Revisiting Antigone’s Dilemma:   
Why the Model Rules of Professional Conduct Need to   
Become Model Presumptions that Can Be Rebutted   
by Acts of Ethical Discretion

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# Introduction

Justice Thurgood Marshall reportedly liked to remind his clerks that “[t]he Constitution does not prohibit legislatures from enacting stupid laws.”[[1]](#footnote-2) The Constitution also does not prohibit legislatures from enacting immoral laws,[[2]](#footnote-3) which have often brought lawyers to struggle with the dilemma of choosing between what is legal and what is right.[[3]](#footnote-4) In *Antigone*,the Greek tragedian Sophocles explores this very dilemma.[[4]](#footnote-5) *Antigone* begins with a scene in which Antigone tells her sister that their brother had died in combat, and that the warlord who had killed him declared that the death penalty faced anyone who dared bury her brother.[[5]](#footnote-6) *Antigone*’s opening chapters explore just how torn its eponymous character feels between obeying the law and obeying the moral impulse to provide her brother with the honor of a proper burial.[[6]](#footnote-7)

The conflict between immoral laws and one’s moral compass was as much of a pressing issue in Antigone’s time as it is today, with mandatory sentencing guidelines, certain Guantanamo Bay practices, and rules of professional conduct that have pushed outstanding attorneys into committing immoral acts. Attorneys and non-attorneys alike continue to struggle with Antigone’s Dilemma. However, attorneys see an especially difficult problem from Antigone’s Dilemma because of their close involvement with perpetuating the legal system. As this Essay will explore, the conflict between immoral laws and moral conscience can be a matter of life and death not only in Antigone’s time, but even today. Attorneys today, like their predecessors in generations past, have four ways to cope with Antigone’s Dilemma. Attorneys can: (1) ignore their conscience, (2) ignore the dilemma by withdrawing from the case, (3) ignore the law, or (4) ignore the law’s original intent by reaching an alternative interpretation that aligns with the conclusion the interpreter desires.[[7]](#footnote-8)

This Essay explores the shortcomings of these four options, then proposes the adoption of a new framework. The new framework is based in large part on the “law as integrity” model advanced by Professor Ronald Dworkin.[[8]](#footnote-9) Dworkin’s model turns on ethical discretion and therefore addresses the source of the problem of immoral laws, namely the inflexibility of the guidelines, practices, and model rules that can result in inadvertently but patently immoral outcomes.[[9]](#footnote-10) Though a number of modern-day laws raise Antigone Dilemma issues, this Essay focuses on the American Bar Association’s Model Rules of Professional Conduct.[[10]](#footnote-11) The Model Rules serve as a case study into a well-intentioned set of rules whose inflexibility constrains attorney behavior, sometimes to the point of forcing attorneys to engage in immoral conduct against their own will. Dworkin’s model offers a glimpse into how the reconceptualization of the Model Rules as rebuttable presumptions can more effectively address an attorney’s moral concerns while retaining the predictability and order that the current rule-based system enjoys.

Under the current regime, the Model Rules provide a number of general scenarios in which attorneys must, may, or must not act in a prescribed manner.[[11]](#footnote-12) But under a Dworkian regime, these ethical rules would *presumptively* apply unless their applicability to a novel and unforeseen circumstance were rebutted on ethical grounds.[[12]](#footnote-13) Dworkin’s model and this Essay’s additions to it reconceptualize the Model Rules as rebuttable presumptions, presumptions that attorneys must consider and can rebut if they find sufficient reason to act otherwise.

Part II of this Essay overviews the Model Rules and examines their impact on *Spaulding v. Zimmerman*,[[13]](#footnote-14) which serves as an excellent litmus test of the kinds of ethical dilemmas facing most attorneys today.[[14]](#footnote-15) In Part III, this Essay analyzes the shortcomings of the solutions that attorneys and academics have relied on in their attempts to resolve the dilemma.[[15]](#footnote-16) Part IV delves into this Essay’s case for why Dworkin’s model holds out great promise in the effort to finally resolve today’s Antigone Dilemma scenario.[[16]](#footnote-17) Part V then outlines the advantages of reconceptualizing the Model Rules into rebuttable model presumptions.[[17]](#footnote-18)

# Rules of Ethics, Legal Positivism, and the Dilemma of Immoral Laws

## Overview of the Model Rules

An “ethics rule” is an oxymoron. Rules by definition restrain the kinds of individual autonomy and personal responsibility that characterize ethicality.[[18]](#footnote-19) Put another way, rules and ethics are incompatible because where rules produce obedience, ethics are the product of free will. Further, a categorical rule “ignores the aspirational dimension of professional ethics,”[[19]](#footnote-20) and “assumes that the legal rules may be applied mechanically, without resort to creative normative judgment.”[[20]](#footnote-21) Taken to the absurd extreme, the problem with undermining autonomy and responsibility is perhaps best exemplified in an episode of *It’s Always Sunny in Philadelphia*.[[21]](#footnote-22)A character learns that his friends have rescued an abandoned human baby from a filthy dumpster, and advises, “Well, put it back! It’s not yours.”[[22]](#footnote-23) Still, the deeply interpersonal and adversarial nature of lawyering ensures that attorneys will always need some guidance on how to resolve ethical conflicts. This need for guidance, in addition to the legal profession’s overall interest in shining a positive light on the public image of attorney conduct and the practice of law, brought a committee of the ABA in 1905 to investigate the possibility of drafting a code of legal ethics.[[23]](#footnote-24) The committee formulated a number of canons, whose general principles and moral appeals offered advice—albeit, unenforceable advice—to perplexed attorneys.[[24]](#footnote-25)

Concerned about the lack of voluntary compliance with the unenforceable canons, the ABA in 1970 reinforced those canons with a model code of ethics, written like a statute for states to adopt as binding legislation that disciplinary institutions could enforce.[[25]](#footnote-26) This remodeling of the canons—and the subsequent remodeling of the code into its current form, with its eight sections of rules and scores of “comments”—created a distinctly regulatory model of ethical conduct among attorneys.[[26]](#footnote-27) Other scholars take a dimmer view of the regulatory model, referring to it instead as imposing a model of “technocratic lawyering”[[27]](#footnote-28) or, as Dworkin put it, “conventionalism.”[[28]](#footnote-29) However one views the Model Rules and their effect on lawyering, most agree that “[t]here can be little doubt that the current embodiment of legal ethics in disciplinary ‘codes,’ whether enacted by state legislatures or adopted by state supreme courts, has transformed legal ethics into positive law.”[[29]](#footnote-30)

Put simply, legal positivism is a commitment to law.[[30]](#footnote-31) This commitment to law “has come to dominate American and European legal thought,”[[31]](#footnote-32) and its commitment traces the validity of a law from that law’s procedural sources instead of from its substantive merits.[[32]](#footnote-33) By prioritizing the source of a law over its merits, the interpreters of a law must “set aside their roles as independent moral agents and act as impartial functionaries within our legal institutions.”[[33]](#footnote-34) In his nomination hearing to the U.S. Supreme Court, Chief Justice John Roberts portrayed the casting aside of independent moral agency somewhat more memorably, saying:

Judges are like umpires. Umpires don’t make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ball game to see the umpire. Judges have to have the humility to recognize that they operate within a system of precedent.[[34]](#footnote-35)

The Model Rules reflects positivist thought because by providing categorical answers to the most common kinds of moral dilemmas, the rules turn every attorney into an umpire.[[35]](#footnote-36) Further, the Model Rules’ preamble outright states that while “many difficult issues of professional discretion can arise[, and s]uch issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules[,]” a lawyer’s conduct nevertheless “should conform to the requirements of the law . . . .”[[36]](#footnote-37)

A central tenant of legal positivism’s commitment to law is its separation between legal validity and moral considerations.[[37]](#footnote-38) This neutrality over moral concerns makes legal positivism seemingly appropriate, if not ideal, for a pluralistic American society. Moreover, many positivists argue that moral concerns can negatively impact the attorney-client relationship, saying that “once the lawyer has assumed responsibility to represent a client, the zealousness of that representation cannot be tempered by the lawyer's moral judgments of the client or of the client's cause.”[[38]](#footnote-39) However, the separation between law and morality necessarily means that an individual’s disagreement with the morality of a law would not excuse that person from the duty to obey it.

Legal positivism is as apathetic to populist sentiments as it is to the attorney’s own moral concerns. At times, this separation between law and morality has helped push major progress through the legal system—but at times, this separation has also set back major progress through the legal system.[[39]](#footnote-40) As populist judges sat on their hands at key moments in American legal history, positivist attorneys struck down the segregation laws that had infested the Jim Crow South,[[40]](#footnote-41) upheld the right of association for communists during the “red scare,”[[41]](#footnote-42) and protected the free speech rights of flag burners.[[42]](#footnote-43) Most recently, the Supreme Court continued this proud tradition by maintaining the due process rights of Guantanamo Bay detainees despite urgent national security concerns.[[43]](#footnote-44) These judicial opinions ignored the strong moral sentiments of their day, and focused instead on the constitutional principles from which society had strayed in the heat of the moment.[[44]](#footnote-45) In constitutional cases, it certainly helps the positivist cause to know that the United States Constitution is a profoundly visionary document. But in some constitutional cases, positivism has led attorneys to perpetuate immoral laws.[[45]](#footnote-46) Much like their counterparts in Apartheid South Africa[[46]](#footnote-47) and fascist Germany,[[47]](#footnote-48) antebellum American judges maintained fugitive slave laws despite their own moral concerns because “law is law.”[[48]](#footnote-49) The Supreme Court upheld the constitutional validity of the Fugitive Slave Acts of 1793 and 1850, which authorized the federal government to return slaves to the South if they were caught in the North.[[49]](#footnote-50) Feeling duty-bound, most judges also simply upheld the Fugitive Slave Acts. Others manipulated the acts to achieve just results.[[50]](#footnote-51) One scholar noted, in an observation reminiscent to Justice Roberts’ analogy to umpires, that “there was a general, pervasive disparity between the individual’s image of himself as a moral human being . . . and his image of himself as a faithful judge, applying legal rules impersonally . . . .”[[51]](#footnote-52)

