

The Role of Personal Values in Professional Decisionmaking

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INTRODUCTION

The 1908 *Canons of Professional Ethics* directed a lawyer to "obey his own conscience."¹ Lawyers receive similar advice today. Writings on legal practice encourage lawyers to make professional decisions based on their moral values² and religious beliefs,³ as expressed in the familiar injunction: to be charted by

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1. CANONS OF PROFESSIONAL ETHICS Canon 15 (1908) ("The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client."); see also *id.* Canon 32 (stating that the lawyer "advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law").

Nineteenth-century compilations of professional norms were particularly emphatic that the lawyer may act according to personal conscience. See DAVID HOFFMAN, A COURSE OF LEGAL STUDIES (2d ed. 1836) ("My client's conscience, and my own, are distinct entities: . . . I shall ever claim the privilege of solely judging to what extent to go."), in THOMAS L. SHAFFER, AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS 64 (1985); Alabama State Bar Ass'n, CODE OF ETHICS, 118 Ala. Reports xxiii (1899) ("The attorney's office does not destroy the man's accountability to the Creator The client cannot be made the keeper of the attorney's conscience in professional matters."), in SHAFFER, *supra*, at App. 1-33, App. 1-35; see generally THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER 6-7 (1981) (noting that professional opinion in the nineteenth century reflected "a vehement denial of the idea that a lawyer may suspend his conscience").

2. See, e.g., A. Leon Higginbotham, Jr., *The Life of the Law: Values, Commitment, and Craftsmanship*, 100 HARV. L. REV. 795, 815 (1987) ("To paraphrase Justice Holmes, the life of the law must not be mere logic; it must also be values."); THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY 59 (1994) (discussing moral values of client and lawyer as "a starting place . . . from which moral understanding can grow").

3. See, e.g., Stephen L. Carter, *Introduction to Faith and the Law Symposium*, 27 TEX. TECH L. REV. 925, 925-26 (1996) (noting that, as legal practitioners make more obvious the connections between their own faith and their work, "the law increasingly will be infused with the rich ethical insights that have been a principal product of America's religious traditions"); Mark E. Chopko, *Public Lives and Private Virtue*, 27 TEX. TECH L. REV. 1035, 1039-40 (1996) (urging lawyers to strive to acknowledge and incorporate private values in their public lives); Teresa Stanton Collett, *To Be a Professing Woman*, 27 TEX. TECH L. REV. 1051, 1051-52 (1996) (encouraging a practice of law as an expression of our love of God and pursuit of justice); THOMAS L. SHAFFER & MARY M. SHAFFER, AMERICAN LAWYERS AND THEIR COMMUNITIES: ETHICS IN THE LEGAL PROFESSION 198 (1991) (discussing a "theological proposition" as one in which the lawyer's occupation is "consistent with [his or] her life in the church"). But see Marc D. Stern, *The Attorney as Advocate and Adherent: Conflicting Obligations of Zealousness*, 27 TEX. TECH L. REV. 1363, 1370 (1996) (arguing that a religious lawyer must "separate his wishes as a member of a religious community from his role as dispassionate advocate for a client").

For purposes of this Article, no effort is made either to define precisely what is meant by "personal moral"

one's own "moral compass."⁴ Underlying this advice is an assumption about the professional norms — namely, that they accommodate, if not contemplate, lawyers' reliance on personal values. This assumption finds some support in the contemporary codes of lawyer conduct, which acknowledge a role for the lawyer's "conscience" or "moral judgment."⁵

Yet, it is open to question whether the legal profession's contemporary norms assign a leading role to lawyers' personal values or merely a bit part. And surprisingly, given the centrality of this question, the legal literature addresses it only peripherally.⁶ This Article responds by examining in detail how the legal profession's norms both accommodate and limit lawyers' reliance on their own

beliefs and "religious" beliefs or to draw a precise line between them. In general, the article addresses "religious" beliefs about right and wrong conduct that are derived from one's understanding of God's will and/or the precepts of one's particular religious affiliation. "Personal moral" beliefs refer to other beliefs that one holds about right and wrong conduct that is not identified with such a source.

4. See, e.g., Paul Brest & Linda Krieger, *On Teaching Professional Judgment*, 69 WASH. L. REV. 527, 530 (1994) ("The foundations for the qualities necessary to the lawyer's craft lie in character traits and deep knowledge that one would not characterize as 'skills' at all — personal integrity, an inner moral compass, and a perception of one's work as embedded in broad social, economic, political, historical, and for some, spiritual contexts."); Robert J. Muise, Note, *Professional Responsibility for Catholic Lawyers: The Judgment of Conscience*, 71 NOTRE DAME L. REV. 771, 798 (1996) ("In order to choose the proper course, a Catholic must follow his moral conscience. A Catholic's moral conscience is his ethical compass — 'calling him to love and to do what is good and to avoid evil.' ") (quoting familiar Christian maxim).

5. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY pmbl. (1981) [hereinafter MODEL CODE] ("The Code of Professional Responsibility points the way to the aspiring and provides standards by which to judge the transgressor. Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards. But in the last analysis it is the desire for the respect and confidence of the members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct."); MODEL RULES OF PROFESSIONAL CONDUCT pmbl. (as amended Aug. 1994) [hereinafter MODEL RULES] ("Within the framework of these Rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.").

6. The question of what role the legal profession's norms contemplate that personal values should play in professional decisionmaking lies at the crossroads of three areas of academic concern in addition to legal ethics. The first is clinical legal studies. See David R. Barnhizer, *The Clinical Method of Legal Instruction: Its Theory and Implementation*, 30 J. LEGAL EDUC. 67, 74-75 (1979) (envisioning clinical law courses as a crucible within which personal values and ethics would be explored). The second is the study of the role of religion in lawyers' professional life, an area to which Thomas L. Shaffer has given prominence. E.g., Thomas L. Shaffer, *Christian Theories of Professional Responsibility*, 48 S. CAL. L. REV. 721 (1975). The third is moral philosophy.

Although moral philosophers have focused on the relationship between common morality and professional norms, see *infra* notes 11-12 (citing scholarship exploring the relationship between common morality and professional morality), a prominent exception is Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 68 (1980) (addressing "the conflict between private and professional moralities"). Postema argues that the "standard conception of the lawyer's role" is marked by the central ideals of "partisanship" and "neutrality," which call for a sharp separation of "private and professional morality. . . . The good lawyer leaves behind his own family, religious, political, and moral concerns, and devotes himself to the client." *Id.* at 73, 75, 78. Postema advocates an alternative conception, in which lawyers would integrate their own "sense of moral responsibility into the role." *Id.* at 82. He responds to various possible objections, including that his alternative conception is unnecessary because lawyers adequately can express their moral judgments through decisions about whether to begin or end a lawyer-client relationship. *Id.* at 84-85. He fails, however, to anticipate an objection suggested by this Article — namely, that Postema vastly exaggerates the extent to which the existing professional norms require lawyers to distance themselves from personal moral

moral and religious understandings. In so doing, it challenges both those who assume that personal and professional values generally can be integrated⁷ and those who assume that professional norms eclipse personal conscience.

After describing various claims concerning how a lawyer's personal values may influence professional decisionmaking, this Article challenges the most robust claim, namely, that the professional norms contemplate that personal values may play a role in all professional decisionmaking and, therefore, lawyers can be accountable to their consciences in all aspects of their professional lives. The Article explores the extent to which lawyers actually may act on the basis of personal moral and religious beliefs while also claiming to conform with professional norms. It demonstrates how particular beliefs, especially highly specific ones, often must be excluded from central aspects of lawyers' professional work. Finally, the Article identifies some implications of this tension between professional norms and personal moral values both for the legal profession and for individual lawyers.

I. HOW PERSONAL VALUES MAY INFLUENCE PROFESSIONAL DECISIONMAKING

At first, the question of whether a lawyer may base professional decisions on personal moral or religious values appears to be simply a variation of Charles Fried's question, "Can a good lawyer be a good person?"⁸ Fried's question about the relationship between professional norms and personal morals has engendered much discussion⁹ and, indeed, has been characterized by Robert Lawry as the

concerns and that, insofar as the professional norms exclude private morality, there is often a moral basis for doing so that does not derive from a principle of neutral partisanship.

7. See, e.g., Samuel J. Levine, *The Broad Life of the Jewish Lawyer: Integrating Spirituality, Scholarship and Profession*, 27 TEX. TECH L. REV. 1199, 1207, 1209 (1996) ("As a prosecutor, I thus have the obligation and opportunity to integrate many of my religious and professional goals.").

8. Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1060 (1976).

9. See, e.g., Rob Atkinson, *Beyond the New Role Morality for Lawyers*, 51 MD. L. REV. 853, 854 (1992) (asking the fundamental question of whether a good person can be a good lawyer); Marie Ashe, "Bad Mothers," "Good Lawyers," and "Legal Ethics," 81 GEO. L.J. 2533, 2538 (1993) (discussing the contradiction between being a good lawyer who advocates for a bad client and being a good lawyer who is a good person); Timothy W. Floyd, *Realism, Responsibility, and the Good Lawyer: Niebuhr Perspectives on Legal Ethics*, 67 NOTRE DAME L. REV. 587, 590 (1992) (discussing the works of David Luban and William Simon that focus on the lawyer's responsibility to refuse to assist clients in wrongdoing); Monroe H. Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U. L. REV. 191, 192 (1978) (discussing the importance of questioning whether professionalism and human decency are incompatible and setting forth the related question of whether it is the lawyer who bears the responsibility of exercising control in the attorney-client relationship); Sanford Levinson, *National Loyalty, Communalism, and the Professional Identity of Lawyers*, 7 YALE J. L. & HUMAN. 49, 52 (1995) (arguing that Fried's question whether a good lawyer can be a good person is too broad and, instead, posing an adapted version of the question asking whether a good lawyer, as defined by adherence to the norms of professional conduct, can be a good citizen); DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 109 (1988) (considering Fried's question in the context of role morality); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 614

issue "that is truly at the heart of the moral inquiry into the ethics of lawyers."¹⁰ The moral inquiry into lawyers' ethics traditionally has focused on how the professional norms relate to¹¹ — and, particularly, conflict with — moral principles that are common (very widely shared), universal (binding upon every person and every community), and fundamental (of utmost importance and addressing basic questions).¹² In practice, however, professional morality rarely

(explaining that there is no moral justification for the accepted standard that lawyers, in representing clients, are judged by a different standard than are laypersons); Gerald J. Postema, *Self-Image, Integrity, and Professional Responsibility*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 286, 287 (David Luban ed., 1983) (suggesting that it is not possible to separate questions concerning the responsibilities of lawyers from those questions considered by individuals contemplating a career in lawyering — namely, whether a good person can be a good lawyer); Thomas L. Shaffer, *Christian Lawyer Stories and American Legal Ethics*, 33 *MERCER L. REV.* 877, 880 (1982) (considering whether a good person can be a good lawyer through an analysis of the character Atticus Finch in the screenplay of *To Kill a Mockingbird*). But see William H. Simon, *Ethical Discretion in Lawyering*, 101 *HARV. L. REV.* 1083, 1113-19 (1988) (asserting that, in most cases, when writers identify what purports to be a conflict between legal and nonlegal moral commitments, the conflict is really between competing legal values).

10. Robert P. Lawry, *The Central Moral Tradition of Lawyering*, 19 *HOFSTRA L. REV.* 311, 312 n.5 (1990).

11. Among the writings in this area are those arguing that lawyers should be required to act in accordance with particular moral principles that the author believes to be uncontested or worthy of universal acceptance. See, e.g., Robert W. Gordon, *The Independence of Lawyers*, 58 *B.U. L. REV.* 1 (1988) (discussing concept of independence as a limit on loyalty to client); Peter Margulies, "Who Are You to Tell Me That?": *Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients*, 68 *N.C. L. REV.* 213 (1990) (arguing that the rules of professional conduct should require lawyers to counsel clients in accordance with specified moral considerations); Simon, *supra* note 9, at 1083 (arguing that lawyers should act based on the principle of promoting justice).

12. See, e.g., David J. Luban, *Introduction* to *THE GOOD LAWYER*, *supra* note 9, at 1 ("The authors . . . address the fundamental problems of legal ethics: does the professional role of lawyers impose duties that are different from, or even in conflict with, common morality?"); David Luban, ed., *THE ETHICS OF LAWYERS* xiii (1994) ("The problematic aspect of lawyers' ethics, however, consists in duties (such as demolishing the truthful witness) that *contradict* rather than *supplement* everyday morality."); Luban, *LAWYERS AND JUSTICE*, *supra* note 9, at 108 (referring to "conflicts between role morality and a universal morality"); *id.* at 110 ("Common morality is not contingently universal: it is universal because it applies to persons *simpliciter*."); Richard Wasserstrom, *Roles and Morality*, in *THE GOOD LAWYER*, *supra* note 9, at 32 (referring to the "incompatibility or tension between roles and universalistic demands of morality"); Bernard Williams, *Professional Morality and Its Dispositions*, in *THE GOOD LAWYER*, *supra* note 9, at 259 ("[I]t is the possibility of a divergence between professional morality and 'ordinary' or 'everyday' morality that lends particular interest to the notion of a professional morality."); Susan Wolf, *Ethics, Legal Ethics, and the Ethics of Law*, in *THE GOOD LAWYER*, *supra* note 9, at 38, 57 ("[I]t is perhaps inevitable that even the best intraprofessional legal standards will on rare occasions conflict with fundamental moral requirements.").

Keeping the focus on common morality is one way of reconciling two possibly conflicting impulses. The first impulse is to mistrust the personal morality of most lawyers for any of several reasons. At best, one might question whether lawyers can claim expertise in dealing with moral questions. See, e.g., Robert C. Post, *On Professional Prerogatives*, 37 *STAN. L. REV.* 459, 463 (1985) (expressing doubt as to whether lawyers possess superior expertise regarding questions of right and wrong). At worst, lawyers may be suspected not simply of moral neutrality, but of sympathy for clients' morally questionable values, or of moral views that are distorted by legal training and experience. Cf. Mark Spiegel, *Lawyers and Professional Autonomy: Reflections on Corporate Lawyering and the Doctrine of Informed Consent*, 9 *W. NEW ENG. L. REV.* 139, 150 (1987) (observing that "lawyers' preoccupation with rules and procedural regularity may lead to a one-sided view of morality"). But see Thomas L. Shaffer, *Less Suffering When You're Warned: A Response to Professor Lewis*, 38 *CATH. U. L. REV.* 871, 873 (1989) (arguing that "what makes the lawyer-client relationship a moral enterprise" is "that the lawyer has character, wisdom, and moral integrity"). The second impulse is to favor moral activism.

will conflict with common moral norms, because so-called "ethical" or "moral" obligations are reflected in the rules of professional conduct just as other aspects of the "law of lawyering" are strongly rooted in common morality.¹³

The question at the heart of this Article — namely, what relationship exists between professional norms and *personal* values and beliefs that are not commonly shared — is less interesting from the moral philosophers' perspective, but significant for practitioners. Professional norms more frequently will conflict with unique individual moral codes than with a concept of morality more common to society. Additionally, the arguments for allowing lawyers to act in accordance with moral principles that conflict with professional norms will apply

Cf. Robert A. Kagan & Robert L. Rosen, *On the Social Significance of Large Law Firm Practice*, 37 STAN. L. REV. 399, 409-10 (1985) (discussing image of corporate lawyers as independent counselors who give advice referring "not only to specific rules of black-letter law, but also to general principles of equity, fair dealing, and public policy" and who "play[] a crucial role in pushing businesses toward socially responsible behavior"). As one would scarcely encourage lawyers to act in furtherance of personal values that are deemed questionable, however, the effort must be made to identify a limited set of moral values that are an aspect of common morality in furtherance of which lawyers may be encouraged to act.

13. See, e.g., GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* § 101 at lix (Supp. 1993) (explaining the overlap between legal and moral elements of the law of lawyering); William E. Nelson, *Moral Ethics, Adversary Justice, and Political Theory: Three Foundations for the Law of Professional Responsibility*, 64 NOTRE DAME L. REV. 911, 917-18 (1989) (noting that various moral ethics are the source of professional standards); Maura Strassberg, *Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics*, IOWA L. REV. 901, 949 (1995) ("[C]odifications such as the Model Code or Model Rules must be interpreted in light of embedded moral and political principles."); Wolf, *supra* note 12, at 45 (stating that the moral constraints on how a lawyer may act on behalf of a client "are simply the ordinary moral constraints that are generally recognized to attach directly to any activity in the absence of special exception"). But see Andreas Eshete, *Does a Lawyer's Character Matter?*, in *THE GOOD LAWYER*, *supra* note 9, at 270, 274 (identifying aspects of "[e]ffective adversarial advocacy on behalf of a criminal defendant [that are] unacceptable from a moral point of view").

