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## Taking the Ethical Duty to Self Seriously: An Essay in Memory of Fred Zacharias

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# Taking the Ethical Duty to Self Seriously: An Essay in Memory of Fred Zacharias

SAMUEL J. LEVINE\*

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In February 2009, at the suggestion of Fred Zacharias and the invitation of Professor Orly Lobel, I had the opportunity visit the University of San Diego School of Law, to present a paper on legal ethics at a faculty colloquium. I spent most of the day with Fred. At one point in the afternoon, Fred calmly mentioned that he had to go to the doctor. He gave me a draft of one of his articles to read, and he opened his office for me to work. Fred soon returned, and for the rest of the evening he remained, typically, gracious and hospitable. Tragically, it turned out to be the last time I saw Fred.

I am honored to participate in this tribute to Fred's memory, and in choosing the topic of the ethical duty to self, I aim not only to incorporate important elements of Fred's scholarship, but also to highlight the sense of personal integrity that Fred embodied.

Earlier versions of this essay were presented at the Legal Ethics Shmooze, hosted by Fordham Law School, and as a public lecture at Loyola University Maryland. I thank Bruce Green, Graham McAleer, Russ Pearce, Tom Shaffer, Bill Simon, Larry Solum, and David Wilkins for helpful discussions. I thank Fraida Liba, Yehudah, Aryeh, Rachel, and Shira for continued encouragement.

## I. INTRODUCTION

For many years, one of the most prominent areas of ethics scholarship has revolved around questions of professional identity.<sup>1</sup> Indeed, for more than one hundred years, American lawyers have explored the implications of their status as professionals, in the process distinguishing themselves from various other occupations and vocations.<sup>2</sup>

Notably, though, efforts to identify the salient features of the lawyer's professional identity have produced widely varying definitions of legal professionalism. As Fred Zacharias memorably observed in a 1995 article: "No term in the legal lexicon has been more abused than 'professionalism.' Because lawyers typically are presumed to fit the model of professionals, the term often is used to mean no more than 'to act as we want lawyers to act.' This concept varies with the speaker."<sup>3</sup> Moreover, a number of scholars have rejected the notion that lawyers should embrace professionalism as a positive and ethically meaningful expression of legal practice,<sup>4</sup> while others have questioned a "standard conception" of lawyering that adopts zealous advocacy as the primary ethical characterization of the lawyer's work.<sup>5</sup>

These critiques have resulted in a rethinking of the role and identity of lawyers, producing alternative models that take into account principles such as public justice and morality as well as the lawyer's personal

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1. See, e.g., Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303 (1995).

2. See Samuel J. Levine, *Rediscovering Julius Henry Cohen and the Origins of the Business/Profession Dichotomy: A Study in the Discourse of Early Twentieth Century Legal Professionalism*, 47 AM. J. LEGAL HIST. 1, 25-29 (2005).

3. Zacharias, *supra* note 1, at 1307 (footnote omitted).

4. See, e.g., Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259 (1995); Robert F. Cochran, Jr., *Professionalism in the Postmodern Age: Its Death, Attempts at Resuscitation, and Alternate Sources of Virtue*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 305 (2000); Samuel J. Levine, *Faith in Legal Professionalism: Believers and Heretics*, 61 MD. L. REV. 217 (2002); Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229 (1995); Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871 (1999); Thomas L. Shaffer, *Inaugural Howard Lichtenstein Lecture in Legal Ethics: Lawyer Professionalism as a Moral Argument*, 26 GONZ. L. REV. 393 (1991); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975).

5. See, e.g., DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* xix-xxi (1988); William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703, 1703 (1993):

A large literature has emerged in recent years challenging the standard conception of adversary advocacy that justifies the lawyer in doing anything arguably legal to advance the client's ends. This literature has proposed variations on an ethic that would increase the lawyer's responsibilities to third parties, the public, and substantive ideals of legal merit and justice.

religious and ethical values. Leading theorists have presented a variety of alternative frameworks, ranging from methods of legal interpretation<sup>6</sup> to philosophical and sociological inquiry<sup>7</sup> to a religious lawyering movement.<sup>8</sup> Not surprisingly, however, although these innovative approaches have gained many adherents, they have also attracted criticism.<sup>9</sup> In addition to the criticism that often accompanies new and innovative ideas, lawyering models that place too much emphasis on personal values seem vulnerable to the charge that they veer too far from the doctrinal law that governs the work of lawyers, and therefore they do not offer viable alternatives.<sup>10</sup> For example, numerous provisions and

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6. See, e.g., Heidi Li Feldman, *Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?*, 69 S. CAL. L. REV. 885 (1996); Serena Stier, *Legal Ethics: The Integrity Thesis*, 52 OHIO ST. L.J. 551 (1991); Maura Strassberg, *Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics*, 80 IOWA L. REV. 901 (1995).

7. See, e.g., WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* (1998); David Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 83 (David Luban ed., 1983); Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980); Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669 (1978).

8. See, e.g., *AALS Section on Professional Responsibility 2006 Annual Meeting Papers*, 21 J.L. & RELIGION 265, 265–314 (2006); Colloquium, *Can the Ordinary Practice of Law Be a Religious Calling?*, 32 PEPP. L. REV. 373 (2005); Rose Kent, *What's Faith Got To Do With It?*, *FORDHAM LAW.*, Summer 2001, at 10, available at <http://law.fordham.edu/assets/LawReligion/rel-2WhatFaithGottoDoWithIt.pdf>; Howard Lesnick, *Riding the Second Wave of the So-Called Religious Lawyering Movement*, 75 ST. JOHN'S L. REV. 283, 283–87 (2001); Russell G. Pearce & Amelia J. Uelmen, *Religious Lawyering in a Liberal Democracy: A Challenge and an Invitation*, 55 CASE W. RES. L. REV. 127 (2004); Symposium, *Rediscovering the Role of Religion in the Lives of Lawyers and Those They Represent*, 26 FORDHAM URB. L.J. 821 (1999); Symposium, 27 TEX. TECH L. REV. 911 (1996); *Symposium on Law & Politics as Vocation*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1 (2006); *Symposium on Lawyering and Personal Values—Responding to the Problems of Ethical Schizophrenia*, 38 CATH. LAW. 145 (1998); Symposium, *The Relevance of Religion to a Lawyer's Work: An Interfaith Conference*, 66 FORDHAM L. REV. 1075 (1998); Robert K. Vischer, *Heretics in the Temple of Law: The Promise and Peril of the Religious Lawyering Movement*, 19 J.L. & RELIGION 427 (2004); Gerry Whyte, *Integrating Professional Practice and Religious Faith: The Religious Lawyering Movement*, 55 DOCTRINE & LIFE 18 (2005).

