Taking Ethical Obligations Seriously: A Look at American Codes of Professional Responsibility through a Perspective of Jewish Law and Ethics

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For at least one hundred years, American lawyers and scholars alike have repeatedly criticized various aspects of legal practice, identifying both particular instances of misconduct among lawyers and more general concerns regarding the character of the legal profession.¹ In turn, the
organized American bar has engaged in a number of efforts to improve both the ethical conduct and the reputation of lawyers. These efforts range from the adoption of ethics codes, often revisited, reconsidered, and, at times, substantially revised,\(^\text{2}\) to seemingly perennial critics" that "[l]awyers belong to a profession permanently in decline"); The Task Force on Law Schools and the Profession: Narrowing the Gap, Am. Bar Ass'n, Legal Education and Professional Development—An Educational Continuum 207-21 (1992) (identifying and developing four categories of values that are fundamental to the legal profession); William H. Simon, The Practice of Justice 1 (1998) ("No social role encourages such ambitious moral aspirations as the lawyer's, and no social role so consistently disappoints the aspirations it encourages."); Roger C. Cramton, Enron and the Corporate Lawyer: A Primer on Legal and Ethical Issues, 58 Bus. Law. 143 (2002); Eugene R. Gaetke, Foreword, Renewed Introspection and the Legal Profession, 87 Ky. L.J. 903, 903 (1999) (noting that "the legal profession is again immersed in a process of self-assessment, reflection, and reform" partly because "the nation is again enduring turmoil engendered by allegations of indiscretion and misconduct at the highest levels of our national government . . . lawyers are inordinately implicated"); Robert W. Gordon, A New Role for Lawyers?: The Corporate Counselor After Enron, 35 Conn. L. Rev. 1185 (2003); Robert W. Gordon, "The Ideal and the Actual in the Law": Fantasies and Practices of New York City Lawyers, 1870-1910, in The New High Priests 51 (Gerard W. Gawalt ed., 1984); Robert W. Gordon, The Independence of Lawyers, 68 B.U. L. Rev. 1, 33 (1988) (discussing the professional autonomy of lawyers and stating that "the norms of independent practice need to be authoritatively declared and promoted, acted upon by powerful lawyers, and institutionalized in elite legal practice" to be effective); Susan P. Koniak, Corporate Fraud: See, Lawyers, 26 Harv. J.L. & Pub. Pol'y 195, 195 (2003) (arguing that "without lawyers, few corporate scandals would exist"); Donald C. Langevoort, Where Were the Lawyers? A Behavioral Inquiry into Lawyers' Responsibility for Clients' Fraud, 46 Vand. L. Rev. 75, 77 (1993) (asserting that "the apparent incidence of complicity must trouble both the public and the profession" even without actual data on the frequency of complicity or the effects of attorney efforts to deter client misconduct); Samuel J. Levine, Faith in Legal Professionalism: Believers and Heretics, 61 Md. L. Rev. 217 (2002) (examining the views of Dean Anthony Kronman, including his "loss of faith in the legal profession"); Samuel J. Levine, Rediscovering Julius Henry Cohen and the Origins of the Business/Profession Dichotomy: A Study in the Discourse of Early Twentieth Century Legal Professionalism, 47 Am. J. Legal Hist. 1 (2005); David Luban, The Adversary System Excuse, in The Good Lawyer, supra, at 83, 85-86 (relating the example of Edward Bennett Williams's use of a tactic called "graymailing" in his defense of former CIA director Richard Helms); William H. Simon, Wrongs of Ignorance and Ambiguity: Lawyer Responsibility for Collective Misconduct, 22 Yale J. on Reg. 1, 30 (2005) (criticizing the bar for its "visceral clinging to the prerogatives of ignorance and ambiguity" in response to the SEC's implementation of Sarbanes-Oxley); Rayman L. Solomon, Five Crises or One: The Concept of Legal Professionalism, 1925-1960, in Lawyers' Ideals/Lawyers' Practices 144, 145 (Robert L. Nelson, David M. Trubek & Rayman L. Solomon eds., 1992) (arguing that "professionalism, as conceived by the elite of the bar, is a set of symbolic rhetorical and normative concepts having consistent content"); David B. Wilkins, Who Should Regulate Lawyers?, 105 Harv. L. Rev. 799 (1992).

2. See, e.g., Monroe H. Freedman & Abbe Smith, Understanding Lawyers' Ethics 2-6 (3d ed. 2004) (reviewing the history and purposes of the ABA ethics codes); Stephen Gillers, Regulation of Lawyers 3-6 (7th ed. 2005) (reviewing revision efforts, including those of the Kutak Commission, the Ethics 2000 Commission, and the
professionalism movements, premised on the claim that the practice of law has lamentably devolved from the status of a noble profession to become merely another form of business.\(^3\)

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3. See, e.g., COMM'N ON PROFESSIONALISM, AM. BAR ASS'N, IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM
This Article suggests that the ethics codes themselves, through both their substance and their underlying assumptions, contribute to the problematic nature of American legal ethics. Focusing on the prevailing and most influential source of ethics codes, the American Bar Association's Model Rules of Professional Conduct, this Article argues that the Model Rules fail sufficiently to mandate ethical obligations. This failure permits lawyers a degree of discretion that relegates many ethics rules to the status of optional guidelines. Moreover, this Article observes, the permissive nature of many rules renders their enforcement largely untenable, thus further undermining the credibility and authority of these codes as a basis for the ethical conduct of lawyers.

In response to these concerns, this Article looks to an alternative source of ethical behavior, the Jewish legal system, and suggests that a
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number of features of Jewish law and ethics might prove helpful in formulating, interpreting, and applying more well-considered and effective ethics codes for the practice of law in the United States. In particular, building in part on my work in the past, this Article suggests that American ethics codes might begin to incorporate the notion of obligation that underlies Jewish law, which includes the broad imperative to exercise ethical conduct and deliberation even in the absence of clearly applicable regulations. At the same time, this Article explores the possibility that, to the extent that enforcement of American ethics codes may often remain elusive, the Jewish legal system may provide a model for ethical adherence that relies more upon communal commitment to shared ethical values and principles than on the threat of official discipline and punishment.

I. ETHICS WITHOUT OBLIGATIONS: A CRITICAL LOOK AT THE MODEL RULES OF PROFESSIONAL CONDUCT

The prevalence in the Model Rules of provisions that do not mandate a particular ethical outcome suggests a refusal or inability among the organized bar to take seriously ethical obligations and aspirations.5


5. Scholars have documented numerous areas in which the Model Rules leave ethical decisions to the discretion of the lawyer. See, e.g., Gaetke, supra note 3, at 721-22 & nn.124-29 (identifying situations in which “[t]he current rules . . . grant considerable discretion to lawyers”); Bruce A. Green & Fred C. Zacharias, Permissive Rules of Professional Conduct, 91 MINN. L. REV. 265, 269-70 & nn.16-22, 276-78 & nn.41-55 (2006) (noting that professional rules generally use the permissive term “may” rather than mandatory terms such as “must” or “shall”); W. Bradley Wendel, Public Values and Professional Responsibility, 75 NOTRE DAME L. REV. 1, 11-12 & nn.31-33 (1999) (noting that some rules “by their terms leave room for deliberation”); Fred C. Zacharias, Reconciling Professionalism and Client Interests, 36 WM. & MARY L. REV. 1303, 1335-36 & nn.101-08 (1995) (listing areas open to a lawyer’s discretion in the negotiating context and stating that “[i]n practice . . . the codes provide authority for virtually any negotiating approach the lawyer chooses to take”); see also Levine, Taking Ethical Discretion Seriously, supra note 4, at 49 n.141 (reviewing scholarly documentation of the fact that
Indeed, the discretionary nature of many of the rules often provides lawyers the opportunity to disregard ethical deliberation without fear of serious consequences. Moreover, the legislative history of many rules indicates that when considering the possibility of drafting a rule in a manner that would require greater adherence to ethical conduct and principles, the ABA has often chosen a less demanding formulation of the rule.

ethics rules are not exhaustive, thus requiring some deliberation and discretion on the part of lawyers). See generally David B. Wilkins, Legal Realism for Lawyers, 104 HARV. L. REV. 468, 470-78 (1990) (setting forth the traditional model of legal ethics and the legal realist critique of that model).

6. See Green & Zacharias, supra note 5 ("Not surprisingly, given lawyers' self-interest and the structure of some of the rules, many practicing lawyers take an extremely lawyer-protective view of permissive rules. They assume that whenever ethics provisions permit lawyers to act in a certain way, the provisions are defining an area in which lawyer conduct is meant to be unconstrained. On this understanding, the choice of conduct belongs entirely to individual lawyers. A lawyer's decision within the area covered by a permissive rule is both unregulated by the disciplinary process and intended to be free from other regulatory oversight." (footnotes omitted)); see also Heidi Li Feldman, Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?, 69 S. CAL. L. REV. 885, 898 (1996) (stating that "[t]he more frequently a black letter ethics code is inconclusive," the more frequently opportunities arise for "interpreting the rules simply to permit pursuit of the client's ends, without regard to independent ethical concerns").

Moreover, Professor Zacharias has noted that:

When the codes authorize lawyers to choose between emphasizing partisanship and important third party or societal interests, lawyers' natural [i.e., personal and economic] incentives encourage them to select partisanship. Lawyers who make that choice can readily justify their conduct as mandated by the code by claiming adherence to the code provisions that call for zeal.

Zacharias, supra note 4, at 1340; see Fred C. Zacharias, Coercing Clients: Can Lawyer Gatekeeper Rules Work?, 47 B.C. L. REV. 455, 495 (2006) ("Other rules simply give lawyers discretion to act, which allows lawyers to base their decisions on personal, potentially venal, incentives"); see also Levine, Taking Ethical Discretion Seriously, supra note 4, at 56-57 & nn.151-52.

7. See discussion infra Part I.A-C. One example can be found in the ABA's resistance to the Security Exchange Commission's (SEC) proposal, pursuant to Sarbanes-Oxley regulations, to mandate that lawyers disclose corporate wrongdoing. See Green & Zacharias, supra note 5, at 271-72; see also Sarbanes-Oxley Act of 2002 § 307, 15 U.S.C. § 7245 (Supp. III 2005) (directing the SEC to issue rules regulating the professional conduct of attorneys); MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2)-(3); id. R. 1.13(c); STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS 173-75 (2007) (reviewing the legislative history of amendments made in 2002 and 2003 to Model Rule 1.13 by the ABA House of Delegates, and the recommendations of the ABA Presidential Task Force on Corporate Responsibility).