A similarly close relationship between the legal profession's norms and religious thought can be expected, given the impact of religious understandings on areas of thought that would seem far less susceptible. For example, in May 1997, the Center for Theology and Natural Sciences hosted an international conference at which some participants concluded that contemporary cosmology had been influenced, if only subconsciously, by scientists' cultural and religious traditions. See Margaret Wertheim, *God is also a Cosmologist*, N.Y. TIMES, June 8, 1997, § 4, at 16 (discussing compatibility of natural science and religious faith). This conclusion was considered so notwithstanding that physical observations limit how one conceptualizes the universe. *Id.* Lawyers would seem to have far greater leeway to construct professional norms than scientists have to construct theories about the universe.

As a possible reflection of this relationship, particular professional norms sometimes have been equated with biblical injunctions. For example, the injunction against "serving two masters" might be cited as an antecedent of the obligation to avoid conflicts of interest, while the injunction to avoid the "appearance of evil" might be cited as an antecedent of the obligation to avoid the "appearance of impropriety." See Monroe H. Freedman, *Legal Ethics from a Jewish Perspective*, 27 TEX. TECH L. REV. 1131, 1134 (1996) (discussing more generally what he believes to be the Jewish sources for themes that motivate his philosophy of lawyers' ethics). Along these lines, it might be worth exploring the extent to which the professional norms are rooted in the particular religious understandings of mid-nineteenth century figures, such as George Sharswood, whose work shaped the contemporary norms, along the lines of Russell Pearce's study of the relationship between Sharswood's work and his political philosophy. See Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241 (1992) (referring to the work of nineteenth-century jurist and scholar George Sharswood as the original source of modern legal ethics codes).

with less force when the particular moral principles are non-conventional.¹⁴ Thus, these individual conflicts are less easily avoided through creative interpretations of the professional norms, and the individual's moral justification for flatly disregarding the professional norms will be far weaker.

One can conceptualize the relationship between professional norms and personal values in various ways. At one extreme, it might be thought that the professional norms require the complete exclusion of personal values from lawyers' professional decisionmaking¹⁵ — or, in Sanford Levinson's words, that they require "the 'bleaching out' of merely contingent aspects of the self, including the residue of particularistic socialization that we refer to as our 'conscience.'" ¹⁶ Levinson has been read to envision " 'bleaching out' [as] the standard conception of the lawyer's professional role."¹⁷

Lawyers and academics have posited, however, a number of alternative conceptions that permit personal moral and religious understandings to inform or influence a lawyer's work to varying degrees. To begin with, Geoffrey Hazard has noted that a lawyer's "subjective religious and personal moral predispositions" are part of "[t]he lawyer's normative milieu."¹⁸ Azizah al-Hibri also has suggested "that religion subconsciously informs our individual professional practice."¹⁹ This view essentially places religious or moral understandings in the background, but not entirely offstage.

Others have suggested that lawyers should be alerted to the possible impropri-

14. See *infra* notes 175-80 and accompanying text (suggesting that professional norms may be presumptively deficient when they conflict with common morality, but not when they conflict with an individual's non-conventional values).

15. See SHAFFER, ON BEING A CHRISTIAN AND A LAWYER, *supra* note 1, at 7 (characterizing "the principle of suspended conscience" as an aspect of "the dominant adversary ethics").

16. Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577, 1578 (1993); see also Judith L. Maute, *Foreword to Symposium: The Evolving Restatement of the Law Governing Lawyers*, 46 OKLA. L. REV. 1, 10 (1993) ("Years of practice tend to toughen one's moral sensibilities, with the result being that very little causes moral discomfort.").

Levinson identifies this view with the writings of Monroe Freedman, as captured by Freedman's observation that " 'mak[ing] each lawyer's conscience his ultimate guide . . . is wholly inconsistent with the notion of professional ethics, which, by definition, supersedes personal ethics.' " Levinson, *supra*, at 1578 (quoting Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1482 n.26 (1966)). Freedman subsequently argued persuasively, however, that the phrase was lifted out of context to exemplify a view that he does not in fact hold. See Freedman, *supra* note 13, at 1135-38 ("In view of the previous discussion, it should be clear why I was taken aback when I learned that I am being used, or misused, by Professor Sanford Levinson as representing those lawyers whose religious identity and personal ethics have been 'bleached out' by their professional ethics.") (footnote omitted).

17. Russell G. Pearce, *Jewish Lawyering in a Multicultural Society: A Midrash on Levinson*, 14 CARDOZO L. REV. 1613, 1627 (1993) (referring to "bleaching out" as the standard view of the lawyer's professional role with regard to devotion to the rule of law); see also Russell G. Pearce, *The Jewish Lawyer's Question*, 27 TEX. TECH L. REV. 1259, 1261 (1996) (citing Levinson's view that the professional project of law "bleaches out" such aspects of the self as one's conscience).

18. Geoffrey C. Hazard, Jr., *Equal Opportunity in the Practice of Law*, 27 SAN DIEGO L. REV. 127, 128 (1990) ("The lawyer's normative milieu includes norms of work setting, family and community, and subjective religious and personal moral predispositions.").

19. Azizah al-Hibri, *On Being a Muslim Corporate Lawyer*, 27 TEX. TECH L. REV. 947, 961 (1996).

ety of proposed conduct and prompted to seek further guidance when their conduct clashes with the lawyer's personal sense of morality.²⁰ A comparably modest "watchdog" role might be assigned to the lawyer's religious understandings. The point is not that one's moral or religious understandings have some direct relevance to how one ultimately resolves a question about how to act. Rather, these understandings simply may alert the lawyer to the existence of such a question, presumably because professional norms *sometimes* coincide with one's personal values.

Ultimately, it seems clear that a lawyer's religious and moral understandings may be brought to bear on at least *some* decisions that the lawyer makes. For example, a lawyer generally may rely on these understandings in deciding whom not to represent,²¹ as Monroe Freedman²² and

20. See, e.g., LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT — AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 204-05 (July 1992) [hereinafter MACCRATE REPORT] ("Primary sources of ethical rules include [a] lawyer's personal sense of morality, particularly to the extent that it causes the lawyer to . . . [q]uestion and research the ethical propriety of practices before employing them (including practices urged upon the lawyer by a supervisor or practices long accepted by lawyers within the particular field of practice) [and] question and seek guidance with regard to practices that are not addressed by existing roles or the opinions interpreting them."); American Bar Association Section of Legal Education and Admissions to the Bar, TEACHING AND LEARNING PROFESSIONALISM 12 (Aug. 1996) ("When students who have completed a solid ethical program enter a law school, they are likely to be more sensitized to the ethical and professional responsibility issues which will face them for the rest of their lives."); see also Charles W. Wolfram, *Legal Ethics and the Restatement Process — The Sometimes-Uncomfortable Fit*, 46 OKLA. L. REV. 13, 13 (1993) ("Considerations of 'legal ethics,' for example, are concerned with personal ethics — the aspects of a life scheme which, at any moment, an actor employs to assess whether what she is doing as a lawyer is appropriate.").

21. While lawyers have a professional duty to accept court appointments, MODEL RULES Rule 6.2, in most cases they have absolute discretion to refuse to represent prospective clients who seek to retain them. See *id.* cmt. ("A lawyer is not obliged to accept a client whose character or cause the lawyer regards as repugnant."). In contrast, lawyers' discretion in deciding whom to represent is bounded. Initially, this discretion presupposes the prospective client's willingness to retain the lawyer. (An obvious exception is in the case of court-appointed representation.) Then, the lawyer's decision is limited by, among other professional norms, the duty to avoid conflicts of interest, *id.* Rule 1.7, and the duty not to undertake work for which the lawyer is unqualified and incapable of becoming qualified. *Id.* Rule 1.1.

22. I credit Monroe Freedman, in part, because he has been identified in the professional literature with a philosophy of legal ethics — characterized by Postema as a philosophy of "neutral partisanship," see *supra* note 6 (discussing Postema's argument) — that is often thought to leave little role for lawyers' personal values. See *supra* note 16 (noting Levinson's identification of Freedman's writings with a philosophy of moral neutrality. Freedman has long urged the importance of moral counseling, see *infra* note 104 (discussing Freedman's views on moral counseling), and has attributed his professional philosophy to his Jewish religious values. See *infra* note 25 and accompanying text (discussing Freedman's views on legal ethics from a Jewish perspective). Further, Freedman has consistently argued that, as a general rule, decisions about which clients to represent are exclusively for the lawyer to decide, and that these decisions should be morally justifiable. See, e.g., MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS at 49, 57 (1990) ("In short, a lawyer should indeed have the freedom to choose clients on any standard he or she deems appropriate. As Professor Fried points out, the choice of client is an aspect of the lawyer's free will, to be exercised within the realm of the lawyer's moral autonomy."); Monroe Freedman, *Ethical Ends and Ethical Means*, 41 J. LEGAL ED. 55, 56 (1991) ("Except in the unusual circumstances of a court appointment, the lawyer is unconstrained by ethical rules in her choice of areas of practice, causes, and clients. . . . [A] lawyer's choice of client or cause is a moral decision that should be weighed as such by the lawyer and that the lawyer should be prepared to justify to

others²³ have argued. Additionally, many decisions about one's professional life that are unrelated to the lawyer-client representation may be based on these understandings. For example, the legal profession's ethical norms give no direction to a lawyer about how respectfully to treat others within one's law firm, what balance to strike between devotion to work and devotion to family, or how to decorate one's office. A lawyer therefore is free to answer these questions (within legal limits) based on personal moral or religious understandings.²⁴

Further, personal moral or religious beliefs may inform a lawyer's understanding of the professional norms in general. Addressing legal ethics from a Jewish perspective, Freedman has written that his philosophy of lawyers' ethics is motivated by themes with Jewish sources: "the dignity and sanctity of the individual, compassion for fellow human beings, individual autonomy, and equal protection of the laws," implicit in all of which is "a pervasive ethic of warm zeal in the client's behalf."²⁵ In the same volume, from a Christian perspective, Dan Edwards has written:

The common assumption that law practice and Christian practice are incompatible rests on misconceptions of both practices. The proper practice of law is not unrestrained advocacy for hire, but rather faithful advocacy and counsel grounded in a commitment to obtaining the goods of justice, mercy, reconciliation, peace, and liberty for one's client.²⁶

These philosophies of law practice sound very different, and may reflect very different approaches to the representation of clients, yet there is nothing in the *Model Rules*, for example, to say that either is wrong. Thus, because of the porous nature of the professional norms, one's general philosophical approach to the practice of law may be determined by one's personal moral or religious understandings.

While this approach assigns a far more significant role to personal morality or

others."); Monroe Freedman, *The Morality of Lawyering*, LEGAL TIMES, Sept. 20, 1993, at 22 ("[T]he lawyer has the broadest power — ethically and in practice — to decide which clients to represent" and "the lawyer's decision to accept or to reject a particular client is a moral decision."); Monroe Freedman, *Must You Be the Devil's Advocate?*, LEGAL TIMES, Aug. 23, 1993, at 19 ("[L]awyers have always been free to choose whether to represent particular clients" and "the question of whether to represent a particular client can present the lawyer with an important decision for which the lawyer is morally accountable.").

23. See generally CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 10.2.2 (1986) (stating that a lawyer generally may refuse to represent a client for moral or other reasons). But see Charles W. Wolfram, *A Lawyer's Duty to Represent Clients, Repugnant and Otherwise*, in THE GOOD LAWYER, *supra* note 9, at 214, 215 (raising "a substantial doubt that a lawyer never is obliged to accept a case of a repugnant client").

24. See, e.g., Joseph G. Allegritti, *Neither Curse Nor Idol: Towards a Spirituality of Work for Lawyers*, 27 TEX. TECH L. REV. 963, 973-74 (1996) (discussing how the author relied on friends and family to help him balance his work and home life).

25. Freedman, *supra* note 13, at 1134; see also *id.* at 1131 ("In two books and several dozen law review articles, I have argued for a coherent system that recognizes that lawyers' ethics must be rooted in the Constitution, specifically, in the Bill of Rights. That is, of course, consistent with Jewish tradition.").

26. Dan Edwards, *Reflections on Three Stories: "Practicing" Law and Christianity at the Same Time*, 27 TEX. TECH L. REV. 1105, 1112 (1996); see also Shaffer, *supra* note 6, at 722-723 (relating Christian values to the *Model Code*).

religion, it is not to say that *all* professional decisions, or even most, are compatible with one's moral or religious views. Yet, a more robust claim about the role of personal values in professional decisionmaking is reflected in recent discussions of the work of religious lawyers. For example, in discussing Judaism as a constitutive aspect of professional practice for Orthodox Jewish lawyers,²⁷ Levinson provided several examples of how Halakhic commands might apply to the lawyer's work, not only with respect to the selection of clients, but also with respect to the advice that the lawyer provides or refrains from providing.²⁸ He underscored that all his examples "deal with what, from the perspective of American law regarding lawyers, is left to the lawyer's own discretion" and therefore present no conflict between Jewish law and the professional norms.²⁹ More recently, an assumption that lawyers may draw on religious understandings in making professional decisions underlaid several essays in the *Texas Tech Law Review* symposium on *Faith and the Law*.³⁰ This collection included stories of how religious lawyers and judges made particular professional decisions in conformity with their religious understandings, frequently without any doubt about their discretion to do so.³¹

Most recently, some participants at an invitational conference on *The Relevance of Religion to a Lawyer's Work*, conducted at Fordham Law School in June 1997, seemed to make the strongest possible claim for the role of morality and religion in the lawyer's work — namely, that personal moral and religious

27. Levinson, *supra* note 16, at 1600-11.

28. Specifically, Levinson provides four examples. *Id.* at 1604. A Jewish lawyer might be obligated to advise the client of the religious "duty to summon the potential defendant to a rabbinical court." *Id.* The second involves representing a Jewish couple seeking a civil divorce. *Id.* at 1606. The lawyer might be obligated "to advise the couple that they must also seek a divorce that is proper according to halacha," that is, to obtain a *get* — an official decree authorizing the dissolution of the marriage — from a properly constituted rabbinical court." *Id.* The third example involves representing a mixed-marriage couple seeking a divorce. *Id.* Because such a marriage is halakhically forbidden, the lawyer might be obligated to give no advice about how to save the marriage or to counsel against trying to do so. *Id.* The last example involves an Orthodox Jew who might be obliged to refrain from representing criminal defendants in order to avoid violating a decree that might be read to forbid the observant Jewish lawyer from helping a criminal escape punishment. *Id.* at 1607.

For additional examples, see Stern, *supra* note 3, at 1366-67 (noting that Jewish law might be read to prohibit seeking prejudgment interest). See also *id.* at 1369-70 (explaining that where spouses in a divorce action seek to contest custody over their child, a lawyer who is of the same faith as the spouses may be tempted to push for custody for the spouse who will provide a better religious upbringing).

29. Levinson, *supra* note 16, at 1607.

30. Symposium, *Faith and the Law*, 27 TEX. TECH L. REV. 911 (1996).

31. See, e.g., Warren K. Anderson, Jr., *Ecumenical Cosmology*, 27 TEX. TECH L. REV. 983, 987-88 (1996) (describing how one lawyer's religious and personal values have influenced his work); Collett, *supra* note 3, at 1053-54 (recounting an occasion during which love of "God and neighbor" influenced her decision to recommend that her client accept a settlement); Raul A. Gonzalez, *Climbing the Ladder of Success — My Spiritual Journey*, 27 TEX. TECH L. REV. 1139 (1996) (detailing the author's personal and religious growth and how such growth has impacted his career). But see al-Hibri, *supra* note 19, at 948-50 (discussing tension between the author's religious principle of fairness and the "adversarial way of doing things" when attempting to draft an agreement in the best interests of her client).

beliefs may be brought to bear on *all* decisions that lawyers make, including decisions about how to represent clients. This claim was embedded in the propositions “that lawyers are morally accountable for all their actions”³² and that “a lawyer’s moral and spiritual traditions properly play an important role in the lawyer’s making of all significant decisions or choices.”³³ To be sure, both propositions are ambiguous.³⁴ But one fairly can read both as assuming not simply that lawyers’ moral understandings are sometimes relevant, but that they are *invariably* relevant,³⁵ and even dispositive, to the decisions that lawyers make.³⁶ On this view, lawyers can always reconcile their moral or religious

32. Conference on the Relevance of Religion to a Lawyer’s Work, Working Group on the Practice of Law as a Vocation or Calling, Draft Agenda (1997) (on file with author).

33. Conference on the Relevance of Religion to a Lawyer’s Work, Working Group on Deciding Whether to Represent a Client, Draft Agenda (1997) (on file with author).