9. See, e.g., *Review Essay Symposium: The Practice of Justice by William H. Simon*, 51 STAN. L. REV. 867 (1999); Monroe H. Freedman, *A Critique of Philosophizing About Lawyers' Ethics* (Hofstra Univ. Legal Studies Research Paper No. 11-07, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1776345##](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1776345##); Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529.

10. See, e.g., Bruce A. Green, *The Religious Lawyering Critique*, 21 J.L. & RELIGION 283 (2006) [hereinafter Green, *The Religious Lawyering Critique*]; Bruce A. Green, *The*

comments in both the *Model Code of Professional Responsibility* and the *Model Rules of Professional Conduct* accept the primacy of zealous advocacy, expressly or implicitly, as an underlying and guiding policy.<sup>11</sup> Alternative methods of lawyering often seem to require a rejection of these and other basic premises.

Responding, in part, to some of these objections and drawing heavily on Fred's scholarship, this essay briefly considers the lawyer's ethical duty to self. Although the concept of a "duty to self" has been explored in philosophical<sup>12</sup> and religious scholarship,<sup>13</sup> less attention has been

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*Role of Personal Values in Professional Decisionmaking*, 11 GEO. J. LEGAL ETHICS 19 (1997) [hereinafter Green, *Personal Values*].

11. See, e.g., MODEL RULES OF PROF'L CONDUCT pmbl. (2010) ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."); *id.* (describing various functions of lawyer as representative of client, including "seek[ing] a result advantageous to the client"); *id.* (expecting the lawyer, as "a representative of clients," to "be a zealous advocate on behalf of a client"); *id.* R. 1.3, cmt. 1 ("A lawyer must also act . . . with zeal in advocacy upon the client's behalf."); MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1986) ("A Lawyer Should Represent a Client Zealously Within the Bounds of the Law.").

12. See, e.g., Keith Bustos, *Defending a Kantian Conception of Duties to Self and Others*, 42 J. VALUE INQUIRY 241 (2008); J.M. Finnis, *Legal Enforcement of "Duties to Oneself": Kant v. Neo-Kantians*, 87 COLUM. L. REV. 433 (1987); Diane Jeske, *Perfection, Happiness, and Duties to Self*, 33 AM. PHIL. Q. 263, 272 (1996); Margaret Paton, *A Reconsideration of Kant's Treatment of Duties to Oneself*, 40 PHIL. Q. 222 (1990); Marcus G. Singer, *On Duties to Oneself*, 69 ETHICS 202 (1959); Warner Wick, *More About Duties to Oneself*, 70 ETHICS 158 (1960); Josh Glasgow, *It's Easy Being Me: Duties to Self*, PEA SOUP (Aug. 26, 2004), [http://peasoup.typepad.com/peasoup/2004/08/its\\_easy\\_being\\_.html](http://peasoup.typepad.com/peasoup/2004/08/its_easy_being_.html).

13. For example, Rabbi Hershel Schachter enumerates a number of different sources of responsibility in Jewish law, including duties between a person and God, interpersonal duties, and duties between a person and one's self. HERSHEL SCHACHTER, B'IKVEI HATZON 87 (1997) (citing RABBI ELIAH OF VILNA, COMMENTARY TO PROVERBS (1:2)). Rabbi Schachter further connects the concept of duty to self with the imperative of *imitatio Dei*, which in turn is based on the notion of *imago Dei*. See *id.*; cf. SHIMON SHKOP, SHAAREI YOSHER (1925) (Introduction).

Recently, David Luban relied on various sources in Jewish law and tradition that emphasize the significance of human dignity, premised on the notion of *imago Dei*. See David Luban, *Human Dignity, Humiliation, and Torture*, 19 KENNEDY INST. ETHICS J. 211 (2009). Accordingly, Luban articulated a model of legal ethics that takes into account the dignity of those impacted by the lawyer's actions, thereby prohibiting a lawyer from humiliating others. See DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 65-95 (2007); cf. Meir Dan-Cohen, *A Concept of Dignity* (Univ. of Cal. Berkeley Sch. of Law Working Paper, 2009), available at <http://ssrn.com/abstract=1468031>; Jeremy Waldron, *The Image of God: Rights, Reason, and Order* (N.Y.U. Sch. of Law, Pub. Law & Legal Theory Research Paper Series, Working Paper No. 10-85, 2010), available at <http://ssrn.com/abstract=1718054>.

Based on Rabbi Schachter's insights, perhaps an alternative model of legal ethics would likewise draw upon the concept of dignity, though rather than focusing on the lawyer's interpersonal duties that take into account the dignity of others, the alternative framework would focus on the lawyer's own dignity, which gives rise to the lawyer's ethical duty to self. Such a duty may similarly prohibit a lawyer from humiliating others,

paid to the role of the ethical duty to self in the work of lawyers. In a 1976 law review article, *Professional Ethics and the Lawyer's Duty to Self*, Professor John Flynn called for "greater concern for the lawyer's duty to self."<sup>14</sup> As Flynn stated in his conclusion:

Lawyers face a particularly difficult conflict of irreconcilable role definitions since they owe duties to their clients, the courts, the profession, and society at large as well as to themselves. . . . [T]hese role definitions . . . should be weighed in light of one's concept of self and those values . . . one perceives as essential to the maintenance of personal integrity.<sup>15</sup>

Since the appearance of Flynn's article, a number of legal scholars, including, significantly, Fred Zacharias,<sup>16</sup> have looked at the lawyer's duty to self and its relationship to other ethical obligations.<sup>17</sup>

though the difference in the source of the duty may likewise suggest a difference in the precise nature and scope of the duty.