For further analysis of the organized bar's response to Sarbanes-Oxley regulations, see, for example, Thomas G. Bost, Corporate Lawyers After the Big Quake: The Conceptual Fault Line in the Professional Duty of Confidentiality, 19 GEO. J. LEGAL ETHICS 1089 (2006); Roger C. Cramton, George M. Cohen & Susan P. Koniak, Legal and Ethical Duties of Lawyers After Sarbanes-Oxley, 49 VILL. L. REV. 725 (2004); Lawrence J. Fox, The Fallout from Enron: Media Frenzy and Misguided Notions of Public Relations Are No
A. Model Rule 6.1

One way for a lawyer to distinguish oneself as engaging in ethical conduct might be to practice law in the public interest without receiving compensation for such service. Accordingly, addressing pro bono publico service, an early draft of Model Rule 6.1 included the obligation that "[a] lawyer shall render unpaid public interest legal services." As adopted in 1983, however, the Rule no longer included a mandatory provision, stating instead that "[a] lawyer should render public interest legal service." Although the Rule was amended substantially in 1993, the revisions merely quantified the optional standard for pro bono work, concluding, in a tone seemingly resigned to idealism, that "[a] lawyer should aspire to render at least (50) hours of pro bono publico legal services per year."
Pursuant to the work of the Ethics 2000 Commission, which represented the ABA’s most recent comprehensive attempt to revise its code of ethics to demonstrate greater fidelity to ethical principles, in 2002 an additional sentence was appended to the beginning of Model Rule 6.1: “Every lawyer has a professional responsibility to provide legal services to those unable to pay.” Though presumably intended to emphasize the ABA’s commitment to the importance of pro bono service, the 2002 addition may instead illustrate some of the shortcomings of Model Rule 6.1 and, more generally, some of the attitudes underlying the Model Rules.

Specifically, the revised version of Model Rule 6.1 now opens with a definitive declaration that pro bono service constitutes an aspect of the lawyer’s “professional responsibility,” a term presumably signifying an ethical duty included among the most fundamental of the lawyer’s obligations. Nevertheless, the remainder of the Rule continues to refer to pro bono service in exclusively optional and aspirational terms.

Thus, the current version of the Rule indicates a resistance on the part of the ABA to impose a mandatory ethical obligation even in fulfillment of a duty that the ABA has identified as a basic component of the lawyer’s professional responsibility.

B. Model Rule 1.5

The ABA’s continued failure to promulgate a model rule mandating pro bono work thus represents a refusal to impose an obligatory duty in the context of the lawyer’s service to the public and toward those in need of legal representation. Perhaps even more disturbing, at times the Model Rules have been drafted in ways that permit a lawyer to avoid ethical conduct vis-à-vis one’s own client, potentially resulting in the lawyer’s engaging in self-interested actions that prove detrimental to the interests of the client. For example, as in many professional relationships, one of the most common issues of contention between a lawyer and a client revolve around money.

With the apparent aim of

12. See Love, supra note 2, at 441-42; Moore, supra note 2, at 923; Veasey, supra note 2, at 1.
14. See id.
15. See id.
16. See GILLERS, supra note 2, at 136 (observing that attorney “fees are often a basis for client complaints or bitterness”); WOLFRAM, supra note 2, at 557 (“A typical report of bar committees and researchers is that fee disputes are frequent, and a high proportion of client and public complaints about lawyers involve charges of excessive fee charges.”). As the North Carolina State Bar Newsletter has described it, “Historically, a problem which has plagued both the Bar and the public has been the number of disputes between lawyers and clients relating to fees. Fee disputes
mitigating some of the tensions that might arise, Model Rule 1.5 provides guidelines for various aspects of the lawyer's fees.\textsuperscript{17} Here again, however, earlier drafts of the Rule emphasized a mandatory ethical obligation of lawyers, only to be replaced by a more permissive version of the Rule.\textsuperscript{18}

The earliest draft of the Rule required that a fee agreement, stating "the nature and extent of the services to be provided[,] . . . shall be expressed or confirmed in writing."\textsuperscript{19} A subsequent draft likewise continued to mandate that the "basis or rate of a lawyer's fee shall be communicated to the client in writing."\textsuperscript{20} When the Model Rules were adopted in 1983, however, the ABA again relieved lawyers of a mandatory ethical obligation, modifying Model Rule 1.5 to read: "[T]he basis or rate of the fee shall be communicated to the client, preferably in writing."\textsuperscript{21} On its face, the change seems merely emblematic of a pattern of decisions by the ABA, similar to the decision regarding the nature of pro bono responsibilities, premised on a general approach that limits the degree to which lawyers' ethics should be deemed mandatory.

Upon closer analysis, however, the modification of Model Rule 1.5 may prove more troubling. As an official comment to the Rule puts it, "[a] written statement concerning the terms of the engagement reduces the possibility of misunderstanding."\textsuperscript{22} Ostensibly, both clients and lawyers alike have an interest in avoiding such misunderstanding; thus, both would presumably benefit from mandating that fee agreements be in writing.\textsuperscript{23} More likely, though, the primary function of placing fee

have generated numerous grievances filed with the State Bar against lawyers, but the grievance procedure is neither a proper nor satisfactory forum for effectively dealing with the problem."

Moseley, Moody & Vernon, supra note 2, at 940 n.3 (quoting Professionalism Report, N.C. St. B. NEWSL. (N.C. State Bar, Raleigh, N.C.), Fall 1992, at 8); see also Alan Scott Rau, Resolving Disputes Over Attorneys' Fees: The Role of ADR, 46 SMU L. REV. 2005, 2006 (1993) (stating that "the suspicion persists that disputes over fees constitute a major and particularly intractable share of all attorney-client conflict"); id. at 2018 ("[I]t appears certain that both the number of litigated cases appearing in the reports and the number of complaints made to the bar's disciplinary agencies give a very inadequate picture of the prevalence of fee disputes between attorney and client." (footnote omitted)).


18. See Gillers & Simon, supra note 7, at 60-61 (providing the legislative history of Model Rule 1.5).

19. See Gillers & Simon, supra note 7, at 60 (quoting Model Rules of Prof'l Conduct (Unofficial Pre-Circulation Draft 1979)) (emphasis added).


23. See Wolfram, supra note 2, at 503 n.48 ("There are few good reasons not to reduce agreements to writing.").
agreements in writing would be to protect the client in the case of an ensuing fee dispute with the lawyer. After all, to the extent that the client remains unable to point to a written statement of the fee arrangement, the lawyer would arguably gain an advantage in interpreting any ambiguity due to the lawyer's relative experience and apparent sophistication and credibility in litigation. Thus, the ABA's

24. See id. at 503 ("The desirability of a writing is suggested by occasional statistics from fee arbitration agencies showing that a high percentage of disputes involve unwritten fee agreements." (footnote omitted)); see also GILLERS, supra note 2, at 136-37 ("Why would a profession—which . . . is supposed to put service and the public interest above the quest for wealth . . .—refuse to require written fee agreements . . .?"); Lawrence A. Dubin, Client Beware: The Need For a Mandatory Written Fee Agreement Rule, 51 OKLA. L. REV. 93, 95 (1998) ("With the widespread recognition that the use of written fee agreements would be beneficial to lawyers and clients in reducing the large number of fee disputes, . . . why is there no such mandatory rule?"); Stephen Gillers, Caveat Client: How the Proposed Final Draft of the Restatement of the Law Governing Lawyers Fails to Protect Unsophisticated Consumers in Fee Agreements with Lawyers, 10 GEO. J. LEGAL ETHICS 581, 602 (1997) ("Mandating a written fee agreement of some specificity is probably the single most important step a client-friendly document could take to reduce the imbalance between buyer and seller."); John Leubsdorf, Ideals, Realities, and Lawyer Fees, 10 GEO. J. LEGAL ETHICS 619, 621 (1997) ("Professor Gillers is on the mark when he urges that written fee agreements should be required."); Lee A. Watson, Note, Communication, Honesty, and Contract: Three Buzzwords for Maintaining Ethical Hourly Billing, 11 GEO. J. LEGAL ETHICS 189, 200-01 (1998) ("The most practical solution to the problem of unethical billing is communication between attorney and client because it levels the playing field and promotes satisfaction of both parties. . . . It is certainly more difficult for an attorney with dishonest urgings to cheat an informed client because the essence of [the] deception lies within [the] ability to withhold information from [the] client. . . . A signed contract that reflects the negotiated fee leaves less to chance than a situation in which the client is uninformed."). Cf. Gabriel J. Chin & Scott C. Wells, Can a Reasonable Doubt Have an Unreasonable Price? Limitations on Attorneys' Fees in Criminal Cases, 41 B.C. L. REV. 1, 68 (1999) ("One malpractice treatise recommends that attorneys engage in detailed fee discussions with prospective clients and that the agreements be reduced to writing. If shrewd attorneys will have this discussion in order to protect themselves from fee disputes and malpractice claims, there is no reason not to expect ethical attorneys to have this discussion for the benefit of their clients." (footnotes omitted)).

25. See Gillers, supra note 24, at 605-06. Furthermore, the client is likely to face the question of whether to retain a second lawyer in such a dispute. As Professor Gillers observes,

If . . . the fee dispute does go to court, the embattled but determined client will have to decide whether to hire a lawyer to defend the claim of her former lawyer. The former lawyer may seek a fee far greater than he was willing to accept "in settlement" without a suit. That heightened sum, giving the lawyer negotiating room, also will have an in terrorem effect on the client. Who knows what the courts will do? Maybe judges, once lawyers, will accept it. These realities make it risky for the former client to forego new counsel in the fee dispute, but then why not save the expense of having another lawyer and add the savings to the "settlement"? The deck is stacked against the former client . . . .

Id. at 606; Professor Wolfram has similar concerns about fee disputes:
willingness to allow a lawyer to evade a mandatory requirement to reduce a fee agreement to writing may represent not only a generally permissive attitude to the promulgation of ethical obligations, but also an outright instance of favoring the interests of the lawyer to the detriment of the client.

Indeed, recognizing the unseemliness of condoning a lawyer's failure to provide a client with a written fee schedule, the Ethics 2000 Commission recommended deleting the word "preferably" from Model Rule 1.5.26 The aim of the proposal was apparently to provide clients, at long last, the measure of protection contemplated in the early versions of the Rule that mandated putting fee agreements in writing.27 Nevertheless, the ABA rejected the proposed modification,28 thus reaffirming the Rule's articulation of a mere preference for written fee agreements and providing an option for a lawyer to make a calculated decision that disregards the effects on the client and instead protects one's own interests.

Fee suits can be ugly affairs. . . . The lawyer suing for fees often appears pro se, creating an imbalance of expenditures for legal services that might prove particularly galling to a nonlawyer client. The lawyer's access to the client's deepest confidences, and the realization that these can be spread abroad in the fee suit, may appear treacherously near blackmail.

WOLFRAM, supra note 2, at 554. As Professor Wolfram has explained, a client finding herself in a fee dispute has at least three additional concerns:

A client dissatisfied with the size of a fee or unhappy at the extent or quality of legal services rendered after paying a fee in advance is faced with unpleasant prospects. The idea of hiring a second lawyer to pursue the first through the courts is unattractive because it simply adds additional fees to the original problem. It might be difficult to find a lawyer willing to litigate against another. And the delays of litigation may put economic pressure on the client to forego any relief.

Id. at 556.

In an effort to combat some of these concerns, "[c]ourts quite uniformly resolve ambiguities in a fee contract against the lawyer, who has almost invariably drafted it." Id. at 503; see also Wilkins, supra note 1, at 875 n.326 (discussing a proposal to make "lawyers who do not submit written fee agreements bear the burden of proof on all matters in any subsequent dispute with the client" (citing COMM'N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES 56 (1991))). Another effort has focused on methods of fee arbitration. See WOLFRAM, supra note 2, at 556-58; see also Leubsdorf, supra note 24, at 622; Moseley, Moody & Vernon, supra note 2, at 940 n.3 (discussing a repealed North Carolina professional responsibility rule "mak[ing] nonbinding fee arbitration, subject to client consent, a prerequisite to suing a client for a fee"); Rau, supra note 16, at 2020-21 (reviewing proposals made in 1970 and 1974 by two ABA committees).