## The Critical Role that the Model Rules Played in Spaulding

*Spaulding v. Zimmerman*[[52]](#footnote-53) illustrates how positivism can encourage, if not compel, immoral conduct.[[53]](#footnote-54) In *Spaulding*, a Minnesota defense attorney in a personal injury lawsuit learned, through routine discovery, of a plaintiff’s potentially life-threatening aorta aneurysm.[[54]](#footnote-55) If the defense attorney informed the plaintiff or his attorney about the existence of this aneurysm, then the plaintiff could have removed the threat with immediate surgery.[[55]](#footnote-56) But the defense attorney failed to disclose the aneurysm and left the plaintiff to a likely death, because the defense attorney read the ABA’s governing disciplinary rules to forbid such a disclosure as a violation of the near-sacrosanct rule of attorney-client confidentiality.[[56]](#footnote-57) Both the trial judge and Minnesota’s supreme court agreed with the defense attorney’s assessment.[[57]](#footnote-58) In a similar scenario that weighed the value of professional conduct against the value of human life, known as the “Innocent Convict” scenario, an attorney’s client reveals that he committed the crime for which another person will be executed.[[58]](#footnote-59) As in *Spaudling*, the rules of confidentiality clearly stated that disclosure would be forbidden for the innocent convict.[[59]](#footnote-60)

Though updated to prevent another *Spaulding* or Innocent Convict situation,[[60]](#footnote-61) the Model Rules continue to use the kind of categorical reasoning that makes no room for affirmative defenses, such as the affirmative defense that Professor David Luban called ethical “disobedience.”[[61]](#footnote-62) Because of this, the fact that the Model Rules have been updated does not change the fact that, had the defense attorney in *Spaulding* engaged in ethical disobedience by revealing the information, then a disciplinary institution in the form of a bar committee or supreme court would have seen little choice but to discipline that attorney. The current framework reflects the positivist view that sparing the proverbial rod of discipline for ethics violations would undermine the legal authority of the ABA rules and encourage lawlessness. This lack of an affirmative defense ensures that when the Model Rules inadvertently compel an attorney to engage in clearly immoral behavior, that attorney will not be able to justify a violation of the Model Rules on ethical grounds.

In contrast to the demands of positivist law, the affirmative defense of ethical discretion follows the model of natural law. Natural law “posits that legal norms embody underlying values of fairness, democracy and order and that obligations must be interpreted in terms of these values.”[[62]](#footnote-63) In short, natural law concerns the “internal morality of the law.”[[63]](#footnote-64) While it is a stretch of the imagination to call for the legal profession to abandon the Model Rules, an exception made for the affirmative defense of ethical disobedience (or, as this Essay terms it, ethical discretion)[[64]](#footnote-65) would enable attorneys to challenge the application of an ethics rule to an extraordinary and unforeseen circumstance. Part III below will begin that discussion by outlining several alternative options to an ethical discretion defense, then surveying their critical shortcomings.[[65]](#footnote-66)

# Four Coping Mechanisms for the Dilemma of Immoral Laws

Henry Thoreau noted three solutions to the problem of immoral laws when he said, “Unjust laws exist: shall we be content to obey them, or shall we endeavor to amend them, and obey them until we have succeeded, or shall we transgress them at once?”[[66]](#footnote-67) In *Justice Accused*,[[67]](#footnote-68) Professor Robert Cover explores those three options and identifies a fourth.[[68]](#footnote-69) Cover’s analysis turns on what the attorney chooses to ignore.[[69]](#footnote-70) First, attorneys can ignore their moral reservations by perpetuating the legally valid but morally wrong law.[[70]](#footnote-71) Second, attorneys can ignore the dilemma by withdrawing from the troubling case, or by withdrawing from the legal profession altogether.[[71]](#footnote-72) Third, attorneys can ignore the law by violating it in ethical disobedience.[[72]](#footnote-73) And fourth, attorneys can attempt to ignore the law’s original intent by reaching an alternative interpretation that aligns with the conclusion the interpreter desires.[[73]](#footnote-74)

## Option One

Option One reflects the “law is law” resignation that positivist thinkers have relied on throughout history.[[74]](#footnote-75) As Justice Holmes explained, “This is a court of law . . . not a court of justice.”[[75]](#footnote-76) If anything, the mandatory nature of the valid-but-wicked law makes it *easier* for judges to treat themselves as humble servants of the law, or as public notaries who are “there only to approve the assembly-line bargain . . .”.[[76]](#footnote-77) One former district judge observed that

[p]rior to the sentencing guidelines, a number of judges expressed to me a view that sentencing was the most difficult part of their job. Today, the mandatory minimums and sentencing guidelines in many ways make the job of a judge easier. In the vast majority of cases, judges no longer have to take moral responsibility for the sentence they impose. They could look a defendant that they have just sentenced [sic] thirty years in the eye and say, “Don’t blame me—I’m just a scorekeeper.” Talk to the Congressmen who voted for this mandatory minimum sentence.[[77]](#footnote-78)

Just as fidelity to one’s client does not suggest agreement with all of the client’s beliefs and actions, neither does fidelity to the law indicate support for or agreement with the law. Upholding the law does not necessarily entail total silence on the matter, or even the suppression of one’s true beliefs. Many judges who formally affirm the questionable laws will alleviate their moral discomfort and perhaps reform the system from within by writing stinging critiques of the law into their decisions.[[78]](#footnote-79) For instance, Judge Paul Cassell presided over a case in which a first-time offender received the felony conviction of dealing marijuana.[[79]](#footnote-80) But because the offender was in possession of a weapon, the mandatory minimum sentencing “guidelines” imposed fifty-five years to a crime that otherwise would receive about six years of imprisonment.[[80]](#footnote-81) Judge Cassell sentenced the offender to fifty-five years and one day—fifty-five years, to satisfy the minimum sentencing guidelines; and one day, for all other crimes combined.[[81]](#footnote-82) The judge suspected that he had no other choice, and the Tenth Circuit affirmed his suspicions.[[82]](#footnote-83) In his judicial opinion, Judge Cassell described his forced decision as “unjust, cruel, and even irrational.”[[83]](#footnote-84) Feeling “ethically obligated to bring this injustice to the attention of those who are in a position to do something about it[,]” the judge urged the Office of the Pardon Attorney to pardon the first-time offender and asked his congressman to reform the mandatory minimum sentencing laws.[[84]](#footnote-85) No action has been taken, and the first-time offender remains scheduled to be released on November 18, 2051.[[85]](#footnote-86)

## Option Two

Option Two, disregarding the case altogether, is perhaps the most tempting option. Attorneys are typically under no obligation to take any given client, and attorneys are free to withdraw from a case if their moral reservations reach the point of interfering with their representation.[[86]](#footnote-87) Through withdrawing, the attorney passes the burden of resolving the dilemma to another attorney. However, an Option Two withdrawal is not necessarily mere avoidance of personal culpability, or a selfish “passing of the buck” onto someone else to resolve. A “noisy withdrawal” can vividly signal one’s protest with the law. Cover notes how antebellum attorneys were condemned not for upholding the slavery laws, but for failing to withdraw from the cases.[[87]](#footnote-88) Judges cannot recuse themselves as easily and often as attorneys can pass up on or withdraw from a case, but it is not unheard of for even modern judges to resign in protest of a law.[[88]](#footnote-89) District Judge Lawrence Irving publically resigned, for instance, and explained that “I’ve had a problem with mandatory sentencing in almost every case that’s come before me . . . I just can’t do it anymore.”[[89]](#footnote-90)

The sentiment is understandable, considering that judges often find themselves conducting an absurd charade in which they must instruct defendants about how to report to a probation office upon their release, in one hundred and fifty years.[[90]](#footnote-91) The demonstrated conviction in Judge Irving’s resignation caught headlines and catalyzed discussion about sentencing guidelines,[[91]](#footnote-92) but the result had no more effect than Judge Cassell’s written protests. Had Judge Cassell publically resigned, a first-time marijuana offender would in all likelihood continue to remain in prison until November 18, 2051 because of the pistol in his pocket. Tempting as it may be to withdraw in protest of an immoral law, attorney withdrawals are also problematic to the overall cause of fixing the law because the attorneys driven to withdraw from cases for moral reasons are also the very attorneys who are likely the “most inclined to try to encourage positive changes in controlling law.”[[92]](#footnote-93)

## Option Three

Option Three calls for activism, encouraging attorneys to disregard the law by fighting it. Option Three essentially brings the concept of civil disobedience to the legal profession. This is a tempting option to attorneys who relish a fight and wish to give voice to the *Augustinian* claim that “an unjust law is no law at all.”[[93]](#footnote-94) Attorney noncompliance is a serious matter, however, given the fact that “[a]ttorneys enjoy unique privilege and power within the judicial system; their rights, status, and actions inherently affect our legal environment in ways that those of other citizens do not.”[[94]](#footnote-95) Even judges have engaged in Option Three activism.[[95]](#footnote-96) Judge James Lawrence King sentenced an eighty-three-year-old drug courier to less than two months of prison, when the mandatory minimum sentence called for a ten-year sentence.[[96]](#footnote-97) Judge Walter Jay Skinner also reduced—at least, he attempted to reduce—the mandatory minimum sentence in a pornography case.[[97]](#footnote-98) Both judges found themselves promptly and perhaps embarrassingly reversed on appeal.[[98]](#footnote-99) As their appellate overseers explained, leniency “cannot be condoned when it results . . . in individual sentencing contrary to the intent and command of the guidelines.”[[99]](#footnote-100) Other scholars take the point further, arguing that judges would even be remiss if they pointlessly analyze a law’s morality instead of exposing its legality, contradictions, and inconsistencies.[[100]](#footnote-101)

Thus, it is ultimately a hopeless endeavor to openly fight the law, as only jurors truly have the power to nullify laws.[[101]](#footnote-102) Attorneys who fight the law instead of fighting for a particular interpretation of the law will always lose, because judges who join the fight will be reversed, sanctioned, or impeached and replaced by more compliant decision-makers. Judges may also feel concerned about the embarrassment of being reversed on appeal in a published opinion,[[102]](#footnote-103) and a reversal of this sort can jeopardize their ability to exert greater influence on legal reform as appellate judges.[[103]](#footnote-104) For judges who are not concerned with embarrassment, job security, and potential job ramifications, there is some intellectual honesty in rejecting a law and, for the sake of the record, tendering a critique on the law’s ethical failings. Ultimately, however, the result is still a reversal. Just as a disciplinary institution cannot excuse the violation of an ethics rule for reasons of moral discretion, so too are appellate judges obliged to reverse a trial judge who rebelliously misapplies the law. Had Judge Cassell imposed a sentence of less than fifty-five years, then, the first-time offender would *still* be imprisoned until at least November 18, 2051.

