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# The Law between the Bar and the State

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# THE LAW BETWEEN THE BAR AND THE STATE

SUSAN P. KONIAK\*

*The traditional understanding of the relation between law and professional legal ethics is that legal ethics covers matters not covered by law; that ethics sits passively above law, starting where law leaves off. In this Article, Professor Susan Koniak argues that this understanding is wrong. She asserts that professional ethics are in competition and conflict with law as it is embodied in the pronouncements of courts and legislatures. Although "law" is usually considered to be the near exclusive preserve of the state, the Article contends that private groups also have "law," but it is usually called "ethics." The legal profession's ethos is the profession's law—a law maintained by the legal profession, not by the state.*

*Professor Koniak examines the profession's nomos—its law—and how it contrasts, competes and coexists with the state's law governing lawyers. The Article concludes that the legal profession and the state are engaged in an ongoing struggle over normative space. It contends that the profession is able to maintain its competing vision of the law, despite the tremendous power the state has at its disposal to enforce its view, because the state is weakly committed to its vision of the law governing conduct of the legal profession.*

I. INTRODUCTION .....	1390
II. THE INADEQUACY OF THE TRADITIONAL UNDERSTANDING OF THE RELATIONSHIP BETWEEN LAW AND PROFESSIONAL ETHICS .....	1395
III. THE PROFESSION'S ETHOS AS LAW .....	1402
IV. TWO LAWS MASQUERADING AS ONE.....	1409

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A.	<i>What We Might Expect to Find</i> .....	1410
B.	<i>The Hierarchy of Norms</i> .....	1410
V.	THE CENTRALITY OF CONFIDENTIALITY IN THE BAR'S <i>NOMOS</i> .....	1427
A.	<i>Introduction</i> .....	1427
B.	<i>The Triumph of Confidentiality in Ethics Opinions</i> ....	1431
C.	<i>The Fight Over Rule 1.6</i> .....	1441
VI.	THE BAR'S SACRED STORIES .....	1447
VII.	COMMITMENT .....	1460
A.	<i>The Weakness of the State's Commitment</i> .....	1461
B.	<i>The Bar's Commitment: Texts of Resistance</i> .....	1478
VIII.	CONCLUSION.....	1485

## I. INTRODUCTION

The state and the profession have different understandings of the law governing lawyers—they have in effect different “law.”<sup>1</sup> The law of lawyering is not inherently more amorphous, contradictory or obtuse than other law.<sup>2</sup> It is not radically uncertain; it is “essentially con-

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1. This Article uses Robert Cover's rich and original vision of law, which he articulated most fully in Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) [hereinafter Cover, *Nomos*] and developed further in Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986) [hereinafter Cover, *Violence*], and Robert M. Cover, *Bringing the Messiah Through Law: A Case Study*, in RELIGION, MORALITY AND THE LAW: NOMOS XXX 201 (J. Roland Pennock & John W. Chapman eds., 1988), as a means of understanding the law governing lawyers. Professor Cover died in the summer of 1986. I loved him much and miss him deeply. The magnificence of his vision is still with us. However modest a tribute to my friend and teacher this Article is, it is my sincere hope that it serves at least to bring those unfamiliar with his work to it.

2. My claim is that what others bemoan as uncertainty in the law of lawyering, see, e.g., Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1098 (1985) (“At present, the law of confidentiality is in a state of chaos.”), is not a function of too little law, but of too much law.

It is remarkable that in myth and history the origin of and justification for a court is rarely understood to be the need for law. Rather, it is understood to be the need . . . to choose between two or more laws, to impose upon law a hierarchy. . . .

Modern apologists for the . . . [role] courts [play in killing off alternative meanings for law] usually state the problem not as one of *too much* law, but as one of *unclear* law. . . . To state, as I have done, that the problem is one of too much law is to acknowledge the nomic integrity of each of the communities that have generated principles and precepts. It is to posit that *each* “community of interpretation” that has achieved “law” has its own *nomos*—narratives, experiences, and visions to which the norm articulated is the right response.

Cover, *Nomos*, *supra* note 1, at 40, 42.

tested."<sup>3</sup> There is a continuing struggle between the profession and the state over whether the profession's vision of law or the state's will reign. The state has violent means at its disposal to ensure the primacy of its law.<sup>4</sup> To struggle with the state can be dangerous. The power of the state provides a formidable incentive for individual members to defect from a group that insists on asserting its own law against the state and for the group to give in and change its position. Protracted struggles with the state are thus generally waged only by groups whose members are strongly committed not only to their shared normative understanding but also to one another.<sup>5</sup> The modern legal profession is not such a group. It is heterogeneous.<sup>6</sup> Moreover, it is a group uniquely dependent on the state and the state's law, which define the group and provide it with purpose.<sup>7</sup> The legal profession thus seems an unlikely group to maintain a normative vision at odds with the state. Nonetheless, this Article contends that the legal profession does maintain a strong competing normative vision and that it struggles with the state to assert the primacy of that vision.

Protracted struggle between the profession and the state is possible, notwithstanding the weak communal bonds among lawyers and the group's dependence on the state, because the state's commitment to *its* vision of the law governing lawyers is weak. The state acts weak and speaks weak. Official interpreters of state law, such as judges,<sup>8</sup> usually act and speak from the starting assumption that the state's vision of the law, their vision, is primary: they assume that their interpretations are

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3. See Cover, *Nomos*, *supra* note 1, at 17 n.46 (citing W.B. GALLIE, *PHILOSOPHY AND THE HISTORICAL UNDERSTANDING* 157-91 (1964)).

4. "Legal interpretative acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result somebody loses his freedom, his property, his children, even his life." Cover, *Violence*, *supra* note 1, at 1601.

5. See Cover, *Nomos*, *supra* note 1, at 26-30 (discussing the insular normative communities of the Amish and the Mennonites).

6. See, e.g., JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* 56-73 (1982); Edward O. Laumann & John P. Heinz, *Washington Lawyers and Others: The Structure of Washington Representation*, 37 *STAN. L. REV.* 465, 476-95 (1985).

7. See *infra* text accompanying notes 83-85.

8. Although from the state's perspective judges are the most authoritative interpreters of law, see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), they are not the only official interpreters of state law. Administrative agencies and officials, prosecutors and other members of the executive branch, and legislatures and members of the legislative branch, also function as official interpreters. While the interpretations of these other state actors are, in theory, always subject to rejection by judges, their interpretations are also to be accorded, in theory, more deference than nonofficial interpretations. See, e.g., *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 866 (1984) (holding that courts should defer to an administrative agency's reasonable interpretation of a statutory term).

uniquely authoritative and that other interpretations must yield to that of the state.<sup>9</sup> In cases involving the law governing lawyers, however, the attitude is different. The state often speaks as if it were uncertain about whether its law should reign, and it demonstrates that uncertainty by refusing to use force against lawyers to vindicate the primacy of its law.<sup>10</sup> The state is thus not so threatening either to group members or to the group's normative vision.<sup>11</sup> The weakness of the state's commitment in combination with other factors, such as the profession's control over the education of its members,<sup>12</sup> has made it possible for the profession to maintain a strong normative vision, its own law, at odds with that of the state.

This Article examines the profession's *nomos*—its law<sup>13</sup>—and how it contrasts, competes and coexists with the state's law governing lawyers. Before proceeding, however, it is important to make clear that while for ease of reading I will speak of “*the profession*” and “*the state*,” I do not mean that either the profession or the state is monolithic or that there exists only one version of the profession's law and one version of the state's law.<sup>14</sup> My claim is rather that the various normative worlds

9. The most extreme demonstration of this attitude is *Walker v. Birmingham*, 388 U.S. 307, 320-21 (1967), in which the Court held that one cannot challenge an unconstitutional court order by disobeying it; unlike statutes, regulations and executive orders, a court order must be obeyed until a court decides it is unconstitutional.

10. See *infra* notes 314-80 and accompanying text.

11. Put simply, it is easier to maintain commitment to the principles of one's own group when the other side is unlikely to get too nasty.

12. Other commentators have discussed the normative messages maintained and communicated by legal education. See generally DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* (1983) (discussing how standard methods of teaching law communicate values and ideology); Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247 (1978) (analyzing the value system of legal education).

13. Throughout this Article I use the terms “*nomos*,” “normative world,” “normative vision” and “law” interchangeably.

The Hebrew word *Torah* was translated into the Greek *nomos* in the Septuagint and in the Greek scripture and postscriptural writings, and into the English phrase “the Law.” “*Torah*,” like “*nomos*” and “the Law,” is amenable to a range of meanings that serve both to enrich the term and to obscure analysis of it. . . . The Hebrew “*Torah*” refers both to law in the sense of a body of regulation and, by extension, to the corpus of all related normative material and to the teaching and learning of those primary and secondary sources. In this fully extended sense, the term embraces life itself, or at least the normative dimension of it, and “*Torah*” is used with just such figurative extension in later rabbinics.

Cover, *Nomos*, *supra* note 1, at 11 n.31.

My justification for (and insistence on) using the word “law” to describe what others call the profession's “ethos” is explained *infra* notes 53-81 and accompanying text.

14. To avoid straining the reader and myself, I will use the term “bar's (or profession's) *nomos*” (or “normative world” or “law”) without reminding you that I mean the core set of

created by communities of practicing lawyers diverge from the various normative worlds created by the state at similar points and for similar reasons, although the degree of divergence may vary considerably.<sup>15</sup> Put another way, my position is that the normative worlds created by segments of the practicing bar (with the possible exception of government lawyers)<sup>16</sup> are more like one another than they are like the various nor-

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normative understandings that tend to be common to at least those segments of the profession that are not also state actors. By "state actors" I mean judges, administrative agency officials, prosecutors and members of the legislature.

I will similarly use the term "state law" to refer to the commonly expressed normative understandings of state actors, but this is not intended to suggest that the state view is monolithic, always consistent or not fraught with ambiguity. The "state" too is diverse. First, much of the law governing lawyers is state—not federal—law, and thus is not uniform. Second, entities within a state may articulate different normative understandings of the law governing lawyers. For example, the Securities and Exchange Commission's understanding of the lawyer's obligations under law may differ from that of the Internal Revenue Service or, for that matter, from the understanding of the federal courts. Third, state officials responsible for articulating and enforcing the state's version of law may vary in their individual commitment to the norms expressed. Most notably, the fact that so many state actors are also lawyers may contribute significantly to the weakness of the state's commitment to state law. See, e.g., Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1343 (1978) (suggesting that judicial reluctance to impose discovery sanctions may stem from the fact that judges are lawyers and thus have been acculturated to the adversarial model of judicial process). Finally, the weakness of the state's commitment to its law results in some ambiguity about the state's position. See *infra* notes 328-33 and accompanying text.

15. Other scholars of the profession, who understand the importance of the substantial heterogeneity in background, substance of work and work-setting of the modern bar, have also described and accepted the existence of a core of shared normative understandings. See, e.g., Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 10 (1988) (describing the core as the "Ideal of Liberal Advocacy," which corresponds to Professor Rhode's description, although he differs with Rhode by claiming that substantial agreement on this normative approach dissolves when lawyers consider the civil lawyer's role); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 595-605 (1985) (describing the core as dominated by an adversary ideology, albeit tempered with rhetoric suggesting more public-spirited ideals).

16. Prosecutors and other government lawyers present a particularly interesting subcommunity of the bar to study in light of the theory presented in this Article because this group functions both as the state and as the bar. While consideration of the *nomos* of this group is outside the scope of this Article, I do want to note that the present struggle between the United States Attorney General and the bar over whether and to what extent the ethics rules apply to government lawyers provides persuasive evidence that at least in some critical respects the prosecutor's *nomos* diverges considerably from that of the private bar.

One center of dispute concerns rule 4.2 of the Model Rules of Professional Conduct, which forbids lawyers from communicating with represented parties without the consent of the lawyers for those parties. The Attorney General contends that this does not prevent government lawyers from communicating directly with those under investigation or accused of crimes. See Memorandum from Attorney General Richard Thornburgh to Justice Department Litigators (June 8, 1989) (on file with author) (interpreting rule 4.2 to allow government lawyers to contact individuals without obtaining their lawyers' consent so long as the contact is legitimate under the Constitution and federal law). The organized bar contends the rule

mative worlds created by different state entities. I do not, however, mean to dispute that the profession—even if, as in this Article, we use the term to mean only the private bar—comprises many different communities or that those communities may differ in their understanding of the normative standards that govern the behavior of their members.<sup>17</sup> That neither the state nor the bar is monolithic introduces another element of uncertainty into discussions of the law of lawyering, but not one that distinguishes this body of law from others. The state, after all, is no more monolithic in its approach to antitrust law, for example,<sup>18</sup> and the business community is no more monolithic in its vision of anticompetitive practices,<sup>19</sup> than the bar is toward the law that most affects it. By identifying and discussing what I claim is the bar's dominant *nomos*, I do not mean to circumvent the alternative normative visions maintained by subcommunities of lawyers.<sup>20</sup> Indeed, I mean to strengthen communities

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forbids such contact. The courts have not been forthcoming with an answer to this question. For example, on at least three occasions the United States Supreme Court has bypassed the opportunity to address whether a prosecutor is bound by the ethics rules governing contact with persons represented by counsel. See *Minnick v. Mississippi*, 111 S. Ct. 486 (1990); *Michigan v. Harvey*, 494 U.S. 344 (1990); *Patterson v. Illinois*, 487 U.S. 285 (1988); see also *United States v. Hammad*, 858 F.2d 834, 839 (2d Cir. 1988) (holding that prosecutors are bound by the ethics rule but interpreting the rule as allowing prosecutors to use informants to gather information from the those suspected of criminal activity without alerting their counsel); *United States v. Adonis*, 744 F. Supp. 336, 346-47 (D.D.C. 1990) (referring to the Attorney General's position with disapproval; holding that the United States Attorney is bound by rule 4.2, but refusing to comment on the widespread "violation" of the rule by Justice Department lawyers); *United States v. Western Elec. Co.*, 1990-1 Trade Cas. (CCH) ¶ 68,939, at 63,050 (D.D.C. Feb. 28, 1990) (referring with apparent approval to the Attorney General's position that prosecutors have wide latitude to talk to criminal suspects and defendants notwithstanding the ethics rules).

By refusing to speak with commitment on this question, the courts have, in effect, ceded their institutional role as official interpreters of state law to the private bar and the prosecutors simultaneously. They have left legal meaning to be created in the arena of power politics. See *infra* notes 329-32 and accompanying text.

17. For an interesting discussion of how communities of practitioners differed on the breadth of the exceptions to the duty of confidentiality to be included in the Model Rules of Professional Conduct during the debate in the ABA House of Delegates, see Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677 (1989).

18. See, e.g., E. THOMAS SULLIVAN & HERBERT HOVENKAMP, ANTITRUST LAW, POLICY AND PROCEDURE 399 (2d ed. 1989) (discussing how the vertical restraint guidelines issued by the United States Justice Department in 1985 departed from case law and explaining how the Justice Department's vision of the law of vertical restraints differed not only from that of the courts but also from that expressed by Congress).

19. See Michael H. Orbison, Note, *Vertical Restraints in the Brewing Industry: Is the Malt Beverage Interbrand Competition Act the Answer?*, 50 BROOK. L. REV. 143, 161-63, 186-88 (1983) (discussing how beer distributors and beer retailers disagree on a statute providing an antitrust exemption for the beer industry).

20. See generally Gordon, *supra* note 15 (arguing persuasively for the need to realize in action the professional ideal of independence from the client and exploring the conditions

dedicated to re-forming the profession's *nomos* by providing a full description of the *nomos* which they challenge and by acknowledging that their struggle is a struggle over the meaning of law.

## II. THE INADEQUACY OF THE TRADITIONAL UNDERSTANDING OF THE RELATIONSHIP BETWEEN LAW AND PROFESSIONAL ETHICS<sup>21</sup>

As traditionally conceived, the domain of professional ethics begins where the law of the state leaves off.<sup>22</sup> By this I mean that ethics is generally understood to be about obligations above and beyond the requirements of law. For example, a classic formulation of the legal profession's ethos—the formulation usually referred to as the “adversary ethic”—is that short of violating the law,<sup>23</sup> the lawyer should do all she can to further the client's cause no matter how morally objectionable that

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conducive to the flourishing of such an ideal). Professor Gordon demonstrates that the ideal of independence from the client has coexisted with the ideal of independence from the state for much of the profession's history in this country, and that the two norms are still expressed today in the bar's rhetoric. His project, with which I am quite sympathetic, is, however, avowedly redemptionist: his purpose is to move the ideal of independence from the client out of the world of rhetoric and into the world of action. In the terms used in this Article, Gordon is seeking to make this norm “law” for the greater community of lawyers. That Gordon, who is a lawyer, speaks this way is itself evidence that independence from the client is already “law” for some subgroups of lawyers. For other evidence, see *id.* at 65-68.

On the other hand, his whole project is premised on the notion that for the vast majority of lawyers this norm has lost the status of “law,” assuming it ever had such status. For example, he writes:

I know perfectly well that when lawyers start talking this way about their public duties, being officers of the court and so on, most of us understand that we have left ordinary life far behind for the hazy aspirational world of the Law Day sermon and Bar Association after-dinner speech—inspirational, boozily solemn, anything but real.

*Id.* at 13. For an examination of the potency of this alternate norm for lawyers in post-Civil War America, see 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: LAWYERS IN POST-CIVIL WAR AMERICA* at 51 (Gerard W. Gawalt ed., 1984).

21. I use the term “professional ethics” here instead of “legal ethics” for a reason. This section of the discussion applies whether we are talking of the ethical (normative) systems of lawyers, doctors or some other group.

22. See, e.g., William J. Goode, *Community Within a Community: The Professions*, 22 *AM. SOC. REV.* 194, 195 (1957) (“Although the occupational behavior of members is regulated by law, the professional community exacts a higher standard of behavior than does the law.”); sources cited *infra* note 29.

23. Here, as is common in discussions of legal ethics, the word “law” refers to law other than the profession's ethics rules. Note, however, that when adopted by a state court or legislature, the ethics rules are a form of “law” as that term is commonly understood. The acceptance of ethics rules as law to some extent by both the state and the bar and the implications of this acceptance are discussed *infra* texts accompanying notes 86-89, 159-72. For now it is sufficient to note that even though the ethics rules are in one sense a part of state law, both the



cause is and no matter what moral wrongs are perpetrated on others in the process.<sup>24</sup>

Thus, even this formulation, which might be characterized as morally unambitious, takes for granted that the domain of professional ethics is separate from the domain of law except to the extent that ethics assumes that law will be obeyed.<sup>25</sup> The same relationship between law and professional ethics is found in discussions of medical ethics,<sup>26</sup> accounting ethics,<sup>27</sup> business ethics<sup>28</sup> and the sociological literature on the

state and the profession generally refer to these rules and questions arising under them as matters of "ethics," not "law."

24. Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 5-6 (1975). I call this formulation classic because those who support and those who criticize the normative justification for the profession's ethos generally accept this statement (or some nearly identical statement) as their point of departure. Compare MONROE H. FREEDMAN, *LAWYER'S ETHICS IN AN ADVERSARY SYSTEM* *passim* (1975) (defending the ethic described by the classic formulation) and Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1063-65 (1976) (similar) and Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 614 (similar) with David Luban, *The Adversary System Excuse, in THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 83, 118 (David Luban ed., 1983) (critiquing the ethic described by the classic formulation) and William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1083-85 (1988) (similar).

For an article questioning whether the classic formulation is an accurate description of the "ethical" obligations of lawyers, see Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529, 1532-44 (1984). Note, however, that even Professor Schneyer acknowledges that most commentators accept the classic formulation as an accurate description of the profession's ethos. *Id.* at 1532.

25. The view that ethics should be about something other than and more than law is exemplified in Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243, 247-48 (1985), an article criticizing the Model Rules of Professional Conduct because, among other things, much of it merely repeats the injunctions of civil and criminal law. "The more [the document traces the commands of civil or criminal law] . . . , the less it can be considered a code of ethics." *Id.* at 246. "It is [the] extralegal realm that defines ethics." *Id.* at 248.

26. See, e.g., COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, AMERICAN MEDICAL ASSOCIATION, CURRENT OPINIONS § 1.02, at 1-2 (1986); SPECIAL COMMITTEE ON BIOMEDICAL ETHICS, AMERICAN HOSPITAL ASSOCIATION, VALUES IN CONFLICT: RESOLVING ETHICAL ISSUES IN HOSPITAL CARE 2-3 (1985); Marc D. Hiller, *Medical Ethics and Public Policy, in MEDICAL ETHICS AND THE LAW* 3, 10, 12, 22 (Marc D. Hiller ed., 1981).

27. See, e.g., AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS (AICPA), CONCEPTS OF PROFESSIONAL ETHICS 3 (1985); WALTER G. KELL ET AL., MODERN AUDITING 721-22 (4th ed. 1989); JACK C. ROBERTSON, AUDITING 89-130 (6th ed. 1990); Stephen E. Loeb, *Introduction to ETHICS IN THE ACCOUNTING PROFESSION* 3, 5 (Stephen E. Loeb ed., 1978); Michael K. Schaub, *Restructuring the Code of Professional Ethics: A Review of the Anderson Committee Report and Its Implications*, 2 ACCT. HORIZONS, Dec. 1988, at 89, 93.

28. See, e.g., Joel Kurtzman, *Shifting the Focus at B-Schools*, N.Y. TIMES, Dec. 31, 1989, § 3 (Business), at 4 ("It is an irony that it was the scandals on Wall Street that caused us to be so concerned about the teaching [of] ethics on campus. But the scandals had nothing to do with ethics. They were simply against the law and that's different.") (quoting Donald P. Jacobs, Dean of J.L. Kellogg Graduate School of Management at Northwestern University)).

professions.<sup>29</sup>

Professional ethics thus conceived does not compete with state law, nor could it possibly conflict with state law. Professional ethics merely supplements state law, supplying norms to govern conduct that the society at large lacks the necessary expertise to regulate<sup>30</sup> or for which the state's standards are insufficiently exacting.<sup>31</sup> But the traditional understanding of the relationship between professional ethics and law—at least among professionals themselves—goes further than the mere statement that ethics begins where law leaves off. It also includes the notion that it is appropriate for the state to leave substantial areas of conduct in which the profession's own norms govern—i.e., that state law should “leave off” sooner rather than later. The rhetoric of the professions is filled with talk of the “right” of self-regulation, of the “encroachments” by the state into areas of professional control, and of the need to ward off increased state regulation by toughening internal controls.<sup>32</sup>

Insofar as the traditional understanding of the relationship between law and ethics includes an ongoing debate over the extent and nature of

29. See, e.g., A.M. CARR-SAUNDERS & P.A. WILSON, *THE PROFESSIONS* 301-03 (1933); TALCOTT PARSONS, *The Professions and Social Structure*, in *ESSAYS IN SOCIOLOGICAL THEORY* 33, 35-37 (rev. ed. 1954); TALCOTT PARSONS, *THE SOCIAL SYSTEM* 463-64 (1951); Dietrich Rueschemeyer, *Professional Autonomy and the Social Control of Expertise*, in *THE SOCIOLOGY OF THE PROFESSIONS: LAWYERS, DOCTORS AND OTHERS* 38, 41 (Robert Dingwaid & Philip Lewis eds., 1983); Goode, *supra* note 22, at 195.