26. See GILLERS & SIMON, supra note 7, at 61.
27. See id. at 60-61.
28. Id. at 61.
C. Model Rule 1.6

The approach of the Model Rules to the lawyer's duty of confidentiality may serve as yet another example of the ABA's apparent unwillingness to require lawyers to engage in mandatory ethical conduct. In particular, Model Rule 1.6 presents a number of scenarios that constitute exceptions to the duty of confidentiality. In the years preceding the adoption of the Model Rules, Model Rule 1.6 evolved through several different stages. The earliest drafts of the Rule provided that "[a] lawyer shall disclose" information about a client when and to the extent necessary to prevent the client from committing an act that would result in the death or serious bodily harm to another. In contrast, later drafts no longer included mandatory disclosure, instead stating that "a lawyer may reveal" information about a client to prevent the client from committing a crime or fraud likely to cause such results as death, substantial bodily harm, or substantial financial injury. Likewise, as adopted in 1983 and later amended, the Rule currently permits—but still does not require—disclosure "to prevent reasonably certain death or substantial bodily harm," among other circumstances.

On one level, the final version of Model Rule 1.6 may prove less troubling than the revisions to Model Rules 6.1 and 1.5. The failure of the Model Rules to require pro bono service or mandatory written fee agreements seems problematic in part because of the apparent absence of any corresponding promotion of the interests of the client or the public. Instead, these Rules appear to function primarily as a mechanism for lawyers to avoid more ethical conduct. In contrast, to the extent that Model Rule 1.6 limits the lawyer's obligation to disclose information about the client, the Rule accordingly serves to protect the client's interest in confidentiality. Indeed, although the Model Rules allow for exceptions, the duty of confidentiality stands as one of the central elements of the attorney-client relationship and one of the most

30. See GILLERS & SIMON, supra note 7, at 79-80.
31. MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (Discussion Draft 1980), quoted in GILLERS & SIMON, supra note 7, at 79 (emphasis added); GILLERS & SIMON, supra note 7, at 79 (quoting MODEL RULES OF PROF'L CONDUCT (Unofficial Pre-Circulation Draft 1979)) (emphasis added).
32. MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (Revised Final Draft 1982), quoted in GILLERS & SIMON, supra note 7, at 80 (emphasis added); MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (Proposed Final Draft 1981), quoted in GILLERS & SIMON, supra note 7, at 79-80 (emphasis added).
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fundamental ethical obligations that a lawyer owes the client. Thus, it might follow, the ABA’s decision not to include mandatory disclosure provisions represents a determination that the ethical obligation of confidentiality stands paramount and, therefore, even in exceptional situations, it would be inappropriate to require disclosure of information about the client. In light of the counterbalancing interest of confidentiality, perhaps the absence of mandatory disclosure provisions indicates a carefully crafted compromise position rather than a more lenient attitude toward ethical obligations.

Despite the potential plausibility of such an analysis, a careful look at Model Rule 1.6, in the context of the official comments to the Rule, suggests a less satisfying conclusion. In delineating the justification for the Rule’s exceptions to confidentiality to prevent death or serious bodily harm, the comment first articulates the general principle that “the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation.” As the comment further explains, however, the exceptions to the Rule “recognize[] the overriding value of life and physical integrity and permit[] disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm.” Although the comment thus provides a rationale for these exceptions, the discretionary nature of the Rule fails to comply fully with the implications of the asserted rationale. If the premise underlying the exceptions to the Rule includes the recognition of an “overriding” value of life and physical integrity, a more appropriate formulation of the Rule would require, rather than merely permit, disclosure to prevent death or serious physical injury. Nevertheless, the Rule leaves to the discretion of the lawyer the decision whether to disclose information to save a life. Thus, Model Rule 1.6 appears to present yet another example of the ABA’s refusal to mandate conduct that would appear more consistent with ethical

34. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. [2] (2006) (“A fundamental principle in the client-lawyer relationship is that, in the absence of the client’s informed consent, the lawyer must not reveal information relating to the representation . . . . This contributes to the trust that is the hallmark of the client-lawyer relationship.”); FREEDMAN & SMITH, supra note 2, at 129-58 (providing a detailed description and defense of the significance and extent of the lawyer’s duty of confidentiality); Lawrence J. Fox, MDPs Done Gone: The Silver Lining in the Very Black Enron Cloud, 44 ARIZ. L. REV. 547, 551 (2002) (describing client confidentiality as a “core value for a lawyer”); Susan P. Koniak, The Law Between the Bar and the State, 70 N.C. L. REV. 1389, 1427-47 (1992) (describing “the centrality and power of the norm of confidentiality in the bar’s nomos”).


36. Id.

principles, instead allowing a lawyer the option of acting in a way that best suits one's own interests.

Indeed, given the discretionary component of the Rule, it seems unlikely that a lawyer would choose the option of disclosing information pursuant to the exceptions, even in the face of overriding concerns of death or serious physical harm to another.\(^3\) As another comment to Model Rule 1.6 emphasizes, the nature of discretionary disclosure provisions implies that failure to disclose will not violate the Rule.\(^3\) Therefore, a lawyer will not face negative professional or financial consequences as a result of a decision not to disclose information, regardless of any harm caused to others. Conversely, a lawyer who decides to reveal information pursuant to an exception to the Rule may, at times, risk the possibility of discipline and/or litigation in case of later review of the lawyer's decision and a determination that the circumstances did not actually permit such disclosure.\(^4\) Thus, contrary to the outcome that the Rule is purported to encourage, the self-interested lawyer will probably choose not to disclose information, even to save a life.\(^5\) In fact, the ABA Task Force on Corporate Responsibility, which recommended expanding the circumstances under which disclosure should be permitted—though still not required—seemed to acknowledge that, in practice, state ethics provisions permitting disclosure are rarely employed by lawyers.\(^42\)

\(^3\) Cf. David McGowan, Why Not Try the Carrot? A Modest Proposal to Grant Immunity to Lawyers Who Disclose Client Financial Misconduct, 92 CAL. L. REV. 1825, 1828 (2004) (suggesting that because lawyers are reluctant to create costs for themselves, disclosure is unlikely to increase “even in cases where disclosure could stop unlawful conduct or help rectify its consequences”).


\(^4\) See McGowan, \textit{supra} note 38, at 1829-30.

\(^4\) Cf. \textit{id.} at 1825 (asserting that “the costs disclosure creates for lawyers who blow the whistle” must be addressed if lawyers are to be encouraged to disclose client financial misconduct); \textit{id.} at 1828 (observing that “[b]ecause disclosure is permissive, lawyers choose whether they will create these other costs,” and concluding that lawyers are unlikely to incur such costs); David Rosenthal, \textit{The Criminal Defense Attorney, Ethics and Maintaining Client Confidentiality: A Proposal to Amend Rule 1.6 of the Model Rules of Professional Conduct}, 6 ST. THOMAS L. REV. 153, 166-68 (1993) (observing that, in addition to the possibility that disclosure may result in discipline, “from an economic standpoint, a more tangible, often damaging consequence of disclosure exists,” particularly for criminal defense attorneys, because “[t]he reputation of criminal defense attorneys travels swiftly through the ranks of criminal defendants and once the attorney is labeled as untrustworthy, that attorney may likely be hard pressed to retain any future clients”).

\(^42\) See \textit{Task Force on Corporate Responsibility, Am. Bar Ass'n, Report to the House of Delegates} (2003), \textit{quoted in Gillers & Simon, supra} note 7, at 81-82.
The impression that Model Rule 1.6 produces the practical—if not intended—result of favoring the interests of lawyers may be reinforced by the Rule’s inclusion of yet another exception to the duty of confidentiality that was absent from the drafts of the Rule. Since its adoption, and continuing through every revision, Model Rule 1.6 has permitted disclosure “to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client.”43 Thus, notwithstanding the presumed and professed centrality of confidentiality as a basic component of the attorney-client relationship and, therefore, as a fundamental element of the lawyer’s ethical responsibilities, the client’s interests in confidentiality lose their special status when confronted with the lawyer’s conflicting interests against the client.44

43. MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(5) (2006).

44. Indeed, in the words of one leading scholar, “[n]o exception to the attorney-client privilege has done as much to draw [the privilege] into question as the exception allowing lawyer self-protection.” WOLFRAM, supra note 2, at 308. As others have put it, permitting lawyers to disclose confidences for the purpose of collecting fees “is sanction for blackmail.” FREEDMAN & SMITH, supra note 2, at 155. For consideration of possible justifications for these exceptions, see WOLFRAM, supra note 2, at 308-09.

In fact, when adopted in 1983, Model Rule 1.6 did not allow disclosure to save the life of the “Innocent Convict.” See SIMON, supra note 1, at 4 (giving the example of lawyer Arthur Powell and innocent convict Leo Frank). In such a scenario, the client admits to a lawyer, in confidence, to having committed a capital crime for which an innocent individual has been convicted. See id. Under the original version of the Rule, the lawyer ostensibly was not permitted to reveal this information because such disclosure would not prevent future harmful conduct by the client. See Levine, Taking Ethical Discretion Seriously, supra note 4, at 30-33, 37-42. Not surprisingly, the prohibition against disclosing confidences to save the life of the Innocent Convict engendered harsh, though not universal, criticism. See id. at 38-42 & nn.112-18. The prohibition seemed particularly disconcerting when juxtaposed with the provision permitting disclosure for the lawyer to collect a fee. Professor Cramton and Lori P. Knowles argue that:

[A] profession that justifiably asks for and receives permission to disclose confidential client information when its own economic interests are at stake (e.g., to collect a fee from a client) cannot plausibly take the position that the threatened death or serious injury of another does not justify an occasional sacrifice of confidentiality.


The same lawyer who is prohibited from disclosing information learned while representing a client to exonerate someone falsely accused of a capital crime ... is perfectly free to disclose confidential information when he or she is the one accused, falsely or not. Nor is there any requirement that the lawyer’s liberty be at stake, or even that the lawyer be accused of anything criminal. A simple fee dispute with a client is sufficient grounds to disclose confidential information. The lawyer’s interest in collecting a fee is apparently a higher priority than exonerating an innocent defendant about to be convicted of a capital crime .... Confidentiality means everything in legal ethics unless lawyers lose money, in which case it means nothing.
Indeed, the self-interested lawyer involved in a controversy with a client might be expected to disclose information in spite of—or, in part, because of—the detrimental effect disclosure will have on the interests of the client. Ultimately, then, the discretionary nature of Model Rule 1.6 seems to operate in a way that makes paramount the interests of the lawyer, often allowing the lawyer to decide, primarily on the basis of those interests, whether to reveal confidential information about the client.45


More general critiques of the rules of confidentiality abound among scholars as well. See, e.g., Simon, supra note 1, at 56, 222 n.9; Wolfram, supra note 2, at 243-47; Simon, supra note 7, at 1453-54, 1468; Fred C. Zacharias, Rethinking Confidentiality, 74 IOWA L. REV. 351, 376-89 (1989) (analyzing the results of empirical studies testing the justifications for strict confidentiality); Fred C. Zacharias, Rethinking Confidentiality II: Is Confidentiality Constitutional?, 75 IOWA L. REV. 601 (1990) [hereinafter Zacharias, Rethinking Confidentiality II] (same).

