TOWARD DUTY-BASED LAWYERING?: RETHINKING THE DANGERS OF LAWYER CIVIL DISOBEDIENCE IN THE CURRENT ERA OF REGULATION

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Because personal tales can sometimes carry significant political messages, I am grateful that Steve Lubet loves to tell stories. His historical vignettes of legal headline–makers give us not simply a glimpse into our entertaining past as a profession, but some useful perspective on our present and future, as well. So it is with his piece on John Brown,[1] which has provoked this set of articles. My interest was naturally drawn to the lawyering surrounding Brown's trial,[2] where his morally enthusiastic defenders engaged in what all of us today would label as civil disobedience in an effort to divert attention from Brown's, shall we say, "small crimes" to the "larger" crimes of slavery. The issue I want to explore is our current attitude toward misbehaving, but morally motivated, counseling and particularly whether we have begun to move toward a new sense of "appropriate" lawyering. My concern is that the shift, while subtle, may be profound: Rather than serving our traditional function as advisors of our clients' rights, we may be becoming instead counselors concerning their duties. If so, the nature of "disobedience"—of being unfaithful to one's professional calling—will be changing as well.

This conclusion, however, is a bit grandiose compared to the uncomplicated issue that actually prompts this Article. The basic issue is simply this—should legal ethics codes,[3] which already contain considerable interpretative leeway, nevertheless be made even more flexible to accommodate competing guides for proper conduct? I believe the answer should be "no."

This judgment is based on both the analytic difficulty and the professional implications of its opposite. To cover this ground, I will proceed in three steps. First, I will summarize the existing commentary on lawyer civil

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1. Steven Lubet, *John Brown's Trial*, 52 ALA. L. REV. 425 (2001).

2. *Id.* at 436-61.

3. Any reference in this Article to "legal ethics codes" should be understood to mean the American Bar Association's Model Code of Professional Responsibility, MODEL CODE OF PROF'L RESPONSIBILITY (1980) [hereinafter MODEL CODE], and its Model Rules of Professional Conduct, MODEL RULES OF PROF'L CONDUCT (2002) [hereinafter MODEL RULES].

disobedience,[4] which naturally focuses on examples like John Brown's lawyers who took questionable action in the name of "higher" normative principles. This literature is characterized by angst and ambivalence, as scholars attempt to balance the simultaneous demands of professional ethics and personal moral integrity. Second, I will focus on one particular aspect of this ambivalence that I find most troubling—the argument that the morality of lawyering can be improved by reducing the disciplinary punishment imposed on those who breach ethical rules on the basis of higher, or at least "other," normative principles. I believe a host of definitional and regulatory problems attend any such move.

Third, as an aspect of this attention on punishment rather than the crime, I will note the most recent element of the phenomenon of redefining lawyering—the special pressure applied by regulatory agencies and prosecutors on that portion of the regulated or investigated entity where lawyers are the most relevant: the exercise of individual rights. Ironically, the effort to accommodate some degree of personal civil disobedience by lawyers helps expose legal ethics and the lawyer-client relationship to other changes from the opposite normative direction, as government attempts to transform lawyering from a rights-based profession into a duty-based prosecutorial adjunct is most evident.

I. BACKGROUND: THE ANALYSIS OF LAWYER CIVIL DISOBEDIENCE

A. The Conceptual Problems

An obvious question raised by the John Brown story is whether modern codes of legal ethics would have had an impact on the behavior and tactics of lawyers in this or similar cases. Not surprisingly, the answer is a loud and

4. My focus will be on the surprisingly large number of books and articles that have focused on this topic over about the last decade. Although this is not the entire body of that impressive literature, and even though I will do justice to none of them, my principle sources for this Article have been the following: DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988); Kathryn Abrams, *Lawyers and Social Change Lawbreaking: Confronting a Plural Bar*, 52 U. PITT. L. REV. 753 (1991); Teresa Stanton Collett, *Professional Versus Moral Duty: Accepting Appointments in Unjust Civil Cases*, 32 WAKE FOREST L. REV. 635 (1997); Stephen Ellmann, *To Live Outside the Law You Must Be Honest: Bram Fischer and the Meaning of Integrity*, 26 N.C. J. INT'L L. & COM. REG. 767 (2001) [hereinafter Ellmann, *Outside the Law*]; Stephen Ellmann, *Lawyering for Justice in a Flawed Democracy*, 90 COLUM. L. REV. 116 (1990); 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 (1996); Leslie Griffin, *The Relevance of Religion to a Lawyer's Work: Legal Ethics*, 66 FORDHAM L. REV. 1253 (1998); W. William Hodes, *Symposium Introduction: What Ought to be Done—What Can be Done—When the Wrong Person Is in Jail or about to be Executed: An Invitation to a Multi-Disciplined Inquiry, and a Detour about Law School Pedagogy*, 29 LOY. L.A. L. REV. 1547 (1996); John Leubsdorf, *Gandhi's Legal Ethics*, 51 RUTGERS L. REV. 923 (1999); Maura Strassberg, *Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics*, 80 IOWA L. REV. 901 (1995); W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1 (1999); David B. Wilkins, *W.M. Keck Foundation Forum on the Teaching of Legal Ethics: In Defense of Law and Morality: Why Lawyers Should Have a Prima Facie Duty to Obey the Law*, 38 WM. & MARY L. REV. 269 (1996); Fred C. Zacharias, *The Lawyer as Conscientious Objector*, 54 RUTGERS L. REV. 191 (2001).

clear "yes." The rules and principles of ethics limit significantly the ability of lawyers to engage in civil disobedience *as a lawyer*, that is, to use one's professional skills in a way that the act is either itself a violation of law,[5] such as speaking to the press when a court has ordered counsel not to do so, or a means of furthering a client's criminal activity[6] like assisting a client in perjury or fraud. Current ethics rules also sweep within their purview illegal behavior by a lawyer more generally, such as when a lawyer files his or her own fraudulent tax return.[7] Thus, a lawyer can endanger his or her ability to practice law by *any* form of behavior that would be characterized as "disobedient" no matter what noble motives or purposes might lie behind the actions.

Several articles over the past decade or so have made these points clearly,[8] and I do not intend to replow all of that ground. Instead, I want to reexamine a few furrows to investigate whether we understand their implications properly and then extend the question in a new direction.

So far as I know, every commentator on the topic of lawyer civil disobedience, even if somewhat sympathetic to the lawyer's agenda, has nevertheless been leery of endorsing this form of "client service."[9] Illegal acts committed by a lawyer raise a range of readily identifiable difficulties for a legal system that prides itself on regularity and protection of rights. For example, in a thoughtful essay commenting on the turbulent professional life of South African lawyer Bram Fischer, Professor Stephen Ellmann identifies the following three sources for a special obligation on the part of lawyers "to obey the rules of their own profession": a lawyer's oath of admission to the bar, the "daily interactions lawyers have with each other," which depend upon mutual trust and shared expectations about lawful behavior, and a lawyer's "participation in the legal system" that implies "some measure of consent, confirming the apparent meaning of the oath of admission."[10] Perhaps we could rethink these sources in the context of a particularly iniquitous regime, like Nazi Germany or apartheid South Africa, for we might argue that a "lawyering" oath there is actually a broader, more ambiguous promise regarding something deeper and more abiding than the dictates of a current regime[11]—in effect, we take the oath with our fingers crossed. Or, as Ronald Dworkin at one point concludes, perhaps in a truly

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5. *See, e.g.*, MODEL CODE, *supra* note 3, at DR 1-102(A)(5), 7-102(A)(4); MODEL RULES, *supra* note 3, at R. 3.4(a) and (d).