30. The classic sociological understanding of the professions is that society and individual consumers are too lacking in expertise to control or monitor adequately the performance of professionals. At the same time, the larger society and individual consumers are intensely interested in controlling the conduct of professionals because of the high stakes involved in the tasks committed to professionals—high stakes both for the individual client and for the larger society because professional work implicates central social values like justice and the physical well-being of societal members. The professions and society thus “strike a bargain”: in exchange for high status, high remuneration, protection from lay competition and a significant degree of autonomy from state control, the professions adopt norms designed to protect individual consumers and the public at large, seek to educate members so they will internalize these norms, and monitor compliance with and sanction deviations from such norms. See DIETRICH RUESCHEMEYER, *LAWYERS AND THEIR SOCIETY* 13-14 (1973), for a statement of this classic sociological explanation of professional ethics. For a similar explanation of professional ethics from an economist, see KENNETH J. ARROW, *THE LIMITS OF ORGANIZATION* 36-37 (1974).

31. See, e.g., Gillers, *supra* note 25, at 247-48.

32. The principle that the state should leave the professions substantial space in which the professions' own norms are authoritative is central to the ideology of the professions. See, e.g., RUESCHEMEYER, *supra* note 30, at 13. It is reflected in the rhetoric of the professions. See, e.g., Robert D. Raven, *Disciplinary Enforcement: Time for Re-examination*, A.B.A. J., May 1989, at 8. Raven, a former president of the ABA, discussed the connection between state law and the profession's own rules as follows:

Certainly establishing and enforcing codes of conduct are two of the most important responsibilities of self-regulation. In fact, dissatisfaction with lawyer disci-

the "right" of self-regulation, it exposes the competition between state and group over normative space. But the nature and force of that competition is masked because the traditional understanding asserts that the domain of professional ethics *does* leave off where state law begins. The traditional understanding thus suggests that a consensus exists on the authoritative position of state law where state law exists. It suggests that the professions and the state agree on when the state has spoken, what the state has said, and that the effect of the state pronouncement is to invalidate as a basis of action group norms that are in conflict with state law. These assumptions are central to the traditional understanding of the relationship between law and professional ethics. But they, and consequently the traditional understanding of the relationship between law and professional ethics, are naive and misleading. They are based on a naive positivism about state law, they minimize the richness and power of the group's normative vision, and they conceal the dynamic interplay between state and group norms.

Consider the following example: By 1985 the number of criminal defense lawyers being subpoenaed before grand juries had risen dramatically,<sup>33</sup> and opposition to this practice from individual lawyers and the organized bar was increasing apace.<sup>34</sup> The state was largely unresponsive

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pline is often at the root of attempts by legislative and executive branches of state and federal government to gain regulatory authority over the profession.

The ABA has steadfastly opposed such attempts, believing that lawyers, like judges, must be protected from the political process.

*Id.* The view that the state should leave the professions substantial normative space is also accepted in the classic sociological works on the professions, written by academic professionals. See sources cited *supra* note 29. For a general sampling of the sociological literature, see PROFESSIONALIZATION (H.M. Vollmer & Donald L. Mills eds., 1966).

33. This increase was in large part due to the broad forfeiture provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968 (1988 & Supp. I 1989) (particularly § 1963(e) (1988)), and to the Continuing Criminal Enterprise Statute (CCE), 21 U.S.C. § 853(c) (1988), which prosecutors interpreted as applying to attorney's fees. See William J. Genego, *Risky Business: The Hazards of Being a Criminal Defense Lawyer*, CRIM. JUST., Spring 1986, at 1, 4 (survey showing that, of 21% of the lawyers responding, the government had questioned the source of the lawyer's fee in one or more cases).

34. See, e.g., Robert Merkle & George J. Moscarino, *At Issue: Are Prosecutors Invading the Attorney-Client Relationship?*, A.B.A. J., Sept. 1985, at 38, 39; Ellen R. Peirce & Leonard J. Colamarino, *Defense Counsel as a Witness for the Prosecution: Curbing the Practice of Issuing Grand Jury Subpoenas to Counsel for Targets of Investigations*, 36 HASTINGS L.J. 821, 870 (1985); Matthew Zwerling, *Federal Grand Juries v. Attorney Independence and the Attorney-Client Privilege*, 27 HASTINGS L.J. 1263, 1290 (1976). In *In re Grand Jury Subpoena Served upon Doe*, 781 F.2d 238 (2d Cir.) (en banc), cert. denied, 475 U.S. 1108 (1986), amicus briefs opposing the government's use of such subpoenas and arguing for special procedures to limit the practice were filed by the Association of the Bar of the City of New York, the New York County Lawyers' Association, the New York Criminal Bar Association, the National Association of Criminal Defense Lawyers and the New Jersey Association of Criminal Defense Lawyers. *Id.* at 241.

to the bar's opposition. The courts that had considered the question had rejected the lawyers' claims that client and fee identity were generally privileged from disclosure and that special procedures, such as prior judicial approval, should be required before the government is allowed to subpoena a criminal defense lawyer.<sup>35</sup> While the Justice Department issued guidelines on this subject in 1985, these guidelines provided that such subpoenas could be issued upon a rather modest showing of need by the U.S. Attorney's office involved; more important, they provided that the showing of need be made to the Department of Justice itself, not to a court.<sup>36</sup>

The Massachusetts bar then proposed an ethics rule making it unethical for a prosecutor to call a lawyer before a grand jury to testify about a client without prior judicial approval.<sup>37</sup> The Supreme Judicial Court of Massachusetts adopted the rule<sup>38</sup> and the United States District Court for the District of Massachusetts refused to enjoin its operation.<sup>39</sup> The federal government challenged the district court decision, arguing, among other things, that ethics rules should not be used to change grand jury procedures, an area governed by the Federal Rules of Criminal Procedure.<sup>40</sup> In *United States v. Klubock*<sup>41</sup> the United States Court of Ap-

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35. See, e.g., *Doe*, 781 F.2d at 247-50; *In re Klein*, 776 F.2d 628, 632-33 (7th Cir. 1985); *In re Grand Jury Proceeding* (Schofield), 721 F.2d 1221, 1222-23 (9th Cir. 1983); *In re Grand Jury Proceeding* (Freeman), 708 F.2d 1571, 1575 (11th Cir. 1983). The only United States court of appeals case to have adopted the bar's position requiring the government to make a preliminary showing of need was *In re Special Grand Jury No. 81-1* (Harvey), 676 F.2d 1005, 1012 (4th Cir.), *vacated and withdrawn on other grounds*, 697 F.2d 112 (1982).

36. In 1985 the Justice Department issued internal guidelines in the United States Attorney's Manual, entitled "Policy with Regard to the Issuance of Grand Jury or Trial Subpoena to Attorneys for Information Relating to the Representation of Clients." The text of these guidelines is reprinted in *In re Grand Jury Subpoena to Attorney* (Under Seal), 679 F. Supp. 1403, 1408 n.15 (N.D. W. Va. 1988). They require the Assistant Attorney General of the Criminal Division of the Justice Department to authorize any such subpoena. *Id.* at 1408. Further, the prosecutor must make all reasonable attempts to obtain the information from other sources before subpoenaing the lawyer "unless such efforts would compromise a criminal investigation . . . or would impair the ability to obtain such information from [the] attorney." *Id.* at 1408 n.15. Compare the much stronger showing required under MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8(f) (1991).

37. MASS. SUP. JUD. CT. R. 3:08 (PF 15) (proposed by the Massachusetts bar in 1985).

38. The rule became effective in 1986. *Id.*

39. *United States v. Klubock*, 639 F. Supp. 117, 126 (D. Mass. 1986), *aff'd*, 832 F.2d 649 (1st Cir.), *aff'd by an equally divided court on reh'g*, 832 F.2d 664 (1st Cir. 1987) (en banc). The district court initially declined to decide whether the rule had been incorporated into the federal court rules for the district, *id.* at 121, but later specifically adopted the rule by amendment. See *United States v. Klubock*, 832 F.2d 664, 666 (1st Cir. 1987) (en banc).

40. *Klubock*, 832 F.2d at 665. The government made three arguments: (1) that the rule was invalid under the Supremacy Clause of the Constitution because it was an attempt by state authorities to control federal prosecutors; (2) that the district court lacked the power to promulgate the rule because it effected a substantial change in grand jury procedures, which

peals for the First Circuit split four-four, leaving in place the district court opinion upholding the rule.<sup>42</sup> In the meantime, courts have continued to hold that special procedures are neither required nor advisable under the Constitution or other law,<sup>43</sup> while state bars, following Massachusetts's lead, have proposed ethics rules that would require such procedures.<sup>44</sup>

In 1988 the American Bar Association passed its second resolution on this issue, which called for even tighter limitations on the government's power to subpoena lawyers to testify before grand juries than those the ABA had originally proposed.<sup>45</sup> The courts, prosecutors and legislatures have remained largely unresponsive to the bar's position.<sup>46</sup>

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should be made by amending the Federal Rules of Criminal Procedure or by separate congressional enactment; and (3) that the court of appeals should exercise its supervisory powers to invalidate the law because the rule was so unwise. *Id.*

41. 832 F.2d 664 (1st Cir. 1987) (en banc).

42. *Id.* at 665.

43. See, e.g., *United States v. Perry*, 857 F.2d 1346, 1348 (9th Cir. 1988); *In re Nackson*, 114 N.J. 527, 537, 555 A.2d 1101, 1107 (1989); cf. *In re Grand Jury Subpoena of Stewart*, 144 Misc. 2d 1012, 1019-22, 545 N.Y.S.2d 974, 979-82, *aff'd as modified*, 156 A.D.2d 294, 548 N.Y.S.2d 679 (1989) (finding no exception to the general principle that fee arrangements are not privileged communications).

44. Among the state bars that have proposed such rules are Tennessee, Virginia, Pennsylvania and Florida. Tennessee and Virginia adopted the bar-proposed rules, Pennsylvania's state court accepted the proposed rule after a federal court rejected it, and Florida's state court rejected the proposed rule. See *Baylson v. Disciplinary Bd. of the Supreme Court*, 764 F. Supp. 328, 349 (E.D. Pa. 1991) (federal district court rejecting bar-proposed and state-adopted rule); Florida Bar *re* Amendments to the Rules Regulating the Fla. Bar, 519 So. 2d 971, 972 (Fla. 1987) (state court rejecting bar-proposed rule); TENN. SUP. CT. R. DR 7-103 (1987); VA. R. SUP. CT. DR 8-102(A)(5) (1989).

45. The ABA House of Delegates passed the first resolution in February 1986. It called on state and federal authorities to require prior judicial approval of all subpoenas to lawyers relating to client information, and proposed specific substantive standards to govern when such approval should be granted. In February 1988 the second resolution was passed. It is stronger than the 1986 resolution in two ways. It calls for an adversarial hearing as a prerequisite to judicial approval, whereas the 1986 resolution called for an ex parte proceeding. It also would require the prosecutor to show that the information sought is "essential" to an ongoing investigation, whereas the 1986 resolution required only a showing of "relevance." See A.B.A. Criminal Justice Report 122B, *reprinted in* AMERICAN BAR ASSOCIATION, SUMMARY OF ACTION TAKEN BY THE HOUSE OF DELEGATES OF THE AMERICAN BAR ASSOCIATION 17-18 (Feb. 1988); A.B.A. Criminal Justice Report 111D, *reprinted in* AMERICAN BAR ASSOCIATION, SUMMARY OF ACTION TAKEN BY THE HOUSE OF DELEGATES OF THE AMERICAN BAR ASSOCIATION 14 (Feb. 1986).

46. For example, despite strong lobbying efforts on the part of the ABA and the National Association of Criminal Defense Lawyers (NACDL), among other bar groups, Congress has not enacted any legislative restrictions on the use of attorney subpoenas, although bills to accomplish this have been introduced. See S. 2713, 100th Cong., 2d Sess. (1988); 134 CONG. REC. S11,438-39 (daily ed. Aug. 11, 1988) (statement of Sen. Simon). Courts have similarly rejected pleas for special procedures and pleas to expand the protection for client identity or fee information under the attorney-client privilege. See, e.g., *In re Grand Jury Subpoenas ex rel. United States v. Anderson*, 906 F.2d 1485, 1498-99 (10th Cir. 1990); *In re Grand Jury*

In 1990 the ABA amended the Model Rules of Professional Conduct to require prosecutors to obtain judicial approval before seeking to subpoena a lawyer about her client's affairs and making it unethical for a prosecutor to seek judicial approval unless the information sought is not privileged, it is essential to the investigation, and there is no feasible alternative means to obtain it.<sup>47</sup>

This example suggests a far more active competition between state and group norms than the traditional understanding suggests. It belies the notion that there is a general agreement between state and bar on the content or authoritative nature of state pronouncements. It suggests a far more complex and dynamic understanding of law and ethics than the static, peaceful understanding of traditional theory, and, as we shall see, it is far from an isolated example of this struggle over law.

I will discuss further examples later, but I want here to dispel two suspicions that the reader might have after reading the example presented. The struggle over law between bar and state is not limited to issues separating criminal defense lawyers and prosecutors, although some of the rhetoric of the bar suggests it is,<sup>48</sup> and it is not a struggle of recent origin. First, the organized bar and the state have long been engaged in a similar struggle over the obligations of securities lawyers (civil lawyers who function primarily as facilitators of transactions, not litigators).<sup>49</sup> This struggle, which reached its peak in the 1970s, involved

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Proceedings (Rabin), 896 F.2d 1267, 1279 (11th Cir. 1990); cases cited *supra* note 35. Moreover, while at least three state supreme courts, those of Pennsylvania, Virginia and Tennessee, have adopted bar-proposed ethics rules requiring special procedures, *see supra* note 44, other state courts have rejected such proposals, *see, e.g., Florida Bar re Amendments*, 519 So. 2d at 972, and no federal court, other than the Massachusetts district court, has officially adopted the rule. *See Baylson*, 764 F. Supp. at 349 (holding that the Pennsylvania rule may not be applied to federal prosecutors); *United States v. Klubock*, 639 F. Supp. 117, 121 (D. Mass. 1986) (refusing to decide whether the state court rule had been incorporated into the rules of the district), *aff'd*, 832 F.2d 649 (1st Cir.), *aff'd on reh'g*, 832 F.2d 664 (1st Cir. 1987) (en banc).

47. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8(f) (1991).

48. *See, e.g., Exercise of Federal Prosecutorial Authority in a Changing Legal Environment: Hearing Before the Subcomm. on Government Information, Justice and Agriculture of the House Comm. on Government Operations*, 101st Cong., 2d Sess. 204-05, 231 (1990) [hereinafter *Hearings*] (statement of Alan Ellis, President-Elect of the National Association of Criminal Defense Lawyers). *See generally* William J. Genego, *The New Adversary*, 54 BROOK. L. REV. 781 (1988) (exploring the relation between criminal defense lawyers and federal prosecutors); Albert J. Krieger & Susan W. Van Dusen, *The Lawyer, The Client and the New Law*, 22 AM. CRIM. L. REV. 737 (1984) (same); Timothy S. Robinson, *Targeting Lawyers*, NAT'L L.J., Jan. 21, 1985, at 1 (finding increased pressure on the criminal defense bar to reveal information regarding clients and fees).

49. *See, e.g.,* Milton W. Freeman, *Recent Government Attacks on the Private Lawyer as an Infringement of the Constitutional Right to the Assistance of Counsel*, 36 BUS. LAW. 1791, 1795 (1981); Marvin G. Pickholz, *The Proposed Model Rules of Professional Conduct—And Other*

similar themes, similar moves and counter-moves by the bar and state, and was conducted with the same intensity as the current struggle between the state and criminal defense lawyers.<sup>50</sup> Second, the competition between legal ethics and law is not of recent origin. For example, in 1935 the ABA ethics committee held that the Canons of Ethics prohibited a lawyer from practicing law before a court in which the lawyer presided as a judge *pro tempore*, despite a state statute that specifically provided that judges *pro tempore* were not debarred from practicing in the courts in which they sat.<sup>51</sup> Other early examples are as stark as this one.<sup>52</sup>

A central part of my project is to change the understanding of the relationship between law and professional ethics. Instead of nested consistency—the group’s normative system (ethics) fitting neatly within and filling out the state’s normative system (law)—I will describe two competing and sometimes conflicting normative systems, each claiming to legitimate action in accordance with its norms and thus each worthy of the name of “law.” By using the word “law” to describe both the state’s *nomos* and the bar’s *nomos*, I am making a claim about the nature of law and a claim about the nature of the bar’s normative understanding. Both claims are grounded in Professor Robert Cover’s jurisprudential vision, to which we now must turn.

### III. THE PROFESSION’S ETHOS AS LAW

Law is more than a collection of rules. Rules require explanation to have meaning. Stories must be told to create even the semblance of a shared understanding of what the rules require. Stories, in turn, demand explanation in the form of a rule—the “point” of the story. It is as if rule is prelude to story and story is prelude to rule: “Every prescription is insistent in its demand to be located in discourse—to be supplied with history and destiny, beginning and end, explanation and purpose. And every narrative is insistent in its demand for its prescriptive point, its

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*Assaults upon the Attorney-Client Relationship: Does “Serving the Public Interest” Disserve the Public Interest?*, 36 BUS. LAW. 1841, 1851 (1981).

50. See *infra* note 307 and accompanying text; *infra* note 319.

51. ABA Comm. on Professional Ethics and Grievances, Formal Op. 142 (1935).

52. ABA Comm. on Professional Ethics and Grievances, Formal Op. 203 (1940) (asserting that Canons override federal statute that allows some advertising by patent lawyers); ABA Comm. on Professional Ethics and Grievances, Formal Op. 152 (1936) (same); ABA Comm. on Professional Ethics and Grievances, Formal Op. 42 (1931) (Canons override court approval of conduct); ABA Comm. on Professional Ethics and Grievances, Formal Op. 6 (1925) (use of dead partner’s name in firm name may violate Canons even if such use is allowed by law); ABA Comm. on Professional Ethics and Grievances, Formal Op. 4 (1924) (distribution of letters soliciting business is unethical whether or not relevant departments of the federal government acquiesce in the conduct).

moral.”<sup>53</sup> But law is not just rules and stories. Rules and stories alone (literature, history), while essential to normative discourse, are to be distinguished from law because they do not license transformations of reality through the use of force.<sup>54</sup> Law does. Law is rules and stories *and* a commitment of human will to change the world that *is* into the world that our rules and stories tell us *ought* to be. This commitment to realize the “ought” distinguishes law from utopian vision, literature, and history.<sup>55</sup> It also accounts for the connection between law and violence. Both metaphorically and literally, law entails violence: to insist on one normative vision is to be willing to kill off alternative visions and, if necessary, those who adhere to those visions or who idiosyncratically fail to conform.<sup>56</sup>

Law understood as rules, the stories told about the rules, and the commitment to act in accordance with those rules and stories requires no

53. Cover, *Nomos*, *supra* note 1, at 5.

54. *Id.* at 9-10. “The creation of legal meaning cannot take place in silence. But neither can it take place without the committed action that distinguishes law from literature.” *Id.* at 49.

55. As Professor Cover explains:

[T]he concept of a *nomos* is not exhausted by its “alterity”; it is neither utopia nor pure vision. A *nomos*, as a world of law, entails the application of human will to an extant state of affairs as well as toward our visions of alternative futures. . . .

Our visions hold our reality up to us as unredeemed. By themselves the alternative worlds of our visions—the lion lying down with the lamb, the creditor forgiving debts each seventh year, the state all shriveled and withered away—dictate no particular set of transformations. . . . But law gives a vision depth of field, by placing one part of it in the highlight of insistent and immediate demand while casting another part in the shadow of the millennium. Law is that which licenses in blood certain transformations while authorizing others only by unanimous consent.

*Id.* at 9.

56. *Id.* at 53. On the distinction between collective outrages that we sometimes call madness and individual insanity, see *id.* at 10 n.28. “[T]he fact that we can locate [the part we play] in a common ‘script’ renders it ‘sane’—a warrant that we share a *nomos*.” *Id.* at 10. “Sanity,” which is seen as an outrage from the perspective of a second normative system and thus labeled “mad” from the perspective of that second normative system, may be distinguished from truly idiosyncratic normative behavior for which we may reserve the term “insane.” To understand the last sentence it is important not to confuse the term “normative system” with the state or the *dominant* normative system in a society. A state or dominant normative system may well label certain acts of resistance to its *nomos*, which are based on alternate normative systems, as “madness.” In fact, the definition of “madness” in all cultures may inextricably be tied to the breadth of the culture’s acceptance of alternative normative visions. See generally THOMAS S. SZASZ, *THE MANUFACTURE OF MADNESS* (2d ed. 1977) (arguing that madness is no more than adherence to a normative vision labeled “mad” by the dominant culture). One, however, may plausibly argue that acts based on a shared, albeit radical, normative vision can be distinguished from idiosyncratic acts whose normative meaning is understood only by the actor and which that actor can locate only in a personal script to which at best only she has access. See generally Cover, *Violence*, *supra* note 1 (exploring the relationship between legal meaning and violence).



state.<sup>57</sup> A community and the state may share an understanding of what constitutes the operative rule, but if they have radically different understandings of what that rule means (different stories) and each is committed to action based on its understanding, we have two distinct laws.

Why insist on calling each "law"? Normally, we reserve the label "law" for official state pronouncements, relegating the normative visions of communities to the status of "nonlaw" or, at best, advocacy about law. But what we miss by doing so is the force and effect that committed communities with their own vision of law have on state law. State law *inevitably* changes in the face of action taken in the name of alternative normative visions, even if the change is only to hold that a certain amount of increased state force is justified and will be used to maintain the state's legal vision. The state cannot merely reaffirm its prior law; it must decide what its former understanding means in light of the community's resistance. It must ask itself whether its law means that people who disobey based on their own narrative will go to jail or whether the group's narrative should in some way be incorporated into state law. In other words the state must decide whether and to what extent the state and the group will be reshaped in the struggle. Prior to the committed "disobedience," state law had not confronted these questions and thus did not include the answers. In the face of the "disobedience," it must. And in doing so, state law changes.

Let's take one of Professor Cover's examples first.<sup>58</sup> The courts and the civil rights sit-in protestors agreed that the Constitution was to be obeyed. They agreed that the Equal Protection Clause was the relevant rule to judge the constitutionality of segregation in public accommodations. But the courts and the protestors had radically different understandings of what that rule meant. The protestors were committed to living out their understanding in action. They sat in. The courts then had to decide how committed they were to living out *their* understanding. Official law could not remain static in the face of the community's law. To reaffirm the official understanding required the demonstration of increased commitment: the judges had to be willing to fill the jails in the name of the state's law, whereas before the protestors' manifestation of

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57. Cover, *Nomos*, *supra* note 1, at 11. Professor Cover explains:

The state becomes central in the process not because it is well suited to jurisgenesis [the creation of legal meaning] nor because the cultural processes of giving meaning to normative activity cease in the presence of the state. The state becomes central only because . . . an act of commitment is a central aspect of legal meaning. And violence [as to which the state has an imperfect but important monopoly] is one extremely powerful measure and test of commitment.

*Id.* at 11 n.30.