45. Even a brief survey of ethics regulations over the past few decades reveals many instances in which the organized bar promulgated ethics rules that seemed to promote lawyers' economic self-interests to the detriment of those of the client. For example, the United States Supreme Court has struck down various regulations that appeared designed, at least in part, to protect the economic interests of lawyers. See, e.g., Supreme Court of Va. v. Friedman, 487 U.S. 59, 67-70 (1988) (striking down regulations limiting admission "on motion" to state residents as unconstitutional in violation of the Privileges and Immunities Clause); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 655-56 (1985) (reversing reprimand for using an illustration in advertising materials on First Amendment grounds); Supreme Court of N.H. v. Piper, 470 U.S. 274, 287-88 (1985) (striking down regulations limiting bar admission to state residents as unconstitutional in violation of the Privileges and Immunities Clause); Bates v. State Bar, 433 U.S. 350, 384 (1977) (striking down restrictions on advertising by lawyers of routine services and their availability as violating the First Amendment); Goldfarb v. Va. State Bar, 421 U.S. 773, 791-93 (1975) (striking down mandatory minimum fee schedules as a form of price fixing).

Many scholars have criticized the sometimes self-serving nature of lawyer self-regulation. See, e.g., Wolfram, supra note 2, at 21 ("Few persons who are not lawyers would judge the... history of [bar] regulation to be one in which the public interest has regularly been vindicated."); Green & Zacharias, supra note 5, at 312 ("[T]here is little doubt that ethics codes traditionally have included self-serving propositions." (citing Zacharias, Rethinking Confidentiality II, supra note 44, at 628 nn.138-39, 629-30 nn.144-45)); Geoffrey C. Hazard, Jr., Russell G. Pearce & Jeffrey W. Stempel, Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services, 58 N.Y.U. L. REV. 1084, 1087 (1983) (arguing that "participants in the debate on lawyer advertising have failed to appreciate that legal services are a market commodity"); Andrew M. Perlman, Toward a Unified Theory of Professional Regulation, 55 FLA. L. REV. 977, 999 (2003) ("[T]he ABA's structural rules... have emphasized self-protection and public image at the expense of more appropriate emphases... [T]here is ample evidence that ethics codes have, in fact, advanced these goals more clearly than other identifiable objectives."); Deborah L. Rhode, Keynote, Law, Lawyers, and the Pursuit of Justice, 70 FORDHAM L. REV. 1543, 1557 (2002) ("[R]egulation of the legal profession has been designed primarily by and for the profession, and too often protects its concerns at the expense of the public."); Schneyer, supra note 2, at 724-33 (criticizing the bar's insistence on designing ethical rules to protect lawyers, its disfavor of regulation by nonlawyer actors and
D. Enforcement

Finally, the discretionary nature of many ethics provisions may have a detrimental effect beyond the specific conduct of lawyers operating in the context of discretionary rules. On a broader level, the extent to which the Model Rules allow important aspects of a lawyer's ethical obligations to remain optional rather than mandatory arguably contributes to a general undermining of the authority and credibility of ethics codes as a source of lawyers' professional responsibility. Indeed, although ethics codes set forth the substantive basis for attorney discipline, even mandatory ethics provisions remain notoriously underenforced. The enactment of discretionary rules—by definition unenforceable under prevailing disciplinary norms—in areas central to ethical behavior reinforces the perception that ethics rules are often at best aspirational or hortatory. In short, the Model Rules send the message that the self-interested lawyer faces minimal—if any—actual risk when disregarding ethics codes and their underlying principles.  


46. See STANDING COMM. ON PROF'L DISCIPLINE, AM. BAR ASS'N, SURVEY ON LAWYER DISCIPLINE SYSTEMS 1-8 (2001) (listing the number of complaints brought against lawyers and the types and frequencies of sanctions imposed); WOLFRAM, supra note 2, at 80 (“Recurring impressionistic accounts claim that the state of lawyer discipline demands urgent attention,” in part because, “there are ample reasons to believe that discipline is selective, episodic, subject to constraints of fluctuating budgets and personal ability, influenced by political instability, and subject to like influences that grossly distort the extent to which lawyer discipline reflects levels of deviance and compliance among lawyers.”); Barton, supra note 2, at 424 & n.47 (“[T]he minimum Rules governing lawyers are, in fact, notoriously underenforced.”); Lisa G. Lerman, Lying to Clients, 138 U. PA. L. REV. 659, 747 n.349 (1990) (“The underenforcement of the legal ethics codes is well-documented.”); Deborah L. Rhode, The Profession and the Public Interest, 54 STAN. L. REV. 1501, 1512 (2002) (“Disciplinary rules and enforcement processes have not adequately curbed ethical abuses . . . .”); Wilkins, supra note 5, at 493 (“[T]he rules of professional conduct . . . tend to be systematically underenforced.”); Fred C. Zacharias, What Lawyers Do When Nobody's Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules, 87 IOWA L. REV. 971, 973 (2002) (exploring “the ramifications of maintaining unenforced or underenforced rules in the professional codes of lawyer responsibility”). But see Charles W. Wolfram, Toward a History of the Legalization of American Legal Ethics—1. Origins, 8 U. CHI. L. SCH. ROUNDTABLE 469, 470 (2001) (“While lawyer discipline was once scandalously under enforced and is still criticized by many as lax, there is no doubt that its incidence has increased significantly in the past thirty years.”) (footnote omitted)).

47. See supra note 6 and accompanying text.

48. See David Luban, Ethics and Malpractice, 12 MISS. C. L. REV. 151, 152 (1991) (making the “routine observation that the codes are drastically underenforced”). Professor Luban observes that, given the current state of underenforcement, if one were to give realistic advice to aspiring lawyers about how to avoid attorney discipline, it would be this: “If you don’t steal your clients’ money,
II. THE JEWISH LEGAL MODEL

In light of the apparent limitations on the effectiveness of the ABA Model Rules of Professional Conduct in improving the reputation and ethical conduct of American lawyers, perhaps American ethics codes should look to an alternative model as a counterexample for the codification and implementation of ethical norms. Specifically, the Jewish legal model offers a different approach to the formulation and interpretation of ethical provisions, grounded in mandatory legal and ethical obligations that require the individual to take seriously both the formal delineation of a rule and the underlying ethical principles reflected and incorporated therein. An analysis of such an approach may prove helpful in promoting a more serious attitude toward ethical obligations in American legal practice.

A. Ethical Obligations: The Mandatory/Optional Dichotomy

A number of scholars have drawn a contrast between the predominance of rights as the guiding value in American law and jurisprudence and the notion of obligation as the central principle in Jewish law. At its core, the Jewish legal system consists of 613 biblical commandments, as applied and implemented through rabbinic interpretation and legislation. Although often dependent on the presence of a variety of circumstances and conditions that trigger their applicability, commandments, by definition, require a prescribed mode of conduct in response to a given scenario.

The mandatory nature of ethical obligations in the Jewish legal system extends to areas of conduct, such as giving aid to those in need, that might seem more consistent with voluntary aspirations than with the

Id. at 152; see also Zacharias, supra note 2, at 861-62 ("[M]any rules simply go unenforced or are patently underenforced. . . . [O]ne could safely hazard the assertion that few rules truly are enforced in a way that makes lawyers fear discipline for violating them.").


dictates of legal strictures. In fact, the biblical term *tzedaka*, often translated as “charity,” contains the root *tzedek*, the biblical word for “justice.” Thus, as a form of implementing social justice, both the individual and the community as a whole must fulfill a legal and ethical obligation to contribute resources to those requiring assistance. The legal status and implications of this obligation parallel those of other financial obligations.

In further contrast to the American legal system, the substance of Jewish law comprises a comprehensive set of obligations, in principle addressing every area of human endeavor. Thus, the Jewish legal system regulates activities both public and private, both interpersonal and ritual, both individual and communal, thereby extending the notion of religious observance and ethical obligation to all realms of life. As Rabbi Joseph Soloveitchik has put it, “[t]he marketplace, the street, the factory, the house, the meeting place, the banquet hall, all constitute the backdrop for the religious life.” In this perspective, “[t]he true sanctuary is the sphere of our daily, mundane activities, for it is there that the realization of religious and ethical obligation takes place.” Applied to

52. Id. at 248.
55. See, e.g., KAPLAN, supra note 50, at 78 (stating that the commandments “penetrate every nook and cranny of a person’s existence, hallowing even the lowliest acts and elevating them to a service to God. . . . [,] sanctify every facet of life, and constantly remind one of [one’s] responsibilities toward God” (footnote omitted)); see also Samuel J. Levine, The Broad Life of the Jewish Lawyer: Integrating Spirituality, Scholarship and Profession, 27 TEX. TECH L. REV. 1199, 1204 (1996) [hereinafter Levine, Broad Life] (observing that “an individual who views religion as the center of life can incorporate other aspects of life, such as a secular career, to broaden that life,” and concomitantly unify all areas of life); Samuel J. Levine, Reflections on the Practice of Law as a Religious Calling, from a Perspective of Jewish Law and Ethics, 32 PEPP. L. REV. 411, 412 (2005) [hereinafter Levine, Reflections] (“[T]he range of halacha, Jewish legal and ethical thought, encompasses all facets of the human experiences, emphasizing the importance of an ethically unified life and demonstrating that every area of life has moral significance.”).
56. JOSEPH B. SOLOVEITCHIK, HALAKHIC MAN 94 (Lawrence Kaplan trans., 1983) (originally published in Hebrew as Ish ha-halakhah, in 1 TALPIOT 3-4 (1944)).
57. Id. at 94-95; see also Levine, Broad Life, supra note 55, at 1205 (“[A]ccording to Maimonides, through my professional career I could actually serve [God], while Ramchal taught that I could utilize my career as a means towards piety”); id. at 1205 nn.21-22 (citing MOSES C. LUZZATO, MESILLAT YESHARIM 336-39 (Shraga Silverstein trans., 1966); MAIMONIDES, MISHNE TORAH, Laws of De’oth 3:2-3)).
commercial activities, the corpus of Jewish law, from the biblical text to modern commentaries, contains a pervasive emphasis on scrupulous adherence to honest and ethical business dealings and includes detailed prohibitions against taking unfair advantage of those who are vulnerable.\(^{58}\)

Notwithstanding the inherent authority of Jewish law to prescribe specific obligations in all realms of human activity, in practice, determination of the appropriate conduct mandated by a particular situation may involve a complex analytical process, which at times depends on balancing various conceptual and practical interests.\(^{59}\) Nevertheless, once a decision has been reached, the terms of the decision stand not merely as a suggested resolution, but as defining the contours of obligation, thereby requiring strict adherence. For example, in the Jewish legal system, with very limited exceptions, the value of preserving life overrides other legal and ethical obligations.\(^{60}\) As a result, Jewish law does not merely permit, but requires violation of virtually any commandment to the extent necessary to respond to a life-threatening situation.\(^{61}\) In fact, it follows that “it is forbidden to delay such violation of [a commandment] for the sake of a person who is dangerously ill.”\(^{62}\)

The mandatory nature of obligations in Jewish law to assist those in need, to engage in fair business practices, and to act to save a life stands

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58. See TAMARI, supra note 52, at 47 (citing legal interpretations of the biblical prohibition against placing “a stumbling block in the path of the blind” as extending to “the giving of unwise business advice to someone, or the provision, through perfectly legal transactions, of goods that are to the buyer’s physical or moral detriment” (quoting Leviticus 19:14)). Indeed, Jewish law requires particular protection of those unable to navigate the legal system, see id. at 48; see also Samuel J. Levine, A Look at American Legal Practice Through a Perspective of Jewish Law, Ethics, and Tradition: A Conceptual Overview, 20 NOTRE DAME J.L. ETHICS & PUB. POL’Y 11, 20-21 & nn.51-52 (2006), in apparent contrast to the client in the American legal system who fails to obtain a written fee agreement from a lawyer and thereby remains at a disadvantage in an ensuing fee dispute. See discussion supra Part I.B.