## Option Four

Option Four is likely the most popular option. By interpreting away the law’s immorality, after all, attorneys can participate in the legal system without having to make the difficult choice between following the law and following their conscience. But this style of legal reasoning is insincere by definition, and that insincerity is often obvious. *Prigg v. Pennsylvania*[[104]](#footnote-105)demonstrates Option Four reasoning in action, and from one of the finest minds in the history of American jurisprudence.[[105]](#footnote-106) In *Prigg*, Justice Joseph Story reconciled his moral objection to slavery with his judicial commitments by striking a Pennsylvania law that forbade the enforcement of the Fugitive Slave Act, but added that while states could not forbid the Act’s enforcement, they were also technically under no obligation to enforce the Act on behalf of the federal government.[[106]](#footnote-107) States could therefore excuse themselves from enforcing the law by forbidding their magistrates from hearing cases brought under the Act.[[107]](#footnote-108) In response, Congress shortly thereafter closed this legal loophole in the Fugitive Slave Act of 1850.[[108]](#footnote-109) The justices of the Wisconsin Supreme Court attempted to fight this new act by declaring it unconstitutional, only to be reversed by the U.S. Supreme Court.[[109]](#footnote-110) It cannot reflect well on either the legal profession or the justice system when officers of the law must go to the great lengths of subverting and misinterpreting a law in order to fix its moral failings, especially if their efforts end up in vain.[[110]](#footnote-111) Ironically, there are also clear ethical issues present in an attempt to raise unreasonable and perhaps dishonest interpretations of a law. As one appellate judge has said, “The ethical lawyer should only advance reasonable interpretations of the authoritative texts—interpretations that are plausible from a public-regarding point of view.”[[111]](#footnote-112)

# The Case for an Affirmative Defense of Ethical Discretion

Covers’ four options identified the full range of choices before attorneys who are struggling with an Antigone’s Dilemma, but only when one relies on the positivist assumption that “law is law.” It is time to consider a fifth option, one that reframes the positivist framework to relax its rule-based compulsion and make room for autonomous discretion. It is time to consider a fifth option that transforms the Model Rules into a process that is more responsive to the unique process of ethical decision-making by softening categorical rules into rebuttable presumptions. Dworkin’s understanding of law as being based on integrity offers a useful standard for this fifth option.[[112]](#footnote-113) The law as integrity model borrows from natural law’s understanding of law as a branch of morality.[[113]](#footnote-114) Notions of ethics, for Dworkin, are so embedded within the laws that they should be limited only by the Constitution’s demands.[[114]](#footnote-115) Ethical dilemmas, therefore, do not pose a choice between law and morality; instead, they pose a choice between competing legal arguments.[[115]](#footnote-116) Ethical discretion can play a role under Dworkin’s model, because ethical discretion sheds light on the ethical rule’s inconsistency with its own moral foundation.[[116]](#footnote-117) Understanding law as based in integrity ensures that each individual is an active participant in establishing the law, and can draw on his or her moral impulses when an unusual and unforeseen case arises instead of relying on a categorical rule as a mindless crutch. Only through the affirmative defense of ethical discretion, Dworkin might argue, can the attorneys and the public “take rights seriously.”[[117]](#footnote-118)

*Riggs v. Palmer*[[118]](#footnote-119)acts as a remarkable example of Dworkian reasoning in action.[[119]](#footnote-120) *Riggs* could—and from the context of positivist law, *should*—have been a fairly simple case in which a murderer would have inherited from his victim’s estate.[[120]](#footnote-121) The New York statute of wills, after all, did not forbid murderers from inheriting under the murdered victim’s will.[[121]](#footnote-122) An attorney could have argued, as the majority opinion decided, that the statute’s drafters could not have intended “that a donee who murdered the testator to make the will operative should have any benefit under it.”[[122]](#footnote-123) Without explicitly disregarding the statute of wills or engaging in ethical discretion, this line of reasoning draws attention to the fact that the drafters had not anticipated the murderous inheritance situation. One can already draw a parallel to the *Spaulding* and Innocent Convict scenarios, wherein an attorney might have argued that the Model Rules’ drafters could not have intended to prioritize attorney-client confidentiality over a human being’s very life. In its decision to stray from the statute’s literal interpretation, the majority in *Riggs* also called on the principle of statutory interpretation that “[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong . . . .”[[123]](#footnote-124) Though there are social policy considerations at play in such a legal principle, the refusal to allow persons to profit from their wrongdoing is inarguably based in part on an ethical norm. Because of the drafters’ probable intent and the principle against profiting through one’s wrongdoing, the straightforward ruling in *Riggs—*namely, that the murderer could inherit under his victim’s estate because the law did not say otherwise—would have violated two of the legal system’s overall aims. Faced with a choice between applying positivist law by letting the murderer inherit or applying natural law by forbidding such an inheritance, the majority opinion had what Dworkin often referred to as a “hard case.”[[124]](#footnote-125)

Some ethicists describe this principle-based reasoning as “remarkable argumentative acrobatics” that “smuggle common morality in through the back door.”[[125]](#footnote-126) Yet *Riggs* is not an anomaly; a long tradition of case law openly avoids applying laws, rules, and guidelines if such an application will achieve a result so absurd that it must have been unintended.[[126]](#footnote-127) Even our highest court has, in a number of contexts, shown a similar desire to avoid the literal, straightforward interpretation of the law when such an interpretation would conflict with the legal system’s overarching principles.[[127]](#footnote-128) In *Bob Jones University v. U.S.*,[[128]](#footnote-129) the U.S. Supreme Court ruled that the university’s admission practices of racial discrimination disqualified it for tax exemption status, despite the fact that the Internal Revenue Code does not explicitly limit its tax exception status to institutions that follow a non-discrimination policy.[[129]](#footnote-130) The “gravitational force” of the distinctively ethical principle against segregation in education decisively influenced the Court in *Bob Jones.*[[130]](#footnote-131)The Court then ruled in *Green v. Bock Laundry Machine Co*.[[131]](#footnote-132) that “[n]o matter how plain the text of the Rule may be, we cannot accept an interpretation that would deny a civil plaintiff the same right to impeach an adversary’s testimony that it grants to a civil defendant.”[[132]](#footnote-133) This is an argument couched in fairness, a rather ethical virtue.

Should the defense attorney in *Spaulding* have no room in which to argue that disclosing the aneurysm would have been warranted, in light of the “gravitational pull” of the principle against unnecessarily causing another human being’s death? If the justices of the Supreme Court find it decisively persuasive to think that they cannot accept an interpretation that brings about a fundamentally unfair result, why should attorneys be unable to at least have the option of making a similar argument before a disciplinary committee or advisory board? Surely such arguments should at least factor into the disciplinary institution’s decision-making as a mitigating factor to the violation. Interestingly, the trial court in *Spaulding* relied on a principle-oriented style of reasoning in its ultimate ruling.[[133]](#footnote-134) The court ruled that while the defense attorney could not have disclosed the aneurysm to the plaintiff (at least, without first securing the defendant’s permission), the defense attorney nevertheless *did* violate his obligation to be candid before the tribunal by not disclosing the aneurysm to the court.[[134]](#footnote-135) For that act of fraud on the court, the trial court vacated the settlement reached between the defendant and plaintiff.[[135]](#footnote-136) In fact, the observation about this principle-based reasoning being acrobatics that smuggles common morality in through the back door was made in reference to *Spaulding*’s reasoning.[[136]](#footnote-137) As true as that observation may be, it would be more accurate to say that the reasoning is an act of acrobatics that carries common morality in through the *front* door.

While the “acrobatics” remark appears to be inaccurate, critics note a number of other perfectly valid concerns with Dworkin’s integrity-based model.[[137]](#footnote-138) Reasonable attorneys, whether in gray suits or in black robes, will invariably disagree about whether and how strongly certain laws possess or lack moral impulses. In a pluralistic society, reasonable people can and will irreconcilably disagree on the moral priorities behind pro-choice versus pro-life arguments, arguments for homosexual unions versus arguments for religious liberty, and all other manner of intractable moral dilemmas.[[138]](#footnote-139) Indeed, the Model Rules begin with an opening section that “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.’”[[139]](#footnote-140) The stability and predictability of the judicial system and its rules would also be severely undermined if lawyers and judges based the binding interpretation of laws on their own personal sense of morality, which already assumes that all people have clear-cut, articulable moral stances.[[140]](#footnote-141) Positivist thinkers as far back as Bentham raised prescient concerns about the anarchist implications of, “This ought not to be the law, therefore it is not . . . .”[[141]](#footnote-142)

Scholars of natural law generally advocate for one of two solutions to the aforementioned concerns.[[142]](#footnote-143) One solution adopts the four-pronged test used in the necessity defense to criminal acts. To invoke the necessity defense, a person must show “(1) that he was faced with a choice of evils and chose the lesser evil; (2) that he acted to prevent imminent harm; (3) that he reasonably anticipated a causal relation between his conduct and the harm to be avoided; and (4) that there were no other legal alternatives to violating the law.”[[143]](#footnote-144) However, the necessity defense must surpass quite a high bar before it can apply to excuse a person’s conduct.[[144]](#footnote-145) Reasonable people can disagree on the question of what constitutes an evil at all, and whether an individual chose the lesser evil. The imminent harm requirement is difficult to meet because it requires, “‘a clear and imminent danger, not one which is debatable or speculative.’”[[145]](#footnote-146) Lastly, the necessity defense can often fail because the defendant *did* have legal alternatives to consider, and courts “have not been approving of arguments that the legal alternatives [were] ineffective or inadequate.”[[146]](#footnote-147)

Professor William H. Simon offered a more promising, though still imperfect, solution.[[147]](#footnote-148) His Contextual View Model asserts that ethical decisions “often turn on the ‘underlying merits’” of an issue.[[148]](#footnote-149) To Simon, the Model Rules impose an ethical decision-making responsibility on attorneys that is analogous to the “‘seek justice, not merely [a conviction]’” ethical decision-making responsibility that the Model Rules impose on American prosecutors.[[149]](#footnote-150) In the *Spaulding* and Innocent Convict scenarios where the Model Rules’ inflexibility on confidentiality jeopardized a person’s life, Simon argues in favor of Option Two ethical disobedience, finding that an attorney *must* disclose and must “consider disclosure as a form of nullification.”[[150]](#footnote-151) To Simon, acts that result in “substantial injustice” lie beyond the bounds of the Model Rules because an attorney’s duties to justice take precedence over the attorney’s duties to his or her client.[[151]](#footnote-152) The “substantial injustice” reasoning already reflects the Supreme Court’s language in *Green* about being unable to accept an interpretation that would deny a civil plaintiff the same cross-examination rights that civil defendants enjoy.[[152]](#footnote-153) Further, the Supreme Court’s language about gravitational pulls[[153]](#footnote-154) and absurd results would also fit well into Simon’s model.[[154]](#footnote-155)