58. *See id.* at 47.

commitment the state did not have to make this choice.<sup>59</sup>

Now let's take an example from legal ethics. The Tax Reform Act of 1984<sup>60</sup> requires people to report cash payments of \$10,000 or more received in their trade or business.<sup>61</sup> The person who received the money must fill in a reporting form, IRS Form 8300, which asks for the paying party's name, address, social security number and occupation and, when applicable, the name of the person on whose behalf the transaction was conducted.<sup>62</sup> In October 1989 the IRS sent letters to 956 lawyers, demanding that they fully complete these forms.<sup>63</sup> The lawyers had submitted incomplete forms, claiming much of the information could not be provided because it was protected by the attorney-client privilege.<sup>64</sup> The vast majority of lawyers receiving the IRS demand letter refused to comply.<sup>65</sup> The IRS then issued ninety summonses to noncomplying lawyers who had reported unusually large cash payments or who had declared multiple instances of cash payments over \$10,000.<sup>66</sup> Many, if not most, of the ninety lawyers refused to comply. The government brought a test case in the Southern District of New York to force compliance. The

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59. As Professor Cover states:

The community that disobeys the criminal law upon the authority of its own constitutional [or "ethical"] interpretation . . . forces the judge [the executive branch official or the legislator] to choose between affirming his interpretation of the official law through violence against the protestors and permitting the polynomia of legal meaning to extend to the domain of social practice and control. The judge's [or other official's] commitment is tested as he is asked what he intends to be the meaning of his law and whether his hand will be part of the bridge that links the official vision of the [law] with the reality of people in jail.

*Id.* at 47-48.

60. Tax Reform Act of 1984, Pub. L. No. 98-369, 98 Stat. 685 (1984) (codified as amended at 26 U.S.C. § 6060I (1988)).

61. 26 U.S.C. § 6050I(a), (b) (1988).

62. *See id.*; 26 C.F.R. § 1.6050I-1 (1991) (Treasury regulations detailing the information to be reported on Form 8300).

63. Alexander Stille, *On Disclosure of Attorney Fees: A Strategic Retreat for the IRS*, NAT'L L.J., May 14, 1990, at 3.

64. *Id.* This claim of privilege was asserted even though courts unanimously have held, in other contexts, that client identity and fee information generally are not protected by the privilege. *See, e.g.*, *United States v. Hodge & Zweig*, 548 F.2d 1347, 1355 (9th Cir. 1977); *United States v. Haddad*, 527 F.2d 537, 538-39 (6th Cir. 1975); *Colton v. United States*, 306 F.2d 633, 637 (2d Cir. 1962). *See generally* EDWARD W. CLEARY ET AL., MCCORMICK ON EVIDENCE § 90 (3d ed. 1984) (explaining general rule that fees and identity are not privileged information). The courts uniformly describe as rare the circumstances under which client identity and fee information might be privileged information. *See, e.g.*, *In re Grand Jury Subpoenas (Hirsch)*, 803 F.2d 493, 497 (9th Cir. 1986). *But cf.* *Corry v. Meggs*, 498 So. 2d 508, 511 (Fla. Dist. Ct. App. 1986) (holding state statutory privilege includes fees and identity).

65. Stille, *supra* note 63, at 3 ("Only 95 lawyers answered the letters by providing client information, according to Ellen Murphy, director of public information at the IRS.')

66. *Id.*

district court ordered the lawyers to comply, holding that nothing in the case justified departing from the general rule that client identity and fee information are not privileged.<sup>67</sup> After the district court ruling and with organized bar support,<sup>68</sup> many of the other ninety lawyers who had received summonses and the other 771 lawyers who did not respond to the IRS demand letter continued to resist.<sup>69</sup> These lawyers and bar groups claimed that complying with state law (as manifested by the federal statute, the IRS regulations, the IRS activities in applying these rules to lawyers, the long line of court precedents suggesting there is no valid claim of privilege regarding client identity and fee, and the district court opinion) would violate the ethical responsibilities of the lawyers involved.<sup>70</sup> For example, the president of the Criminal Trial Lawyers Association of Northern California urged other lawyers to resist: "There are ethical responsibilities we have as lawyers that foreclose[] giving information which may put our clients in jeopardy."<sup>71</sup> On appeal the United States

67. *United States v. Fischetti*, No. M-18-304, slip op. at 51-52 (S.D.N.Y. Mar. 13, 1990).

68. The organized bar demonstrated its support of these lawyers in various ways. The Association of the Bar of the City of New York, the National Association of Criminal Defense Lawyers and the New York Council of Defense Lawyers filed amicus briefs on behalf of the lawyers in *Fischetti*. The American Bar Association communicated to the Justice Department that wholesale enforcement of the federal law would have a devastating effect on the attorney-client relationship. See Respondents' and Intervenors' Joint Memorandum of Law at 5, *Fischetti* (No. M-18-304) (letter dated Nov. 9, 1989, from the ABA's Grand Jury Committee to James Bruton, Deputy Assistant Attorney General, Tax Division).

Perhaps most important for my purposes, several bars have issued ethics opinions stating or strongly suggesting that compliance with the demands of the IRS or similar state revenue agency is unethical, at least in the absence of a court order, and that even when a court order exists, the lawyer may ethically choose not to comply. See, e.g., Chicago Bar Ass'n, Op. 86-2 (1988); Ethics Advisory Comm., Nat'l Ass'n of Crim. Def. Lawyers, Formal Op. 89-1 (1989); Fla. Bar, Staff Op. TEO 88-203 (1988); State Bar of Ga., Advisory Op. 41 (1984); State Bar of N.M., Op. 1989-2 (1989).

69. Steve Albert, *Courting a Showdown: More Lawyers Defy IRS Demands for Client Data*, LEGAL TIMES, Apr. 30, 1990, at 2.

70. For example, one bar group, arguing in support of the lawyers in *Fischetti*, said: Because of ethical considerations (see, e.g., ABA Model Code of Professional Responsibility Disciplinary Rule 4-101; ABA Model Rule of Professional Conduct 1.6), since 1985 thousands of criminal law practitioners across the country have completed their 8300 Forms, but have declined to provide the names of the clients or other information identifying the clients.

Memorandum of the Association of the Bar of the City of New York Committee on Criminal Advocacy as Amicus Curiae in Support of the Motion to Quash an I.R.S. Summons at 7-9, *Fischetti* (No. M-18-304) [hereinafter ABCNY Brief in *Fischetti*].

71. William Carlsen, *U.S. Demands Data on Clients: Drug War Tactic Hits Lawyers*, S.F. CHRON., Jan. 15, 1990, at A1, A8. Consider also the argument of counsel in *Fischetti*:

[W]e are here because we have no choice but to be here. We are not here as willing gladiators, we are here because the government began this proceeding. We are ethically counseled, in a number of opinions that we have cited, not to disclose client identity without testing the enforceability of the statute in a court.

Court of Appeals for the Second Circuit upheld the district court decision, dismissing as “without merit” the contention that the reporting requirement conflicts with the attorney-client privilege.<sup>72</sup> After this decision, when asked what advice he would give to lawyers in the circuit, the head of the National Association of Criminal Defense Lawyers’ “8300 Task Force” commented: “I would say many people subscribe to the notion that you don’t violate a confidence until you are ordered to do so by a court.”<sup>73</sup> From the context it is obvious he meant *personally* ordered.

To justify the use of the word “law” to describe a community’s *nomos*, I have thus far suggested that “law” reveals the necessary and dynamic interplay between communal and state law, which is otherwise masked. Am I describing “advocacy” and not “law”?<sup>74</sup> The normative understanding offered by the sit-in protestors or the lawyers in the examples above is, of course, in one sense advocacy, but it is not only advocacy.<sup>75</sup> The sit-in protestors and the lawyers “are not simply advocates,

*Fischetti*, No. M-18-304, slip. op. at 26.

72. *United States v. Goldberger & Dubin, P.C.*, 935 F.2d 501, 504 (2d Cir. 1991). “The [privilege] protects only those disclosures that are necessary to obtain informed legal advice and that would not be made without the privilege.” *Id.* This is the only case thus far decided on this issue. A case brought by lawyers to test the IRS summons before any government action was dismissed for lack of jurisdiction. See *In re IRS Summons to Hall*, No. LR-C-90-221, 1990 WL 127105, at \*5-6 (E.D. Ark. July 31, 1990).

73. Fred Strasser, *Lawyers Must Name Names*, NAT’L L.J., June 24, 1991 at 18 (quoting Gerald B. Lefcourt, head of the National Association of Criminal Defense Lawyers’ “8300 Task Force”).

74. For Professor Cover’s discussion of the distinction between advocacy and the community’s law, see Cover, *Nomos*, *supra* note 1, at 28-29.

75. Professor Cover explains:

[T]o state the problem as one of unclear law or difference of opinion about the law seems to presuppose that there is a hermeneutic that is methodologically superior to those employed by the communities that offer their own law. One might suppose that this assumption had been put to rest by Justice Jackson’s famous aphorism: “We are not final because we are infallible, but we are infallible only because we are final.” . . .

Alternatively, the statist position may be understood to assert implicitly, not a superior interpretive method, but a convention of legal discourse: the state and its designated hierarchy are entitled to the exclusive or supreme jurisgenerative capacity. Everyone else offers suggestions or opinions about what the single normative world should look like, but only the state creates it. The position that only the state creates law thus confuses the status of interpretation with the status of political domination. . . .

Although this second position may be good state law—the Constitution proclaims itself supreme—the position is at best ambiguous when viewed as a description of what the various norm-generating communities understand themselves to be doing.

*Id.* at 42-43 (quoting *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring)).

for they are prepared to live and do live by their proclaimed understandings of the Constitution"<sup>76</sup> and other law.

Law may be distinguished from "mere advocacy" by examining whether the expressed understanding is intended to be realized in action. This does not mean that all, many, or any group members will actually *continue* to live by the group's law in the face of a strong commitment by the state to kill off the communal law.<sup>77</sup> When the state expresses a strong commitment, the community is faced with choices similar to those the state faces when the community expresses strong commitment. The community (or the subcommunity that is actually threatened with violence) must decide what its law means: does it require members to use violence (or allow violence to be inflicted upon them) in the name of their law, or should the community's law be reinterpreted to incorporate the

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76. *Id.* at 29.

77. By calling the normative vision I will describe "law," I am, however, making the following empirical claim: Most lawyers understand a lawyer's obligations from within the bar's normative vision. This means that most lawyers decide how to act and how to judge the propriety of their acts (and those of other lawyers) based on the bar's *nomos* as I describe it, at least when the state is unlikely to insist on *its* vision, which includes, for example, all the times that the lawyer's actions are unlikely to come to the state's attention. I rest this claim on three primary types of evidence: bar ethics opinions, *see infra* text accompanying notes 116-19; the arguments made by bar groups in amicus briefs; and cases (reported in court decisions and in newspaper accounts) that involve lawyers acting upon the bar's normative vision. Finally, the work of other scholars, who notice a divergence between the ethics rules and other law in a variety of legal contexts, supports my argument. *See, e.g.,* Theresa A. Gabaldon, *Free Riders and the Greedy Gadfly: Examining Aspects of Shareholder Litigation as an Exercise in Integrating Ethical Regulation and Laws of General Applicability*, 73 MINN. L. REV. 425 (1988) (discussed *infra* note 145); L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L.J. 909 (1980) (discussed *infra* note 167); Subin, *supra* note 2, at 1107-08 (discussed *infra* note 167); *see also* Robert Hewitt Pate, III, Comment, *Evans v. Jeff D. and the Proper Scope of State Ethics Decisions*, 73 VA. L. REV. 783, 794-95 & nn. 73-83 (1987) (addressing attorney's fee waivers, discussed *infra* note 145).

I do not rest my argument on survey evidence that purports to document the attitudes of lawyers or to catalogue their activities. First, there are few such surveys. Second, many of the questions and answers asked in such surveys are not particularly illuminating given the analysis I present here, i.e., knowing whether or not lawyers believe that such and such *is* a precept of ethics does not tell one much about what lawyers think the precept means or how it should be weighed in comparison with other precepts. For a similar refusal to rely on survey results to support a description of the bar's *nomos*, see Robert P. Lawry, *The Central Moral Tradition of Lawyering*, 19 HOFSTRA L. REV. 311, 318 n.49 (1990). On the differences between Professor Lawry's description and my own, see *infra* note 257. My refusal to rely on survey evidence should not, however, be mistaken for an admission that the survey evidence contradicts what I say here. It does not. *See, e.g., infra* note 198 (referring to one such survey). Compare Professor Lawry's assertion that a survey reported by Professor Freedman contradicts the organized bar's stated ethos. Lawry, *supra*, at 318 n.49 (citing MONROE FREEDMAN, *LAWYERS ETHICS IN AN ADVERSARY SYSTEM* 38 (1975)). Professor Freedman's survey purports to show that 90 to 95% of the responding lawyers would act contrary to what the ethics rules say on their face and, the rules notwithstanding, would call a perjurious witness to the stand. *Id.* The survey does not contradict the bar's position as I describe it.

state's understanding? To choose between these alternatives, communities with law (as opposed to mere advocates) appeal to what Professor Cover calls "a secondary hermeneutic—the interpretation of the texts of resistance."<sup>78</sup> Because of the state's powerful, albeit imperfect, monopoly on violence, communities with divergent understandings of law must (and do) develop "an understanding of what is right and just in the violent contexts that the group will encounter."<sup>79</sup> As we shall see later,<sup>80</sup> the profession's *nomos* includes such texts of resistance, including rules on the degree of resistance to be offered, narratives of martyrdom and triumphant courage, and narratives that justify and define the normative boundary between state and profession and the drastic consequences for the group and the society of state action that violates that boundary.<sup>81</sup>

#### IV. TWO LAWS MASQUERADING AS ONE

No *nomos* is static, not only because it is in constant interaction with other normative visions, but also because each *nomos* is itself the source of new combinations of precepts, narratives, and commitment—new normative visions.<sup>82</sup> Thus, it is futile to try to capture in words a complete picture of a normative vision. One, however, can portray central features in a *nomos*' topography that identify it and distinguish it from other normative visions. In this section I will begin to paint a picture of the profession's law by explaining and exploring how it differs from state law and how those differences are hidden from view.

78. Cover, *Nomos*, *supra* note 1, at 49.

79. *Id.*

80. See *infra* notes 381-409 and accompanying text.

81. In an insightful article that explores the profession's ideology as revealed in the ABA's Model Rules of Professional Conduct and the commentary on those rules by the bar and legal academics, Professor Deborah Rhode concludes that the legal profession's "contemporary ideology portrays the legal profession as a distinctive moral community, whose norms depart from ordinary conceptions of civic virtue." Rhode, *supra* note 15, at 618. The distinctive moral community that Professor Rhode so skillfully describes is the same one I see and will picture in this piece. Where my thesis differs most from hers is that I argue that the norms of that distinct community depart from the public *nomos*, not merely as reflected in "ordinary conceptions of moral virtue," but also as reflected in the state's law. Further, just as Professor Rhode sees radical moral skepticism as a primary justification for the "amorality" of the profession's contemporary ideology, see *id.* at 620-23, I see legal realism (and most post-realist jurisprudential theories) as an explanation for the failure of knowledgeable legal ethics scholars to identify the profession's ethos as inconsistent with state law. In the post-realist world, there are few who dare to speak of what the state's law is for fear of the charge of engaging in some form of naive positivism. To ignore the state's important role in creating a public *nomos* with characteristics that might distinguish it from alternative legal visions, however, is to miss an important means of analyzing that *nomos* and the state's use of violence in support of it. Professor Cover's theory of law provides a means of speaking of state law that avoids both the static vision of positivism and the disempowerment of those who would reform the state's law.

82. See *supra* note 20 (discussing Professor Gordon's article).

### A. *What We Might Expect to Find*

The legal profession is, by definition, inextricably connected to the state and its laws. The state has the last say over such central matters of group definition as who may be admitted to group membership and who may be excluded.<sup>83</sup> Moreover, the central privilege of membership in the profession is the right to speak to the state on behalf of another in the state's courts. Thus, the profession is dependent on the state for boundary and functional definition, central matters in the normative vision of any community. But the state's *nomos* is similarly dependent on the profession. To be a lawyer is to have a right to participate in the creation and maintenance of the state's *nomos* that is denied to other persons in the society.

As an expression of the real interdependence of these two normative worlds, we would expect to find significant areas in which they coincide. Further, to the degree that the two worlds differ, we would expect to find that the profession's *nomos* favors an accommodationist stance, i.e., "one that goes to great lengths to avoid confrontation or the imposition upon adherents of demands that will in practice conflict with those imposed by the state."<sup>84</sup> Finally, the intensity and particular nature of the interdependence of bar and state increase the need of all involved to maintain the myth of a unitary normative system. The idea that the ministers of the state's law are somehow less than faithful to that law is simply too powerful a suggestion to be incorporated easily into either the state's or the bar's normative system. Thus, we would expect to find that each normative world has developed means of masking the existence of the profession's conflicting norms. In exploring the profession's *nomos*, we will find the sharing of norms with the state and the masking of the alternative *nomos*, but the prediction of an accommodationist stance will need some modification. At a number of critical points where the profession's *nomos* diverges from the state, the state shows a weak commitment to its normative vision.<sup>85</sup> Real accommodation is rarely necessary; the appearance of accommodation, which is another way of saying "a masking of the differences," will do.

### B. *The Hierarchy of Norms*

For the most part, the bar and the state agree on the precepts that are relevant to the law governing lawyers: precepts contained in the

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83. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS §§ 2.2.1, 2.2.2, 3.2, 15.1, 15.2 (1986).

84. Cover, *Nomos*, *supra* note 1, at 33.

85. See *infra* notes 314-80 and accompanying text.

Constitution of the United States; the ethics rules as embodied in various codes promulgated by the bar; the common law of lawyering, particularly the attorney-client privilege; and precepts embodied in "other law," including the law of torts, criminal law, securities law and the law of procedure. I say "for the most part" for two reasons. First, the state treats ethics rules as "law" only to the extent that they are (and in the form in which they are) adopted by the state. On the other hand the bar may treat as law ethics rules adopted by the ABA or a state bar organization but not adopted by the state.<sup>86</sup> Second, the extent to which the bar accepts that precepts of "other law" govern the conduct of lawyers is not clear. Sometimes lawyers and bar groups speak as if lawyers enjoy some form of immunity from the precepts of other law.<sup>87</sup> But, even if we put aside for the moment these two areas of potential disagreement on precepts<sup>88</sup> and assume that the bar and the state are in total agreement on the relevant precepts, the existence of shared precepts indicates a unitary normative system only if the precepts are ordered by each group (the bar and the state) in the same way. They are not. In the bar's *nomos* ethics rules<sup>89</sup> are presumed to control when they conflict with other law, while in the state's *nomos* other law is presumed to control when it conflicts with the ethics rules.

In the state's hierarchy of norms—as it exists in theory<sup>90</sup>—ethics rules occupy a relatively low status. Ethics rules are generally court rules, not legislative,<sup>91</sup> and they are usually state law, not federal law.<sup>92</sup>

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86. See *infra* notes 195-99 and accompanying text for a discussion of the amendment, which was not adopted by most states, to the MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1) (1974).

87. See *infra* text accompanying notes 374-78 for a discussion of the position taken by bar groups in *United States v. Cintolo*, 818 F.2d 980 (1st Cir. 1987).

88. Notice that we are also putting aside for the moment an even greater source of potential disagreement: disagreement about the "meaning" of the precepts that both bar and state agree are relevant. Disagreement about the "meaning" of precepts will be explored after establishing here the disagreement between state and bar over the ordering of precepts. The "meaning" of a precept is, of course, dependent on its order in a hierarchy of precepts.

89. This is not to say that in the bar's *nomos* each precept in the ethics rules carries equal power to trump other law. The bar is so weakly committed to some rules that they may be said to have taken on the status of "non-law" for the bar, and thus they lack the power to trump other law. See *infra* text accompanying notes 154-56.

90. "There is a systematic hierarchy—only partially enforced in practice but fully operative in theory—that conforms all precept articulation and enforcement to a pattern of nested consistency." Cover, *Nomos*, *supra* note 1, at 16-17. Professor Cover cites JOHN C. GRAY, *THE NATURE AND SOURCES OF THE LAW* (1909), and H.L.A. HART, *THE CONCEPT OF LAW* (1961), especially chapters three and five of Hart's book, as attempts to articulate the state's hierarchy of norms and their pattern of nested consistency. Cover, *Nomos*, *supra* note 1, at 17 n.44.

91. WOLFRAM, *supra* note 83, § 2.6.3, at 57.

92. See, e.g., *id.* § 2.4.2, at 44-45.



Those two facts relegate ethics rules to a low status in the state's hierarchy of precepts. First, federal constitutional requirements, including those on procedure, trump all other law.<sup>93</sup> Second, federal law trumps state law.<sup>94</sup> Third, on matters of substantive law, legislation trumps rules adopted by courts.<sup>95</sup> Fourth, on matters of procedure, federal legislation trumps rules adopted by federal courts;<sup>96</sup> and federal rules of procedure adopted pursuant to congressional authorization, such as the Federal Rules of Civil Procedure, trump rules adopted by federal courts, which include ethics rules.<sup>97</sup> And while in many states rules of procedure adopted by a court pursuant to the court's inherent powers (which is how ethics rules are adopted) trump conflicting state legislative pronouncements on procedure, this may be truer in theory than in practice.<sup>98</sup> Finally, federal and state courts often state that the only instances in which they are bound to treat the ethics rules as binding precepts are in disciplinary proceedings against lawyers.<sup>99</sup> Thus, even when the ethics rules

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93. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803).

94. U.S. CONST. art. VI, § 2.

95. See, e.g., A. Leo Levin & Anthony G. Amsterdam, *Legislative Control over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 14 (1958) ("Nothing could be clearer than the fact that courts in the exercise of the rule-making power have no competence to promulgate rules governing substantive law."). Of course, the distinction between substance and procedure is far from clear, but that does not alter the fact that the hierarchical precept is well settled. The debate over what distinguishes "substance" from "procedure" assumes the validity of the hierarchical precept.

96. See, e.g., Sara S. Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1465-66 (1984).

97. See FED. R. CIV. P. 83, which in turn is derived from 28 U.S.C. § 2071(a) (1988) (providing that rules of court may be adopted so far as they are not inconsistent with congressional legislation or rules enacted pursuant to this Enabling Act).

98. Most state courts still assert the exclusive power to regulate the profession and thus in theory would strike down legislation directed exclusively at lawyers. See WOLFRAM, *supra* note 83, § 2.2.3, at 27 n.46. Several caveats are necessary, however. First, when state courts strike down legislation because it interferes with the court's power to regulate the profession, the legislation is generally legislation that regulates lawyers only, not legislation, such as a criminal law, that applies to lawyers and all others. *Id.* § 2.2.3, at 27-28. *But see id.* § 2.2.3, at 28 (citing cases in which courts used inherent powers to limit laws of general application). Second, state supreme courts "[o]ften . . . stop short of declaring invalid a statute . . . with the announcement that the court finds the legislative intent congenial and the regulation will be permitted to exist as valid." *Id.* This accommodationist approach to legislation generally characterizes state court decisions on legislation affecting judicial procedure. See JACK B. WEINSTEIN, *REFORM OF COURT RULE-MAKING PROCEDURES* 77-88 (1977). "No serious student of the subject would today accept Wigmore's thesis that the legislature has no power to effect judicial procedure." *Id.* at 79.

99. See, e.g., *Armstrong v. McAlpin*, 625 F.2d 433, 444 (2d Cir. 1980) (holding that courts need not resolve whether representation is a violation of the ethics rules to determine whether to disqualify a lawyer at trial), *vacated on other grounds*, 449 U.S. 1106 (1981); *W.T. Grant Co. v. Haines*, 531 F.2d 671, 676-77 (2d Cir. 1976) (holding that lawyer's violation of ethics rule against advising unrepresented party is insufficient basis upon which to dismiss

purport to speak directly on a matter and are the only existing source of precept on the question, they may be ignored with relative ease so long as the case is not a disciplinary proceeding.