59. See Levine, Taking Prosecutorial Ethics Seriously, supra note 4, at 1358-69 (“[E]ach conflict poses its own unique challenges, thereby necessitating a correspondingly particularized method of resolution.”).

60. See id. at 1359 & n.67 (citing TALMUD BAVLI, Yoma 85a-85b; MAIMONIDES, MISHNE TORAH, Laws of Sabbath, 2; 2 ARYEH KAPLAN, THE HANDBOOK OF JEWISH THOUGHT 38-49 (Abraham Sutton ed., 1992); HERSHEL SCHACHTER, B’IKVEI HATZOAN 14-18 (1997); SOLOVEITCHIK, supra note 56, at 34-35); see also Levine, Taking Ethical Discretion Seriously, supra note 4, at 57 n.151 (“[N]early every obligation in Jewish law is suspended to save a life.”); Russell G. Pearce, To Save a Jewish Life: Why a Rabbi and a Jewish Lawyer Must Disclose a Client Confidence, 29 LOY. L.A. L. REV. 1771, 1776 (1996) (“To save a life, one may violate all of Jewish law, except idolatry, incest and adultery, and murder.”).

61. See MAIMONIDES, supra note 60, 2:2-3; SOLOVEITCHIK, supra note 56, at 34.

62. SOLOVEITCHIK, supra note 56, at 34.
in stark contrast to discretionary provisions in the Model Rules that, at most, recommend—but do not require—a lawyer to perform pro bono services, to place fee agreements in writing, and to disclose confidences when reasonably necessary to prevent a death.\(^\text{63}^\) Arguably, though, the differences between obligations in Jewish law and in American ethics codes merely reflect broader differences in the two legal systems. The notion of mandating a particular mode of action obtains from the basic premise underlying Jewish law as a religious system based in divine wisdom and command. Because American law instead emphasizes rights and personal autonomy, the American legal system is far less likely to impose additional duties.\(^\text{64}^\) Indeed, American law does not mandate charitable contributions; does not prevent shrewd—if seemingly unfair—business dealings, though it prohibits fraud; and does not generally require acts to save the life of a person in mortal peril. Likewise, it may not seem appropriate for the American legal system to place such obligations on lawyers.\(^\text{65}^\)

Despite the appeal—and, to some degree, the descriptive accuracy—of such an argument, it may fail in the context of the role and responsibilities of American lawyers. The existence of codes of ethics for lawyers, adopted by courts to have binding legal authority, grows out of an expression of the special role of the lawyer in American society and,

\(^\text{63}^\) See discussion supra Part I.A-C.

\(^\text{64}^\) See supra note 49 and accompanying text.

\(^\text{65}^\) See, e.g., David Luban, *Calming the Hearse Horse: A Philosophical Research Program for Legal Ethics*, 40 MD. L. REV. 451, 472-73 (1991) (citing the argument that "a pro bono duty in effect selectively taxes lawyers to provide a public service" and that "if it is in the public interest to make legal services available to all, the expense should fall on the entire public, not just on the lawyers"); Nancy J. Moore, *In the Interests of Justice*: *Balancing Client Loyalty and the Public Good in the Twenty-First Century*, 70 FORDHAM L. REV. 1775, 1786 (2002) (arguing that lawyers "should not be obligated to perform as agents of the state in situations where private citizens have no similar obligation"); *id.* at 1786 n.51 (noting that under American criminal law and tort law, "[p]rivate citizens do not have a legal duty to prevent death or substantial bodily harm, even when it is the result of an intended criminal act"); *see also* David A. Hyman, *Rescue Without Law: An Empirical Perspective on the Duty to Rescue*, 84 TEX. L. REV. 653, 655 (2006) ("The common law approach to rescue is straightforward. Absent a limited number of specific exceptions, there is no duty to rescue, regardless of the ease of rescue and the consequences of non-rescue."); Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 VA. L. REV. 879, 880 (1986) (noting that "[the American] legal system is seen as one that . . . rarely deters antisocial omissions, and virtually never rewards rescuers"); Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 247 (1980) (observing that "the courts have uniformly refused to enunciate a general duty to rescue, even in the face of repeated criticisms that the absence of such a duty is callous"). *See generally* Simon, *supra* note 7 (critiquing a libertarian/formalist vision of legal ethics); William H. Simon, *The Belated Decline of Literalism in Professional Responsibility Doctrine: Soft Deception and the Rule of Law*, 70 FORDHAM L. REV. 1881 (2002) (critiquing literalism in legal ethics).
in particular, in the American legal system.\textsuperscript{66} Even among those who have questioned, at times convincingly, both the value and the validity of referring to lawyers as professionals, there remains an abiding insistence that lawyers maintain high ethical standards.\textsuperscript{67} Therefore, the absence of a given obligation in American law need not preclude the possibility that such an obligation should nevertheless be imposed on lawyers.\textsuperscript{68} At the same time, of course, the mere presence of a particular obligation in Jewish law need not suggest that such an obligation would likewise prove appropriate in the context of the work of American lawyers. However, to the extent that the organized bar claims to uphold, as a matter of its professional responsibility, the ethical values of serving those in need, protecting clients in potential litigation against their lawyers, and recognizing the value of human life,\textsuperscript{69} changes in the formulation of the Model Rules to incorporate mandatory forms of ethical obligation would demonstrate a more fully realized commitment to these underlying ethical principles.

B. Beyond the Mandatory/Optional Dichotomy

The possibility of improving the ethical conduct and reputation of American lawyers through increased mandatory ethics rules may present the most direct method of enhancing the sense of ethical obligation among the organized bar. However, as demonstrated in the legislative history of various provisions in the Model Rules, the ABA has often remained resistant to articulating ethics rules in expressly mandatory terms.\textsuperscript{70} Consequently, to the extent that such resistance continues, it

\textsuperscript{66} See Rhode, supra note 45, at 1545-46.

\textsuperscript{67} See sources cited supra note 3 (listing works criticizing the use of the word professional).

\textsuperscript{68} See, e.g., RHODE, supra note 1, at 50-57 (arguing that “lawyers need to accept moral responsibility for the consequences of their professional actions” by adhering to “more ethically demanding professional codes and institutionalized practices”); SIMON, supra note 1, at 138-39 (discussing a lawyer’s responsibility to take actions that “seem likely to promote justice”); Rhode, supra note 45, at 1546 (arguing that, unlike other private citizens, “lawyers, as officers of the justice system, have a special obligation to pursue justice”). Cf James E. Fleming, The Lawyer as Citizen, 70 FORDHAM L. REV. 1699, 1715 (2002) (“Lawyers ... may attribute only partial authorship of their acts to the law themselves . . . .”); Koniak, supra note 34, at 1438 (noting “the potential for ethics rules to compete and conflict with other law”); Luban, supra note 65, at 473 (“The pro bono duty, rather than constituting a tax on lawyers, can be viewed as a fee which they pay the public in return for special privileges granted to the legal profession.”); Simon, supra note 7, at 1456-57 (“All lawyers are formalists some of the time. . . . Some lawyers, however, are formalists all the time. . . . [T]hey do not feel constrained by any public interest that is not fully articulated in positive rules. They thus stand ready to exploit ‘loopholes’ and ‘technicalities’ . . . .”).

\textsuperscript{69} See discussion supra Part I.A-C.

\textsuperscript{70} See discussion supra Part I.A-C.
Taking Ethical Obligations Seriously

may prove necessary to suggest alternative interpretive methodologies that aim to promote closer adherence to ethical principles in a manner more consistent with current formulations of the Model Rules. Toward that end, approaches to legal and ethical obligation in Jewish law may again provide a helpful model.

1. Unenumerated Ethical Obligations

Despite the applicability of the Jewish legal system to all areas of human behavior, as with any set of rules intended to regulate a broad range of activities, the scope of specific obligations enumerated in the Torah remains, inevitably, somewhat limited. Indeed, in the words of the Medieval scholar Nachmanides, “it [would be] impossible to mention in the Torah all aspects of [a person’s] conduct with . . . neighbors and friends, and all [of a person’s] various transactions, and the ordinances of all societies and countries.” Therefore, in addition to the commandments addressing particular responsibilities and prohibitions, the Bible prescribes a number of more general principles to be applied to govern situations not delineated in the Torah.

Scholars of Jewish law have identified a number of biblical verses that provide a basis for obligations not expressly enumerated, but no less mandatory than enumerated commands. The verse “you shall be holy” has been understood to prohibit behavior that is improper but not expressly forbidden. Similarly, the command to “do the just and the good” extends the range of interpersonal obligation beyond those actions enumerated as commandments. The general rule to “love your neighbor as yourself” prescribes wide-ranging care for the needs and well-being of others. Perhaps the broadest of biblical admonitions, “in all of your ways acknowledge [God],” captures the centrality of

71. See 5 Ramban (Nachmanides), Commentary on the Torah 87-88 (Charles B. Chavel trans., 1976) (explicating Deuteronomy 6:18); see also Levine, Taking Ethics Codes Seriously, supra note 4, at 543 & n.57.


73. Leviticus 19:2; see also Levine, Taking Ethics Codes Seriously, supra note 4, at 547; Levine, supra note 72, at 516-17.

74. Deuteronomy 6:18; see also Levine, Taking Ethics Codes Seriously, supra note 4, at 548; Levine, supra note 72, at 520-22.

75. Leviticus 19:18; see also Levine, Taking Ethics Codes Seriously, supra note 4, at 549; Levine, supra note 72, at 525-26.

76. Proverbs 3:6; see also Levine, Reflections, supra note 55, at 4412-13 & nn.3-6; Levine, Taking Prosecutorial Ethics Seriously, supra note 4, at 1340 & n.5.
mandatory obligations in Jewish thought by applying the ethical imperative to all of life's endeavors.77

Of particular relevance to a consideration of the interpretation of American ethics codes, in addition to identifying biblical sources articulating broad legal and ethical obligations, scholars of Jewish law have formulated interpretive methodologies for the derivation and application of specific unenumerated biblical obligations.78 For example, Nachmanides relies upon biblical narrative to delineate the substance of the instruction "you shall be holy."79 Specifically, through an analysis of the stories of Noah and Lot, Nachmanides concludes that, although not otherwise the subject of an express commandment, drunkenness is prohibited as a violation of the notion of holiness.80 Likewise, employing a methodology that explores the nature of biblical obligations, Nachmanides interprets the command to "do the just and the good" as mandating interpersonal obligations beyond the scope of those enumerated.81 Thus, he derives such unenumerated obligations as adopting a respectful and appropriate attitude and manner toward others, even in the context of adversarial situations such as litigation proceedings.82 On a broader level, both Nachmanides and his illustrious Medieval predecessor, Maimonides, understand the imperative to "love your neighbor as yourself"83 as a basis for requiring an expansive degree of care and consideration for the interests of others,84 including, for example, visiting the sick and comforting mourners.

