2003

# Taking Ethical Discretion Seriously: Ethical Deliberation as Ethical Obligation

Samuel J. Levine
*Touro Law Center*, slevine@tourolaw.edu

# TAKING ETHICAL DISCRETION SERIOUSLY: ETHICAL DELIBERATION AS ETHICAL OBLIGATION

SAMUEL J. LEVINE*

TABLE OF CONTENTS

Introduction ..... 21
I. Representative and Prevailing Alternative Models of Legal Ethics ..... 25
A. *Simon's "Contextual Model"* ..... 25
B. *Strassberg's Model of "Interpretative Integrity"* ..... 33
II. A Critical Analysis of the Simon and Strassberg Models ..... 37
A. *Analysis of Simon's Model* ..... 37
B. *Analysis of Strassberg's Model* ..... 42
C. *Analysis Under Amended Model Rule 1.6* ..... 43
III. Beyond the Mandatory/Optional Dichotomy: A Deliberative Model of Legal Ethics ..... 46
Conclusion ..... 63

## INTRODUCTION

In recent years, a number of leading scholars have depicted and criticized prevailing models of legal ethics as curtailing the range of ethical discretion and deliberation available to lawyers.[1] These scholars have faulted what they have called, variously but in a nearly uniformly pejorative manner, the "Dominant View,"[2] the "Official View,"[3] the "standard conception of lawyering,"[4] the "regulatory model,"[5] the "traditional professional position,"[6] "the principle of professionalism,"[7] "the libertarian approach,"[8] and the "accepted dogma,"[9]

---

* Associate Professor of Law, Pepperdine University School of Law; LL.M., Columbia University; J.D., Fordham University; Ordination, Yeshiva University; B.A., Yeshiva University. I thank Fraida Liba, Yehudah Tzvi, and Aryeh Shalom for their encouragement.

1. *See, e.g.*, WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS (1998); Heidi Li Feldman, *Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?*, 69 S. CAL. L. REV. 885 (1996); Maura Strassberg, *Taking Ethics Seriously, Beyond Positivist Jurisprudence in Legal Ethics*, 80 IOWA L. REV. 901 (1995); Fred C. Zacharias, *Reconciling Professionalism and Client Interest*, 36 WM. & MARY L. REV. 1303 (1995).

2. SIMON, *supra* note 1, *passim*.

3. David Luban, *The Adversary System Excuse*, *in* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 84 (David Luban ed., 1983).

4. Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980).

5. W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1, 8 (1999).

6. Michael Bayles, *Clients and Others*, *in* PROFITS AND PROFESSIONS: ESSAYS IN BUSINESS AND PROFESSIONAL ETHICS 65 (1983), *cited in* Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529, 1534 n.24.

7. Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L.

REV. 669, 673 (1978). The use of the term "professionalism" in this context is a somewhat striking expression of the wide variation of meanings—at times contradictory—attributed to the term. *Cf.* Monroe H. Freedman, *Professionalism in the American Adversary System*, 41 EMORY L.J. 467, 470 (1992) (arguing that "professionalism means that a lawyer should . . . zealously and competently use all lawful means to protect and advance the client's lawful interests"), *and* Schwartz, *supra*, at 673 (stating that under the principles of professionalism, "[w]hen acting as an advocate, a lawyer must, within the established constraints upon professional behavior, maximize the likelihood the client will prevail"), *with* Anthony T. Kronman, *Legal Professionalism*, 27 FLA. ST. U. L. REV. 1, 5 (1999) (describing legal professionalism as characterized, in part, by a "division of allegiances" between "a particular client" and "the well being of the law as a whole"), *and* Zacharias, *supra* note 1, at 1307 (stating that professionalism "encompasses the notion that the lawyer's function includes . . . the ability to distance oneself from personal and client desires in order to evaluate the effect of potential actions on clients, third parties, and the legal system"). *See generally* Samuel J. Levine, *Faith in Legal Professionalism: Believers and Heretics*, 61 MD. L. REV. 217 (2002).

For an example of these variations in the context of the Jewish identity of some lawyers and, more broadly, group identity, contrast Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577, 1578-79 (1993), describing "one important aspect of ([one] version of) the professional project" as "the 'bleaching out' of merely contingent aspects of the self, including the residue of particularistic socialization that we refer to as our 'conscience'" and concluding that "[t]he triumph" of the "standard version of the professional project" would result in "almost purely fungible members of the respective professional community" through which "[s]uch apparent aspects of the self as one's race, gender, religion, or ethnic background would become irrelevant to defining one's capacities as a lawyer" with Russell G. Pearce, *Jewish Lawyering in a Multicultural Society: A Midrash on Levinson*, 14 CARDOZO L. REV. 1613, 1635, 1636 (1993) (quoting MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 376 (1990)), stating that the legal profession must acknowledge the "contradiction between group identity and the goals of the professional project" and should thus "discard[] the notion of 'bleaching out'" in favor of "seek[ing] to 'create community' by bringing us together to explore the potential for rule of law in light of 'how we are all different from one another and also how we are all the same'". *See generally* Samuel J. Levine, *The Broad Life of the Jewish Lawyer: Integrating Spirituality, Scholarship, and Profession*, 27 TEX. TECH L. REV. 1199 (1996) [hereinafter Levine, *Broad Life*]; Samuel J. Levine, *Professionalism Without Parochialism: Julius Cohen, Rabbi Nachman of Breslov, and the Stories of Two Sons*, 71 FORDHAM L. REV. 1339 (2003) [hereinafter Levine, *Professionalism*]; Russell G. Pearce, *The Jewish Lawyer's Question*, 27 TEX. TECH L. REV. 1259 (1996).

Indeed, the inevitable tension that arises when different conceptions of professionalism are considered in light of religious and personal values has been a central focus of a "religious lawyering movement." *See* Russell G. Pearce, *Foreword: The Religious Lawyering Movement: An Emerging Force in Legal Ethics and Professionalism*, 66 FORDHAM L. REV. 1075 (1998); *see also* Samuel J. Levine, *Introductory Note: Responding to the Problems of Ethical Schizophrenia*, 38 CATH. LAW. 145 (1998); Symposium: *Faith and the Law*, 27 TEX. TECH L. REV. 911 (1996); Symposium: *Lawyering and Personal Values*, 38 CATH. LAW. 145 (1998); Symposium, *Rediscovering the Role of Religion in the Lives of Lawyers and Those They Represent*, 26 FORDHAM URB. L.J. 821 (1999); Symposium, *The Relevance of Religion to a Lawyer's Work: An*

characterized by adherence to "technocratic lawyering,"[10] "categorical" ethical decisionmaking,[11] "positivism,"[12] "conventionalism,"[13] "role-differentiation,"[14] and the "ideology of advocacy."[15] Although these criticisms are far from identical, they share the general premise that the ethical nature of legal practice suffers from literalistic adherence to what appears to be the letter of ethics codes, combined with overzealous loyalty to clients' wishes, obviating the need for—or, at times, preventing the possibility of—careful attention to ethical issues.[16]

In response, many of these scholars have proposed alternative models of legal ethics, with titles such as the "Contextual View,"[17] the "Discretionary Model,"[18] "Interpretive Integrity,"[19] the "Principle of Integrative Positivism,"[20] the "Integrity Thesis"[21] and a "common law of lawyers' ethics,"[22] each aimed at

---

*Interfaith Conference*, 66 FORDHAM L. REV. 1075 (1998).

8. William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1085 (1988).

9. ALAN H. GOLDMAN, THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS 90 (1980), *cited in* Schneyer, *supra* note 6, at 1534 n.24.

10. Feldman, *supra* note 1, *passim*; Wendel, *supra* note 5, at 8.

11. SIMON, *supra* note 1, at 9.

12. Strassberg, *supra* note 1, *passim*.

13. Wendel, *supra* note 5, at 17.

14. Postema, *supra* note 4, at 63.

15. William H. Simon, *The Ideology of Advocacy, Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29.

16. Professor Rob Atkinson has described as "reformers" those scholars, including himself, who "believe that other normative limits, sometimes narrower than the letter of the law, govern what the good person, as good lawyer, may do for at least some clients, at least some of the time." Rob Atkinson, *A Skeptical Answer to Edmunson's Contextualism: What We Know We Lawyers Know*, 30 FLA. ST. U. L. REV. 25, 26-27 (2002). *Cf.* David Rosenthal, *The Criminal Defense Attorney, Ethics, and Maintaining Client Confidentiality: A Proposal to Amend Rule 1.6 of the Model Rules of Professional Conduct*, 6 ST. THOMAS L. REV. 153, 157 (1993) (applying the title "Moralists" to theorists who aim to "promote the lawyer's responsibility to seek societal justice over the obligation to assist a particular client").

In one of the earliest and most powerful responses to such a position, Professor Ted Schneyer employed the largely accurate term "philosophers" to describe many of these scholars and attributed to them a "standard misconception of legal ethics." Schneyer, *supra* note 6; *see also* Ted Schneyer, *Some Sympathy for the Hired Gun*, 41 J. LEGAL EDUC. 11 (1991); Zacharias, *supra* note 1, at 1326-27 (describing a "relatively new branch of philosophical scholarship [that] concentrates so much on perceived client orientation of lawyers that it suggests that objectivity in legal practice is virtually non-existent" and concluding that "this school of thought may overstate the case").

17. SIMON, *supra* note 1, at 9.

18. *Id.* at 10.

19. Strassberg, *supra* note 1, at 934.

20. Serena Stier, *Legal Ethics: The Integrity Thesis*, 52 OHIO ST. L.J. 551 (1991).

21. *Id.*

22. Feldman, *supra* note 1, at 945.

providing a framework through which lawyers are encouraged—if not required—to replace simplistic ethical decisionmaking with more thoughtful and complex deliberation of ethical considerations. These models, like the criticisms of the prevailing model, differ substantially from one another, including proposals for rethinking the function and goals of the lawyer,[23] providing civil remedies for ethical violations,[24] suggestions of additional ethics provisions,[25] and innovative methodologies for the interpretation of current ethics codes.[26]

Despite these differences, however, certain common themes run through all of the models. On a practical level, each of the models requires a fundamental change in the way the current regulatory system of ethics codes is interpreted and/or implemented. More importantly, for the purposes of the current analysis, it seems that each of the models either prescribes to the lawyer a particular decision to be applied to a given ethical dilemma or does not obligate the lawyer to demonstrate the exercise of thoughtful ethical discretion. Thus, the models all appear to fall short of their stated goal: ultimately permitting but not requiring that the individual lawyer engage in ethical deliberation and analysis.

This Article looks to build on and respond to the work of these scholars, adopting and explicating many of their insights into the nature of the current structure of legal ethics and ethics codes. After describing[27] and critiquing two representative and prevailing alternative models,[28] the Article proposes a "Deliberative Model" which not only allows for, but expects and, at times, requires careful ethical deliberation prior to the exercise of discretion.[29]

Specifically, the Article posits that the concept of ethical discretion in legal practice should be understood neither as a license to engage in a variety of optional activities without justification for a particular course of action, nor as grounds for mandating a particular decision under circumstances of ethical complexity. Instead, the Article suggests that the lawyer's professional responsibility carries with it a duty on the individual lawyer to exercise such discretion through consideration of the relevant ethical issues. Thus, the Article takes seriously the principle of ethical discretion, respecting the role of individual ethical decisionmaking, but requiring that such decisionmaking be carried out through a justifiable process of ethical deliberation.

---

23. SIMON, *supra* note 1, *passim*.

24. Feldman, *supra* note 1, at 945-47.

25. *See, e.g.*, Russell G. Pearce, *Model Rule 1.0: Lawyers are Morally Accountable*, 70 FORDHAM L. REV. 1805, 1805 (2002); Zacharias, *supra* note 1.

26. Stier, *supra* note 20; Strassberg, *supra* note 1.

27. *See infra* Part I.

28. *See infra* Part II.

29. *See infra* Part III.

## I. REPRESENTATIVE AND PREVAILING ALTERNATIVE MODELS OF LEGAL ETHICS

### *A. Simon's "Contextual Model"*

Among the work of scholars criticizing the current state of ethics regulation, Professor William Simon's may stand out as both the most prominent and the most ambitious. In 1998, Simon published *The Practice of Justice*, a book-length elaboration of some of the theories he had begun to develop in a series of law review articles.[30] The target of Simon's critique is the "Dominant View," his appellation, for "[t]he prevailing approach to lawyers' ethics as reflected in the bar's disciplinary codes, the case law on lawyer discipline, and the burgeoning commentary on professional responsibility."[31] Under the Dominant View, "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."[32] According to Simon, "in the Dominant View the only ethical duty distinctive to the lawyer's role is loyalty to the client. Legal ethics impose no responsibilities to third parties or the public different from that of the minimal compliance with law that is required of everyone."[33] Simon sees this emphasis on loyalty to the client as central to both the Model Code of Professional Responsibility and the Model Rules of Professional Conduct, reflected in provisions promoting zealous advocacy[34] and confidentiality.[35]

Simon finds the Dominant View and the accompanying regulatory scheme insufficient as a basis for legal ethics, criticizing both the form of current ethics codes and, consequentially, their mode of interpretation. Simon sees the form of the codes—in particular the Model Rules—as "a set of mechanical disciplinary rules" that, he concludes, "reduce ethics to a matter of mindless rule application."[36] Specifically, he argues, the Dominant View imposes a form of

---

30. *See* SIMON, *supra* note 1, at 249 (acknowledging the book's reliance, in parts, on: Simon, *supra* note 8; William H. Simon, *Should Lawyers Obey the Law?*, 38 WM. & MARY L. REV. 217 (1996); William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703 (1993)).

31. SIMON, *supra* note 1, at 7.

32. *Id.* at 7.

33. *Id.* at 8.

34. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter MODEL CODE], Canon 7 ("A lawyer shall represent a client zealously within the bounds of the law."); ABA MODEL RULES OF PROFESSIONAL CONDUCT [hereinafter MODEL RULES], R. 1.3, cmt. [1] ("A lawyer must also act with commitment and dedication to the interests of a client and with zeal in advocacy upon the client's behalf.").

35. *See* MODEL CODE, *supra* note 34, DR 4-101; MODEL RULES, *supra* note 34, R. 1.6.

36. SIMON, *supra* note 1, at 15. As Simon observes, the Model Rules generally employ the form of "black letter rules" in place of the Model Codes' inclusion of aspirational "Ethical Obligations" alongside more specific and mandatory "Disciplinary Rules." *Id.* at 14-15. Indeed, scholars have documented the evolution of twentieth century ethics regulations from "fraternal norms issuing from an autonomous professional society" to "binding legal rules . . . rendered in

"categorical" ethical decisionmaking, "severely restrict[ing] the range of considerations the decisionmaker may take into account when she confronts a particular problem."[37] In short, "a rigid rule dictates a particular response in the presence of a small number of factors."[38] As a result, "[t]he decisionmaker has no discretion to consider factors that are not specified or to evaluate specified [sic] factors in ways other than those prescribed by the rule[s]."[39] Ultimately, Simon rejects the current model of ethics regulation, stating poignantly that "it is no longer apparent what it has to do with ethics or responsibility."[40]

Simon is particularly troubled by the jurisprudential implications of categorical—or "formalistic"—modes of ethical interpretation.[41] He notes, with more displeasure than irony,[42] that "[t]he revolt against formalism in legal

---

statutory language." Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1254, 1250-51 (1991). *See also* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 53-63 (1986); Geoffrey C. Hazard, Jr., *Legal Ethics: Legal Rules and Professional Aspirations*, 30 CLEV. ST. L. REV. 571 (1982); Geoffrey C. Hazard, Jr., *The Legal and Ethical Position of the Code of Professional Ethics*, *in* 5 SOCIAL RESPONSIBILITY: JOURNALISM, LAW, MEDICINE 5 (Louis Hodges ed., 1979) [hereinafter Hazard, *Legal and Ethical*]; 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).

These changes have been met with sharply differing reactions among scholars, reflecting starkly opposing attitudes toward both the form and function of ethics rules. Like many of the scholars whose work is highlighted in this Article, Simon faults what he sees as the overly "simple and straightforward" nature of ethics codes. SIMON, *supra* note 1, at 14. Conversely, other scholars, who approve of the increasing specificity of the codes, have expressed their own dissatisfaction with areas of the codes that, in their view, have remained unacceptably broad and imprecise. *See* Levine, *supra*. In fact, as a result of these criticisms, the quest for "black-letter law" regulating the conduct of lawyers has continued, culminating in the completion in the fall of 2000 of the American Law Institute's RESTATEMENT OF THE LAW GOVERNING LAWYERS [hereinafter RESTATEMENT].

37. SIMON, *supra* note 1, at 9.

38. *Id.*

39. *Id.*

40. *Id.* at 15.

41. *Id.* at 3.