For discussions of the imperative of *imitatio Dei* in Jewish law, see, for example, Samuel J. Levine, *Halacha and Aggada: Translating Robert Cover's Nomos and Narrative*, 1998 UTAH L. REV. 465, 490–92 & nn.130–35 (citing ABRAHAM R. BESDIN, REFLECTIONS OF THE RAV: LESSONS IN JEWISH THOUGHT 25–27 (1979) (adapted from lectures of Rabbi Soloveitchik)). See also HERSHEL SCHACHTER, NEFESH HARAV 63–69 (1994); JOSEPH B. SOLOVEITCHIK, OUT OF THE WHIRLWIND: ESSAYS ON MOURNING, SUFFERING, AND THE HUMAN CONDITION 207 (David Shatz et al. eds., 2003) (referring to *imitatio Dei* as "the categorical norm within [the Jewish] ethical system"). For a discussion of the relationship between human dignity and *imitatio Dei*, see JOSEPH B. SOLOVEITCHIK, THE LONELY MAN OF FAITH 14–19 (Doubleday 2006) (1965).

14. John J. Flynn, *Professional Ethics and the Lawyer's Duty to Self*, 1976 WASH. U. L.Q. 429, 429.

15. *Id.* at 444.

16. See Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 262 (1993) [hereinafter Zacharias, *Specificity in Professional Responsibility Codes*] (advocating that lawyers "engage[] in serious introspection concerning their personal responsibility to help achieve good results"); see also Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 372 (1989) [hereinafter Zacharias, *Rethinking Confidentiality*] (relying on Flynn and concluding that "[t]he traditional legal and ethical approaches to the legal profession's responsibilities tend to distort lawyers' perceptions of their own obligations as moral and autonomous individuals"); Fred C. Zacharias, *Rethinking Confidentiality II: Is Confidentiality Constitutional?*, 75 IOWA L. REV. 601, 639 n.196 (1990) [hereinafter Zacharias, *Rethinking Confidentiality II*] (relying on Flynn); *id.* ("[C]onfidentiality's restriction of free expression impacts severely on lawyer integrity. It enables lawyers to rationalize conduct that would otherwise transgress their moral precepts. It eliminates their freedom of thought and choice."); Zacharias, *supra* note 1, at 1312 (citing Flynn as among scholars who "identify lawyer self-awareness and introspection as avenues for determining appropriate behavior").

17. See, e.g., Roberta K. Flowers, *What You See Is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors*, 63 MO. L. REV. 699, 738 (1998) ("The role of professional lawyer requires introspection."); Susan G. Kupfer, *Authentic*

Building on this work, this essay suggests that, although the *Model Rules* place substantial emphasis on the lawyer's duty to the client, the *Model Rules* do not advocate a form of ethical monism<sup>18</sup> that excludes consideration of other ethical obligations such as the lawyer's duty to self.<sup>19</sup> As Zacharias observed in a 1993 article, "the [ethics] codes clearly endorse a measure of soul searching and discretion by lawyers."<sup>20</sup> In fact, various statements and provisions in the preamble and official comments to the *Model Rules* call for a complex form of moral and ethical reasoning. Thus, this essay borrows, in part, from the analysis offered by Zacharias in one of his later articles, premised on the insight that "the very structure of the codes is to provide a framework under which lawyers can and will act as ordinary moral individuals."<sup>21</sup>

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*Legal Practices*, 10 GEO. J. LEGAL ETHICS 33, 39 n.17 (1996) (understanding the lawyer's duty to self as requiring that "lawyers must develop their own moral sensibilities and incorporate them into their professional lives"); Reed Elizabeth Loder, *Moral Truthseeking and the Virtuous Negotiator*, 8 GEO. J. LEGAL ETHICS 45, 52 (1994) (discussing "a duty to avoid . . . internal disharmony, a duty to oneself"); John K. Morris, *Power and Responsibility Among Lawyers and Clients: Comment on Ellmann's Lawyers and Clients*, 34 UCLA L. REV. 781, 784 (1987) (identifying, in addition to the interests of the client, "other interests in the attorney-client interaction," including "the attorney's interest as an independent moral actor; the interests of third persons who may be immediately affected by the lawyer's or the client's conduct; and the interests of society as a whole" (footnote omitted)); Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 117 & n.315 (1979) (stating that "the lawyer has an interest in not being forced to make decisions that conflict with either the profession's or his own code of professional responsibility," and defining "[o]ne's own code" as "the complex of rules that an individual accepts as governing his behavior as a lawyer," which "includes personal rules and rules derived from the profession"); Alice Woolley, *Integrity in Zealousness: Comparing the Standard Conceptions of the Canadian and American Lawyer*, 9 CAN. J.L. & JURISPRUDENCE 61, 85 (1996) (citing an "the application of a 'duty to self . . . to all aspects of a lawyer's life'" to ensure that [the lawyer] remains 'true to himself'" (quoting Mary Meechan, *More Than an Mere Citizen: The Special Responsibilities of the Lawyer in To-Day's Society*, 14 LAW SOC'Y GAZETTE 284, 292 (1980))).

18. Cf. W. Bradley Wendel, *Value Pluralism in Legal Ethics*, 78 WASH. U. L.Q. 113 (2000).

19. Wendel's framework allows for "[a] [l]imited [r]ole for [p]ersonal [v]alues in [l]egal [e]thics." *Id.* at 198–211.

20. See Zacharias, *Specificity in Professional Responsibility Codes*, *supra* note 16, at 259 n.107.

21. Fred C. Zacharias, *Integrity Ethics*, 22 GEO. J. LEGAL ETHICS 541, 544 (2009) [Zacharias, *Integrity Ethics*]; see also Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 15–16 (2005) ("[T]he professional ethics codes . . . authorize lawyers to exercise moral restraint" (footnote omitted)); Zacharias, *supra* note 1, at 1349 ("[T]he codes in fact accord lawyers significant choice in selecting tactics, screening arguments, and presenting accurate versions of the facts."); *id.* at 1377 ("Contrary to the view that client-oriented legal ethics codes deprive lawyers of the discretion to act morally, [this article] suggests that the codes leave ample room for objective decisionmaking and objective conduct."); cf. Green, *The Religious Lawyering Critique*, *supra* note 10, at 292 ("[I]t is a vast overstatement to say of the professional norms that they leave no room for lawyers' personal morality . . .");

