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 the “Constitution does not prohibit legislatures from enacting stupid laws.”1 The Constitution also does not prohibit legislatures from enacting immoral laws, which has often brought lawyers to struggle with the dilemma of choosing between what is legal and what is right.2 Antigone’s brother died in combat, and the triumphant general declared that the death penalty faced anyone who dared bury her brother.3 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 a proper burial.4

The problem of immoral laws is not merely a relic of the past and its ancient tyrannical edicts, Civil War era fugitive slave acts, and Nazi-era genocidal laws. The problem remains alive and well today, with mandatory sentencing guidelines, certain Guantanamo Bay practices, and rules of professional conduct that have pushed outstanding attorneys into committing flagrantly 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

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3 Id.
4 Id.
their close involvement with perpetuating the legal system. Attorneys today, like their predecessors in generations past, have four ways to cope with Antigone’s Dilemma: 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 the interpreter desires.5

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.6 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. 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.7 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 can more effectively address an attorney’s moral concerns without resulting in unpredictability and lawlessness.

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. 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. This Essay brings to Dworkin’s

model a semi-compulsory addition, stating that while attorneys need not reach a certain decision, they must engage in the ethical decision-making process. Part I of this Essay overviews the Model Rules and examines their impact on Spaulding v. Zimmerman, which serves as an excellent litmus test of the kinds of ethical dilemmas facing most attorneys today. In Part II, this Essay analyzes the shortcomings of the solutions that attorneys and academics have relied on in their attempts to resolve the dilemma. Part III delves into this Essay’s case for why Dworkin’s model and its semi-compulsory corollary hold out some promise in the effort to finally resolve today’s Antigone Dilemma scenario. Part IV then outlines the advantages apparent in a reconceptualization of the Model Rules as imposing rebuttable presumptions instead of law-like, unqualified rules.

I: RULES OF ETHICS, LEGAL POSITIVISM, AND THE DILEMMA OF IMMORAL LAWS

A) Overview of the Model Rules

“Ethics rule” is an oxymoron. Rules by definition restrain the kinds of individual autonomy and personal responsibility that characterize ethicality. Put another way, rules and ethics are incompatible because rules are the product of obedience, while ethics are the product of free will. Further, a categorical rule “ignores the aspirational dimension of professional

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8 116 N.W.2d 704 (Minn. 1962).
9 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) (“Although most of our law is morally based, the term ethics implies the antithesis of law. Ethical rules focus on individual and voluntary moral responses, not legally mandated duties.”).
ethics,”¹⁰ and “assumes that the legal rules may be applied mechanically, without resort to creative normative judgment.”¹¹ 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*, when a character learns that his friends have rescued an abandoned human baby from a filthy dumpster, then advises, “Well, put it back! It doesn’t belong to you.”¹² 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 to investigate the possibility of drafting a code of legal ethics in 1905.¹³ The committee formed a number of canons, whose general principles and moral appeals offered advice – albeit, unenforceable advice – to perplexed attorneys.¹⁴

Concerned about the lack of voluntary compliance with the unenforceable canons, the ABA in 1965 reinforced those canons with a model code of ethics, written like a statute for states to adopt as binding legislation whose violation could result in discipline.¹⁵ This remodeling of

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¹⁰ See Wendel, *supra* note 9, at 12.
¹¹ *Id.* at 17.
¹⁵ Some scholars are careful to only call the Model Rules a code of “professional conduct” instead of a code of ethical conduct. See Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 *Yale L.J.* 1239, 1241-42 (1991). 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). There is no practical difference between “ethics” and “professional conduct” in this Essay’s analysis, because the ethical considerations are tied into the professional conduct framework, suggesting that an attorney’s conduct is still largely a matter of conscience.
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. Other scholars take a dimmer view of the regulatory model, referring to it instead as imposing a model of “technocratic lawyering” or, as Dworkin put it, “conventionalism.” However one views the Model Rules and their effect on lawyering, all 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.”