6. *See, e.g.*, MODEL CODE, *supra* note 3, at DR 7-102(A)(7); MODEL RULES, *supra* note 3, at R. 4.1 and 3.3(a)(2).

7. *See, e.g.*, MODEL CODE, *supra* note 3, at DR 1-102(A)(3) and (4); MODEL RULES, *supra* note 3, at R. 8.4(b) and (c).

8. *See* sources cited *supra* note 4 and *infra* note 57.

9. *See* sources cited *supra* note 4.

10. Ellmann, *Outside the Law*, *supra* note 4, at 771 n.23.

11. In the case of South Africa, for example, Professor Ellmann suggests that the oath might be understood to bind the lawyer "only to the laws of the just nation that was waiting to be born." *Id.* So the oath becomes one potentially to the concept of justice itself, rather than to "law" or "ethics" or anything narrower than values in their grandest, best form.

difficult scenario, the right thing to do would be to lie,[12] for we will be able to do more good in this bad situation by remaining a lawyer and doing the best we can than by being honest and hence removed from the profession.

But thankfully, we do not face that circumstance except, I suppose, in the view of a few deeply committed ideologues who would reject the foundations of our legal system altogether as well as its occasional misguided doctrines. When the system can be characterized as generally just, even though not perfect, Ellman's focus on promises to abide by the system's laws and ethics must have special and binding relevance to practicing lawyers as they define the nature of "misbehavior" by any of them.

And in that more difficult context of a generally just system,[13] other factors weigh heavily in favor of demanding lawful actions by lawyers otherwise passionately opposed to portions of existing law. These can be summarized under the heading of the "rule of law,"[14] which must necessarily be the cornerstone of any justification of lawyer behavior. Whatever detail one might try to give to this concept, its essence remains the idea that "system" and "process" trump individual preference or special privilege. But as nice as this sounds, it masks a very important underlying problem that must be confronted—the rule of law *itself* never alone carries its own justification. The fact that a society has a legal "system" means nothing impressive if the system is itself corrupt. Thus, the normative value of the "rule of law" is always *derivative*.[15] One can use this ideal to demand allegiance to oaths to uphold it only if the system or processes that embody it are themselves justified normatively. Here, for example, we are assuming that the social and legal context is sufficiently just to make the "rule of law" an appropriate basis for criticizing lawyer civil disobedience.

In turn, the concept of a lawyer's "role morality" is also derivative in exactly the same way.[16] If and only if the rule of law has a normative foundation does the "role" a lawyer plays as a professional have any moral standing. For example, when we refuse, under the banner of our ethical duty for confidentiality, to disclose information that other citizens would have a duty to reveal, we can cloak ourselves in righteousness only if the legal system that created and sustains that professional role is itself righteous. But if we grant, as current arguments do, the basic justice of our legal system,[17]

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12. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 326-27 (1978) [hereinafter DWORKIN, RIGHTS].

13. This is generally the circumstance imagined by John Rawls when he considered how his ambitious theory of justice as fairness would handle "toleration of the intolerant." *See* JOHN RAWLS, A THEORY OF JUSTICE 216-21 (1972).

14. One of about three million recent references to and analyses of the "rule of law" can be found in Timothy P. Terrell and James H. Wildman, *Rethinking "Professionalism,"* 41 EMORY L. J. 403, 422-24 (1992).

15. *Id.*

16. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 76-78 (1985) (giving a brief but useful discussion of role morality).

17. This acknowledgement is generally implicit rather than explicit, however, for it is difficult to find a scholar who simply argues that the American legal system is corrupt as a whole.

then *dis*obedience to the legal and ethical rules of the system necessarily undermines the system's claim to legitimacy.

Lawyer civil disobedience, then, from this perspective, encounters an insolvable irony: Any "victory" by the disobedient lawyer, where inappropriate tactics achieve a "good" immediate result for a client, is necessarily hollow. The disobedience, by denying the legitimacy of the legal system, validates precisely the same improper tactics *against* this lawyer in the next instance. The victorious lawyer cannot, on the one hand, disparage the "rule of law" and then, on the other hand, attempt to protect their "good" result under that concept. If the legal system itself cannot stand outside the fight over the particular laws or policies in dispute, then the civil disobedient lawyer may have won the battle but lost the war.

B. The Defenses

Despite these evident difficulties, attempts have been made to defend lawyers who, for reasons of conscience or political commitment, act illegally or unethically as part of their "client service." Three basic strategies seem to be available. The first is simply to be proud of one's disobedience and recognize it as such; the second attempts to redefine disobedience by redefining "law" or "ethics"; and the third attempts to dodge the consequences of disobedience by redefining punishment. The third is the most intriguing and troubling, and is the subject of its own section. The other two, discussed here, put it in proper perspective.

1. The "Moral" Defense

The first approach to civil disobedience defends the lawyer morally rather than legally. The misbehavior is admitted to be improper, and punishment for it is accepted as a legitimate systemic outcome, perhaps as part of a larger scheme to bring publicity to the more fundamental wrongs against which the illegal behavior was aimed. The goal here, of course, is to use disobedience to bring pressure on the political system to change the law fundamentally to eliminate these injustices. This was the well-known tactic of the American Civil Rights Movement, particularly of Martin Luther King, Jr.,[18] and of India's Mahatma Gandhi.[19]

Although this approach has a long and respected tradition, it suffers, so advocates against injustice emphasize,[20] from the fact that lawyers who engage in it may likely endure disbarment or other harsh professional penalties to assist in achieving the greater good. Thus, the particularly dramatic act of the lawyer acting illegally can only happen once per lawyer, which makes it

18. This is the essential message of Dr. King's *Letter From a Birmingham Jail*. *See* Wilkins, *supra* note 4, at 282-83.

19. *See* Leubsdorf, *supra* note 4, at 931-35.