Accordingly, this essay delineates a three-tiered approach that incorporates not only the lawyer's duty to the client and to society, but also the lawyer's obligation to take into consideration the duty to self, which includes fidelity to the lawyer's personal ethical values and commitments. In addition, rather than placing the various interests in hierarchical opposition, requiring that one duty invariably prevail over the others, the three-tiered approach looks to consider ways in which competing interests might balance or, at times, be reconciled with one another.<sup>22</sup> To illustrate the three-tiered approach to the lawyer's ethical

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Russell G. Pearce, *Model Rule 1.0: Lawyers Are Morally Accountable*, 70 *FORDHAM L. REV.* 1805, 1807 (2002) ("The use of the ethical rules to educate lawyers to their moral responsibility falls squarely within the purposes of the ethics codes."); Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 *GEO. J. LEGAL ETHICS* 241, 281-82 (1992) (relying on an examination of the origins of legal ethics codes in George Sharswood's essays to "support[] a new reading of the legal ethics codes," in that "Sharswood's ethical standards were derived from the lawyer's republican role as a public officer exercising independent moral discretion," and likewise "the codes in fact continue Sharswood's approach to the extent that they permit the lawyer discretion to reject or ignore client instructions"); Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 *LAW & SOC. INQUIRY* 677, 736 (1989) (citing provisions through which the *Model Rules* "invite lawyers . . . to take their own values into account").

22. Cf. Jane B. Baron & Richard K. Greenstein, *Constructing the Field of Professional Responsibility*, 15 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 37, 84 (2001) ("The codes themselves provide that the lawyer owes duties to self, client, and the public interest without providing any sort of algorithm for resolving conflicts among those potentially conflicting duties."); *id.* at 84-85 n.113 ("Lawyers owe duties to clients, the justice system, third parties generally, opposing parties, the society, and the profession. There is a hierarchy among these duties, but all difficult legal ethics questions involve an attempted balancing among these duties. The law governing lawyers, at least the profession's self-regulation/rules, are essentially an attempted balance among the competing duties in given contexts." (quoting JAMES E. MOLITERNO, *CASES AND MATERIALS ON THE LAW GOVERNING LAWYERS* 2 (2000))); *id.* ("[I]n an important sense, any rules of professional conduct are an attempt to accommodate at least five interests . . . (1) lawyers as individuals, (2) lawyers in their relationships with each other, (3) lawyers' responsibilities to their clients, (4) lawyers' responsibilities to non-clients with whom the lawyer deals, and (5) institutions of the legal system through which the lawyer works." (quoting THOMAS D. MORGAN & RONALD D. ROTUNDA, *PROFESSIONAL RESPONSIBILITY: PROBLEMS AND MATERIALS* 28 (7th ed. 2000))); Geoffrey C. Hazard, Jr., *Law, Ethics and Mystery*, 82 *U. DET. MERCY L. REV.* 509, 512-13 (2005) ("[S]erious ethical dilemmas typically involve, not questions of distinguishing right from wrong, but deciding upon the priority between obligations emanating from different normative realms that dictate inconsistent courses of action. Lawyers deal all the time with actual or apparent inconsistencies in legal rules. People in ordinary life also confront similar inconsistencies. A continuing responsibility in real life is resolving, accommodating, or somehow adjusting to these inconsistencies."); Paton, *supra* note 12, at 229 (analyzing Kant's treatment of duty to self vis-à-vis other duties and concluding that a "ranking of obligations [in order of importance] would be



obligations, this essay focuses on the lawyer's duty of confidentiality.<sup>23</sup> In so doing, this essay both expressly and implicitly relies yet again on the work of Fred Zacharias, whose pioneering articles raised basic and crucial questions about the duty of confidentiality,<sup>24</sup> while his later scholarship continued to explore the issue of confidentiality in the context of a variety of areas of legal ethics.<sup>25</sup>

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purely mechanical and arbitrary"); Wendel, *supra* note 18, at 114–17 (identifying a number of “foundational normative values of lawyering,” including “loyalty to one’s client, social justice, fidelity to a set of legal norms, or, most recently, interpersonal considerations such as care, mercy, and connectedness,” and concluding that “the lawyer seeking to act ethically must take account of different value claims that may not be comparable with one another in an impersonally rational, mathematical, or algorithmic manner”).

23. See Limor Zer-Gutman, *Revising the Ethical Rules of Attorney-Client Confidentiality: Towards a New Discretionary Rule*, 45 LOY. L. REV. 669, 676 (1999) (identifying a “hierarchy of protection” within the rules of confidentiality, placing “the courts and lawyers on top, clients a close second, and society and third parties far behind at the unprotected end of the spectrum”); cf. Rachel Vogelstein, Note, *Confidentiality vs. Care: Re-Evaluating the Duty to Self, Client, and Others*, 92 GEO. L.J. 153 (2003). In an effort to balance different interests implicated by the duty of confidentiality, Zer-Gutman proposes a new discretionary rule that “requires consideration of all the relevant circumstances of a particular case, with various factors and competing interests being weighed.” Zer-Gutman, *supra*, at 704.

Similarly, in a number of his later articles, Zacharias explored the nature of “permissive” or discretionary rules, suggesting that such rules may “presuppose that lawyers will exercise professional conscience in deciding how to act in individual cases within the category identified by the rule.” Zacharias & Green, *supra* note 21, at 52; see also Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265, 281–87 (2006) [hereinafter Green & Zacharias, *Permissive Rules*] (characterizing “permissive rules” as “regulated discretion”); Fred C. Zacharias, *Coercing Clients: Can Lawyer Gatekeeper Rules Work?*, 47 B.C. L. REV. 455, 495 (2006) [hereinafter Zacharias, *Coercing Clients*] (“Other rules simply give lawyers discretion to act, which allows lawyers to base their decisions on personal, potentially venal, incentives.” (footnote omitted)); Fred C. Zacharias, *The Images of Lawyers*, 20 GEO. J. LEGAL ETHICS 73, 99 (2007) [hereinafter Zacharias, *Images of Lawyers*] (“The codes do not tell lawyers how to behave in situations implicated by the discretionary rules, though some observers might believe that particular conduct sometimes is required or that, at a minimum, lawyers must exercise their discretion in accordance with the spirit of the rules.” (footnote omitted)); cf. Samuel J. Levine, *Taking Ethical Discretion Seriously: Ethical Deliberation as Ethical Obligation*, 37 IND. L. REV. 21 (2003); Patrick Santos, *Why the ABA Should Permit Lawyers To Use Their Get-Out-of-Jail Free Card: A Theoretical and Empirical Analysis*, 31 U. LA VERNE L. REV. 151, 189 (2009) (“A lawyer’s professional responsibility necessarily carries with it a duty to exercise discretion by considering the relevant legal issues.”).