34. The recommendation that the American Bar Association’s (ABA) model disciplinary rules should hold lawyers “morally accountable” *see* Conference on the Relevance of Religion to a Lawyer’s Work, *supra* note 32 (discussing this recommendation), is unclear in at least three respects. First, it is unclear to whom lawyers would be accountable. To themselves and their own consciences? To their clients? To disciplinary authorities? To members of the bar or bar associations? To the public at large? Second, it is unclear whose morality must be taken into account. The lawyer’s personal morality? Professional morality? Common morality? Third, the recommendation is unclear about the relevance of the lawyer’s religious understandings to the moral accounting prescribed by the proposed rule. Would the proposed model rule require religious lawyers to take account of their religious understandings, allow them to do so, or forbid them from doing so?

Likewise, questions are raised by the observation that “a lawyer’s moral and spiritual traditions properly play an important role in the lawyer’s making of all significant decisions or choices.” *See* Conference on the Relevance of Religion to a Lawyer’s Work, *supra* note 33 (discussing this recommendation). First, it is unclear whether lawyers *must* or simply *may* draw on their moral and spiritual traditions. That is, do lawyers act improperly in failing to take their religious and moral traditions into account? Or is it simply that those lawyers who elect to do so are acting properly? Further, it is unclear whether this statement is meant to describe existing professional norms, to prescribe appropriate professional norms, or to prescribe how lawyers should conduct themselves even when personal moral or religious considerations conflict with professional norms. In other words, is it that the “ethical codes” presently accommodate lawyers’ moral or religious traditions in all cases? Is it that they should accommodate such traditions? Or is it that lawyers should regard their moral or religious understandings as the higher authority, so that regardless of whether lawyers’ moral and spiritual understandings conform with professional norms, they should act on the basis of the former? *See* Thomas L. Shaffer & Julia B. Meister, *Is This Appropriate?*, 46 DUKE L.J. 781 (1997) (discussing ambiguity of the term “appropriate” when used to describe a legal or moral judgment).

35. Both declarations use the word “all” to describe the professional conduct to which morality and/or religion is relevant. The first declaration is prescriptive: Lawyers should be “morally accountable for *all* their actions.” *See* Conference on the Relevance of Religion to a Lawyer’s Work, *supra* note 32 (discussing this quotation). The second is either descriptive, prescriptive or both: Lawyers’ “moral and spiritual traditions properly play an important role in the . . . making of *all* significant decisions or choices.” *See* Conference on the Relevance of Religion to a Lawyer’s Work, *supra* note 33 (discussing this recommendation). Both conclusions are absolute. Moral and/or religious understandings that lie outside the professional norms are not merely relevant on occasion. They are relevant to all decisions and therefore must always be taken into account.

36. In calling on lawyers to give a moral accounting with regard to all their conduct, the first group appeared to assume that all conduct undertaken by lawyers can be justified in moral terms. Further, the group must have intended the justification to be made in terms of personal rather than professional morality. Otherwise, the recommendation would be trivial. It would be nothing more than a demand that lawyers’ conduct comply with professional norms. Likewise, the second group’s conclusion that “a lawyer’s moral and spiritual traditions properly play an important role,” *see* Conference on the Relevance of Religion to a Lawyer’s Work, *supra* note

understandings with the legal profession's ethical norms, because the professional norms invariably accommodate moral and religious understandings.³⁷

II. THE PROFESSIONAL OBLIGATION TO EXCLUDE PERSONAL MORALITY AND RELIGION FROM THE DECISIONMAKING PROCESS

Are there situations in which the applicable professional norms would foreclose lawyers from making decisions based on their personal religious or moral beliefs? Consider the following possibilities:

Example One: Confidentiality (part one)

*Hopewell, a lawyer, represents Jones, a criminal defendant, who discloses that he has committed a murder for which an innocent man, Smith, is about to be executed. Jones instructs Hopewell not to reveal this information unless it can be used to Jones's benefit.*³⁸

In this situation, the professional rules governing confidentiality appear to forbid a lawyer from revealing a confidence in order to save an innocent human life — a result, Monroe Freedman has argued, that is “[in]consistent with the sanctity of life in Jewish tradition” and that should be changed.³⁹ This scenario was selected as the base topic of the recent *Loyola of Los Angeles Law Review* symposium on “Faith and the Law”⁴⁰ precisely because it seemed to provide an example of where a lawyer who believes that a confidence should be betrayed where necessary to save an innocent human life may not, consistent with the codified professional norms, act on the basis of this personal moral or religious belief.⁴¹

In this example, the content of the applicable professional norm is contested precisely because a lawyer's personal beliefs coincide with a common, universal,

33 (discussing this recommendation), in all decisionmaking implies that, in all cases, the lawyer can act according to his or her moral and spiritual traditions. Otherwise, the role of lawyers' moral and spiritual traditions would not be an important one.

37. Sanford Levinson has suggested that this view might be identified with Thomas Shaffer's conception that a religious lawyer is a member of a religious community first and a lawyer second. See Levinson, *supra* note 16, at 1578, quoting SHAFER & SHAFER, *supra* note 3, at 198 (discussing how a professional identity is constituted and contributed to by professional participation).

38. See Symposium, *Executing the Wrong Person: The Professionals' Ethical Dilemmas*, Symposium Problem, *The Wrong Man is About to be Executed for a Crime He Did Not Commit*, 29 LOYOLA L.A. L. REV. 1543-1545 (1996) (describing the same hypothetical problem in greater detail).

39. Freedman, *supra* note 13, at 1136-37; see also *id.* at 1137 n.29 (citing Professor Freedman's prior writings).

40. Symposium, *Executing the Wrong Person: The Professionals' Ethical Dilemmas*, 29 LOY. L.A. L. REV. 1543 (1996).

41. See Mary C. Daly, *To Betray Once? To Betray Twice?: Reflections on Confidentiality, a Guilty Client, an Innocent Condemned Man, and an Ethics-Seeking Defense Counsel*, 29 LOY. L.A. L. REV. 1611, 1622 (1996) (recognizing that under any ABA codification of professional norms “[t]he answer is the same: Ms. Hopewell may not disclose her client's communication over his objection not even to save the life of an innocent man”).

and fundamental norm. Thus, on the rare occasions when lawyers encounter this extreme situation, they are able to “interpret” the confidentiality rule in the applicable professional code to allow disclosure.⁴² An implied exception to the confidentiality requirement might be justified for any of several reasons, such as the argument that the interests protected by the rule are outweighed by the interest in protecting an innocent life or that the general rule must be interpreted in light of reason or necessity. Thus, as Mary Daly has argued, “[t]o the extent that [Hopewell] is morally committed to preventing the execution of an innocent man it will not be difficult to justify her decision” on a ground other than flat-out “civil disobedience.”⁴³ That there is no published bar association ethics opinion or judicial decision forbidding a lawyer from disclosing a confidence in a situation such as this one supports the argument that this is not, in fact, an example where professional norms foreclose a lawyer from acting in accordance with personal belief, because the black letter of the confidentiality rule does not accurately capture the professional understanding.⁴⁴

Example Two: Confidentiality (part two)

Hope, a lawyer, agrees to represent Young, a teenage child, in “abuse and neglect” proceedings. Young confides that he is the subject of serious, but not life-threatening, psychological or physical abuse at the hands of his father, with whom he resides, but directs Hope not to reveal this information to anyone. The lawyer has a personal moral or religious belief that children should be protected from physical and emotional harm of any kind. This leads her to conclude that she must seek help for Young, even though doing so will require betraying his confidence. She seeks guidance from the local bar association, which sends her a copy of a recent ethics opinion of the Association of the Bar

42. Cf. *Spaulding v. Zimmerman*, 116 N.W.2d 704 (Minn. 1962) (holding that the district court did not abuse its discretion in setting aside a settlement where defendants’ counsel failed to disclose to the plaintiff’s counsel and the court that the plaintiff was suffering from an aorta aneurysm that had been diagnosed by the defendants’ expert even though the defendants’ counsel may not have had a legal or ethical obligation to reveal such information).

43. Daly, *supra* note 41, at 1627; see also 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, 1634 (1996) (arguing that while the codified professional rules should recognize explicitly a “life-saving exception,” such an exception is consistent with the existing professional norm as reflected in the unwillingness of disciplinary authorities to bring charges against a lawyer who revealed a client confidence to save an innocent life); Robert P. Lawry, *Damned and Damnable: A Lawyer’s Moral Duties With Life on the Line*, 29 LOY. L.A. L. REV. 1641, 1652 (1996) (suggesting that notwithstanding the absence of an explicit “life-saving” exception to the *Model Rules*, most would agree that an implicit exception covering such cases exists).

44. See W. William Hodes, *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, 1576 & n.115 (1996) (noting that in *State v. Macumber*, 582 P.2d 162 (Ariz. 1978), the case upon which the Loyola hypothetical was based, the State Bar Committee on Ethics advised the lawyers that it would not be improper to disclose the client’s confidence; recognizing, however, that it is unclear upon what basis the Committee would allow such an exception).

*of the City of New York. The opinion concludes that in this precise situation the lawyer may not disclose the confidence without the child's consent.*⁴⁵

This is not a rare situation, but one that lawyers who represent children can expect to encounter.⁴⁶ Further, this is not a situation in which one can argue that the professional norms are ambiguous and susceptible to an interpretation that allows the lawyer to make the disclosure that she may believe to be dictated by moral or religious principle. Because the professional norms clearly require confidentiality, the lawyer's moral or religious views would not be relevant to her decision about how to treat the child's confidence under the professional norms. It would not be true to say that the lawyer acts properly in relying on her moral or religious understandings, at least as far as the "law of lawyering"⁴⁷ is concerned, even if it may be true from the perspective of some perceived higher obligation.⁴⁸

One might argue, however, that this scenario does not in fact present the lawyer with a moral decision, other than the decision of whether to comply with the professional norms. Therefore, it does not contradict the claim that moral and religious beliefs may appropriately be brought to bear on all of the lawyer's professional decisions. Properly understood (or, as necessarily refined), this claim does not address all aspects of professional conduct, but only those as to which the lawyer has some discretion: that is, where there is a decision to be made — not where the professional norms dictate only one decision.⁴⁹

Example Three: Judicial decisionmaking

The lawyer, Judge Yaccarino, is called on to decide the visitation rights of Dr. Bornstein with respect to two children who are in his ex-wife's custody and who have refused to see him. Judge Yaccarino holds the personal belief that divorce is immoral, as well as a religious conviction that children should respect and

45. Association of the Bar of the City of New York, Comm. on Professional and Judicial Ethics, Formal Op. 1997-2 (1997).

46. See, e.g., Bruce A. Green & Bernardine Dohrn, *Foreword: Children and the Ethical Practice of Law*, 64 *FORDHAM L. REV.* 1281, 1282 (1996) (studying a hypothetical child welfare case where the child's express desires conflict with his lawyer's belief as to the best interest of that child).

47. HAZARD & HODES, *supra* note 13 (coining phrase "law of lawyering").

48. Cf. Levinson, *supra* note 16, at 1610-11 (noting that, for an observant Jewish lawyer, the conflict between the professional duty of confidentiality and a Halakhic duty of disclosure is "a true conflict of legal obligations, rather than a more conventional conflict between law and morals," and that "presumably, a lawyer who cared enough to seek out Halakhic guidance would feel obligated to obey its commands, even at the cost of violating the secular law").

49. Charles W. Wolfram, *The "Ethics" of Lawyers*, 11 *CORNELL L. FORUM* 10, 13 (1984). Wolfram writes:

[T]hinking about the work of lawyers requires thinking about its morality. Lawyers are impelled not only by the direct and sanctionable commands of professional regulations and other law. Those commands cover only a minute fraction of the decisions a lawyer must make in the practice of law. In their more-numerous legally unfettered decisions, lawyers are led perhaps by a desire to make money, perhaps by a personal sense of honor. Situated somewhere amidst those nonlegal compulsions for many lawyers is an acknowledged personal moral sense.

revere their parents. Although two independent psychiatrists believe that the children would be harmed if forced to visit their father, Judge Yaccarino understands his personal moral and religious beliefs to dictate such a result.

This example is based on *In re Yaccarino*,⁵⁰ in which a New Jersey trial court judge was removed from the bench for misconduct including basing his decisions in a matrimonial proceeding on his personal and religious views.⁵¹ Among other things, the judge expressed the view that he did not believe in divorce, and he thought that the children's mother had "an absolute affirmative duty cast upon [her] by [her] God" to persuade the children to visit voluntarily with their father. The state supreme court concluded that the judge had "invoked personal beliefs not legally relevant to the cause."⁵²

Although the court was not explicit, its condemnation may have been directed at either the trial judge's justification of his decision on the basis of irrelevant personal beliefs, his consideration of irrelevant personal beliefs in his deliberations, or both. In all likelihood, however, the answer is both. Suppose the trial judge had considered and relied on his personal beliefs in ruling on Dr. Boorstein's motion, but had publicly justified his decision based exclusively on

50. 502 A.2d 3 (N.J. 1985).

51. As described by the New Jersey Supreme Court, in the course of the proceeding:

[Judge Yaccarino] invoked his own personal views about child rearing when, referring to the fact that the Bornstein children would not call Dr. Bornstein "father" or "daddy," but only by his first name, Alan, or simply as "he," [the judge] stated, "[i]f I had a kid and he called my wife Gail, his nose would be out of joint and his teeth would rattle."

Respondent also indicated that his personal views concerning religion took precedence over the law. When Mrs. Bornstein explained that she was in court because the children did not want to see their father, and not because of an intention on her part to stop them from doing so, respondent told her that she had "an absolute affirmative duty cast upon [her] by [her] God, not by Yaccarino, not by me, but by God" to persuade them to change their attitude and to respect and revere their father, and that she was not relieved of that responsibility because the father might have been a "100 carat cad." Respondent again criticized Mrs. Bornstein for permitting the children to refer to their father as "Alan" and then invoked a religious example by reminding Mrs. Bornstein of how God destroyed Sodom and Gomorrah. When Mrs. Bornstein informed respondent that two independent psychiatrists had advised her that it would be harmful if the children were forced to see their father, he stated, "I am not talking about a psychiatrist. I am talking about God."

Respondent also advised those present in court of his personal views on divorce. He announced from the bench that he did not believe in divorce. With respect to custody, respondent commented that he could not imagine a situation in which a court would say to him "[y]ou may or you may not see your children." In addition, respondent stated that if confronted with such a situation, "I would pull this courthouse right off the hinges. There wouldn't be a courthouse. There can't be a world where those are the rules in my life." When counsel demurred, respondent informed the attorney that while both he [the attorney] and his client were "civilized," he himself was "uncivilized" since [sic] "I don't believe in divorce." The respondent expressed his personal views that the State's matrimonial laws and the court's authority to limit a parent's visitation rights would not be enforced by him. Respondent also expressed his willingness to kill anyone including himself for the protection of his children.

Id. at 10.

52. *Id.* at 11.

relevant legal considerations. In such a case, the trial judge undoubtedly would have escaped sanction because his reliance on impermissible considerations would have been unprovable. Yet, it is hard to imagine that the court meant to promote such a course of action, which would compound an abuse of discretion with deceit.⁵³

To be sure, Judge Yaccarino had considerable discretion in deciding whether to allow Dr. Bornstein visitation rights, and a variety of considerations might permissibly have entered into the decision.⁵⁴ But the judge's own moral and religious beliefs were not among them. The same difficulty is likely to arise whenever judges exercise discretion under the law. Whether or not the law explicitly identifies all the criteria on which the decision must be based, the judge's personal moral and religious beliefs will be off limits because they will not be included among the criteria that the judge explicitly or implicitly is authorized to consider.⁵⁵

In *The Nature of the Judicial Process*, Benjamin Cardozo provided another illustration:

[A] judge, I think, would err if he were to impose upon the community as a rule of life his own idiosyncrasies of conduct or belief. Let us, suppose, for

53. Stephen Carter might be expected to argue, however, that the judge may make decisions based on moral conviction but then must justify them in the formal terms of professional norms to achieve this preferred result. See Stephen L. Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932, 943-44 (1989) ("[I]f religious conviction plays a role at all, it would enter into the deliberative process, but not the process of justification.").

54. The literature on discretion, a subject beyond this Article's scope, is obviously extensive. See, e.g., Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 635-36 (1971) (stating that the concept of judicial discretion "manifests itself in numberless ways" while attempting to give judges guidance in using discretion "reflectively and purposefully").

55. One case provides another illustration. *United States v. Bakker*, 925 F.2d 728 (4th Cir. 1991). In that case, the sentencing judge was found to have acted improperly in commenting about the defendant, a noted television evangelist: "He had no thought whatever about his victims and those of us who do have a religion are ridiculed as being saps from money-grubbing preachers or priests." *Id.* at 740. The court explained:

To a considerable extent a sentencing judge is the embodiment of public condemnation and social outrage. . . . As the community's spokesperson, a judge can lecture a defendant as a lesson to that defendant and as a deterrent to others. If that were all that occurred here, the court would have been properly exercising its discretion, and we would be loathe to disturb what surely is an integral part of the sentencing process.