The strongest evidence that the bar's hierarchy of norms differs from the state's is found in the bar narratives that explicate the rules—ethics opinions—and we shall turn to those sources in a moment. It is, however, worth considering first what, if anything, the ethics rules themselves say about their place in the hierarchy of possible norms. On their face the ethics rules are somewhat ambiguous as to their relationship to other norms. Unlike, for example, the Constitution, which declares itself and other federal law to be supreme to state enactments,<sup>100</sup> neither the Model Code of Professional Responsibility<sup>101</sup> nor the Model Rules of Professional Conduct<sup>102</sup> as drafted by the American Bar Association or as enacted by the states contains any similar general and express declaration of its place in relation to other norms. While the Model Code's Preamble begins with an explanation of the importance of the rule of law,<sup>103</sup> neither the Preamble, the Preliminary Statement, the disciplinary rules nor the ethical considerations state, as a general proposition, whether the Code or other law is presumed to govern in the case of a conflict.<sup>104</sup> As for the Model Rules, the Preamble and Scope sections contain more references to the existence of other law governing lawyers than similar sections of the Model Code, but again, they contain no explicit statement on the general hierarchy of norms. In fact, the references to other law in the Preamble and Scope sections of the Model Rules highlight the ambiguity of the relationship of the Rules to other law. The Preamble and Scope sections of the Rules include the following

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client's lawsuit or disqualify the law firm); *Southern Valley Grain Dealers Ass'n v. Board of County Comm'rs*, 257 N.W.2d 425, 432 (N.D. 1977) (holding that violation of ethics rules does not require reversal of case when violation played no part in lawyer's decisionmaking process).

Courts typically consult the ethics rules in nondisciplinary cases involving a lawyer's conduct, but they treat the rules as a source of guidance rather than as binding precept. Typical of this approach is the following statement from *Woodruff v. Tomlin*, 616 F.2d 924 (6th Cir.) (en banc), *cert. denied*, 449 U.S. 888 (1980): "We recognize that the Code of Professional Responsibility '[does not] undertake to define standards for civil liability of lawyers for professional conduct.' Nevertheless, it certainly constitutes *some evidence* of the standards required of attorneys." *Id.* at 936 (emphasis added) (citation omitted) (quoting TENN. SUP. CT. R. 38 app. preliminary statement).

100. U.S. CONST. art. VI, § 2.

101. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1981).

102. MODEL RULES OF PROFESSIONAL CONDUCT (1983).

103. MODEL CODE OF PROFESSIONAL RESPONSIBILITY pmb. (1981).

104. This omission is in all probability largely attributable to the traditional understanding of the relationship between law and ethics, which masks the potential for any such conflict.

statements about other law:<sup>105</sup>

[1] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. . . .

. . . .

[2] [a] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. [b] However, a lawyer is also guided by personal conscience and the approbation of professional peers. . . .

. . . .

[3] [a] . . . Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system [presumably including other law] and to the lawyer's own interest in remaining an upright person . . . . [b] The Rules . . . prescribe terms for resolving such conflicts.<sup>106</sup>

[4] [a] The Rules presuppose a larger legal context shaping the lawyer's role. [b] That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. [c] Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. [d] The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. . . .

. . . .

[5] [a] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. . . . [b] These Rules do not abrogate any such authority.

. . . .

[6] [a] Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. . . . [b] [The Rules] are not designed to be a

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105. The numbers and letters in front of the statements are mine, inserted to make later reference to these statements easier.

106. MODEL RULES OF PROFESSIONAL CONDUCT pmb1. (1991).

basis for civil liability. . . . [c] Accordingly, nothing in the Rules should be deemed to *augment* any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.<sup>107</sup>

[7] [a] Moreover,<sup>108</sup> these Rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege. . . . [b] The fact that in exceptional situations the lawyer under the Rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.<sup>109</sup>

Despite the seemingly straightforward injunction in [1], which suggests that other law is always binding and that it is arguably, if not presumptively, authoritative in cases of conflict with the Rules,<sup>110</sup> the above statements also contain strong suggestions of a different hierarchy of norms. First, the *nomos* portrayed by these statements is self-consciously open-ended, i.e., the statements invite personal and informal group interpretations to flourish as potential sources of authoritative norms to be realized in action.<sup>111</sup> Second, if "the legal system" in statement [3][a] can be understood to include precepts embodied in other law, as I have suggested with my brackets, then [3][b] suggests that the Rules provide the mega-text for resolving conflicts with other law and thus constitute higher authority. Third, each time other precepts are mentioned in a list that includes the Rules, the Rules are mentioned first, which invites one to view the Rules as higher authority.<sup>112</sup> Fourth, the statements explic-

107. *Id.* scope (emphasis added). The Model Code contains a similar, although less audacious, statement: "The [Model] Code . . . [does not] undertake to define standards for civil liability of lawyers for professional conduct." MODEL CODE OF PROFESSIONAL RESPONSIBILITY preliminary statement (1981).

108. This paragraph immediately follows the one quoted above as [6].

109. MODEL RULES OF PROFESSIONAL CONDUCT scope (1991).

110. The more ambiguous statement in [4][a] also might be read to suggest that in general other precepts trump the Rules.

111. Statements [2], [4][c], [4][d]. This "open-ended *nomos*" corresponds to what Professor Cover calls the "paideic ideal-type." Cover, *Nomos, supra* note 1, at 12-17. In an open-ended *nomos* any ordering of the norms is subject to challenge, including the order expressed in the Supremacy Clause of the Constitution. The portrayal of the *nomos* as open-ended is evident in other sections of the Model Rules and Model Code. See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(2) (1981) (a lawyer *may* reveal "[c]onfidences and secrets when . . . required by law or court order" (emphasis added)).

112. Statements [2][a], [4][c]; see, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(2) (1981).

itly provide that other law trumps the Rules *in certain instances*, which invites the reading that such a hierarchy is the exception.<sup>113</sup>

My point here is not that one hierarchy is a “correct” interpretation of the Rules and the other is not, nor that the ambiguity is the “cause” of the “confusion” about which hierarchy is “correct.” Rather, the point is that in a code drafted for state adoption by a community whose understanding of the appropriate hierarchy of norms is different from that of the state,<sup>114</sup> some ambiguity as to the appropriate hierarchy should be expected, and that ambiguity does exist in the ethics rules.<sup>115</sup> What is more surprising, given the degree of interdependence of bar and state and the state’s ability to marshal force to enforce its norms, is the degree to which the rules overtly suggest that state norms are not primary.

We are now ready to turn to the narratives that reveal the divergent normative hierarchies. The evidence that the bar has a different hierarchy of norms is particularly strong because it appears in bar ethics opinions, narratives that the bar intends as “law”—intends, that is, to be realized in action. For the state, court opinions provide a body of narratives (and a source of precepts, which flow out of those narratives) that are intended to be realized in action.<sup>116</sup> Ethics opinions perform a similar function in the bar’s *nomos*: they are narratives (and the source of precepts) intended to be realized in action.<sup>117</sup> Because ethics opinions

113. Statements [5], [6], [7]. Notice, too, that while statements [6] and [7] explicitly state that tort law and evidence law (the attorney-client privilege) should trump the Rules, the statements concede this only to the extent that tort law proposes less stringent standards for the lawyer’s duty of care toward the client than the Rules and only to the extent that the attorney-client privilege is *more* protective of client confidences than the Rules.

114. The existence of this ambiguity does not necessarily mean that the bar and the state have divergent understandings of the appropriate hierarchy of norms. However, the ambiguity is consistent with this thesis. Similarly, the fact that states which have adopted the Rules have not eliminated the ambiguity does not necessarily mean that the state and the bar share an understanding—albeit an ambiguous one—of the hierarchy of norms. The fact that two communities share precepts is not sufficient to establish the existence of a unitary *nomos*.

115. While the ambiguity is certainly suggestive of the existence of divergent understandings about the appropriate hierarchy of norms, the arguments in this Article do not rest on such relatively weak evidence. If, however, one accepts on faith for the moment that such a divergence on hierarchy exists, the ambiguity in the ethics rules makes it easier to see how divergent understandings can be maintained or, at least, how the divergence can be masked.

116. I assume this point is self-evident. Of course, by prefacing the sentence in the text with the words “for the state,” I do not mean that the bar generally rejects these narratives as law. Rather, what I mean is that, to the extent the narratives embedded in the courts’ opinions conflict with the narratives of the bar, the state’s *nomos* is revealed in the courts’ opinions and the bar’s *nomos* in its texts.

117. Ethics opinions are issued generally in response to inquiries by members of the bar about how to act in a particular situation. Thus, they are understood by author and audience as interpretation intended to guide action. Although the opinions in many jurisdictions are officially titled “advisory,” they typically respond in language that is authoritative: they say that a lawyer may, may not, must not or must do something. Ethics opinions often contain

are intended to be realized in action, they are by definition more than mere advocacy.<sup>118</sup> Ethics opinions are also a particularly strong source of evidence of the content of the bar's *nomos* because they generally are not subject to prior state control.<sup>119</sup> They therefore express law to which the bar, but not necessarily the state, is committed.

What do the ethics opinions tell us about the bar's ordering of norms? Consider this excerpt from State Bar of New Mexico Advisory Opinion 1989-2:

It is the intent of Congress under 26 U.S.C. § 6050I that

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disclaimers. For example, the Committee on Professional Ethics of the State Bar of Wisconsin includes at the end of its opinions the following statement:

Opinions and advice of the Committee on Professional Ethics, its members, and its assistants are issued pursuant to Article IV, Section 5 of the State Bar Bylaws. Opinions and advice are limited to the above facts, are advisory only, and are not binding on the courts, the Board of Attorneys [on] Professional Responsibility, or any member of the state bar of Wisconsin.

See, e.g., State Bar of Wis., Formal Op. E-90-3 (1990). Notice that nothing in this statement belies the notion that the opinions are intended to guide action.

As the Wisconsin disclaimer suggests, courts do not consider the opinions binding law. When the bar or an individual lawyer brings an ethics opinion to the attention of a court, seeking to justify or condemn conduct based on that opinion, the court treats the ethics opinion much as it does a law review article cited for similar purposes: the court rejects or ignores an opinion when it disagrees with the opinion's reasoning and accepts an opinion when it agrees. See WOLFRAM, *supra* note 83, § 2.6, at 67 ("Courts obviously do not feel bound [by ethics opinions]. . . . When a court does notice ethics opinions that are contrary to the court's view, it generally seems not overly concerned about offering special justifications for rejecting the opinion."); *id.* § 12.6.5, at 672-73.

The bar's understanding that ethics opinions are intended to guide action, however, is recognized by state law to the following extent: courts generally consider the seeking of, and action taken in accordance with, an ethics opinion as evidence of the lawyer's good faith. *Id.* § 2.6, at 67. That the state and the bar see ethics opinions differently suggests that the bar and state have separate normative understandings.

118. See *supra* notes 74-79 and accompanying text.

119. The courts generally do not review or comment on such opinions, so that any differences in the two normative systems should be more apparent in ethics opinions than in ethics codes, which in most instances are at least drafted with the intent that they be approved by the state. See *infra* notes 169-70 and accompanying text. Unlike ethics rules, which in theory (or to put it another way, which under the state's law) are not operative law until a court or legislature adopts them, ethics opinions generally are not reviewed by a court before being issued.

In some jurisdictions a lawyer may petition a court to review an ethics opinion. See, e.g., *Shapero v. Kentucky Bar Ass'n*, 726 S.W.2d 299, 299 (Ky. 1987) (rejecting an ethics opinion which had stated that the bar's antisolicitation rule was constitutional), *rev'd on other grounds*, 486 U.S. 466 (1988); *In re Advisory Opinion of Ky. Bar Ass'n*, 613 S.W.2d 416, 416 (Ky. 1981) (reviewing an ethics opinion). To the extent the resulting court opinion accepts the ethics opinion, the ethics opinion has the status of other case law. Apart from such review, the only opportunity most courts have to approve or reject a bar interpretation offered in an ethics rule is when the bar asserts that action in violation of an ethics opinion is conduct that warrants formal discipline or when the state prosecutes an action, and the lawyer asserts the opinion as a defense or justification.

an attorney who receives \$10,000 or more in cash from a client must report the receipt and the client's identity to the Internal Revenue Service. This law provides no recognition of client confidence. Violation of the law is a felony. On the other hand, [the state court-adopted ethics rule] provides that, "A lawyer shall not reveal information relating to representation of a client unless the client consents . . ." <sup>120</sup> It appears the intent of the New Mexico Rules of Professional Conduct is that attorney should not reveal exactly what the federal law requires attorney to reveal. Thus, there is a conflict between [the federal statute and the state rule]. Our Committee does not resolve the conflict, but we give guidance to New Mexico attorneys encountering it.

. . . .

If the client [insists upon paying in cash and insists that the attorney comply with the professional conduct rule by not reporting the transaction], New Mexico law would permit the attorney to decline the representation;<sup>121</sup> or . . . to withdraw . . . .<sup>122</sup>

There is another possibility for an attorney [in this situation]. While no attorney is ethically obligated to pursue it, for the reasons stated later in this opinion, we believe pursuit of it would be consistent with the highest ideals of the profession. Since we have identified a conflict between the New Mexico ethical rules and the federal law,<sup>123</sup> an attorney may, with the client's consent, agree to "make a good faith effort to determine the validity, scope, meaning or application" of the law at issue.<sup>124</sup>

. . . .

While New Mexico attorneys are not required to make this good faith effort, the Committee notes that one commentator

120. State Bar of N.M. Advisory Opinions Comm., Advisory Op. 1989-2 (1989) (quoting N.M. SUP. CT. R. ANN. 16-106(A) (1986)).

121. *Id.* (citing N.M. SUP. CT. R. ANN. 16-102(E) (1986)).

122. *Id.* (citing N.M. SUP. CT. R. ANN. 16-116(B)(3), (6) (1986)).

123. Notice that the bar's hierarchy of norms here suggests an inversion of the Supremacy Clause of the Constitution.

124. State Bar of N.M. Advisory Opinions Comm., Advisory Op. 1989-2 (1989) (quoting N.M. SUP. CT. R. ANN. 16-102(D) (1986)). Rule 16-102(D) is identical to rule 1.2(d) of the Model Rules. In full, rule 1.2(d) provides:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) (1991).

suggests the very purpose of laws such as 26 U.S.C. 6050I is to drive a wedge between lawyer and client with the end result that persons accused of drug offenses will be weakened in their ability to defend themselves.<sup>125</sup> The Committee further notes that, throughout the former Code of Professional Responsibility and the current Rules of Professional Conduct, there are provisions requiring a lawyer to be mindful of his obligations to provide legal assistance to those who need it.<sup>126</sup> Thus, the Committee is of the opinion that an attorney who chooses not to decline the representation and who rather chooses to represent the client while challenging the law would uphold the highest ideals and traditions of our profession.<sup>127</sup>

Ethics opinions that actively and openly encourage disobedience of other law, as this one does, in the name of compliance with the ethics rules provide the strongest evidence that the bar's hierarchy of norms places ethics rules above other state precepts. Such opinions are, however, relatively rare.<sup>128</sup> What is surprising is that they exist at all. "[M]ost communities will avoid outright conflict with a judge's interpre-

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125. State Bar of N.M. Advisory Opinions Comm., Advisory Op. 1989-2 (1989) (citing Steven Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 *HASTINGS L.J.* 889, 900-04 (1987)).

126. *Id.* (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 2, EC 2-1 (1969); N.M. SUP. CT. R. ANN. 16-601 to 16-602 (1986)).

127. *Id.* The New Mexico committee was split on whether lawyers who had not discussed the IRS regulations with the client before accepting the \$10,000 were prohibited from filing any form with the IRS or could file a form that omits the client's identity. *Id.* This opinion is reproduced here as evidence of the bar's hierarchy of norms. It should be noted, however, that the one court deciding this precise question not only used a different hierarchy of norms but also rejected the bar's position on the merits. *See United States v. Goldberger & Dubin*, 935 F.2d 501, 505 (2d Cir. 1991).

128. Other examples of openly defiant ethics opinions include: Chicago Bar Ass'n, Op. 86-2 (1988) (lawyer would not be condemned for filing a completed IRS form; "however, the better course . . . is to file an IRS form that asserts the attorney-client privilege and gives notice . . . that information has been withheld"); Ethics Advisory Comm., Nat'l Ass'n of Crim. Def. Lawyers, Formal Op. 89-1 (1989) (stating that lawyer who receives an IRS summons should not disclose client confidences unless a court orders disclosure); State Bar of Ga., Advisory Op. No. 41 (1984) (lawyer should pursue all reasonable avenues of appeal before complying with requests from state agency); State Bar of Wis., Formal Op. E-90-3 (1990) (lawyer should not make disclosure when faced with an IRS summons "unless and until a court, preferably an appellate court, considers the validity of the summons and any judicial enforcement orders in this area and that court's ruling requires such disclosure").

Openly defiant ethics opinions are much more likely to involve certain precepts, such as the rule on confidentiality, than others. For a discussion of the centrality of confidentiality in the bar's *nomos*, see *infra* text accompanying notes 159-256. The bar's demonstration of strong commitment to certain precepts in the rules and weak (or negative) commitment to other precepts is another aspect of the bar's hierarchy of norms and is not inconsistent with the general proposition presented here: the bar's hierarchy differs from the state's because the bar presumes that ethics rules (even if only some ethics rules) trump law, which the state considers above the ethics rules.



tations, at least when he will likely back them with violence."<sup>129</sup> If this is true of "most communities," the bar's special dependence on the state would lead one to predict that it would be more true of the bar. Further, the heterogeneity of the bar, which many commentators see as a complete and effective obstacle to the maintenance of any group *nomos*,<sup>130</sup> suggests that the bar could muster at most a weak commitment to any normative understanding contrary to state law.<sup>131</sup> Thus, the existence of any texts of resistance that are both forceful and committed is surprising and will require further explanation.<sup>132</sup>

Much more common than the New Mexico opinion are ethics opinions stating that the ethics rules permit, but do not require, compliance with other law.<sup>133</sup> While less dramatic, these opinions also provide evidence that the bar's hierarchy of norms presumes that ethics rules trump other norms. How else can one understand the question, do the ethics rules permit compliance with other law? How else can one understand the answer, compliance is permitted? Typical of this sort of opinion is the following excerpt from the Association of the Bar of the City of New York, Opinion 1990-2:<sup>134</sup>

In response to a document request served by the plaintiff, the [lawyer] was advised by his client [the chief executive officer of the corporate defendant] that the corporate defendant had previously produced all responsive documents to a government agency pursuant to an earlier subpoena, and that no copies of the documents had been retained. [The lawyer, after confirming that the government agency was in possession of the documents,] advised the plaintiff that neither his client nor the corporate defendant possessed any documents called for by the document request.

The [lawyer] subsequently learned from his client that several boxes of documents responsive to the . . . document request had been stored by the client with a third person. The [lawyer]

129. Cover, *Nomos*, *supra* note 1, at 53.

130. See, e.g., sources cited *supra* note 6.

131. "The normative universe is held together by the force of interpretive commitments . . ." Cover, *Nomos*, *supra* note 1, at 7.

132. See *infra* text accompanying notes 308-409 (discussing the bar's strong commitment and the state's weak commitment).

133. See, e.g., ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1349 (1975) ("[W]e do not decide whether local criminal law makes it unlawful for S to fail to reveal the information . . . . If disclosure is required by such law, S may, but is not required under DR 4-101(C)(2), to make disclosure."); Chicago Bar Ass'n, Op. 86-4 (undated) (lawyer is permitted but not required to disclose to IRS its overpayment to client if he is under a legal obligation pursuant to statute or regulation to disclose such information).

134. Association of the Bar of the City of New York, Op. 1990-2 (1990).

informed his client that the plaintiff should be advised of the existence of these documents. The client, however, took the position that the [lawyer] learned this information in the course of a confidential attorney-client communication and instructed the [lawyer] not to disclose the information.

. . . .

Although this committee does not opine on the applicability of court rules<sup>135</sup> to particular sets of facts, it is within our purview to consider whether obligations imposed by court rules are "required by law" within the meaning of DR 4-101(C)(2).<sup>136</sup> In this committee's opinion, a lawyer's obligations under Rule 26(e)<sup>137</sup> are "required by law" within the meaning of DR 4-101(C)(2) since the Federal Rules of Civil Procedure "have the effect of law."<sup>138</sup>

Therefore, assuming the [lawyer] concludes that the information received from his client . . . provides the [lawyer] with actual knowledge that his prior response to plaintiff's document request was inaccurate, this committee concludes that under DR 4-101(C)(2) the [lawyer] *may* disclose to the plaintiff the existence of the documents . . . , even though that information may constitute a "confidence" and/or "secret."

. . . .

Should the [lawyer] choose not to disclose the information, he would have to consider whether continued representation of the client might violate the Code. EC 7-1 provides that it is the duty of a lawyer to represent "his client zealously within the bounds of law, which includes Disciplinary Rules and enforceable professional regulations."

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135. *Id.* Throughout this opinion the term "court rules" is meant to refer to the Federal Rules of Civil Procedure and not to the ethics rules, although they too are rules adopted by the court in New York.

136. *Id.* (referring to N.Y. JUD. LAW § 29 app., DR 4-101(C)(2) (McKinney 1975), which provides that a lawyer may disclose a confidence or secret when "required by law").

137. *Id.* (referring to FED. R. CIV. P. 26(e), which provides that a party generally is not required to supplement a response made in discovery to include information later acquired as long as the response was complete when made). Rule 26(e) lists several exceptions. *See, e.g.*, FED. R. CIV. P. 26(e)(2)(A) (requiring that an answer be supplemented if the party or lawyer learns that the original response was based on information that the party knew was incorrect when the original response was filed); *id.* 26(e)(2)(B) (requiring that an answer be supplemented if the party learns that, although correct when made, "the circumstances are such that a failure to amend the response is in substance a knowing concealment"). The Advisory Committee Note explains that these two exceptions are designed to cover the situation in which the "lawyer obtains actual knowledge that a prior response is incorrect," but that they do not impose a continuing obligation to check prior answers. *Id.* 26 advisory committee's note.

138. Association of the Bar of the City of New York, Op. 1990-2 (1990) (citing 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1030, at 125 (2d ed. 1987)) (other citations omitted).

. . . .

DR 7-102(A)(3) provides: "In his representation of a client, a lawyer shall not . . . [c]onceal or knowingly fail to disclose that which he is required by law to reveal." Because this committee considers obligations imposed by the Federal Rules of Civil Procedure to be ones "required by law" within the meaning of DR 7-102(A)(3), the [lawyer] would be required to terminate representation of the client (assuming the [lawyer] has concluded that Rule 26(e) requires correction of the prior discovery response), because continued representation would entail a violation of this Disciplinary Rule.<sup>139</sup>

While this opinion "allows" the lawyer to comply with other law, it explicitly acknowledges the possibility that the lawyer may choose not to do so. Also notice the committee's claim that it does not "opine" on court rules. Ethics committees often state that they will not pass on "legal" questions.<sup>140</sup> This position avoids overt confrontation with the state and affirms the existence of a discrete normative space in which "ethics" govern, not "law." However, as the New Mexico opinion discussed above demonstrates, the "rule" that ethics committees will not pass on questions of other law yields when the principle involved is determined to be important enough to risk overt confrontation.