24. Zacharias, *Rethinking Confidentiality*, *supra* note 16; Zacharias, *Rethinking Confidentiality II*, *supra* note 16.

25. See, e.g., Green & Zacharias, *Permissive Rules*, *supra* note 23; Zacharias, *Coercing Clients*, *supra* note 23, at 476–78; Fred C. Zacharias, *Fact and Fiction in the Restatement of the Law Governing Lawyers: Should the Confidentiality Provisions Restate the Law?*, 6 GEO. J. LEGAL ETHICS 903 (1993); Fred C. Zacharias, *Harmonizing Privilege and Confidentiality*, 41 S. TEX. L. REV. 69 (1999); Zacharias, *Integrity Ethics*, *supra* note 21, at 562–65; Fred C. Zacharias, *Privilege and Confidentiality in California*, 28 U.C. DAVIS L. REV. 367 (1995); Fred C. Zacharias, *Steroids and Legal Ethics Codes: Are Lawyers Rational Actors?*, 85 NOTRE DAME L. REV. 671, 693–95 (2010) [hereinafter

II. THE THREE-TIERED FRAMEWORK OF ETHICAL RESPONSIBILITIES:  
THE PREAMBLE TO THE *MODEL RULES*

The opening section of the *Model Rules* is titled “Preamble: A Lawyer’s Responsibilities.”<sup>26</sup> Although this section does not present a systematic analysis of the lawyer’s varying responsibilities, the preamble acknowledges the lawyer’s multiple—and, at times, conflicting—sources of ethical responsibility, including not only ethics rules and other law, but also the lawyer’s “personal conscience” and the “legal profession’s ideals of public service.”<sup>27</sup>

To be sure, the preamble adopts an approach that often accepts the primacy of the lawyer’s duty of zealous advocacy.<sup>28</sup> Yet, the preamble seemingly implies that the general preference for zealous advocacy is based in practical and utilitarian—albeit, arguably dubious—assumptions about the adversary system, rather than in acceptance of zealous advocacy as an inherently overriding value.

As the preamble declares:

A lawyer’s responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done.<sup>29</sup>

The preamble acknowledges, however, that “[i]n the nature of law practice . . . conflicting responsibilities are encountered.”<sup>30</sup> In fact, “[v]irtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interest in remaining an ethical person while earning a satisfactory living.”<sup>31</sup> Thus, the preamble to the *Model Rules* expressly

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Zacharias, *Steroids and Legal Ethics Codes*]; Fred C. Zacharias, *The Lawyer as Conscientious Objector*, 54 RUTGERS L. REV. 191 (2001) [hereinafter Zacharias, *Lawyer as Conscientious Objector*].

26. MODEL RULES OF PROF’L CONDUCT pmb1. (2010).

27. *Id.* para. 7.

28. *See id.* para. 2 (describing various functions of lawyer as representative of client, including “zealously assert[ing] the client’s position,” and “seek[ing] a result advantageous to the client”); *id.* para. 8 (expecting the lawyer, as “a representative of clients,” to “be a zealous advocate on behalf of a client”).

29. *Id.* para. 8. W. Bradley Wendel has characterized this and similar statements as having a “utopian ring,” owing to an “implicit monism [that] promise[s] a decision procedure that avoids the tragedy of inevitable wrongdoing.” Wendel, *supra* note 18, at 115–16.

30. MODEL RULES OF PROF’L CONDUCT pmb1. para. 9.

31. *Id.*

recognizes at least three duties that play a role in the lawyer's work and identity: the duty to the client, the duty to justice, and the duty to self—to the lawyer's interest in remaining faithful to personal and ethical values.<sup>32</sup>

The preamble then asserts that the *Model Rules* “often prescribe terms for resolving such conflicts” but that there remain “many difficult issues of professional discretion [that] must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.”<sup>33</sup> Notably, though, in identifying these underlying principles, the preamble does not delineate the three aforementioned duties but instead refers to the “lawyer’s obligation zealously to protect and pursue a client’s legitimate interests.”<sup>34</sup> Almost as an afterthought, the preamble adds that the lawyer must act “within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.”<sup>35</sup> Significantly, these broad references to following the law and maintaining civility do not provide an articulation of an identifiable responsibility to justice, let alone any hint of a duty to self, that might counterbalance or temper the duty of zealous advocacy.

Nevertheless, there remains substantial language in the preamble to the *Model Rules* acknowledging the lawyer’s duty to self, expressed through the lawyer’s personal and ethical values. This duty stands as an important component of the lawyer’s professional identity and responsibility, one that informs ethical deliberations and decision making when a lawyer is confronted with conflicting responsibilities.

### III. THE FRAMEWORK APPLIED: THE DUTY OF CONFIDENTIALITY

The three-tiered framework of ethical responsibilities—to the client, to justice, and to self—may prove helpful in descriptive and normative discussions of ethical dilemmas. For example, one of the most prominent—and, at times, most controversial—areas of debate among both ethics scholars and practicing lawyers revolves around the lawyer’s duty of confidentiality. In one of his final articles, Zacharias observed

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32. Cf. Zacharias, *Specificity in Professional Responsibility Codes*, *supra* note 16, at 259 n.107 (citing preamble to code as “clearly endor[s] a measure of soul searching and discretion by lawyers”); cf. also Douglas L. Colbert, *Professional Responsibility in Crisis*, 51 HOWARD L.J. 677, 685 (2008) (stating that “the Preamble speaks to lawyers’ ethical societal values”); *id.* at 708–09 (describing the preamble’s recognition of a lawyer’s various duties to society); Santos, *supra* note 23, at 178 (noting the competing duties recognized by the preamble to the *Model Rules*).