20. *See, e.g.*, Strassberg, *supra* note 4, at 922, 949-52.

a very expensive gambit. For those who believe that a lawyer's moral or political values should be more relevant to his or her practice, this result is therefore unacceptable. The reasoning behind it is criticized for separating "law" and "morality" too starkly, insisting on a division that clarifies the nature of "law," or of "legal ethics," by impoverishing it.[21] As one commentator puts it, "[c]hoosing morality rejects the importance of the rule of law while choosing law, rejects the importance of moral values."[22]

2. *The "Redefinition" Defense: Ethical "Integrity" Through Ethical Doubt*

A second strategy, then, is to reject this so-called "positivist,"[23] or "formalist,"[24] thinking about law and ethics in favor of something normatively richer, a move that seeks to expand the scope of what is "legal" and "ethical," and hence reduce the scope of what would be labeled "disobedience." From this perspective, law and ethics already contain a normative element when they are "fully" understood, which then means that a lawyer's reference to values to justify his or her behavior might indeed transform the improper into the proper. The technique for accomplishing this result is to expand law and ethics beyond the technical "rules" that seem to constitute them to include as well the normative "principles" that lie underneath and animate them. This approach relies upon the well-known legal theory of Ronald Dworkin,[25] which he has most recently labeled as an "integrity" thesis.[26] According to this approach, a decision by a court, or a bar disciplinary panel, will have "integrity," and therefore be legitimate, if it reflects not just consistency with prior decisions, which he calls "fit,"[27] but also a recognition that the decision embodies the values already residing in the law, which he calls putting the law in its "best light"[28] or giving it its "best moral justification."[29]

This is a complex and challenging set of propositions, a full exposition and analysis of which would take us well beyond the modest ambitions of this Article. A convenient short-circuit is available, however, in an article by Professor Maura Strassberg in which she carefully works through both Professor Dworkin's legal theory and its implications for legal ethics and

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21. *See id.* at 914-26.

22. *Id.* at 926.

23. The most famous, and still, in my opinion, best exposition of the positivist approach to law is H.L.A. HART, THE CONCEPT OF LAW (1961). One should recognize, however, that even Hart believed that laws could be too iniquitous to be obeyed. *Id.* at 207-11. The problem, of course, is that positivism by itself does not identify the legitimate bases for such conduct.

24. A useful summary of both positivism and formalism, and the relation between the two, appears in Strassberg, *supra* note 4, at 910-26.

25. The work by Professor Dworkin most relevant to the issues here would be his TAKING RIGHTS SERIOUSLY, *supra* note 12, and LAW'S EMPIRE (1986) [hereinafter DWORKIN, LAW'S EMPIRE].

26. DWORKIN, LAW'S EMPIRE, *supra* note 25, at 225.

27. *Id.* at 176-78.

28. *Id.* at 226.

29. *Id.*

lawyer civil disobedience.[30] A few observations here about that article, particularly its final comments, will be the bridge to the next section, in which the meaning of "integrity" becomes rather problematic because of *other* work by Professor Dworkin[31] not discussed by Professor Strassberg.

Although Professor Dworkin's legal theory began as a response to the positivism of Professor Hart,[32] it involved, even at its earliest stages, much more than just trying to add morality back into the analysis of legal concepts. A central part of the debate between Hart and Dworkin was the challenge for judges of what Dworkin called "hard cases," in which the easy, rule-based elements of the law did not give the judge a clear, definitive basis for a decision. The issue was what judges in fact do, and should do, in such circumstances.[33] Legal realists, a close ally of positivists, argue, of course, that in these "spaces" between rules there is no law, and therefore the judge is just making up answers as he or she proceeds.[34] Professor Hart, a bit less cynically, would contend that judges are guided in these areas by analogies to existing rules,[35] but that essentially we must concede that judges have significant discretion, that they are not officially bound by any limits other than their own good faith attempt to find relevant resemblances and differences.[36] Professor Dworkin termed this approach one of "strong discretion"[37] and rejected it, claiming that morality-based "principles" filled in the gaps between discrete "rules,"[38] and therefore denied judges an opportunity to decide as they pleased.

The obvious response here is that a reference to normative principles is hardly a constraint on judicial discretion if the judge can use anything he or she pleases as "norms." Dworkin's solution involved two interrelated claims, only one of which got serious attention from Professor Strassberg. Dworkin argued first that the values to which a judge could legitimately refer in a hard case were only those that were already evident in the existing institutional material of the law itself, that is, values that could be derived from prior decisions, statutes, or constitutional provisions.[39] Any resort, then, to the judge's own personal morality to decide a case would be inappropriate. Thus, judges did not have, according to Dworkin, the kind of "strong discretion" imagined by Hart.

Professor Strassberg appropriately notes this element in the context of ethical decisions in writing that "ethical integrity does not permit personal convictions alone to justify violations of existing rules of legal ethics. Inter-

30. Strassberg, *supra* note 4.
31. DWORKIN, RIGHTS, *supra* note 12, at 169-77.
32. *Id.* at 14-45.
33. *Id.* at 81-130.
34. *See, e.g.*, ANALYTIC JURISPRUDENCE ANTHOLOGY 181-217 (Anthony D'Amato ed., 1996).
35. HART, *supra* note 23, at 149-50, 156.
36. *Id.* at 156.
37. DWORKIN, RIGHTS, *supra* note 12, at 32-34.
38. *See id.* at 37-45. The idea surfaces at this point but permeates Professor Dworkin's work thereafter.
39. *Id.* at 40, 105-23.

pretive principles must be 'embedded' in the existing laws of legal ethics."[40] But now a second interpretive problem arises. If we concede, as Professor Dworkin does, that the analysis of these "embedded" values can itself be controversial and variable,[41] doesn't this add back the element of judicial discretion simply in a new form? What is to prevent a judge from emphasizing any "embedded" principle that produces whatever result he or she wanted to reach anyway? Dworkin's solution was a second thesis focused on individual rights. It states that the appropriate principles for a judge, as opposed to a legislature, to apply in a case were limited to those values that vindicated the *rights* of the litigants—hence, "taking rights seriously," rather than any broader social "policy."[42] This idea then carries over into the more recent "integrity" thesis: To say that a judge decides a case with integrity means that the judge pays attention to both the "fit" of the decision with prior decisions *and* the need to put the law in its "best light" normatively, meaning more specifically that the decision continues the law's effort, according to Professor Dworkin, to vindicate individual rights.[43]

The "law" thus becomes a rich, textured, normative entity where values matter but judges are nevertheless constrained. Professor Strassberg notes most of this in her effort to use Dworkin's theory to add flexibility to "rules" of ethics that otherwise seem to demand that sanctions be imposed on lawyers who act contrary to them on the basis of their own personal values.[44] Rather than sacrificing the "ruleness" of ethics by allowing lawyers to make such arguments in their defense, however, she believes that this approach validates "ruleness" in its appropriate, non-positivist form.[45] It allows lawyers with strong moral convictions to become "hero(es)" in the world of ethics by turning disobedience to positivist ethics into obedience to principled ethics.[46]

But what I believe is not noted sufficiently in this account is the difficulty of separating out and focusing solely on those values that count as "rights," in contrast to those that are inappropriate social "policies" or some other category. Unless one has an extraordinarily fine-tuned sense of the nuances of Professor Dworkin's approach, it becomes difficult to spot the "heroes" without a program. A good example is quite simply how hard Professor Strassberg must work looking for values beneath the ethics rules to find the principles she needs to justify a lawyer's disclosure of confidential information in her target example of *Spaulding v. Zimmerman*.[47] There, the defendant's lawyers learned that the plaintiff was much more seriously in-

40. Strassberg, *supra* note 4, at 937.

41. Dworkin and Strassberg both certainly concede this point. *See* DWORKIN, RIGHTS, *supra* note 12, at 266-90; Strassberg, *supra* note 4, at 937.