Put simply, legal positivism is a commitment to law. This commitment to law “has come to dominate American and European legal thought,” and its commitment traces the validity of a law from that law’s procedural sources instead of from its substantive merits. By prioritizing sources over merits, the interpreters of a law must “set aside their roles as an

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16 Geoffrey C. Hazard, Jr., The Legal and Ethical Position of the Code of Professional Ethics, in 5 SOCIAL RESPONSIBILITY: JOURNALISM, LAW, MEDICINE 29 (Louis Hodges ed., 1979); see also Wendel, supra note 9, at 8 (referring to the Model Rules as imposing a “regulatory model.”).
17 Heidi Li Feldman, Codes and Virtues: Can Good Lawyers be Good Ethical Deliberators?, 69 S. CAL. L. REV. 885, passim (1996); see also Wendel, supra note 9, 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.”).
18 See RONALD DWORKIN, LAW’S EMPIRE 114-50 (1986).
22 See John Gardner, Legal Positivism: 5 ½ Myths, 46 AM. J. JURISPRUDENCE 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.”).
independent moral agents and act as impartial functionaries within our legal institutions.”23 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.24

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. Further, the Model Rules’ preamble outright states that while “many difficult issues of professional discretion 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.”25

A central tenant of legal positivism’s commitment to law is its separation between legal validity and moral considerations.26 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

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24 Id. at 690.
25 Compare MODEL RULES, supra note 7, pmbl. para. 9 (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 1 (2007) (stating that “[a] lawyer’s conduct should conform to the requirements of the law.”).
represent a client, the zealfulness of that representation cannot be tempered by the lawyer's moral judgments of the client or of the client's cause."^{27} 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 valid laws.

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. 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,^{28} upheld the right of association for communists during the “red scare,”^{29} and protected the free speech rights of flag burners.^{30} Most recently, the Supreme Court continued this proud tradition by maintaining the due process rights of Guantanamo Bay detainees despite the urgent and grave concerns of terrorism and national security following the terror attacks on September 11, 2011.^{31} These judicial opinions ignored the strong moral sentiments of

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^{31} See, e.g., *Rasul v. Bush*, 542 U.S. 466 (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); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Boumediene v. Bush*, 553 U.S. 723 (2008). 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*
their day, focusing exclusively and narrowly on the constitutional principles from which society had strayed in the heat of the moment. 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. Much like their counterparts in Apartheid South Africa and fascist Germany, for instance, antebellum American judges maintained fugitive slave laws despite their own moral concerns because “law is law.” The Fugitive Slave Acts of 1793 and 1850 authorized the federal government to return slaves to the South if they were caught in the North, but these acts were constitutionally valid. Feeling duty-bound, most judges simply upheld the Fugitive Slave Acts. Others manipulated the acts to achieve just results. 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

And The Rise In Targeted Killing, 43 Seton Hall L. Rev. 595, 633 (2013). “It 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.


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 26, 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).


See Cover, supra note 5, at 199, 232-36.
faithful judge, applying legal rules impersonally…“

B) The Critical Role that the Model Rules Played in Spaulding

*Spaulding v. Zimmerman* illustrates one of the most recent cases in which positivism can encourage (or rather, compel) immoral conduct. In *Spaulding*, a Minnesota defense attorney in a personal injury lawsuit gained, through routine discovery, exclusive knowledge of a plaintiff’s potentially life-threatening aorta aneurysm. Had the defense attorney informed the plaintiff or his attorney about the existence this aneurysm, then the plaintiff could have removed the threat with immediate surgery. 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. Both the trial judge and Minnesota’s supreme court agreed with the defense attorney’s assessment. 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. As in *Spaulding*, the rules of confidentiality clearly stated that disclosure would be forbidden for the innocent convict.

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37 *Id.* at 228.
38 116 N.W.2d 704 (Minn. 1962).
39 *Id.* at 709-10.
40 *Id.*
41 *Id.*
Though updated to prevent another *Spaulding* or Innocent Convict situation, 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.” 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, after all, 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 – and that is an assured ‘when,’ not an ‘if’ – the Model Rules inadvertently compel an attorney to engage in clearly immoral behavior, that attorney will not be able to violate the Model Rules and then successfully avoid disciplinary sanctions by defending his or her violation as an act of ethical discretion.

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 vales.” In short, natural law concerns the “inner morality of law.” While it is a stretch of the imagination to call for the legal profession to abandon the Model Rules, an exception made for

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43 *MODEL RULES, supra* note 7, R. 1.6 (b)(1).
the affirmative defense of ethical disobedience (or, as this Essay terms it, ethical discretion) would enable attorneys to challenge the application of an ethics rule to an extraordinary and unforeseen circumstance. Part II below will begin that discussion by outlining several alternative options to an ethical discretion defense, then surveying their critical shortcomings.