33. MODEL RULES OF PROF’L CONDUCT pmbl. para. 9.

34. *Id.*

35. *Id.*

that “rules involving confidentiality exceptions have been among the most fiercely debated in the code-drafting process.”<sup>36</sup> Or, as he succinctly—though somewhat understatedly—put it: “lawyers seem to care about them a lot.”<sup>37</sup>

The organized bar has consistently characterized the duty to maintain client confidences as one of the central components of the attorney-client relationship.<sup>38</sup> Indeed, it seems intuitive that a client’s interests will be best served if the client is guaranteed that conversations with the lawyer will remain confidential. As the official comment to Model Rule 1.6 asserts: “The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct.”<sup>39</sup> Although Zacharias and others have questioned the empirical grounds for the degree of confidentiality prescribed by the rule,<sup>40</sup> this comment captures the conventional wisdom behind the function of the duty of confidentiality.

As a basic matter, the rules of confidentiality require that the lawyer protect the interests of the client, notwithstanding the inherently detrimental effect on potentially valid interests of the client’s adversary, as well as, under most circumstances, any negative effect on innocent and uninvolved third parties. This sometimes troubling aspect of confidentiality has led Zacharias and other ethics scholars to “rethink” confidentiality,<sup>41</sup> questioning both the primacy and the scope of the duty. For example, some scholars have presented alternative theories that

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36. Zacharias, *Steroids and Legal Ethics Codes*, *supra* note 25, at 694.

37. *Id.*

38. See MODEL RULES OF PROF’L CONDUCT R 1.6. cmt. 2 (2010) (“A fundamental principle in the client-lawyer relationship is that, in the absence of the client’s informed consent, the lawyer must not reveal information relating to the representation. . . . This contributes to the trust that is the hallmark of the client-lawyer relationship.”).

39. *Id.*

40. See Zacharias, *Rethinking Confidentiality*, *supra* note 16; see also STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* 37 (8th ed. 2009) (“The trouble with the empirical argument is that it is based on an intuition—or some would say common sense—about how people will behave. But we have no rigorous test of this intuition.”).

41. See Zacharias, *Rethinking Confidentiality*, *supra* note 16; Zacharias, *Rethinking Confidentiality II*, *supra* note 16.

focus on the lawyer's countervailing duties to justice<sup>42</sup> and to self.<sup>43</sup> In partial response to these concerns, the *Model Rules* permit lawyers to reveal confidences in certain exceptional scenarios.<sup>44</sup> Nevertheless, in most situations, the confidentiality rules consistently place paramount the lawyer's duty to the client over those to justice or to self.

Apparently dissatisfied or uncomfortable with a stance that virtually ignores the lawyer's other duties, the ABA included in the preamble an attempt to respond to these objections. Again, however, the response reads like an afterthought and proves unconvincing. The preamble states that "a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private."<sup>45</sup> Such as it is, this statement offers the accurate observation that the public interest is generally served when a client seeks legal advice.

Notably, however, the statement focuses on only one aspect of confidentiality, ignoring the prevalent and often more serious effects that confidentiality may have, to the detriment of both the public and the lawyer's own moral identity. In fact, as conceptualized in the preamble, even the benefit to the "public interest" seems relegated to a secondary result, a mere by-product of serving the client's interest in seeking legal advice.

Thus, notwithstanding the three-tiered framework of the lawyer's responsibilities delineated elsewhere in the preamble,<sup>46</sup> both the substantive rules and the commentary set forth a vision of confidentiality that promotes almost exclusively the client's interests. This vision, in turn, is largely consistent with one traditional view of the lawyer's professional identity, subjugating the lawyer's duty to the public and to the lawyer's ethical self, in favor of the lawyer's duty to zealously promote the best interests of the client.

Indeed, the expansive duty of confidentiality is the focus of an article in which Zacharias considers "a few scenarios that might implicate a lawyer's deeply held beliefs."<sup>47</sup> As Zacharias observed, in many of these scenarios:

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42. See, e.g., SIMON, *supra* note 7, at 54–62.

43. See, e.g., Russell G. Pearce, *To Save a Life: Why a Rabbi and a Jewish Lawyer Must Disclose a Client Confidence*, 29 LOY. L.A. L. REV. 1771 (1996).

44. See MODEL RULES OF PROF'L CONDUCT R 1.6(b) (2010).

45. *Id.* pmb. para. 8.

46. See *supra* Part II.

47. Zacharias, *Lawyer as Conscientious Objector*, *supra* note 25, at 196.

Under the common conception of a lawyer's role morality, the lawyer must balance the personal and third-party interests in disclosure against the system's interests in maintaining the client's confidences. The confidentiality rules in the professional codes provide guidance as to how those interests should be reconciled. Under the Model Rules of Professional Conduct, for example, the primacy of maintaining inviolate the attorney-client relationship trumps third-party interests unless the client's acts are "criminal" and "likely to result in imminent death or substantial bodily harm." How should the lawyer factor in her core belief that she should not stand idly by while another is injured?<sup>48</sup>

To be sure, some cases may allow for creative interpretation of confidentiality rules to permit disclosure, while recent amendments have expanded the scope of the exceptions to the rules.<sup>49</sup> Nevertheless, in other cases the lawyer is left with stark and difficult choices. As Zacharias explained:

First, to disclose the information under the rule's exception, the lawyer would have to make a knowing decision to manipulate, twist, or misinterpret the rule's terms. Alternatively, the lawyer can adopt the mandate of the rule itself as an equally important core belief. In other words, she can accept that maintaining confidentiality is as important as, or more important than, preventing injury. . . . Remaining is the final option . . . to defy the professional rule and to honor the personal ethical standard over the professional rule.<sup>50</sup>

In short, as Zacharias put it elsewhere: "[S]trict confidentiality rules can reduce the bar's ability and willingness to hear the call of morality."<sup>51</sup>

#### IV. THE INNOCENT CONVICT

Of the various scenarios in which the rules of confidentiality implicate the lawyer's sense of duty to self, the case of the "innocent convict"—in particular, the innocent convict on death row—stands out as perhaps the most troubling and, accordingly, one of the most widely discussed.<sup>52</sup> The scenario involves a client who, in conversation with a lawyer, admits to having committed the crime for which an innocent individual has been convicted and is currently imprisoned; in an extreme case, the innocent convict is awaiting execution. This scenario may provide a particularly helpful illustration of the way different perspectives on the

48. *Id.* at 196–97 (footnote omitted).