42. DWORKIN, RIGHTS, *supra* note 12, at 82-130.

43. Professor Dworkin weaves these two dimensions together metaphorically, but very usefully, in his image of the "chain novel" in LAW'S EMPIRE, *supra* note 25, at 228-32.

44. Strassberg, *supra* note 4, at 905, 926-37.

45. *Id.* at 905-06

46. *Id.* at 951.

47. 116 N.W.2d 704 (Minn. 1962).

jured than anyone knew. The plaintiff had a life-threatening aneurysm, but the defendant's lawyers decided not to tell the plaintiff because of the prohibition in legal ethics rules against disclosure of their client's confidential information.[48] The fact that confidentiality rules *do* contain *some* exceptions, but not the one needed to respond to this case, was of no particular moment in Professor Strassberg's analysis. Instead, to reach the desired result, the search was on for *any* plausible principle that might support the lawyer's disclosure.[49]

Despite the attractive outcome—life-affirming, after all—I find the result disheartening. *Any* lawyer worth his or her fee ought to be able to develop the kind of analysis that Professor Strassberg applied to *Spaulding*. *Any* lawyer should, in other words, be able to generate interpretive doubt where others perceive clarity. Indeed, I have argued elsewhere[50] that normative disagreement about legal ethics is inevitable, that whenever an interpretive argument turns on values, at least four different perspectives of reasoning *about* those values will give them content,[51] and none of those perspectives is uniquely "correct" or legitimate as compared to the others.[52] Thus, to generate enough support to be accepted by a bar association not composed of clones, ethics codes are *always*, to some significant degree, vague. Codes are notorious, for example, for resorting to the standard of "reasonableness" when reasonable people might disagree.[53]

Given this inevitability, we face the prospect not only of having a hard time identifying the Dworkinian distinction between "rights" and "policies," but also choosing among competing versions of rights themselves. The *Spaulding* case, for example, may seem relatively easy because it involved a threat to someone's life, but how far can this analysis be pushed? What dangers less than life are nevertheless honored by the law and deserving protection through disobedience? How about the sanctity of one's home or family, with "sanctity" being defined essentially by the actor? And how do we define "life?" Would a breach of confidentiality be justified if the lawyer were attempting to protect a fetus that he fervently believed was a "life" deserving protection? In its strongest form, the Dworkinian argument presents the startling conclusion that the right thing for decision makers like courts and disciplinary boards to do is to *acquit* such lawyers—that is, conclude that nothing "wrong" has happened at all, because of the existence of doubt that the lawyer is permitted to identify through the lens of his or her own personal morality. Both Dworkin and Strassberg are clear on this point. As she puts it, "accomodat[ing] conscientious dissenters . . . includes acquittal rather than conviction even when, in the final analysis, disobedience *is*

48. *Spaulding*, 116 N.W.2d at 707-08.

49. *See* Strassberg, *supra* note 4.

50. Timothy P. Terrell, *Turmoil at the Normative Core of Lawyering: Uncomfortable Lessons from the "Metaethics" of Legal Ethics*, 49 EMORY L.J. 87 (2000).

51. *Id.* at 97-110.

52. *Id.* at 114.

53. *Id.* at 87.

disobedience, on the ground that the law prior to that analysis is vague on what constitutes disobedience."[54]

Vagueness—doubt—now becomes its own vindication, and as far as I can see, discretion once again reigns supreme. The only response to lawyer civil disobedience will therefore be either surrender by the bar to unpredictable applications of the ethics codes as lawyers subject them to personal interpretation, or to apply "ruleness" with a vengeance, a kind of super-specificity of ethical rules that tries to anticipate all future situations and deny alternative interpretations. Neither choice is attractive, and the latter is essentially impossible.[55] Concerning the former, if legal ethics can be modified by personal ethics, then we can no longer claim to have drafted and imposed on lawyers a "professional" code of conduct. Joining the bar can essentially be made personally costless, as one's "oath" becomes a promise only to be true to oneself.

But there is an alternative route here, noted by both Professors Dworkin and Strassberg. Rather than permit personal moral convictions to reshape "law" or "ethics" themselves, these values could be taken into consideration in the decisions to prosecute or punish.[56] Disobedience would therefore be conceded, but now simply forgiven among friends. This prospect has its own serious conundra.

II. THE "FORGIVING" DEFENSE OF DISOBEDIENCE

A consistent theme through the literature sympathetic toward morally-based disobedient lawyers is that at the very least we should reduce or modify sanctions in these cases.[57] Punishment is, after all, the one part of the legal/regulatory system, that is already flexible and therefore capable of recognizing appropriate extenuating factors or circumstances. And what could be a more legitimate factor than a lawyer taking his or her values seriously?

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54. Strassberg, *supra* note 4, at 951 (emphasis added).

55. Professor Hart is as good a source as any on this straightforward observation. Rules, he noted, will always to some degree have "open texture" simply because of the messy nature of the language in which they are expressed and the inability of human beings to predict and describe all future events to which the rule might be applied. HART, *supra* note 23, at 121-32.

56. DWORKIN, RIGHTS, *supra* note 12, at 214; Strassberg, *supra* note 4, at 951-52.

57. DWORKIN, RIGHTS, *supra* note 12, at 214; Bruce A. Green, *Lawyer Discipline: Conscientious Noncompliance, Conscious Avoidance, and Prosecutorial Discretion*, 66 FORDHAM L. REV. 1307, 1312 (1998); Strassberg, *supra* note 4, at 951-52. A good example of the reasoning on this point, although outside the context of lawyer discipline, is stated by Bruce Ledwitz. He writes:

> Amelioration of sanction in the case of civil disobedience convictions is a sound policy. Insofar as it is adopted, it helps create a freer and healthier society. But amelioration is a subterranean phenomenon, a sort of back door. Reduced sanctions represent a compromise between the demands of law and conscience. Perhaps the hidden quality of amelioration is necessary to allow such compromise to exist. Amelioration of criminal sanctions occurs, but it is not formally acknowledged.

Bruce Ledwitz, *Civil Disobedience, Injunctions, and the First Amendment*, 19 HOFSTRA L. REV. 67, 139 (1990).

Moreover, sanction leniency does not require any "doubt" to exist in the requirements of the legal or ethical rule that the lawyer violates. It can be invoked solely on the basis of the internal morality—the "good faith"—of the lawyer. It is therefore always, and abundantly, available.