42. At times, irony seems an appropriate reaction to anomalous and hypocritical conduct on the part of individual lawyers and the organized bar. *See* Thomas L. Shaffer, *The Irony of Lawyers' Justice In America*, 70 FORDHAM L. REV. 1857 (2002).

Simon is similarly unforgiving in his attack on the bar's approach to confidentiality, consciously engaging in an "*ad hominem* argument[]" because "the indications of bad faith" on the part of the bar "are too salient to pass over." SIMON, *supra* note 1, at 56. Simon characterizes the bar's defenses of confidentiality as "sloppy, cavalier, and dogmatic," *id.*; he describes the rationale offered in the Model Rules for confidentiality as "ludicrously inconsistent" with the substance of the rule, *id.*; and he offers illustrations of "the bar's anxiety and hypocrisy about its confidentiality norms." *Id.* at 222-23 n.9. *Cf.* MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 144 (2d ed. 2002) (stating that "[s]ome of the ABA's exceptions to lawyer-client

thought has carried the day in nearly every legal field other than that of lawyering itself."[43] Simon finds it "remarkable" that "[a]lone . . . professional responsibility . . . ha[s] enjoyed relative immunity from the[ ] critiques" of formalism that have been applied by modern jurisprudence "nearly everywhere else."[44]

Simon offers an alternative model of ethical decisionmaking that embraces complexity. He calls it the "Contextual View."[45] As the name suggests, the "essence of this approach is contextual judgment," which Simon defines as "a judgment that applies relatively abstract norms to a broad range of the particulars [that apply in the] case at hand."[46] The "basic maxim" of this approach is indeed

---

confidentiality are a mockery of an ideal . . . .").

43. SIMON, *supra* note 1, at 3. Professor Deborah Rhode has similarly faulted lawyers for acting in a "highly selective" manner when objecting to the application of "vague" terms such as "justice," "fairness," and "good faith" for imposition of moral condemnation or discipline. DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 68 (2000). As Professor Rhode notes, "[t]he legal system routinely requires judges, juries, and prosecutors to pursue 'justice' or to determine 'fairness,' and it imposes sanctions on businesses that fail to act in 'good faith.'" *Id.* Echoing Simon in emphasizing the "selectiv[ity]"—if not downright hypocrisy—of arguments against applying these concepts to the conduct of lawyers as well, Rhode concludes with the observation that "[l]awyers charge substantial fees for interpreting such requirements. The interpretive process is no different when lawyers' own actions are involved." *Id.*

44. SIMON, *supra* note 1, at 3. Likewise, Simon connects the Dominant View with the jurisprudential philosophy of Positivism to the extent that it "characteriz[es] the values that compete with client loyalty . . . as nonlegal." *Id.* at 17. Here, too, however, he observes that "strong versions of Positivism turn out to be implausible, and indeed they are rejected by most lawyers outside the sphere of legal ethics." *Id.* at 17-18. *See also id.* at 37 ("While a few legal philosophers still defend the Positivist premise, nearly all practicing lawyers reject it implicitly in the way they argue cases, advise clients, and draft documents. Legal ethics is the only area in which they continue to cling to it."). As Professor Bradley W. Wendel has put it, "[t]he regulatory model is a jurisprudential dinosaur." Wendel, *supra* note 5, at 17. *See also id.* (stating that "the regulatory model assumes that the legal rules may be applied mechanically, without resort to creative normative judgment[, and] [i]n this way, it resembles a jurisprudential position that has almost no adherents outside the realm of legal ethics").

Clearly, though largely implicitly, Simon's analysis relies in part on insights developed by the Legal Realist and Critical Legal Studies movements. Although the substance of his arguments contains few citations to specific works or ideas in these fields, Simon acknowledges Critical Legal Studies as one of two inspirations for his argument. SIMON, *supra* note 1, at 247. In addition, a relatively brief list of recommended "Further Reading" at the end of the book includes citations to such works. *See id.* at 243-46 (citing, e.g., Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468 (1990)).

45. SIMON, *supra* note 1, at 9. Simon also refers to this as the "Discretionary Model." *Id.* at 10.

46. *Id.* at 10.

complex and requires that the lawyer "take such actions as, considering the relevant circumstances of the particular case, seem likely to promote justice."[47] Under such an approach, Simon asserts, ethical decisions will "often turn on 'the underlying merits'" of an issue.[48]

Simon readily acknowledges—in fact, he relies in part upon—the similarity between the model he proposes for lawyers generally and that which is most familiarly associated with the prosecutor. Simon writes that his formulation of the basic maxim of the Contextual View was "partly inspired" by the Model Code's prescription for the role of the prosecutor "to seek justice, not merely to convict."[49] At first glance, it seems striking that Simon adopts so vague a command as "seek justice" to guide lawyers' ethical decisionmaking. After all, while there exists a wide-ranging debate regarding the appropriate level of specificity for ethics guidelines,[50] even scholars such as Professor Fred Zacharias, who accept some measure of ambiguity in ethics provisions,[51] find the

---

47. *Id.* at 9. In adopting a position that obligates a private lawyer to do justice, Simon participates in a debate that has continued "at least since the rise of large-scale organizations in American society during the nineteenth century." Susan D. Carle, *Lawyers' Duty to Do Justice: A New Look at the History of the 1908 Canons*, 24 LAW & SOC. INQUIRY 1, 2 (1999). *See id.* ("Perhaps no issue in legal ethics has been debated more often, and resolved less satisfactorily, than that of lawyers' duties—in civil cases—to concern themselves with the 'justice' of their client's cause.").

48. SIMON, *supra* note 1, at 9.

49. *Id.* at 10. *See* MODEL CODE, *supra* note 34, EC 7-13 (providing that "[t]he responsibility of the public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."). *See also* MODEL RULES, *supra* note 34, R. 3.8, cmt. [1] (stating the proposition that "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate."). For historical outlines of the prosecutor's duty to seek justice, see Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 792-94 (2000) and Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 612-17 (1999).

50. *See supra* note 36.

51. *See* Fred C. Zacharias, *Foreword: The Quest for a Perfect Code*, 11 GEO. J. LEGAL ETHICS 787, 791 (1998) (stating that "I am not arguing that codes need to be specific in every regard"); *id.* at 791-92 n.44 (stating that "I have taken a contrary position, in sharp contrast to the position of scholars . . . who favor specificity in regulation whenever it is possible"); *id.* (contrasting Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 249-85 (1993) [hereinafter Zacharias, *Specificity*], with Bruce A. Green & Bernadine Dohrn, *Foreword: Children and the Ethical Practice of Law*, 64 FORDHAM L. REV. 1281, 1282-83, 1288-89 (1996); Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules be Created?*, 64 GEO. WASH. L. REV. 460, 468 (1996); Bruce A. Green, *Zealous Representation Bound: The Intersection of the Ethical Codes and the Criminal Law*, 69 N.C. L. REV. 687, 689-90 (1991)); *see also* Zacharias, *supra* note 1, at 1328 n.85 (stating that "[i]t might be possible to adopt a highly specific code of professional conduct, which all lawyers must obey . . . [that] might instruct lawyers in how to balance competing interests in all situations," but noting

"do justice" standard to be unworkably broad as applied to prosecutors, let alone private attorneys.[52] Nevertheless, Simon's theory of "justice" does not appear vulnerable to such concerns, as he dedicates an entire chapter to a detailed discussion of the considerations underlying the Contextual View, applied to concrete situations.[53]

---

that "[v]irtually all existing codes . . . avoid that approach, probably for good reason").

52. *See* Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45 (1991); Zacharias, *Specificity*, *supra* note 51, at 292 (asserting that: "[f]or obvious reasons . . . the 'justice' approach seems inadequate to reformers, both as a general method of role definition and as a means to alleviate the reformers' specific concerns regarding [prosecutorial misconduct]"; that "[e]mpirically, the justice provisions have not worked"; and that "in the absence of other constraints, a ['do justice'] rule provides minimal behavioral guidance and, in practice, may even reduce prosecutors' ethical introspection"); *cf.* Geoffrey C. Hazard, *Law and Justice in the Twenty-First Century*, 70 FORDHAM L. REV. 1739, 1741 (2002) (asserting that "[i]n contemporary American academic discussion there is much talk about 'justice' that is not anchored in the mundane apparatus of judges and court clerks, pleadings and procedural motions, and the technicalities of legal interpretation," and concluding that "[i]n my view these discussions are vacuous").

*But see* Berenson, *supra* note 49, at 817 (stating that "the 'do justice' standard [can] serve as a basis for determining the appropriate professional role for public prosecutors despite criticisms regarding its vagueness [and] . . . can also serve as an important source for determining the appropriate professional role for government lawyers in civil litigation contexts"); Green, *supra* note 49, at 634 (finding that "[d]oing justice comprises various objectives which are, for the most part, implicit in our constitutional and statutory schemes"). *Cf.* Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 957-58 (1991) (noting the "ethical tension inherent in the role of the government lawyer," but concluding that "the ethical codes draw no distinctions between the duty of the government lawyer and the duty of the private lawyer to defend a civil case zealously").

53. *See* SIMON, *supra* note 1, at 138-69; *see also* Ted Schneyer, *Reforming Law Practice in the Pursuit of Justice: The Perils of Privileging "Public" Over Professional Values*, 70 FORDHAM L. REV. 1831, 1842 & n.68 (2002) (reviewing RHODE, *supra* note 43, and stating that "[t]he main problem with Rhode's call for a more 'contextual' view of legal ethics is the difficulty of clarifying how lawyers (or their regulators) should determine the import of contextual variables or how finely-grained their contextual analysis should be," and contrasting Simon's work as a "more sustained effort to identify contextual factors that should be considered relevant").

Nevertheless, a number of scholars have argued that Simon's model fails to provide sufficiently specific guidance. *See, e.g.*, Heidi Li Feldman, *Matter of Ethics Apparently Substantial, Oddly Hollow: The Enigmatic Practice of Justice*, 97 MICH. L. REV. 1472, 1480-81 (1999) (stating that Simon "recommends procedural guidelines to assist lawyers in deciding what justice requires of them in any given situation," but concluding that the guidelines "do not provide a lawyer with a substantive account of justice"); David Luban, *Reason and Passion in Legal Ethics*, 51 STAN. L. REV. 873, 896-97 (1999) (citing SIMON, *supra* note 1, at 157) (quoting Simon's view that "when the lawyer decides that time and resources permit only an incomplete analysis, the lawyer will fall back on 'presumptive responses to broad categories of situations,'—in a word, she will fall back on rules," but concluding that Simon is "silen[t] on the issue of default rules" and that

Moreover, responding to the potential argument that the Contextual View "collapses the lawyer's role into that of the . . . prosecutor,"[54] Simon explains that the comparison is only to the prosecutor's "style of judgment, not the particular decisions . . . prosecutors make."[55] Simon insists that the Contextual View thus "incorporates much of the traditional lawyer role, including the notion that lawyers can serve justice through zealous pursuit of clients' goals" and "is fully respectful of the most plausible conceptions of procedural justice and the adversary system."[56]

One of the primary targets of Simon's critique is the Dominant View's "close-to-absolute confidentiality norms for client information."[57] Of course, as Simon acknowledges, he is far from the first to criticize the rules of attorney-client confidentiality.[58] Yet, in both tone and substance, Simon is particularly relentless in his attack on the organized bar's attitude toward confidentiality,[59] as reflected in ethics codes.[60] In fact, the very first example Simon offers to

---

the Contextual View "offers no purchase in figuring out what the default rules should be"); Deborah L. Rhode, *Symposium Introduction: In Pursuit of Justice*, 51 STAN. L. REV. 867, 872 (1999) (stating that although Simon "proposes some promising reforms [he] gives little attention to how they might be achieved or to the social, economic, and political barriers that stand in the way"). Indeed, Simon himself refers to "[t]he scant efforts I've made to suggest how my ideas might be institutionalized and implemented." SIMON, *supra* note 1, at 248.

54. SIMON, *supra* note 1, at 10-11.

55. *Id.* at 11. Simon similarly justifies a further comparison between the Contextual View of a lawyer's ethical judgment and the style of contextual judgment associated with judges. *See id.* at 10-11.

56. *Id.* at 11.

57. *Id.* at 54.

58. *See, e.g.*, 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); Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989).

59. *See supra* note 42.

60. SIMON, *supra* note 1, at 54-62. Professor Susan Koniak has offered an insightful examination of the "centrality and power of the norm of confidentiality in the bar's nomos." Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1427-47 (1992). Koniak refers to confidentiality as a "constitutional norm" in the bar's nomos, a norm

> 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.

Among other observations, Koniak notes that:

> the special importance of the norm of confidentiality in the bar's nomos is not apparent on the face of the ethics codes . . . but the ethics opinions interpreting the codes make it plain. A pattern emerges in these opinions: rules affirming a duty or the discretion not disclose are either narrowed to the point of near-irrelevance or held to be overridden by

contrast the Dominant View with the Contextual View, and one to which he returns at several points in the book, is the vexing case of the "Innocent Convict."[61] Simon uses this term to refer to a situation in which, during a conversation between a lawyer and a client, the client admits to having committed a capital crime for which an innocent individual has been convicted.[62] Under traditional rules of confidentiality, such a lawyer would be prohibited from disclosing this information, even if the Innocent Convict faced execution.[63]

Although, as he again acknowledges, Simon is expressing a widely held view among scholars that the scenario of the Innocent Convict represented an unsatisfactory outcome of the confidentiality rules,[64] Simon's solution serves as

---

rules requiring silence.

*Id.* at 1428, 1431.

61. SIMON, *supra* note 1, at 4.

62. This scenario has received extensive attention among ethics scholars. Indeed, Professor Wolfram has referred to this scenario as a "much mooted situation." WOLFRAM, *supra* note 36, at 673. *See, e.g.*, Symposium, *Executing the Wrong Person: The Professionals' Ethical Dilemmas*, 29 LOY. L.A. L. REV. 1543 (1996). One leading ethics scholar has stated that "[o]f all the 'doomsday scenarios' commonly discussed in law school classrooms, this one holds special fascination, because it is so stark and so real." W. William Hodes, *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, 1561 (1996).

63. The obligation to maintain the client's confidence in this scenario is implicit but unambiguous in the Model Code, which permits disclosure of a client's intention to commit a crime, but contains no provision permitting disclosure of past crimes, regardless of the consequences to a third party. *See* MODEL CODE, *supra* note 34, DR 4-101 (C)(3).

Although various drafts of the Model Rules would have permitted, or even mandated, disclosure to prevent various negative consequences to a third party, *see* STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 80 (2003), as enacted in 1983, the Model Rules permitted disclosure to prevent a client from committing crimes resulting in death or serious physical injury, but did not provide for disclosure of past crimes. *See id.* at 70.

It should be noted that the current version of the Model Rules, recently amended, permit disclosure "to prevent reasonably certain death or substantial bodily harm," MODEL RULES, *supra* note 34, R. 1.6 (b) (2), apparently permitting—though still not requiring—disclosure to save the Innocent Convict from execution, and presumably from imprisonment as well. *See id.*, cmt. 6 (describing Rule's recognition of "overriding value of life and physical integrity"). *See* discussion *infra* Part II.C; *see also* RESTATEMENT, *supra* note 36, § 66.

64. *See, e.g.*, Zacharias, *supra* note 58. As Simon notes, even "[m]any defenders of the Dominant View regard the case as sufficiently troubling to warrant an exception," leading some to engage in "tortuous analyses of [the] problem" in an "effort to justify an exception without trenching further on the categorical confidentiality norm." SIMON, *supra* note 1, at 218 n.6. *See id.* (citing Symposium, *supra* note 62).

As Simon further observes, the approach to the Innocent Convict in the Model Rules was particularly disturbing when juxtaposed with the conversely categorical exception to confidentiality

to establish a claim or defense on behalf of the lawyer in a controversy between the

a useful example for understanding more broadly his approach to ethical decisionmaking for lawyers. Simon first posits that "the general procedural system has failed" the Innocent Convict and that the system is not likely to "correct itself."[65] Therefore, in accordance with the guidelines he has delineated for the Contextual View, Simon asserts that "[t]he lawyer thus has some responsibility to assess substantive merit."[66] Undoubtedly, as Simon concludes, such an assessment will lead the lawyer to conclude that the execution of the Innocent Convict will produce "a horrendous injustice."[67] The ethical question for the lawyer, then, is how to respond to the prospect of such injustice, in the absence of a tenable interpretation of the Model Rules permitting disclosure.[68]

For Simon, the unequivocal answer is for the lawyer to disclose the confidential information to save the life of the Innocent Convict. To the extent that this answer requires violation of the Model Rules, Simon declares that "the lawyer might have to consider disclosure as a form of nullification."[69] Using harsh language characteristic of his attitude toward rules prescribing nearly categorical adherence to confidentiality,[70] Simon decries the "substantive absurdity of the rules' application in the particular circumstances of the Innocent

---

> lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

MODEL RULES, *supra* note 34, R. 1.6 (b) (3). *See* SIMON, *supra* note 1, at 222-23 n.9; *see also* Roger C. Cramton & Lori P. Knowles, *Professional Secrecy and its Exceptions:* Spaulding v. Zimmerman *Revisited*, 83 MINN. L. REV. 63 (1998):

> [A] profession that justifiably asks for and receives permission to disclose confidential client information when its own economic interests are at stake (*e.g.* to collect a fee from a client) cannot plausibly take the position that the threatened death or serious injury of another does not justify an occasional sacrifice of confidentiality.