49. See MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1)–(3).

50. Zacharias, *Lawyer as Conscientious Objector*, *supra* note 25, at 198.

51. Zacharias, *Rethinking Confidentiality*, *supra* note 16, at 372.

52. See, e.g., SIMON, *supra* note 7, at 163–64; Symposium, *Executing the Wrong Person: The Professionals' Ethical Dilemmas*, 29 *LOY. L.A. L. REV.* 1543 (1996).

lawyer's role and identity may lead to an emphasis on different aspects of the lawyer's three-tiered ethical obligations.<sup>53</sup> At the same time, distinctions between lawyering models need not represent monistic approaches to legal ethics.<sup>54</sup> Instead, each model operates within a broader recognition that a lawyer's responsibility is comprised of often-conflicting duties. However, when such a conflict arises, each of the models focuses on a different aspect of the lawyer's responsibility.

For example, although the *Model Rules* largely adopt a traditional model of zealous advocacy, they do not ignore the importance of protecting innocent third parties. Accordingly, the *Rules* currently permit disclosure to prevent death or substantial bodily harm.<sup>55</sup> As the comment explains, this exception is intended to "recognize[] the overriding value of life and physical integrity."<sup>56</sup> Yet, under the precise contours of the rule, the value of life does not quite *override* confidentiality. Instead, the rule retains sufficient allegiance to the interests of the client to place confidentiality on equal footing with the value of life. Thus, in a case such as the innocent convict, the rule leaves to the lawyer the discretion either to disclose confidential information to prevent the death of an innocent third party or to remain silent in the face of such a result.

In contrast, Bill Simon offers an approach that tempers the duty of zealous advocacy significantly, calling instead for a "contextual view" that emphasizes the lawyer's duty to serve the interests of justice.<sup>57</sup> Simon's model categorizes the death of the innocent convict as a "substantial injustice," thereby lying outside the proper bounds of confidentiality.<sup>58</sup> In Simon's framework, "[i]f the facts are such that disclosure would probably save an innocent life without posing a demonstrable threat to important rights of others . . . then it would be grotesque not to disclose them."<sup>59</sup> Simon does not ignore the importance of the lawyer's duty to represent the client's interests, but the contextual view places the lawyer's duty to justice—to prevent "substantial injustice"—as paramount. Thus, for Simon, the lawyer's failure to disclose in such a case would represent "a monumental violation of a core commitment of [the lawyer's] role."<sup>60</sup> Nevertheless, the differences between Simon's model and the *Model Rules* may turn on the degree of

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53. Cf. Santos, *supra* note 23, at 178 ("The innocent convict hypothetical . . . pits three duties against themselves: duty to client, duty to self, and duty to society.").

54. See *supra* notes 22–23 and accompanying text.

55. See MODEL RULES OF PROF'L CONDUCT R 1.6(b)(1) (2010).

56. *Id.* cmt. para. 6.

57. See SIMON, *supra* note 7, at 138–69.

58. *Id.* at 56.

59. *Id.* at 164.

60. *Id.*

emphasis in balancing competing duties and values, rather than constituting an unbridgeable gap between diametrically opposed attitudes toward the role of lawyers.

Similarly, the insights of religious lawyering and other systems of personal values may complement the lawyer's duties to the client and to justice. In the words of one leading scholar, rather than conflicting with other conceptions of the lawyer's professional obligations, religious lawyering may "inform or influence a lawyer's work."<sup>61</sup> Moreover, in some accounts, "professional and religious norms are ordinarily not antithetical, but capable of being interwoven."<sup>62</sup>

Nevertheless, many proponents of religious lawyering argue powerfully that other lawyering models fail to take into account the significance of the lawyer's duty to self. In scenarios of conflicting duties, such as the innocent convict, the duty to self may outweigh other duties and require that the lawyer disclose confidences to save the innocent third party. Accordingly, some scholars have rejected the notion that fidelity to the ideals of confidentiality should lead a lawyer to allow an innocent individual to remain wrongfully incarcerated, while many have insisted that lawyers must breach confidentiality to save the life of an innocent death-row convict.<sup>63</sup> As Zacharias noted, "[s]ome observers . . . believe that a lawyer sometimes must act to save a third party's life when there are no alternatives even if the professional rules make the disclosure of confidences in order to do so 'discretionary.'"<sup>64</sup>

Of course, arguments for revealing confidences to save the life of the innocent third party are not exclusively religious in nature. After all, many value systems would likely reach a similar result,<sup>65</sup> as would

61. Green, *Personal Values*, *supra* note 10, at 24.

62. Green, *The Religious Lawyering Critique*, *supra* note 10, at 287.

63. See, e.g., Robert F. Cochran, Jr., *The Rule of Law(yers)*, 65 MO. L. REV. 571 (2000); 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); Monroe H. Freedman, *Legal Ethics from a Jewish Perspective*, 27 TEX. TECH L. REV. 1131 (1996) [hereinafter Freedman, *Legal Ethics from a Jewish Perspective*]; 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) [hereinafter Freedman, *The Life-Saving Exception*]; Robert P. Lawry, *Damned and Damnable: A Lawyer's Moral Duties with Life on the Line*, 29 LOY. L.A. L. REV. 1641 (1996); Samuel J. Levine, *Taking Ethical Obligations Seriously: A Look at American Codes of Professional Responsibility Through a Perspective of Jewish Law and Ethics*, 57 CATH. U. L. REV. 165 (2007); Pearce, *supra* note 43.

64. Zacharias, *Images of Lawyers*, *supra* note 23, at 99 n.123.

65. See Symposium, *supra* note 52.



Simon's contextual view.<sup>66</sup> Nevertheless, religious lawyering may stand out as a particularly powerful illustration of a model in which lawyers appeal to their own moral conscience as a guide to their ethical decisionmaking. Thus, though at times reaching the same result as other models, religious lawyering differs from both the traditional view and Simon's model, relying instead on the lawyer's duty to self as a primary basis for ethical values and reasoning.