Further evidence of the bar's hierarchy of norms is found in a *New York Law Journal* story announcing the New York ethics opinion quoted above. The story begins: "A city bar ethics committee has determined for the first time that the Federal Rules of Civil Procedure fall under the 'required by law' *dictum* of the Disciplinary Rules, permitting attorneys to disclose confidential information from clients when they have actual knowledge that prior representations were inaccurate."<sup>141</sup> The article never suggests that the ethics opinion is unremarkable to the extent that rule 26(e) imposes an obligation to disclose.<sup>142</sup> It thus supports the proposition that other law generally occupies a lower status than ethics rules in the bar's *nomos*.

The bar's understanding that ethics rules trump other law (or qual-

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139. *Id.*

140. See, e.g., ABA Standing Comm. on Ethics and Professional Responsibility, Rules of Procedure 9, in 1 ABA INFORMAL ETHICS OPINIONS 6 (1975) ("The Committee will not issue opinions on questions of law . . ."); WOLFRAM, *supra* note 83, § 2.6.6, at 67.

141. Martin Fox, *Bar Ethics Panel Clarifies Rules on Client Secrets*, N.Y. L.J., Mar. 7, 1990, at 1 (emphasis added). The article does not explain why it calls the "required by law" portion of Model Code DR 4-101 "dictum," which suggests that most lawyers would understand and find noncontroversial the use of that term in this context. *Id.* (commenting on MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1981)). The word "dictum" emphasizes the nonbinding character of the lawyer's obligation to comply with other law.

142. *Id.*

ify it or render it ambiguous) is also evident in its efforts to pass ethics rules or interpret existing rules to stop state action that the courts have held is permitted under other law. Ethics rules that would require prosecutors to get prior judicial approval and demonstrate extreme need before subpoenaing lawyers to testify before grand juries about their clients' affairs<sup>143</sup> are just one example of this. Other examples include ethics rules and ethics opinions prohibiting the disclosure of client fraud in connection with the sale or purchase of securities to the Securities and Exchange Commission, purchasers, or stockholders;<sup>144</sup> those prohibiting

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143. See *supra* notes 33-47 and accompanying text.

144. In February 1974 the ABA adopted an amendment to Model Code DR 7-102(B)(1) that all but eliminated the lawyer's duty to reveal a client's fraud in which the lawyer's services had been used. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1) (1974); see *infra* notes 195-99 and accompanying text. It is generally known that this amendment was a response to several court decisions that had alarmed the securities bar, particularly *SEC v. Spectrum, Ltd.*, 489 F.2d 535, 542 (2d Cir. 1973) (holding that a lawyer who negligently prepared an erroneous opinion used to sell securities could be enjoined from future violations of the securities laws), and to the position being advanced by the SEC on securities lawyers' obligations to the SEC and to stockholders, particularly as evidenced by its complaint in *SEC v. National Student Marketing Corp.* See Complaint, SEC v. National Student Mktg. Corp., 457 F. Supp. 682 (D.D.C. 1978) (No. 225-72), reprinted in [1971-72 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,360, at 91,913 (D.D.C. Feb. 3, 1972) [hereinafter *National Student Marketing Complaint*]; see also Junius Hoffman, *On Learning of a Corporate Client's Crime or Fraud*, 33 BUS. LAW. 1389, 1405-07 (1978) (explaining that the amendment was one of a series of attempts by bar groups to resolve the "conflict" raised between the state's position and the securities lawyers' ethical obligations); *infra* note 319 (describing the bar's reaction to the position taken by the SEC in the 1970s on the responsibility of securities lawyers).

The article by Junius Hoffman describes other efforts by the ABA and state bars in the 1970s to restrict the obligations of securities lawyers under the securities laws by passing ethics rules and issuing interpretations of ethics rules. Hoffman, *supra*, at 1406-08. One example notable for its breadth is The Association of the Bar of the City of New York, *Report by Special Committee on Lawyers' Role in Securities Transactions*, 32 BUS. LAW. 1879 (1977) [hereinafter *ABCNY Report on Securities Transactions*].

In the 1980s this struggle over the law governing securities lawyers was played out in the ABA's adoption of rules 1.13 and 1.6. MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.13, 1.6 (1983). Rule 1.13, as adopted, eliminated the lawyer's discretion to disclose criminal or fraudulent corporate activity to stockholders, government agencies, or those defrauded by the corporation's activities—discretion that had been included in the draft presented to the House of Delegates. See GEOFFREY C. HAZARD, JR. & SUSAN P. KONIAK, *THE LAW AND ETHICS OF LAWYERING* 759 (1990) (explaining the difference between the adopted rule and the draft, and juxtaposing the text of the adopted rule and the draft proposal); see also Stephen Gillers, *Model Rule 1.13(c) Gives the Wrong Answer to the Question of Corporate Counsel Disclosure*, 1 GEO. J. LEGAL ETHICS 289, 291-94 (1987) (discussing the evolution of rule 1.13, focusing on three drafts between 1980 and 1982); Harvey L. Pitt, *The Georgetown Proposals*, 36 BUS. LAW. 1831, 1834-35 (1981) (explaining the connection between the ABA's work on rule 1.13 and the SEC's position).

Rule 1.6 eliminated the lawyer's discretion to reveal client fraud—discretion that had been included in the Kutak draft. See Geoffrey C. Hazard, Jr., *Rectification of Client Fraud: Death and Revival of a Professional Norm*, 33 EMORY L.J. 271, 296-98 (1984); *infra* notes 217-56 and accompanying text (discussing rule 1.6).

the simultaneous negotiation of attorneys' fees in civil rights cases;<sup>145</sup> and those prohibiting disclosure of information to the Legal Services Corporation.<sup>146</sup>

Finally, this ordering of norms is apparent and pervasive<sup>147</sup> in other

145. See Pate, *supra* note 77, at 794-95 (discussing the conflict between ethics opinions and other law on fee waivers).

That the effort to trump state law through ethics opinions largely abated after the Supreme Court's decision in *Evans v. Jeff D.*, 475 U.S. 717 (1985), is not conclusive of the bar's acceptance that state law trumps the ethics rules or the bar's interpretation of those rules. After all, the ethics opinions stood in the face of contrary legal interpretations from lower federal courts. See *id.* at 787 nn.20-25 (discussing the pre-*Evans* law in the federal circuits). At most, this acquiescence to the Supreme Court's interpretation suggests some limit on the bar's commitment to its alternate vision. See *infra* text accompanying notes 381-409 (discussing the bar's texts of resistance).

In his dissent in *Evans*, Justice Brennan invited the bar to use ethics opinions to try to outlaw simultaneous negotiations. *Evans*, 475 U.S. at 765 (Brennan, J., dissenting). This invitation for the bar to continue its own normative understanding is consistent with Justice Brennan's general approach of inviting alternative normative understandings to counteract the Court's decisions.

Pate's is the most thorough consideration of the relationship between ethics opinions and state law in the legal literature. The author observes and documents the overlap of state law and "ethics," and the conflict and competition over norms that this produces. Given that few commentators have focused on these matters, this piece by then-student Robert Hewitt Pate, III is quite remarkable. As a virtual pioneer in this area, Mr. Pate cannot be faulted for failing to see all the implications of what he had discovered. Compare Professor Gabaldon's article, *supra* note 77. She carefully documents and explores in the context of shareholder litigation the differences between what she calls "laws of general applicability" (state law) and what she calls "the ethics regulation" (which, as she uses that term, includes both bar law and state law). See *id.* at 425-27. In discussing ethical regulation, Professor Gabaldon does not focus on the different meanings that those rules may have for the bar and the state. *Id.*

146. See, e.g., ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1394 (1975); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1287 (1974); N.H. Bar Ass'n, Formal Op. 1988-9/13 (1989). As a firm supporter of legal services organizations, this seems like a good place to make explicit that I see the law-generating power of non-state communities as not only descriptive of the world of law around me and inevitable, but also as a good thing. I do not ascribe to all of the bar's vision of law as described in this Article—a point I will come back to in concluding this piece. But the fact that the private bar has a vision that is different from the state is for me a cause for some celebration and not dismay. My celebration comes from the sacred stories that I share with my colleagues at the bar—stories of the danger of unmitigated state power and of the special destiny and history of the profession as protectors of the oppressed and of individual (and, at least in my subcommunity, as protectors of minority group) rights.

147. This ordering of norms is so pervasive that some significant evidence of it can be found in the vast majority of texts that refer to legal ethics and were authored by lawyers in private practice. Most articles on legal ethics written by lawyers in academia also reflect the bar's order of norms. There are, of course, exceptions, but they are relatively rare and often ambiguous. See, e.g., Lewis H. Van Dusen, *Ethics and Specialized Practice—An Overview of the Momentum for Reexamination*, 33 BUS. LAW. 1565, 1572 (1978). Van Dusen has expressed his belief that "those members of the profession who would view more specialized articulations of professional responsibility as a source of defense in potential actions against them for violating the securities laws misconstrue the relationship between professional responsibilities and legal obligations." *Id.* Oddly, the footnote Mr. Van Dusen appends to this

bar texts, such as reports of bar committees, bar resolutions and amicus briefs.<sup>148</sup> Consider the following examples:

Application of § 6050I to attorneys is contradicted by Canon 4 of the Code of Professional Responsibility.<sup>149</sup>

Public policy, we strongly believe, is best served by lawyers acting in conformance with their obligation to their client[s] and others as prescribed under the [Model Code]. Accordingly, liability should not be imposed upon lawyers whose conduct is in conformance with the [Model Code].<sup>150</sup>

These developments [in the case law] relate to the legal liabilities of securities lawyers and raise questions which can only be answered in the last event by courts and legislatures. However, the uncertainties they have engendered in the minds of securities lawyers are not confined to problems of legal liability; they extend also to questions of professional responsibility, and this is an issue upon which lawyers, and not only judges and legislators, may speak with authority.<sup>151</sup>

. . . .

We recognize that lawyers do not have the ultimate decision as to their own standards of conduct . . . . We believe, however, that . . . a lawyer complying with the guidelines [issued in this text] should not be subject to discipline or liability by the SEC or the courts.<sup>152</sup>

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statement cites Model Code EC 6-5 and not any of the court decisions that have rejected or ignored such defenses. *Id.* at 1572 n.21 (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 6-5 (1969)). An earlier note in that piece does, however, mention such cases. *Id.* at 1571 n.18. Model Code EC 6-5 states that a lawyer should act competently not just because he fears civil liability or discipline, but because he "should have pride in his professional endeavors." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 6-5 (1981).

148. Admittedly, these sources standing alone could be construed as mere advocacy; but as the preceding discussion demonstrates, they do not stand alone.

149. Memorandum on Behalf of Amici National Association of Criminal Defense Lawyers et al. in Opposition to Enforcement of Summonses Issued by the Internal Revenue Service and to Compelled Compliance with IRC Section 6050I at 41, *United States v. Fischetti*, No. M-18-304, slip op. (S.D.N.Y. Mar. 13, 1990) [hereinafter NACDL Brief in *Fischetti*]. The NACDL was joined on the brief by the New York Criminal Bar Association, the New York State Bar Association of Criminal Defense Lawyers, the National Network for the Right to Counsel and the New York Civil Liberties Union. *Id.*

150. Statement of Policy Adopted by the American Bar Association Regarding Responsibilities and Liabilities of Lawyers in Advising with Respect to the Compliance by Clients with Laws Administered by the Securities and Exchange Commission, *reprinted in* 61 A.B.A. J. 1085, 1086 (1975) [hereinafter ABA Policy on Advising on Securities Matters].

151. This statement goes quite far in revealing the existence of separate normative understandings and asserting the right of the bar's competing *nomos* to exist alongside that of the state.

152. *ABCNY Report on Securities Transactions*, *supra* note 144, at 1882-83.

There is, of course, much in bar texts about the special obligations of lawyers to see to it that their clients obey the law and to obey and demonstrate respect for the law themselves.<sup>153</sup> What of this? First, as other commentators have remarked, much of this talk is not intended to guide action,<sup>154</sup> and thus is not "law." Second, to the extent this talk is "law," it is not evidence that the bar places other law above the ethics rules unless the text (1) relates to cases of conflict between the two sources of norms *and* (2) dictates that other law governs *because* other law is the superior norm. The bar does not talk this way often,<sup>155</sup> and when it does the obligation to obey other law is described as an ethical obligation.<sup>156</sup> These examples thus do not show that the bar recognizes other law as trumping the Code: even if all ethics opinions held that the lawyer's ethical obligation was to obey other law, at most that would show an extremely accommodationist stance toward the state *nomos*. It would not prove, so long as the obligation to obey law was portrayed as an "ethical" obligation, that the ethics rules are not considered the superior source of obligation.

A traditionalist might object to my argument at this point: "Of course ethics committees speak of the duty to obey other law as an ethical obligation. How else could they speak without usurping the function of the courts by expounding on what state law requires the lawyer to do?"<sup>157</sup> Thus, our traditionalist would argue, we cannot make too much of the fact that ethics opinions never locate the obligation to obey other law *in* other law because to do so would require them to interpret other law directly. Of course, the traditionalist would then have to describe as "mistakes" the ethics opinions that countenance disobedience and that suggest that obedience is not required by ethical norms. Nevertheless, let us take this traditionalist objection seriously for a moment. The strongest support for the traditionalist position is found in the ethics opinions that suggest that a lawyer must obey other law. These opinions, how-

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153. See Gordon, *supra* note 15, at 1-10.

154. *Id.* at 13.

155. *But see, e.g.*, ABA Comm. on Ethics and Professional Responsibility, Formal Op. 352 (1985) (explaining that a lawyer must have a reasonable basis in law for any position she advises a client to take on a tax return, and discussing what "reasonable basis" means); Van Dusen, *supra* note 147, at 1571-72.

156. *See, e.g.*, ABA Comm. on Ethics and Professional Responsibility, Formal Op. 352 (1985); ABA Comm. on Professional Ethics, Informal Op. 1141 (1970).

157. Ethics committees are for this very reason bound by their own rules not to expound on law. *See supra* note 140. Such operating rules reflect the traditional understanding of the relationship between law and ethics. As we have seen, however, ethics opinions often tackle "legal issues" while reciting their obligation not to. Of course, the argument in this Article is that these coexisting normative worlds in fact overlap all the time and conflict at critical points. Ethics committees therefore cannot avoid tackling "legal issues."

ever, generally ground this duty in particular provisions of the ethics rules,<sup>158</sup> which is consistent with the presumption that the hierarchy places ethics rules over other law and is difficult to reconcile with the traditionalist's understanding that ethics rules begin where state law leaves off.

## V. THE CENTRALITY OF CONFIDENTIALITY IN THE BAR'S *NOMOS*

### A. Introduction

The bar texts discussed in the previous section suggest the centrality and power of the norm of confidentiality in the bar's *nomos*. Those texts show that it is confidentiality, and particularly the duty to keep client confidences from the state, more often than any other norm, that triggers the obligation to resist competing state norms<sup>159</sup> and that justifies the passage of ethics rules to "undo" state pronouncements.<sup>160</sup> That the bar deems individual acts of resistance and group efforts to repeal state pronouncements to be appropriate responses to state efforts to secure client confidences reveals the bar's interpretation of the norm—i.e., that it is absolute or nearly absolute.

Confidentiality is a constitutional norm in the bar's *nomos*. By "constitutional norm," I mean a norm so central to group definition (that which constitutes a group) that the group perceives threats to the norm as threats against the group itself—against the group's very existence; that the group sees proposals to change the norm as proposals to change the essence/character/function of the group itself; and consequently that the group feels extreme action in defense of the norm is justified. That the norm is constitutional is implicit in the texts examined in the last section.

Why does the bar see this norm as constitutional? That question is addressed in the next section, which relates the bar's sacred stories. Here the issue is *how* the bar elevated the norm to a position of prominence

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158. See, e.g., ABA Comm. on Ethics and Professional Responsibility, Formal Op. 352 (1985). But see ABA Comm. on Professional Ethics, Informal Op. 1141 (1970) ("[I]f the attorney is required by law to make a disclosure . . . the ethics rules are drafted in such a way as to remove any ethical bar to disclosure or to reporting and the only relevant consideration would be the application of legal rules."). Notice that, while this opinion does not rely on a specific ethics provision, it still suggests that the ethics rules *could* have barred a lawyer from obeying the law. It is also interesting that this highly deferential opinion, the most deferential ABA opinion I found in my research, involved disclosing the whereabouts of a deserter from military service during the Vietnam War. The intense normative commitment of those on either side of the Vietnam War question may explain the bar's eagerness to put the state's *nomos*, and not its own, on the line here.

159. See *supra* notes 128, 133.

160. See *supra* notes 143-46 and accompanying text.



and how it maintains it in that position, not why. If the bar's understanding of confidentiality provides the most frequent source of conflict with other state law, we would not expect the ethics rules (which are shared with the state) to reflect the bar's understanding of the norm. How then was the norm elevated when the bar does not have exclusive control over the authoritative wording of the precepts? This is the question that concerns us here.

As just predicted, the special importance of the norm of confidentiality in the bar's *nomos* is not apparent on the face of the ethics codes as adopted by the states, nor is it readily apparent on the face of the ethics rules as drafted by the ABA. Confidentiality is not the first norm stated in the Canons of Professional Ethics,<sup>161</sup> the Model Code of Professional Conduct, or the Model Rules of Professional Responsibility. It is instead covered in canon 37 (out of forty-seven in the Canons of Professional Ethics),<sup>162</sup> canon 4 (out of nine in the Model Code)<sup>163</sup> and model rule 1.6 (the sixth of seventeen rules in the first of eight articles).<sup>164</sup> Moreover, the language describing confidentiality in all three documents is relatively dry and straightforward,<sup>165</sup> and each document contains excep-

161. CANONS OF PROFESSIONAL ETHICS (1937).

162. As originally adopted in 1908, the Canons did not deal directly with confidentiality. The only reference to the subject was in canon 6 on conflicts of interests. A lawyer was forbidden to accept employment that might require the disclosure of the client's "secrets or confidences." *Id.* Canon 6. In 1928, the first time the Canons were amended, canon 37 on confidentiality was added. *Id.* Canon 37 (1928).

163. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1981) (entitled "A Lawyer Should Preserve the Confidences and Secrets of a Client").

164. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1991). Moving the norm closer to the front of the ethics rules may in part be an attempt by the bar to affirm its commitment to the norm at a time when the bar sees the norm as under increasing attack by the state.

165. Canon 37 of the Canons of Professional Ethics, entitled "Confidences of a Client," provides in part:

It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.

CANONS OF PROFESSIONAL ETHICS Canon 37 (1937).

Model Code DR 4-101, entitled "Preservation of Confidences and Secrets of a Client," provides in part:

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

tions to the duty to keep client confidences.<sup>166</sup> Nothing in the description of the norm in these three ethics codes reveals its centrality or power in the bar's *nomos*.<sup>167</sup> Compare, for example, the position and

- (1) Reveal a confidence or secret of his client.
- (2) Use a confidence or secret of his client to the disadvantage of the client.
- (3) Use a confidence or secret of the client for the advantage of himself or of a third person, unless the client consents after full disclosure.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1981).

Model rule 1.6, entitled "Confidentiality of Information," provides in part:

- (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1991).

166. Canon 37 of the Canons of Professional Ethics provides that a lawyer "is not precluded from disclosing the truth" when accused by the client of wrongdoing and that "[t]he announced intention of a client to commit a crime is not [a] confidence [the lawyer] is bound to respect." CANONS OF PROFESSIONAL ETHICS Canon 37 (1937).

The Model Code lists four exceptions to the rule on confidentiality:

A lawyer may reveal [confidences or secrets]:

- (1) . . . with the consent of the client . . . after a full disclosure to [her].
- (2) . . . when permitted under Disciplinary Rules or required by law or court order.
- (3) [when they involve t]he intention of his client to commit a crime . . . .
- (4) [when] necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C) (1981).

The Model Rules provide:

A lawyer may reveal [confidential] information to the extent the lawyer reasonably believes necessary:

- (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
- (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (1991).

167. Some commentators read the cursory treatment of confidentiality in the original Canons and the failure to define "confidences" in the amended Canons as evidence that the bar's understanding of the duty of confidentiality was more limited and that the norm was less central, in my terms, than it is for the bar today. *See, e.g.,* Patterson, *supra* note 77, at 944-45; Subin, *supra* note 2, at 1107. These commentators argue that DR 4-101 in the Model Code represents a significant change from the bar's "traditional," limited understanding of confidentiality to a modern, expanded understanding. For example, Professor Subin, who writes to explain the divergence of the ethics rules on confidentiality from state law on confidentiality, dates the divergence from the adoption of the Code. *See* Subin, *supra* note 2, at 1107-08. The Canons, he claims, were consistent with state law. *Id.* Professor Patterson apparently agrees. *See* Patterson, *supra* note 77, at 944-45.

While it may be true that the bar's understanding of the norm of confidentiality has changed somewhat over time, I do not think that any such claim can be substantiated by

text of the First Amendment to the United States Constitution.<sup>168</sup>

The masking of the centrality and power of the confidentiality norm in the ethics codes is explicable. The Model Code and Model Rules were drafted by the bar, but they were intended to be adopted by the state.<sup>169</sup> The Canons were drafted with the hope that they would, at least, influence the state.<sup>170</sup> One would thus not expect these documents to reflect on their face the bar's understanding of confidentiality, if, as I claim, it is over this norm that the bar's *nomos* diverges most from the state's.

Before moving on to explore the bar texts that order the norms in the ethics codes and elevate confidentiality to a position of supremacy, I want to emphasize what is new and what is not new in the theory I am presenting, because the ground to be covered on confidentiality in the next several pages has been well traveled by other commentators. This is not the first article to notice that the bar's understanding of confidential-

referring to the precepts alone. In my opinion, the commentators referred to above rely too heavily on analysis of the language of the precepts and too little on the stories and commitment that fill out the meaning of the rules. To know whether (and how much) the bar's understanding on confidentiality has changed over time, one must compare not only the written precepts but also the texts explaining those precepts and the action deemed justified in the name of those rules and stories. While I will not attempt in this Article to provide precise answers to what the bar's *nomos* looked like at various points in history, my examination of the texts elaborating the precepts suggests a greater continuity over time than the commentators above have suggested. See *infra* notes 173-256 and accompanying text.

168. Not only is the Amendment first, but its language suggests no exceptions. It states: "Congress shall make *no law* respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble . . ." U.S. CONST. amend. I (emphasis added).

169. Both the Model Code and Model Rules were written with the intent that they would officially be adopted by the state as law. After the ABA adopted the Model Code, it "launched a highly organized campaign to persuade the states to adopt the Code as the official local set of standards." WOLFRAM, *supra* note 83, § 2.6.3, at 56. The effort launched on behalf of the Model Rules was more modest, *id.* § 2.6.4, at 63, but that does not change the fact that the Model Rules were written and adopted by the ABA with the intent that they would become state law.