*Id.* at 111-12; Fischel, *supra* note 58:

> The same lawyer who is prohibited from disclosing information learned while representing a client to exonerate someone falsely accused of a capital crime . . . is perfectly free to disclose confidential information when he or she is the one accused, falsely or not. Nor is there any requirement that the lawyer's liberty be at stake, or even that the lawyer be accused of anything criminal. A simple fee dispute with a client is sufficient grounds to disclose confidential information. The lawyer's interest in collecting a fee is apparently a higher priority than exonerating an innocent defendant about to be convicted of a capital crime . . . . Confidentiality means everything in legal ethics unless lawyers lose money, in which case it means nothing.

*Id.* at 10. *See supra* note 42.

65. SIMON, *supra* note 1, at 163.

66. *Id.*

67. *Id.*

68. *See supra* note 64.

69. SIMON, *supra* note 1, at 164.

70. *See supra* note 42.

Convict."[71] Such a rule, he continues, would be "degrading" to the lawyer, for whom "it would be grotesque not to disclose" confidences to save the life of the Innocent Convict.[72] Though he offers admittedly perfunctory efforts to reconcile his position with the rules—suggesting, for example, that perhaps "[t]he rule should not be interpreted to require such degradation"[73]—Simon recognizes that such reconciliation is impossible. Therefore, he confronts the rule directly, insisting that "[i]f such an interpretation is unavoidable, then the lawyer should defy the rule."[74]

### *B. Strassberg's Model of "Interpretive Integrity"*

As a result of the innovative and provocative nature of his theories and observations, Simon's work has been the subject of both considerable admiration[75] and substantial criticism.[76] Indeed, among Simon's critics are many scholars who are largely sympathetic to his arguments but who nevertheless maintain reservations about accepting the full range of his proposals.[77]

---

71. SIMON, *supra* note 1, at 164.

72. *Id.*

73. *Id.*

74. *Id.*

75. *See, e.g.*, Review Essay Symposium, *The Practice of Justice by William H. Simon*, 51 STAN. L. REV. 867 (1999); Rob Atkinson, *Lawyering in Law's Republic*, 85 VA. L. REV. 1505, 1517 (1999); Robert F. Cochran, Jr., *The Rule of Law(yers)*, 65 MO. L. REV. 571 (2000); Feldman, *supra* note 53.

76. *See, e.g.*, *supra* note 53 and *infra* note 119.

77. As Professor Deborah Rhode noted in the introduction to a *Stanford Law Review* Symposium dedicated to reviews of Simon's book:

> Like most leading ethics experts, the participants here are all FOBs—friends of Bill—in important respects. They share his premise that the bar's prevailing ethical norms are fundamentally flawed and that their inadequacies carry a substantial cost for both the profession and the public. Where the commentators differ, both with Simon and each other, is on plausible prescriptions. While sharing Simon's commitment to the "practice of justice," the essays that follow raise substantial questions about the meaning of justice and the strategies to achieve it.

Rhode, *supra* note 53, at 867.

As Simon himself observes in responding to the contributions to the symposium:

> We have here, not the clash of opposites, but a series of family quarrels within what you might call the Party of Aspiration in legal ethics. My seven allies and I all favor a lawyers' ethic of more complex judgment and more responsibility to nonclients than the currently dominant one. The differences among us are not large from the broadest perspective, but they involve issues that are quite important to the elaboration of the sort of alternative ethic we would like to see.

William H. Simon, *The Legal and the Ethical in Legal Ethics: A Brief Rejoinder to Comments on the Practice of Justice*, 51 STAN. L. REV. 991, 991 (1999).

Indeed, differences are at times most apparent among generally similar objects or ideas. *See*

Perhaps representative of such scholars, Professor Maura Strassberg shares a number of Simon's views regarding the absence of sufficiently complex deliberation under the current model of ethical decisionmaking, but she offers an alternative significantly different from Simon's.

Like Simon, Strassberg aims to remedy the "positivist jurisprudence" that "constrains the moral content of legal ethics."[78] Tracing the evolution of the rules regulating the conduct of lawyers, Strassberg observes that "[t]here can be little doubt that the current embodiment of legal ethics in disciplinary 'codes' . . . has transformed legal ethics into positive law."[79] Yet, she concludes, "[i]n embracing positive law, the drafters of [ethics codes] did not intend to reduce ethics to positive law."[80] Rather, quoting Professor Geoffrey Hazard, Strassberg considers a code of positive law to be a "necessary preface to ethics."[81] Thus, according to Strassberg, contemporary ethics theory faces the

---

RABBI YITZCHAK HUTNER, PACHAD YITZCHAK, PURIM 42-45, 87-92 (6th ed. 1998). *Cf.* SIMON, *supra* note 1, at 248 (noting similarity between his own work and Luban's, but stating that "I have tended in public—and indeed in this book—to focus on the relatively few matters on which we disagree").

Nevertheless, some scholars offer alternative theories substantially different from Simon's approach. For example, as an alternative to Simon's view, Professor Serena Stier has proposed an "integrity thesis" aimed at "provid[ing] a better reading of the law of lawyering and hence a better interpretation of what constitutes the standard conception of lawyering." Stier, *supra* note 20, at 554. Stier provides the following summary of her proposal:

> The integrity thesis demonstrates that the correct standard conception of lawyering provides ample opportunity for attorneys to integrate their responsibilities to the profession and their own cherished moral values. Lawyers, as the Normativity Principle holds, have a special obligation to obey the law of lawyering but, as the Principle of Integrative Positivism maintains, this is a prima facie obligation only. Lawyers remain responsible for balancing their legal and moral obligations for themselves and may conscientiously decide to disobey the law of lawyering so long as their reasons for doing so are good reasons.

*Id.* at 609.

Applying her model to the case of the Innocent Convict, Stier concludes that there is both moral and ethical support for either silence or disclosure, and that, therefore, "integrity requires the good reader to carefully balance the respective moral and legal reasons and to act as indicated by the stronger reasons." *Id.* at 604-05. Stier offers a theory of interpreting ethics rules to permit disclosure, based on principles of the "the purpose underlying" the rules and their "underlying jurisprudence." *Id.* at 606-07. In so doing, however, her reasoning seems premised on a methodology similar to the type of "tortuous" analyses that Simon identifies among proponents of the Dominant View who attempt to find within the rules permission for disclosure to save the life of the Innocent Convict. SIMON, *supra* note 1, at 218 n.6. *See* Strassberg, *supra* note 1, at 917-18 n.93 (critiquing Stier's interpretive framework as inconsistent with Stier's defense of positivism).

78. Strassberg, *supra* note 1, at 901.

79. *Id.* at 905. *See supra* note 36.

80. Strassberg, *supra* note 1, at 910.

81. *Id.* (quoting Hazard, *Legal and Ethical*, *supra* note 36, at 12).

challenge of reconciling the positive nature of codes with a jurisprudence that avoids positivism.

In apparent contrast to Simon, however, Strassberg asserts that "given the reality of the American practice of law," it is "unrealistic" to premise a solution on either "a call for the abandonment" of current ethics rules or "a reframing of the rules."[82] Likewise, she finds unsatisfactory solutions based in "impermissible ethical disobedience,"[83] which she defines as "morally desirable action taken in apparent violation of the governing rules of conduct."[84] Requiring "reject[ion of] the existing law,"[85] such responses are "not a legal vindication" and thus "leave[] ethically disobedient lawyers with no comfort that their careers will or should survive."[86]

Instead, Strassberg insists that "[i]f we are to have legal ethics, it must be compatible with the existence of ethical rules."[87] Accordingly, she suggests, "if . . . the existing rules can be reconceptualized to make them flexible and responsive to moral concerns, then the practicing bar and disciplinary institutions may accept some degree of discretion in legal ethics."[88] Consistent with this suggestion, Strassberg offers an alternative proposal, based on the application of Ronald Dworkin's theory of "adjudication as interpretive integrity"[89] to the realm of legal ethics.[90] Thus, in Strassberg's model, "[p]ositing integrity as an ethical virtue requires the positive law of legal ethics to be read as embedded with underlying moral principles."[91]

Again similar to Simon, Strassberg illustrates her model in the context of the rules of confidentiality. Strassberg argues that application of her model to the interpretation of ethics codes would prevent the kind of "moral failure"[92] that resulted from a positivist interpretation in *Spaulding v. Zimmerman*.[93] In *Spaulding*, believing disclosure was prohibited, defense attorneys did not reveal to the plaintiff their medical expert's discovery of the plaintiff's life-threatening aneurysm.[94] According to Strassberg, "[t]he astonishing refusal of these lawyers to violate the rule may be attributed to a contemporary positivist approach to

---

82. *Id.* at 903-04.

83. *Id.* at 901.

84. *Id.* at 901 n.1.

85. *Id.* at 904.

86. *Id.* at 902-03 n.14.

87. *Id.* at 904.

88. *Id.* at 905.

89. *Id.* at 930.

90. *Id.* at 930-51.

91. *Id.* at 934.

92. *Id.* at 902.

93. 116 N.W.2d 704 (Minn. 1962). For a recent analysis of *Spaulding* and its implications, see Cramton & Knowles, *supra* note 64, at 65 & n.5-6 (noting that "*Spaulding* is extensively discussed in books and articles dealing with legal ethics and prominently featured in professional responsibility casebooks and courses," and citing sources).

94. *See Spaulding*, 116 N.W.2d 704.

legal ethics, which made disclosure in Spaulding ethically impermissible and, therefore, unthinkable."[95] Indeed, for Strassberg, "Spaulding serves as an exemplar of cases in which seemingly morally justified conduct does not fit the governing rule."[96]

Though she acknowledges that "[t]he [then-]existing language of [the rules of confidentiality] cannot provide express justification for disclosing the aneurysm to the plaintiff,"[97] Strassberg nevertheless arrives at such a result through an interpretive framework that considers the "principles arguably embedded in" the rules.[98] Specifically, Strassberg identifies a number of values underlying confidentiality, including: "[e]ncourag[ing] the full and frank client disclosure necessary for effective representation" and for "permit[ting] lawyers to effectively protect society by discouraging wrongful conduct"; "creating a 'zone of privacy' . . . , thus enhanc[ing] the autonomy and individual liberty of citizens"; and "promot[ing] the moral values of trust and loyalty."[99]

Although these values generally justify obedience to the letter of the rules of confidentiality, Strassberg asserts that in a case such as *Spaulding*, "a principle arising from a profound sense of the value of human life forces us to examine rigorously these rationales for nondisclosure."[100] Thus, she engages in an analysis that, she suggests, demonstrates the inapplicability of the rationale for confidentiality under the specific circumstances of *Spaulding*.

First, she reasons, because the information about the aneurysm was not a confidence obtained from the client, revealing the information will not affect the ordinarily salutary ramifications stemming from the open nature of attorney-client communications.[101] Second, but-for negligence on their part, the plaintiff's doctors and attorneys should have discovered the information; therefore, disclosing the information in this case is unrelated to concerns about a zone of privacy.[102] Finally, with respect to promoting trust and loyalty, "a client who caused a life and death situation betrays a moral trust by refusing to permit disclosure in order to gain financial advantage and may not be entitled to the absolute loyalty of their attorney."[103] Based on this analysis, Strassberg concludes that "disclosure of the aneurysm may be permitted" under the rules of

---

95. Strassberg, *supra* note 1, at 902.

96. *Id.*

97. *Id.* at 938.

98. *Id.* at 947.

99. *Id.* (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 250).

100. *Id. See also* Cramton & Knowles, *supra* note 64, at 87 & n.79 (noting "broad agreement" for "the primacy of human life in the hierarchy of values recognized by ordinary morality" among "[a]ll of the world's major religions" as well as "[m]oral philosophies that are secular and humanistic in nature" and concluding that "the basic proposition of respect for life is more universally accepted than perhaps any other moral tenet"). For a discussion the primacy of human life in Jewish law and tradition, see *infra* note 151.

101. Strassberg, *supra* note 1, at 947.

102. *Id.*

103. *Id.*

confidentiality.[104]

Having demonstrated that, in a case such as *Spaulding*, her interpretive model permits ethical disclosure, Strassberg turns to the broader practical effects of her proposal on the ethical deliberation of lawyers. Strassberg posits that "[l]awyers may be more likely to question whether the positive ethical law controls an apparent moral-formal dilemma when they have not been schooled to believe that moral concerns are irrelevant to interpretations of the law."[105] Moreover, she continues, if lawyers believe that "those interpreting the ethical law are not limited to the letter of the law,"[106] they will submit more requests for advisory opinions, even when "the specific language of the law appears to leave no room for avoiding the impact of the law."[107] Thus, Strassberg's model permits and encourages a greater degree of ethical discretion and deliberation on the part of lawyers, even in the face of apparently categorical rules.

## II. A CRITICAL ANALYSIS OF THE SIMON AND STRASSBERG MODELS

### *A. Analysis of Simon's Model*

Despite Simon's insistence that the Contextual View relies on current conceptions of "justice" and his observation that contextual judgment is central to modern jurisprudence,[108] his approach to confidentiality demonstrates that his solution includes, when he deems it appropriate, express rejection of contemporary ethical guidelines.[109] Indeed, Simon's use of terms such as "nullification" and "def[iance]"[110] indicates the extent to which he calls on

---

104. *Id.* at 948. *See also* Cramton & Knowles, *supra* note 64, at 87 (concluding that "[g]iven agreement about the primacy of human life as a value, the moral issue in Spaulding should be an easy one for lay people and moral philosophers alike").

105. Strassberg, *supra* note 1, at 949-50.

106. *Id.* at 950.

107. *Id.*

108. *See supra* text accompanying notes 45-49, 54-56.

109. Professor Robert Gordon has similarly observed that Simon's work can be seen as both a "fundamental" and "remarkably conservative . . . critique of the prevailing system of lawyers' ethics and practices." Robert W. Gordon, *The Radical Conservatism of The Practice of Justice*, 51 STAN. L. REV. 919, 919 (1999) [hereinafter Gordon, *Radical Conservatism*]. As Gordon explains,

> it is fundamental, in the sense that . . . Simon razes to the ground the current structure of ethical rules and their presuppositions. It is conservative, in that he then shows how a system of lawyers' ethics can be rebuilt on its existing foundations, using existing construction materials—the ordinary working conceptions of law and justice that lawyers bring to bear in other aspects of their practices.

*Id. Cf.* Robert W. Gordon, *Portrait of a Profession in Paralysis*, 54 STAN. L. REV. 1427, 1427 (2002) (reviewing RHODE, *supra* note 43, and stating that Rhode "has many practical concerns for reform, which on the whole are modest, incremental, sensible, and entirely feasible").

110. SIMON, *supra* note 1, at 164.

lawyers consciously to violate ethics rules.[111] To be sure, Simon is not alone among ethics scholars who prescribe violation of the rules of confidentiality to save the life of the Innocent Convict.[112] In fact, there is nothing particularly remarkable about such a position, when articulated as a moral judgment based in considerations of the competing values of confidentiality and saving a life.[113] Yet, Simon's approach is different, in that he refuses to characterize his solution as contrary to law; instead, Simon refers to violation of the rules as "an act of principled commitment to legal values more fundamental than those that support the rule."[114] Notwithstanding his own characterization of the result, however, Simon's solution is ultimately premised on a rejection of and consequent disregard for prevailing ethics regulations.[115]

---

111. Likewise, Simon acknowledges, albeit in a rather understated fashion, the clear nature of the legal authority that supported the prohibition against disclosure of confidential information in the case of the Innocent Convict, stating that "many people, *including people with authority over the matter*, accept . . . the arguments for categorical confidentiality safeguards." *Id.* (emphasis added). Moreover, he notes that: "[f]or the most part the norms have been recently enacted, often after substantial debate"; "the bar's rules are consistent in important respects with the attorney-client privilege in the law of evidence"; and "professional responsibility norms are ultimately enacted by courts." *Id.* Nevertheless, in the face of this demonstration of the legal legitimacy of the rule prohibiting disclosure, Simon concludes that these "considerations" are "outweighed" by the arguments he offers in favor of disclosure. *Id.*

112. *See, e.g.*, Cochran, *supra* note 75; Mary C. Daly, *To Betray Once? To Betray Twice?: Reflections on Confidentiality, A Guilty Client, an Innocent Condemned Man, and an Ethics-Seeking Defense Counsel*, 29 LOY. L.A. L. REV. 1611 (1996); Robert P. Lawry, *Damned and Damnable: A Lawyer's Moral Duties With Life on the Line*, 29 LOY. L.A. L. REV. 1641 (1996); Russell G. Pearce, *To Save a Jewish Life: Why a Rabbi and a Jewish Lawyer Must Disclose a Client Confidence*, 29 LOY. L.A. L. REV. 177 (1996).

