of the world whence they come than the views of those who seek their advice.”<sup>127</sup>

Similar critiques have been leveled against efforts, such as those of Bill Simon, to apply a spirit of the law approach to the ethical obligations of lawyers. And yet, as acknowledged by courts and scholars alike, ethics codes are different. In the words of one court, “calculating one’s behavior to merely comply with the wording of the professional rules, while doing violence to their spirit, is fundamentally inconsistent with a lawyer’s responsibilities to the parties, to the community at large and to the Court.”<sup>128</sup> Accordingly, notwithstanding the arguments that have been raised in other contexts against relying on the spirit of the law, it may be appropriate to interpret the ethics rules in a manner that incorporates both the letter of the rules and their underlying spirit.

---

Ethics: Theory and Practice 62 (Marvin Fox ed., 1975); Louis E. Newman, *Law, Virtue and Supererogation in the Halakha: The Problem of “Lifnim Mishurat Hadin” Reconsidered*, 40 J. JEWISH STUD. 61 (1989); Tzvi Novick, *Naming Normativity: The Early History of the Terms Surat Ha-Din and Lifnim Mis-Surat Ha-Din*, 55 J. OF SEMITIC STUD. 391 (2010).

124. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892).

125. SCALIA, *supra* note 122, at 18.

126. 491 U.S. 440 (1989).

127. *Id.* at 473 (Kennedy, J., concurring).

128. *E.E.O.C. v. Hora, Inc.*, Civ. A. 03-CV-1429, 2005 WL 1387982 (E.D. Pa. June 8, 2005), at \*10. Cf. AM. BAR ASS’N, COMM’N ON PROFESSIONALISM, “. . . IN THE SPIRIT OF PUBLIC SERVICE”: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 47 (1986) (“All segments of the Bar should . . . [r]esolve to abide by higher standards of conduct than the minimum required by the Code of Professional Responsibility and the Model Rules of Professional Conduct.”); KY. BAR ASS’N, KY. CODE OF PROF’L COURTESY (“[A]ttorneys are expected to comply with the letter and spirit of the applicable Code of Professional Responsibility adopted by the Supreme Court of Kentucky.”); TEX. DISCIPLINARY RULES OF PROF’L CONDUCT, Preamble (“The Comments also frequently illustrate or explain applications of the rules, in order to provide guidance for interpreting the rules and for practicing in compliance with the spirit of the rules.”).