But Simon’s calls for “defiance” may be so strong as to undermine the viability of the model as a whole.[[155]](#footnote-156) Attorneys cannot actually nullify a law outside of a jury room and, therefore, they remain accountable to a disciplinary institution for any conduct that violates the Model Rules. In light of the fact that the attorneys have engaged in ethical disobedience instead of ethical discretion, their only hope is that the disciplinary institution resorts to prosecutorial discretion or disciplinary leniency.[[156]](#footnote-157) If the disciplinary institution does so, however, it does so in secret because the Model Rules leave no room for discretion and leniency. Further, it is unlikely that a disciplinary institution would extend any leniency. Lawlessness and defiance are both especially difficult subjects to be lenient about, after all, for lawyers whose job is primarily if not exclusively “to facilitate planning and compliance with the law.”[[157]](#footnote-158)

Aside from the issues with Type Two solutions that achieve nothing except the needless destruction of legal careers, Simon’s proposal is as non-discretionary, categorical, and formalistic as the Model Rules have proven to be. After all, he seems to state that an attorney faced with a *Spaulding* or Innocent Convict scenario *must* disclose the aneurysm, whatever the consequences may be. By positing that there are clearly “right” and “wrong” solutions to moral problems,[[158]](#footnote-159) he seems to have proposed the very kind of mechanical decision-making process that he had set out to reject. Naturally, then, the Contextual View Model’s use of clear-cut rules erases any need for establishing standards for attorneys to draw on for guidance, in the event that they are faced with an unusual moral dilemma that Simon’s directives have not foreseen.

This lack of standards also creates an open-ended subjectivity that permits lawyers to defy the Model Rules in unpredictable ways. Attorneys should take care not to bring reasonable, articulable acts of ethical discretion into the realm of arbitrary, judgmental acts of ethical paternalism. As one scholar put it,

If the lawyer decides not to inform her client that he has the legal right to disinherit his children [because she feels that such a disinheritance would be cruel], then she effectively assumes an arrogant posture of moral superiority, since treating this information about the legal system as ‘dangerous knowledge,’ akin to a doctor refusing to tell a patient the lethal dose of a medication, assumes that the lawyer has superior expertise in evaluating the morality of” how the client wishes to dispose of his assets.[[159]](#footnote-160) Whereas the Model Rules “restrict[] the range of considerations the decisionmaker may take into account,

Simon’s model suffers from the opposite problem of permitting too much room for considering ethical disobedience.[[160]](#footnote-161)

This Essay offers an alternative model—one that begins with Dworkin’s work, then adds to it. Dworkin put forward a two-prong test for interpreting the validity of ethical discretion without engaging in overly discretionary judgment.[[161]](#footnote-162) Under Prong One, the defendant’s arguments must meet a threshold “fitness” test by being coherent in principle with existing law.[[162]](#footnote-163) If the interpretation is “fit,” then under Prong Two a person determines the soundness of the interpretation by determining which interpretation “provides the best moral justification of the relevant legal materials.”[[163]](#footnote-164) The two-prong fitness and soundness test helps ensure the interpretation’s objectivity and the rules’ “ruleness,” while also avoiding the moral skepticism that grounds positivism.[[164]](#footnote-165)

One major setback to Dworkin’s model is that it does not seem to offer a straightforward definition for ethical discretion. Ethical discretion should be proven by clear and convincing evidence that the action or actions taken in violation of the Model Rules resulted from ethical considerations that would have compelled a reasonable person to have also taken comparable action or actions. This definition distinguishes ethical discretion from unethical conduct, which would be an unjustifiable violation of the Model Rules. This definition also distinguishes ethical discretion from ethical misconduct, which would result from an actor’s negligence, ignorance, or self-serving desires. A second major setback to Dworkin’s model is that its efforts to counter the Model Rules’ rigid prescriptions with flexible standards seem to have the effect of making ethics a discretionary endeavor.[[165]](#footnote-166) In other words, Dworkin’s model would help an attorney defend his or her decision to violate the Model Rules, but it would only apply to attorneys who decided to violate the Model Rules.

Certain attorneys will voluntarily engage in ethical discretion, with or without an affirmative defense to draw on for aid. But many attorneys operate on a very heavy workload, and may also feel distracted by an increasingly competitive and shrinking legal market. For attorneys with several pressing deadlines hanging over their head and no strong ethical preferences about how to resolve an issue, the categorical Model Rules are simply a time-effective solution to what would otherwise be a dilemma. Just as many judges felt relieved when the mandatory sentencing guidelines took the difficult moral question out of their hands, so too do many attorneys feel relieved by the fact that there are black-and-white rules on ethical conduct. Scholars note that “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.”[[166]](#footnote-167)

Ideally, then, a reconceptualization of the Model Rules can strike a balance between the need to take ethics seriously and the reasonable discretion that individuals should exercise in resolving ethical problems. The balance would obligate attorneys to consider obeying or disobeying the Model Rules’ suggested behavior, then articulating the reasoning behind why that attorney obeyed the Model Rules or acted on his or her discretion instead. Presumptions prescribe ethical deliberation while leaving the decision itself up to the attorneys, who can draw on Dworkin’s “fitness” and “soundness” tests (as well as the ABA’s ethical hotlines and advisory opinions) to help prevent them from accidentally abusing their discretion. Regardless of the decision reached, attorneys should engage in such deliberation or risk disciplinary sanctions.

# The Advantages of a Rebuttable Presumption

## Current Practices

In practice, disciplinary institutions do not necessarily apply the Model Rules with the rigidity that the rules’ formality suggests.[[167]](#footnote-168) In *Ankerman v. Mancuso*,[[168]](#footnote-169) for instance, the court enforced a property agreement despite the fact that an attorney had entered into the agreement in clear violation of the Model Rules.[[169]](#footnote-170) Unlike the *Spaulding* court*,* the *Ankerman* court seemed unwilling to allow the Model Rules to affect non-disciplinary matters.[[170]](#footnote-171) It would be inaccurate to believe that reframing the Model Rules as presumptions would mark a major break from current practices. If anything, the current practice is somewhat inconsistent, with some courts taking a positivist approach to the Model Rules’ interpretation and other courts using *Ankerman*’s natural law approach.

On a more general note, it is uncanny that a profession defined by its openness to and reliance on the adversarial process should rigidly enforce ethical conduct, one of the most open-ended subjects.[[171]](#footnote-172) To suggest that the legal system is a closed one is to delegitimize a great deal of what courts routinely do[[172]](#footnote-173) and what legal reasoning ultimately is.[[173]](#footnote-174) Without the adversarial process, the law’s development would stagnate—just as the development of the Model Rules has stagnated in recent decades instead of evolving as a relevant guideline that can address new ethical problems *as* they arise, and not years later. In an area as dynamic as the practice of law, attorneys will always need relevant, specific, and timely guidance from the Model Rules.[[174]](#footnote-175) There is no escaping the adversarial process; even a more compliant court would presumably admit that the interpretation of the Model Rules, like the interpretation of the words of any text, depends on a number of competing political, ethical, social, and other interpretive theories that are ripe for argument.[[175]](#footnote-176)

## The Underlying Principles of the Model Rules

Second, an act of ethical discretion would not disobediently stray from the Model Rules. Instead, a valid act of ethical discretion would obediently comply with the rules’ explicitly stated goals and principles. The Model Rules’ prefatory comments state, for instance, that the rules do not “exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.”[[176]](#footnote-177) The preamble to the Model Rules also states that although the rules often “prescribe terms for resolving such [ethical] conflicts[,]” 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.”[[177]](#footnote-178) The necessary implication of these statements, taken together, is that attorneys have a great deal of space in which to lawyer with honor.[[178]](#footnote-179)

The *Spaudling* attorney should have been able to draw on statements like these in defense of an unsanctioned yet justifiable disclosure of the aneurysm. The attorney in *Spaulding* could have analogized his situation to the handful of exceptions that the Model Rules carve out for the non-disclosure of attorney-client confidences. The Model Rules permit attorneys to disclose otherwise confidential information about “[t]he intention of his client to commit a crime and the information necessary to prevent the crime.”[[179]](#footnote-180) Further, several advisory opinions permit the disclosure of a client’s impending suicide attempt.[[180]](#footnote-181) Under Dworkin’s model, the *Spaudling* attorney should have been able to justify a disclosure of the plaintiff’s aneurysm by pointing to these statements as embedding the principle that attorneys should use their special privileges to help reduce crime, serious bodily injury, and death in society, to the point that the reduction of crime, serious bodily injury and death all take precedence over matters of confidentiality.[[181]](#footnote-182) The defense attorney in *Spaulding* could have also pre-emptively argued that disclosing the aneurysm would not have violated the confidentiality rules’ intention of facilitating frank client disclosure.[[182]](#footnote-183) First, the plaintiff could have discovered his aneurysm on his own—and in fact, he *should* have discovered it, had his physician and attorney not been unusually negligent. And second, the defense lawyer found the aneurysm through discovery, not through a confidential statement from Spaulding himself. By turning the rules into rebuttable presumptions of how attorneys should act and by basing acts of ethical discretion on the rules’ state principles, an ethical discretion defense would enable some discretion without undermining the rules’ “ruleness.”

## Prompt Resolution of Novel Ethical Problems as They Arise

Third, this Essay’s ethical discretion doctrine would allow attorneys to address novel ethical problems as they arise in real time. Though the *Spaulding* and Innocent Convict dilemmas are no longer pressing matters because of an update to the Model Rules,[[183]](#footnote-184) both *Spaulding* and the Innocent Convict problem were troubling attorneys across the nations for *years* before the ABA announced its delayed reaction. When the Moral Rules are written so rigidly, it asks too much to assume that they can be quickly redrafted when the next *Spaudling* problem arises. Instead, it will by design take several years and several unfortunate moral failures before the Model Rules can address the next *Spaudling* scenario and reclaim the moral compass it aspires to have. Instead of waiting for the lumbering bureaucratic process to fix the ethical problem while their client is suffering, attorneys who can act with ethical discretion would at once bring to light the ethical problem.