113. *See, e.g.*, Cochran, *supra* note 75, at 577 ("I think that the moral arguments for revealing [the convict's] innocence, the importance of human life, and protecting the innocent, justify a lawyer revealing this information . . ."); Pearce, *supra* note 112, at 1776 (quoting *Leviticus* 19:16; *Deuteronomy* 30:19) (concluding that, on the basis of Jewish law, the lawyer should reveal the information, because "the combined duties 'not to stand idly by' and 'to preserve life' outweigh [ ] the Jewish legal obligations of confidentiality" and following the law of the land).

114. SIMON, *supra* note 1, at 164.

115. *See* Cochran, *supra* note 75, at 579-80 (observing that "Simon insists that he is making a legal judgment" in favor of disclosure, but concluding that Simon's analysis is "short on legal support" and noting that "Simon cites no legal sources that justify revealing the confidential information"); Feldman, *supra* note 53, at 1479 (observing that Simon "devotes a large part of the book to justifying nullification, which he argues is not really nullification but, when done rightly, is correction of a misunderstanding of what the law is"); Gordon, *Radical Conservatism*, *supra* note 109, at 922 (stating that Simon's "view of 'law' is one of judgments that often, though not invariably, incorporate moral norms, including norms that sometimes justify ad hoc nullification or even conscientious resistance to laws whose operation is conspicuously unjust"); Luban, *supra* note 53, at 886 (challenging Simon's premise that "any argument for disobedience against a particular command would also be an argument that the command was an incorrect interpretation

of the law"); Strassberg, *supra* note 1, at 904 (observing that Simon's model "appears incompatible with the current rules of legal ethics" and finding it "unlikely . . . that the organized bar would be sympathetic to [Simon's] reframing of the rules").

*See also* Cochran, *supra* note 75, at 576 (acknowledging that "[t]he law of professional responsibility can be a source of injustice" and that, in the case of Leo Frank, the actual case on which Simon modeled his discussion of the Innocent Convict, "[t]he law governing lawyers led to the most unjust of results"); Cramton & Knowles, *supra* note 64, at 65 (observing "the reality . . . that the adversary role of the lawyer in litigation arguably permits, and may sometimes require, a lawyer to behave in an amoral or immoral way"); Luban, *supra* note 53, at 887 (recognizing that "some laws are morally unacceptable under any interpretation that does not do violence to the text" and that "[e]ven good laws occasionally yield unjust outcomes in exceptional cases").

Simon's approach is thus significantly different from the position of others who likewise prescribed disclosure to save the life of the Innocent Convict but acknowledged that their solution was inconsistent with the legal obligations of lawyers. *See* Cochran, *supra* note 75, at 577-79 n.39 (stating that "'legal values' appear to be on the side of not revealing" the information, but concluding that "I agree with Simon that the lawyer should reveal the information, but as a matter of moral judgment, rather than legal judgment"); Daly, *supra* note 112, at 1612-13 (concluding that "I am confident of my response" that "[m]y conscience will not permit confidentiality to trump justice," because "[a]n innocent man cannot be allowed to die"). Daly describes it as "unambiguous and consistent," that whether the issue is

> filtered through the prism of the attorney-client privilege or that of the ethical obligation of confidentiality; whether it is analyzed historically under the Canons or the Model Code; or whether it is examined newly under the Model Rules[,] [t]he answer is the same: [the lawyer] may not disclose [the confidence] even to save the life of an innocent man.

*Id.* at 1621-22; Lawry, *supra* note 112, at 1652, 1654 (identifying "a moral imperative" to disclose the information and stating that "[i]f the state or the legal profession punished me for disclosing the information . . . then so be it"); Pearce, *supra* note 112, at 1774, 1779 (stating that, under the rules, "one could assume that confidentiality as a lawyer is required" but concluding that the lawyer "had to do whatever she could to try to save a life," even though she would be "jeopardizing her career as a lawyer"); Rosenthal, *supra* note 16, at 166, 168 (stating that "[a]ttorneys who decide to disclose under the circumstances [of the Innocent Convict] may maintain a sense of moral equilibrium by adhering to their principles" but they "must be prepared for the potential consequences" of violating the rule).

*See also* John Leubsdorf, *Using Legal Ethics to Screw Your Enemies and Clients*, 11 GEO. J. LEGAL ETHICS 831, 834 (1998) ("Sometimes the law requires lawyers to act unethically. Blame then falls on the law-makers, and the lawyer's only options are civil disobedience and the pursuit of law reform."); Luban, *supra* note 53, at 889 (recognizing that at times, "the lawyer confronts a law-versus-morality question (not a law-versus-law question): 'Should I commit a crime to prevent injustice?'"); Stier, *supra* note 20, at 607-08 n.233 ("[T]he essence of civil disobedience [is] that it may be morally required although it both demands exceptional courage to undertake and resolution to endure its penalties").

Rosenthal notes the possibility of discipline resulting from disclosure, though he emphasizes that "[f]rom an economic standpoint, a more tangible, often damaging consequence exists" because

Moreover, and more significantly for the purposes of the present analysis, despite his declared goal of incorporating contextual considerations into the ethical judgment of attorneys, Simon's model does not appear to increase the ethical discretion of individual lawyers. Rather, Simon's approach seems to replace arguably unsatisfactory dictates of the current regulatory model with alternative—yet similarly mandatory—prescriptions in response to complex ethical questions. Simon's solution to the problem of the Innocent Convict is again instructive.

Simon's discussion of the Innocent Convict is certainly compelling. There is undoubtedly substantial appeal to his position that saving the life of the Innocent Convict outweighs any considerations supporting a categorical rule of confidentiality for information related to completed crimes. Even among scholars who disagree with Simon's characterization of his reasoning as based in legal—in addition to moral—principles, there is much agreement with the substance of his analysis.[116]

Nevertheless, it would seem presumptuous to assume that disclosure is the only viable ethical response. Clearly, both the organized bar, as reflected in the Model Code and the Model Rules, and many state courts, as reflected in the implementation of similar rules, adopted the position that, despite the tragic consequences to the Innocent Convict, a lawyer's ethical duty requires maintaining client confidences.[117] Though this position was the subject of much

---

"[t]he reputation of criminal defense attorneys travels swiftly through the ranks of criminal defendants and once the attorney is labeled as untrustworthy, that attorney may likely be hard pressed to retain any future clients." Rosenthal, *supra* note 16, at 167-68. Therefore, he concludes, "the decision to disclose . . . in this scenario is analogous to professional martyrdom." *Id.* at 168. *Cf.* Stier, *supra* note 20, at 598 n.185 ("It would be both self-righteous and foolish to prescribe martyrdom as an essential ingredient of integrity").

116. *See supra* note 115.

117. For a description—and sharp critique—of the initial refusal of the American Law Institute ("ALI") to provide an exception to the rules of confidentiality in this scenario, see Monroe H. Freedman, *The Life-Saving Exception to Confidentiality: Restating the Law Without the Was, the Will Be, or the Ought to Be*, 29 LOY. L.A. L. REV. 1631 (1996). Professor Freedman refers to this refusal as a "bizarre . . . example of th[e] tendency to overlook the ought [to be]," *id.* at 1631, and states that "[t]he fact that the questions posed in these cases are seriously debated within the legal profession is itself a kind of sick lawyer joke." *Id.* at 1632.

Simon is likewise critical of the approach of the ALI, observing in particular that a draft of the Restatement had included the case of the Innocent Convict as an illustration of the rule prohibiting disclosure in such a scenario. As Simon notes, with open incredulity, "[a]fter heated debate, the members [of the ALI] voted to delete the illustration as 'offensive' *without making any change to the rule!*" SIMON, *supra* note 1, at 222 n.9 (emphasis in original) (quoting 5 LAWYER'S MANUAL ON PROFESSIONAL CONDUCT (ABA/BNA) 1581-59 (1989)).

It should be noted that, like the current version of the Model Rules, the final version of the Restatement permits disclosure "to prevent reasonably certain death or bodily harm to a person." RESTATEMENT, *supra* note 36, § 66. The illustration accompanying the rule is taken from the facts of *Spaulding*, though the rule would now permit disclosure in the case of the Innocent Convict as

controversy and criticism, it was based on the conclusion of these groups and authorities that on some level and in some cases, contrary to Simon's reasoning, the benefits and values underlying nearly categorical rules of confidentiality outweigh saving a human life.[118]

---

well. *See id.* at § 66, illus. 1.

118. *See, e.g.*, Kathryn W. Tate, *The Hypothetical as a Tool for Teaching the Lawyer's Duty of Confidentiality*, 29 LOY. L.A. L. REV. 1659, 1683 (1996) (arguing that "[a]llowing or mandating attorneys to reveal a client's confidences puts the profession on a slippery slope of having to be the judge of which confidences are to be revealed and which are not" and concluding that "[n]ow that the profession has begun to assume the role of deciding when to make disclosures in the first instance, without judicial scrutiny and without clear guidelines, lawyers may become more and more comfortable with this role change and with disclosure," and as a result, "the client will only have the luck of the draw as to what moral standard or perspective of the professional code's scope the lawyer selected will follow").

Professor Abbe Smith advocates "a strict principle that client secrets and confidences are sacrosanct and lawyers should not divulge them under any circumstances," arguing that "it is more important to maintain and preserve the principle of confidentiality—no matter how difficult the circumstance—than it is to affirm individual lawyer morality." FREEDMAN & SMITH, *supra* note 42, at 147. Smith is also concerned that under more permissive rules, "lawyers will be more likely to use or disclose a client's confidential information . . . when the client is an indigent . . . than any other client," resulting in "an even greater divide between the kind of legal services—and loyalty—provided to some clients than that provided to others." *Id.* Moreover, Smith "worries . . . that there will be a spillover from lawyers who too broadly disclose client information in the name of third parties." *Id.* According to Smith, "[t]here is already a prevalent view that court-appointed lawyers are not to be trusted, that they don't care about their clients." *Id.* She concludes that "[p]oor clients will soon stop disclosing information to lawyers altogether—and perhaps they would be wise to do so." *Id.*

It should be noted that Smith considers the scenario of the Innocent Convict a "rare case where it is truly necessary to disclose information obtained through the lawyer-client relationship." *Id.* She anticipates that under such circumstances, notwithstanding a strict rule of confidentiality, a lawyer would disclose the information but would not be disciplined. *Id.*

*Cf.* Cramton & Knowles, *supra* note 64, at 112-13 (concluding that "a person's interest in averting wrongful execution or incarceration justifies disclosure" but "recogniz[ing] that client betrayal is likely to be more troublesome in situations in which the disclosure may result in the client being punished for the crime for which another person has been wrongfully convicted"); Lawry, *supra* note 112, at 1652-53 (concluding that disclosure is "a moral imperative" but stating that "such a breach would not be easy" in light of justifications for general confidentiality).

Professor Stier has argued that, in the case of the Innocent Convict, "there are good moral and legal reasons available to support either silence or disclosure." Stier, *supra* note 20, at 605. Specifically, "[p]reserving client confidences because of the promise of loyalty is a good moral reason for maintaining one's silence[, and s]uch an action can readily find legal support in the confidentiality provisions of the professional standards." *Id.* However, "[u]nder the facts of this unusual and extremely troubling hypothetical, revealing client confidences in order to save an innocent life obviously can be justified morally." *Id.* at 605-06. Moreover, according to Stier, "[s]upport for this decision can also be located in the standards of the profession, but less readily."

According to Simon, however, such a conclusion is not merely problematic, or even disturbing; it is plainly wrong, both in its outcome and its rationale. In Simon's view, the only correct analysis in the case of the Innocent Convict is one that, on balance, considers saving a life more important than any justifications for maintaining confidences. Therefore, it follows, in Simon's view, the only correct outcome in the case of the Innocent Convict is the one he prescribes: disclosure of confidences to save a life. Perhaps Simon's solution offers a more complex mode of analysis than that suggested by the rules, in the sense that it considers more factors, or at least engages and then attempts to refute arguments supporting the rule. Nevertheless, in concluding that disclosure is the only viable ethical solution, Simon likewise prescribes an apparently categorical answer to a complex ethical question, resulting in a form of ethical decisionmaking and adherence seemingly similar to the mechanical method he so strenuously rejects.[119]

### *B. Analysis of Strassberg's Model*

Similarly, an examination of Strassberg's position suggests that, despite her efforts to the contrary, like Simon's, her solution appears to raise concerns over both its viability within prevailing ethical standards and, more importantly, its ability to effect the broader aim of increased ethical deliberation. First, despite Strassberg's stated goal of working within "the interpretation and application of the existing rules of ethics, as set out in either the Model Code or the Model Rules,"[120] her solution appears vulnerable to criticism similar to that which she levels against Simon and others.[121] Second, although Strassberg's model offers a broader range of ethical discretion for lawyers than do categorical rules, again, like Simon's approach, it appears to have a limited effect in the extent to which it will result in more careful and complex ethical deliberation by lawyers.

Although her analysis offers a method for interpreting current rules regulating lawyers, her proposal seems unrealistic in light of—if not ultimately inconsistent with—the substance of the rules. Strassberg insists that, unlike Simon and others, whose work she characterizes as calling for an "abandonment"

---

*Id.* at 606.

119. *See* Wendel, *supra* note 5, at 73 (stating that "[o]ne might ask whether Simon places more weight on the objectivity of legal judgments than is warranted" and that Simon "sounds in places like [Ronald] Dworkin, who has sometimes argued that all legal questions have a single right answer"); *cf.* Luban, *supra* note 53, at 895 (describing Simon as "Dworkinian, in that the interpretation of legal standards turns out to presuppose background views about difficult questions of political theory into which the lawyer must weave the legal standard in the most coherent way possible"). *But see* Atkinson, *supra* note 75, at 1517 (concluding that Simon's book "is thus best read . . . not as a blueprint for replacing one professional order of mandatory rules and sanctions with another more to his liking, but as an invitation to join him in examining our shared professional lives").

120. Strassberg, *supra* note 1, at 923.

121. *See supra* text accompanying notes 82-86.

or a "reframing"[122] of ethics rules, her own model involves a "reconceptualiz[ation]" of the rules.[123] Notwithstanding the theoretical distinction between these characterizations, and even looking beyond positivist jurisprudence, ultimately, Strassberg's conclusion—that a rule expressly and categorically prohibiting disclosure of confidences may be understood to permit such disclosure—seems more a rejection of the rule than a reinterpretation.

In addition, whereas Simon's model may prescribe an assertedly correct answer to an ethical dilemma, thereby obviating the need for ethical deliberation on the part of the individual lawyer,[124] Strassberg's solution seems merely to allow, but not require, that the lawyer engage in ethical deliberation. Strassberg does encourage lawyers to interpret ethics rules in light of moral principles, thus supporting a more complex interpretation of ethical guidelines. For example, Strassberg offers an interpretive framework through which facially categorical confidentiality rules may be understood, after careful analysis, to permit disclosure in cases such as *Spaulding*.[125] Nevertheless, Strassberg's model does not appear to impose on lawyers the obligation to engage in such analysis. Although some lawyers will perhaps accept the challenge of applying more nuanced ethical considerations to the interpretation and implementation of ethics codes, Strassberg's solution does not seem to suggest a way of increasing or improving the level of ethical analysis among those who continue to opt for more mechanical adherence to ethical guidelines.

### *C. Analysis Under Amended Model Rule 1.6*

Addressing the concerns underlying the broad criticism of the Model Rules' facial prohibition of disclosure in scenarios such as the Innocent Convict and *Spaulding*, in 2002, the American Bar Association adopted an important change to Model Rule 1.6. The amended rule allows disclosure "to prevent reasonably certain death or substantial bodily harm."[126] Thus, amended Model Rule 1.6 apparently permits a lawyer in the Innocent Convict scenario to reveal that the client, not the Innocent Convict on death row, committed the capital crime, or in the Spaulding case to reveal an adversary's life-threatening injury caused by the client.[127]

---

122. Strassberg, *supra* note 1, at 904.

123. *Id.* at 905.

124. *See supra* Part II.A.

125. *See supra* Part I.B.

126. MODEL RULES, *supra* note 34, R. 1.6 (b)(1). *See also* RESTATEMENT, *supra* note 36, § 66 ("A lawyer may use or disclose confidential client information when the lawyer reasonably believes that its use or disclosure is necessary to prevent reasonably certain death or serious bodily harm to a person.").