Sentencing discretion, however, must be exercised within the boundaries of due process. . . . In this case, the trial judge exceeded those boundaries. Courts have held that sentences imposed on the basis of impermissible considerations, such as a defendant's race or national origin, violate due process. . . . While these cases focused on a defendant's characteristics, we believe that similar principles apply when a judge impermissibly takes his own religious characteristics into account in sentencing.

Our Constitution, of course, does not require a person to surrender his or her religious beliefs upon the assumption of judicial office. Courts, however, cannot sanction sentencing procedures that create the perception of the bench as a pulpit from which judges announce their personal sense of religiosity and simultaneously punish defendants for offending it. Whether or not the trial judge has a religion is irrelevant for purposes of sentencing.

Id. (citations and footnote omitted).

illustration, a judge who looked upon theatre-going as a sin. Would he be doing right if, in a field where the rule of law was still unsettled, he permitted this conviction, though known to be in conflict with the dominant standard of right conduct, to govern his decision? My own notion is that he would be under a duty to conform to the accepted standards of the community, the *mores* of the times.⁵⁶

In Cardozo's example, the judge's personal moral understanding appears to be an idiosyncratic one, and the same might be said of Judge Yaccarino's views. But a judge would be equally foreclosed from deciding cases based upon personal moral views that, although not a matter of common morality, are widely shared. For example, in the Texas Tech symposium, Judge Thomas M. Reavley suggested that it would be improper for him as a judge to vote to stay the execution of capital punishment in order to promote his "precept of the sacredness of life."⁵⁷

This is not to claim that a judge's conscience has no role in judicial decision-making. At the very least, a judge's personal moral and religious beliefs are part of what the judge invariably brings to the decisionmaking process — they form part of the judge's "normative milieu," to return to Professor Hazard's phrase — and the judge may be influenced by them subconsciously.⁵⁸ But it does not follow that the judge may consciously draw on these beliefs in making judicial determinations. On the contrary, to the extent they enter his mind, he would be

56. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 108 (1921).

57. Thomas M. Reavley, *My Faith and My Work*, 27 TEXAS TECH L. REV. 1295, 1300 (1996) ("I must consider my authority and its limits. My office does not endow me with the decision on capital punishment; it only authorizes me to ensure compliance with the United States Constitution. If the state has satisfied the requirements of the Constitution, I have no legal authority to grant the stay of execution. I abuse my office and the law if I use them to impose my moral beliefs."); accord *People v. Davis*, 371 N.E.2d 456, 468 & n.* (N.Y. 1977) (Breitel, J., dissenting) (noting that in reviewing the death penalty, individual appellate judges may not take account of their philosophical opposition or personal repugnance to capital punishment); see also *Board of Education v. Barnette*, 319 U.S. 624, 646-47 (1943) (Frankfurter, J., dissenting) ("Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic.").

A contrary approach has been adopted, however, by Justice Raul A. Gonzalez of the Supreme Court of Texas. See Gonzalez, *supra* note 31, at 1147 (stating that he is a Roman Catholic who "believe[s] that we are called to live our faith full time, not just on weekends, and that all our thoughts, words, and deeds should be impacted by our religious convictions"). On occasion, his judicial decisions have been directly impacted by what he believes as a Christian. *Id.* at 1148. For example, in *Kennedy v. Hyde*, 682 S.W.2d 525 (Tex. 1984), the issue was the enforceability of an oral settlement agreement under the Texas Rules of Civil Procedure. Justice Gonzalez dissented from the court's decision that the rules do not permit enforcement of an oral agreement because "[i]t was clear to me that the only dispute was that one of the parties to the agreement had changed his mind and chose not to be bound by the agreement. My faith teaches me that unless there are extenuating circumstances, such as fraud or misrepresentation, people ought to live up to their commitments." Gonzalez, *supra*, at 1150. See also James F. Nelson, *The Spiritual Dimension of Justice*, 27 TEXAS TECH L. REV. 1237, 1249 (1996) ("I cannot believe that it is possible for any judge to persevere and succeed without substantial reliance upon his or her moral reservoir. A judge who feels able to divorce law from morality is subject to judicial schizophrenia.").

58. See, e.g., CARDOZO, *supra* note 56, at 167 ("Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge.").

expected to put them to the side and make the decision based exclusively on considerations that the law prescribes.⁵⁹

Nor is this to say that a professional norm limiting reliance on personal moral views necessarily can be enforced, as it was in *Yaccarino*,⁶⁰ by a higher court. One would expect that a savvy judge who bases his or her decision on personal morality will not do so explicitly, but will cite only legally relevant grounds for the decision.

Finally, none of this is to say that morality has no place in judicial decisionmaking. There is room to debate whether and to what extent interpreting or applying the law may require moral reasoning, reference to one's understanding of the law's moral underpinnings, or consideration of commonly accepted moral norms.⁶¹ The point is simply that the professional norms governing judicial

59. This assumption underlies the law governing judicial recusal. Judges are assumed to be able to decide cases based on legal considerations, notwithstanding relevant personal views based on prior experience. For example, judges in civil rights cases have declined to recuse themselves in response to claims that they will be biased because of their race, gender, or prior legal experience working on behalf of individuals who have suffered discrimination. *See, e.g.,* Blank v. Sullivan & Cromwell, 418 F. Supp. 1 (S.D.N.Y. 1975) (Motley, J.) (finding that the sex and race of the judge insufficient to prove bias sufficient to warrant recusal); *Pennsylvania v. Local 542, Int'l Union of Operating Engineers*, 388 F. Supp. 155 (E.D. Pa. 1974) (Higginbotham, J.), *aff'd*, 478 F.2d 1398 (3d Cir. 1974) (failing to prove bias based upon judge's race and zealous advocacy on behalf of African-Americans).

Interestingly, Judge John T. Noonan, Jr. made no reference to these prior decisions in response to a religion-based recusal motion — notwithstanding that his coauthored casebook does so. JOHN T. NOONAN, JR. & KENNETH I. WINSTON, *THE RESPONSIBLE JUDGE* 302-06 (1993). In *Feminist Women's Health Ctr. v. Codispoti*, 69 F.3d 399 (9th Cir. 1995), an abortion-related case, the plaintiffs sought his recusal based on the fervor of his beliefs as a member of the Catholic Church, which supports the belief that (in Judge Noonan's words) "the deliberate termination of a normal pregnancy is a sin, that is, an offense against God and against neighbor." *Id.* at 400. The plaintiffs argued that Judge Noonan's " 'fervently-held religious beliefs would compromise [his] ability to apply the law.' " *Id.* (quoting plaintiff's brief). In denying the motion, Judge Noonan relied entirely on Article VI of the Constitution, which provides that "no religious Test shall ever be required as a Qualification to any Office or public trust under the United States." *Id.*, U.S. Const. art. VI, § 2. He noted that the Catholic Church was only one of a number of religious bodies or denominations teaching that abortion is ordinarily sinful; Orthodox Judaism and the Church of Jesus Christ of Latter-Day Saints were others. *Id.* Because it is unworkable to distinguish "fervently-held" from "lukewarmly maintained" beliefs, the implication of the plaintiffs' argument would be that judges who were Catholics, Jews, or Mormons would be excluded from deciding a broad class of cases. *Id.* Judge Noonan concluded that this reduction in these judges' sphere of action would, in effect, impose a religious test on the federal judiciary, in violation of the Constitution. *Id.* at 400-01. In so ruling, Judge Noonan never expressly denied the plaintiffs' claim that his religious beliefs would compromise his ability to apply the law in abortion-related cases. Such a denial may have been implicit, however, in Judge Noonan's observation that "[i]f religious beliefs are the criterion of judicial capacity in abortion-related cases, . . . I should have disqualified myself from hearing or writing *Koppes v. Johnston*, 850 F.2d 594 (9th Cir. 1988), upholding the constitutional rights of an advocate of abortion." *Id.* at 400.

60. *In re Yaccarino*, 502 A.2d 3 (N.J. 1985).

61. *See, e.g.,* Cardozo, *supra* note 56, at 106 ("[The judge's] duty to declare the law in accordance with reason and justice is seen to be a phase of his duty to declare it in accordance with custom. It is the customary morality of right-minded men and women [that] he is to enforce by his decree."); *id.* at 109 ("Some relations in life impose a duty to act in accordance with the customary morality and nothing more. In those the customary morality must be the standard for the judge."); *United States ex rel. Iorio v. Day*, 34 F.2d 920, 921 (2d Cir. 1929) (Hand, J.) (stating that when Congress requires a finding of moral turpitude as grounds for deportation, court will try to ascertain "accepted moral notions"). *But see* Edmond Cahn, *Authority and Responsibility*, 51 COLUM.

decisionmaking do not invariably permit — and, in fact, generally forbid — explicit reliance on *personal* moral views. Thus, the norms governing lawyers *qua* judges would seem to provide a counter example to the robust claim that the professional norms permit lawyers always to rely on personal conscience in making professional decisions.

One might argue, however, that the judge's office or station in life is different from that of the lawyer in private practice and, therefore, the exercise of judicial discretion is different from the exercise of discretion in one's role as a lawyer representing a private client. Judges are public officers. They are forbidden from giving weight to their own religious beliefs because religious argument has no place in the public square and/or because, as Kent Greenawalt has suggested, "one expects judges to rely on arguments they believe should have force for all judges. In our culture this excludes arguments based on particular religious premises."⁶² These principles do not apply to lawyers representing private clients. Although lawyers have been termed "officers of the court,"⁶³ "officers of the law,"⁶⁴ and "officers of the legal system,"⁶⁵ lawyers are public officers only in a metaphorical sense.⁶⁶ Lawyers are not representatives of the public except when they serve a public entity as a client. When lawyers represent private clients — including religious institutions — they unquestionably may promote and publicly advocate for private moral or religious understandings or beliefs (namely, those of their private clients) in ways that judges could not. If that is the case, it might be asked, cannot lawyers also act in accordance with their *own* personal moral and religious beliefs, at least in areas that permit discretion?

Example Four: Defining and undertaking the objectives of the representation

Faith, a matrimonial lawyer, agrees to represent Mrs. Bornstein in response to her ex-husband's motion to obtain visitation rights. Like Judge Yaccarino,⁶⁷ Faith holds the view that divorce is immoral and that the religious principle that children should honor their parents means that children of divorced parents should spend time with the noncustodial parent whether they like it or not.

L. REV. 838, 844 (1951) (arguing that naturalization provisions referring to applicants' "moral character," if not struck down as unconstitutionally vague, should be interpreted in accordance with the judge's moral views, not common societal views).

62. Kent Greenawalt, *Religious Expression in the Public Square — The Building Blocks for an Intermediate Position*, 29 LOY. L.A. L. REV. 1411, 1419 (1996).

63. See generally WOLFRAM, *supra* note 23, at 17-19 (discussing origin and significance of characterization of lawyers as "officers of the court").

64. *Id.* at 688; Lawry, *supra* note 10, at 326.

65. See, e.g., Hazard, *supra* note 18, at 131-32 ("Admission to the bar is the legal transformation of a lay person into an officer of the legal system, effectuated by law through the act of the supreme court of the jurisdiction or some similarly constituted authority.").

66. See, e.g., Bruce A. Green, Note, *Court Appointment of Attorneys in Civil Cases: The Constitutionality of Uncompensated Legal Assistance*, 81 COLUM. L. REV. 366, 373-76 (1981) (arguing that the "officer of the court doctrine" is inapplicable to American attorneys in that they are not "ministerial agents of the judiciary").

67. *In re Yaccarino*, 502 A.2d 3, 11 (N.J. 1985).

If Mrs. Bornstein decides that out of concern for her children's psychological well-being she does not want her ex-husband to visit her children, Faith may not contravene Mrs. Bornstein's instructions by setting out to assist Dr. Bornstein's attempt to compel the children to spend time with him. A lawyer must "abide by a client's decisions concerning the objectives of representation."⁶⁸ Nor may Faith assert Mrs. Bornstein's position but, in doing so, covertly adopt a strategy that is intended to fail.⁶⁹ For example, although Faith has considerable discretion to decide what evidence to present to the court, she may not elect to withhold the testimony of psychiatric experts if her purpose in doing so is to weaken Mrs. Bornstein's case.⁷⁰

This is true for two reasons. First, the decision about which tactics to employ involves what William Simon has called a "grounded discretionary judgment" akin to that employed by a judge.⁷¹ Although the professional norms allow the lawyer to "assume responsibility for technical and legal tactical issues,"⁷² the considerations relevant to the lawyer's exercise of professional discretion are implicitly prescribed by this rule. The lawyer must adopt tactics that are reasonably calculated to achieve the client's objectives, or at least not to subvert them. Thus, decisions about whether to retain experts, which experts to retain, and which witnesses to call ordinarily are tactical decisions entrusted to the lawyer, but a lawyer may not make these decisions to achieve objectives defined by the lawyer's personal moral or religious beliefs.

68. MODEL RULES Rule 1.2(a). On the division of decisionmaking authority between lawyers and their clients, see, for example, Susan R. Martyn, *Informed Consent in the Practice of Law*, 48 GEO. WASH. L. REV. 307 (1980); Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979); Mark Spiegel, *The New Model Rules of Professional Conduct: Lawyer-Client Decisionmaking and the Role of Rules in Structuring the Lawyer-Client Dialogue*, 1980 AM. B. FOUND. RES. J. 1003 (1980); Marcy Strauss, *Toward a Revised Model of Attorney Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315 (1987) (arguing that in practice, the traditional rule allocating lawyer control over "means" and client control of the "ends" of the representation affords too much control to the lawyer).

69. See, e.g., Hazard, *supra* note 18, at 135-36, who writes:

A lawyer is an agent, not a principal. Having taken on a client, a lawyer is not free to pursue the client's objectives only to the extent that the lawyer may see fit. The lawyer has to go forward to the point that the client sees fit, within the limits of the law. Openly deviating from a client's purposes is professional disloyalty, and covertly deviating from them involves professional dishonesty as well.

Client objectives impose substantial constraints on a lawyer's ethical autonomy . . . [R]ecognition that the client's objectives must prevail, as long as they are within the limits of the law, makes the concept of independent judgment ethically more important even while rendering it more complex and elusive.

Id.

70. In most cases, professional norms would permit the lawyer to withdraw from the representation to avoid the conflict between the lawyer's personal beliefs and the client's objectives. See MODEL RULES Rule 1.16(b)(2) (allowing a lawyer to withdraw from representing a client if the client will not be prejudiced or if the lawyer considers the client's objective to be "repugnant"); see also *infra* notes 86-88 and accompanying text (discussing the limitations on the lawyer's right to withdraw).

71. Simon, *supra* note 9, at 1120.

72. MODEL RULES Rule 1.2.cmt.

Second, the lawyer's discretion in making tactical decisions is subject to other professional obligations. These include the duties of competence,⁷³ zealous advocacy,⁷⁴ candor,⁷⁵ and loyalty,⁷⁶ all of which would be violated by the surreptitious adoption of a strategy designed to further the lawyer's personal objectives at the expense of the client's objectives.⁷⁷ A lawyer who could not put aside personal beliefs that conflicted with the client's objectives would therefore have a conflict of interest that would foreclose undertaking or continuing the representation.⁷⁸

This is not to say that a lawyer may never draw on personal values in deciding how to carry out the client's objectives.⁷⁹ The point is simply that, in the exercise of discretion, the professional norms do not *invariably* allow lawyers to act in accordance with their personal moral or religious understandings and that one area in which the lawyer's personal views may be impermissible criteria is in the exercise of discretion regarding how to achieve the objectives of the representation — an area of lawyer decisionmaking that is central to virtually every representation in which a lawyer is engaged to act on the client's behalf.

III. THE ROLE OF PERSONAL MORALITY AND RELIGION IN THE EXERCISE OF PROFESSIONAL DISCRETION

If the professional norms do not always permit a lawyer's personal moral and

73. See, e.g., *id.* Rule 1.1 ("A lawyer shall provide competent representation to a client.").

74. See, e.g., MODEL CODE Canon 7 ("A Lawyer Should Represent a Client Zealously Within the Bounds of the Law").

75. See, e.g., MODEL RULES Rules 1.4 ("A lawyer shall keep a client reasonably informed about the matter and promptly comply with reasonable requests for information."), 8.4(c) ("It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit[,] or misrepresentation.").

76. See, e.g., *id.* Rule 1.7 cmt. 1 ("Loyalty is an essential element in the lawyer's relationship to a client.").

77. Cf. MODEL RULES OF PROFESSIONAL CONDUCT ANNOTATED Rule 1.2 commentary at 22 (1996) [hereinafter MODEL RULES ANN.] (citing *Model Rules* 1.3 and 1.7 for the proposition that "a lawyer may not allow personal interests and loyalties, including political or social viewpoints, to dilute the diligence or vigor with which a client is represented").