Notably, in the context of American codes of legal ethics, both courts and the ABA itself have similarly acknowledged practical limitations to the range of conduct delineated in enumerated ethics provisions.85 As the United States Supreme Court observed in 1856, "it is difficult, if not impossible, to enumerate and define, with legal precision, every offence

77. See Levine, Taking Ethical Discretion Seriously, supra note 4, at 46 n.137; Levine, Taking Prosecutorial Ethics Seriously, supra note 4, at 1364-65, 1369-70.
78. See Levine, Taking Ethics Codes Seriously, supra note 4, at 547-48; Levine, supra note 72, at 516-17.
79. See Leviticus 19:2.
80. See Levine, Taking Ethics Codes Seriously, supra note 4, at 547 (citing 3 Ramban (Nachmanides), Commentary on the Torah 282 (Charles B. Chavel trans., 1971)); Levine, supra note 72, at 517.
81. See Deuteronomy 6:18; Levine, Taking Ethics Codes Seriously, supra note 4, at 548 (citing 5 Ramban, supra note 80, at 87-88); Levine, supra note 72, at 520-21.
82. See Levine, Taking Ethics Codes Seriously, supra note 4, at 548 (citing 5 Ramban, supra note 80, at 87-88); Levine, supra note 72, at 520-21.
83. Leviticus 19:18.
84. See Levine, Taking Ethics Codes Seriously, supra note 4, at 549 (citing sources); Levine, supra note 72, at 525-26.
85. See Levine, Taking Ethics Codes Seriously, supra note 4, at 538 n.48; id. at 540 n.50.
Taking Ethical Obligations Seriously

Likewise, in the Preamble to the 1908 Canons of Professional Ethics, the ABA emphasized that "[n]o code or set of rules can be framed, which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life." Moreover, in an explicit endorsement of unenumerated ethical obligations, the Preamble declared that "[t]he following canons of ethics are adopted by the American Bar Association as a general guide, yet the enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned." In addition, a number of courts, including the New York Court of Appeals, have endorsed the enactment of broad ethics provisions as a means of regulating those activities otherwise unaddressed in enumerated rules.

In practice, the presence of broad rules in ethics codes has attracted considerable criticism from courts and scholars alike, who have found such rules unworkably vague and thus too difficult to interpret and apply precisely and consistently. Responding in part to these arguments, the ABA omitted from the first version of the Model Rules some of the broad ethics provisions that had been included fewer than fifteen years earlier in the Model Code of Professional Responsibility. Nevertheless, a number of broad rules remain in the Model Rules and, perhaps more significantly, broad ethics provisions continue to be enforced by some courts as a basis for lawyer discipline and/or disqualification in instances of violations of unenumerated ethical obligations. The interpretive methodologies employed by these courts echo, to some degree, those formulated by scholars of Jewish law for deriving unenumerated biblical obligations. This suggests the potential for looking more closely at the Jewish legal system as a model for increasing the degree of obligation in American legal ethics.

86. Ex parte Secombe, 60 U.S. (19 How.) 9, 14 (1856); see also Levine, Taking Ethics Codes Seriously, supra note 4, at 538-40 & nn.48-49.
87. CANONS OF PROF'L ETHICS Preamble (1908).
88. Id.
89. See In re Holtzman, 577 N.E.2d 30, 33 (N.Y. 1991) (per curiam) ("Broad standards governing professional conduct are permissible and indeed often necessary." (citation omitted)); see also Levine, Taking Ethics Codes Seriously, supra note 4, at 540 & n.49.
90. See Levine, Taking Ethics Codes Seriously, supra note 4, at 535-37 & n.46, 550-64.
91. Compare MODEL RULES OF PROF'L CONDUCT (1983), with MODEL CODE OF PROF'L RESPONSIBILITY (1969); see also Levine, Taking Ethics Codes Seriously, supra note 4, at 530-37.
92. See Levine, Taking Ethics Codes Seriously, supra note 4, at 550-68; see also MODEL RULES OF PROF'L CONDUCT (2006).
For example, both the Model Code and the Model Rules prohibit "conduct that is prejudicial to the administration of justice." In a manner somewhat parallel to the methodology applied to interpret the command to "do the just and the good," courts have expansively analyzed principles underlying enumerated ethics rules, thereby identifying unenumerated conduct likewise prohibited as prejudicial to the administration of justice. Another broad Model Code provision, omitted from the Model Rules but still retained in a number of jurisdictions, prohibits "conduct that adversely reflects on [the lawyer's] fitness to practice law." In a manner similar to reliance on biblical narrative to delineate unenumerated obligations mandated in the imperative "you shall be holy," courts have looked to the nature and narratives of the practice of law through an examination of "the everyday realities of the profession and its overall code of conduct," to derive unenumerated violations of fitness to practice provisions. Finally, Canon 9 of the Model Code instructs lawyers to "[a]void [e]ven the [a]ppearance of [p]rofessional [i]mpropriety." Despite its omission from the Model Rules, a number of courts continue to apply the appearance of impropriety standard as a basis for prohibiting a wide range of unethical yet unenumerated activities, echoing the broad scope of unenumerated obligations required by the command to "love your neighbor as yourself." To the extent that courts, scholars, and the organized bar take these methods seriously, they may potentially impact the interpretation and application of ethics rules that facially do not impose mandatory imperatives.

To be sure, it would be implausible to interpret existing Model Rules provisions to require universal pro bono service, written fee agreements, or disclosure of confidences to save a life. Indeed, the final version of the Model Rules presumably expresses the ABA's collective view that, on balance, such conduct generally should not be obligatory. Nevertheless, the implementation of broad ethics provisions as a means for the interpretation of these rules might suggest that, at least at times,
such conduct should indeed be considered mandatory. For example, although circumstances may often support as reasonable a lawyer's decision not to place a fee agreement in writing, in other cases, the failure to provide a written fee agreement may appear to have been designed by the lawyer to gain an unfair advantage over the client. In such a scenario, the lawyer's behavior, though technically consistent with the letter of Model Rule 1.5, may concurrently prove prejudicial to the administration of justice, may reflect poorly on the lawyer's fitness to practice law, and/or may carry the appearance of impropriety.

Similarly, against the backdrop of an ongoing debate about appropriate limitations on the duty of confidentiality, the ABA, through its promulgation of the current form of Model Rule 1.6, adopts an approach that places the importance of confidentiality as paramount, permitting a lawyer to remain silent in the face of resulting danger to others. However, even among scholars who support expansive definitions of the duty of confidentiality, many find it unseemly—if not downright immoral—for a lawyer to maintain a confidence in a case such as the "Innocent Convict," in which a client confesses to the crime for which an innocent person is going to be executed. Although Model Rule 1.6 does not require disclosure in such a case, the failure to reveal confidences to save the life of a wrongly convicted individual might arguably be understood to contradict ethical notions of fitness to practice, proper administration of justice, and/or maintaining appearances of appropriate attorney conduct.

Finally, scholars have proposed a variety of arguments to support the assertion that pro bono service should be viewed as mandatory. Although virtually all jurisdictions seem to concur with the ABA's general determination, codified in Model Rule 6.1, that pro bono representation should retain aspirational status, a more nuanced approach might take into account the resources and abilities of a particular lawyer. In this context, looking beyond the contours of the language of Model Rule 6.1, a lawyer who is personally and professionally capable of providing pro bono services, but fails to do so, might be held to have acted in a way inconsistent with fitness to practice.

101. See discussion supra Part I.B.
102. See discussion supra Part I.C.
103. See discussion supra note 44.
104. See sources cited supra note 8.
105. See GILLERS & SIMON, supra note 7, at 392 ("No state yet requires lawyers to perform pro bono work, and no state is actively considering such a requirement, but a number of states require lawyers to report their pro bono hours, and other states encourage lawyers to do so."); see also GILLERS, supra note 2, at 169-70.
law, promoting the administration of justice, and/or maintaining the appearance of propriety.

2. Obligatory Ethical Deliberation

Notwithstanding the conceptual validity and practical utility of employing interpretive methods for deriving unenumerated ethical obligations through the application of broad ethics provisions, the dominant attitude among courts, scholars, and the organized bar remains opposed to such efforts. Moreover, the ABA has often demonstrated a resistance to articulating ethics rules in the form of mandatory obligations, resorting instead to promulgating discretionary, or permissive, rules. As a result, lawyers are often presented with ethical directives that ostensibly may be either followed, or disregarded, at the will of the lawyer.

Therefore, given the current formulation of ethics rules, perhaps a more effective alternative for promoting a greater degree of ethical obligation should address the underlying assumptions regarding the nature and consequent interpretation of discretionary ethics rules. Once again, sources in Jewish law and ethics may prove valuable in the consideration of such an approach.

Despite the wide range of conduct regulated through both enumerated biblical commands and extensive unenumerated obligations, many of life’s activities appear to fall outside of the scope of these categories. Nevertheless, as a number of scholars have explained, those areas do not comprise a realm of “optional” activities in which individuals may choose a particular mode of conduct without reflecting upon the ethical implications. Rather, as instructed in perhaps the broadest of biblical

106. See Levine, Taking Ethics Codes Seriously, supra note 4, at 535-37.
107. See discussion supra Part I. See generally Green & Zacharias, supra note 5.
108. See Green & Zacharias, supra note 5, at 270 & nn.16-22, 276-78 & nn.41-55; Levine, Taking Ethical Discretion Seriously, supra note 4, at 24.
109. See Moshe Sokol, Personal Autonomy and Religious Authority, in RABBINIC AUTHORITY AND PERSONAL AUTONOMY 169, 207 (Moshe Sokol ed., 1992) (“The fact is that most of one’s waking hours are spent at work, or with one’s family. Certainly these situations call for obedience to appropriate standards of behavior: it is wrong to cheat at work, for example, or hurt a spouse’s feelings. Nevertheless, for great stretches of the day each individual must decide for [one’s self] how [one] will work, with what commitment, how warm [one] will be toward [one’s] children, how much time [one] will spend working for good causes, and so on.”); see also Levine, Taking Ethical Discretion Seriously, supra note 4, at 46 n.137 (citing YITZCHAK HUTNER, PACHAD YITZCHAK, Pesach 123-26 (6th ed. 1999); RABBENU BACHYA IBN PAQUDA, CHOVOTH HA-LEVAVOTH (4:4); Aharon Lichtenstein, Does Jewish Tradition Recognize an Ethic Independent of Halakha?, in CONTEMPORARY JEWISH ETHICS 102, 102-23 (Menachem Marc Kellner ed., 1978); Sokol, supra, at 169-216).
110. See, e.g., sources cited supra note 109.
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imperatives, "in all your ways acknowledge [God]," every human action is subject to ethical considerations and therefore requires careful ethical deliberation. Indeed, in this framework, the extent to which a given scenario initially seems beyond the bounds of ethical guidelines may, in fact, indicate the complexity of analysis necessary to arrive at a decision in an ethically appropriate manner. As Rabbi Yitzchak Hutner observes, although determination of the proper approach to a situation may depend on specific factors and circumstances, Jewish thought renders virtually nonexistent the category of conduct that would be deemed truly "optional" in the sense of permitting resolution without regard to ethical deliberation.