127. The amended comment to the rule incorporates the rationale of those who have advocated disclosure in these scenarios, emphasizing that "[a]lthough the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients," the amended rule "recognizes the overriding value of life and

On one level, the amended rule appears to alleviate the concerns of Simon, Strassberg, and others, proposing expressly incorporating into the law governing

---

physical integrity . . . ." MODEL RULES, *supra* note 34, R. 1.6, cmt. [6]. Although the comment does not refer to either the Innocent Convict or *Spaulding*, it presents a similar—perhaps more common—scenario, in which:

> a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

*Id.*

In adopting this amendment to Rule 1.6, the ABA accepted only one component of a considerably more extensive amendment to the rule proposed by the Ethics 2000 Commission. The proposal included two additional provisions permitting disclosure, in limited circumstances, to prevent financial harm to a third party. After the first of these provisions was rejected by the ABA in 2001, the other was withdrawn. *See* GILLERS & SIMON, *supra* note 63, at 80-81.

These proposals and the decisions of the ABA are, to some degree, representative of the broader work of the Ethics 2000 Commission and the responses of the ABA. For example, the proposed amendments to Model Rule 1.6 appeared to be an attempt by the Ethics 2000 Commission to reflect the judgments and values underlying proposals that had likewise been considered but rejected before the initial enactment of the Model Rules in 1983—though it should be noted that the earlier proposals included mandatory disclosure provisions as well. *See id.* at 80-81. Similarly, the Ethics 2000 Commission proposed an amendment to Model Rule 1.5 that would have revived earlier drafts of the rule requiring that fee agreements be put in writing, in place of the enacted rule's language merely suggesting that fee agreements should "*preferably* [be] in writing." *See id.* at 58-59; MODEL RULES, *supra* note 34, R. 1.5(b) (emphasis added). The ABA rejected this proposal as well. *See* GILLERS & SIMON, *supra* note 63, at 59.

On the other hand, the Ethics 2000 Commission did achieve an arguably substantial level of success with respect to Model Rule 1.6, effecting a change in the confidentiality rule to provide an exception to prevent death or substantial physical harm. Another example of a successful proposal, adopted by the ABA, requires that a lawyer entering into a business transaction with a client not only give the client "a reasonable opportunity" to seek the advice of a lawyer regarding the transaction, but also advise the client, in writing, of "the desirability" of seeking such counsel. MODEL RULES, *supra* note 34, R. 1.8.

Indeed, not surprisingly, as with most legislative processes—including the drafting of ethics codes—the responses of the ABA to the proposals of the Ethics 2000 Commission have been varied and complex. *See* Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441 (2002); *cf.* Richard Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639 (1981); Marvin Frankel, *Why Does Professor Abel Work at a Useless Task?*, 59 TEX. L. REV. 723 (1981); Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243 (1985); Thomas Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977); Deborah Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689 (1981); Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677 (1989).

lawyers the moral principles recognizing the overriding value of human life. As a consequence, the letter of the amended rule permits the very discretion to disclose that Simon and Strassberg struggled to justify, thereby obviating the need for theoretical interpretations and reconceptualizations that seem inconsistent with the prior formulation of the rule.

Nevertheless, a closer look at the amended rule suggests that it neither yields the same result as, nor meets the goals of Simon's model. In his discussion of the case of the Innocent Convict, after weighing the competing ethical considerations, Simon prescribes disclosure as the correct decision, in apparent violation of the former rule.[128] Undoubtedly, then, the permission to disclose provided under the current rule would, according to Simon, imply an obligation to disclose. Indeed, Simon hypothesizes that "[i]f . . . the rules gave the lawyer discretion to disclose, then the case would be an easy one."[129]

In contrast to Simon's hypothetical analysis, however, the current rule, despite permitting disclosure, does not suggest that the case is an easy one militating an obligation to disclose. Rather, notwithstanding the comment to the rule describing the "overriding value of life,"[130] the rule does not definitively determine that saving a life overrides confidentiality; instead, it only permits such a discretionary conclusion on the part of the lawyer. Hence, the current rule differs significantly from Simon's model in that it continues to allow a lawyer, alternatively, to conclude—contrary to Simon's view of ethics and morality—that confidentiality outweighs saving the life of the Innocent Convict. Thus, unlike Simon's model, the current rule arguably expands the range of ethical discretion for the individual lawyer, who ultimately decides among competing values.

The current rule appears more consistent with the outcome of the *Spaulding* scenario under Strassberg's model, though the current rule may also be susceptible to the same limitations as Strassberg's model. Like Simon, despite operating under the prior version of Rule 1.6, Strassberg presented a theory permitting disclosure to save a life. Yet, unlike Simon, Strassberg did not conclude that disclosure is mandatory in such a case.[131] Therefore, even under the more permissive current rule, although the case for disclosure may seem more compelling, Strassberg would appear to permit—but still not require—disclosure. Thus, both Strassberg's model and the current rule may be intended to increase the likelihood as well as the quality of ethical deliberation. In practice, however, although they may encourage such analysis on the part of lawyers, they do not offer a framework through which such deliberation becomes obligatory.

As an alternative to both Simon's and Strassberg's models, perhaps a more effective method for increasing and improving ethical deliberation among lawyers requires a different understanding of the concept of discretion in legal ethics.

---

128. *See supra* Part II.A.

129. SIMON, *supra* note 1, at 163.

130. MODEL RULES, *supra* note 34, R. 1.6, cmt. [6].

131. *See supra* Part II.B.

## III. BEYOND THE MANDATORY/OPTIONAL DICHOTOMY: A DELIBERATIVE MODEL OF LEGAL ETHICS

Under the standard conception of ethics rules, an ethics provision is either mandatory or optional. This conception is reinforced, in part, by the "Scope" section introducing the Model Rules, which states that "[s]ome of the Rules are imperatives, cast in the terms of 'shall' or 'shall not.'"[132] These Rules "define proper conduct for purpose of professional discipline."[133] In contrast, "[o]ther [Rules], generally cast in the term 'may,' are permissive and define areas under the Rules in which the lawyer has discretion."[134] With respect to the latter, "[n]o disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion."[135] Thus, it appears that if an ethics provision does not contain an express command, in the form of required or prohibited conduct, the lawyer may decide whether and in what manner to respond to the provision, and may not be disciplined for this decision.[136]

Yet, there may be an alternative conceptual model for ethics rules, a "Deliberative Model," that looks beyond a simplistic mandatory/optional dichotomy. Under this model, in addition to the categories of rules that are mandatory and optional, there is a third category of "discretionary" rules. Significantly, in this conceptual framework, a discretionary rule differs from an optional rule. Adherence to a discretionary rule, as the term implies, is—like adherence to an optional rule—ultimately at the discretion of the lawyer. However, unlike the suggestions set forth in optional rules—consideration of which is in no way obligatory—the ethical alternatives presented in a discretionary rule must be considered and deliberated before a decision is made.[137] Thus, whereas an optional rule is purely suggestive—often

---

132. MODEL RULES, *supra* note 34, Scope [14].

133. *Id.*

134. *Id.*

135. *Id.*

136. It should be noted that even under this understanding of ethics rules, ethics provisions need not always state, with complete specificity, the precise nature of conduct that may be subject to discipline. Both the Model Code and the Model Rules contain broad ethics provisions that courts have interpreted as a basis for discipline, finding violations of what I have called elsewhere "unenumerated ethical obligations." *See* Levine, *supra* note 36; *see, e.g.*, MODEL CODE, *supra* note 34, DR 1-102 (A)(6) (prohibiting "conduct that adversely reflects on [the lawyer's] fitness to practice law"); MODEL CODE, *supra* note 34, DR 1-102 (A)(5) (prohibiting "conduct that is prejudicial to the administration of justice"); MODEL RULES, *supra* note 34, R. 8.4(d) (same); MODEL CODE, *supra* note 34, Canon 9 ("avoid[ing] even the appearance of professional impropriety"). For examples of specific conduct that courts have held to be in violation of these broad ethics provisions, see Levine, *supra* note 36.

137. The Deliberative Model borrows in part from Rabbi Yitzchak Hutner's analysis delineating the nature of different activities under Jewish law and philosophy. *See* YITZCHAK HUTNER, PACHAD YITZCHAK, PESACH 123-26 (6th ed. 1999). Rabbi Hutner refutes a misconception

aspirational[138]—a discretionary rule must be taken seriously before a lawyer

---

that categorizes a limited number of human actions as either obligatory or prohibited pursuant to God's express or implied command, but considers purely optional the remainder of life's activities. *See id.* at 123-24.

As Rabbi Hutner explains, the range of activities that are truly optional, in the sense of being exempt from moral consideration, is virtually nonexistent. Instead, based on the biblical verse, "in all of your ways you shall acknowledge [God]," *Proverbs* 3:6, Rabbi Hutner describes a broad and general obligation that all of life's activities be used to serve God. However, he continues, unlike those activities that are expressly or implicitly identified as mandated or prohibited under Jewish law, the remaining activities require a more complex analysis to be exercised, under a consideration of the relevant circumstances, in the service of God. *See id.*; *see also* HUTNER, *supra* note 77, at 51-53; RABBENU BACHYA IBN PAQUDA, CHOVOTH HA-LEVAVOTH (4:4); Levine, *Broad Life*, *supra* note 7; Levine, *Professionalism*, *supra* note 7; Samuel J. Levine, *Unenumerated Constitutional Rights and Unenumerated Biblical Obligations: A Preliminary Study in Comparative Hermeneutics*, 15 CONST. COMMENT. 511 (1988); Aharon Lichtenstein, *Does Jewish Tradition Recognize an Ethic Independent of Halakha?*, CONTEMPORARY JEWISH ETHICS 102-23 (Menachem Marc Kellner ed., 1978); Moshe Sokol, *Personal Autonomy and Religious Authority*, *in* RABBINIC AUTHORITY AND PERSONAL AUTONOMY 169-216 (Moshe Sokol ed., 1992).

Similarly, the Deliberative Model observes that some ethics rules specify actions that are mandated or prohibited, thus determining definitively the ethical nature of these actions. However, the fact that other rules identify actions that are left to the ethical discretion of lawyers does not imply that such conduct is optional in the sense that it is outside of the realm of ethical consideration. Instead, the rules acknowledge that such conduct is not easily or universally defined as ethically mandated or prohibited. Thus, under these rules, the lawyer is obligated to engage in ethical deliberation to determine the way in which, under the circumstances, the rule can best be applied in an ethical manner.

As I have elsewhere noted and developed at greater length, hermeneutic comparison between Jewish law and American legal ethics may be helpful in part "because both focus on and prescribe obligations rather than rights." Levine, *supra* note 36, at 543. Likewise, a comparison of the modes of ethical decisionmaking in the two systems may be particularly appropriate, as both involve consideration and deliberation of complex legal and moral issues underlying these obligations.

138. *See, e.g.*, MODEL RULES, *supra* note 34, R. 6.1 ("A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year."). The clearly aspirational nature of the Rule is demonstrated by the use of the word "should," which indicates an optional suggestion, rather than a statement of either mandatory, prohibited, or discretionary conduct. In fact, the Scope section likewise distinguishes between: (1) "Rules [that] are imperatives, cast in the terms 'shall' or 'shall not'"; (2) Rules, "cast in the term 'may,' [that] are permissive and define the areas under the Rules in which the lawyer has discretion to exercise professional judgment"; and (3) Comments that use the term "should" and do not add obligations to the Rules. MODEL RULES, *supra* note 34, Scope Cmt. [14]. Thus, consistent with the distinctions described in the Scope, the pro bono rule, employing the term "should," does not impose additional obligations, while discretionary rules, which use the term "may," require the exercise of professional judgment.

The Deliberative Model thus finds much in common with, but ultimately differs from, Professor Russell Pearce's proposed Rule that "would hold lawyers morally accountable for their

decides to act or not to act.[139]

---

conduct." Pearce, *supra* note 25, at 1805. Like the Deliberative Model, Pearce's proposal "would not dictate a particular moral vision. Rather, it would direct lawyers with sometimes conflicting understandings of their role to wrestle with the moral implications of their conduct both as individuals and as a community." *Id.* The Deliberative Model, likewise, would not dictate a particular view of a complex moral issue, but would instead impose the obligation to engage in ethical deliberation before determining a course of action.

Unlike the Deliberative Model, however, Pearce describes the proposed Rule 1.0 as "aspirational, similar to Rule 6.1." *Id.* at 1807. Thus, "[t]he goal of the Rule would be to educate lawyers to their moral responsibility and to encourage lawyers as individuals and as members of the legal community to explore how their work 'contribut[es] to the social good.'" *Id.* (quoting RHODE, *supra* note 43, at 8). In contrast to both Model Rule 6.1 and Pearce's proposed Model Rule 1.0, the Deliberative Model envisions an obligation, not merely an option or aspiration, of ethical deliberation and decisionmaking.

139. The lack of precision in the current approach to discretionary ethics rules may have contributed to the confusion that has arisen in the interpretation and application of provisions stating that an attorney "may" reveal confidences when "required" by a court order. For example, a case before the Supreme Court of Illinois involved a rule stating that a lawyer "*may*" reveal "'confidences or secrets when . . . required by law or court order.'" In re Marriage of Decker, 606 N.E.2d 1094, 1103 (Ill. 1992) (emphasis in original) (quoting 107 Ill.2d R. 4-101). The Illinois State Bar Association argued that the rule was "discretionary" because it used the "permissive word 'may'" and not the "mandatory 'shall,'" and that, therefore, under the rule, an attorney was not required to disclose confidences pursuant to a court order. *Id.* The court rejected this interpretation, concluding that the phrase "required by law or court order" is "clearly mandatory." *Id.* (quoting Ill.2d R. 101(d)(2)). Accordingly, the court explained that "rather than being discretionary, [the rule] simply instructs attorneys that they will not be disciplined for revealing confidences or secrets when *required* by law or court order." *Id.* at 1103-04 (emphasis in original). The court added that "[t]o hold otherwise would place an attorney's discretion above judicial determination of the matter." *Id.* at 1103. *See also* Fellerman v. Bradley, 493 A.2d 1239, 1248 (N.J. 1985) (interpreting a similar rule and concluding that "the attorney must comply with the trial court's order compelling disclosure.").

The differing interpretations in these cases may be an unavoidable consequence of the problematic wording of the rules. Alternatively, the cases may serve as illustrations of Professor Koniak's view that "[t]he state and the profession have different understandings of the law governing lawyers—they have in effect different 'law,'" as well as examples of what Professor Koniak sees as a "continuing struggle between the profession and the state over whether the profession's vision of law or the state's will reign." Koniak, *supra* note 60, at 1390.

Nevertheless, it appears that some of the confusion in the interpretation of these rules stemmed from imprecise use and application of the concepts "mandatory," "discretionary" and "permissive" as applied to ethics regulations. The Illinois Bar Association appears to have premised its argument upon the understanding that the rule was discretionary and, therefore, optional. This understanding was based in part on a parallel interpretation of Rule 4-101(d)(3), which provided that an attorney may reveal the intention of a client to commit a crime that would not involve death or serious injury. As the court acknowledged, this rule "is discretionary" and therefore, under this rule, the lawyer "had the discretion to inform" or not to inform. *In re Marriage of Decker*, 606 N.E.2d at

Thus, whereas mandatory rules prescribe a particular mode of conduct, violation of which may subject a lawyer to discipline, discretionary rules under the Deliberative Model prescribe ethical deliberation.[140] Therefore, if a response to a discretionary rule is determined on the basis of an articulable and justifiable form of ethical deliberation, regardless of the outcome, discipline is not appropriate. If, however, a course of conduct is undertaken without such deliberation, depending on the circumstances, such conduct may subject the lawyer to discipline.[141]

---

317. Because the court and the Bar Association both equated discretionary rules with optional rules, the Bar Association simply applied the same interpretation to Rule 4-101(d)(2). In response, the court could distinguish Rule 4-101(d)(2) only by asserting that it was not a discretionary rule.

Perhaps a more helpful understanding of these rules would view both of them as discretionary rules, in the sense of requiring the lawyer's ethical deliberation in their interpretation and application. Under such an analysis, Rule 4-101(d)(3) would continue to allow for either disclosure or silence on the basis of ethical deliberation. Consistent with the court's conclusion, however, ethical consideration of Rule 4-101(d)(2) would require disclosure pursuant to a court order, because the lawyer's ethical discretion, quite understandably, would not override the implicit judicial determination of the ethical issue through its order to disclose.