78. See MODEL RULES Rule 1.7(b) ("A lawyer shall not represent a client if the representation of the client may be materially limited by . . . the lawyer's own interests . . .").

79. In some cases, the lawyer's personal values will coincide with professional values. In others, the lawyer's values will coincide with those to which the client ascribes equal weight. In still others, conduct based on the lawyer's values will not be inconsistent with the fulfillment of the client's legitimate objectives. In each of these cases, a lawyer's reliance on personal values in making "tactical" decisions is likely to be unobjectionable. Suppose, for example, that the lawyer for the opposing litigant requests additional time to respond to a motion and the lawyer's client has no particular interest in expediting the matter. In that case, the client's objectives will not be harmed by consenting to the request; further, a lawyer generally would be expected to consent as a matter of "professional courtesy." For either of these reasons, a lawyer who consented, instead, based on the religious belief that one should "love thy neighbor" could scarcely be criticized. In contrast, it would be improper, based on the moral conviction that individuals should repay just debts, for a lawyer unilaterally to decide not to interpose a defense based on the statute of limitations. See Wolf, *supra* note 12, at 45-46 ("While retaining a client, a lawyer is obliged to make whatever legal claims the law explicitly and straightforwardly permits that can be expected to foster that client's legal interests This means that a good lawyer must, for example, invoke the statute of limitations when it applies in a way that promotes the achievement of a client's goals" (footnote omitted)).

religious understandings to influence or determine how the lawyer makes professional decisions, when and how may these understandings permissibly be brought to bear? Consider the following additional scenarios.

Example Five: Establishing the lawyer's fee

Feeney, who is terminally ill and has no family, has come to Goodheart, a lawyer, to have his will drafted. Feeney has \$2,000, which he wants to leave to a former co-worker. Goodheart's standard fee for a simple will is \$500.

A lawyer's fee may not be unreasonable.⁸⁰ Assuming that \$500 would be a "reasonable" fee for drafting Feeney's will, may Goodheart nevertheless charge only a nominal fee or no fee at all for this service, based on her religious or personal moral belief that it would be unconscionable to take what remains of Feeney's assets?⁸¹ Of course she may. Within the limits set by the professional norms, it is entirely a matter of discretion what fee a lawyer sets. Further, the norms set no criteria for, and exclude no criteria from, the exercise of this discretion.

In many other areas of professional conduct, including those relating to the representation of clients, the professional norms likewise appear to afford lawyers unlimited discretion, albeit within certain bounds. To give a few examples: A lawyer must "act with reasonable diligence and promptness."⁸² But a lawyer may, for moral or religious reasons, act even more diligently or promptly than reasonably required. A lawyer must "keep a client reasonably informed about the status of a matter"⁸³ and "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."⁸⁴ But a lawyer may, for moral or religious reasons, provide more detailed information than would reasonably be required.

In these contexts, the lawyer's professional discretion might be said to be bounded but not grounded. That is, the lawyer must make a decision within prescribed bounds or limits, but within those limits the grounds on which the lawyer exercises discretion are left to personal conscience. In its preamble, the *Model Code* identified the role of personal values in making decisions such as these: "[e]ach lawyer must find within his own conscience the touchstone against

80. MODEL RULES Rule 1.5(a).

81. Goodheart might chart her course by two biblical injunctions that David Smolin identified in his discussion of how religious rhetoric could be brought into the debate about welfare and medicaid reform: "If a man shuts his ears to the cry of the poor, he too will cry out and not be answered," and "He who oppresses the poor to increase his wealth and he who gives gifts to the rich-both [sic] come to poverty." David M. Smolin, *Cracks in the Mirrored Prison: An Evangelical Critique of Secularist Academic and Judicial Myths Regarding the Relationship of Religion and American Politics*, 29 LOY. L.A. L. REV. 1487, 1491 (1996) (quoting *Proverbs* 21:13, 22:16).

82. MODEL RULES Rule 1.3.

83. *Id.* Rule 1.4(a).

84. *Id.* Rule 1.4(b).

which to test the extent to which his actions should rise above the minimum standards.”⁸⁵

Example Six: Withdrawal from the representation

Faith initially agreed to represent Mrs. Bornstein (in Example Four) because Mrs. Bornstein did not oppose her husband's application for visitation rights. However, the reports of the psychologists lead Mrs. Bornstein to change her mind. Thereupon, Faith changes her mind about the desirability of representing Mrs. Bornstein, having concluded that her own personal moral and religious belief — namely, that children should revere their parents — is offended by Mrs. Bornstein's desire to accommodate her children's refusal to visit their father.

May Faith invoke her personal beliefs to justify withdrawing from the representation? It might seem obvious that she may. At least in cases in which the client will not be disadvantaged, the professional norms appear to give lawyers as much freedom to exit the representation as to enter. Under the *Model Rules*, “a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client.”⁸⁶ Indeed, even when the client would be disadvantaged, a lawyer may terminate the representation when “a client insists upon pursuing an objective that the lawyer considers repugnant.”⁸⁷ This plainly would include objectives that offend the lawyer’s personal moral or religious understandings, and not solely those that are repugnant as a matter of common morality.⁸⁸

Faith cannot get off so easily, however. She has invoked a highly particular personal belief.⁸⁹ Mrs. Bornstein could not reasonably have anticipated that Faith held this belief, which is far from universal. On the other hand, before undertak-

85. MODEL CODE pmbl.; see also WOLFRAM, *supra* note 23, at 68 (suggesting that “what a lawyer can conscientiously extract from the meaning of a professional rule should guide a lawyer’s personal conduct although, as a legal technician, the lawyer might advise another lawyer that the conduct would probably not in fact result in a court imposing a sanction.”).

86. MODEL RULES Rule 1.16(b). The one limitation is that, in a judicial proceeding, the lawyer may require judicial authorization to withdraw. *Id.* Rule 1.16(c).

87. *Id.* Rule 1.16(b)(3).

88. Professors Freedman and Shaffer have debated whether a lawyer should be permitted to withdraw from the representation over the client’s objection, in order to avoid participating in morally offensive conduct, where doing so will prejudice the client’s interests. Professor Freedman has advocated for a rule that would require the lawyer to carry out the client’s objectives in this situation, see Monroe H. Freedman, *Legal Ethics and the Suffering Client*, 36 CATH. U. L. REV. 332-33 (1987) (arguing that there is an important “difference between” rejecting a case and giving “less than the lawyer’s zealous best”), while Professor Shaffer has argued in favor of “conscientious objection.” See Shaffer, *supra* note 12, at 877 (“If the client *rejects* the lawyer’s moral counsel and the lawyer feels strongly enough that the client’s proposed course of action although lawful, is morally repugnant, the lawyer has the *right* and the professional *duty* to desist.”).

89. In another context, Professor Greenawalt has noted that “it is difficult to come up with any satisfactory division” between “deep fundamental religious assumptions, such as that God loves all human beings equally” and “narrower, more specific religious grounds, such as the Pope’s explanation of how natural law precludes artificial contraception and abortion.” Greenawalt, *supra* note 62, at 1414. With respect to the role of personal

ing the representation, Faith could have anticipated the possibility that her belief would be implicated. Mrs. Bornstein's reaction is therefore likely to be, "Why didn't Faith tell me she felt this way? Had she done so, I never would have hired her." Even if Faith refunds her fee and Mrs. Bornstein has enough time to obtain another lawyer, there is still a cost from Mrs. Bornstein's perspective. Like Faith, Mrs. Bornstein has invested time and emotional energy in developing a client-lawyer relationship of trust and confidence. Faith's withdrawal from the representation, on grounds that amount to a moral condemnation by the person in whom the client has placed her trust, might reasonably be perceived to be an act of betrayal.⁹⁰

Some would argue that Faith had no business undertaking the representation in the first place: if a lawyer's personal moral or religious understandings are reasonably likely to restrain the lawyer from acting for a client in the manner in which a lawyer ordinarily would be expected or required to act, the lawyer should not accept the client.⁹¹ This concept would be even more emphatically true in a divorce action, given Faith's belief that divorce is immoral. Even if the client initially seeks representation in opposing her spouse's divorce action, it is foreseeable that she will change her mind, thereby bringing her objectives into conflict with the lawyer's moral or religious convictions. At the very least, as a matter of candor and to minimize the likelihood that the client will feel betrayed by the lawyer who terminates the representation, a lawyer in Faith's position should disclose to Mrs. Bornstein that she possesses particular beliefs that (a) are not commonly held, (b) may be implicated in the particular representation, and (c) if implicated, will lead Faith to terminate the representation.⁹²

Example Seven: Client counseling

Faith initially agreed to represent Mrs. Bornstein (in Example Four) because Mrs. Bornstein did not oppose her husband's application for visitation rights. After undertaking the representation, two psychologists report that the children will be harmed if they are forced to visit with Dr. Bornstein. Mrs. Bornstein seeks Faith's advice about whether to oppose the application.

values in professional decisionmaking, however, it seems fair to say that specific beliefs are likely to present more difficult questions.

90. Cf. Harold S. Lewis, Jr., *Commentary: Shaffer's Suffering Client, Freedman's Suffering Lawyer*, 38 CATH. U. L. REV. 129, 132 n.13 (1988) (arguing that withdrawal from the representation for reasons of conscience "unfairly disappoints the client's reasonable expectations").

91. Cf. Levinson, *supra* note 16, at 1607 (quoting a rabbi who states that an observant Jewish lawyer who believes that he is forbidden from helping a criminal escape the consequences of his act should not represent criminal defendants).

92. In other contexts, the duty to keep a client reasonably informed has been read to include an obligation, before undertaking the representation, to provide information that might reasonably affect the client's decision whether to retain the lawyer. See, e.g., ABA Comm. on Ethics and Professional Responsibility, Formal Op. 97-406 (Apr. 19, 1997) (concurring opinion of Lawrence J. Fox) ("Rule 1.4 contains an independent obligation to inform the client that the lawyer is either representing or being represented by the lawyer on the other side."); cf. N.J. Advisory Comm. on Professional Ethics, Op. 600 (July 30, 1987) (stating that a lawyer should disclose to prospective client that a member of the lawyer's firm is married to a member of the opposing counsel's firm).

Undoubtedly, a lawyer's personal values may influence the manner in which she counsels a client. Thus, as Teresa Collett has described, a lawyer believing that you should "love your neighbors as yourself" may be influenced to relate to her clients in a particular way, for example, with expressions of concern for the clients' emotional as well as legal needs.⁹³ In discussing the influence of his religious beliefs, Joseph Allegetti made the similar point that "[s]ometimes lawyers serve clients . . . just by being present and listening, by taking the client seriously and valuing the client as a person."⁹⁴ Both also assume, however, that a lawyer's moral and religious beliefs may equally influence the content of a lawyer's advice.⁹⁵ Is this invariably true? For example, may Faith, influenced by her personal belief that children should revere their parents, urge that, notwithstanding the psychologists' report, Mrs. Bornstein should not oppose her husband's application and, indeed, that it would be immoral for her to do so?

The professional norms appear to assign a significant role to lawyers' moral understandings in the context of client counseling.⁹⁶ The *Model Rules* say that "it is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice,"⁹⁷ and the predecessor *Model Code* was to like effect.⁹⁸ Some have argued, further, that giving advice about moral considerations ought to be *required*, not simply permitted.⁹⁹

This presents two important questions, however. First, whose moral understand-

93. See Collett, *supra* note 3, at 1052 ("As a Christian woman I have professed a belief in the God who calls me to care about myself and others . . .").

94. Allegetti, *supra* note 24, at 969.

95. *Id.* ("We are . . . confident as well that God can use us as instruments of grace and love. Sometimes lawyers serve clients by the advice they give . . . Sometimes by prophetically raising issues or concerns that their clients would just as soon ignore."); Collett, *supra* note 3, at 1052 ("[L]ove born of faith causes us to love God and seek justice. It calls us to relate to our clients in the fullness of their present pain or desire. . . . The son considering a will contest is provided both an accurate assessment of the legal issues present in the facts and a caution that such actions destroy family solidarity. The business partners seeking incorporation are given counsel concerning both the legal implications of creating such an entity and the manner in which such entities can contribute to or detract from building up the common good.").

96. See Geoffrey C. Hazard, Jr., *Doing the Right Thing*, 70 WASH. U.L.Q. 691, 695 (1992) ("With regard to interjection of personal, moral[,] and prudential values, under the governing rules of professional ethics the lawyer has authority and at times the duty to be assertive."); *id.* at 699 ("Thinking of a client as a 'damned fool' is not exactly formal legal analysis. To the contrary, it involves unashamed interjection of personal and prudential considerations into giving legal advice. The rules of professional ethics recognize the propriety of doing so.").

97. MODEL RULES Rule 2.1 cmt. (1983); see also *id.* Rule 2.1 ("In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social[,] and political factors, that may be relevant to the client's situation.").

98. See MODEL CODE EC 7-8 ("Advice of a lawyer to his client need not be confined to purely legal considerations. . . . In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors [that] may lead to a decision that is morally just as well as legally permissible.").

99. See Jamie G. Heller, *Legal Counseling in the Administrative State: How to Let the Client Decide*, 103 YALE L.J. 2503, 2504 (1994) ("[T]he legal counselor should provide what this Note calls 'full-picture' counseling."); Margulies, *supra* note 11, at 214 (arguing that lawyers have a responsibility to counsel clients on moral considerations); Thomas L. Shaffer, *The Practice of Law as Moral Discourse*, 55 NOTRE DAME L. REV. 231, 231 (1979) (stating that a lawyer's personal moral and religious views should enter into discussions of advocacy).

ings may be raised: those of the client? those commonly recognized in society? the lawyer's unconventional personal beliefs? the lawyer's religious beliefs? Second, how may moral understandings be employed in counseling clients? Is the lawyer limited to identifying a moral consideration? May the lawyer affirmatively recommend that the client base his decision on the particular consideration? May the lawyer rely, explicitly or tacitly, on the moral consideration in formulating the lawyer's recommendation about what decision the client should make?

The most constricted conception of the lawyer's discretion has been advanced by those who advocate "client-centered" counseling. For example, *Lawyers as Counselors: A Client-Centered Approach*,¹⁰⁰ a leading law-school text, cautions that "though you may ultimately provide a client who asks for it with your opinion, you should do so only after you have counseled a client thoroughly enough that you can base your opinion on the client's subjective values, not on your own."¹⁰¹ When clients clearly request "advice based on *your* personal values," you may offer such advice out of respect for "clients as autonomous individuals."¹⁰² But even then, the text advises, you should "be sure to mention the [personal] values and attitudes on which you rest your decision" so that "clients can compare their attitudes to yours when deciding how much weight to give your opinion."¹⁰³

Again reflecting their porous nature, the professional norms permit a lawyer to choose among philosophies of client counseling. It is permissible for lawyers to approach the task less neutrally. Indeed, the above-quoted provision itself implies that lawyers may at least "refer" to relevant considerations that the client has not himself identified as relevant to his decisionmaking process. As a practical matter, it is hard to see how a lawyer could learn which moral considerations are important to the client without identifying considerations that may be relevant and inviting the client to reflect on whether or not he considers them important.¹⁰⁴ Further, it is not uncommon for lawyers to make unsolicited recommendations either about what considerations the client should weigh or about what decision the client ultimately should make. There is nothing approaching a professional consensus in favor of a "client-centered" approach under which a lawyer

100. DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (1991).

101. *Id.* at 279.

102. *Id.* at 280 & n.49.

103. *Id.* at 350.

104. See, e.g., FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS*, *supra* note 22, at 51-52 (arguing that lawyers have an obligation to engage in moral counseling, which involves presenting moral considerations to the clients for their consideration, rather than "preempt[ing] . . . clients' moral judgments" by, for example, "assum[ing] that the client wants us to maximize his material or tactical position in every way that is legally permissible, regardless of non-legal considerations"); Monroe H. Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U. L. REV. 191, 204 (1978) (asserting that "the attorney acts both professionally and morally in assisting clients to maximize their autonomy, that is, by counseling clients candidly and fully regarding the clients' legal rights and moral responsibilities as the lawyer perceives them").

generally must refrain from expressing any opinion at all, much less one based on the lawyer's own values.¹⁰⁵

Nonetheless, the lawyer's discretion in counseling clients, as in many contexts, is both loosely prescribed and circumscribed. The lawyer is limited to moral and other non-legal considerations that are relevant — that is, considerations that might be weighed by the client in making the particular decision. Further, the professional obligations of competence and candor place limits on how advice is presented as well as on its content. In general, a client seeks the lawyer's advice in order to be able to make an informed decision. Advice that undermines the client's ability to make an informed decision — because the advice is coercive,¹⁰⁶ false, incomplete, or so offensive as to undermine the client's trust in the lawyer¹⁰⁷ — thus may be contrary to applicable professional norms.