II: 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?” In Justice Accused, Professor Robert Cover explores those three options and identifies a fourth. Cover’s analysis turns on what the attorney chooses to ignore. First, attorneys can ignore their moral reservations by perpetuating the legally valid but morally wrong law. Second, attorneys can ignore the dilemma by withdrawing from the troubling case, or by withdrawing from the legal profession altogether. Third, attorneys can ignore the law by violating it in ethical

47 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.
49 See Cover, supra note 5.
50 Id. at 6.
51 Id.
52 Id.
disobedience. 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.

A) Option One

Option One reflects the “law is law” resignation that positivist thinkers have relied on throughout history. As Justice Holmes explained, “This is a court of law…not a court of justice.” 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…”.

One former district judge observed that prior 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.

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. Even the judges who formally affirm the questionable laws can alleviate their moral discomfort and perhaps reform the system from within by writing stinging critiques

53 Id.
54 Id.
56 See Oleson, supra note 23, at 692.
57 Id.
of the law into their decisions. For instance, Judge Paul Cassell presided over a case in which a first-time offender received the felony conviction of dealing marijuana. But because the offender was in possession of a weapon, both on his person and in his home, the mandatory minimum sentencing “guidelines” imposed fifty-five years to a crime that otherwise would receive about six years of imprisonment. 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. The judge suspected that he had no other choice, and the Tenth Circuit affirmed his suspicions. In his judicial opinion, Judge Cassell described his forced decision as “unjust, cruel, and even irrational.” 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. No action has been taken, and the first-time offender remains scheduled to be released on November 18, 2051.

**B) 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. Through withdrawing, the attorney passes the burden of resolving the dilemma

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59 *Id.* at 1230.
60 *Id.*
61 *U.S. v. Angelos*, 433 F.3d 738 (10th Cir.2006).
62 *Angelos*, 345 F.Supp. at 1230.
63 *Id.* at 1261.
64 *MODEL RULES*, *supra* note 7, R. 1.16.
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.65 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.66 District Judge Lawrence Irving resigned rather publically, for instance, and explained that he had “a problem with mandatory sentencing in almost every case that’s come before me…I just can’t do it anymore.”67

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.68 The demonstrated conviction in Judge Irving’s resignation caught headlines and catalyzed discussion about sentencing guidelines.69 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

65 See Cover, supra note 5, at 150-54.
66 MODEL RULES, supra note 7, R. 2.11.
68 See Oleson, supra note 23, at 685.
69 Id.
cases for moral reasons are also the very attorneys who are likely the “most inclined to try to encourage positive changes in controlling law.”

C) 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.” 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.” Even judges have engaged in Option Three activism. 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. Judge Walter Jay Skinner also reduced – at least, he attempted to reduce – the mandatory minimum sentence in a pornography case. Both judges found themselves promptly and perhaps embarrassingly reversed on appeal. That is because leniency “cannot be condoned when it results…in individual

71 AUGUSTINE, ON FREE CHOICE OF THE WILL bk. I, § 5, at 8 (Thomas Williams trans., Hackett Publ'g Co. 1993) (c. 400 C.E.); see also 2 THOMAS AQUINAS, SUMMA THEOLOGICA, question 96, art. 4, at 70 (Fathers of the English Dominican Province trans., 1915) (c. 1274 C.E.) ("[A] law that is not just, seems to be no law at all.").
72 Palumbos, supra note 21, at 1062.
75 Florida v. Bailey, 966 F.2d 679 (11th Cir. 1992) (vacating U.S. v. Valdes); Studley, 907 F.2d at 260.
sentencing contrary to the intent and command of the guidelines.”76 Other scholars would take
the point further, arguing that judges would even be remiss if they pointlessly analyze a law’s
morality instead of analyzing exposing its legality, contradictions, and inconsistencies.77

Thus, it is ultimately a hopeless endeavor to openly fight the law, as only jurors truly
have the power to nullify laws.78 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 finders of fact. Judges may also feel
concerned about the embarrassment of being reversed on appeal in a published opinion,79 and a
reversal of this sort can jeopardize their ability to become appellate judges.80 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.