140. The precise wording of the "Scope" section lends some support to this conception. The sentence stating that permissive rules "define areas . . . in which the lawyer has discretion" concludes with the words "to exercise professional judgment." MODEL RULES, *supra* note 34, Scope Cmt. [14]. This language seems to indicate that a lawyer's discretion in relation to a permissive rule does not include an option blithely to disregard the ethical concerns underlying the rule. Rather, with discretion comes the responsibility to exercise professional judgment. Thus, although the lawyer ultimately may decide how to respond to a permissive rule, such a decision is acceptable only when reached as the result of exercising professional judgment, presumably through ethical deliberation. Simon has similarly emphasized the centrality of the concept of professional judgment, both in the area of legal ethics and more generally in the American legal system. *See* SIMON, *supra* note 1, at 198-99. Because discretion is thereby based in professional judgment, it is arguably only in the exercise of such judgment that, as the Scope continues, "[n]o disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion." MODEL RULES, *supra* note 34, Scope Cmt. [14]. The complex and limited nature of the obligation imposed by discretionary rules may be captured in the seemingly oxymoronic reference to "permissive duties." Fred C. Zacharias, *Five Lessons for Practicing Law in the Interests of Justice*, 70 FORDHAM L. REV. 1939, 1943 (2002).

141. Scholars have documented the extent to which, on a descriptive level, the substance of many ethics rules consciously "do not claim to occupy the whole field of ethical deliberation." Wendel, *supra* note 5, at 11. Professor Wendel delineates two different categories of such rules: First, "[s]ome rules expressly build in an element of discretion, such as the provision which empowers a lawyer to withdraw from representation if 'a client insists upon pursuing an objective that the lawyer considers repugnant,'" *id.* (quoting MODEL RULES, *supra* note 34, R. 1.16(b)(3)) (presently R. 1.16 (b) (4)), "or the rule which permits a lawyers to charge only reasonable fees." *Id.* (quoting MODEL RULES, *supra* note 34, R. 1.5). Second, "[i]n addition to the rules which by their terms leave room for moral deliberation, the drafters of the disciplinary rules correctly note that in addition to substantive and procedural law, 'a lawyer is also guided by personal conscience

and the approbation of professional peers.'" *Id.* (quoting MODEL RULES, *supra* note 34, pmbl.). As an example of the second category, Wendel cites the approach of the Restatement, adopted in the amended Model Rule 1.6 as well, permitting but not requiring disclosure of confidential information to prevent death or serious bodily harm. *See id.* at 11-12; *supra* Part II.C.

Although the present analysis centers on the relevance of the Deliberative Model to the second category, and indeed the same example, that Wendel identifies, the Deliberative Model is relevant to the interpretation and application of rules included in the first category as well. In effect, the Deliberative Model looks to extend to discretionary rules that fit within the second category an interpretive methodology that has already been applied to the rules that fall under the first category.

Professor Zacharias has likewise identified a number of ethics rules that "afford lawyers significant discretion in accepting clients, giving advice, and selecting litigation tactics." Zacharias, *supra* note 1, at 1326. For example, Zacharias finds ethics codes "ambiguous" in relation to tactics employed in the course of negotiations: The Model Rules "forbid making false statements in negotiations, while condoning 'puffing' and adherence to negotiation 'conventions.'" *Id.* at 1335 (quoting MODEL RULES, *supra*, R. 4.1, cmt. [2]). In addition, "[t]he Rules encourage lawyers to communicate with clients regarding appropriate means and objectives, while emphasizing the lawyer's duty to maximize client interests and the client's right to control settlements and pleas." *Id.* at 1135-36 (citing MODEL RULES, *supra* note 34, R. 1.4(b), cmt. 1; R. 1.2(a)). Finally, "[t]he codes express disapproval of delay and state that lawyers need not employ all possible tactics, but also appear to subordinate these preferences to client interests." *Id.* at 1136 (citing MODEL RULES, *supra* note 34, R. 1.3, cmt. 1; R. 1.2, cmt. 1; R. 3.2). On the basis of these examples, Zacharias concludes that "[i]n practice, therefore, the codes provide authority for virtually any approach the negotiating lawyer chooses to take." *Id.*

Indeed, Zacharias makes similar observations in relation to a number of other areas of legal practice, including the "courtroom context," *id.* at 1338-39, the "media context," *id.* at 1339-1340, "employing proper tactics to help wrongful clients win," *id.* at 1340-43, "employing proper tactics to help clients commit new wrongful acts," *id.* at 1344-46, and "employing marginal tactics." *Id.* at 1346-48. *See also id.* at 1329-30 & nn.87-88.

Moreover, Zacharias observes, although—or, more likely, because—"the codes in fact accord lawyers significant choice in selecting tactics, screening arguments, and presenting accurate versions of the facts, . . . lawyers have come to use the model of client-oriented ethics as a shield, both for defending behavior and for avoiding introspection regarding moral issues." *Id.* at 1349. *See also* Zacharias, *Specificity*, *supra* note 51, at 263 (asserting that "the requirement that 'prosecutors should do justice' . . . enables prosecutors to justify virtually any response to any ethical dilemma" and that as a result, nearly "anything they decide is professionally correct"); Zacharias, *supra* note 140, at 1942-43 (asserting that "[l]awyers have more influence on the conduct of lawsuits than they are ready to admit," and concluding that "[f]or as many types of conduct as the codes require of lawyers, there are more instances in which the codes impose permissive duties to serve societal interests or in which the codes grant lawyers ultimate decisionmaking discretion").

*Cf.* Hodes, *supra* note 62, at 1558 (noting that "discretionary language still abounds in the Model Rules, recognizing—while at the same time underscoring—the continuing need for judgment"); Stier, *supra* note 20, at 584 (stating that "much of both the [Model] Code and the [Model] Rules provide lawyers with opportunities to decide for themselves whether or not to take a particular action"); *id.* at 596 & n.179 (noting that "[m]uch of the law of lawyering makes room for morals by giving lawyers discretion in determining what they ought to do," not only when "[t]he

The significance of the Deliberative Model may be considered in light of its application to the rules of confidentiality. Although it shares with the models proposed by Simon and Strassberg the goal of increased and improved ethical deliberation, the Deliberative Model differs significantly from both of these models, as demonstrated in a comparison of the different approaches to the scenarios of the Innocent Convict and *Spaulding*.

In applying the Deliberative Model to these scenarios, the analysis first acknowledges that in both cases the applicable rule—Model Rule 1.6—states that

---

language of some standards is deliberately couched in permissive rather than mandatory terms," but also when "[e]ven mandatory standards . . . leave room for judgment calls").

The Deliberative Model is intended, in part, as an effort to respond to and remedy this phenomenon, requiring that lawyers engage in ethical introspection to arrive at an ethically justifiable decision under a particular set of circumstances, even when involved in an area of practice in which ethics codes do, in fact, afford discretion to lawyers rather than mandating specific conduct. It may not be surprising, in light of his analysis, that one of the remedies Professor Zacharias proposes shares a number of similarities with—but nevertheless differs significantly from—the Deliberative Model. *See* discussion *infra* note 154.

Moreover, some scholars have suggested not only that, as a descriptive matter, "the current Model Rules and Model Code do not even aim to cover all ethically required conduct, let alone all ethically exemplary conduct," Feldman, *supra* note 1, at 902 n.55, but that, as a jurisprudential matter, there exists an "inevitable inconclusiveness inherent in any statutory code, including a code of ethics." *Id.* at 898. Professor David Wilkins' groundbreaking work in this area applies to legal ethics each of three primary arguments set forth by "legal realists and their followers" to support the claim that "law is largely indeterminate." Wilkins, *supra* note 44, at 478.

Specifically, Wilkins considers the relevance to the practicing lawyer of the arguments that: (1) "there are in most cases a number of sources from which a 'legal' answer might be derived"; (2) "legal doctrines contain vague or ambiguous language susceptible to multiple, inconsistent interpretations"; and (3) "by shifting the focus of analysis between the general and the particular, it is often possible to alter the perception of the proper application of the law to the facts." *Id.* at 478-84. In support of the second of these propositions, Wilkins observes that the Model Code is "rife with vague and ambiguous terms," *id.* at 480 (citing MODEL CODE, *supra* note 34, DR 1-105(A); DR 7-102(A)(2); DR 9-101), and that, although the tone and structure of the Model Rules "eliminated some of the more pervasive ambiguities, vagueness and open-endedness remain." *Id.* at 480-81 (citing MODEL RULES, *supra* note 34, R. 1.1; R. 3.4(d)).

Finally, both courts and legal scholars have emphasized that, "[a]s a practical matter, there could never be a set of rules which contemplates every aspect of the many encounters between an attorney and client." *In re* Rinella, 677 N.E.2d 909, 917 (Ill. 1997). *See* Levine, *supra* note 36 (citing and analyzing sources). Indeed, as I have noted elsewhere, courts and scholars have recognized a similar impracticality in articulating every right guaranteed by the United States Constitution or, under Jewish legal theory, every obligation mandated by the Torah. *See id.* I have suggested that, on both a descriptive and normative level, all three of these areas of law adopt a hermeneutic methodology through which broad provisions are interpreted as a basis for deriving and identifying otherwise unenumerated ethical obligations, constitutional rights, and biblical obligations, respectively. *See id.*

a lawyer "may" reveal confidential information necessary to save a life.[142] Yet, because under the Deliberative Model this Rule is seen as discretionary rather than optional, the analysis does not end with the simplistic and categorical conclusion that, regardless of circumstances and even in the absence of any ethical deliberation, a lawyer may ethically reveal—or not reveal—the information. Instead, according to this analysis, in most—or, quite likely, as the rule implies, all—cases in which the lawyer faces such an ethical dilemma, the lawyer *may* be ethically permitted either to disclose or not disclose the information. Nevertheless, upon review of the action taken, the lawyer may be required to justify the ethical quality of the decision, through an articulable demonstration of ethical deliberation supporting the decision.[143]

The difference between the Deliberative Model and Simon's model is apparent in the context of the case of the Innocent Convict. According to Simon, even under the former Rule 1.6, which, by virtually all accounts, would have flatly prohibited disclosure[144]—and, *a fortiori*, under the current, more permissive rule—disclosure is considered not merely an optional decision for the ethical lawyer but the one correct decision.[145] In contrast, under the Deliberative Model, although specific circumstances and various forms of deliberation may likewise support the ethical decision of disclosure, the individual lawyer retains

---

142. *See* MODEL RULES, *supra* note 34, R. 1.6(b)(1).

143. The Deliberative Model thus recognizes that different—possibly contradictory—responses may be ethically proper in the same situation, as long as each is justifiable on the basis of ethical deliberation. *See* Atkinson, *supra* note 75, at 1515 (advocating "healthy toleration of ethical diversity" based on the principle that "[b]eyond certain widely agreed minimal standards, conscientious lawyers genuinely and perhaps irreducibly disagree about what their ethical obligations are," insisting that "[i]n the face of that kind of disagreement, a well-meaning majority might well opt to allow legal latitude to the loyal opposition, even as the majority holds out its view in an official form as ethically superior," and invoking a "religious parallel" to note that "one can have an established church without persecuting dissenters"); RHODE, *supra* note 43, at 58 ("Lawyers can, and should, act on the basis of their own principled convictions, even when they recognize that others could in good faith hold different views"); Zacharias, *Specificity*, *supra* note 51, at 258 (arguing that "in guiding lawyers rather than directing . . . particular acts, the codes acknowledge that there may be more than one appropriate response to the situations in question."); *cf.* W. Bradley Wendel, *Value Pluralism in Legal Ethics*, 78 WASH. U. L.Q. 113, 116-17 (2000) (observing that "the foundational normative values of lawyering are substantively plural and, in many cases, incommensurable" and prescribing that, therefore, "the model of ethical decision making for lawyers accommodate the incommensurability of professional values and make appropriate adjustments.").

Thus, under the Deliberative Model, as under Simon's model, the decisionmaking process of the private lawyer approximates that of the prosecutor, whose obligation to do justice "may . . . point in contradictory directions." Green, *supra* note 49, at 622. *See* SIMON, *supra* note 1, at 10-11; *see also* Zacharias, *Specificity*, *supra* note 51, at 250 ("Different prosecutors . . . can justify diametrically opposite conduct as serving justice.").

144. *See supra* note 115.

145. *See supra* Part II.A.

the discretion not to disclose when such a decision is based in demonstrable ethical deliberation.[146]

At the same time, if challenged, the lawyer who chooses disclosure to save the life of the Innocent Convict may be required to demonstrate ethical considerations supporting such a decision under the specific circumstances of the case.[147] Thus, when compared with Simon's model, which prescribes disclosure

---

146. The Deliberative Model likewise differs from the approach prescribed by California rules of confidentiality, flatly prohibiting disclosure of confidences to save a life. As Professor Zacharias has developed at some length, a reasonable interpretation of California's generally categorical laws against disclosing confidences may have permitted disclosure in the extreme case of a client's stated intent to commit a murder. *See* Fred C. Zacharias, *Privilege and Confidentiality in California*, 28 U.C. DAVIS L. REV. 365 (1995). Indeed even the generally restrictive Model Code and former Model Rule 1.6 include provisions permitting disclosure under such a scenario. *See* MODEL CODE, *supra* note 34, DR 4-101(C)(3); GILLERS & SIMON, *supra* note 63, at 70. According to the interpretation set forth in a California ethics opinion, however, the lawyer must nevertheless maintain the client's confidences. *See* Zacharias, *supra* note 1, at 1329 n.86 (citing San Diego County Bar Ass'n Legal Ethics and Unlawful Practices Comm., Op. 1990-1) (applying CAL. BUS. & PRO. CODE § 6068(e)).

Although the outcome of this interpretation of the California rule is directly contrary to Simon's prescription of disclosure to save a life, the bar committee similarly shares with Simon a methodological framework that mandates a single ethically acceptable response for lawyers. *See id.* (concluding that, under such an interpretation, the California rule "depriv[es] lawyers the right or obligation to weigh values" by "establish[ing] an absolute principle that a lawyer's role in the system includes a duty not to weigh considerations militating against confidentiality"). In contrast to both of these approaches, the Deliberative Model considers either disclosure or silence a potentially proper ethical response, mandating instead that the lawyer engage in ethical deliberation in deciding how to exercise discretion. *Cf.* Reed Elizabeth Loder, *Tighter Rules of Professional Conduct: Saltwater for Thirst?*, 1 GEO. J. LEGAL ETHICS 311, 316 (1987) ("Prepackaged solutions remove situational ambiguities and the need to make and justify difficult choices, two features which characterize moral decisionmaking.").

147. The approach of the Deliberative Model in the case of the Innocent Convict may also be elucidated through a contrast to the Restatement. Like the current Model Rule 1.6, the Restatement permits disclosure of confidential information to prevent death or serious bodily injury. RESTATEMENT, *supra* note 36, § 66(1). Unlike the Deliberative Model, however, the Restatement considers the decision to disclose or not disclose to be optional rather than discretionary. Accordingly, under the Restatement, "[a] lawyer who takes action or decides not to take action permitted under this Section is not, solely by reason of such action or inaction, subject to professional discipline." *Id.* § 66 (3).

The Comment to this Section explains the rationale behind the optional approach to disclosure. Specifically, the Comment observes that the decision to disclose "would inevitably conflict to a significant degree with the lawyer's customary role of protecting client interests." *Id.* at cmt. g. Moreover, "[c]ritical facts may be unclear, emotions may be high, and little time may be available in which the lawyer must decide on an appropriate course of action." *Id.* Therefore, the Comment continues, "[s]ubsequent re-examination of the reasonableness of a lawyer's action in light of later developments would be unwarranted." *Id.* Instead, "reasonableness of the lawyer's belief at the

as a mandatory ethical decision, the Deliberative Model would appear both to increase and to require the exercise of ethical discretion, through ethical deliberation on the part of individual lawyers.[148]

---

time and in the circumstances in which the lawyer acts is alone controlling." *Id.*

A close look at the reasoning of the Comment suggests a logical flaw, or at least a leap in the logic—in effect, a non-sequitur—from these convincing premises to the Restatement's more questionable conclusion that the lawyer's decision to disclose or not disclose is not subject to disciplinary review. The Comment first asserts the premise—undoubtedly correct—that the decision of an attorney to disclose a client's confidential information, even to save a life, is a difficult one, both because it entails action contrary to the goals of the client and because it involves complex ethical judgment under circumstances that may not be conducive to careful ethical deliberation. Based on the initial premise, the Comment further posits—again, rather convincingly—that any consideration of the reasonableness of the lawyer's decision must be evaluated exclusively upon the lawyer's belief at the time of and under the circumstances of the lawyer's actions, rather than in light of later circumstances.

At this point, the Restatement's logic would not seem substantially different from the approach of the Deliberative Model. Indeed, the Deliberative Model emphasizes the complex nature of the decision whether to disclose confidences, acknowledging that differing circumstances and considerations may suggest different responses. As a result, the Deliberative Model incorporates both substantive and procedural limitations on the extent to which a lawyer's exercise of discretion to disclose or not disclose may later be questioned. *See* discussion *infra*. In fact, the approach of the Deliberative Model is thus consistent with the statement in the Comment that "[s]ubsequent re-examination . . . of the lawyer's action in light of later developments would be unwarranted." RESTATEMENT, *supra* note 36, cmt. g.