For these reasons, as the above-quoted text¹⁰⁸ on client counseling suggests, it would be improper for a lawyer to recommend a course of conduct when the lawyer's motivation is to promote the lawyer's *unexpressed* personal views.¹⁰⁹ Suppose that Mrs. Bornstein seeks Faith's advice about whether to support, oppose, or take no position with respect to her husband's application for visitation rights. Mrs. Bornstein may express concern about legal considerations. For example, her response and/or the judge's decision may affect other legal issues, such as the terms of her ex-husband's support payments. She may express concern about non-legal considerations. For example, her willingness to support or oppose her children's desires may influence her relationship with them, and the judge's decision may affect their psychological well-being. If Faith recommends that Mrs. Bornstein support her ex-husband's application without revealing that this advice is predicated on personal values that Mrs. Bornstein does not share, the advice will be both incompetent and deceptive, because Mrs. Bornstein will

105. See Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 509 (1990) ("The most controversial aspect of Binder and Price's client-centered counseling model is their great resistance to the lawyer giving the client her opinion as to what action the client should take."); Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 744 (1987) (viewing it as manipulative for lawyers to withhold their opinions). For a critique of the client-centered approach, arguing that a lawyer cannot be morally neutral, see SHAFFER & COCHRAN, *supra* note 2, at 19-24. See also Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 623 (1985) (criticizing lawyer amorality).

106. See, e.g., *People v. Adams*, 836 P.2d 1045 (Colo. 1991) (Dubofsky, J., dissenting) (stating that the defense lawyer's advice about the "potential hazards of incarceration" in the event the defendant was convicted after trial "went far beyond a legitimate informational advisement and recommendation and constituted threats and coercion").

107. See, e.g., *Frazer v. United States*, 18 F.3d 778, 780, 783-84 (9th Cir. 1994) (finding that, if defense lawyer directed racist outburst at defendant, as alleged, "[s]uch a disrespectful and inappropriate eruption would signal and be tantamount to (unless somehow cured) a 'total lack of communication' far exceeding the parameters of any duty on the part of counsel to deliver to his client a 'pessimistic prognosis' of his legal position.") (quoting *United States v. Rogers*, 769 F.2d 1418, 1424 (9th Cir. 1985)).

108. See *supra* notes 97-103 for that text.

109. See, e.g., *Williams v. Chrans*, 742 F. Supp. 472, 480 n.5 (N.D. Ill. 1990) (criticizing defense lawyers in capital cases for pressuring client to plead guilty because lawyers were motivated to do so by their moral objections to the death penalty).

erroneously understand that Faith is recommending the position that, in Faith's view, would best fulfill Mrs. Bornstein's objectives.

Thus, when it comes to whether personal views are better expressed or left unexpressed, the analogy to discussions of "religion in the public square"¹¹⁰ breaks down. It is generally considered more troublesome for legislators to invoke explicit religious arguments to justify their decisions than to rely on religious arguments tacitly in making decisions.¹¹¹ In contrast, it is more troublesome for a lawyer to conceal the religious (or personal moral) beliefs underlying her advice than to make them explicit in urging a course of conduct. The lawyer's advice is deceptive when the lawyer conceals her motivations, because the client will reasonably misunderstand that the advice reflects the lawyer's judgment about how best to achieve the client's objectives, not the lawyer's objectives.

May a lawyer make a recommendation based on values that the client does not share, as long as the lawyer is candid?¹¹² The strongest case for doing so is when the lawyer's values coincide with professional values¹¹³ or common societal values.¹¹⁴ Returning to Example One,¹¹⁵ few would contest that Hopewell has the professional discretion to advise Jones that "[a]llowing an innocent person to die when you have the power to save him is . . . a serious moral wrong,"¹¹⁶ that Jones should consider this in making his decision whether to admit to the murder for which Smith awaits execution, and, indeed, that Jones ought to make the

110. See *supra* text accompanying note 62 for this analogy.

111. See Greenawalt, *supra* note 62, at 1419 (stating that judges are expected to rely on arguments that have force with all judges, not arguments with religious premises).

112. Cf. Post, *supra* note 12, at 464 (suggesting that lawyers should not be discouraged from influencing clients to act in accordance with the lawyer's ethical judgment, "so long as this is done without the pretense of professional authority"). That this question can be asked suggests the distance that the professional norms have traveled since the nineteenth century, when a lawyer's moral understandings were presumed to be superior to those of the client. See Shaffer & Cochran, *supra* note 2, at 32, 35-37 (discussing American tradition of lawyers making moral choices for clients as "gentleman lawyers"); see also *supra* note 1 and accompanying text (stating that a lawyer must obey his conscience).

113. For example, when a client commits perjury during the representation, the lawyer is obligated to "remonstrate" with the client to remedy the wrongdoing. MODEL RULES Rule 3.3 cmt. Likewise, lawyers may, and generally should, advise clients to comply with the law. Cf. MODEL CODE EC 7-5 ("A lawyer should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment therefor."). Professor Freedman has argued that one of the justifications for an "ethics of lawyer-client trust and confidence" is precisely that, in the context of such a relationship, the lawyer is better able to provide effective moral counseling to dissuade clients from committing crimes, frauds, or perjury. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS, *supra* note 22, at 87-88, 120.

114. See, e.g., In re Ludlam's Estate, 285 N.Y.S. 597, 600 (Sur. Ct. 1936) (finding that an attorney advising his client to return a gift because the gift was ineffective is not duress).

For a criticism of a lawyer's reliance on societal values, see Reed Elizabeth Loder, *Out of Uncertainty: A Model of the Lawyer-Client Relationship*, 2 S. CAL. INTERDISC. L.J. 89, 134-35 (1993) (discussing different moral standards used by lawyers in decision making).

115. See *supra* text accompanying note 38 for that example.

116. Lawry, *supra* note 43, at 1646.

admission in light of this moral consideration. The advice would be proper notwithstanding that Jones himself may appear to value human life less highly and that such an admission may be contrary to Jones's own liberty interests. Going further, Robert Lawry argues that Hopewell would have an affirmative obligation to urge Jones to make disclosure.¹¹⁷

Lawyers act in accordance with a legitimate understanding of the professional norms when they counsel clients to comply with common societal norms, just as when they advise clients to comply with the law. Lawyers have a responsibility to society, as well as to individual clients.¹¹⁸ At the same time, simply encouraging a client to act in accordance with societal and legal norms would not seem to be unduly coercive, offensive, or misleading. For example, Hopewell's recommendation that Jones take responsibility for the murder for which Smith is to be executed would demonstrate respect for Jones as an individual who, notwithstanding his prior wrongs, is capable of moral decisionmaking. Indeed, Jones might find it surprising, and perhaps even disrespectful, if his lawyer were not to advise him to act in accordance with what Jones surely must know to be the accepted societal norms.

The more troublesome case is where the lawyer recommends that the client act, or consider acting, on the basis of a religious belief that the client does not share.¹¹⁹ Returning to Example Seven,¹²⁰ suppose that Faith advises Mrs. Bornstein, "Despite what the psychologists say, you should not oppose your ex-husband's request for visitation, because it is God's will that your children visit with him." Or suppose, putting it less forcefully, Faith advises, "In deciding on what position to take in this proceeding, you might want to bear in mind that it is a tenet of my religious faith that children revere their parents." In either case, if Mrs. Bornstein is not a member of the same religious faith and does not share Faith's religious beliefs, she is likely to feel confused, because Faith's beliefs are irrelevant to her own decisionmaking, and offended, because of the implication that her own religious beliefs (if any) are inadequate.¹²¹ Mrs. Bornstein cannot reasonably be expected to adopt Faith's religious beliefs as the basis of her own decisionmaking. A lawyer-client relationship is not conducive to the kind of theological dialogue that might be necessary to convince Mrs. Bornstein of the appropriateness of Faith's theological views and, in any case, it would be abusive

117. *Id.* at 1645.

118. *See, e.g.,* MODEL RULES pmbl. ("Lawyers play a vital role in the preservation of society.").

119. Although Professors Shaffer and Cochran take the view that "[i]f lawyers are to talk with clients about the moral values they have, they may have to talk about religious moral beliefs," SHAFFER & COCHRAN, *supra* note 2, at 60, this is not necessarily to say that the lawyer should recommend that the client act on the basis of the lawyer's religious values. Further, the authors' proposed framework for moral discourse does not expressly contemplate that such a recommendation be made. *Id.* at 113-34.

120. *See supra* text accompanying note 93 for that example.

121. *See* GEOFFREY C. HAZARD, JR., *ETHICS IN THE PRACTICE OF LAW* 146-49 (1978) (discussing whether a lawyer should give ethical advice).

to use the representation as an occasion for an uninvited discussion of religion.¹²² This is the problem of "religion in the public square"¹²³ writ small. A religious lawyer simply is not offering competent counseling when he presents advice that is inaccessible to the nonbelieving client.¹²⁴

When a client has sought the lawyer's advice, it is less troublesome from the perspective of professional norms for the lawyer to respond with a recommendation based on the lawyer's non-conventional moral beliefs (or, perhaps, characterizing one's religious beliefs as personal moral values). Suppose that Faith says, "I believe it is morally right that children should revere their parents. You should encourage your children to do so. They are not showing proper reverence when they refuse to visit with your ex-husband." This expression of personal moral belief would be less offensive to the client than the comparable expression of religious belief and more conducive to moral dialogue. Mrs. Bornstein may have no particular belief about how children should treat their parents. Or she may believe, contrary to Faith, that parent-child relations should involve mutual respect but not reverence, and that it is important at times for children to stand up to authority, including parental authority, rather than invariably deferring. Faith's advice therefore may challenge one of Mrs. Bornstein's particular values, but not her entire system of values or faith. It is conceivable that Mrs. Bornstein would want to refine or reevaluate her particular views on parent-child relations in light of Faith's alternative moral proposition, which Mrs. Bornstein can evaluate independently of either a theological source or an entire set of beliefs of which it is part.¹²⁵ It seems more realistic to think that Mrs. Bornstein will be open to considering the appropriateness of Faith's belief as a personal moral proposition than as a religious one. Thus, a lawyer's belief about right and wrong is more likely to be "relevant" to the client when it is, or is cast as, a personal moral belief (*i.e.*, a belief without an explicit theological source) rather than as a religious belief, even though a religious belief may be shared more widely within the community.¹²⁶

122. Even in dealing with fellow believers, a lawyer may be acting contrary to client expectations in attempting to explore explicitly religious considerations. Cf. B. Carl Buice, *Practicing Law to the Glory of God*, 27 TEXAS TECH L. REV. 1027, 1032 (1996) ("I will no longer represent members of my church. My role expectations and theirs become mixed and very confusing. People want different things from their priest and their lawyer.").

123. See *supra* text accompanying note 62 for more on "religion in the public square."

124. This is not to say that lawyers cannot give advice with reference to their own religious understandings to those of different religious faiths. No one would fault a lawyer for invoking concepts such as compassion, forgiveness, or charity, for example, because these values, although differently understood, are commonly shared.

125. It is also conceivable, if the moral discourse is open, that the lawyer will reevaluate her own moral proposition. SHAFFER, AMERICAN LEGAL ETHICS, *supra* note 1, at 248. This is true, at least, if the proposition is not a religious belief characterized by the lawyer as a personal moral belief.

126. In real life, moral views and religious views are unlikely to be as easily differentiated and neatly cabined as they may appear to be in this example. Thomas Shaffer has informally offered me the example that many who speak of an obligation to help poor people may not understand or explicate this as a religious obligation. Nor are

Even advice framed in terms of moral but nonreligious concerns may pose problems, however, when the client has not sought the lawyer's advice, but has engaged the lawyer to carry out a specific objective that the lawyer finds morally objectionable. For example, if Mrs. Bornstein retained Faith for the specific purpose of opposing Dr. Bornstein's visitation application, Faith's subsequent attempt to discourage Mrs. Bornstein from pursuing this objective, whether on moral or religious grounds, would seem to reflect a lack of zealousness and/or loyalty. In a forthcoming article in connection with the Fordham conference, Howard Lesnick addresses this problem.¹²⁷ He takes issue with a Tennessee ethics opinion that called into question whether a lawyer, appointed to represent a minor seeking an abortion, may strongly recommend a course of action that is contrary to the client's initial objectives but consistent with the lawyer's moral or religious views in opposition to abortion.¹²⁸ Lesnick suggests that, because the client's stated objective may be contingent or may not be her true objective, the lawyer may provide information relating to the wisdom or virtue of the client's decision and invite her to engage in reflection and dialogue.¹²⁹ Lesnick acknowledges, however, that the lawyer must counsel the client sensitively, with restraint, and with openness to the possibility of accepting the client's objectives, and that the lawyer must respect the client's decision to end the dialogue.¹³⁰ Like the Tennessee ethics committee, Lesnick would seem to condemn counseling in which the lawyer strongly discourages the client from pursuing her initial objective. His point, however, is that considerable room remains for client counseling that gives expression to the lawyer's moral and religious beliefs in a manner that invites genuine mutual exploration.

moral and religious views easily separated from legal, scientific, and other views. Lawyers may be influenced not only by professional ethics and personal morality, but also by contingent epistemological assumptions. Further, one set of beliefs may influence the other. For example, Carrie Menkel-Meadow has pointed out to me informally that Faith may believe that particular child-rearing practices are most conducive to raising psychologically healthy children and that her beliefs may be both subject to disagreement within the scientific community and subject to change as scientific knowledge advances. Faith's religious beliefs about parent-child relations may influence her choice among plausible psychological understandings. And, like her religious beliefs, her scientific views may be taken on faith. Similarly, a lawyer's moral or religious opposition to the death penalty may be bound up with her belief that the death penalty is an ineffective deterrent to crime. This obviously poses a challenge insofar as lawyers might be expected to acknowledge, first to themselves and then to their clients, the personal moral and/or religious beliefs underlying recommendations they make to their clients.

127. Howard Lesnick, *The Religious Lawyer in a Pluralist Society*, 66 FORDHAM L. REV. (forthcoming 1997) (manuscript at 2-7, 48-66, on file with the author), discussing Tennessee Formal Ethics Op. 96-F-140 (1996) (holding that the duties of loyalty and zealous advocacy called in question whether a devout Catholic who is appointed against his will to represent a minor seeking an abortion may "strongly recommend that his client discuss the potential abortion with her parents or with other individuals or entities [that] are known to oppose such a choice").

128. *Id.* (manuscript at n.74)

129. *Id.* (manuscript at 54-56 & n.126) (quoting Warren Lehman, *The Pursuit of a Client's Interests*, 77 MICH. L. REV. 1078, 1080-81 (1979)).

130. *Id.* (manuscript at 59-61).

Example Eight: Client counseling (part two)

Upright, a legal ethics expert, is consulted by Woodby, the managing partner of a large metropolitan law firm. The law firm has discovered information giving rise to a strong suspicion that one of its partners, Shady, has been billing clients fraudulently. Woodby seeks Upright's advice about whether or not to disclose the law firm's information to disciplinary authorities. Unknown to Woodby, Upright possesses a personal moral and religious view that it is improper to "snitch" on friends, family, colleagues, and others with whom one has a relationship.

The first question this raises is the extent to which a lawyer may withhold advice in light of the lawyer's personal moral or religious understandings.¹³¹ For example, may Upright advise Woodby that the law firm has no *legal obligation* to disclose Shady's possible wrongdoing¹³² and leave it at that, rather than continu-

131. *United States v. Lopez* presents this issue where the defense lawyer agreed to represent a defendant charged in a drug conspiracy, but stipulated that he would not negotiate a guilty plea with the government in exchange for cooperation because, as he later told the court, he considered such negotiations "personally morally and ethically offensive." *United States v. Lopez*, 989 F.2d 1032, 1042 (9th Cir. 1993) (Fletcher, J., concurring). For an extensive discussion of *Lopez* and issues it raises, see Daniel Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69 (1995).

Additionally, Sanford Levinson has provided an example of where an observant Jewish lawyer might withhold advice based on the lawyer's understanding of a Halakhic command. Levinson, *supra* note 16, at 1606. In his scenario, a lawyer is retained to represent a spouse in a divorce action involving one spouse who is Jewish and one who is not. Because such a marriage is Halakhically forbidden, the lawyer might be required to withhold advice about how to salvage the marriage or, indeed, to advise against doing so. *Id.* Levinson notes that this is an interesting and troublesome example, *id.*, but nevertheless concludes that it is left to the lawyer's discretion and therefore does not involve conflict between religious and professional norms. *Id.* at 1607.