76 U.S. v. Pozzy, 902 F.2d 133, 140 (1st Cir. 1990).
77 See Recent Case: Civil Disobedience - The Role of Judges - Ninth Circuit Affirms Mandatory
Sentence. - United States v. Hungerford, 465 F.3d 1113 (9th Cir. 2006), 120 HARV. L. REV. 1988,
78 See generally Aaron McKnight, Jury Nullification as a Tool to Balance the Demands of Law
79 One scholar noted, perhaps somewhat tongue-in-cheek, that “judges dislike reversal.” William
80 See W. Bernard Richland, Book Review, 64 COLUM. L. REV. 180, 182 (1964) (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).
**D) 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 glaringly obvious. *Prigg v. Pennsylvania* demonstrates Option Four reasoning in action, and from one of the finest minds in the history of American jurisprudence.\(^{81}\) 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 acts’ enforcement, they were also technically under no obligation to enforce the acts on behalf of the federal government.\(^{82}\) States could therefore excuse themselves from enforcing the law by forbidding their magistrates from hearing cases brought under the Act.\(^{83}\) In response, Congress shortly thereafter closed this legal loophole in the Fugitive Slave Act of 1850.\(^{84}\) The justices of the Wisconsin Supreme Court attempted to fight this new act by declaring it unconstitutional, only to be reversed in the U.S. Supreme Court.\(^{85}\) 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.\(^{86}\) Ironically, there are also clear ethical issues present in an attempt to raise

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\(^{81}\) 41 U.S. 539 (1842).

\(^{82}\) *Id.* at 612.

\(^{83}\) *Id.* at 614-15.

\(^{84}\) Act of Sept. 18, 1850, 9 Stat. 464 (repealed 1864).


\(^{86}\) *See Planned Parenthood 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.”).
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.”

III: 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.” Perhaps 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. Perhaps 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. The law as integrity model borrows from natural law’s understanding of law as a branch of morality. Notions of ethics, for Dworkin, are so embedded within the laws that they should be limited only by the Constitution’s demands. Ethical dilemmas, therefore, do not pose a choice between law and morality; instead, they pose a choice between competing legal arguments. 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

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88 See Dworkin, Taking Rights Seriously, supra note 6, at 217-21.
89 Id.
90 Cover, supra note 5, 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.”).
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.”

*Riggs v. Palmer* acts as a remarkable example of Dworkian reasoning in action. *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. The New York statute of wills, after all, did not forbid murderers from inheriting under the murdered victim’s will. 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.” 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 “no one shall be permitted to profit by his own fraud, or

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91 *Id.*
92 Dworkin, *Taking Rights Seriously*, supra note 6, at 204. As Dworkin states elsewhere on that page, a government “that professes to recognize individual rights must dispense with the claim that citizens never have a right to break its law.” *Id.*
93 22 N.E. 188 (N.Y. 1889).
94 *Id.* at 189.
95 *Id.* at 190.
to take advantage of his own wrong.”

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.”

Some ethicists describe this principle-based reasoning as “remarkable argumentative acrobatics” that smuggle “common morality in through the back door.” 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. Even our highest court has, in a number of contexts, showed 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. In *Bob Jones University v. U.S.*, 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. The “gravitational pull” of the distinctively ethical principle against segregation in education decisively influenced

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96 Id.
98 Luban, supra note 44, at 150.
99 See generally, e.g., *U.S. v. Kirby*, 74 U.S. 482 (1868) (holding that carrying out the arrest warrant of a mailman did not constitute the crime of hindering the transportation of mail); see generally John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113 (2011).
100 461 U.S. 574 (1983).
the Court in Bob Jones.\textsuperscript{101} The Court then ruled in Green v. Bock Laundry Machine Co. 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.”\textsuperscript{102} 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. 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 \textit{did} violate his obligation to be candid before the tribunal by not disclosing the aneurysm to the court.\textsuperscript{103} For that act of fraud on the court, the trial court vacated the settlement reached between the defendant and plaintiff.\textsuperscript{104} 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.\textsuperscript{105} As true as

\textsuperscript{102} 490 U.S. 504, 510 (1989).
\textsuperscript{103} 116 N.W.2d at 709-10.
\textsuperscript{104} \textit{Id.} at 711.
\textsuperscript{105} See Luban, \textit{supra} note 44, at 150.
that observation may be, but 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. 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 manner of intractable moral dilemmas.106 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.’”107 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.108 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…”109