Unlike the Deliberative Model, however, the Restatement goes a step further, reaching a different conclusion, without apparent support in the logic of the premises on the basis of which this conclusion is ostensibly constructed. The Restatement goes beyond the concern that comprises the focus of the comment—the need to protect the lawyer's decision from second-guessing based on incomplete and inappropriate factors. Instead, the Restatement precludes any form of review, thereby essentially adopting an optional rule and obviating any requirement of ethical deliberation.

Interestingly, the introductory Scope of the Model Rules formerly included the statement: "The lawyer's exercise of discretion not to disclose information under Rule 1.6 should not be subject to reexamination." *See* GILLERS & SIMON, *supra* note 63, at 13 (quoting MODEL RULES, *supra* note 34, Scope [20] (now deleted)). It is not clear why this provision was initially adopted as part of the Scope of the Model Rules, as it appears merely to repeat one aspect of the general principle that a lawyer's decision to act or not act pursuant to a permissive rule is not subject to disciplinary action. Conversely, there does not appear to be any significance to the deletion of this provision, as its deletion likewise does not affect the same general principle precluding discipline for decisions undertaken in relation to permissive rules. Perhaps the inclusion—and later deletion—of this provision indicates at least a recognition, even within the Model Rules, that on some level discretionary decisions regarding confidentiality are different from other permissive rules.

148. In addition, unlike Simon's solution, the Deliberative Model thus acknowledges that there may be more than one ethically justifiable response to the case of the Innocent Convict, as reflected in the policy decision of the ABA to amend the Rule to permit—but not to categorically mandate—disclosure. *See supra* note 118; Cramton & Knowles, *supra* note 64:

Concomitantly, the Deliberative Model differs from Strassberg's model, as illustrated in an analysis of the scenario in *Spaulding*. When applied to *Spaulding*, Strassberg's model would certainly encourage disclosure, but apparently would require neither a specific outcome nor a justification for a decision either to disclose or not disclose.[149] According to the Deliberative Model, while either of these decisions may likewise be available to the individual lawyer, it would be insufficient—if not inaccurate—to state merely that the lawyer has the "option" to disclose or to maintain the client's confidence.

Instead, under the Deliberative Model, the lawyer has the discretion to make an ethical determination, accompanied by an obligation to engage in ethical deliberation before arriving at one of the possible conclusions. Therefore, unlike Strassberg's model, which may be understood to involve ethical deliberation of the lawyer only to the extent that the individual lawyer voluntarily undertakes such deliberation, the Deliberative Model requires the individual lawyer to exercise ethical discretion through ethical deliberation.[150]

---

> The variety and uniqueness of the circumstances that must be considered confirm our preference that, as a general matter, exceptions to confidentiality be cast in discretionary terms. Broad legal commands are unlikely to reflect the moral complexity of many real-life situations. The lawyer must consider the unique characteristics of the individual case as well as its consonance with values held dear by the community.

*Id.* at 119; Hodes, *supra* note 62, at 1561 (noting that "the specific context of each case—including the [Innocent Convict]—colors what can be done to alleviate the tragedy, which affects what ought to be done" and concluding "[t]hat focus should, in turn, significantly affect the judgments we make in assessing what the lawyers actually did do in any particular case."). *See also* Feldman, *supra* note 1, at 932-33 (stating that "one of the reasons for the genuine difficulty of live ethical problems is the uniqueness of such cases" and that "[t]he distinctiveness of the configuration stems from the specifics of the circumstances"); Strassberg, *supra* note 1, at 951-52 n.257 (suggesting an approach "compatible with the numerous attempts to broaden permissive disclosure by attorneys which would allow individual attorneys to weigh the principles supporting and opposing disclosure in particular fact situations in which a great deal of controversy exists over what is ethical conduct").

149. *See supra* Part II.B.

150. The Deliberative Model thus requires lawyers to exercise judgment in a manner that Professor Stier attributes to the "good reader" of discretionary rules, rather than adopting the decision-making process of the "bad reader." *See* Stier, *supra* note 20, at 594. Stier considers these two categories of lawyers in the context of a rule permitting the disclosure of confidences to prevent a client's future crime that will result in substantial bodily harm to another. In Stier's framework, bad readers "determine[] whether it is prudent to do nothing that is not required or whether their self-interest lies in some actions and what that may be." *Id.* Accordingly, if the bad reader decides to remain silent, the "reasons for doing so would be bad reasons like concern for losing clients and fees." *Id.*

Good readers, in contrast, "are not foreclosed from acting prudently, but the judgments they must make require even more. They must also integrate and balance possibly competing legal, moral, and prudential reasons for action." *Id.* For example,

> [t]he good reader who defends drug sellers might justify . . . silence by reference to some moral value like the centrality of confidentiality to maintaining a relationship with

Of course, like virtually any proposed model of reform, the Deliberative Model may encounter criticisms and contain weaknesses. Perhaps the most fundamental objection that may be lodged against the Deliberative Model is the concern that, because it requires a lawyer to justify an ethical decision even in the case of a discretionary rule—and, in the absence of such articulable justification, may subject the lawyer to discipline—it curtails the range of discretion available to a lawyer. A defense of the Deliberative Model against such an objection may be offered on at least two different levels, one substantive and the other procedural.

On a substantive level, admittedly, requiring justification of ethical decisions may, in some cases, limit the range of actions available to the lawyer. It is indeed possible that a lawyer may be deterred from making a decision that could lead to acting in a manner that may be ethically proper—or perhaps ethically preferable—because of the lawyer's inability or unwillingness to engage in and articulate ethical deliberation in support of such a decision. However, as scholars have observed, as a direct result of the current approach, which views discretionary rules as optional rules, "lawyers have come to use the model of client-oriented ethics as a shield, both for defending behavior and for avoiding introspection regarding moral issues."[151] The Deliberative Model directly

---

> the criminal client and affording that client a fair representation under the conditions provided by the current adversary system of justice.

*Id.*

Significantly, like the Deliberative Model, Stier's analysis recognizes that two lawyers may decide upon the same course of action through two very different processes of decisionmaking. Moreover, in such a case, the ethical quality of their judgments is dependent on a complex consideration of the nature of their ethical deliberations, not on a superficial consideration of the outcome of the decisionmaking process.

A similar emphasis on the quality of the process of ethical deliberation is central to the question Professor Feldman's asks in the title of her article, *Can Good Lawyers be Good Ethical Deliberators?* Feldman, *supra* note 1. *See id.* at 929 ("Primarily, I am interested in the character of the lawyers' ethical deliberation, rather than whether their actions were ethically correct."); *id.* ("I do not mainly measure the authenticity of the lawyers' ethical deliberations according to the choices they ended up making."). Likewise, a student who participated in a seminar of the same name offered by Feldman concluded that "it is not only the outcome, but also the reasoning process itself, that constitutes good ethical deliberation." Stephanie Loomis-Price, Note, *Decision-Making in the Law: What Constitutes a Good Decision—the Outcome or the Reasoning Behind It?*, 12 GEO. J. LEGAL ETHICS 623, 624 (1999).

151. Zacharias, *supra* note 1, at 1349. *See also* Feldman, *supra* note 1, at 898 ("The more frequently a black letter ethics code is inconclusive, the more opportunities there are for . . . interpreting the rules simply to permit pursuit of the client's ends, without regard to independent ethical concerns.").

Moreover, as Professor Wilkins has noted, "the traditional model strongly implies that doubts about the exact contours of the law should be resolved in the client's favor." Wilkins, *supra* note 44, at 473. *See id.* at 473 n.17 (citing MODEL CODE, *supra* note 34, DR 7-101 (A) (1); EC 7-4; EC 7-5; MODEL RULES, *supra* note 34, R. 3.1, cmt.[1]) (adding that "[t]he rules of professional conduct

confronts each of these problems, requiring ethical deliberation and thereby preventing lawyers from blithely justifying nearly any conduct through assertions of acting in the client's interests.[152] Thus, despite occasional—if not

---

generally support the view that all doubts should be resolved in favor of furthering the best interest of the client."). The ramifications of this approach to decisionmaking in the face of doubts—including the problems that seem to inhere in such an approach to legal ethics—may be examined through another comparison to Jewish law.

The complexities of resolving legal questions when there remains an insoluble doubt find extensive expression in the corpus of Jewish law. *See, e.g.*, ARYEH LEB HA-COHEN HELLER, SHEV SHEMAT'TA. As a general rule, an even doubt relating to the applicability of an obligation or commandment of biblical authority is resolved in favor of requiring conscious adherence to the obligation. *See id.* This principle would appear broadly parallel to the notion of resolving ethical doubts in favor of adherence to the interests of the client.

Nevertheless, Jewish law recognizes that, at times, a counterbalancing interest may override adherence even to obligations of biblical authority. Specifically, nearly every obligation in Jewish law is suspended to save a life. *See* MAIMONIDES, MISHNE TORAH, LAWS OF SABBATH, ch. 2 (Rabbi Eliyahu Touger trans.) (1993). In fact, the primacy of saving a life is such that "[e]ven if there is only a doubtful possibility that a person's life is in danger, one renders a lenient decision [to violate other obligations]; and as long as one is able to discover some possible danger to life, one may use that doubt to render a lenient decision." JOSEPH B. SOLOVEITCHIK, HALAKHIC 34-35 (Lawrence Kaplan trans., 1983) (originally published in Hebrew as *Ish ha-halakhah*, in 1 TALPIOT 3-4 (1944)). Thus, while a minor possibility of the applicability of an obligation generally does not mandate adherence to the obligation, even a minor possibility of danger to life justifies—and requires—any necessary response, including violation of nearly any obligation. *See id.* at 34 (quoting MAIMONIDES, *supra*, *Laws of Sabbath* (2:3)) ("[I]t is forbidden to delay such violation of the Sabbath for the sake of a person who is dangerously ill.").

In contrast, the mechanical approach to legal ethics documented by Wilkins fails to acknowledge the complexity of ethical decisionmaking, relying instead on adherence to client goals as an avenue for avoiding meaningful consideration and balancing of competing interests.

152. In fact, it is arguable that, rather than restricting the range of conduct available to lawyers, the requirement that lawyers engage in ethical deliberation may expand the range of possible action, compelling lawyers to consider responses they otherwise might have reflexively rejected as inconsistent with their own personal/economic interests and/or those of their clients. Indeed, under the current model of ethics regulation,

> [w]hen the codes authorize lawyers to choose between emphasizing partisanship and important third party or societal interests, lawyers' natural [personal and economic] incentives encourage them to select partisanship. Lawyers who make that choice can readily justify their conduct as mandated by the code by claiming adherence to the code provisions that call for zeal.

Zacharias, *supra* note 1, at 1340. *See also id.* at 1304 (observing that "[l]awyers have obvious economic incentives to pursue client desires aggressively" and that "[l]awyers typically also feel comfortable allying themselves with clients whom they know personally and who may exert an influence on their well-being.").

Professor Zacharias has collected a number of common statements lawyers offer to justify "hardball tactics" and "decisions to assert questionable claims or arguments or to delay litigation,"

rare—practical drawbacks, the Deliberative Model offers a preferable framework through which lawyers are generally encouraged to consider viable ethical alternatives as they are required to articulate justifications for their ethical decisionmaking.[153]

---

or in response to "the claim that the lawyer has misled a jury or court." *Id.* at 1348-49. As Zacharias observes, "[e]ach of these statements suggests that," as a result of a duty of zealous loyalty to clients' interests, "the lawyer had no discretion to act differently. . . . [t]hat the ethics of the profession—the codes—required [the] conduct." *Id.* at 1349. If, as this analysis indicates, lawyers feel—or at least contend—that under many circumstances they are prevented from exercising free choice of ethical conduct, while perhaps counterintuitive, it may be necessary to impose an obligation of ethical deliberation in order to return to lawyers such freedom of ethical decisionmaking.

To draw another parallel to Jewish law and philosophy, a number of leading Medieval scholars grappled with the question of the apparent contradiction between the fundamental principle in Jewish thought that human beings exercise free will and the biblical verses stating that, at certain points, God "hardened Pharaoh's heart" to prevent Pharaoh from deciding to free the Nation of Israel from slavery in Egypt. *See, e.g.*, *Exodus* 7:13; 7:22; 8:15; 9:12; 9:35; 10:20; 10:27; 14:7; 14:8. Of course, the issue of human free will is extraordinarily complex and has captured the attention of philosophers since antiquity. *See, e.g.*, Sherman J. Clark, *The Courage of Our Convictions*, 97 MICH. L. REV. 2381, 2402 n.39 (1999) (citing sources); Samuel J. Levine, *Playing God: An Essay on Law, Philosophy, and American Capital Punishment*, 31 NEW MEX. L. REV. 277, 286-89 (2001) (discussing the issue of free will in Jewish law and philosophy).

Regarding the question of Pharaoh's free will, Rabbi Yoseph Albo offers a response that may help illuminate one of the functions of the Deliberative Model in improving the quality and range of ethical decisionmaking. Rabbi Albo explains that, as a result of the miraculous plagues that God brought against Egypt, Pharaoh's free will had effectively been removed; in the face of such Divine intervention, it would have been impossible for a human being freely to choose any response other than to send the nation out of bondage. *See* YOSEPH ALBO, SEFER HA'IKKARIM (4:25). Therefore, such a decision by Pharaoh would not have been the product of free will. Accordingly, God influenced Pharaoh's decisionmaking process to the extent of removing this impediment to Pharaoh's exercise of free will, thereby in fact returning to Pharaoh the discretion to decide whether to free the nation. *Id.* Similarly, by requiring ethical deliberation, the Deliberative Model aims in part to remove impediments to careful ethical decisionmaking often posed by the natural tendency of lawyers to avoid the exercise of discretion in favor of simplistic adherence to personal and economic pressures.

For other responses to the specific question of Pharaoh's free will, see, e.g., MAIMONIDES, *supra* note 151, *Laws of Teshuva* (6:3); MAIMONIDES, INTRODUCTION TO COMMENTARY ON THE MISHNA, *Introduction to Pirke Avoth*, ch. 8; 1 NACHMANIDES, COMMENTARY ON THE TORAH 309 (Chaim Chavel ed., 1960) (commenting on *Exodus* 7:3).

153. Ethics scholars have observed that "institutional justifications for actions are 'seductive' because they limit the lawyer's decisionmaking within a structured and 'simplified moral world,'" Loder, *supra* note 146, at 315-16 (quoting Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 8 (1975)), and that, therefore, "the rules may provide an escape from an otherwise painful process of justifying moral choices." *Id.* at 319.

This psychological insight evokes yet another parallel to Jewish thought. The biblical

Moreover, on a procedural level, the Deliberative Model may avoid improper curtailment of ethical discretion through the adoption of a standard of review for discipline that takes into account the range of ethically justifiable conduct that may apply under a given set of circumstances: the abuse of discretion standard. The utility of this standard for reviewing ethical decisions of lawyers goes beyond semantic similarities. The abuse of discretion standard is an important device through which appellate courts have the ability, in reviewing certain types of rulings, to maintain appropriate supervision of trial court decisions while according trial courts a substantial and deserved measure of discretion.[154]

---

narrative of the binding of Isaac, *see Genesis* 22:1-19, begins with the statement that "God tested Abraham." *Id.* at 22:1. Ostensibly, the nature of the test was whether Abraham would abide by the apparent command to sacrifice "your son, your only one, whom you love," *id.* at 22:2, and whose birth Abraham had awaited for so many years. *See id.* at 17:15-21; 21:1-7.

Alternatively, however, some offer an innovative and psychologically complex interpretation of the test facing Abraham. Specifically, a close look at the biblical text suggests that Abraham understood God's command to sacrifice Isaac only after close and careful interpretation of God's arguably ambiguous words. *See* RABBI MORDECHAI YOSEPH OF IZHBITZ, MEI HA-SHILOACH (explicating *Genesis* 22:1). Thus understood, the test facing Abraham was the obligation to engage in honest and painful moral deliberation resulting in the decision to undertake the unimaginable action of sacrificing his son. *See id.*; Rabbi Menachem Mendel Blachman, *The Sacrifice of Intellectual Honesty*, *available at* http:// www.kby.org. On some level, this was a more painful decision than adhering to an unambiguous command, however difficult and demanding. *See also* RABBI YOSEPH YOZEL HURWITZ, MADREGAT HA-ADAM 226-31 (4th ed. 1976) (describing human tendency to prefer simplistic and self-interested solutions in place of complexity); RABBI CHAIM SHMULEVITZ, SICHOTH MUSAR 95 (1980) (describing human tendency to prefer definite result or command—even negative or burdensome one—rather than remaining in state of uncertainty).