170. "The Canons were probably not intended to have any direct legal effect, but it is clear that the ABA leadership contemplated that they would be influential in lawyer discipline proceedings in courts." *Id.* § 2.6.2, at 55 (footnote omitted). Moreover, whatever the intent of those who drafted the original Canons in 1908, by 1937, when the ABA amended the Canons, it was clear that courts were using the Canons as a source of the law governing lawyers. See, e.g., *People ex rel. Colorado Bar Ass'n v. Ginsberg*, 87 Colo. 115, 121, 285 P. 758, 760 (1930); *People v. McCallum*, 341 Ill. 578, 595-96, 173 N.E. 827, 833 (1930) (Dunne, C.J., Stone, J. & DeYoung, J., dissenting); *In re Greathouse*, 189 Minn. 51, 62, 248 N.W. 735, 740 (1933); *In re Thatcher*, 83 Ohio St. 246, 253, 93 N.E. 895, 897 (1910). A few states already had adopted the Canons as state law by 1937. See, e.g., *In re Galton*, 289 Or. 565, 582, 515 P.2d 317, 326 (1980) (noting that the Canons were adopted by statute in 1935); *In re Arctander*, 110 Wash. 296, 305, 188 P. 380, 383 (1920) (noting that the Canons were adopted by statute in 1917). And the federal courts were using the Canons as evidence of the applicable legal standards. See, e.g., *American Can Co. v. Ladoga Canning Co.*, 44 F.2d 763, 772 (7th Cir. 1930); *United States ex rel. Randolph v. Ross*, 298 F. 64, 66 (6th Cir. 1924).

ity diverges from state law. Other commentators have insightfully and meticulously described the divergence between the bar's vision and that of the state.<sup>171</sup>

On the other hand, these commentators have had little to say about the questions that are the focus of this Article: how such divergence could have come about and why it has proved so resilient. It is as if these questions are outside the scope of legal analysis. Armed only with traditional theories of law, one is forced to talk of this persistent divergence as if it were some sort of continuing blunder. But this explanation is unsatisfying. How is it that the profession and the courts, both presumably expert in discerning such "mistakes," have failed to see and correct an error that these commentators have noticed and described in published articles? Without further explanation is it plausible to believe that so many lawyers and judges simply failed to notice the divergence or that either group would simply change its opinion upon having someone point out the divergence? The failure of these commentators to grapple with the reasons for and meaning of the divergence they identify is not a failure of these particular scholars, but rather an expression of the traditional boundaries of legal analysis.<sup>172</sup>

### B. *The Triumph of Confidentiality in Ethics Opinions*

The ethics codes may mask the power of the norm of confidentiality, but the ethics opinions interpreting the codes make it plain. A pattern emerges in these opinions: rules affirming a duty or the discretion to disclose are either narrowed to the point of near-irrelevance or held to be overridden by rules requiring silence. First, consider the rules and ethics opinions under the Canons.

Canon 37, which stated the duty to keep confidences and included a

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171. For a comprehensive discussion of how the bar's understanding of confidentiality diverges from state law, see Subin, *supra* note 2, at 1106-57. For further discussion on this subject, see Wayne D. Brazil, *Unanticipated Client Perjury and the Collision of Rules of Ethics, Evidence and Constitutional Law*, 44 Mo. L. Rev. 601, 615-22 (1979); David J. Fried, *Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds*, 64 N.C. L. Rev. 443, 490-98 (1986); Patterson, *supra* note 77, at 944-45.

172. The Critical Legal Studies movement, with its insistence on revealing and emphasizing divergence (conflict) in law, is perceived as a threat precisely because of the fear that legal analysis becomes pointless at the moment that we identify divergence as more than a "mistake." Unfortunately, Critical Legal Studies scholarship, with some important exceptions, has thus far been least satisfying in suggesting what lies beyond the acknowledgement of divergence. I say "unfortunately" because I believe that after "divergence" there is still a world of law out there to be explored and that there are meaningful ways to explore it. One way of understanding Professor Cover's work in *Nomos*, *supra* note 1, and *Violence*, *supra* note 1, is that he demonstrated the richness, complexity and importance of law and legal analysis in a world that acknowledges divergence, indeterminacy, the political and the violent in law.

self-defense exception, also provided: "The announced intention of a client to commit a crime is not included within the confidences which [the lawyer] is bound to respect."<sup>173</sup> But ABA Formal Opinion 268 stated that a lawyer who learns that his client intends to commit the crime of perjury and consequently withdraws has no discretion to reveal the intended perjury to successor counsel.<sup>174</sup>

Similarly, canon 29 provided: "The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities."<sup>175</sup> Moreover, canon 41 stated:

When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps.<sup>176</sup>

Nevertheless, ABA Formal Opinion 287 held that a lawyer who discovers that his client has committed perjury in a civil case should not disclose it because that would violate the duty to keep the client's confidences.<sup>177</sup> The reasoning of this opinion reveals the centrality and power of the norm of confidentiality, other rules notwithstanding. The opinion begins with a series of quotes from various sources that portray the norm as absolute. For example, from ABA Formal Opinion 91: "[I]t is *essential* to the administration of justice that there should be *perfect* freedom of consultation by client with attorney without *any* apprehension of a compelled disclosure by the attorney to the detriment of the client."<sup>178</sup> Having established through quotation the power of the norm, the opinion proceeds:

On its face [canon 29] would apparently make it the duty of the lawyer to disclose his client's prior perjury to the prosecuting authorities. However, to do so in this case would involve the direct violation of Canon 37.

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173. CANONS OF PROFESSIONAL ETHICS Canon 37 (1937). Read literally, this is a wonderfully narrow exception: when does a client ever do this? *But cf.* Patterson, *supra* note 77, at 944-45 (arguing that the Canons were less protective of confidentiality than the Code); Subin, *supra* note 2, at 1107-08 (same).

174. ABA Comm. on Professional Ethics and Grievances, Formal Op. 268 (1945).

175. CANONS OF PROFESSIONAL ETHICS Canon 29 (1937).

176. *Id.* Canon 41.

177. ABA Comm. on Professional Ethics and Grievances, Formal Op. 287 (1953).

178. *Id.* (quoting ABA Comm. on Professional Ethics and Grievances, Formal Op. 91 (1933)) (emphasis added).

Accordingly, it is essential to determine which of the Canons controls.

Neither Canon 41 nor Canon 29 specifically requires the lawyer to advise the court of his client's perjury, even where this was committed in a case in which the lawyer was acting as counsel and an officer of the court. We do not consider that either the duty of candor and fairness to the court, as stated in Canon 22, or the provisions of Canon 29 and 41 above quoted are sufficient to override the purpose, policy and express obligation under Canon 37.<sup>179</sup>

These ethics opinions elevating the norm of confidentiality above other norms and interpreting it to require silence in almost all cases<sup>180</sup> are typical of those issued under the Canons.<sup>181</sup> There are two ethics

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179. *Id.*

180. One exception to confidentiality is consistently affirmed in ethics opinions under the Canons and later codes. This exception allows a lawyer to disclose confidences to collect his fee or defend himself against an accusation by the client. *See, e.g.,* ABA Comm. on Professional Ethics and Grievances, Formal Op. 19 (1930).

181. For example, Opinion 202, which is cited in the footnote to DR 4-101(C)(3) of the Model Code, presumably as authority for the proposition that a lawyer may disclose the client's intent to commit a crime, is in fact another testament to the power and scope of the confidentiality norm. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) n.17 (1981) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 202 (1940)). Opinion 202 involved the following situation. The lawyer was asked to draw up a contract. Given the facts he knew, he could (and did) reasonably infer that the contract might be used to perpetrate a fraud and conceal the perpetration of embezzlement, a felony. He drew up the contract and warned the client in a separate memo that unless the client disclosed the embezzlement to the affected party before executing the contract, "much greater liability . . . might result." ABA Comm. on Professional Ethics and Grievances, Formal Op. 202 (1940). The client executed the contract without making disclosure. *Id.*

Although the ethics opinion repeats the exception of canon 37, which allows a lawyer to reveal the client's intent to commit a crime, it holds that in this case that exception is not applicable because: (1) the client did not actually tell the lawyer that it was going to execute the contract without disclosure of the embezzlement before doing so; and (2) the "transaction has been consummated." It goes on to hold that canon 37 prohibits disclosure to anyone but the client; the client in this situation includes the board of directors of the client-company. *Id.* The opinion never mentions canon 41, which requires the lawyer to disclose client fraud which the client refuses to rectify, or canon 15, which states that the office of attorney must not be used for "any manner of fraud or chicanery" for any client. CANONS OF PROFESSIONAL ETHICS Canon 15 (1937).

For other opinions permitting nondisclosure, see ABA Comm. on Professional Ethics, Informal Op. C 778 (1964) (relying on ABA Comm. on Professional Ethics and Grievances, Formal Op. 287 (1953); ABA Comm. on Professional Ethics and Grievances, Formal Op. 216 (1941) (holding that a lawyer did not need to reveal information to the court on a pending collusive divorce, even though that information was not disclosed in the course of rendering legal services); ABA Comm. on Professional Ethics and Grievances, Formal Op. 23 (1930) (holding that "[a]n attorney for a fugitive from justice should not disclose the fugitive's hiding place to the prosecuting authorities," and that when the client is a court-appointed guardian, his lawyer is not required to reveal a fraud perpetrated by the client upon the client's ward, canon 41 notwithstanding, because canon 37 trumps canon 41).

opinions under the Canons that do not follow this pattern: ABA Formal Opinions 155 and 156, which were both issued on May 4, 1936. Opinion 155 holds that a lawyer must reveal the whereabouts of a client who has fled the jurisdiction while out on bail.<sup>182</sup> It appears to be in direct conflict with an earlier ABA opinion on the subject, Formal Opinion 23,<sup>183</sup> however, it does not overturn that opinion.<sup>184</sup> The other aberrant opinion, Formal Opinion 156, holds that when the client is violating his parole and refuses to stop, the lawyer must advise the authorities.<sup>185</sup> The only ethics opinion mentioned in Opinion 156 is Formal Opinion 155.<sup>186</sup> Whatever explains the appearance of Opinions 155 and 156 in 1936, the more limited view of confidentiality expressed in those opinions was not present six years earlier when Opinion 23 was issued, nor was it evident four years later.<sup>187</sup> Moreover, by 1953 the aberrant twins of 1936 were openly disowned, but not overruled, in Formal Opinion 287.<sup>188</sup>

The Model Code as adopted by the ABA did not make explicit that ethics opinions under the Canons had subordinated competing norms to the obligation to keep confidences.<sup>189</sup> First, the subordinated canons are

182. ABA Comm. on Professional Ethics and Grievances, Formal Op. 155 (1936).

183. ABA Comm. on Professional Ethics and Grievances, Formal Op. 23 (1930) ("An attorney for a fugitive from justice should not disclose the fugitive's hiding place to the prosecuting authorities . . .").

184. Instead, without explanation, it asserts: "A similar question was considered by the committee in Opinion 23. What was said in that Opinion, as applied to the facts then before the committee, is not in conflict with the views here stated." ABA Comm. on Professional Ethics and Grievances, Formal Op. 155 (1936).

185. ABA Comm. on Professional Ethics and Grievances, Formal Op. 156 (1936).

186. *Id.* (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 155 (1936)). The caption on Opinion 156 lists canons 5, 15, 16, 32, 37, and 44 as the canons interpreted, but the body of the opinion does not refer to any of these canons and does not try to reconcile this opinion with Formal Opinion 23. *Id.*

187. See ABA Comm. on Professional Ethics and Grievances, Formal Op. 202 (1940). Opinion 202 cites to and quotes from Opinion 155 with approval, but ultimately finds it irrelevant. *Id.* Opinion 202 is discussed *supra* note 181.

188. See ABA Comm. on Professional Ethics and Grievances, Formal Op. 287 (1953) ("Any inconsistency . . . between our decisions in Opinions 155 and 156 and that in Opinion 23 [holding that a lawyer should not disclose a fugitive's hiding place] we would resolve in favor of Opinion 23."). In two later opinions on the fugitive problem, issued under the Model Code, Opinions 155 and 156 are mentioned but not followed. See ABA Comm. on Professional Ethics, Informal Op. 1141 (1970) (trying to reconcile Opinions 155 and 156 with Opinion 23 by limiting the first two opinions to cases in which "the client is under the immediate jurisdiction of the court," and holding that in the present case disclosure was not required); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1453 (1980) (holding that a lawyer has no "affirmative duty" to disclose the client's whereabouts to the court, absent the prior imposition of such a duty by the court).

189. The ethics opinions under the Canons had subordinated more or less explicitly the following canons to the obligation to keep confidences: CANONS OF PROFESSIONAL ETHICS Canon 41 (1937) (requiring disclosure of client fraud); *id.* Canon 37 (allowing disclosure of future crimes); *id.* Canon 29 (requiring disclosure of perjury); *id.* Canon 22 (requiring candor

repeated in the Model Code with little change.<sup>190</sup> Second, neither DR 4-101 of the Model Code (the confidentiality rule) nor any of the Model Code rules that correspond to the subordinated canons (at least, as the Model Code rules were originally adopted)<sup>191</sup> reveal the supremacy of confidentiality expressed in the ethics opinions.<sup>192</sup>

Just as we found in examining the Canons, however, once we

to the court). The list of the canons that the ethics opinion subordinated to the obligation to keep confidences might well be expanded to include: *id.* Canon 32 ("No client . . . is entitled to receive nor should any lawyer render any service . . . involving disloyalty to the law whose ministers we are . . . or deception or betrayal of the public."); *id.* Canon 22 ("The conduct of the lawyer before the Court . . . should be characterized by candor . . ."); *id.* Canon 15 ("The office of attorney does not permit . . . any manner of fraud or chicanery").

190. Canon 41, requiring the lawyer to disclose client fraud, was repeated in DR 7-102(B)(1). See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1) (1969) (adopting CANONS OF PROFESSIONAL ETHICS Canon 41 (1937)). The exception to confidentiality on disclosure of future crimes in canon 37 was repeated in DR 4-101(C)(3). See *id.* DR 4-101(C)(3) (repeating CANONS OF PROFESSIONAL ETHICS Canon 37 (1937)). Although canon 29, requiring the revelation of perjury, was not restated in the Model Code, the language of DR 7-102(B)(1) requiring disclosure of fraud perpetrated upon "a person or tribunal" could reasonably be understood as continuing the canon 29 duty. See *id.* DR 7-102(B)(1) (emphasis added). Thus, assuming the ABA dropped canon 29 to signify a change in the norms stated on the face of the Canons, it obscured the change, which is significant.

The Code did make one change relevant to the present discussion: the general duty of candor to the court contained in canon 22 was replaced by DR 7-102(A) and (B) of the Model Code. See *id.* DR 7-102(A) (adopting duty of candor espoused in CANONS OF PROFESSIONAL ETHICS Canon 22 (1937)); DR 7-102(B) (same). Instead of enunciating a general duty of candor as did canon 22, DR 7-102(A) lists specific instances requiring candor. For example, DR 7-102(A)(3) prohibits "[c]onceal[ing] or knowingly fail[ing] to disclose that which [the lawyer] is required by law to reveal"; DR 7-102(A)(4) prohibits "[k]nowingly us[ing] perjured testimony or false evidence"; and DR 7-102(A)(5) prohibits "[k]nowingly mak[ing] a false statement of law or fact." *Id.* DR 7-102(A)(3), (4), (5). The list may be read as circumscribing the general duty of candor expressed in the Canons, but the list is sufficiently lengthy and broadly enough constructed that, particularly in conjunction with the requirement to reveal fraud on the tribunal in DR 7-102(B), it is unclear what more, if anything, canon 22 covered. See *id.* DR 7-102(B); CANONS OF PROFESSIONAL ETHICS Canon 22 (1937).

191. Model Code DR 7-102(b)(1) was amended in 1974. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1) (1974); see *infra* text accompanying notes 195-99 (discussing this amendment).

192. Professors Patterson and Subin argue that the language of the Model Code diverged from state law in a way the Canons did not, by defining confidentiality in Model Code DR 4-101(A) to include more than the attorney-client privilege, i.e., to include "secrets" as well as "confidences." Patterson, *supra* note 77, at 941-45 (interpreting MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A) (1969)); Subin, *supra* note 2, at 1107-09 (same). I believe Professors Patterson and Subin have correctly identified language in the Model Code that demonstrates, albeit not explicitly, the *nomos* expressed in the ethics opinions issued under the Canons—i.e., a *nomos* in which confidentiality is a supreme norm. Professor Subin comments that

[t]he message from the organized bar was clear: confidentiality, viewed historically as an obstacle, albeit a necessary one, to the disclosure of pertinent information, was now to be treated as a good of the highest order. The *Code's* thrust was that disclosure was the evil, and rarely if ever necessary.



broaden our inquiry to include more than the precepts shared by bar and state, the bar's normative vision becomes apparent. First, the Preliminary Draft of the Model Code did not include a corollary to canon 41.<sup>193</sup> Canon 41, already eviscerated in the bar's *nomos* by ethics opinions, was dropped completely from the Preliminary Draft of the Model Code. A corollary to canon 41, DR 7-102(B)(1), was added before final adoption of the Model Code,<sup>194</sup> apparently to respond to severe criticism by representatives of the public. Second, in 1974, five years after the adoption of the Model Code, DR 7-102(B)(1) was amended by the ABA.<sup>195</sup> The 1974 amendment tacked an exception onto the duty to reveal unrectified client fraud: "except when the information is protected as a privileged communication."<sup>196</sup> Third, less than a year after adopting this amendment, the ABA issued an ethics opinion, ABA Formal Opinion 341, which interpreted the 1974 amendment as negating the duty, contained in DR 7-102(B)(1), to reveal fraud.<sup>197</sup> Fourth, the bar apparently accepted as its law the ABA amendment and the interpretation of it given in Opinion 341,<sup>198</sup> even though most states rejected the amendment.<sup>199</sup>

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Subin, *supra* note 2, at 1108. While I believe that Professor Subin correctly describes the bar's understanding of the norm, I disagree that the Model Code made this "clear."

I also disagree with Professor Subin's dating this normative vision to the Model Code, *id.*, and with Professor Patterson's conclusion that the "expanded scope of confidentiality [in the Model Code] had [the] unintended consequence[] . . . [of] vitiat[ing] the duty . . . to reveal a client's fraud." Patterson, *supra* note 77, at 945 (emphasis added). Professor Patterson dates the bar's celebration of the norm of confidentiality to the 1880s, *see id.* at 914-15, 944-45, but both he and Professor Subin fail to note that the subordination of other norms took hold long before the Model Code was written and DR 7-102(B)(1) was amended.

193. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975) (noting that the preliminary draft of the Code of Professional Responsibility did not contain a requirement that the lawyer reveal client fraud).

194. *See* R.W. Nahstoll, *The Lawyer's Allegiance: Priorities Regarding Confidentiality*, 41 WASH. & LEE L. REV. 421, 430 (1984).

195. *Id.* at 430-32 (giving legislative history of the 1974 amendment and Formal Opinion 341, which interpreted the amendment).

196. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1) (1981).

197. *Id.*

198. For discussion of the debate in the ABA House of Delegates on the proposed Model Rules provision on confidentiality, *see infra* notes 217-56 and accompanying text. *See* STEVEN D. PEPE, STANDARDS OF LEGAL NEGOTIATIONS: INTERIM REPORT FOR ABA COMMISSION ON EVALUATION OF PROFESSIONAL STANDARDS AND ABA HOUSE OF DELEGATES 251, 254-55 (1983), *excerpted in* GEOFFREY C. HAZARD, JR. & DEBORAH L. RHODE, THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION 206-08 (1st ed. 1985). Over half of the more than 2500 lawyers surveyed by Pepe said they would not disclose an unrectified client fraud in which their services had been used—i.e., that they would act in accordance with the bar's law. This attitude was as prevalent in states where the bar's amendment had not been adopted by the state as it was in states that had adopted the amendment. *Id.*

199. Hazard, *supra* note 144, at 294 n.38. Professor Hazard states:

As of 1983, only fourteen states had adopted the amended version of [DR 7-102(B)(1)]. One additional state, Iowa, has adopted a version of the rule that appar-

Opinion 341 shows that, ambivalence on the face of the Model Code notwithstanding, confidentiality continued to trump other norms in the bar's *nomos*.<sup>200</sup> The language and reasoning of Opinion 341 make clear the centrality and power of confidentiality for the bar. The opinion begins by emphasizing that the Preliminary Draft of the Model Code did not contain a duty to reveal client "misconduct,"<sup>201</sup> and it speaks approvingly of that approach: "Perhaps the omission was due to the committee's consideration of the high fiduciary duty owed by lawyer to client and consideration of the firm support found in the law of evidence for the attorney-client privilege."<sup>202</sup> Moreover, while the opinion attributes the addition of DR 7-102(B)(1) to the concern expressed by some lawyers that the Model Code lacked a corollary to canon 41, the opinion's reference to canon 41 is terse. The reference is accompanied by neither a statement of support for the principle articulated in canon 41 nor an explanation of that principle.<sup>203</sup> The opinion thus suggests that the addition of DR 7-102(B)(1) was not so much (or at all) a function of commitment to the principle articulated in canon 41 as it was an expression of sentimental attachment to the language of the Canons. And, according to the authors of Opinion 341, it was an expression of sentiment that caused an immediate and serious problem.

The problem was that DR 4-101(C)(2), which allows a lawyer to reveal information about the client when another disciplinary rule per-

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ently ties the exception to the duty to disclose to the more limited evidentiary attorney-client privilege rather than the confidentiality privilege of the Code . . . .

*Id.* (citing IOWA CODE ANN. § 602 app. A, Canon 7, DR 7-102(B)(1) (West Supp. 1983); 4 NATIONAL REPORTER ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY ABA 6 (1983) (Roy M. Mersky ed., 1983)). "Another analyst counts seventeen states as having adopted the 1974 amendment." *Id.* (citing Nahstoll, *supra* note 194, at 433).

200. See Frederick D. Lipman, *The SEC's Reluctant Police Force: A New Role for Lawyers*, 49 N.Y.U. L. REV. 437 (1974). Lipman's article was written before Opinion 341 was issued and explains: (1) DR 7-102(B)(1) as amended "represents a significant expansion of the limited duty to reveal . . . under the ABA Canons;" (2) Canon 41 "had been given a strict and limited construction by the ABA Committee on Professional Ethics;" (3) if the amendment is limited to matters covered by the attorney-client privilege, securities lawyers might have to reveal their client's "past" securities fraud committed in the course of the representation because securities fraud is considered an ongoing crime; and (4) the ABA should therefore amend DR 7-102(B)(1) to make revealing fraud to the defrauded person a matter entrusted to the lawyer's discretion, and not a duty. *Id.* at 454-58.

201. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975). The Opinion's use of "misconduct" instead of the more familiar "fraud," which is the word used in both the Canons and the Model Code, seems calculated to suggest both the breadth of the potential danger to the norm of confidentiality and the triviality of the danger posed by the client's conduct.

202. *Id.*

203. *Id.*

mits disclosure, extends not only to secrets<sup>204</sup> (sensitive information about the client that falls outside the privilege<sup>205</sup>) but also to confidences (information protected by the attorney-client privilege).<sup>206</sup> Since DR 7-102(B)(1), as originally drafted, did not exempt privileged information from the information the lawyer was required to disclose and DR 4-101(C)(2) extended to privileged information, the Code seemed to require a lawyer to reveal information "which he also was duty-bound not to reveal according to the law of evidence."<sup>207</sup> The 1974 amendment "was necessary . . . to relieve lawyers of exposure to such diametrically opposed professional duties."<sup>208</sup>

The justification of the 1974 amendment provides a direct acknowledgment of the potential for ethics rules to compete and conflict with other law. Other law seems to "win" here, which may help explain the overt acknowledgement of the conflict, but the "win" is illusory. First, other law wins by virtue of the amendment to DR 7-102(B)(1), not in its own right. According to the opinion, the amendment was "necessary" to resolve the dilemma—necessary not because the ethics rules must conform to other legal precepts but "to relieve lawyers of exposure to such diametrically opposed professional duties."<sup>209</sup>

Second, having acknowledged that "diametrically opposed duties" existed before the amendment, Opinion 341 seeks to justify the resolution provided by the 1974 amendment.<sup>210</sup> In other words bringing the ethics rules in line with other law is not itself sufficient justification for the 1974 amendment. The amendment has to be right in itself; to discover what is right—to justify the amendment—the Committee turns to the bar's *nomos* as embodied in Opinion 287.