As a final illustration of the three-tiered framework, it may be helpful to consider the position of Monroe Freedman, who is perhaps the preeminent scholar identified with the traditional model of zealous advocacy. As Zacharias put it, Freedman is the scholar who, in modern times, has "sponsored most fiercely" "the ultra-adversarial norm." Under this approach:

[T]he adversarial ethic governs everything else. Lawyers must abide by the law and codes of ethics—which provide some rules for the adversarial game. But even these rules should be read and interpreted in light of, and as furthering, a lawyer's overriding obligation to serve his client's interests.<sup>67</sup>

In fact, Freedman has articulated a vision of client-centered lawyering and confidentiality—particularly in the work of the criminal defense attorney—that goes beyond the contours incorporated into the *Model Rules*.<sup>68</sup> Nevertheless, Freedman was a leading voice in the successful effort to amend the *Model Rules* to permit disclosure of confidential information to prevent the execution of an innocent death-row inmate.<sup>69</sup> Freedman expressly acknowledged his religious faith as the basis for this position, which in some ways runs contrary to his general insistence on protecting the interests, rights, and confidentiality of the client.<sup>70</sup>

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66. See *supra* text accompanying notes 57–60.

67. Fred C. Zacharias, *Fitting Lying to the Court into the Central Moral Tradition of Lawyering*, 58 CASE W. RES. L. REV. 491, 492–93 (2008) (footnotes omitted).

68. See, e.g., Monroe H. Freedman, *Client Confidences and Client Perjury: Some Unanswered Questions*, 136 U. PA. L. REV. 1939 (1988); Monroe H. Freedman, *In Praise of Overzealous Representation—Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct*, 34 HOFSTRA L. REV. 771 (2006); Monroe H. Freeman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

69. See Freedman, *Legal Ethics from a Jewish Perspective*, *supra* note 63, at 1136–37; Freedman, *The Life-Saving Exception*, *supra* note 63.

70. See Freedman, *Legal Ethics from a Jewish Perspective*, *supra* note 63:

I have written extensively for thirty years about the need to change the existing rules to conform with the constitutional and religious ideals that I believe in. One of many examples is the rule that forbids a lawyer to reveal a confidence in order to save an innocent human life. I have long argued that the rule should be changed to protect innocent life, and I drafted the first rule permitting a lawyer to use a confidence for that purpose. This is consistent with the sanctity of life in Jewish tradition, which is illustrated in the familiar Mishnahic discussion of the death penalty (involving, by hypothesis, a guilty person, not an innocent

Notably, Freedman's coauthor, Abbe Smith, disagrees with Freedman's position, contending that "it is more important to maintain and preserve the principle of confidentiality . . . than it is to affirm individual lawyer morality."<sup>71</sup> Significantly, in others contexts, Smith has likewise described the way her religious faith informs her lawyering.<sup>72</sup> Thus, the debate between Freedman and Smith need not indicate an unbridgeable gap in perspectives, but again a difference in emphasis. Both scholars take seriously the duty of confidentiality and the duty to the ethical self, as well as a duty to justice. They differ as to which of the conflicting duties should take precedence in the case of the innocent convict.

## V. CONCLUSION

This essay has drawn on the work of Fred Zacharias to suggest that competing models of the lawyer's role, including an ethical duty to self, need not be viewed as incompatible expressions of ethical monism. Instead, relying on the preamble and comments to the *Model Rules of Professional Conduct*, the essay proposes a framework that recognizes a three-tiered approach to the lawyer's professional responsibilities, consisting of the duty to the client, the duty to justice, and the duty to self. This framework provides a means for analyzing ethical dilemmas, on both descriptive and normative levels, taking into account a range of competing responsibilities that arise in legal practice.

Through the example of the lawyer's duty of confidentiality, an area that Fred addressed repeatedly throughout his scholarship, the essay employs the three-tiered framework to identify points of contention that divide different lawyering models. In this perspective, each model may be viewed as emphasizing one aspect of the lawyer's ethical duties, while at the same time acknowledging, rather than rejecting outright, the

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one). It was said that a Sanhedrin that puts a man to death once in seven years is called a murderous one. Rabbi Eleazar ben Azariah emended that to read, "or even once in 70 years." And Rabbi Tarfon and Rabbi Akiba added that if they had been in the Sanhedrin, no death sentence would ever have been passed.

*Id.* at 1136–37 (footnote omitted); see also MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 152–54 (3d ed. 2004). For further analysis of the Mishnaic discussion, see Samuel J. Levine, *Capital Punishment in Jewish Law and Its Application to the American Legal System: A Conceptual Overview*, 29 ST. MARY'S L.J. 1037, 1044–52 (1998).

71. FREEDMAN & SMITH, *supra* note 70, at 154.

72. Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443 (1999).

importance of other ethical obligations and considerations. This recognition may help facilitate more illuminating dialogue and debate among adherents of various models.

Finally, the essay looks at Monroe Freedman as an example of a scholar who stands as an outspoken proponent of the duty of zealous advocacy, but who likewise maintains a dedication to an ethical duty to self, which at times outweighs the interests of the client. Admiring Freedman's ability to incorporate morality into his vision of counseling clients, Fred declared that "[a] lawyer who implements a client-oriented role as an excuse not to think in moral terms misunderstands the thrust of the theory."<sup>73</sup>

Indeed, it may be particularly fitting to invoke Freedman in closing this essay tribute to the memory of Fred Zacharias. In one of his final articles, published posthumously, Fred emphasized the influence of academic scholarship on the work of lawyers: "[A]cademic debate . . . is important, even when it proves to be incomplete. Practitioners and professional code drafters need help identifying lines that are finer than the ones in the current professional rules or current conceptions of the lawyer's role."<sup>74</sup> At the end of the article, after identifying Freedman as an academic who influenced the drafting of modern professional codes, Fred concluded: "The influence of high theory may take time to percolate down to the bar, but the influence is present. So long as practitioners are willing to engage with academia, lawyers and scholars can work together to make practical progress."<sup>75</sup>

In the course of his remarkable career, from his work on confidentiality to his insights into the lawyer's duty to self, Fred Zacharias addressed nearly every significant issue related to legal ethics and the practice of law. In remembering Fred, we will continue to turn to his valuable legacy of scholarship, which will remain important and influential for academics and practitioners alike.

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73. Fred C. Zacharias, *Practice, Theory, and the War on Terror*, 59 EMORY L.J. 333, 354 (2009).

74. *Id.* at 366.

75. *Id.* at 368.