For that very reason, an ABA committee has already considered the possibility of making room for ethical discretion, stating that “whether a lawyer would decide to risk disciplinary sanctions . . . would depend upon the lawyer’s assessment of a number of factors and the strength of the lawyer’s moral convictions that disclosure was necessary, regardless of the potential personal consequences to the lawyer.”[[184]](#footnote-185) In a similar advisory opinion, an ABA committee speculated that attorneys should be able to take refuge in a “‘moral compulsion’” exception to the Model Rules where the attorney disclosed the client’s AIDs condition to the client’s live-in girlfriend.[[185]](#footnote-186) The ethical discretion doctrine merely adds that when an attorney takes appropriate discretion, that action should not result in any consequences besides perhaps an update to the Model Rules.

## Proactive Ethical Conduct

Fourth, attorneys under the current formalistic regime have no reason to seek advisory opinions. If a violation of the rules is not permitted, then a violation (however morally compelling it may be) is simply not permitted and will result in disciplinary sanctions. When the rules are so categorical, requests for an advisory opinion are a frivolous struggle. The positivist approach unintentionally demands attorneys to look away from the unethical, to tolerate the intolerable, to close their eyes to injustice instead of lawyering with their eyes wide open. Such behavior truly strikes a blow to the profession, and “implicitly slights the moral basis of the majority’s laws.”[[186]](#footnote-187)

When there *is* room for discretion, attorneys will certainly be willing to at least ask an advisory board if the unique circumstances warrant discretion. Indeed, attorneys might make the request for advice part of their routine if advisory opinions would help protect the attorneys from abusing their ethical discretion. Disturbingly, there is a serious lack of disciplinary cases in which attorneys raise the defense of ethical discretion, moral compulsion, or similar arguments.[[187]](#footnote-188) This dearth strongly suggests that attorneys who are engaging in ethical discretion—attorneys like Lieutenant Commander Matthew Diaz, perhaps—are doing so in secret. Given the likelihood that at least some attorneys will engage in ethical discretion, even if in secret, it would greatly serve the interests of transparency for attorneys to have reason to ask the advisory board for its recommendation. Even without the advisory board’s recommendation, an open act of ethical discretion is still more helpful to the legal profession than a secret act of ethical discretion. Secret acts of discretion may help clients on a case-for-case basis, but it is more important for this profession to create precedent and guidance for other attorneys who will inevitably face similar circumstances.

## The Image of the Profession

Fifth, ethical discretion promises to best serve the legal profession’s image in the hearts and minds of non-lawyers. The public’s opinion about the legal profession undoubtedly has a direct and lasting impact on the quantity and quality of individuals who seek a legal degree. In the wake of a scandal like the affair with Enron, non-lawyers should wonder, “But where were the lawyers?”[[188]](#footnote-189) Now the public has come to take it for granted that attorneys are involved in, if not leading the charge of, major scandals. Increasingly, “but where were the lawyers” is turning into “but which lawyer was it this time?” If attorneys are permitted to take acts of ethical discretion when the Model Rules’ suggestions are inappropriate and disciplinary institutions are permitted to uphold such acts, then the legal profession would be putting its best face forward.

And with regards to compliance, one can only expect half-hearted and halfway compliance when the Model Rules merely burden and frighten attorneys instead of inspire them. One might mistake the Model Rules in their current form as the narrator in Tolstoy’s *What Is to Be Done?*,[[189]](#footnote-190) the narrator who reflects,

It is as if I were sitting on the neck of a man, and, having quite crushed him down, I compel him to carry me, and will not alight from off his shoulders, while I assure myself and others that I am very sorry for him, and wish to ease his condition by every means in my power except by getting off his back.[[190]](#footnote-191)

Attorneys who find that their “primary motivation for adherence to ethics codes owes more to a shared sense of values than to the threat of punishment” are more likely to comply under a Model Rules that permits ethical discretion than one that does not.[[191]](#footnote-192) And that is precisely why ethical discretion is best suited to promoting the nobility of this profession.

# Conclusion

By imposing a uniquely positivist kind of law on attorney conduct, the Model Rules force the legal profession to gaze at the outmost limits of positive law. No law or rule should force an attorney to make an Antigone’s choice between doing what is legal and doing what is right. Even in the context of military law, with its national security concerns and justifiably strict hierarchy, the Manual for Courts-Martial states that “an order . . . may be inferred to be lawful and it is disobeyed at the peril of the subordinate,” so that orders are only presumptively binding and may be rebutted by evidence of their illegality.[[192]](#footnote-193)

Under the current regime, attorneys can ignore their conscience, ignore the dilemma by withdrawing from the case, ignore the law, or ignore the law’s original intent by reaching an alternative interpretation that aligns with the conclusion they desire. This Essay has explored the critical shortcomings of these options, then proposed that instead of adapting attorney conduct to the Model Rules, it is the Model Rules that need to adapt to the hard realities on the ground. Dworkin’s understanding of “law as integrity” offers great promise as a method through which natural law and the adversarial process can revitalize the Model Rules. This new model can recapture the Model Rules’ presumed intent to ease the profession’s ability to lawyer with honor. Dworkin’s model and this Essay’s additions to it reconceptualize the Model Rules as rebuttable presumptions, presumptions that attorneys must consider and can rebut if they find sufficient reason to act otherwise. This reconceptualization of the Model Rules brings us back to the ABA’s original “canons” approach to regulating ethical conduct in 1905, but adds the necessary enforcement mechanisms to ensure compliance this time. And perhaps this reconceptualization, with its affirmative defense of ethical discretion, also offers a glimpse into how to help resolve the myriad other laws, guidelines, and rules whose inflexibility can, in extraordinary cases, haunt attorneys with a modern-day Antigone’s dilemma.