132. Although a lawyer has a general duty to report the misconduct of another lawyer, the relevant rules qualify this obligation. See MODEL RULES Rule 8.3(a) ("A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness[,], or fitness as a lawyer in other respects, shall inform the appropriate professional authority."); MODEL CODE DR 1-103(A) ("A lawyer possessing unprivileged knowledge of a violation of DR1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such a violation."). The rules apply only where a lawyer has knowledge, and not merely a strong suspicion, of misconduct. See, e.g., N.Y. Bar Comm. on Professional Ethics, Op. 635 ("Although absolute certainty is not required under the rule, . . . a mere suspicion of misconduct does not give rise to an obligation to report. . . . [The rule] would not be triggered unless the lawyer has a clear belief, or possesses actual knowledge, as to the pertinent facts."); Gerard E. Lynch, *The Lawyer as Informer*, 1986 DUKE L.J. 491, 516 ("[T]he knowledge requirement seems to exempt the lawyer who has good faith questions about whether a violation has actually occurred."). Even when they apply, these rules are thought to be widely ignored. See Hal Lieberman, *A Lawyer's Duty to Report Misconduct under DR 1-103(A)*, N.Y. L. J., Aug. 21, 1990, at 1 ("[Recent decisions] have caused the bar to re-examine this duty, one [that] more than a few lawyers may have forgotten or wilfully ignored."); WOLFRAM, *supra* note 23, at 683 ("Probably no other professional requirement is so widely ignored by lawyers subject to it."). Further, disciplinary proceedings rarely are brought against lawyers for violating them. Indeed, there has been only one widely reported decision sanctioning a lawyer for violating DR 1-103(A) in recent years, and that decision was widely criticized. See *In re Himmel*, 533 N.E.2d 531 (Ill. 1988) criticized in Richard W. Burke, *Where Does My Loyalty Lie?: In re Himmel*, 3 GEO. J. LEGAL ETHICS 643 (1990); Ronald D. Rotunda, *The Lawyer's Duty to Report Another Lawyer's Unethical Violations in the Wake of Himmel*, 1988 U. ILL. L. REV. 977 (critiquing the ways in which lawyers are held responsible for unethical behavior). All of this suggests that the professional value underlying the rule is contrary to many lawyers' personal morality.

ing on to discuss non-legal (including moral) considerations that might lead Shady to make the disclosure voluntarily? Or may Upright identify only considerations weighing against reporting, while omitting those that favor disclosure, such as that the law firm's reputation may suffer if the public later learns that the law firm knew of Shady's wrongdoing but did not report it? Woodby has sought general advice about whether to disclose the information. Upright is not providing the agreed-on service, but is purporting to have done so, when he addresses only the narrow question of whether Woodby is legally required to make disclosure. Further, in order to address the broader question competently, a lawyer must identify relevant non-legal considerations. Advice that identified only considerations that weigh against disclosure would be incomplete and, insofar as it seemed otherwise, misleading. It would be improper for Upright, based on his personal moral or religious opposition to snitching, to give incomplete or one-sided advice.¹³³

The second question is whether a lawyer may advise the client to act in accordance with a personal moral or religious value that is contrary to a professional value. It is clear that professional norms are comprised of more than just enforceable rules. Implicit in the rules and the traditions of law practice are "professional values."¹³⁴ For example, William Simon has identified "promoting justice" as one such value.¹³⁵ No doubt, lawyers can debate whether certain propositions enjoy sufficient recognition to enter the pantheon of professional values. Further, lawyers may often find that different professional values point in different directions with respect to a given decision. Nonetheless, lawyers concerned with the morality of their conduct might want to act not only in conformity with the enforceable rules of professional conduct and other aspects of the law governing lawyers, but also consistently with professional norms and values that are not enforced or that are meant to be self-enforced.

For example, a lawyer is legally obligated to serve clients competently within the standards set by malpractice law and professional rules. A lawyer also is expected, however, to strive to provide clients better quality representation than that which is minimally required by law.¹³⁶ Consequently, a lawyer would be acting contrary to the professional norms insofar as he sought to provide

133. An additional problem in this example is the possibility that Upright's evaluation of the legal question will be influenced by his personal values. The conflict-of-interest rule would require Upright to assess whether his advice will be affected by his "own interests." MODEL RULES Rule 1.7(b). It is not self-evident, however, that this phrase encompasses personal values. It might be argued that the rule applies insofar as the lawyer has a perceived interest in acting or convincing the client to act in accordance with the lawyer's personal values. But this might not capture all occasions on which lawyers' values will interfere with their ability to give detached advice.

134. Cf. MACCRATE REPORT, *supra* note 20, at 207-21 (identifying "fundamental values of the profession").

135. See, e.g., Simon, *supra* note 9, at 1083-84, 1090; (advocating ethical discretion when advancing or pursuing even legally permissible course of action); SHAFFER & COCHRAN, *supra* note 2, at 33 (quoting David Hoffman's 1836 "Resolutions on Professional Deportment").

136. See, e.g., MODEL CODE EC 6-5 ("A lawyer should take pride in his professional endeavors. His

professional representation to his clients that successfully met the minimal standards set by the enforceable law but that was of no better quality than that.

In Example Eight,¹³⁷ the lawyer's personal belief that an individual should not reveal the misconduct of a friend or colleague — a belief that many others share — is at odds with what, it seems fair to say, is the profession's recognition that it is morally worthy conduct for a lawyer to report strong suspicions of another lawyer's professional misconduct (where there is no bar against doing so), because law is a self-regulating profession.¹³⁸ It might be appropriate for Upright to identify the competing moral proposition in order to facilitate Woodby's ability to make a decision in accordance with Woodby's own moral preferences. But it would seem wrong, at least as far as the professional norms are concerned, for Upright affirmatively to endorse the competing moral proposition, just as it ordinarily would be wrong for a lawyer to advise a client to act contrary to law.

Thus, another way in which professional norms may limit lawyers' discretion is by preempting particular personal and religious values that are inconsistent with professional values. This is not to say that a lawyer engages in sanctionable misconduct in giving primacy to personal conscience in this situation. It is simply to say that the lawyer cannot claim to be acting consistently with the professional norms: he may claim to be a moral person, but not necessarily a well-regulated lawyer.¹³⁹

Example Nine: Disclosure

Prudence, a lawyer, undertakes to represent a teenage client, Small, in an "abuse and neglect" case. Prudence concludes from her discussions with Small that Small's life is endangered by his father, with whom Small lives. Small insists that Prudence preserve the confidence. Prudence would like to comply, because, like Upright, she believes that it is morally wrong to snitch on friends and family, and she believes that Small would be doing this through her if she were to report the father's threatening and abusive conduct. For guidance, Prudence refers to her local bar association's ethics opinion, which says that when a lawyer representing a teenage client honestly concludes that disclosure of a client confidence is necessary to save the child's life, the lawyer has

obligation to act competently calls for higher motivation than that arising from fear of civil liability or disciplinary penalty.").

137. See *supra* text accompanying note 122 for Example Eight.

138. See, e.g., MODEL RULES pmbl. ("The legal profession's relative autonomy carries with it special responsibilities of self-government . . . Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers.").

139. Although this Article's focus is on professional decisionmaking, one might also consider whether professional values trump inconsistent personal values when a lawyer acts in an area of personal rather than professional discretion. Consider, for example, the lawyer who believes that divorce is immoral. May she therefore oppose federal funding for lawyers representing indigent clients in divorce actions? May she seek to persuade lawyers in the community to withdraw from representing clients who seek a divorce? Wholly apart from First Amendment considerations, a lawyer initially would seem to have absolute personal discretion to take such steps. It might be argued, however, that the lawyer's advocacy, while motivated by personal conscience, is morally objectionable when viewed in the context of the professional norms. See, e.g., MODEL CODE EC 8-3 ("The fair administration of justice requires the availability of competent lawyers.").

*discretion to protect the child by disclosing his confidences in this extreme situation even over the client's objection.*¹⁴⁰

Prudence has professional discretion to decide whether to disclose Small's confidence in order to protect the child from life-threatening harm. Her discretion is certainly grounded. For example, she is not free to employ just any methodology in exercising this discretion. While a lawyer could decide whether or not to represent a particular client by flipping a coin, it would be improper for Prudence to decide in an equally arbitrary manner whether to betray Small's confidences. It would be no better for the lawyer to make this decision on the basis of the lawyer's self-interest, for example, in order to avoid the public criticism that might attend one decision or the other if the facts became known. If this is so, may the lawyer's religious or moral convictions serve as a basis for making this decision? The bar association committee concluded that *no* single consideration may serve as an exclusive factor, because a lawyer must make an individual decision based on a range of relevant factors.¹⁴¹ Although the interest in protecting the client obviously weighs in favor of disclosure, some other professional values might weigh in the opposite direction, including the interest in respecting client decisionmaking and concern for preserving a lawyer-client relationship of trust and confidence. A lawyer would be expected to take account of all these considerations. May personal moral or religious beliefs that have no analogue in the professional norms be added to the mix? Or are the only relevant principles for the exercise of discretion those that can be said to derive from the legal profession's norms?

William Simon has argued that lawyers should look to "values associated with

140. See N.Y.C. Bar Assoc. Comm. on Professional Ethics, Formal Op. 1997-2, in *The Record of the Assoc. of the N.Y. Bar*, at 435-36 ("A lawyer has latitude to report information concerning child abuse or mistreatment in the rare case in which the lawyer honestly concludes, after full consideration, that disclosure is necessary to save the child's life."). The committee cautioned, however, that

"[t]his exception would be appropriately invoked only in the most extreme cases [T]he lawyer would have to take care not to use this implied exception simply as a pretext for overriding what the lawyer considers to be a client's bad judgment. . . . [F]urther, the disclosure 'should be no greater than the lawyer reasonably believes necessary to the purpose.' "

Id. at 436.

141. The opinion explained:

It does not necessarily follow that, because the lawyer is permitted to make disclosure, the lawyer should invariably disclose a juvenile client's intention to kill or maim himself or another. On the contrary, EC 4-7 recognizes that "[t]he lawyer's exercise of discretion to disclose confidences and secrets requires consideration of a wide range of factors." It would generally be inappropriate, therefore, for a lawyer to decide invariably to reveal client confidences whenever she is permitted to do so, rather than taking relevant factors into account in making an individual decision. This being so, a lawyer may not commit herself in advance to revealing a juvenile client's confidences whenever the child reveals an intention to kill or maim himself or another. And, for a lawyer to advise the child client that she will invariably do so, when she must in fact exercise individualized discretion in deciding whether or not to do so, would be impermissibly misleading if the lawyer's purpose is to apprise the client of the ordinarily applicable scope of lawyer-client confidentiality.

Id. at 440.

the legal role”¹⁴² as a basis of decisionmaking rather than to common or personal “moral concerns outside the legal system.”¹⁴³ He advances this argument not only when professional discretion is “grounded,”¹⁴⁴ but also when it would appear to be unrestricted. Thus, he argues that decisions about whom to represent should not be entirely personal decisions, but should be based on professional morality. In particular, he argues that in making this discretionary decision, as in making others, “[t]he lawyer should take those actions that, considering the relevant circumstances of the particular case, seem most likely to promote justice.”¹⁴⁵

Simon does not claim, however, that existing professional norms expect lawyers to rely on professional values to the exclusion of personal ones, but simply that, as a prescriptive matter, lawyers should do so.¹⁴⁶ Further, with respect to discretionary decisions that are ungrounded, the existing normative understanding is to the contrary. The decision of whom to represent (within the confines of conflict-of-interest rules and other applicable rules)¹⁴⁷ is the paradigm of a professional decision that lawyers may make — and, some would say, *should* make — based on their personal as well as professional values. Thus, the *Model Rules* allow a lawyer to decline to accept a court appointment if “the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer’s ability to represent the client.”¹⁴⁸ To be sure, this rule can be explained as an exception designed to protect against the provision of inadequate representation, rather than to facilitate lawyers’ reliance on personal conscience. Still, few would question that, when an individual or entity seeks to retain a lawyer, the lawyer acts consistently with the professional norms in refusing to render legal services if the prospective client or the prospective cause is repugnant, or even mildly offensive, in light of the lawyer’s personal values.

When the lawyer’s discretion is grounded, however, the lawyer’s reliance on personal moral and religious considerations in addition to considerations rooted in the professional norms seems more troublesome. The *Model Rules* are ambiguous on this question, as on many others. Its preamble says that “[w]ithin the framework of these Rules many difficult issues of professional discretion can arise”¹⁴⁹ and that “[s]uch issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.”¹⁵⁰ It is unclear, however, whether the “moral judgment”¹⁵¹ to

142. Simon, *supra* note 9, at 1083-84, 1113.

143. *Id.*

144. *Id.* at 1083.

145. *Id.* at 1090, 1135-37.

146. *Id.*

147. See *supra* note 21 (discussing limitations on lawyers’ right to choose clients).

148. MODEL RULES Rule 6.2(c).

149. *Id.* pmb1.

150. *Id.*

151. *Id.*

which the *Model Rules* refer may be based on personal moral values or only on professional ones. It is equally unclear whether “the framework of these Rules”¹⁵² and “the basic principles underlying the Rules”¹⁵³ limit the lawyer’s consideration to professional values (and personal values that may happen to coincide with professional values).

The answer may depend on what sort of decision is being made and why the lawyer is afforded discretion to make it. If discretion is intended, in part, to allow the lawyer to promote her own interests, then it would seem appropriate for the lawyer to take personal values into account. For example, a lawyer has discretion to reveal a client’s confidence “to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved.”¹⁵⁴ Out of personal moral opposition to snitching, a lawyer who is accused of wrongdoing might properly decline to reveal client confidences in his defense.

One might argue, in contrast, that when the ethics committee recognized the discretion of a lawyer in Prudence’s position to disclose client confidences, it expected her to act exclusively for the benefit of the client. In that event, Prudence’s moral opposition to snitching is not relevant to her decision. It is not implausible, however, to say that the discretion was afforded in part to enable her to protect or promote her own interests. In particular, the option of reporting against the client’s will is meant in part to enable her to sleep better at night by acting in a manner that reconciles her professional conduct with her personal concern for the client’s physical welfare. But even on this reading, it seems fair to say that the lawyer is limited in which personal values she may consider. The rule contemplates that she may give weight to her personal “ethics of care.”¹⁵⁵ It does not contemplate, however, that she will give weight to personal values unrelated to concern for the client’s welfare.¹⁵⁶

Example Ten: Disclosure (part two)

Hope, a lawyer, is asked to represent Young, a teenage child, in “abuse and neglect” proceedings. But, she is unwilling to do so unless she can be confident

152. *Id.*

153. *Id.*

154. *Id.* Rule 1.6(b)(2).

155. Cf. SHAFFER, ON BEING CHRISTIAN, *supra* note 1, at 33 (claiming “that the ethics of care, which are the ethics of Jews and Christians, have relevance in law offices”).

156. Of course, personal values may sometimes be recast in terms of professional norms. For example, in deciding whether to make disclosure, Prudence would be expected to take into consideration all of the client’s interests, and not only the client’s physical well-being (although that would seem to be the most important one). One of Small’s perceived interests may be in preventing harm to his father. Small may understand that, if his father’s conduct is reported, his father may be criminally prosecuted. This may be precisely why Small insists that Prudence keep his confidence. If that is so, then Prudence properly would give weight to an interest that coincides with her own moral view. On the other hand, it may turn out that Small has no concern about causing harm to his father, but simply underestimates the danger to himself or is indifferent to it.

that she will be able to act in accordance with her personal belief that children should be protected from harm.

One might argue that a lawyer properly may rely on her personal moral or religious understandings as long as these understandings are disclosed to the client at the outset of the representation and the client consents to be represented in accordance with the lawyer's understandings.¹⁵⁷ Thus, personal values would have a more robust role than the one described in this Article as long as the client agreed. The argument fails, however, because professional norms are not always open to negotiation between lawyers and their clients. Thus, in the above example, it is questionable whether Faith may ask Young to permit her to disclose his confidences whenever she believes necessary to protect him from harm.¹⁵⁸ And even if Faith could seek Young's advance consent, he would, in any event, be entitled to change his mind.¹⁵⁹

Other professional norms that limit the lawyer's reliance on personal values are equally inflexible. For example, it is doubtful whether a lawyer could rely on a client's consent to receive advice based on the lawyer's personal moral and religious views where such advice would be incompetent or misleading. Nor could a lawyer rely on a client's agreement that the lawyer will define the objectives of the representation in accordance with the lawyer's personal values.

IV. CONCLUSION

All lawyers hold beliefs and values that "are contingent, or are not shared by others,"¹⁶⁰ including by their clients or by other lawyers. On one conception of the professional norms, conflicts never would arise between lawyers' personal

157. Cf. Buice, *supra* note 122, at 1033 ("If I see my role in divorce cases to be a mediator who brings warring factions to agreement, . . . I may lay down parameters: 'If you hire me, this is the way we will do it.' Such clarification may be necessary to protect my personal integrity, so that I can live consistently with who I perceive myself to be and who I want to become. Such a clarification of my role will free me to enter into my task with my whole heart.").