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106 See Wendel, supra note 9, 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.”).
108 Fuller, supra note 33, at 655 (“Moral confusion reaches its height when a court refuses to apply something it admits to be law.”).
109 Hart, supra note 26, at 598; see also Fuller, supra note 46, at 222-27 (describing Thomas Hobbes’ view of positivism as imposing authority onto the otherwise chaotic disaster of individual reasoning).
Scholars of natural law generally advocate for one of two solutions to the aforementioned concerns. One solution adopts the four-pronged test used in the necessity defense to criminal acts. To invoke the necessity defense, a person must show “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.”110 However, the necessity defense must surpass quite a high bar before it can apply to excuse a person’s conduct. 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.”111 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.”112

Professor William H. Simon offered a more promising, though still imperfect, solution.113 His Contextual View Model asserts that ethical decisions “often turn on the ‘underlying merits’” of an issue.114 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.115 In the Spaudling 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

110 See Yaroshefsky, supra note 45, at 590.
111 Id.
112 Id.
113 See Simon, supra note 20, at 9.
114 Id.
115 Id. at 10; see also MODEL CODE EC 7-13.
that an attorney must disclose and must “consider disclosure as a form of nullification.”116 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.117 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. Further, the Supreme Court’s language about gravitational pulls and absurd results would also fit well into Simon’s model.

But Simon’s calls for “defiance” may be so strong as to undermine the viability of the model as a whole.118 Attorneys cannot actually nullify a law outside of a jury room, and therefore 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.119 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.”120

116 See Simon, supra note 20, at 164.
117 Id. at 56.
118 Id.
119 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 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. on Professional Ethics, Op. E-89-11 (1989).
120 See Simon, supra note 20, at 52.
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, 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.121 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.122

121 See Wendel, supra note 9, at 30-31.
122 See Simon, supra note 20, at 9.
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. Under Prong One, the defendant’s arguments must meet a threshold “fitness” test by being coherent in principle with existing law.\textsuperscript{123} 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 relevant legal material.”\textsuperscript{124} 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.\textsuperscript{125}

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.\textsuperscript{126} In other words, Dworkin’s model would help an attorney defend his

\textsuperscript{123} See Dworkin, Law’s Empire, supra note 18, at 225.
\textsuperscript{124} DAVID DYZENHAUS, HARD CASES IN WICKED LEGAL SYSTEMS: SOUTH AFRICAN LAW IN THE PERSPECTIVE OF LEGAL PHILOSOPHY 25 (1991).
\textsuperscript{125} See Dworkin, Taking Rights Seriously, supra note 6, at 24-25.
\textsuperscript{126} MODEL RULES, supra note 7, scope cmmt. 14.
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.”

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, which might be termed “semi-compulsory,” 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. The semi-compulsory rule would 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

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128 Admittedly, this term is at least as much of an oxymoron as “ethics rule.”
them from accidentally abusing their discretion. Regardless of the decision reached, the failure to engage in such deliberation would subject the attorney to disciplinary sanctions.

IV: THE ADVANTAGES OF A REBUTTABLE PRESUMPTION

A) Current Practices

In practice, disciplinary institutions do not necessarily apply the Model Rules with the rigidity that the rules’ formality suggests.129 In *Ankerman v. Mancuso*, 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. Unlike the *Spaulding* court, the *Ankerman* court seemed unwilling to allow the Model Rules to affect non-disciplinary matters.130 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.131 To suggest that the legal system is a closed one is to delegitimize a great deal

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129 Frederick 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).


131 *Thomas Morawetz, The Philosophy of Law* 46-50 (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.”).
of what courts routinely do and what legal reasoning ultimately is. 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.

132 See Dworkin, Law’s Empire, supra note 18, at 13; see also Dworkin, Taking Rights Seriously, supra note 6, at 216-17.
133 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, legal reasoning is not susceptible to the same formalistic structures of logic that may be applied in such disciplines as mathematics or the natural sciences. Instead, legal arguments and conclusions are necessarily derived through complex modes of interpretation, often based in potentially imprecise factors including textual analysis, reasoning by analogy, and policy considerations.”).
134 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 to Guantanamo Bay, Cuba. Tim Golden, Naming Names at Gitmo, N.Y. TIMES MAG., Oct. 21, 2007, at 78, 80-81. Just two years short of retirement, Diaz was described by his superiors as an “outstanding officer, leader and judge advocate” and “a superstar” (Letter from Appellate Counsel to Commander, Navy Region Mid-Atlantic, Request for Clemency at 4-5, I.C.O. United States v. L.C.D.R. Matthew M. Diaz, JAGC, USN), and as “the consummate naval officer” and “a stellar leader of unquestionable integrity” (Golden, supra, at 80-81).