At first glance, such an approach appears inconsistent with the stated attitude of the Model Rules toward discretionary ethics provisions. The Scope section introducing the Model Rules declares that, in contrast to Rules that "are imperatives, cast in the terms 'shall' or 'shall not..." others, generally cast in the term 'may,' are permissive." Because the latter category "define[s] areas under the Rules in which the lawyer has discretion to exercise professional judgment," the Scope section cautions that "[n]o disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion." Therefore, it would seem to follow, when an ethics rule leaves a decision to the discretion of the lawyer, the permissive nature of the rule allows the lawyer to act without resort to ethical deliberation or justification.

Alternatively, however, the Scope section’s reference to the lawyer’s "discretion to exercise professional judgment" may be understood to imply that, although a discretionary rule does not mandate a particular mode of action, the rule does instruct the lawyer to engage in a decisionmaking process that involves reliance on the lawyer’s professional judgment. Specifically, this process arguably may require

112. See supra notes 56-57 and accompanying text.
113. See Levine, Taking Prosecutorial Ethics Seriously, supra note 4, at 1358-69.
115. See infra notes 116-18; see also Green & Zacharias, supra note 5, at 280-87; Levine, Taking Ethical Discretion Seriously, supra note 4, at 46; McGowan, supra note 38, at 1825 n.1; Fred C. Zacharias & Bruce A. Green, Reconceptualizing Advocacy Ethics, 74 GEO. WASH. L. REV. 1, 46-47 (2005).
117. Id.
118. See supra note 6.
119. See Levine, Taking Ethical Discretion Seriously, supra note 4, at 49 n.140 (arguing that “with discretion comes the responsibility to exercise professional judgment”); see also Green & Zacharias, supra note 5, at 281-82.
ethical deliberation, including consideration of the ethical implications and consequences of the lawyer’s choice of conduct. Indeed, a number of ethics scholars have recently begun to evaluate such a reconceptualization of discretionary ethics rules, suggesting an approach that in many ways resembles the complex analysis often necessary in the interpretation and application of the command “in all your ways acknowledge [God].”

Imposing an obligation of ethical deliberation may offer yet another method for improving the ethical posture of the Model Rules, while remaining consistent with both the present form of the Rules and their

120. See Levine, Taking Ethical Discretion Seriously, supra note 4, at 46-52.

121. See, e.g., Green & Zacharias, supra note 5, at 281-87; id. at 285 n.81 (citing Mario J. Madden, The Indiscreet Role of Lawyer Discretion in Confidentiality Rules, 14 GEO. J. LEGAL ETHICS 603, 604-05 (2001); Limor Zer-Gutman, Revising the Ethical Rules of Attorney Client Confidentiality: Towards a New Discretionary Rule, 45 LOY. L. REV. 669, 705-06 (1999)); Andrew M. Perlman, Untangling Ethics Theory from Attorney Conduct Rules: The Case of Inadvertent Disclosures, 13 GEO. MASON L. REV. 767, 790-91 (2005); Zacharias & Green, supra note 115, at 52-55.


123. See Levine, Taking Ethical Discretion Seriously, supra note 4, at 59 n.154 (discussing the deliberative model of legal ethics and noting it can be applied to existing ethics rules).
ultimate deference to the lawyer's appropriate exercise of discretion.\textsuperscript{124} For example, such an approach may not always require that a lawyer disclose confidential information to protect the life of a third party, but it likewise would not permit the lawyer blithely to ignore the consequences of maintaining client confidences regardless of ethical implications.\textsuperscript{125}

Likewise, while acknowledging the value of pro bono representation and the potential importance of placing fee agreements in writing, this approach would nevertheless recognize that such conduct may not always represent the only appropriate course of action. Thus, lawyers would maintain the discretion to forego pro bono service or written fee agreements, subject to the obligation to engage in a careful ethical analysis supporting the reasoned conclusion that, under the circumstances, they found another course of action preferable. In short, a deliberative model of discretionary ethics rules contemplates a variety of acceptable responses to an ethical question, but at the same time, this approach takes ethical obligations seriously by insisting that a response be justified on the basis of meaningful ethical deliberation.\textsuperscript{126}

C. Enforcement

Finally, it might be instructive to analyze the possible impact that an increased degree of ethical obligation might have on enforcement of ethics rules, as well as the more general ramifications of such a change for lawyers' adherence to and attitudes toward ethics regulations. In theory, replacing discretionary rules with rules formulated as

\begin{itemize}
\item \textsuperscript{124} Such a framework finds an analogue in the abuse of discretion standard of review applied to certain kinds of discretionary judicial rulings. \textit{See id.} at 59-63; \textit{see also} Green & Zacharias, \textit{supra} note 5, at 282.
\item \textsuperscript{125} \textit{See} Levine, \textit{Taking Ethical Discretion Seriously, supra} note 4, at 51-55. \textit{Cf.} Maura Strassberg, \textit{Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics}, 80 IOWA L. REV. 901, 949-50 (1995) (discussing the practical effects of viewing law as including something more than positive law).
\item \textsuperscript{126} \textit{See} Levine, \textit{Taking Ethical Discretion Seriously, supra} note 4, at 46-63; \textit{see also} Feldman, \textit{supra} note 6, at 887 ("If one believes that good lawyering practically always demands good ethical deliberation, then it follows that the honorable mode of legal analysis should practically always dominate the technocratic one."); Serena Stier, \textit{Legal Ethics: The Integrity Thesis}, 52 OHIO ST. L.J. 551, 554 (1991) (outlining the integrity thesis, which makes it possible to "integrate[e] one's cherished personal values with one's obligations as an attorney"); Wendel, \textit{supra} note 5, at 6 (pointing to the logical necessity of uncovering "the moral principles that are implicated by the practice of lawyering"); W. Bradley Wendel, \textit{Value Pluralism in Legal Ethics}, 78 WASH. U. L.Q. 113, 117 (2000) ("[T]he lawyer seeking to act ethically must take account of different value claims that may not be comparable with one another in an impersonally rational, mathematical, or algorithmic manner."); Zacharias, \textit{supra} note 5, at 1359 (suggesting that lawyers should be required to discuss certain subjects with clients, so as to aid lawyers in distinguishing partisanship from objective, independent duties).
\end{itemize}
imperatives \textsuperscript{127} sends a message to lawyers that, unlike rules that are inherently unenforceable, mandatory rules are, indeed, obligatory, and violations of these rules will be identifiable and, consequently, potentially subject to enforcement actions. Similar results may be obtained from interpreting broad ethics provisions to impose unenumerated ethical obligations \textsuperscript{128} and from reconceptualizing discretionary rules so as to require ethical deliberation. \textsuperscript{129} These interpretive methods may promote adherence to ethical principles, premised in part on the proposition that ethical obligation extends beyond conduct expressly delineated in mandatory rules.

Perhaps more likely, however, models of increased ethical obligation may have a negative effect on efforts to promote enforcement of ethics rules and adherence to their underlying goals. On one level, notwithstanding the theoretical benefits of these models, they may prove inherently difficult to implement in practice. For example, reliance upon broad ethics provisions to curtail unethical conduct has been criticized as imprecise and, therefore, unsuited for enforcement. \textsuperscript{130} Likewise, evaluating compliance with the requirement of ethical deliberation for discretionary decisions may prove highly challenging, if not ultimately elusive. \textsuperscript{131} Although a variety of methods may be offered to overcome these objections, \textsuperscript{132} they suggest possible obstacles to enforcement.

More fundamentally, the adoption of models aimed at increasing the degree of ethical obligation may instead exacerbate problems presently associated with underenforcement. As currently adopted and interpreted, many ethics rules have remained rarely—if ever—enforced. \textsuperscript{133} Although a number of causes may contribute to underenforcement, including the unenforceability of discretionary rules, \textsuperscript{134} the failure to enforce mandatory rules may have serious consequences, potentially undermining the general credibility of ethics

\textsuperscript{127} See supra Part II.A.

\textsuperscript{128} See supra Part II.B.1.

\textsuperscript{129} See supra Part II.B.2.

\textsuperscript{130} See Levine, Taking Ethics Codes Seriously, supra note 4, at 535-37 (citing criticisms).

\textsuperscript{131} See Zacharias, supra note 5, at 1367 (observing that "[a] requirement of introspection, by definition, is difficult to enforce," because "[d]isciplinary authorities cannot know what lawyers 'have thought,'" and that "[u]pon questioning, lawyers can rationalize most conduct after the fact"). Cf Stephen Gillers, More About Us: Another Take on the Abusive Use of Legal Ethics Rules, 11 GEO. J. LEGAL ETHICS 843, 846 (1998) (positing the "near-impossibility of proving the lawyer's 'true' motive").

\textsuperscript{132} See Levine, Taking Ethical Discretion Seriously, supra note 4, at 59-60 n.154. See generally Levine, Taking Ethics Codes Seriously, supra note 4 (responding to various scholars' objections to broad ethics provisions).

\textsuperscript{133} See supra notes 46-48 and accompanying text.

\textsuperscript{134} See supra note 6.
codes as a system of regulation. Thus, to the extent that additional models of mandatory ethical obligations prove difficult to enforce, they accordingly may have the deleterious effect of reducing even further the perceived authority of ethics codes.

Indeed, Jewish exegetical tradition understands the biblical events of the Garden of Eden as an illustration of the negative consequences that may ensue from perceptions of unenforced mandatory rules. As the Talmud notes, in relating to the serpent God's command not to eat from the tree of knowledge, Eve states that God has also instructed not to touch the fruit of the tree. Although the motivation for Eve's extension of the prohibition remains open to interpretation, in the Talmudic reading of the story, the serpent thereby found an opportunity to entice Eve to eat from the fruit of the tree. The serpent first caused

135. See Loder, supra note 2, at 328 (summarizing David Luban's analysis that "even lawyers who believe in the ethical superiority of a certain course of conduct will engage in substandard behavior if they perceive other lawyers will so behave without sanction" and that "[s]ince lawyers suspect the unrealistically stringent rules will go unenforced, they will act not from a rational assessment of the most ethical behavior, but from fear of professional disadvantage" (citing Luban, supra note 65 at 460 n.24, 461)); Tanina Rostain, Ethics Lost: Limitations of Current Approaches to Lawyer Regulation, 71 S. CAL. L. REV. 1273, 1307-08 (1998) ("In a rational-actor model of legal ethics, enforcement—the detection of wrongdoing, apprehension of the wrongdoer, and conviction—bears the full weight of ensuring compliance with rules. Even with well-drafted rules and appropriate sanctions, a regulatory regime will founder unless the rules are enforced at a sufficient level to deter wrongful conduct."); Zacharias, supra note 2, at 857 ("[U]nderlying most professional regulation is the faulty assumption that professional discipline works to deter lawyer misconduct. This premise is inherently questionable. Many aspects of the codes are not seriously enforced, nor can they be. Moreover, so long as the disciplinary process remains secret, lawyers are unlikely to be deterred . . . ." (footnote omitted)); Fred C. Zacharias, The Professional Discipline of Prosecutors, 79 N.C. L. REV. 721, 772 (2001) ("[W]hen disciplinary agencies fail to enforce the codes altogether, or fail to enforce them against a segment of the bar, they encourage disrespect for the codes' letter and spirit. This disrespect can take numerous forms. At the simplest level, the affected segment of the bar . . . may simply have less inclination to follow the governing code's mandates. More subtly . . . [their] adversaries may feel a need to counteract the . . . misconduct by engaging in misconduct of their own. . . . [T]his in turn will reduce their own respect for the codes and for the disciplinary authorities in other areas." (footnote omitted)); Zacharias, supra note 46, at 1006 ("[S]ubstantial underenforcement of the advertising rules breeds disrespect for professional regulation. It seems to tell lawyers that the rules do not mean what they say. In the long run, this may encourage lawyers to violate or bend other professional rules." (footnote omitted)).