1. . N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 209 (2008) (Stevens, J., concurring). [↑](#footnote-ref-2)
2. . *See* U.S. Const. art. I. [↑](#footnote-ref-3)
3. . *See generally* J.C. Oleson, *The Antigone Dilemma: When the Paths of Law and Morality Diverge*, 29 Cardozo L. Rev. 669, 670 (2007) (describing the Antigone dilemma as a “choice between command and conscience”). [↑](#footnote-ref-4)
4. *. See* Sophocles, Antigone (David Mulroy trans., Univ. of Wis. Press 2013) (441 B.C.). [↑](#footnote-ref-5)
5. . *Id.* at 3–5. [↑](#footnote-ref-6)
6. . *Id.* at 5–7. [↑](#footnote-ref-7)
7. . Robert M. Cover, Justice Accused: Antislavery and the Judicial Process 6 (1975). [↑](#footnote-ref-8)
8. . *See* Ronald Dworkin, Law’s Empire 119–20 (1986). [↑](#footnote-ref-9)
9. . *See generally id.* (describing the law as integrity model as “not limit[ing] law to what convention finds in past decisions but direct[ing judicial decision makers] also to regard as law what morality would suggest to be the best justification of these past decisions”). [↑](#footnote-ref-10)
10. . Model Rules of Prof’l Conduct (Am. Bar Ass’n 1984) [hereinafter “Model Rules”]. [↑](#footnote-ref-11)
11. . *See generally id.* at r. 1.6 (requiring attorneys to keep client information confidential, but allowing them to disclose the information in several specific situations). [↑](#footnote-ref-12)
12. . Michael Gentithes, *Precedent, Humility, and Justice*, 18 Tex. Wesleyan L. Rev. 835, 853 (2012). [↑](#footnote-ref-13)
13. . Spaulding v. Zimmerman, 116 N.W.2d 704 (Minn. 1962). [↑](#footnote-ref-14)
14. . *See generally id.* (describing the ethical dilemma faced by a defense attorney who acquired exclusive knowledge of a plaintiff’s life threatening medical condition). [↑](#footnote-ref-15)
15. . *See infra* Part III. [↑](#footnote-ref-16)
16. . *See infra* Part IV. [↑](#footnote-ref-17)
17. . *See infra* Part V. [↑](#footnote-ref-18)
18. . *See* Steven R. Salbu, *Law and Conformity, Ethics and Conflict: The Trouble with Law-Based Conceptions of Ethics,* 68 Ind. L. J. 101, 104–05, 129 (1992); *see also* W. Bradley Wendel, *Public Values and Professional Responsibility,* 75 Notre Dame L. Rev. 1, 10 (1999) (quoting L. Ray Patterson & Thomas B. Metzloff, Legal Ethics: The Law of Professional Responsibility 3 (1982)). (“Althoughmost of our law is morally based, the term ethics implies the antithesis of law. Ethical rules focuson individual and voluntary moral responses, not legally mandated duties.”) [↑](#footnote-ref-19)
19. *. See* Wendel, *supra* note 18, at 12. [↑](#footnote-ref-20)
20. *. Id.* at 17. [↑](#footnote-ref-21)
21. . *It’s Always Sunny in Philadelphia* (FX television). [↑](#footnote-ref-22)
22. . *It's Always Sunny in Philadelphia: The Gang Finds a Dumpster Baby* (FX television broadcast Sept. 13, 2007). [↑](#footnote-ref-23)
23. . Henry S. Drinker, Legal Ethics 23–25 (1953). [↑](#footnote-ref-24)
24. *. See* *id.* at 26–27. [↑](#footnote-ref-25)
25. . *See* Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 Yale L.J. 1239, 1251 (1991). Some scholars are careful to only call the Model Rules a code of “professional conduct” instead of a code of ethical conduct. *See id.* at 1241–42. Other scholars observe that “[n]o term in the legal lexicon has been more abused than ‘professionalism.’” Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 Wm & Mary L. Rev. 1303, 1307 (1995). [↑](#footnote-ref-26)
26. . *See* Wendel, *supra* note 18, at 9 (referring to the Model Rules as imposing a “regulatory model”). [↑](#footnote-ref-27)
27. . Heidi Li Feldman, *Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?*, 69 S. Cal. L. Rev. 885, 886(1996); *see also* Wendel, *supra* note 18, at 54 (stating that legal positivism reduces attorneys to “amoral technicians, who bring to the lawyer-client relationship nothing more than expertise in the complex apparatus of the legal system. This conception of the lawyer’s role eliminates valued traits such as prudence and professional judgment, which are important goods the lawyer brings to a representation”). [↑](#footnote-ref-28)
28. *. See* Dworkin, *supra* note 8, at 114–50. [↑](#footnote-ref-29)
29. . Maura Strassberg, *Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics,* 80 Iowa L. Rev. 901, 905 (1995) (citing Geoffrey C. Hazard, Jr., *The Legal and Ethical Position of the Code of Professional Ethics*, in 5 Social Responsibility: Journalism, Law, Medicine 5–7 (Louis Hodges ed., 1979)). [↑](#footnote-ref-30)
30. . *See* William H. Simon, The Practice of Justice 7–9 (1998) (explaining how “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”). [↑](#footnote-ref-31)
31. . Harold J. Berman, *Law and Logos*, 44 Depaul L. Rev. 143, 151 (1994); *see also* Robert M. Palumbos, *Within Each Lawyer’s Conscience a Touchstone: Law, Morality, and Attorney Civil Disobedience,* 153 U. Pa. L. Rev. 1057, 1061 (2005) (“Positivism remains, by and large, the dominant American approach toward legal ethics today.”). [↑](#footnote-ref-32)
32. *. See* John Gardner, *Legal Postivism: 5½ Myths,* 46 Am. Jur. 199, 201 (2001) (“In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits.”). [↑](#footnote-ref-33)
33. . Oleson, *supra* note 3, at 672. [↑](#footnote-ref-34)
34. *. Id.* at 691 (quoting *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary,* 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice)). [↑](#footnote-ref-35)
35. . *See generally* Model Rules, *supra* note 10 at r. 1.6 (requiring attorneys to keep client information confidential, but allowing disclosure in specific situations). [↑](#footnote-ref-36)
36. *. Compare id.* at Preamble (stating that while the rules often “prescribe terms for resolving such [ethical] conflicts,” 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.”); *with id*. at Preamble (stating that “[a] lawyer’s conduct should conform to the requirements of the law . . . .”). [↑](#footnote-ref-37)
37. . *See generally* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593, 617 (1958) (describing legal positivism as “the insistence on the separation of the law as it is from law as it ought to be”). [↑](#footnote-ref-38)
38. . Monroe H. Freedman, *Personal Responsibility in a Professional System*, 27 Cath. U. L. Rev. 191, 199 (1978) (citing Monroe H. Freedman, Lawyers’ Ethics in an Adversary System 9 (1975)). [↑](#footnote-ref-39)
39. . *Compare* Brown v. Bd. of Educ.*,* 347 U.S. 483, 495 (1954) (ignoring strong moral sentiments of the time and striking down segregation on constitutional grounds) *with* Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (following popular sentiment of the day and upholding segregation). [↑](#footnote-ref-40)
40. . *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964) (forcing private businesses to abide by the Civil Rights Act); *Brown*, 347 U.S. at 495 (finding public school segregation unconstitutional). [↑](#footnote-ref-41)
41. . Yates v. United States, 354 U.S. 298, 312 (1957), *overruled by* Burks v. United States, 437 U.S. 1 (1978). [↑](#footnote-ref-42)
42. . Texas v. Johnson, 491 U.S. 397, 397, 420 (1989). [↑](#footnote-ref-43)
43. *. See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 798 (2008) (finding the Military Commissions act of 2006 was unconstitutional and all detainees at Guantanamo had a right to habeas corpus); Hamdan v. Rumsfeld, 548 U.S. 557, 634–35 (2006) (finding that U.S. military commissions violated procedural rights for enemy detainees); Rasul v. Bush, 542 U.S. 466, 485 (2004) (finding that detainees are entitled to file habeas corpus petitions in federal courts, and thus ensuring that Guantanamo Bay would see judicial, and not exclusively executive, oversight). Interestingly, “the fact is that since the Supreme Court decided *Boumediene* in 2008, there have been few reports of the United States capturing high-value targets. This reality may well indicate that efforts to grant detainees more rights have instead instigated an unforeseen and unintended shift away from capture and toward targeted killing.” Carla Crandalla, *If You Can’t Beat Them, Kill Them: Complex Adaptive Systems Theory and the Rise in Targeted Killing*, 43 Seton Hall L. Rev. 595, 633 (2013). “[I]t may well be that the government's expanded use of drones arose as an unexpected and unintended consequence of prior efforts to grant detainees greater civil liberties.” *Id.* at 641. One might wonder what role this shift in focus may have played in the decision to kill instead of capture Osama bin Laden on May 2, 2011. [↑](#footnote-ref-44)
44. . *See* *Boumediene*, 553 U.S. at 798 (stating that “[t]he laws and Constitution are designed to survive, and remain in force, in extraordinary times”). [↑](#footnote-ref-45)
45. . Cover, *supra* note 7 at 119–23. [↑](#footnote-ref-46)
46. *. See generally* David Dyzenhaus, Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy 52–53, 82 (1991) (examining the South African judiciary’s maintenance of racially unequal legislation). [↑](#footnote-ref-47)
47. . Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 Harv. L. Rev. 630, 648–61 (1958); *see also* Hart, *supra* note 37, at 617 (discussing Gustav Radbruch, a leading German legal theorist, who recanted his belief in pure positivism after the evils it permitted under the Nazi regime). [↑](#footnote-ref-48)
48. . Cover, *supra* note 7 at 119–23. [↑](#footnote-ref-49)
49. . *See generally, e.g.*,Jeffrey M. Schmitt, *The Antislavery Judge Reconsidered*, 29 Law & Hist. Rev. 797, 799–802 (2011) (explaining the political context in which antislavery judges operated in order to better understand why they supported the Fugitive Slave Act); Karla Mari McKanders, *Immigration Enforcement and the Fugitive Slave Acts: Exploring Their Similarities*, 61 Cath. U. L. Rev. 921, 926 (2012) (providing information on the Fugitive Slave Act of 1793). [↑](#footnote-ref-50)
50. *. See* Cover, *supra* note 7, at 198. [↑](#footnote-ref-51)
51. *. Id*. at 228. [↑](#footnote-ref-52)
52. . Spaulding v. Zimmerman, 116 N.W.2d 704 Minn. (1962). [↑](#footnote-ref-53)
53. . *Id.* at 707–08. [↑](#footnote-ref-54)
54. *. Id.* [↑](#footnote-ref-55)
55. . *Id.* at 708. [↑](#footnote-ref-56)
56. . *Id.* at 709–10. [↑](#footnote-ref-57)
57. . *Id.* at 706, 711. [↑](#footnote-ref-58)
58. . Monroe H. Freedman, *The Life-Saving Exception to Confidentiality: Restating Law Without the Was, the Will Be, or the Ought to Be*, 29 Loy. L.A. L. Rev. 1631, 1632 (1996). [↑](#footnote-ref-59)
59. . *Id.* at 1633 (citing Restatement of the Law: The Law Governing Lawyers § 132 cmt. E, illus. 4 (Am. Law Inst., Tentative Draft No. 2, 1989)). [↑](#footnote-ref-60)
60. . Model Rules, *supra* note 10, r. 1.6(b)(1). [↑](#footnote-ref-61)