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 names of Guantanamo detainees to the Center for Constitutional Rights. See Request for Clemency, supra, at 6-7 (describing Diaz’s feeling of moral obligation); see also Golden, supra, at 80 (describing how Diaz sent the print-out). After the government traced the document to Diaz through his fingerprints, Diaz explained his motivations before the court-martial and outlined a defense based on moral obligation. See Golden, supra note 68, at 80 (describing how the government traced Diaz through his fingerprints); see also Request for Clemency, supra, at 7 (describing Diaz’s defense theory).

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 Kate Wiltrout, Naval Officer Sentenced to Six Months in Prison, Discharge, VIRGINIAN-PILOT, May 18, 2007, available at http://hamptonroads.com/node/268001.

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.” U.S. v. Olinger, 47 M.J. 545, 547-49, 551 (N-M. Ct. Crim. App. 1997) (dismissing the necessity defense of a Navy officer
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.\textsuperscript{135}

**B) The Underlying Principles of the Model Rules**

Second, an act of ethical discretion would not disobediently stray from the Model Rules. Oppositely, 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.”\textsuperscript{136} The preamble to the Morale 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

\footnotesize\textsuperscript{135} Schauer, supra note 130, at 514.

\footnotesize\textsuperscript{136} MODEL RULES, supra note 7, scope; see also Alan H. Goldman, Confidentiality, Rules, and Codes of Ethics, 3 CRIM. JUST. ETHICS 8, 10 (1984) (“no rule, not even one with built-in exceptions, can capture the lawyer’s moral duties in all the situations he might encounter.”).
The necessary implication of these statements, taken together, is that attorneys have a great deal of space in which to lawyer with honor. The Spaulding 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 “the intention of his client to commit a crime and the information necessary to prevent the crime.” Further, several advisory opinions permit the disclosure of a client’s impending suicide attempt. Under Dworkin’s model, the Spaulding attorney should have been able to justify a disclosure of the plaintiff’s aneurysm by pointing to these statements as clearly 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. Helpfully, the defense attorney in Spaulding could have also pre-emptively argued that disclosing the aneurysm would not have violated the confidentiality rules’ intention.

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137 See supra note 25 and accompanying text.
141 At the same time, 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.
of facilitating frank client disclosure.\textsuperscript{142} First, the plaintiff could have discovered his aneurysm on his own – and in fact, he \textit{should} have discovered it, had his physician and attorney not been unusually negligent. And second, the defense lawyer discovered the aneurysm through discovery, not through a confidential statement from the Spaulding himself. By turning the rules into rebuttable presumptions of how attorneys should act and by basing acts of ethical discretion on the rules’ states principles, an ethical discretion defense would enable some discretion without undermining the rules’ “ruleness.”

C) 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 \textit{Spaulding} and \textit{Innocent Convict} dilemmas are no longer pressing matters because of an update to the Model Rules,\textsuperscript{143} both \textit{Spaulding} and the \textit{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 \textit{Spaulding} problem arises. Instead, it will by design take several years and several unfortunate moral failures before the Model Rules can address the next \textit{Spaulding} 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 in ethical discretion would at once bring to light the ethical problem.

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\footnotesize\textsuperscript{142} See 1 \textsc{Geoffrey C. Hazard, Jr. \& W. William Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct} § 1.6:130-31 (Supp. 1993) (discussing the “zone of privacy” that confidentiality creates); \textit{see also} ABA Comm. on Professional Ethics and Grievances, Formal Op. 250 (discussing the goals of confidentiality).
\footnotesize\textsuperscript{143} \textsc{Model Rules, supra} note 7, R. 1.6 (b)(1).
\end{footnotesize}
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.”\textsuperscript{144} 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.\textsuperscript{145} 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.

\textbf{D) 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 encourages – demands, in fact – 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.”\textsuperscript{146}

When there \textit{is} room for discretion, though, 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. 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 in secret if they must, 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.

E) 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?”147 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

147 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 & Loan Association scandal).
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?*, 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.” Attorneys who find that their “primary motivation for adherence to ethics codes owes or 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. 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,

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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.150

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 suggestions, suggestions that attorneys must follow unless they find sufficient reason to act otherwise. 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.

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