Third, the identified conflict between the attorney-client privilege and the original version of DR 7-102(B)(1) is itself clearly visible only from within the bar's *nomos*. In the state's *nomos*, the crime/fraud exception to the attorney-client privilege looms large.<sup>211</sup> The courts show

204. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A) (1981), quoted *supra* note 165.

205. Sensitive information would include, for example, information about the client communicated to the lawyer by a third party. Information communicated by a third party is not privileged. See CLEARY ET AL., *supra* note 64, § 89, at 212-13; 8 JOHN H. WIGMORE, EVIDENCE § 2291, at 619 (John T. McNaughton ed., rev. ed. 1961).

206. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A) (1981), quoted *supra* note 165.

207. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975).

208. *Id.*

209. *Id.* (emphasis added).

210. *Id.*

211. A classic statement of the breadth of the crime/fraud exception to the attorney-client

little commitment to the norm of confidentiality when the client has used the lawyer's services to perpetrate a crime or fraud.<sup>212</sup> Thus, in the state's *nomos* it is not clear whether there is any conflict between the privilege and unamended DR 7-102(B)(1), which would explain why the majority of states saw no reason to adopt the 1974 amendment. For the bar the conflict appears and the amendment is "necessary" because the bar's understanding of confidentiality leads it to understand the attorney-client privilege as all but impervious to the stated exceptions. The state's understanding that privileges in evidence law, including the attorney-client privilege, are to be interpreted narrowly,<sup>213</sup> is inverted in the bar's *nomos* where it is the exceptions to the privilege that are interpreted narrowly.

Finally, although Opinion 341 explains the need for the 1974 amendment by talking of the conflict that would otherwise exist between the ethics rule and evidence law, the Opinion holds that the amendment does much more than merely cure this conflict. The Opinion holds that the amendment to DR 7-102(B)(1) all but wipes out the ethics rule.<sup>214</sup> Opinion 341 interprets the amendment as a reaffirmation of the bar's *no-*

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privilege appears in *Clark v. United States*, 289 U.S. 1 (1936). Writing for the court, Justice Cardozo said: "The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law." *Id.* at 15.

212. See, e.g., *United States v. Zolin*, 491 U.S. 554, 574-75 (1989) (holding that a trial court may order an in camera review of attorney-client communications to see whether the crime/fraud exception applies upon a rather modest showing by the party seeking to pierce the privilege).

213. All privileges are interpreted narrowly because they interfere with the truth-seeking function of a trial. See *United States v. Nixon*, 418 U.S. 683, 710 (1974); *NLRB v. Harvey*, 349 F.2d 900, 907 (4th Cir. 1965). For a detailed description of the limits on the attorney-client privilege, see WOLFRAM, *supra* note 83, § 6.3. Professor Wolfram provides the following summary of state law: "Once the attorney-client privilege has struggled into existence, it lives a fragile life threatened by forces that can snuff it out." *Id.* § 6.4.1.

214. Opinion 341 interprets the word "privileged" in DR 7-102(B)(1) to mean both confidences or secrets, as defined by DR 4-101(A). ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975) (interpreting MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1), 4-101(A) (1981)). Thus, DR 7-102(B)(1) is interpreted as saying: The lawyer shall reveal frauds the client has committed by using the lawyer's services when the client refuses to rectify them, except when such revelation would be privileged or embarrassing to the client. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A) (1981) (defining material secrets as those that might embarrass or be detrimental to the client). Of course, all such revelations would embarrass the client.

Opinion 341 denies that it wipes out DR 7-102(B)(1):

[T]he duty [to disclose fraud] would remain in force if the information clearly establishing a fraud . . . committed by a client in the course of representation were obtained by the lawyer from a third party (but not in connection with his professional relationship with the client), because it would not be a confidence or secret of a client entitled to confidentiality.

*mos*, a *nomos* in which the norm of confidentiality trumps other norms, particularly the duty to reveal client fraud:

The conflicting duties to reveal fraud and to preserve confidences have existed side-by-side for some time.

However, it is clear that there has long been an accommodation in favor of preserving confidences either through practice or interpretation. Through the Bar's interpretation in practice of its responsibility to preserve confidences and secrets of clients, and through its interpretations like Formal Opinion 287, significant exceptions to any general duty to reveal fraud have been long accepted.<sup>215</sup> Apparently, the exceptions were so broad or the policy underlying the duty to reveal so weak that the earlier drafts of the Code of Professional Responsibility omitted altogether the concept embodied in Canon 41. Nonetheless, DR 7-102(B) is a part of the Code of Professional Responsibility and must be given some meaning. Some of the exceptions to a general duty to reveal have been built into the Disciplinary Rule itself (for example, that the information must "clearly establish" fraud; that it must be received "in the course of representation;" and [since 1974] that it must not be information "protected as a privileged communication").

Formal Opinion 287, which dealt with a lawyer's duty to

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ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975). It is difficult, if not impossible, to imagine such a case arising.

Of course, one could make a neat legal argument that this still allows the lawyer to reveal information in accordance with the exceptions in DR 4-101(C). See, e.g., Hazard, *supra* note 144, at 294 n.38 (making the argument but pointing out that this would effectively cancel the 1974 amendment). Opinion 341 also suggests this reading, although it surely was not the intent of Opinion 341 to cancel the 1974 amendment: "[I]n cases where [DR 4-101's] exceptions apply, DR 7-102(B) may make the optional disclosure of information under DR 4-101 a mandatory one. For example, when disclosure is required by a law, the [amendment] is not applicable and disclosure may be required." ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975) (emphasis added).

Several things suggest that we should not make too much of this apparent concession. First, notice that in the example the disclosure is not only required by law and thus permissible under DR 4-101, but also apparently required by DR 7-102(B)(1). Presumably this is one of those rare cases where the fraud is not a "secret." Thus, there are two separate sources (other law and an ethics rule) that require revelation, and yet all the Committee can manage is a weak statement that disclosure in such a case "may" be required. Second, Opinion 341 reaffirms and relies on Opinion 287. Opinion 287 said a lawyer should not reveal the client's intent to commit perjury. ABA Comm. on Professional Ethics and Grievances, Formal Op. 287 (1953). But the exception in DR 4-101(C)(3) allows a lawyer to reveal this, because perjury is a crime. Finally, other statements in Opinion 341 and the overall tone of the argument presented therein suggest an understanding of confidentiality as a near-absolute duty. *Id.*

215. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975). Notice in this sentence and the one immediately preceding it the explicit appeal to committed interpretation (interpretation in practice) as a source of law.

reveal a perjury committed earlier by his client, represents merely one of the exceptions to old Canon 41 . . . .

The tradition (which is backed by substantial policy considerations) that permits a lawyer to assure a client that information (whether a confidence or a secret) given to him will not be revealed to third parties is so important that it should take precedence, in all but the most serious cases, over the duty imposed by DR 7-102(B).<sup>216</sup>

### C. *The Fight Over Rule 1.6*

Once one understands that for the bar the norm of confidentiality had for a long time been elevated above other norms, the outcry from the bar<sup>217</sup> over the Kutak Commission's<sup>218</sup> proposed rule on confidentiality becomes comprehensible. The version of rule 1.6 presented by the Kutak Commission to the ABA House of Delegates in 1983 was on its face more protective of client confidentiality than the Model Code adopted by the ABA in 1969.<sup>219</sup> Unlike the Model Code, the proposed rule made no mention of disclosures to comply with other law, court orders or other ethics rules.<sup>220</sup> It limited the lawyer's discretion to reveal the client's intent to commit a crime, allowing such discretion only for serious crimes against persons or property.<sup>221</sup> And instead of *requiring* lawyers to reveal client fraud committed against a third party<sup>222</sup> through the law-

216. *Id.*

217. See ANDREW L. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 145 (3d ed. 1989); Hazard, *supra* note 144, at 287.

218. "Kutak Commission" was the informal name for the American Bar Association Special Commission on the Evaluation of Professional Standards, which drafted the Model Rules. It was named after its chairperson, Robert J. Kutak.

219. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (Final Draft 1981), reprinted in A.B.A. J., Oct. 1981, at Supp. [hereinafter Kutak 1.6]. Kutak 1.6 provided in pertinent part:

A lawyer may reveal [confidential] information to the extent the lawyer reasonably believes necessary:

. . . .

(2) to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interests or property interests of another; [or]

(3) to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.

*Id.*

220. *Id.*

221. *Id.*; cf. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (1981) (allowing a lawyer to reveal the client's "intention . . . to commit a crime").

222. The duty to disclose client fraud upon the tribunal, also a part of DR 7-102(B)(1), was retained in model rule 3.3, as proposed by the Kutak Commission and as adopted by the ABA.

yer's services, it *allowed* lawyers to reveal such fraud.<sup>223</sup>

These limits on the language of the Code did not, however, go far enough for many members of the bar. The proposed rule did not include a corollary to the 1974 amendment, the amendment that in the bar's view reinstated and reaffirmed its understanding that confidentiality trumped the duty to reveal unrectified fraud in which the lawyer's services had been used. Moreover, whatever the Model Code might say about discretion to reveal *any intended* crime of the client, the bar's understanding, as is apparent from Formal Opinions 287<sup>224</sup> and 341,<sup>225</sup> was that no such sweeping discretion existed. Kutak 1.6 simply did not reflect the bar's law of confidentiality; hence the outcry.

The American Trial Lawyers Association (ATLA) was so outraged by the Kutak Commission's work, particularly its proposals on confidentiality, that it drafted a complete alternative, the American Lawyer's Code of Conduct (ALCC).<sup>226</sup> The Preface to the ALCC states:

Our first principle remains that a client must be able to confide absolutely in a lawyer, or there may be little point in anyone's having a lawyer. We have rejected one concept that the Kutak Commission apparently espouses, that lawyers have a general duty to do good for society that often overrides their specific duty to serve their clients.<sup>227</sup>

The ALCC provisions on confidentiality were much more protective of that norm than the Kutak proposals, the Model Code on its face, and the ethics rules as they had been adopted in the various states.<sup>228</sup> Almost

*See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1) (1981); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1983).

223. Kutak 1.6, *supra* note 219.

224. *See supra* notes 197-216 and accompanying text.

225. *See supra* notes 200-16 and accompanying text.

226. THE AMERICAN LAWYER'S CODE OF CONDUCT (1982) [hereinafter ALCC].

227. Theodore I. Koskoff, *Preface to id.* The preface, written by the president of the American Trial Lawyers Association (ATLA) from 1979 to 1980, is openly hostile to and suspicious of the Kutak Commission and its supporters. "Chairman Kutak and his friends" are all but charged with treason. *Id.* The preface accuses the Commission of "side-stepping" the issues and "ramrod[ing]" changes through the ABA. *Id.* The preface ends by promising that, should the ABA adopt the Kutak proposals, ATLA will continue to resist:

We are not willing to allow the Kutak Rules to become the law of legal ethics by default. We intend to fight in the state bar associations, and in the state courts, to preserve the constitutional concept of what a lawyer is, and what a lawyer's duties are.

I invite you to join . . . the fight.

*Id.*

228. Under the ALCC, *supra* note 226, confidences may be revealed without client consent: (1) "to the extent required . . . by law, rule of court, or court order, but only after good faith efforts to test the validity of the law, rule, or order have been exhausted," *id.* Rule 1.3;

as protective of confidentiality was the amendment to Kutak 1.6 proposed by the American College of Trial Lawyers (the College), a smaller and more elite group of trial lawyers than ATLA. The College's amendment eliminated completely the lawyer's discretion to reveal client fraud in which the lawyer's services had been used. It further narrowed the exception on revealing a future crime to allow disclosure only when the crime would result in death or serious bodily injury.<sup>229</sup>

How had the Kutak Commission proposed so wrongheaded a rule? Where had the Commission gotten its strange ideas?

The Commission's answer was simple: its proposal was "essentially consistent with the law as it stood, soberly considered."<sup>230</sup> "[The] legal facts," as Professor Geoffrey C. Hazard, the Reporter for the Kutak Commission, later wrote, "were of little moment to the critics [of Kutak 1.6]. They persuaded the bar that the Kutak proposal would have opened wide new exceptions to confidentiality, whereas in fact the Kutak proposal would have narrowed these exceptions."<sup>231</sup>

What Professor Hazard misses is that the "legal facts" to which he alludes were not "legal facts" in the bar's *nomos*. The proposal *did* cre-

(2) when a judge or juror has been subjected to a bribe or extortion, *id.* Rule 1.4; and (3) in self defense, although if the accusation is from a third party the lawyer must wait for formal charges to be instituted against her, *id.* Rule 1.5. Moreover, the ALCC limits the lawyer's option of withdrawing from representation when the client is committing a crime or fraud because it treats withdrawal in such circumstances as tantamount to indirectly revealing a client confidence. *Id.* Rules 1.2, 6.6. Consequently, a lawyer may withdraw in *noncriminal cases* only when the client has "induced the lawyer to take the case or to [act] . . . on the basis of material misrepresentations" but only "if withdrawal can be accomplished without a direct violation of [client] confidentiality." *Id.* Rule 6.5. A lawyer may not withdraw on these grounds in criminal cases. *Id.*

229. This amendment was adopted and with little modification became model rule 1.6. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983).

230. Hazard, *supra* note 144, at 298.

231. *Id.* The "legal facts" were pointed out to the critics by some of the supporters of the Kutak proposal during the ABA House of Delegates debate on rule 1.6. For example, Mr. Robert Cummins argued: "[The critics of the Kutak proposal] misperceive the current scope of [DR 1-102,] they misperceive the scope of Canon 4, they misperceive the scope of Canon 7 and I respectfully submit that they have overlooked the current status of case law in this area." ABA House of Delegates Transcript, Tape 2, at 50 (Feb. 7, 1983) [hereinafter ABA Transcript] (on file with author) (statement of Robert Cummins); *see also id.* at 44 (statement of Dean Norman Redlich) (pointing out that Kutak 1.6 was consistent with then-current law); *id.* at 51 (statement of Peter Moser, speaking on behalf of the ABA Committee on Ethics and Professional Responsibility) ("[T]he proposed amendment is now the rule in a small minority of states . . .").

The critics' response is perhaps best captured by John Elam, speaking on behalf of the College in support of that organization's amendment to Kutak 1.6, in the last speech before the vote on the amendment: "[W]hen the Commission suggests that [its proposed rule 1.6] will not change the role [of the lawyer] they are misspeaking because when you allow . . . discretion [to reveal confidences], you are changing the rules." *Id.* Tape 3, at 2 (statement of John Elam).



ate wide new exceptions to confidentiality as that norm was understood by the bar. The Kutak proposal was essentially *inconsistent* with the *bar's law* as it stood, soberly considered. It was on that ground that the ABA House of Delegates rejected the Kutak draft of rule 1.6.

Listen to the critics of Kutak 1.6 in the ABA House debate:

The American College of Trial Lawyers moves to amend [Kutak 1.6] because in its present form this rule will *transform* the role of the attorney and change his duties to his client.<sup>232</sup>

What the [Kutak] rules seek to do is to *cast aside* a statutory scheme that has recognized the sanctity of the disclosures of a client to his lawyer and to create an adversarial relationship between the lawyer and his client.<sup>233</sup>

[Kutak] 1.6 . . . seriously *undermines* the attorney's duty to protect client confidences.<sup>234</sup>

For as long as I have known, this profession has regarded its remedy [to client fraud] as being withdrawal . . . This profession for so long as I have known, has not regarded the proper remedy to be the revelation of the secrets of the client.<sup>235</sup>

The reality and strength of the bar's *nomos* to members of the profession is further demonstrated by the remarks of some of the supporters of the Kutak proposal. While some supporters understood the law from the state's perspective,<sup>236</sup> others argued from a position grounded in the bar's *nomos*. For example, one supporter stated, regarding client fraud in which the lawyer's services were used: "[I]t would be quite wrong if [Kutak 1.6] said that a lawyer must disclose."<sup>237</sup> But that is exactly what the Code required in most states.<sup>238</sup> Another supporter portrayed Kutak

232. *Id.* at 23 (statement of John Elam) (emphasis added). The amendment he refers to was adopted as model rule 1.6. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983).

233. ABA Transcript, *supra* note 231, Tape 2, at 29 (statement of Justice William H. Erickson of the Colorado Supreme Court, speaking in his role as State Delegate for the Colorado Bar) (emphasis added).

234. *Id.* at 30 (statement of Robert M. Landis) (emphasis added); *see also id.* at 31 (statement of Louis G. Davidson, Assembly Delegate) ("If you begin to open the door in a way that really seriously undermines th[e] lawyer client privilege then the lawyer who does not make disclosure is exposed to very serious sanctions and liability because of the charge . . . that he could have made disclosure."). Notice that Mr. Davidson assumed that an ethical duty not to disclose would stop the imposition, presumably under other law, of "very serious sanctions and liability." *Id.*

235. *Id.* at 43 (statement of A.B. Conant, speaking on behalf of the General Practice Section of the ABA).

236. *See* comments cited *supra* note 231.

237. ABA Transcript, *supra* note 231, Tape 2, at 26 (statement of Dean Erwin N. Griswold, Assembly Delegate).

238. *See supra* notes 201-02 and accompanying text.

1.6 as a step into the future—as new law:

[S]imply stated, [the question is:] can a client who is about to commit or has already committed a crime or a fraud and who has implicated an innocent lawyer in the matter, rely on confidential information to prevent that lawyer in his or her discretion from taking action to prevent the act about to be done or to rectify the consequence of the act already done. I submit to you that answer should be a firm no. I submit the lawyer should have the discretion . . . to reveal the information . . . . [Kutak 1.6] would articulate that the lawyer will not be the pawn of the client's illegal purposes. Today we have a tremendous opportunity and . . . this might be our finest hour.<sup>239</sup>

The supporters, armed only with arguments based on “foreign” law (the state's law) or on calls for reform, lost. The ABA House of Delegates, voting 207 to 129 in favor of the College's amendment to rule 1.6, overwhelmingly reaffirmed the bar's law.<sup>240</sup> According to the procedure adopted by the ABA to govern consideration of the Kutak draft, the House was to debate and vote on all the black-letter rules before moving on to discuss and vote on the official comments.<sup>241</sup> The debate on the rules, including rule 1.6, took place in February 1983 and was so lengthy that consideration of the official comments had to be postponed until the August meeting of the ABA.<sup>242</sup> The supporters and opponents of Kutak 1.6 agreed to work together to revise the comment to rule 1.6 as amended.<sup>243</sup> This delay gave the supporters another chance to convince their opponents that the bar's law placed lawyers in jeopardy under state law—in jeopardy of being accused and possibly convicted or held civilly liable for client frauds in which their services had been used. The supporters explained: If a lawyer withdraws from a fraudulent transaction without warning the victim or otherwise revealing the fraud, and the victim continues to rely on the lawyer's past participation in the transaction as a sign that all is on the up and up, the lawyer might be civilly liable to the victim.<sup>244</sup>

Moreover, a lawyer can be held criminally liable as an aider and abettor of his client's fraud if a jury finds that the lawyer knew of the fraud while acting on behalf of the client<sup>245</sup> (or was so reckless in not

239. ABA Transcript, *supra* note 231, Tape 2, at 45-46 (statement of S. Shepherd Tate, former President of the ABA).

240. ABA Transcript, *supra* note 231, Tape 3, at 3; Schneyer, *supra* note 17, at 713.

241. Hazard, *supra* note 144, at 301.

242. *Id.* at 302.

243. *Id.*

244. *Id.* at 302-03.

245. See HAZARD & KONIAK, *supra* note 144, at 63-65.

discovering the fraud earlier that the lawyer had to have “deliberately closed his eyes” not to have seen it while actively representing the client).<sup>246</sup> Precluding lawyers from disclosing the fraud upon discovery deprives lawyers of one effective way of demonstrating that before that time they had no knowledge of scheme and thus were not knowingly aiding and abetting it. The opponents responded with an accommodation to state law: the lawyer may signal that something is wrong so long as she does not reveal the content of confidential communications.<sup>247</sup> This accommodation was included in the comment to rule 1.6, which was amended to allow a lawyer to “giv[e] notice of the fact of withdrawal, and . . . [to] withdraw or disaffirm any opinion, document, affirmation, or the like.”<sup>248</sup> The comment is silent on the need for and purpose of this addition. The accommodation is thus hidden from view. It was accepted in August 1983 by the ABA House of Delegates, along with the rest of the comments to the Model Rules.<sup>249</sup>

At one level the revised comment can be understood as allowing what rule 1.6 itself appears to forbid—disclosure of unrectified client fraud in which the lawyer’s services were used: “Giving a signal—going through a ritual that is intended to be a signal and is understood as a signal—is surely to ‘reveal’ the information that the signal denotes.”<sup>250</sup> Although an effective signal and outright disclosure may be equivalent from the perspective of the client and the victim, from the perspective of the person forced to limit his communications to signals—from the perspective of the lawyer, who is forced to communicate in so unnatural a manner—they are materially different. The very requirement that direct communication be dispensed with in favor of signals allows the bar to reaffirm the power of the norm of confidentiality even as it provides an escape from it.

Moreover, banishing the “exception” to the comment, giving it at best the status of a sort of common law,<sup>251</sup> suggests that it should be relied on as the basis of action in only the most urgent cases. After all, the lawyer who acts upon a comment does so at some risk because, according to the Model Rules, “[c]omments are intended as guides to interpretation, but the text of each rule is authoritative.”<sup>252</sup> Thus, by placing

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246. *United States v. Benjamin*, 328 F.2d 854, 862 (2d Cir.), *cert. denied*, 377 U.S. 953 (1964).

247. Hazard, *supra* note 144, at 302-03.

248. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. (1991).

249. Hazard, *supra* note 144, at 303.

250. *Id.* at 304.

251. *Id.* at 305.

252. MODEL RULES OF PROFESSIONAL CONDUCT scope (1991).

the accommodation in the comment and not the rule, the bar further reaffirms its understanding of the norm of confidentiality.<sup>253</sup> Accommodation of state law is one thing; concession and recognition are quite another.

A model ethics code is not state law, however, until adopted by a court,<sup>254</sup> and the majority of state courts refused to adopt rule 1.6 as recommended by the ABA. Instead, most courts adopted confidentiality rules at least as permissive of disclosure as the Kutak draft had been, and in a number of cases, more so.<sup>255</sup> The state courts thus reaffirmed their understanding of the norm of confidentiality, just as the bar had reaffirmed its understanding.<sup>256</sup>

## VI. THE BAR'S SACRED STORIES

Thus far our attention has been focused primarily on precepts. We have seen that in the bar's *nomos*, ethics rules have the power to trump other sources of law and the norm of confidentiality has the power to

253. Compare New York's approach, which incorporates the substance of this Comment into the Code itself.

A lawyer may reveal:

....