61. . David Luban, Lawyers And Justice: An Ethical Study 35 (1988). [↑](#footnote-ref-62)
62. . Ellen Yaroshefsky, *Military Lawyering at the Edge of the Rule of Law at Guantanamo: Should Lawyers Be Permitted to Violate the Law?*, 36 Hofstra L. Rev. 563, 581 (2007). [↑](#footnote-ref-63)
63. *. See* Lon L. Fuller, The Morality of Law 96 (rev. ed. 1969). [↑](#footnote-ref-64)
64. . Though this is perhaps a mere matter of semantics, the term “ethical discretion” captures the idea of rationally using one’s moral compass to take action in spite of the rules of professional conduct. “Ethical disobedience,” by contrast, suggests an emotional air of defiance and rebellion that this Essay does not intend to convey. [↑](#footnote-ref-65)
65. . *See infra* Part III. [↑](#footnote-ref-66)
66. . Henry David Thoreau, On Civil Disobedience (1849), *reprinted in* Walden and Civil Disobedience 224, 231 (Owen Thomas, ed. 1966). [↑](#footnote-ref-67)
67. . *See* Cover, *supra* note 7. [↑](#footnote-ref-68)
68. *. Id.* at 6. [↑](#footnote-ref-69)
69. *. Id.* [↑](#footnote-ref-70)
70. . *Id.* [↑](#footnote-ref-71)
71. . *Id.* [↑](#footnote-ref-72)
72. . *Id.* [↑](#footnote-ref-73)
73. . *Id.* [↑](#footnote-ref-74)
74. . *See id.* at 119–23. [↑](#footnote-ref-75)
75. . Brown v. R.J. Reynolds Tobacco Co., 576 F. Supp. 2d 1328, 1347 n.28 (M.D. Fla. 2008), *vacated,* 611 F.3d 1324 (11th Cir. 2010) (quoting Lawyer’s Wit and Wisdom 152 (Bruce Nash & Allan Zullo eds., 1995)). [↑](#footnote-ref-76)
76. *. See* Oleson, *supra* note 3, at 693. [↑](#footnote-ref-77)
77. . *Id.* at 691 (quoting John S. Morton, Jr., *Why Mandatory Minimums Make No Sense*, Notre Dame J.L. Ethics: Pub. Pol’y 311, 311–12 (2004)). [↑](#footnote-ref-78)
78. . *See, e.g.*,United States v. Angelos, 345 F. Supp. 2d 1227, 1230, 1261 (D. Utah 2004), *aff’d,* 433 F.3d 738 (10th Cir. 2006) (applying the sentencing guidelines minimum sentence even though “[t]he court believes that to sentence [the defendant] to prison for the rest of his life is unjust, cruel, and even irrational”). [↑](#footnote-ref-79)
79. . *Id.* at 1230. [↑](#footnote-ref-80)
80. *. Id.* [↑](#footnote-ref-81)
81. . *Id.* [↑](#footnote-ref-82)
82. . United States v. Angelos, 433 F.3d 738, 754 (10th Cir. 2006). [↑](#footnote-ref-83)
83. . *Angelos*, 345 F. Supp. 2d at 1230. [↑](#footnote-ref-84)
84. *. Id.* at 1261–63. [↑](#footnote-ref-85)
85. . *See* Donald A. Dripps, *Reinventing Plea Bargaining*, 59 (Robina Inst. Conference on the Future of Criminal Law, Working Paper, 2014) (commenting that Angelos has “an expected release date of November 18, 2051”); *Nightline: Locked Up for Life on a Nonviolent Drug Bust* (ABC television broadcast Aug. 12, 2015) (noting that President Obama has not yet commuted Angelos’s sentence). [↑](#footnote-ref-86)
86. . Model Rules, *supra* note 10, at r. 1.16. [↑](#footnote-ref-87)
87. *. See* Cover, *supra* note 7, at 153–54 (quoting Wendell Phillips, The Constitution: A Pro-Slavery Compact 171, 181 (3rd ed. 1856)). [↑](#footnote-ref-88)
88. . Model Code of Judicial Conduct Canon 2, r. 2.11(A)(2)(c) (Am. Bar Ass’n 2011). [↑](#footnote-ref-89)
89. . *U.S. Judge Quits over Sentencing Rules,* Chi. Trib., Oct. 1, 1990, § 1, at 6. [↑](#footnote-ref-90)
90. *. See* Oleson, *supra* note 3, at 683–84 (quoting United States v. Hungerford, 465 F.3d 1113, 1120 (9th Cir. 2006)). [↑](#footnote-ref-91)
91. . *U.S. Judge Quits over Sentencing Rules, supra* note 89, at § 1. [↑](#footnote-ref-92)
92. . Jack B. Weinstein, *Every Day Is a Good Day for a Judge to Lay Down His Professional Life for Justice*, 32 Fordham Urb. L.J. 131, 140 (2004). [↑](#footnote-ref-93)
93. . Augustine, On Free Choice of the Will bk. I, § 5, at 8 (Thomas Williams trans., Hackett Publ’g Co. 1993) (c. 400 C.E.). [↑](#footnote-ref-94)
94. . Palumbos, *supra* note 31, at 1062. [↑](#footnote-ref-95)
95. . *See generally* United States v. Studley, 907 F.2d 254, 257 (1st Cir. 1990) (stating that the sentencing court chose to depart from the sentencing guidelines). [↑](#footnote-ref-96)
96. . *Elderly Man Gets Lighter Sentence*, Spokesman Rev. Spokane Chron. Oct. 12, 1990, at A5. [↑](#footnote-ref-97)
97. . *Studley*, 907 F.2d at 257. [↑](#footnote-ref-98)
98. . *Id.* at 260; *see* *Elderly Man Gets Lighter Sentence*, *supra* note 96, at A5 (attorneys pointed out there was no precedent for Judge King’s holding). [↑](#footnote-ref-99)
99. . United States v. Pozzy, 902 F.2d 133, 140 (1st Cir. 1990). [↑](#footnote-ref-100)
100. . *See* Recent Case,United States v. Hungerford*,* 465 F.3d 1113 (9th Cir. 2006), 120 Harv. L. Rev. 1988, 1992–93 (2007). [↑](#footnote-ref-101)
101. . *See generally* Aaron McKnight, Comment, *Jury Nullification as a Tool to Balance the Demands of Law and Justice*, 2013 BYU L. Rev. 1103 (2013) (explaining that juries have the power to fight unjust laws). [↑](#footnote-ref-102)
102. . One scholar noted, perhaps somewhat tongue-in-cheek, that “judges dislike reversal.” William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 541 (2001). [↑](#footnote-ref-103)
103. *. See* W. Bernard Richland, Book Review, 64 Colum. L. Rev. 180, 182 (1964) (reviewing Herbert Mitgang, The Man Who Rode the Tiger: The Life and Times of Judge Samuel Seabury (1963)) (analyzing the New York Court of Appeals’ decision to refuse an appellate position to a judge who had publicly criticized several decisions of the appellate court). [↑](#footnote-ref-104)
104. . Prigg v. Pennsylvania, 41 U.S. 539 (1842). [↑](#footnote-ref-105)
105. . *See id.* [↑](#footnote-ref-106)
106. *. Id.* at 612–16. [↑](#footnote-ref-107)
107. *. Id.* at 614. [↑](#footnote-ref-108)
108. . Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (repeated 1864). [↑](#footnote-ref-109)
109. . Ableman v. Booth, 62 U.S. 506, 526 (1858). [↑](#footnote-ref-110)
110. *. See* Planned Parenthood of Se. Pa.v. Casey, 505 U.S. 833, 865 (1992) (“The Court’s power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people’s acceptance of the Judiciary as fit to determine what the Nation’s law means and to declare what it demands.”). [↑](#footnote-ref-111)
111. . Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34, 59 (1992). [↑](#footnote-ref-112)
112. *. See* Ronald Dworkin, Taking Rights Seriously 217–21 (1977). [↑](#footnote-ref-113)
113. . *Id.* at 218–21. [↑](#footnote-ref-114)
114. . *Id.* at 215. [↑](#footnote-ref-115)
115. . Cover, *supra* note *7*, at 199 (stating that anti-slavery judges ignored the “legitimate, substantial doctrinal innovations that might have made certain cases less a choice between law and morality and more a choice between alternative legal formulations.”). [↑](#footnote-ref-116)
116. . *Id.* [↑](#footnote-ref-117)
117. . Dworkin, *supra* note 8, at 205. As Dworkin also states, a government “that professes to recognize individual rights . . . [m]ust dispense with the claim that citizens never have a right to break its law . . . .” *Id.* at 204. [↑](#footnote-ref-118)
118. . Riggs v. Palmer, 22 N.E. 188 (N.Y. 1889). [↑](#footnote-ref-119)
119. . *Id.* at 191. [↑](#footnote-ref-120)
120. *. Id.* at 189. [↑](#footnote-ref-121)
121. . *Id.* [↑](#footnote-ref-122)
122. *. Id.* [↑](#footnote-ref-123)
123. . *Id.* at 190. [↑](#footnote-ref-124)
124. *. See generally* Ronald Dworkin, *Hard Cases*, 88 Harv. L. Rev. 1057, 1058–59 (1975) (contending that a “hard case” is one in which judges ignore existing law when faced with a novel set of facts, thereby creating new law). [↑](#footnote-ref-125)
125. . Luban, *supra* note 61, at 150. [↑](#footnote-ref-126)
126. *. See generally, e.g.*, United States v. Kirby, 74 U.S. 482, 487 (1868) (holding that carrying out the arrest warrant of a mailman did not constitute the crime of hindering the transportation of mail); *see also* John F. Manning, *The New Purposivism*, 2011 Sup. Ct. Rev. 113, 181 (2011) (“Nowadays, if the text of the statute is clear, that is the end of the matter (unless the statute produces an absurd result).”)). [↑](#footnote-ref-127)
127. . *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574, 598 (1983) (holding that the university could not be tax-exempt under a charitable status because of its discriminatory policies, although the IRS did not mandate a non-discriminatory requirement for schools.) [↑](#footnote-ref-128)
128. . 461 U.S. 574 (1983). [↑](#footnote-ref-129)
129. . *Id.* at 598 (quoting Walz v. Tax Comm’n, 397 U.S. 664, 673 (1969); Rev. Rul. 71-447, 1971-2 C.B. 230). [↑](#footnote-ref-130)
130. . William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. Pa. L. Rev. 1007, 1036 (1989). [↑](#footnote-ref-131)
131. . Green v. Bock Laundry Mach. Co., 490 U.S. 504 (1989). [↑](#footnote-ref-132)
132. . *Id.* at 510. [↑](#footnote-ref-133)
133. . Spaulding v. Zimmerman, 116 N.W.2d 704, 709 (Minn. 1962). [↑](#footnote-ref-134)
134. . *Id.* [↑](#footnote-ref-135)
135. *. Id.* at 710. [↑](#footnote-ref-136)
136. *. See* Luban, *supra* note 61, at 150 (citing *Spaulding*, 116 N.W.2d 704) (arguing that the court in *Spaulding* had to “smuggle common morality in through the back door.”). [↑](#footnote-ref-137)
137. . *See generally* Wendel, *supra* note 18, at 36 (“This Dworkinian conception maintains that there is something about the lawyer’s role which generates moral duties that would not apply to a similarly situated nonprofessional.”). [↑](#footnote-ref-138)
138. *. See id.* at 4 (“Furthermore, appeals to shared values inevitably provoke the question of whether these values are really shared across class, racial, ethnic, and gender boundaries, or whether they are merely the values of the dominant class, dressed in spuriously universal garb.”). [↑](#footnote-ref-139)
139. . Samuel J. Levine, *Taking the Ethical Duty to Self Seriously: An Essay in Memory of Fred Zacharias*, 48 San Diego L. Rev. 285, 293 (2011). [↑](#footnote-ref-140)
140. . Fuller, *supra* note 47, at 655 (“[M]oral confusion reaches its height when a court refuses to apply something it admits to be law . . . .”). [↑](#footnote-ref-141)
141. . Hart, *supra* note 37, at 598; *see also* Fuller, *supra* note 47, at 224–25 (contending that positivism has never been comfortable with interpretation: “This is precisely because it brings to open expression ‘the cooperative nature of the task of maintaining legality.’”). [↑](#footnote-ref-142)
142. . *See generally* Yaroshefsky, *supra* note 62, at 589 (contending that necessity as a defense, arising under criminal common law, “is justified because it . . . produces a net benefit to society.”); *see also* Simon, *supra* note 30, at 9 (arguing that lawyers should take action for the promotion of justice.). [↑](#footnote-ref-143)