Thus, only a couple of questions would seem to remain to be resolved. First, should we leave this sanction leniency for morally-based disobedience implicit, as it is in the current codes, or should we make it explicit, as Professor Strassberg suggests: "[T]he ABA should revise its Standards for Imposing Lawyer Sanctions [to] . . . specifically includ[e] reasonable moral justification for misconduct as a mitigating factor."[58] And second, should we attempt to specify the grounds on which lenience can be appropriately granted, or should we leave it as vague as Professor Strassberg's "reasonable" justification? Perhaps others see these issues as details to be worked out later; I, however, find the problems lying behind these unresolved points unresolvable. This may be, of course, because I simply have not yet thought through the problems sufficiently. In what follows I will at least attempt to frame parts of the debate that I do not think have been adequately addressed.

In the first instance, as odd as it may seem, it is not at all clear that lenience should be granted for attempts at "goodness" through the means of unethical conduct. The problem here, once again, is one of theory: We have moved from a concern in this Article's previous section with "ethics theory" to a concern now with "punishment theory."[59] The basic question here is why sanctions exist for unethical behavior. I do not believe the reasons are primarily retributive or reformative, even though in some cases a lawyer might be sanctioned straightforwardly as punishment, and perhaps to get that lawyer to change her ways. I would bet, however—and it is only a bet because I do not have any statistics or other evidence at hand—that such instances are limited to those where the lawyer's behavior is more egregious than being merely professionally unethical. For example, this includes instances where the lawyer displays gross indifference toward or wanton hostility regarding the rights and interests of a client or the legal system. Indeed, I would argue that, in contrast to the doctrines of criminal law, a professional ethics code is based on very different assumptions about its purposes. Criminal law seems more aimed at *assessing past* behavior. It is a set of directions to officials to tell them when and how to respond to miscreants who have done something that they knew or should have known was wrong to do. A professional ethics code, on the other hand, is aimed much more at *guiding future* conduct.[60] It exists to state the profession's expectations

58. Strassberg, *supra* note 4, at 952.

59. Classic sources for discussions of punishment theory, which work through the distinctions between and among retribution, deterrence, prevention, rehabilitation, and so on, are WAYNE LAFAVE, CRIMINAL LAW 22-27 (3d ed. 2000), and H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 3-27 (1968).

60. This distinction is one of the essential differences between John Austin's positivism, which put the "bad person" at the conceptual center of "law," and Professor Hart's, which imagined a more average, relatively decent, but not perfect, person at that center. *See* HART, *supra* note 23, at 20-22, 27-33,

about behavior in specialized circumstances. The mitigating factors that currently *are* recognized as legitimate grounds for leniency reflect that forward-looking purpose, for they permit leniency primarily where the deterrent/guiding aspect of the ethics rules is already evident, as in demonstrations of remorse by the lawyer or absence of any history of unethical behavior, or where that purpose is irrelevant, as in circumstances of mental illness.[61] What this list of appropriate factors does *not* contain, then, is an endorsement of *competing* forms of behavior guidance—personal values that would permit a lawyer to *not* treat the ethics code seriously. The problem with any other approach is now clear: If ethics codes already contain substantial normative slack, as I noted earlier,[62] then adding more in the form of sanction discretion will only help guarantee that the codes will be unable to supply meaningful direction. Rather than directory, they will become precatory—"we hope you will act in the following way, but if you have reasons for doing something else, go for it."

I will note here one example of lawyer regulation moving in precisely the *opposite* direction from that argued by those in favor of sanction lenience for civil disobedient lawyers. Rule 11 of the Federal Rules of Civil Procedure in its original incarnation stated that a court could sanction a lawyer if he or she filed pleadings that were not "warranted by existing law or a *good faith* argument for the extension, modification, or reversal of existing law."[63] This language was amended in 1993 to require that pleadings be supported "by existing law or by a *nonfrivolous* argument for the extension . . . ."[64] The change in the noted terminology is not cosmetic. The problem with the "good faith" standard was exactly what the sanction leniency approach hopes to add back into the ethics debate, which is the lawyer's own *personal, subjective* claim that he or she acted on the basis of the motivations of a good person. In the Rule 11 context, on what grounds could a court conclude that a lawyer lacked "good faith," except to attempt to crawl inside the lawyer's head? Thus, the term was changed to "nonfrivolous" to remove this subjective element, not to make the application of Rule 11 crystal clear and uncontroversial, but to move the debate about its ambiguity from a focus on the lawyer's mind to the judge's perspective on the law. So it should also be for ethics violations more generally. Sanction leniency

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38-41.

61. The factors currently endorsed by the ABA are as follows:

(a) absence of a prior disciplinary record; (b) absence of a dishonest or selfish motive; (c) personal or emotional problems; (d) timely good faith effort to make restitution or to rectify consequences of misconduct; (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; (f) inexperience in the practice of law; (g) character or reputation; (h) physical disability; (i) mental disability or chemical dependency including alcoholism or drug abuse . . .; (j) delay in disciplinary proceedings; (k) imposition of other penalties or sanctions; (l) remorse; (m) remoteness of prior offenses.

A.B.A. STANDARDS FOR IMPOSING LAWYER SANCTIONS R. 9.32 (1999).

62. *See supra* text accompanying notes 50-53.

63. This older version of Rule 11 can be found in WOLFRAM, *supra* note 16, at 596.

64. FED. R. CIV. P. 11 (1994) (emphasis added).

based on the misbehaving lawyer's own personal sense of appropriateness will create ethical subjectivity precisely where and how it should not exist.

I am not arguing, however, that ethics sanctions must be applied mechanically to serve their guidance purpose. Although rather rigid judicial sentencing guidelines are currently in vogue,[65] the act of sentencing has traditionally and unavoidably contained an element of flexibility that allows courts to respond to cases individually. The issue is one of degree and purpose. Sanctioning flexibility that would essentially permit the bar to *forgive* a violation of ethics rules would raise serious questions about the bar's claim to self-governance. Which values, for example, should any given bar disciplinary panel or state supreme court be able to invoke to vindicate disobedience? Professor Strassberg's reference to "*reasonable* moral justification[s]"[66] must mean, if her reasoning is consistent, only those that the panel or court agrees are already "embedded" in the ethics code, but I have already noted how problematic it is to identify the legitimate candidates for that honor. And we must also note here, as well, what "embedded" means in this context. We are not talking about values underlying society's laws generally but about the values claimed by members of the legal profession to be a part of their own self-proclaimed professional world. Thus "self-governance" and "self-serving" unavoidably travel hand-in-hand which should make everyone, including lawyers, suspicious. In turn, then, any effort to use sanction leniency to give the profession an escape hatch for its self-proclaimed morally-motivated members should be scrutinized with care, if not downright hostility.

But an even more serious problem lurks in the background here. A principal criticism of ethics codes within the literature on lawyer civil disobedience has been, as noted earlier,[67] that these codes have the unfortunate tendency to force lawyers to leave their personal values behind as they act as professionals. Commentators argue consistently that personal morality ought to matter, and matter seriously and unashamedly. Presumably then, when a lawyer's personal values are really serious to the lawyer and indeed are of a kind that have traditionally been given respect within our political system, then surely the ethics codes should, at the very least, respect *that* form of disobedience in some meaningful way. The best example of this would of course be a lawyer's religious values. Should we, then, as some scholars have argued, privilege these particular values as reasons for noncompliance with ethical requirements?[68]

I do not believe so. The problems here seem to me to be both obvious and insurmountable. One is a straightforward difficulty of proof—how would we know that an ethics violation is actually based on religious values rather than instrumental values of immediate convenience? Apparently we

65. *See* U.S. SENTENCING GUIDELINES MANUAL, preface (1998).