158. In N.Y.C. Bar Assoc. Comm. on Professional Ethics, Formal Op. 1997-2, in *The Record of the Assoc. of the N.Y. Bar*, at 435-36, 442, the ethics committee considered the question of whether, before committing herself to represent a child, the lawyer may require a child to consent in advance to the lawyer's disclosure of information concerning harm threatened by the child's caretaker. The committee answered, in part: "[I]t is appropriate for the lawyer to seek advanced consent to certain disclosures and it may even be appropriate to condition the representation on the client's consent. It would not necessarily be appropriate, however, to seek the client's consent in order to promote interests other than those of the client." *Id.* In particular, the committee opined, "[i]t would not be appropriate . . . to seek to promote the agency's interests by soliciting the client's consent to disclosures that are likely to be contrary to the client's best interest." *Id.* The committee also observed that any consent given by the child must be voluntary and that, "[a]mong other things, the lawyer must consider whether the child perceives, accurately or not, that in the absence of consent, he will not be able to secure legal assistance." *Id.* at 443.

159. *Id.* at 443-44 ("If the minor client consents in advance to the lawyer's reporting of confidences or secrets concerning abuse or mistreatment, the client may later change his mind and revoke consent, in which event the lawyer must maintain confidentiality . . .").

160. Richard A. Matasar, *The Pain of Moral Lawyering*, 75 IOWA L. REV. 975, 983 (1990).

values and professional norms because a lawyer always would be permitted to obey his or her own conscience. On another, such conflicts would arise at any time that a lawyer's personal moral or religious understandings were implicated because the lawyer would be required to exclude personal values from all professional decisionmaking. Neither conception accurately describes the professional understandings, however. Personal values do not take the lead in professional decisionmaking, but neither are they shunted offstage. Instead, personal conscience plays a supporting role.

On one hand, a lawyer may rely on personal conscience to signal a possible ethical quandary, draw on personal values to construct a philosophy of legal practice within the porous construct of professional norms, invoke personal values (almost) always in making professional decisions that are relegated to the lawyer's ungrounded discretion, and refer to personal moral considerations in counseling clients. Thus, the professional norms do not bleach out the lawyer's conscience.¹⁶¹

On the other hand, personal values are sometimes excluded from professional decisions, including aspects of everyday decisions about how to counsel clients and how to carry out clients' objectives. This Article offered various examples in which the professional norms would foreclose lawyers from acting in particular ways based on personal moral or religious beliefs that lawyers might plausibly possess, such as that divorce is immoral,¹⁶² that children should revere their parents, or that people should not snitch on others. Whereas presumed conflicts between professional norms and common morality often rest on a contested understanding of the professional norms,¹⁶³ and particularly on a philosophy of extreme partisanship,¹⁶⁴ the conflicts described in this Article occasioned by lawyers' personal moral or religious understandings rested on conservative readings of the professional norms. Consequently, when their personal values are implicated in the course of their work, conscientious lawyers face an initial question of whether the professional norms allow the lawyer to take account of his or her personal values in making any particular decision. This decision must be made on an ad hoc basis, because the limits cannot be captured in a formula or a framework. Personal values are especially likely to be excluded when a lawyer's professional discretion is grounded. But lawyers may sometimes weigh personal values in making such decisions and, conversely, lawyers may be

161. A better explanation for why lawyers often do not rely on personal values is simply that it is easier for lawyers to deal with one set of values at a time. See Wasserstrom, *supra* note 12, at 29 ("Psychologically, roles give a great power and security because they make moral life much simpler, less complex, and less vexing than it would be without them.").

162. See generally, e.g., Muise, *supra* note 4, at 790-91 (discussing the Catholic view of divorce and its possible implications for a Catholic lawyer); *supra* note 28 (discussing Jewish understandings of divorce).

163. See, e.g., *supra* notes 38-44 and accompanying text (discussing differing interpretations of the professional rules governing confidentiality).

164. See, e.g., Matasar, *supra* note 160, at 779-80 (noting examples in which morally questionable conduct, although prevalent in professional practice, is unsupported by the written ethical rules).

foreclosed from relying on certain personal values in making decisions that are primarily relegated to a lawyer's unguided discretion. If the professional norms turn out to conflict with the lawyer's professional values, the lawyer then faces the question of whether to give priority to personal or professional morality.

The above discussion suggests two additional questions, which this Article makes no attempt to resolve. First, to what extent *should* the professional norms permit a lawyer to obey his or her own conscience? From the limited perspective of professional morality, the answer may depend in part on two other questions: first, whether one is satisfied that the professional norms adequately identify the considerations that ought to influence lawyers' professional decisions or whether one believes that there are significant gaps that ought to be filled by lawyers' personal moral beliefs; and, second, whether one believes that lawyers' personal morality will improve the professional norms or whether one is skeptical about lawyers' personal moral beliefs. The examples offered in this Article suggest the difficulty of addressing these questions purely in the abstract. Personal moral and religious understandings are a double-edged sword; they have the potential either to ameliorate or to exacerbate the deficiencies of the professional norms. For example, various features of legal practice "conspire to depersonalize the client in the eyes of the lawyer *qua* professional."¹⁶⁵ Some moral and religious values would inspire lawyers to respect individuals and to take their emotional needs into account.¹⁶⁶ But other values, if acted upon, would underscore the lawyer's dominance of the lawyer-client relationship.¹⁶⁷ From a broader perspective, as Professor Lesnick discusses, the question of whether the professional norms should accommodate personal morality depends in part on the extent to which one believes that a pluralist society should make room for individuals to lead professional lives in accordance with their moral and religious beliefs.¹⁶⁸ It also depends on the extent to which one believes, as Susan Kupfer previously argued in this Journal, "we need to encourage and endorse the development of individual moral autonomy for lawyers."¹⁶⁹

Second, how should lawyers ultimately respond to conflicts between personal conscience and professional morality — should conscience trump the professional norms or vice versa? Lawyers whose personal moral beliefs genuinely conflict with the professional morality have various alternatives,¹⁷⁰ which in-

165. Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 21 (1975).

166. See *supra* notes 93-94 and accompanying text (discussing how some lawyers exhibit compassion by just respecting their clients as individuals and listening to their needs).

167. See *supra* notes 119-24 and accompanying text (discussing the problems that arise when a lawyer counsels his client based on the lawyer's religious beliefs).

168. Lesnick, *supra* note 127 (manuscript at 7) (stating that a pluralist society should make a reasonable space for lawyer's strongly held moral beliefs).

169. Susan G. Kupfer, *Authentic Legal Practices*, 10 GEO. J. LEGAL ETHICS 33, 41 (1996).

170. See Wolf, *supra* note 12, at 52 ("A host of situations can be imagined in which the dictates of a lawyer's professional responsibilities are clear, but with respect to which the question remains whether it is morally good or even morally permissible for the lawyer to follow these dictates. In such situations, a lawyer must simply (or,

clude avoiding professional settings in which conflicts are likely to arise or, if doing so is not possible, leaving the profession altogether.¹⁷¹ In the course of representation, lawyers can make categorical judgments, either always complying with the professional norms¹⁷² — an alternative that is likely to be particularly unsettling when the norms of the lawyer's professional community conflict with those of the lawyer's religious community — or always giving priority to a personal moral or religious belief.¹⁷³ Or, lawyers can exercise moral judgment in individual situations.¹⁷⁴

From the perspective of the legal profession, of course, priority ordinarily would be given to the professional norms.¹⁷⁵ Conflicts between professional norms and personal values seem far less troubling than conflicts between professional norms and common morality. Moral philosophers have argued that when a professional norm conflicts with common morality, lawyers should question the appropriateness of the professional norm¹⁷⁶ and, presumptively, should abandon it.¹⁷⁷ The same could not be said, however, when professional

more often, not so simply) take stock of his or her commitments to the profession and to nonprofessional values and principles, and decide.”).

171. See *id.* at 58 (“There are significant moral tensions between the values a person must uphold if he or she wants to excel as a lawyer and the values a person with any of a variety of morally praiseworthy ideals may want his or her life to reflect. These tensions discourage some people from entering and remaining in the legal profession . . .”); *supra* note 28 (noting Levinson’s observation that an Orthodox Jew might be obliged to refrain from representing criminal defendants).

When individuals are sworn in as members of the bar, they customarily are required to avow that they will conform to the applicable rules of professional conduct. Insofar an individual anticipates disregarding the professional rules as a matter of conscience, he or she faces a moral question about whether it is right to enter the profession under the pretense that he or she will follow the rules. By way of comparison, consider an individual who had moral objections to the death penalty. One might accept this moral position but conclude that it is morally wrong for that individual to take a position as an executioner without disclosing this view and then, as a matter of conscience, for him or her to take steps to ensure that scheduled executions go awry.

172. See, e.g., Postema, *supra* note 9, at 289-94 (describing cognitive strategies for dealing with “professional knavery”).

173. See generally Judith A. McMorrow, *Civil Disobedience and the Lawyer’s Obligation to the Law*, 48 WASH. & LEE L. REV. 139 (1991) (discussing lawyers’ civil disobedience).

174. Cf. David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 39 (1995) (“Moral decision making requires more than identifying the appropriate principles and values, and it requires more than analyzing arguments Rather, moral decision making involves identifying which principle is most important given the particularities of the situation, and this capacity is precisely what we mean by judgment.”).

175. The Tennessee ethics opinion discussed by Professor Lesnick is a good example. See *supra* note 127 for that opinion.

176. See Williams, *supra* note 12, at 266-267 (arguing that an important element of legal education should be to leave lawyers with some moral unease concerning their actions as lawyers).

177. See, e.g., David Wasserman, *Should a Good Lawyer Do the Right Thing? David Luban on the Morality of Adversary Representation*, 49 MD. L. REV. 392, 394-404 (1990) (reviewing LUBAN, *supra* note 9); Wasserstrom, *supra* note 12, at 34 (“[T]he burden of argument and proof rests upon those who seek to justify the differential consideration and treatment of members of the moral community that takes place as a result of the role-defined reasoning. . . . [A]t least where important needs and interests are at stake, the universalistic dimension of morality presumptively requires equality of consideration and treatment in quite a strong sense.”).

This view has been contested, however. For example, Susan Wolf points out that one might identify “the

norms conflict with personal morality, especially when the applicable professional norms, such as those relating to competence and candor, are not merely regulatory provisions but themselves have substantial moral content.¹⁷⁸ Rather, the burden in such a case, from the profession's perspective, would be the other way: because the professional norms embody the professional community's understanding of what it means to be a good lawyer,¹⁷⁹ they are presumptively justified and worthy of respect.¹⁸⁰

Yet, many lawyers with deeply held moral views would reject the idea that the legal profession, any more than the client, is the keeper of his or her conscience. Religious lawyers, in particular, might presume that the values of their religious community take priority over those of their professional community and dismiss as "idolatry" the premise that the question of whether to act in reliance on religious belief is to be decided by professional rulemakers. This might lead to the conclusion that, in the end, a lawyer should always obey his or her conscience.

The middle course, that is, exercising moral judgment on an ad hoc basis, poses the most difficult personal challenge.¹⁸¹ Much as conflicts between

promotion of truth and justice," Wolf, *supra* note 12, at 46, as a universal moral value, *id.*, but that a lawyer who made this his "direct, overriding aim," *id.*, and therefore "undermine[d] the legal interests of clients with less noble legal goals" would not be acting in accordance with the profession's ideal of the good lawyer. *Id.* at 49.

178. See, e.g., Wolf, *supra* note 12, at 47 ("The good lawyer . . . gives the client the best professional care possible subject to the constraints of ordinary morality that apply inside, as well as outside, the context of the job.").

179. Cf. *id.* at 40 ("[L]egal ethics . . . takes as its central focus the study of what ethical principles and virtues are essential . . . to being a good lawyer.").

180. One can envision situations in which, from the profession's perspective, a lawyer would be justified in disregarding a rule of professional conduct as a matter of personal conscience. For example, lawyers are forbidden (subject to exception) from providing financial assistance to a client in connection with a pending litigation. E.g., MODEL RULES Rule 1.8(e) (precluding, subject to two exceptions, lawyers from providing clients financial assistance in connection with pending litigation); MODEL CODE DR 5-103(B) ("While representing a client in connection with contemplated or pending litigation, a lawyer shall not provide financial assistance to his client. . ."). On its face, this rule would forbid providing financial assistance to a client who would otherwise be evicted from her apartment. However, it might be argued in a disciplinary context that a lawyer who, acting on a moral or religious conviction, provides financial assistance to an indigent client under these circumstances should be found to have acted in a professionally proper manner. At least two problems are raised by recognizing conscientious objection as a justification, rather than simply as a consideration relevant to a disciplinary agency's exercise of prosecutorial discretion. The first is that disciplinary agencies might then be put in the position of inquiring into the *bona fides* of lawyers' asserted moral views. The other is that it might be difficult to determine when conscientious objection should or should not be a justification for violating a rule. Violating the rule against financially assisting a client in litigation seems to be a sympathetic candidate for conscientious objection because the justification for the rule is questionable and because the rule is broader than necessary to achieve its questionable aims. In contrast, although moral objections might be made to the rule forbidding a lawyer from deliberately eliciting false testimony, it is inconceivable that a professional consensus can be achieved for allowing lawyers to violate this rule for moral or religious reasons.

181. See, for example, Edwin Greenebaum, *Attorneys' Problems in Making Ethical Decisions*, 52 IND. L.J. 627, 630 (1977), in which he writes:

The traditions of the profession do provide rationalizations for those who would abandon their own judgment to that of the group. . . . Whatever rationalizations lawyers accept, however, there will

professional norms and common morality might occasion lawyers to reevaluate the professional norms, conflicts between professional norms and personal values might occasion lawyers additionally to reevaluate the relevant personal beliefs;¹⁸² to determine whether their beliefs are clear, fundamental, and deeply held; and, ultimately, to make a judgment whether to follow conscience or professional norms. Subject to considerations of client confidentiality, lawyers might resolve conflicts of this nature, not in isolation, but through dialogue with concerned individuals, including nonlawyers, who have varied viewpoints and who are, for the most part, uninvolved in the dilemma.¹⁸³

These last questions — whether the professional norms should accommodate personal conscience and how lawyers should respond when they do not — are serious and important ones precisely because, as this Article shows, the professional norms presently do not accommodate personal conscience in all cases.

remain that portion of their personalities [that] holds to notions of goodness which [sic] were learned as children growing up in a family and in the general community. Coping with the resulting internal conflicts is a part of every attorney's personal agenda.

The alternative to abandoning one's judgment to that of the group is to learn to acknowledge one's conflicting personal motivations and to make judgments on explicit recognition and weighing of facts and values influencing decisions. If this is the path of greater responsibility, however, it is also potentially one of greater distress, requiring as it does living with insoluble dilemmas Attorneys can never be certain of the moral correctness of their decisions

Id.

182. This reevaluation presumably would differ depending on whether the relevant values are non-religious values, in which case the question is likely to be whether they are appropriate ones, or religious values, in which case the question is likely to be whether they are correctly understood.

183. In the past, I have advocated resolving problems of legal ethics "though open discourse among individuals with varied perspectives." Bruce A. Green & Nancy Coleman, *Foreword, Ethical Issues in Representing Older Clients*, 62 *FORDHAM L. REV.* 961, 970-71 (1994) [*hereinafter* Green & Coleman]; see also Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?*, 64 *GEO. WASH. L. REV.* 460, 488 n.139 (1996) ("In the absence of judicial involvement, another preferable alternative would be to seek consensus among those with various perspectives."). I also have worked to develop frameworks within which such discourse may take place. See, e.g., Green & Coleman, *supra*, at 961 (describing Conference on Ethical Issues in Representing Older Clients); Green & Dohrn, *supra* note 46, at 1281 (describing Conference on Ethical Issues in the Legal Representation of Children). Where the ethical conflicts involve competing legal values, it would seem appropriate to resolve them through dialogue among lawyers, judges, and other professionals who work in legal settings. In the case of a conflict between professional morality and personal moral or religious views, however, this approach will not work. As Thomas Shaffer noted in a letter responding to an earlier draft of this Article, this is true "partly because aggregations of lawyers (official and otherwise) are not communal enough to make it work; and mostly because aggregations of lawyers are so committed to ruling-class ideology that their answers will be answers that serve their own interests and the interests of their clients." Letters from Thomas Shaffer to Bruce Green (on file with the author). Professor Shaffer suggested in a recent article that religious lawyers should deliberate on their professional questions in small groups of fellow believers. See Thomas L. Shaffer, *Maybe a Lawyer Can Be a Servant; If Not . . .*, 27 *TEX. TECH. L. REV.* 1345, 1352-53 (1996) (discussing the possibility of lawyers meeting informally to deliberate about Christian law practice).