143. *. See* Yaroshefsky, *supra* note 62,at 590 (quoting United States v. Aquilar, 883 F.2d 662, 693 (9th Cir. 1989); William P. Quigley, *The Necessity Defense in Civil Disobedience Cases: Bring in the Jury*, 38 New Eng. L. Rev. 3, 12 (2003)). [↑](#footnote-ref-144)
144. . *See* Yaroshefsy, *supra* note 62, at 590 (citing Quigley, *supra* note 143, at 72) (“This defense presents significant hurdles to an actor who intends to invoke it.”); *see also* United States v. Oakland Cannabis Buyers Coop., 532 U.S. 483, 490 (2001) (“Even at common law, the defense of necessity was somewhat controversial.”). [↑](#footnote-ref-145)
145. . Yaroshefsky, *supra* note 62, at 590 (quoting Commonwealth v. Brugmann, 433 N.E.2d 457, 461 (Mass. App. Ct. 1982)). [↑](#footnote-ref-146)
146. . *Id*. at 591. [↑](#footnote-ref-147)
147. *. See* Simon, *supra* note 30, at 9. [↑](#footnote-ref-148)
148. . *Id.* [↑](#footnote-ref-149)
149. *. Id*. at 10; *see also* Model Code of Prof’l Responsibility EC 7-13 Am. Bar Ass’n 1980. [↑](#footnote-ref-150)
150. *.* Simon, *supra* note 30, at 164. [↑](#footnote-ref-151)
151. *. See id*. at 56 (contending that “the agency rule and the ‘substantial injustice’ rule are better than the bar’s current rule”). [↑](#footnote-ref-152)
152. . Green v. Bock Laundry Mach. Co., 490 U.S. 504, 510 (1989). [↑](#footnote-ref-153)
153. . *See* Eskridge, *supra* note 130, at 1036. [↑](#footnote-ref-154)
154. . *See Green*, 490 U.S. at 527 (“We are confronted here with a statute which, if interpreted literally, produces an absurd, and perhaps unconstitutional, result.”). [↑](#footnote-ref-155)
155. . *See* Simon, *supra* note 30, at 56 (arguing that the *Model Rules* “rationale offered for the confidentiality rule is ludicrously inconsistent with its substance.”). [↑](#footnote-ref-156)
156. . The Wisconsin State Bar Committee of Professional Ethics offered the possibility of incorporating prosecutorial discretion or disciplinary leniency in a 1989 opinion, expressing the hope that “disciplinary agencies and courts will react to these kinds of situations in a manner which encourages lawyers to exercise sound discretion in taking actions to prevent serious harm to innocent persons.” Wisconsin State Bar Comm. of Prof’l Ethics, Op. E-89-11 (1989). [↑](#footnote-ref-157)
157. *. See* Wendel, *supra* note 18, at 52. [↑](#footnote-ref-158)
158. . *See* Simon, *supra* note 30, at 162–69 (discussing three examples of moral issues lawyers have faced and stating the correct solution to the three issues). [↑](#footnote-ref-159)
159. *. See* Wendel, *supra* note 18, at 30–31. [↑](#footnote-ref-160)
160. *. See* Simon, *supra* note 30, at 9. [↑](#footnote-ref-161)
161. . *See* Dworkin, *supra* note 8, at 255 (stating that there the two prongs are fit and justification). [↑](#footnote-ref-162)
162. *. See* *id.* [↑](#footnote-ref-163)
163. . Dyzenhaus, *supra* note 46, at 25. [↑](#footnote-ref-164)
164. *. See* Dworkin, *supra* note 8, at 24–25. [↑](#footnote-ref-165)
165. . *See* Model Rules, *supra* note 10, at 11. [↑](#footnote-ref-166)
166. . Fred C. Zacharias, *Reconciling Professionalism and Client Interest*, 36 Wm. & Mary L. Rev. 1303, 1349 (1995) (citing Kenneth Mann, Defending White Collar Crime: A Portrait of Attorneys at Work 121 (1985)) (discussing lawyers’ ability to make decisions about ethics and methods of practice). [↑](#footnote-ref-167)
167. . *See generally* Fredrick Schauer, *Formalism*, 97 Yale L.J. 509, 511–38 (1988) (proposing that formalism relates to rules in only three ways: through a denial of choice of norms, denial of choice between norms, or literalistic refusal to sacrifice rules to results). [↑](#footnote-ref-168)
168. . Ankerman v. Mancuso, 830 A.2d 388 (Conn. App. Ct. 2003), *aff’d,* 860 A.2d 244 ( Conn. 2004). [↑](#footnote-ref-169)
169. . *Id.* at 393. [↑](#footnote-ref-170)
170. . *Id.* at 389–90. [↑](#footnote-ref-171)
171. . *See* Thomas Morawetz, The Philosophy of Law 50–51 (1980) (describing the distinction between closed and open systems, and stating that the law is best understood as an open system because the view of law as a closed system is “oddly defective . . . insofar as its rules have open texture and therefore generate hard cases.”). [↑](#footnote-ref-172)
172. *. See* Dworkin, *supra* note 8, at 13; *see also* Dworkin, *supra* note 8, at 216–17 (describing how the legal system is open because it is tested and developed by citizens and the adversary process). [↑](#footnote-ref-173)
173. *. See* Samuel J. Levine, *Taking Ethical Discretion Seriously: Ethical Deliberation as Ethical Obligation*, 37 Ind. L. Rev. 21, 63 (2003) (“As every new law student quickly discovers, legalreasoning is not susceptible to the same formalistic structures of logic that may be applied insuch disciplines as mathematics or the natural sciences. Instead, legal arguments and conclusionsare necessarily derived through complex modes of interpretation, often based in potentiallyimprecise factors including textual analysis, reasoning by analogy, and policy considerations.”). [↑](#footnote-ref-174)
174. . The importance of guidance is vividly illustrated in the case of Lieutenant Commander Matthew Diaz. In 2004, Diaz saw a six-month tour as Deputy Staff Judge Advocate in Guantanamo Bay, Cuba. Tim Golden, *Naming Names at Gitmo*, N.Y. Times, Oct. 21, 2007, § 6 (Magazine), at 78, 80–81. Just two years short of retirement, Diaz was described by his superiors as “‘the consummate naval officer’” and “‘a stellar leader of unquestionable integrity.’” *Id.* at 81. Feeling a moral obligation to correct Guantanamo Bay’s failure to follow the habeas corpus rules set out in Rasul, Diaz anonymously sent out thirty-nine page list of 551 names of Guantanamo detainees to the Center for Constitutional Rights. *See id.* (describing how Diaz sent the print-out). After the government traced the document to Diaz through his fingerprints. *See id.* at 80 (describing how the government traced Diaz through his fingerprints). Diaz explained his motivations before the court-martial and outlined a defense based on moral obligation. *See* Kate Wiltrout, *Naval Officer Sentenced to Six Months in Prison, Discharge*, Virginian-Pilot (May 18, 20070, http:// hamptonroads.com/node/268001. Despite the fact that the federal government itself had released the list of detainees two months before Diaz’s trial, Diaz was found guilty of a number of crimes and sentenced to half a year in prison, dismissal from the Navy, and loss of pay and pension. *See* *id.* Of course, “the ramifications of an individual choosing to commit an illegal act, in order to avoid what they [sic] perceive to be a greater harm, are drastically different in the military than they are in civilian life . . . .  Such a decision affects an individual’s shipmates, the safety and efficiency of the ship, as well as the effectiveness of the mission.” (United States v. Olinger, 47 M.J. 545, 551 (N-M. Ct. Crim. App. 1997), *aff’d*, 50 M.J. 365 (C.A.A.F. 1999) (dismissal of the necessity defense of a Navy officer who left his post to care for his depressed and suicidal wife). National security concerns also play a unique role in the military context. Personal discretion can severely, if unintentionally, jeopardize national security or national interests. But, drawing from Diaz’s example, perhaps it is possible to allow ethical discretion for civilian lawyers. [↑](#footnote-ref-175)
175. . Schauer, *supra* note 168, at 514 (citing Hart, *supra* note 37, 608–12)). [↑](#footnote-ref-176)
176. . Model Rules, supra note 10, at 11; *see also* Alan H. Goldman, *Confidentiality, Rules, and Codes of Ethics*, 3 Crim. Just. Ethics 8, 10 (1984) (“[N]o rule, not even one with built-in exceptions, can capture the lawyer’s moral duties in all the situations he might encounter.”). [↑](#footnote-ref-177)
177. *.* Model Rules, supra note 25, at 10. [↑](#footnote-ref-178)
178. . *See* William H. Simon, *Ethical Discretion in Lawyering*, 101 Harv. L. Rev. 1083, 1084 (1988) (stating that disciplinary rules “are likely to leave a good deal of autonomy to individual lawyers.”). [↑](#footnote-ref-179)
179. . Model Code of Prof’l Responsibility DR 4-101(C)(3) (Am. Bar Ass’n 1983). [↑](#footnote-ref-180)
180. *. See, e.g.,* Comm. on Prof’l Ethics of the New York State Bar Ass’n, Op. 486 at 3 (1978) (acknowledging the “underlying common law and statutory policies of deep concern for the preservation of human life and the prevention of suicide.”). [↑](#footnote-ref-181)
181. . Of course, attorneys would have to be careful in drawing up inferences about what is embedded in the rules. After all the rules explicitly forbid disclosure for fraudulent and tortious acts, despite the fact that they can also lead to terrible consequences for society. In such cases, the drafters have already foreseen the potential ethical conflict but decided that the importance of securing a trusting and open relationship between attorneys and clients outweighs the unfortunate scenario in which the client has engaged in fraudulent or tortious behavior. [↑](#footnote-ref-182)
182. *. See* 1 Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct 131 (2d ed. supp. 1998) (discussing the “zone of privacy” that confidentiality creates); *see also* 2Floyd R. Mechem, A Treatise on the Law of Agency 1877–79 (2d ed. 1914) (discussing the goals of confidentiality). [↑](#footnote-ref-183)
183. . Model Rules, *supra* note 10, at r. 1.6(b)(1). [↑](#footnote-ref-184)
184. . Wisconsin State Bar Comm. of Prof’l Ethics, Op. E-89-11 (1989). [↑](#footnote-ref-185)
185. . *See* Comm. on Prof’l Ethics of Delaware State Bar Assoc., Op. 1988-2 (1988). [↑](#footnote-ref-186)
186. *. See* Wendel, *supra* note 18, at 81. [↑](#footnote-ref-187)
187. . *See generally* Model Rules, *supra* note 10, at 11 (stating that the rules do not contain all of the things that a law should consider because “no worthwhile human activity can be completely defined by legal rules.”); Simon, *supra* note 30, at 9 (discussing that lawyers should engage in ethical decision-making by considering the situation at hand and making the choice that is the most likely to “promote justice”). [↑](#footnote-ref-188)
188. . Lincoln Sav. & Loan Ass’n v. Wall, 743 F. Supp. 901, 920 (D.D.C. 1990) (expressing a similar sentiment of “where were [the] professionals?” with regards to the Lincoln Savings and Loan Association scandal). [↑](#footnote-ref-189)
189. . Leo Tolstoy, *What Is to Be Done?*, in The Complete Works of Lyof N. Tolstoi 81 (1899). [↑](#footnote-ref-190)
190. . *Id.* [↑](#footnote-ref-191)
191. . 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, 199–200 (2007). [↑](#footnote-ref-192)
192. . Manual for Courts-Martial, United States pt. IV, ¶14.c. (2)(a)(i) (2005). [↑](#footnote-ref-193)