136. See TALMUD BAVLI, Sanhedrin 29a.


138. Id. at 3:3.

Eve to touch the fruit, thus violating God's command as she depicted it. Subsequently, when Eve was not punished for her actions, it appeared to her that God was not enforcing the prohibition. Of course, because her conduct did not, in fact, violate God's command, which was limited to not eating from the fruit, Eve was properly not subject to punishment. Nevertheless, the serpent argued that, just as the supposed prohibition against touching the fruit had not been enforced, Eve would not be punished for breaching the prohibition against eating the fruit. The serpent's devious logic succeeded in convincing Eve and Adam to eat from the fruit of the tree, which violated God's command and resulted in punishments including their banishment from Eden and their ultimate deaths.

The Talmud thus concludes with the broader observation that, at times, the addition of mandatory obligations and prohibitions may prove to have negative effects. Specifically, the failure to enforce obligations may send the message that wrongful conduct will not be subject to punishment, thus providing a license for more widespread violations. Similarly, in the realm of American legal ethics, the addition of ethical obligations that seem difficult to enforce may serve to amplify a more general impression among self-interested lawyers that ethics rules are underenforced and, therefore, do not require adherence. Consequently, lawyers may increasingly fail to take ethics codes seriously as a source of ethical guidance and influence.

Perhaps, though, problems resulting from underenforcement of ethics rules are but symptoms of more a fundamental defect in lawyers' attitudes toward the purpose and function of ethics codes. To the extent that lawyers perceive ethics codes essentially as a disciplinary system regulating the practice of law, underenforcement of code

140. See TALMUD BAVLI, Sanhedrin 29a, Commentary of Rashi.
141. See id.
143. See Genesis 3:6-24; see also Samuel J. Levine, The End of Innocence, HAMEVASER, Dec. 1989, at 8, 8, 10 (exploring rabbinical insights into the nature of the Tree of Knowledge).
144. See TALMUD BAVLI, Sanhedrin 29a; see also RASHI, supra note 142, at 31 (explicating Genesis 3:3).
146. See supra note 135.
147. For discussions of various functions of ethics codes, see Gaetke, supra note 3, at 737-41; Rostain, supra note 135, at 1339 & n.282; Zacharias, supra note 135, at 771-72; Zacharias, Specificity in Professional Responsibility Codes, supra note 122, at 225-39; Zacharias, supra note 46, at 1003-04.
provisions undermines the credibility and value of the rules.\textsuperscript{148} Instead, however, lawyers may seek an alternative function for ethics codes, as reflecting ethical norms among the community of lawyers and thereby inherently deserving of respect, independent of the possibility of enforced discipline.\textsuperscript{149} Under such a framework, the primary motivation

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\item \textsuperscript{148} See supra note 135; see also Rostain, supra note 135, at 1303-19.
\item \textsuperscript{149} For example, as Professor Gaetke recently observed:
\begin{quote}
An interesting study of why people obey the law . . . . criticizes common instrumental views of compliance, which posit that peoples' behavior is “motivated by self-interest” and which lead to a preoccupation with “manipulation of behavior through the control of punishments and incentives.” It sees such views as inadequate to explain what really determines citizens' desire to comply with the law. Instead, the study found that people focus on “normative issues,” such as “the legitimacy of legal authorities and the morality of the law.” The author of the study concludes that “[p]eople are more responsive to normative judgments and appeals than is typically recognized by legal authorities. Their responsiveness leads people to evaluate laws . . . in normative terms, obeying the law if it is legitimate and moral.” If this is true for citizens in general, there is reason to believe or at least hope that the same conclusion could be reached about lawyers and the rules that govern them.

What the . . . study suggests . . . is that lawyers will be more likely to obey new rules regarding professional behavior if the rules reflect values that are moral in their content and are legitimate in the sense that they are supported by a consensus within the bar.
\end{quote}


Furthermore, Professor Rostain argues that:

While rules are undoubtedly important, the focus of legal ethics cannot be limited to debates about their content or the schemes through which they are enforced. For regulation to be effective, it needs to be undergirded by widespread commitments among lawyers to the values reflected in the regulatory enterprise. A central concern of legal ethics scholarship must be to investigate, articulate, and shore-up such collective commitments in the context of law practice.

Rostain, supra note 135, at 1340. Cf. Susan P. Koniak, Through the Looking Glass of Ethics and the Wrongs with Rights We Find There, 9 GEO. J. LEGAL ETHICS 1, 28-29 (1995) (“Unlike tax law, tort law or other sources of legal obligation in our normative world, ethics is not merely a source of obligation but the place where obligation is understood as dignifying and ennobling. . . . In legal and judicial ethics we find the possibility of dignifying obligations that are enforceable as law.”); Thomas D. Morgan & Robert W. Tuttle, Legal Representation in a Pluralist Society, 63 GEO. WASH. L. REV. 984, 1004-05 (1995) (“The lawyer's moral duty to obey the law rests primarily on the concept of consent. . . . The obligation binds because it is self-imposed, self-chosen. . . . Lawyers do stand in a moral relationship with the legal system and do possess duties of fidelity to that system.”); Simon, supra note 45, at 652-58 (proposing “competitive ethical regimes” to supplement the “low-commitment ethics of the ABA rules”).

Building on Professor Robert Cover's work, Professor Koniak has demonstrated that the bar's nomos includes a commitment to both legal precepts and narratives. See Koniak, supra note 34, at 90 n.1 (citing Robert M. Cover, Bringing the Messiah Through Law: A Case Study, in NOMOS XXX: RELIGION, MORALITY AND THE LAW: 201 (J. Ronald Pennock & John W. Chapman eds., 1988); Robert M. Cover, The Supreme Court, 1982
for adherence to ethics codes owes more to a shared sense of values than to the threat of punishment.\textsuperscript{150}

To conclude this analysis, it may be appropriate to turn once again to the Jewish legal system to provide an analogue for an alternative vision of the legal profession. As Rabbi Soloveitchik has eloquently described, Jewish thought emphasizes fidelity to ethical and religious principles as an expression of commitment to fulfilling personal and communal obligations, independent of any possibility of human enforcement.\textsuperscript{151} Likewise, perhaps lawyers can begin to take ethical obligations more seriously, embracing rather than resisting heightened expectations of ethical behavior, thereby demonstrating a shared commitment to values and principles underlying the practice of law.

III. CONCLUSION

The following story is told of Rabbi Levi Yitzchak of Berditchev, one of the Chasidic masters around the turn of the nineteenth century:\textsuperscript{152}

Once the Czarist Russian government put a ban on the importation of all Turkish tobacco. Anyone found possessing this contraband would be severely punished. One day during Passover, Rabbi Levi Yitzchak asked his disciples for some

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\textsuperscript{150} See supra note 149; see also Cassidy, supra note 122, at 692-93 ("Professional norms are hollow without reference to the moral aspirations and sensitivities of individual actors working within their framework... Virtue cannot be taught in law school... It also cannot be commanded by rules... The advantage of virtue theory is that it provides a noncynical response to this failure of codification."); id. at 693 (responding to criticism on the generality of virtue theory by suggesting that "a renewed focus on the virtues might promote a culture of thoughtful decisionmaking in the prosecutorial community, thus providing individual prosecutors with the intestinal fortitude necessary to resist both institutional pressures and the unscrupulous direction of other actors within the system"); Rostain, supra note 135, at 1338 (analyzing "the role of collective professional norms in forming individual commitments" in view of "the importance of participating in shared practices that foster normative commitments to collective values embodied in law and the legal framework," as opposed to undue focus on individual discretion).

\textsuperscript{151} See SOLOVEITCHIK, supra note 54, at 48-50 (author's translation). Indeed, Jewish history repeatedly offers moving testimony to the power of such commitment, even when religious adherence has carried its own risk of punishment and persecution.

\textsuperscript{152} For descriptions of Rabbi Levi Yitzchak of Berditchev's life and teachings, see ARYEH KAPLAN, THE CHASIDIC MASTERS AND THEIR TEACHINGS 69-85 (rev. 2d ed. 1989); ARYEH KAPLAN, THE LIGHT BEYOND 16-18 (1981); ELIE WIESEL, SOULS ON FIRE 89-112 (Marion Wiesel trans., 1972).
Turkish tobacco for his pipe. They scattered through the ghetto and soon came back with several packets of tobacco, enough to fill a large can. Rabbi Levi Yitzchak then told his followers to bring him a piece of bread. They looked at him in astonishment and protested, "But Rabbi, it is Passover and we have no bread!"153

The rabbi's face grew more stern. He repeated, "I command you as your Rabbi! Search the entire ghetto and bring me a piece of bread." His followers went all through the ghetto and ransacked every house in the ghetto. Several hours later they returned to Rabbi Levi Yitzchak and told him that they were sorry. They had fine-combed the entire ghetto, and they could not find a single crust of bread.

Then Rabbi Levi Yitzchak raised his eyes and said, "Master of the Universe, see how faithful Your children are. The Czar has hundreds of soldiers, police and agents guarding his borders, watching that no Turkish tobacco enter his land, yet in a short while, I can have all I want. But You, O [God], have but once given Your children a commandment not to have bread in their houses on [Passover], 154 and to this very day, not a scrap is to be found."155

This story provides an insightful lesson about the power of commitment, and at the same time offers a poignant illustration of both the effectiveness and limitations of legal rules. In the face of strict warnings of harsh punishment, the Czar's subjects openly defied the prohibition against importing Turkish tobacco. Their unwillingness to commit themselves to these rules rendered futile the Czar's extensive network of guards enlisted in an attempt to enforce the prohibition. In contrast, the community's commitment to God's command to rid all homes of bread on Passover resulted in careful adherence to religious principles, despite the absence of official human mechanisms of enforcement. In short, shared communal norms and values prevailed, while official legal pronouncements remained rejected and ignored.

For more than a century, American lawyers and scholars have explored various methods of improving the ethical conduct of lawyers and the reputation of the legal profession. Efforts have ranged from broad calls for increased professionalism to the enactment of ethics codes consisting of rules designed to capture essential components of ethical legal practice. Though not entirely without success, these efforts seem repeatedly to fall short of producing a genuine sense that lawyers are

153. See Exodus 12:19.
154. See id.
dedicated to ethical norms. In part, the current state of ethics codes, in often leaving ethical decisionmaking to lawyers’ unfettered discretion, contributes to the impression that the organized bar continues to place its own interests above those of both clients and the general public. Therefore, formulating and interpreting various ethics provisions to impose a greater degree of mandatory ethical conduct might demonstrate a resolve among lawyers to take more seriously their ethical obligations. Perhaps more importantly, however, in place of a reluctant adherence to ethics rules out of a fear of possible enforcement, the community of lawyers must be willing to undertake a sincere commitment to ethical conduct, premised upon a shared sense of ethical values and principles.