66. Strassberg, *supra* note 4, at 952 (emphasis added).

67. *See supra* text accompanying notes 22-31.

68. *See, e.g.*, Abrams, *supra* note 4; Collett, *supra* note 4; Griffin, *supra* note 4.

would need a test somewhat like that developed by the federal courts to identify legitimate conscientious objectors to military service. But, as Fred Zacharias notes in a thoughtful discussion of this prospect, this approach is unworkable and unappealing.[69] Moreover, what would we do if some of these religious-based values turned out to be from a Dworkinian perspective much more like "policies" to this person than concerns about anyone else's "rights" but their own? Should we honor only those religious values that have the correct "embedded" non-religious political "rights" qualities that the Dworkin/Strassberg analysis apparently requires? This question in turn raises a basic constitutional question. Why should religious-based values be granted this privilege within the system of legal ethics when other values just as fervently held by individual lawyers are not? It is one thing to recognize and respect religious scruples in the context of forced military conscription where the Free Exercise Clause is implicated,[70] but it is quite another to do so regarding a purely voluntary circumstance like joining and remaining a member of the legal profession.

III. THE DANGER OF REDEFINING DISOBEDIENCE: THE GROWING RELEVANCE OF "DUTIES"

Despite the worries I have expressed about endorsing lawyer ethical disobedience through either "doubt" or sanction leniency, it does nevertheless seem reasonable to acknowledge that the ethics system will not collapse if, occasionally at the margins, when unethical behavior is alleged, we take into account the lawyer's normative angst. Yet this attitude, moderate, logical, and practical though it seems, in fact disguises a much more troubling phenomenon in the world of regulating professional behavior than has heretofore surfaced in the academic literature.

A. The Relationship Between Rights and Duties

The problem is an adjunct to the effort, discussed earlier,[71] to redefine "law" and "ethics" by adding the normative "ought" back in to the positivist's "is." In Dworkin's terminology, it is supplementing mere doctrinal "fit" with an effort to put the law in its "best light." I noted above[72] that it is difficult in the first instance to limit the "best light" analysis to the legitimate realm of individual rights, and excluding inappropriate social "policies," but there is another distinction of this sort that has not yet played a role in the "value-friendly" analyses of legal ethics in the civil disobedience context. This is the differences between "rights" and "*duties*."

69. Zacharias, *supra* note 4, at 210-18.

70. U.S. CONST. amend. I.

71. *See supra* text accompanying notes 23-29.

72. *See supra* Part I.B.2.

Early in his career as a legal theorist, in presenting a close and careful analysis of the ambitious political theory of John Rawls,[73] Professor Dworkin noted that political theories could be classified according to their most fundamental orientation.[74] Some were "goal-based," others "duty-based," and others, like Rawls's and his own, were "rights-based."[75] Dworkin's claim was that a "goal-based" theory defined all its other elements with reference to identified social goals. From the perspective of utilitarianism, for example, citizens would get only those rights and would have imposed on them only those duties that would be required by the goal of generating the greatest happiness for the greatest number.[76] By the same token, the "duty-based" theory of Emmanuel Kant would generate only those individual rights and would permit only those social goals that could be derived from Kant's "categorical imperative" of treating others as you would want to be treated.[77] And finally, the "rights-based" theories of Rawls and Dworkin would put individual rights at the center, and make all duties and social goals derivative of those rights.[78]

The reason this system of classification makes a difference here is the troublesome distinction between "rights" and "duties." I have noted previously that the distinction in Dworkin's work between "rights" and "policies," which now we would label "goals," is difficult enough to pin down. But for present purposes, let us assume that the teleological character of "goals" or "policies" is sufficient to distinguish them from the deontological categories of "rights" and "duties,"[79] and furthermore we will assume that we can rule out of order, as Professor Strassberg suggests, any effort by a misbehaving lawyer to justify her actions by reference to social "goals" that would trump the requirements of the ethics codes.[80] That is, a disciplinary panel would be correct to reject an argument for "no violation" or a request for "sanction leniency" by a lawyer who claimed that he revealed a client confidence on the grounds that society was made happier or better off in some way by that action. Instead, we will assume that the panel would be limited to deontological claims based in "rights" or "duties." But now we face new and even more difficult conceptual problems and very serious implications for the future of lawyer behavior regulation.

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73. RAWLS, *supra* note 13.

74. DWORKIN, RIGHTS, *supra* note 12, at 150-83.

75. *Id.* at 169-77.

76. *Id.* at 171-72. Professor Dworkin also placed theological theories and Aristotle's "perfectionist" theories in this category. *Id.*

77. *Id.* at 171.

78. DWORKIN, RIGHTS, *supra* note 12, at 171-72. Professor Dworkin also included "Tom Paine's theory of revolution" in this category. *Id.* at 172.

79. This was Professor Dworkin's approach. *See id.* at 169.

80. *See* Strassberg, *supra* note 4.

B. The Relevance of Duties to Client Service

The challenge is essentially this: Because political theories based on "rights" and "duties" are both deontological in character, and both, as Professor Dworkin puts it, "place the individual at the center and take his decision or conduct as of fundamental importance,"[81] it will be even more difficult to tell when one or the other is the driving force in any given setting. And the situation is made worse by the fact that in a rights-based political system we will have the right to voluntarily choose to be regulated by a set of *duties* that we believe are central to our lives. Thus, our justification for any action could be a blend of both rights and duties.

Legal ethics is a prime example. Lawyers voluntarily join an association that imposes duties on them. Indeed, in earlier eras in the profession's history it was believed that those duties could in fact trump even the most basic political rights of its members, such as freedom of speech, but we have left that idea behind.[82] Nevertheless, a basic tension remains between the duties of the ethics codes and our picture of ourselves more generally as rights-bearers. The claims to justified lawyer civil disobedience confirm and illustrate that tension.