154. The Supreme Court has described deference to the trial court as "the hallmark of abuse-of-discretion review," emphasizing that "such deference [is] owed to the judicial actor . . . better positioned than another to decide the issue in question" and that "deferential review . . . afford[s] the district court the necessary flexibility to resolve questions involving multifarious, fleeting, special, narrow facts that utterly resist generalization." *See, e.g.*, Koon v. United States, 518 U.S. 81, 98-99 (1996). The Court emphasized that such "deference [is] owed to the judicial actor . . . better positioned than another to decide the issue in question" and that "deferential review . . . afford[s] the district court the necessary flexibility to resolve questions involving multifarious, fleeting, special, narrow facts that utterly resist generalization." *Id.* at 99 (internal citations and quotations omitted). Likewise, the Deliberative Model acknowledges the deference owed to the lawyer who exercises professional judgment and who should be afforded flexibility in resolving complex, fact-specific ethical dilemmas.

Indeed, an important element of the Deliberative Model is its ability to withstand objections that place limitations on other models of ethics regulation, through the incorporation of both substantive and procedural principles applied in the American legal system in contexts other than legal ethics. For example, the Deliberative Model shares a number of similarities with a proposal by Professor Zacharias "[c]odifying the [d]uties [t]o [e]ngage in [m]oral [d]iscourse and [i]ntrospection." Zacharias, *supra* note 1, at 1357. A fundamental premise of the Deliberative Model, echoing the approach offered by Zacharias, is its emphasis that it "need not prescribe

particular outcomes" but that nevertheless it "can encourage lawyers to take the duty of objectivity more seriously." *Id.* at 1360-61. Moreover, under both models, "the lawyer would need to document that she has considered the moral issues. . . ." *Id.* at 1367-68.

Nevertheless, Zacharias restricts his proposal to an obligation on the lawyer to "discuss[] the limits on advocacy with her client . . . and discuss[] the particular deposition and deposition strategy with the client, including the appropriateness of harassing or intimidating the plaintiff." *Id.* at 1368. The proposal thus places a significant limitation on the duty of ethical discourse and introspection, restricting the requirement to conversations with clients. According to Zacharias, restricting the review by courts to what he considers "verifiable action by lawyers," *id.* at 1367, is necessary for two apparently interrelated yet separate reasons, both based in the recognition that "[a] requirement of introspection, by definition, is difficult to enforce." *Id.* First, "[d]isciplinary authorities cannot know what lawyers 'have thought.'" *Id.* Second, "[u]pon questioning, lawyers can rationalize most conduct after the fact." *Id. Cf.* Stephen Gillers, *More About Us: Another Take on the Abusive Use of Legal Ethics Rules*, 11 GEO. J. LEGAL ETHICS 843, 846 (1998) (positing the "near-impossibility of proving the lawyer's 'true' motive").

Under the Deliberative Model, however, the obligation of introspection—or ethical deliberation—applies to the exercise of any discretionary decision by the lawyer, including when such deliberation is not undertaken through communication with another person. As for the concerns about verifiability voiced by Zacharias, the Deliberative Model can again rely on procedures common to the American legal system and their underlying assumptions.

While it may be impossible to know with certainty the thoughts of an individual, our legal system—in particular the criminal law—is replete with rules that depend on the motive or state of mind of an individual. The law accepts—as it must—circumstantial evidence to establish the state of mind for intentional crimes, justifying punishment on the basis of such evidence. *See, e.g.*, United States v. Nelson, 277 F.3d 164, 197 (2d Cir. 2002) ("[I]t is well-settled that, as a general matter, criminal intent may be proven by circumstantial evidence.").

Likewise, as Zacharias himself emphasized in an earlier article, in a number of contexts, "[c]ourts have coped with problems of determining the motives of government administrators" and "[i]t is [thus] the task of judges to infer intent from extrinsic circumstances, corroborating documentary evidence, and the demeanor of witnesses." Fred C. Zacharias, *Flowcharting the First Amendment*, 72 CORNELL L. REV. 936, 977 & nn. 207-08 (1987). *See also* Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 290 (1997) ("emphasiz[ing] that the need to rely on circumstantial evidence to prove [discriminatory] intent is not a new issue"). Therefore, it would not seem unreasonable to rely on circumstantial evidence, when necessary, to review the ethical deliberations and decisions of lawyers.

Moreover, the legal system—again, in large part out of necessity, it might seem—allows individuals to attempt to rationalize conduct after the fact. For example, in preparing for a criminal trial, a prosecutor may have the task of deriving a theory justifying the tactics the police employed in apprehending a defendant, while conversely, a defense attorney may be faced with the prospect of formulating a theory justifying the defendant's apparently criminal conduct. The fact that attorneys may find a way to justify their own conduct when subject to review should be no more problematic than their ability to perform a similar service for those they represent and defend.

In establishing the Contextual View, Simon similarly aimed to offer a model that would be consistent with general principles of the legal system, emphasizing its reliance on the principles of justice and contextual judgment and the prevalence of these principles in modern jurisprudence.

Similarly, application of the abuse of discretion standard to the ethical decisionmaking of lawyers strikes a proper balance, requiring lawyers to engage in articulable ethical deliberation[155] without improperly curtailing the range of

---

In complying with principles and procedures already established in the legal system, the Deliberative Model may succeed in meeting such a goal.

More generally, the Deliberative Model may satisfy one of the criteria some scholars have set for alternative models, as it may be readily applied under the current structure of ethics regulation. *See, e.g.*, Strassberg, *supra* note 1, at 904, 923 (concluding that "[i]f we are to have legal ethics, it must be compatible with the existence of ethical rules" and accordingly proposing a model of "interpretation and application of the existing rules of ethics"); Zacharias, *supra* note 140, at 1942 (asserting that "it is not necessary to trash existing professional standards to sanction tamer lawyering 'in the public interest'" and that "[t]he current codes already allow it"); *cf.* Shannan E. Higgins, Note, *Ethical Rules of Lawyering: An Analysis of Role-Based Reasoning from Zealous Advocacy to Purposivism*, 12 GEO. J. LEGAL ETHICS 639, 662 & n.67 (1999) (suggesting an approach that does not "suggest a complete overhaul of the legal profession," acknowledging that the approach involves a "change" that may not "be easy," but concluding that "manipulation of the present legal and ethical discourse might be a more productive course of action than . . . styling a new theory of legal ethics"). Although it suggests a new interpretive framework, the Deliberative Model is generally consistent with the substance of existing rules, their underlying goals, and the mechanism employed for their enforcement.

155. Thus, by incorporating a degree of objectivity, this standard may be consistent with Professor David Luban's insistence that "legal ethics isn't only a matter of a lawyer's first-personal belief: The belief needs some plausible basis." Luban, *supra* note 53, at 891. *Cf.* Loder, *supra* note 146, at 330 (noting that "permissive rules may perpetuate a public perception that lawyers are oftentimes free from institutional accountability"); Wilkins, *supra* note 44, at 524 ("Legal ethics owes the profession and society a credible account of how [lawyers'] discretion should be exercised.").

Professor Zacharias has articulated and applied a similar observation in an analysis of the form of ethics rules, positing that although "[o]rdinarily, emphasizing discretion implies that two or more responses to a situation are equally good[,] . . . [t]here may be correct or incorrect responses to a particular situation, given the priorities set in the rules." Zacharias, *Specificity*, *supra* note 51, at 246 n.74. Nevertheless, he continues, drafters "may rely on a [] provision [that suggests but does not require a result] because of their inability to predict the situation or to write a useful rule that is sufficiently broad to encompass that *and other* situations." *Id.* (emphasis added). Through its insistence on an articulably justifiable basis for ethical decisionmaking, the Deliberative Model may provide a means of evaluating responses—and identifying "incorrect" responses—even in the context of a discretionary rule that does not require a particular result.

Likewise, the Deliberative Model might have offered a compromise position for a controversial proposed draft of the Restatement of the Law Governing Lawyers that would have immunized a lawyer from malpractice liability for "any action or inaction the lawyer reasonably believed to be required, *or reasonably believed to be discretionary in the judgment of the lawyer, under . . . a professional rule*." *See* Zacharias, *supra* note 1, at 1330 n.88 (quoting Motion Submitted to the ALI (May 1994), amending RESTATEMENT, *supra* note 36, § 76(4) (Tentative Draft No. 7 (per Rule 12.8.5) (1994))) (emphasis added).

Zacharias voiced the concern, apparently shared by the members of the ALI, who rejected the

their discretion by subjecting their decision to possibly inflexible review by others who may prefer an alternative approach.[156] In the absence of a finding of

---

proposed amendment, that such a provision "would enable lawyers to assert virtually any exercise of discretion under the codes as a defense to civil liability." *Id.* In requiring articulable ethical deliberation for actions arising under discretionary rules, the Deliberative Model may provide a response to such concerns, limiting the range of malpractice immunity to discretionary decisions justifiably based in ethical considerations. At the same time, the Deliberative Model would thus offer a framework for promoting the apparent goal of the proposed amendment, extending immunity to discretionary actions that, pursuant to careful and defensible ethical deliberation—although not expressly required—are determined to comprise ethically proper courses of action.

Consistent with its rejection of such an approach, the final version of the Restatement rejected the proposed amendment, instead maintaining the simplistic dichotomy between acts that are "required" and those that are "permissib[le]" in that they are "allow[ed] but . . . not require[d]." *See* RESTATEMENT, *supra* note 36, § 54(1), cmt. h (per Rule 3.5).

156. The Deliberative Model may thereby also satisfy Professor Strassberg's suggestion that the rules "accommodate, within limits, the reasonable judgments of different attorneys." Strassberg, *supra* note 1, at 951-52 n.257. In short, the Deliberative Model recognizes that "[p]rofessional ethics need not look like a branch of science or formal logic in order to provide a satisfying account of how lawyers should resolve practical dilemmas." Wendel, *supra* note 143, at 117.

Indeed, as legal scholars and philosophers have long-emphasized, unlike the exact sciences, legal reasoning is often not reducible to a degree of mathematical precision. Instead, there may often exist more than one viable answer to a legal question. *See, e.g.*, Samuel J. Levine, *Jewish Legal and American Constitutional Theory: Some Comparisons and Contrasts*, 24 HASTINGS CONST. L.Q. 441 (1997):

> [The] Medieval scholar, Nachmanides, . . . noted an inherent difference between legal reasoning and the logic of exact sciences, such as engineering. While it is possible in engineering to prove demonstrably, with mathematical precision, that a particular theory is correct, legal reasoning often involves issues that can be resolved logically in more than one way. The role of a legal interpreter is to examine the evidence motivating each of the possible conclusions, and to determine which conclusion appears most accurate.

*Id.* at 471 (footnotes omitted). *See also* Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 744 (1982) ("[T]he meaning of a text does not reside in the text, as an object might reside in physical space or as an element might be said to be present in a chemical compound, ready to be extracted if only one knows the correct process. . . ."); Gerald Graff, *"Keep off the Grass," "Drop Dead," and Other Indeterminacies: A Response to Sanford Levinson*, 60 TEX. L. REV. 405, 410 (1982) ("[T]he practice of interpretation doesn't depend on interpreters' possessing godlike powers to arrive at an 'ultimately provable right answer' that closes the books on further argument about the meaning of a text. Therefore the lack of such godlike power doesn't entail indeterminacy. . . ."); Michael Rosensweig, *Eilu ve-Eilu Divrei Elohim Hayyim: Halakhic Pluralism and Theories of Controversy*, *in* Sokol, *supra* note 137, at 101 (explicating "several talmudic sources suggest[ing] a notion of the inherent value of dissenting views and possibly even of multiple truths").

If a range of plausible interpretations may be available in response to a difficult legal question, it should not be surprising that a range of reasonable approaches may be offered in response to a complex ethical dilemma. *Cf.* Wendel, *supra* note 5:

> One need not endorse a radical critique of the rule of law to express doubts about

abuse of discretion, the lawyer is accorded the respect appropriate for the exercise of professional judgment.[157]

## CONCLUSION

As every new law student quickly discovers, legal reasoning is not susceptible to the same formalistic structures of logic that may be applied in such disciplines as mathematics or the natural sciences. Instead, legal arguments and conclusions are necessarily derived through complex modes of interpretation, often based in potentially imprecise factors including textual analysis, reasoning by analogy, and policy considerations.[158]

Accordingly, a central characteristic of the adversary system is the process through which advocates attempt to procure a favorable disposition through the quality of the arguments they present, not merely as a result of the asserted virtue of their conclusions. Likewise, judicial rulings in hard cases are routinely accompanied by opinions articulating the reasoning behind the decisions. Indeed, the emphasis on the logic behind a conclusion is so central to our legal system that a number of courts accord precedential value only to "published" opinions, in which the reasoning underlying the ruling has been fully delineated.[159]

---

> whether Dworkin's model of judging (and by analogy Simon's model of legal ethics) adequately handles the case in which two legal actors disagree in good faith about the interpretation of the scheme of justificatory principles underlying the practice of judging or lawyering.

*Id.* at 74.

157. *Cf.* Stier, *supra* note 20, at 561 ("Since both the decision maker and any subsequent evaluator of that decision will be examining reasons for action, not only behavioral descriptions, explanations and predictions, the centrality of the actor's point of view is particularly important.").

158. *See supra* note 156 and accompanying text.

159. In *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001), Judge Alex Kozinski provided an extensive explanation for the rationale behind this policy:

> Writing a precedential opinion . . . involves much more than deciding who wins and who loses in a particular case. It is a solemn judicial act that sets the course of the law for hundreds or thousands of litigants and potential litigants . . . . An unpublished disposition is, more or less, a letter from the court to parties familiar with the facts, announcing the result and the essential rationale of the court's decision . . . . [A]lthough three judges might agree on the outcome of the case before them, they might not agree on the precise reasoning or the rule to be applied to future cases.

*Id.* at 1177-78. *See also* Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Dispositions*, CAL. LAW., June 2000, at 44.

For additional scholarly treatment of the issue, from the perspectives of judges, law professors, practitioners, and law students, see, e.g., Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & The Nature of Precedent*, 4 GREEN BAG 2d 17 (2000); Brian P. Brooks, *Publishing Unpublished Opinions: A Review of the Federal Appendix*, 5 GREEN BAG 2d 259 (2002); Kenneth Anthony Laretto, *Precedent, Judicial Power, and the Constitutionality of "No-Citation" Rules in the*

It would seem particularly suitable for ethical decisionmaking similarly to be governed by a model that accepts and appreciates various approaches to inherently complex questions. Nevertheless, as Professor Simon and a number of other scholars have observed, the prevailing model of legal ethics and ethical discretion stands out as a stark exception to American law's development of a modern jurisprudence acknowledging and embracing the complex nature of legal decisionmaking.[160] Anomalously, the area of ethical decisionmaking, in which lawyers must confront some of the most difficult personal and professional issues they are likely to encounter, is also one area in which the American legal system has remained resistant to advancing beyond a structure of mechanical decisionmaking.

In response to both the prevailing model of legal ethics and alternative models proposed by leading ethics scholars, the Deliberative Model aims to offer a framework through which lawyers are both encouraged and, in many cases, required to engage in the kind of complex legal reasoning that is expected of lawyers in virtually all other areas of law. In so doing, the Deliberative Model likewise relies upon both substantive and procedural mechanisms already prevalent in the American legal system. Moreover, through its emphasis on the quality—rather than the outcome—of ethical deliberation, the Deliberative Model accounts for the potential variety of appropriate responses to an ethical dilemma. Ultimately, the Deliberative Model requires that lawyers take ethical discretion seriously, imposing on lawyers an obligation to exercise their discretion through ethical decisions that are the product of articulable and justifiable ethical deliberation.

---

*Federal Courts of Appeals*, 54 STAN. L. REV. 1037 (2002); Boyce F. Martin, Jr., *Judges on Judging: In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177 (1999); Johanna S. Schiavoni, Comment, *Who's Afraid of Precedent?: The Debate Over the Precedential Value of Unpublished Opinions*, 49 UCLA L. REV. 1859 (2002); Suzanne O. Snowden, *That's My Holding and I'm Not Sticking to It!": Court Rules that Deprive Unpublished Opinions of Precedential Authority Distort the Common Law*, 79 WASH. U. L.Q. 1253 (2001); David S. Tatel, *Some Thoughts on Unpublished Decisions*, 64 GEO. WASH. L. REV. 815 (1996); Carl Tobias, *Anastasoff, Unpublished Opinions, and Federal Appellate Justice*, 25 HARV. J.L. & PUB. POL'Y 1171 (2002); Lance A. Wade, *Honda Meets Anastasoff: The Procedural Due Process Argument Against Rules Prohibiting Citation to Unpublished Judicial Decisions*, 42 B.C. L. REV. 695 (2001).

160. *See supra* notes 41-44 and accompanying text.