The situation is even more intriguing when the *education* of lawyers is considered. We are trained relentlessly in rights, not duties. Individual autonomy, rather than the responsibilities of community membership, is the hallmarks of courses in contracts, torts, property, and in any other subject you can name. This is not, however, the result of some political conspiracy. It reflects the simple political realities of the function of the legal system in our society and the consequent function that lawyers are paid to perform. As the law attempts to regulate human interaction in a complex society, lawyers are not paid by government to lecture the citizenry about their duties. Instead, private practice exists because clients come to us and pay us to as-

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81. DWORKIN, RIGHTS, *supra* note 12, at 172. Professor Dworkin's description of the distinction between "rights" and "duties" in this context is as follows:

> Right-based and duty-based theories . . . put the individual in a different light. Duty-based theories are concerned with the moral quality of his acts, because they suppose that it is wrong, without more, for an individual to fail to meet certain standards of behavior. Kant thought that it was wrong to tell a lie no matter how beneficial the consequences, not because having this practice promoted some goal, but just because it was wrong. Right-based theories are, in contrast, concerned with the independence rather than the conformity of individual action. They presuppose and protect the value of individual thought and choice. Both types of theory make use of the idea of moral rules, codes of conduct to be followed, on individual occasions, without consulting self-interest. Duty-based theories treat such codes of conduct as of the essence, whether set by society to the individual or by the individual to himself. The man at their center is the man who must conform to such a code, or be punished or corrupted if he does not. Right-based theories, however, treat codes of conduct as instrumental, perhaps necessary to protect the rights of others, but having no essential value in themselves. The man at their center is the man who benefits from others' compliance, not the man who leads the life of virtue by complying himself.

Id.

82. *See, e.g.*, Gentile v. State Bar, 501 U.S. 1030 (1991).

sist them in learning about and implementing their rights.[83] Client service is understood to be rooted fundamentally in the *client*'s interests, not society's more generally. Hopefully, the two will coincide, but when they do not, lawyers do not earn fees by telling clients to go away and behave "properly."

This interplay between rights and duties in turn helps identify the types of lawyer civil disobedience that has prompted this Article. Righteous disobedience to ethics rules can essentially take two forms: where, as in John Brown's case, the lawyer is "excessively" rights-focused and wants to go beyond the limits of legal ethics to provide the client more service than ethics rules say he or she should, and where, as in *Spaulding v. Zimmerman*,[84] the lawyer becomes duty-focused and wants to violate ethical rules in the name of competing moral responsibilities so as *not* to help a client, which disobedience will nevertheless be expressed in terms of the lawyer's "right" to do so, or with reference to the "rights" of other persons not to be victimized.[85] And this is where the problem ultimately lies: Lawyer civil disobedience necessarily rests on the idea that proper lawyering can indeed be duty-based rather than rights-based. If that reasoning is considered legitimate, then we must face the prospect of a fundamental change in the nature of practicing law. If legal ethics can be modified by a lawyer's own personal sense of duty to others outside the lawyer-client relationship, what other duties should be acknowledged as deserving this status? The legal ethics codes establish that a duty to the "legal system" more generally is an appropriate concern, but how much further can and should this concept be pushed? In other words, when should lawyering shift from analyzing what clients might be able to do in the midst of regulations, to lecturing clients on the sanctity of the regulations and the client's responsibilities to others?

C. The Power of Duties

This is not a theoretical problem. And it is not in fact particularly new. Charles Reich noted long ago the pressures on individual rights that were emerging from government's control over and selective distribution of economic "largess" such as licenses to practice a profession or financial benefits such as welfare and social security.[86] He warned that the shift to wealth in government-based forms meant that government's interest in controlling behavior through attached duties would follow close behind.[87] What seems not to have been noticed sufficiently in the literature sympathetic to lawyer civil disobedience is the fact that by endorsing one form of competing du-

83. This perspective, and its implications for the illusive concept of lawyer "professionalism," appears in Timothy P. Terrell & James H. Wildman, *Rethinking Professionalism*, 41 EMORY L.J. 403 (1992).

84. 116 N.W.2d 704 (Minn. 1962).

85. *See supra* text accompanying notes 47-48.

86. Charles Reich, *The New Property*, 73 YALE L.J. 733, 734-38 (1964).

87. *Id.* at 746-57.

ties, although traveling under the more attractive attire of rights, as legitimate amendments to legal ethics rules strongly implies that other forms of duty, not based in personal moral beliefs so much as in personal *political* beliefs, are also legitimate supplements. The possibility thus becomes that the lawyer accused of an ethics violation could respond by declaring, "I disclosed that client's confidences because she intended to subvert the national interest in having all citizens pay their fair share of taxes," or "I failed to disclose a conflict of interest between two of my clients because to do so would have alerted one of them to possible defenses to its appropriate liability for the costs of an environmental clean-up." Thus, a personal, moral claim to a "right" to disobey is based on that person's heartfelt commitments to public, political duties. It seems to me that it now gets very difficult to identify any moral "heroes" in this disobedience.

However, if it seems unlikely that individual lawyers will make these kinds of political duty-based claims, it is not at all unlikely, as Reich argued, that *government* will make them regarding "proper" lawyer ethics.[88] Indeed, government entities have done just that, applying precisely this kind of duty-focused pressure on law practice, as three quick examples will demonstrate.

1. The "Fraud and Abuse Dragnet" in the Healthcare Industry

I first encountered the move toward a "duty" orientation for lawyering at conferences of lawyers representing clients in the healthcare field. These lawyers were, of course, accustomed to the painstaking work of parsing complex statutes and accompanying regulations promulgated by various agencies, but they were abuzz about efforts of federal prosecutors to use precisely that careful lawyering as a weapon against them and their clients. The strategy was to induce companies under so-called "fraud and abuse"[89] investigations to cooperate with prosecutors by using control over confidential legal advice as a wedge to drive the companies and their lawyers apart.

A particular irritant to prosecutors in their investigative efforts were pesky legal ethics rules requiring confidentiality[90] and evidence rules establishing the attorney-client privilege,[91] which prevented access to useful information. The easiest way around these barriers was simply to have clients waive any rights they may have or for the prosecutors to invoke the crime-fraud exception to the privilege to force both the clients and their lawyers before grand juries as co-conspirators.[92] Once the healthcare client realized that it and its lawyers were under serious attack, the client was given an

88. *Id.*

89. "Fraud and abuse" is the shorthand reference to various actions that can be brought for filing false claims and the like under the Medicare and Medicaid statues.

90. MODEL RULES, *supra* note 3, at R. 1.6.

91. FED. R. EVID. 502.

92. *Id.* at 502(d)(2). One among many sources on the crime-fraud exception is WOLFRAM, *supra* note 16, at 279-82.

extra incentive to sell out its lawyers by government offers of leniency under the corporate sentencing guidelines for those corporations that demonstrated their cooperative attitude by waiving their attorney-client privilege and any related confidentiality restrictions.

The most discussed incident of this sort is reflected in the Tenth Circuit's 1998 opinion in *In re Grand Jury Subpoenas*,[93] but the more complete story is told in contemporaneous articles.[94] The Justice Department's "Operation Restore Trust,"[95] which targeted the healthcare industry, created what has been termed a "fraud and abuse dragnet" that swept everyone into the investigation, particularly the lawyers who had been advising clients about healthcare law.[96] Rather than being viewed in their traditional role as advisors, however, federal prosecutors labeled the lawyers, who are operating in the ordinary sense of client service, as direct participants in the questionable transactions. Two lawyers involved in the *Grand Jury Subpoenas* case were indicted on this basis, only to have all charges later dropped.[97]

But the message had been delivered. One's duty to the law outweighed any rights the lawyers and clients might have to an ordinary, protected professional relationship. Conversations between lawyers and their healthcare clients must therefore be reshaped to focus on enthusiastic compliance with regulations, not reviewing the regulations carefully to find ways to comply that aren't quite as extensive and expansive as the government would like. The possibility of attacks of this kind give both the client and the lawyer incentives to create evidence that they can later use to their advantage to demonstrate how their conversations focused on complying with the regulations rather than trying to avoid them. Consequently, discussions of techniques or strategies that are within the law but have the tone or flavor about them of less than full and enthusiastic regulatory compliance are necessarily discouraged. Contemplating the extent of one's rights therefore becomes dangerous for everyone. In fact, the emphasis on compliance, and thus duties, transforms clients and lawyers alike into assistants to prosecutors in a nationwide effort to make law enforcement both more effective and more efficient.

2. The SEC's New "307 Land"

The most well-known recent example of duty-based reasoning is the effort of the Securities Exchange Commission (SEC) to change the law practice of lawyers over which it has any jurisdiction. The SEC has proposed

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93. 144 F.3d 653 (10th Cir. 1998).

94. Neville Bilimoria, *Lawyers Beware of Criminal Health Care Fraud: What Attorneys Can Learn from the Kansas City Health Care Attorney Indictments*, 11 HEALTH LAW. 4, 8 (May 1999).

95. *Id.*; *see also* MEDICARE COMPLIANCE ALERT 1 (Sept. 7, 1998).

96. The dragnet includes the enforcement of the Operation Restore Trust in more than ternty-five states and various civil and criminal statutes and regulations. Bilimoria, *supra* note 94, at 8.

97. United States v. Anderson, D. Kan., No. 98-20030-JWL, indictment July 15, 1998; *see also*, United States v. Anderson, 1999 WL 84290 (D. Kan. Jan. 8, 1999).

amendments to its rules, most notably through section 307 of the Sarbanes-Oxley Act,[98] that would expressly enlist the legal profession as adjunct securities regulators. Former SEC Chairman Harvey Pitt made the agency's purpose clear in remarks he made before the A.B.A.'s Business Law Section in 2002, stating that "recent events have refocused our attention on the need for the profession to assist us in ensuring that fundamental tenets of professionalism, ethics and integrity work to ensure investor confidence in public companies."[99]

Section 307 requires the SEC to promulgate regulations that will establish the minimum standards for attorney conduct in representing clients and issues before the SEC, but more specifically requires the Commission to establish rules that will "requir[e] an attorney to report evidence of a material violation of securities law or breach of fiduciary duty . . . by the company . . . to the chief legal counsel or the chief executive officer of the company," and if these officers do not "appropriately respond to the evidence," a rule requiring the attorney to report the evidence to the company's audit committee or board of directors.[100] The SEC's response to this mandate is "proposed Part 205,"[101] which is based at least in part on the SEC's conclusion that "state ethical rules have not proven to be an effective deterrent to attorney misconduct."[102] Within its many details, one example will make the point here. Section 205.3(e)(2) would provide that a lawyer:

> [M]ay reveal to the Commission, without the issuer's [the client's] consent, confidential information . . . to the extent the attorney reasonably believes necessary . . . [t]o prevent the issuer from committing an illegal act that the attorney reasonably believes is likely to result in substantial injury to the financial interest or property of the issuer or investors . . . [or] to perpetrate a fraud upon the Commission.[103]

This rule clearly has its root in Rule 1.13(b) of the Model Rules,[104] but the key difference is that Rule 1.13 uses the "reasonably likely" standard only to permit reports by worried lawyers to higher authorities *within the corporate client*, not reports to government authorities.[105] Clearly, an appreciation

98. Implementation of Standards of Professional Conduct for Attorneys, Release No. 33-8150 (Nov. 21, 2002). A useful summary description and discussion of the Act appears in Jenny Davis, *Sorting Out Sarbanes-Oxley*, 89 A.B.A. J. 44 (Feb. 2003).

99. SEC Chairman Harvey L. Pitt, Remarks Before the Annual Meeting of the ABA's Business Law Section (Aug. 12, 2002), *available at* http://www.sec.gov/news/speech/spcj579.htm.

100. Purpose of this Rule Proposal, Release No. 33-8150; *see SEC Proposes to Require Corporate Lawyers to Report Evidence of Violations by Clients*, 34 SEC. REG. & L. REP. 1818 (Nov. 11, 2002).

101. Summary of Part 205, Release No. 33-8150.

102. *Id.*

103. *Id.*

104. MODEL RULES, *supra* note 3, at R. 1.13.

105. *Id.*

of the lawyer's regulatory duties is the driving force behind this modification of legal ethics.

Unfortunately for my analysis here, not for the world of legal ethics, as this Article was headed for publication, the SEC decided that it would continue to think about, rather than fully implement, its new powers over lawyers. It therefore actually enacted a much milder version of Part 205 that does not require disclosure to the Commission.[106] The SEC could nevertheless, of course, return at some point to its earlier views.

3. The IRS's "Offshore Voluntary Compliance Initiative"

The third example is quite recent, having gone into effect in January of 2003. In its new "Offshore Voluntary Compliance Initiative,"[107] the IRS is offering an enforcement break to taxpayers who have used credit cards issued by foreign banks to stash money in offshore accounts, and thus hide those assets from taxation. If taxpayers admit to these practices, the Initiative will allow them to avoid most tax penalties.[108] But to qualify for this favored treatment, the taxpayers must identify all those, including their lawyers, who assisted or advised them about the idea to use the offshore accounts.[109] Thus, we now have the same implications for the lawyer-client relationship in tax law practice that the healthcare lawyers have experienced.

IV. CONCLUSION

Dissatisfaction with lawyer ethics codes, and consequent demands for specific, beneficial exceptions or modifications, can therefore come from both inside and outside the profession itself. I am not claiming, of course, that there is a straight-line connection between a particular lawyer's argument for dispensation based on personal moral principles to the government's efforts to transform private law practice into adjunct law enforcement. But the pressure to rethink legal ethics in light of "other" values depends upon clean lines between personal and public, between moral and political, between rights and duties.[110] Such distinctions cannot be assumed, however. They must be proved. So the questions remain: What, precisely, entitles individual moral claims, based on personal values, to special treatment under the ethics codes? How do we prevent those claims from becom-

106. Jonathan Glater, *SEC Backs Rules for Auditors, Revised from Original Plan*, N.Y. TIMES, Jan. 23, 2003, at C7.

107. Offshore Voluntary Compliance Initiative, Rev. Proc. 2003-11, 2003-4 I.R.B. 311 (Jan. 14, 2003).

108. *Id.*

109. *Id.*

110. I am reminded here of a book that is only tangentially related to the present topic, but whose title is apropos: PAUL ROBERTS & LAWRENCE STRATTON, THE TYRANNY OF GOOD INTENTIONS: HOW PROSECUTORS AND BUREAUCRATS ARE TRAMPLING THE CONSTITUTION IN THE NAME OF JUSTICE (2000).

ing so broad in subject and scope that they do not create more serious challenges to the nature of the practice of law itself? I worry.