Confidences or secrets to the extent implicit in withdrawing a written or oral opinion or representation previously given by the lawyer and believed by the lawyer still to be relied upon by a third person where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud.

N.Y. JUD. LAW § 29 app., DR 4-101(C)(5) (McKinney Supp. 1992).

254. See *supra* text accompanying note 86.

255. 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* app. 4, at 1259-66 (2d ed. 1991).

256. Despite a cold reception by the state courts, the bar has stuck to its position. In 1991 the ABA Committee on Ethics and Professional Responsibility proposed to the ABA House of Delegates that rule 1.6 be rewritten to restore much of the substance of the Kutak proposal. The Committee's proposal would have added the following language to model rule 1.6: "A lawyer may reveal . . . information . . . to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used." AMERICAN BAR ASSOCIATION, *REPORTS WITH RECOMMENDATIONS TO THE HOUSE OF DELEGATES 2* (1991) (Report 108B).

The Committee explained that the amendment was necessary because rule 1.6 as adopted in 1983 "threaten[s] to unfairly subject lawyers to potential civil liability and criminal prosecution." *Id.* at 8. In other words, rule 1.6 as then written was contrary to state law. The Committee admitted that the inconsistency between rule 1.6 and state law was great enough that "[w]e have . . . declined to issue ethics opinions announcing the undesirable conclusions we believe to be required by the present provisions of [rule 1.6] . . ." *Id.* Notwithstanding this blatant admission of the inconsistency between the ethics rules and other law, the ABA House of Delegates rejected the amendment, leaving the conflict in place. AMERICAN BAR ASSOCIATION, *SUMMARY OF ACTION TAKEN BY THE HOUSE OF DELEGATES OF THE AMERICAN BAR ASSOCIATION 11* (Aug. 1991) (amendment rejected by a standing vote of 158 to 251).

trump other ethics rules. These insights have provided us with a skeleton of the bar's *nomos*, with enough material to compare bar law to state law and conclude that they are different and with enough material to discern the constitutional significance for the bar of confidentiality, but not enough material to understand what holds the *nomos* together. For that we need to turn from precept to narrative.<sup>257</sup>

The central and recurring theme in the profession's narratives portrays the lawyer as champion, defending the client's life and liberty against the government, which is portrayed as oppressor, willing, ready and able to use its power to destroy the individual and the values society holds dear.<sup>258</sup> The story has many versions.<sup>259</sup> One standard version, the defense of John Peter Zenger, is relied on in the amicus brief filed jointly by the National Association of Criminal Defense Lawyers (NACDL), the National Network for the Right to Counsel (NNRC) and the American Civil Liberties Union, among others, in *Caplin & Drysdale, Chartered v. United States*<sup>260</sup> and *United States v. Monsanto*.<sup>261</sup>

Zenger was tried in the colony of New York in 1735 for seditious libel based on his printing a newspaper critical of the Governor of the colony, the tyrant William Cosby. Two noted

257. Two recent articles on the legal profession rely heavily on narratives to construct what I call the bar's *nomos*. Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239 (1991); Lawry, *supra* note 77. The difference between them is that Professor Hazard's piece is explicitly redemptive, while Professor Lawry's is not. Professor Hazard uses the bar's central narratives to reveal a *nomos* that coincides with the one I depict in this Article. He then relies heavily on exiled narratives—i.e., narratives that have lost (or never had) the status of law within the bar (narratives that do not demand action in accordance with their morals in the present)—to argue for a reconstructed *nomos*. Hazard, *supra*, at 1266-80. On the other hand, Professor Lawry contends that the critics (and supporters) of the bar's *nomos* have got it wrong; he argues that one can find in bar texts and stories a different *nomos*, which he believes better describes how lawyers actually behave, and which he thus claims better describes the bar's *nomos* or what he calls the bar's central moral tradition. Lawry, *supra* note 77, at 318-21. My analysis suggests that despite Lawry's claim that his work is descriptive, it is redemptive, and that the narratives he uses are exiled—i.e., not law. Professor Lawry, especially in the conclusion of his article, shows some ambiguity about whether his effort is descriptive or redemptive:

If the adversary ethic so damned by [Professors] Luban and Shaffer is of recent vintage or represents a distortion of healthy partisanship, then let us try to articulate why this is so and decide what can be done about it. My contention is that "reform" or "modification" of lawyers' ethics within the adversary system is a secondary challenge to the task of getting the central idea of lawyering straight to begin with.

*Id.* at 363 (footnotes omitted).

258. See Hazard, *supra* note 257, at 1242-46 (describing versions of this central narrative); see also THOMAS L. SHAFFER, FAITH AND THE PROFESSIONS 1-38 (1987) (describing professional narratives).

259. See Hazard, *supra* note 257, at 1242-46.

260. 491 U.S. 617 (1989).

261. 491 U.S. 600 (1989).

New York lawyers who had been leaders in the political movement opposing Cosby, James Alexander and William Smith, came to Zenger's defense. Judge James DeLancey, a Cosby lieutenant appointed by the Governor as Chief Justice of the New York Supreme Court, presided at the trial. He rebuffed the lawyers' attempts to win Zenger's release and set an excessive bail. When the defense attorneys challenged DeLancey's authority to act as judge, DeLancey responded by disbarring them. This unprecedented order . . . was a partisan "tactic to deprive Zenger of competent legal counsel . . . ."

Following the disbarment of his attorneys, Zenger, without funds, immediately petitioned the court for appointment of counsel. DeLancey obliged him by appointing John Chambers, "a competent lawyer but a Governor's man." Zenger's allies were concerned, and Alexander and Smith began to look for another lawyer to try the case. Alexander, although disbarred, had continued to work on the case, and developed a more daring strategy than the conventional one conceived by Chambers. The plan was to base Zenger's defense on the truth of the newspaper articles, trying Crosby in the process, and on that basis to seek a jury acquittal on the libel charges. Alexander engaged Andrew Hamilton, a distinguished attorney from the neighboring colony of Pennsylvania, to execute the defense plan.

Hamilton took over the defense following Chambers' opening statement and made an impassioned plea to the jury in support of the liberty to expose and oppose tyranny by speaking and writing truth. Admitting that Zenger had published the statements in question, he asserted that the printer could not, however, be convicted of libel for printing the truth. Judge DeLancey instructed the jury that it was to determine only whether Zenger had published the statements, leaving the law of libel to the court. But the jury acquitted Zenger.

. . . The trial of John Peter Zenger played a significant role in establishing the American tradition of an independent criminal defense bar serving as a meaningful check against a partisan or corrupt judge or prosecutor. The Zenger trial and the importance of the right to representation by counsel of choice were fresh in the minds of the Framers when they drafted the Sixth Amendment.<sup>262</sup>

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262. Joint and Combined Amicus Brief of the National Association of Criminal Defense Lawyers et al. in Support of the Petitioner Caplin & Drysdale, Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (No. 87-1729) (1989), and the Respondent Monsanto, United States v. Monsanto, 491 U.S. 600 (No. 88-454) (1989), at 17-21 [hereinafter NACDL Amicus Brief in *Caplin & Drysdale*] (citations omitted) (quoting JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK

This narrative reveals several aspects of the bar's *nomos*. First, it explains the group's claim to *nomos* autonomy. In this narrative, lawyers through their actions assert their independence from English tyranny. The independence of the bar presages the American Revolution. Lawyers fearless of government control contribute to the Revolution's success by protecting those, like Zenger, who would stir up discontent. Moreover, they protect the norms, like freedom of the press, in whose name the Revolution was fought, and thereby guarantee the continuation of the normative world that the Revolution engendered. In sum, according to the story, a material and normative world in which the bar is independent from government control preceded, helped bring about and is necessary to maintaining the nation's material and normative existence.<sup>263</sup>

This is a powerful claim to *nomos* autonomy. By connecting the bar to the state's creation and continuation, the bar's stories portray the state's vulnerability and its dependence on the bar. The mythology of creation,

whether the narrative device is that of Robinson Crusoe, the Pilgrim Fathers, the conquest of Canaan, or Mount Sinai, . . . always provides the typology for a dangerous return. Revelation and (to a lesser extent) prophecy are the revolutionary challenges to an order founded on revelation. Secession is the revolutionary response to an order founded on consent or social contract.<sup>264</sup>

The bar's stories express a dual vision of the state's birth. First,

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WEEKLY JOURNAL 20-21 (Stanley N. Katz, 1st ed. 1963)). NACDL is a voluntary bar organization with a national membership of more than 5000 lawyers. *See id.* at 1-2. NACDL was joined on the brief by the NNRC, an organization established in early 1986 to defend the right to counsel against government intrusion, and by the American Civil Liberties Union, the New York Civil Liberties Union, and the American Civil Liberties Union of Virginia. *See id.* at 4.

263. Another version of this story involves Lord Erskine's defense of Thomas Paine in 1792 against a charge of seditious libel for the publication of *The Rights of Man*. *See* LLOYD PAUL STRYKER, FOR THE DEFENSE 210-26 (1947). Erskine's oft-quoted closing argument in that case makes explicit the connection between the bar's independence and the normative existence of the state:

"I will forever, at all hazards, assert the dignity, independence, and integrity of the English Bar, without which impartial justice, the most valuable part of the English constitution, can have no existence."

*Id.* at 217 (quoting Erskine); *see also* Brief of the National Lawyers Guild (*Amicus Curiae* on Behalf of Petitioners) at 7-8, 13-14, *Konigsberg v. State Bar*, 366 U.S. 36 (1961) (No. 28) [hereinafter *Guild Amicus Brief in Konigsberg*] (using the Erskine story and quotation as the central narrative, along with references to the Zenger trial and Darrow's defense of the school-teacher in the *Scopes* trial); Pickholz, *supra* note 49, at 1850-51 (using the Erskine story to criticize the Securities and Exchange Commission's position and the Kutak Commission's proposals on the disclosure of client fraud).

264. Cover, *Nomos*, *supra* note 1, at 23-24.

stories, like the Zenger tale and the many speeches in which lawyers take credit for opposing the Stamp Act and signing the Constitution,<sup>265</sup> emphasize the bar's leading role in the state's birth, portraying the process as one of normative challenge and normative reconstruction. These stories carry an implicit threat: we created you and we can destroy you.<sup>266</sup> A second creation motif, however, enters to mute the threat and transform the bar's destructive power into a saving force. This motif reminds the state that the normative challenge was realized through violent popular revolution. It is the people who can destroy the state, and it is the bar and its *nomos* which can prevent that by forestalling the normative challenge—by upholding the state's *nomos*.<sup>267</sup> In sounding this second theme, lawyers commonly invoke De Tocqueville:

[T]he authority [Americans] have entrusted to members of the

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265. Bar stories that give lawyers primary credit for the creation and legitimacy of the state are legion. See, e.g., REPORT OF THE COMMISSION ON PROFESSIONALISM TO THE BOARD OF GOVERNORS AND THE HOUSE OF DELEGATES OF THE AMERICAN BAR ASSOCIATION 1 (1986) [hereinafter ABA REPORT ON PROFESSIONALISM] (beginning by giving lawyers credit for having "produced one of history's greatest documents of freedom," the Constitution); Eugene C. Thomas, *Some Straight Talk About Lawyers on Law Day USA*, A.B.A. J., May 1987, at 6, 6 (then-president of the ABA describing lawyers as "leaders of the movement for independence," telling of their opposition to the Stamp Act and detailing how many lawyers signed the Declaration of Independence, attended the Constitutional Convention and signed the Constitution); *Quotes*, A.B.A. J., Dec. 1986, at 25, 25 ("When doctors were prescribing leeches to cure General Washington's cold, lawyers were drafting the Declaration of Independence and the Constitution." (quoting James Bond, Dean of the University of Puget Sound School of Law, addressing the Rotary Club of Tacoma)).

266. One of the most celebrated bar stories, that of Queen Caroline's defense by Lord Brougham, makes explicit the power of the bar to destroy the state. See 2 PROCEEDINGS IN THE HOUSE OF LORDS, TRIAL OF QUEEN CAROLINE 5 (London, Wright 1821); *infra* notes 295-305 and accompanying text. The NACDL brief in *Caplin & Drysdale* conjures the threat by concluding with the following words:

We, the People, cherish the right to counsel and the primary right to choose our own counsel. We disfavor, even eschew, forfeitures. The latter is now encroaching on the former. If the Government's blind expansion of a legal fiction is not stopped, the result will be to take the adversary out of the adversary process. The Sixth Amendment is at stake.

We ask this Court to hold strong for Freedom . . . .

NACDL Amicus Brief in *Caplin & Drysdale*, *supra* note 262, at 92-93.

267. Narratives expounding this theme are plentiful. For example:

"I came to realize that without a Bar trained in the traditions of courage and loyalty, our constitutional theories of individual liberty would cease to be a living reality. . . . So I came to feel that the American lawyer should regard himself as a potential officer of his government and as a defender of its laws and constitution."

Motion for Leave to File Brief Amici Curiae and Brief at 4, *Konigsberg v. State Bar*, 366 U.S. 36 (1961) (No. 28) (filed by a group of California attorneys) (quoting HENRY LEWIS STIMSON, ON ACTIVE SERVICE IN PEACE AND WAR at xxi-xxii (1948)); see Frank G. Tyrell, *The Lawyer Lights the Way*, 13 CAL. ST. B.J. 40 (1938); Lloyd Wright, *Milestones and Concepts of the Lawyer-Citizen*, 41 A.B.A. J. 797, 797 (1955).



legal profession, and the influence that these individuals exercise in the government, are the most powerful existing security against the excesses of democracy. . . .

. . . .

. . . [W]ithout this admixture of lawyer-like sobriety with the democratic principle, I question whether democratic institutions could long be maintained; and I cannot believe that a republic could hope to exist at the present time if the influence of lawyers in public business did not increase in proportion to the power of the people.<sup>268</sup>

It is also captured in the explanation of Shakespeare's line: "The first thing we do, let's kill all the lawyers."<sup>269</sup> Bar leaders never tire of pointing out that this line was "spoken by one who was plotting how to overthrow the government."<sup>270</sup> As explained by a recent ABA president, the moral of the tale is clear: "Through the rebels' threat, Shakespeare reminds the groundlings that lawyers, as protectors of that system of ordered liberty, are as much an obstacle to a rebellion that would curtail liberty as any garrisoned castle."<sup>271</sup>

Through these creation motifs, the bar explains why both the state, which it can destroy, and the people, whose will to rebel it can thwart,<sup>272</sup> are often hostile to the bar and its *nomos*.<sup>273</sup> At the same time, the motifs express why the state and the people are ultimately beholden to the bar and its *nomos*.<sup>274</sup> Attacks on the bar are therefore to be expected from

268. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 272, 276 (Phillips Bradley ed., 1945) (1st ed. 13th prtg. 1980), quoted in John D. Randall, *Our Professional Responsibility: Lawyers Make Freedom a Living Thing*, 43 A.B.A. J. 315, 318 (1957); see also Guild Amicus Brief in *Konigsberg*, *supra* note 263, at 12 (quoting this same passage from De Tocqueville).

269. WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE SIXTH* act 4, sc. 2, l. 70 (Blaisdell Pub. Co. 1969).

270. David R. Brink, *The Image, the Truth, and the Bard*, 68 A.B.A. J. 510, 510 (1982) (Brink was then president of the ABA); see John J. Curtin, "Killing" *All the Lawyers*, A.B.A. J., Sept. 1990, at 8, 8 (Curtin was then president of the ABA).

271. Curtin, *supra* note 270, at 8; see Brink, *supra* note 270, at 510 ("Shakespeare understood that the bulwark of an orderly society is its legal profession.").

272. In the stories the implicit threat is that the people might overthrow the state in its material form; the explicit threat found in the morals is that the people will overthrow the state's normative vision.

273. The state's hostility to the bar is expressed in the central theme elaborated above and appears as a feature of most of the bar's sacred stories. The public's hostility to the bar is another important theme. Bar leaders are constantly talking about what they call "lawyer-bashing" by the public. See, e.g., ABA REPORT ON PROFESSIONALISM, *supra* note 265, at 4-5; Brink, *supra* note 270, at 510; Curtin, *supra* note 270, at 8.

274. My claim about what the stories "express" or "explain" is only a claim that representatives of the bar commonly use these stories to express the ideas that I have described. The stories can be and are, however, often used to express other ideas. By their nature, narratives "are subject to no formal hierarchical ordering, no centralized, authoritative provenance, no

both the state and the public, and may justifiably be resisted.

The second aspect of the bar's *nomos* explained by the Zenger tale is the location and elaboration of a boundary line between the bar's normative space and the state's. Just as religious communities and the press use the First Amendment,<sup>275</sup> and as other communities have used property or corporate law<sup>276</sup> "to create boundaries [from the state] for [their] communities and their quasi-autonomous law,"<sup>277</sup> the bar uses the Sixth

necessary pattern of acquiescence" or interpretation. Cover, *Nomos*, *supra* note 1, at 17. Professor Gordon, for example, shows how the creation/maintenance motif can be used to construct a bar *nomos* centered on the republican virtues of maintaining the public *nomos*—a *nomos* that Professor Gordon hopes will replace the existing *nomos*, which is centered on the duty to the client. See Gordon, *supra* note 15, at 17-19.

275. On religious communities using the First Amendment as a boundary rule, see Cover, *Nomos*, *supra* note 1, at 27-29. On the press's use of the First Amendment as a boundary rule, see *Branzburg v. Hayes*, 408 U.S. 665, 679-81 (1972) (describing the reporter's argument, which was rejected by the Court, that the First Amendment protects journalists from having to reveal their sources to a grand jury); Brief for Amici Curiae Advance Publications, Inc. et al. at 11, *Cohn v. Cowles Media Co.*, 111 S. Ct. 2513 (1991) (No. 90-634) (arguing that the First Amendment prevents a source from suing a reporter for breaking a promise to keep the source confidential, an argument rejected by the Court, *Cohen*, 111 S. Ct. at 2516); Brief for Amicus Curiae Association of American Publishers, Inc. at 7, *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 112 S. Ct. 501 (1991) (No. 90-1059) (arguing that the First Amendment protects the press and authors from laws prohibiting publishers from paying—for writing the stories of their crimes—those who have been convicted, accused, or who admit having committed crimes); *Facts on File*, WORLD NEWS DIG. 748 A3 (1976) (describing Daniel Schorr's nine refusals to answer questions about his sources posed by a House Ethics Panel and quoting Schorr's explanation that his silence was based on "professional conscience as well as [the First Amendment, freedom of the press] constitutional right" (brackets in original)).

276. As Professor Cover explained:

Property and corporation law have also been bases for claims to creation of an insulated nomic reserve. The company town, mine, or plant often asserts a right to law creation and enforcement with respect to social relations. Such claims were a pervasive condition of industrial life throughout the nineteenth and early twentieth centuries . . . Perhaps the most compelling historical example of the use of private law in the generation of a *nomos* was the creation of a polity out of the corporate charter of Massachusetts Bay. And although such dramatic instances of the normative authority of the corporate charter are rare, modern corporation law continues to bear the formal character of a grant of norm-generating authority.

Cover, *Nomos*, *supra* note 1, at 30-31 (footnotes omitted).

My experience teaching business ethics leads me to conclude that Professor Cover understated the norm-generating capacity of corporations. Corporate institutions manage to generate and maintain normative systems, although the norms generated and maintained may not be those reflected on the face of the ethics codes adopted by corporations. See generally ROBERT JACKALL, *MORAL MAZES: THE WORLD OF CORPORATE MANAGERS* (1988) (elaborating on the normative vision maintained in several corporate entities studied by the author); John M. Conley & William M. O'Barr, *The Culture of Capital: An Anthropological Investigation of Institutional Investment*, 70 N.C. L. REV. 823 (1992) (describing results of an anthropological study of normative culture of major pension funds).

277. Cover, *Nomos*, *supra* note 1, at 30.

Amendment as a boundary to justify and explain the end of the state law's domain and the beginning of the bar's *nomos*.<sup>278</sup> State doctrine also recognizes that the Sixth Amendment protects some space in which the bar's norms should operate without state interference. For example, in *Strickland v. Washington*,<sup>279</sup> the Court stated:

The Sixth Amendment . . . relies . . . on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. . . . The proper measure of attorney performance remains simply reasonableness under prevailing professional norms. . . .

. . . .

. . . Intensive scrutiny [by the court] and rigid [court imposed] requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.<sup>280</sup>

That state doctrine recognizes that the Sixth Amendment provides some boundary to its own law and some corresponding space for the bar's *nomos* is not surprising, nor does it mean that we are looking at a unitary legal vision shared by bar and state.<sup>281</sup> The shape and nature of the boundary between the state's normative space and the community's "differs depending upon which side of the wall our narratives place us on."<sup>282</sup> Thus, for the state, whatever boundary the Sixth Amendment creates is limited by the state's understanding of the contours of that Amendment—for example, that it applies only to criminal proceedings<sup>283</sup> and does not apply to grand jury investigations.<sup>284</sup> In the bar's *nomos*, the amendment's sweep and the boundary it creates against the imposi-

278. See *supra* text accompanying note 262 (quoting final paragraph of the Zenger tale as told in the NACDL Amicus Brief in *Caplin & Drysdale*).

279. 466 U.S. 668 (1983).

280. *Id.* at 688-90 (citations omitted).

281. Professor Cover explains:

The community must mark off its *nomos* by a normative boundary from the realm of civil coercion, just as the wielders of state power must establish their boundary with a . . . community's resistance and autonomy. Each group must accommodate in its own normative world the objective reality of the other. There may or may not be synchronization or convergence in their respective understandings about the normative boundary and what it implies.

Cover, *Nomos*, *supra* note 1, at 28-29.

282. *Id.* at 31.

283. See CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE* § 31.02, at 764-67 (2d ed. 1986).

284. *Id.* § 23.05(b), at 523-24.

tion of state norms are much broader.<sup>285</sup> The bar's interpretation can differ markedly from the state's because for the bar the boundary and the precept it is using to represent the boundary, here the Sixth Amendment, take their shape not from state law but from the bar's narratives, which create, justify and maintain the boundary.

Of course, the bar and its members are obviously neither completely blind to nor unaffected by what they might call, to emphasize its contingent status, *current* state doctrine. Where the state is least likely to see the boundary in the Sixth Amendment, the bar may use some other precept—the Fifth Amendment,<sup>286</sup> the First Amendment,<sup>287</sup> the attorney-client privilege<sup>288</sup> or the ethics rules<sup>289</sup>—to support its claim to *nomie* autonomy.<sup>290</sup> Like any community with its own vision of law living within the shadow of the state, the bar is deeply interested in convincing the state (and overlapping normative communities) to accept the boundary as the bar envisions it. Therefore, it chooses its boundary rule with

285. See, e.g., NACDL Brief in *Fischetti*, *supra* note 149, at 25-39 (arguing that the Sixth Amendment applies whenever a client retains a lawyer); Freeman, *supra* note 49, at 1795 (arguing that the Sixth Amendment boundary applies in considering legitimacy of state interference with lawyers in civil and counseling situations). For the bar, state doctrine notwithstanding, the Sixth Amendment boundary prevents the application of fee forfeiture statutes to attorneys' fees. See, e.g., NACDL Amicus Brief in *Caplin & Drysdale*, *supra* note 262, at 57; Brief Amicus Curiae of the American Bar Assoc. at 8-10, *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989) (No. 87-1729) [hereinafter ABA Amicus Brief in *Caplin & Drysdale*]; Paul B. Johnson, *American Bar Association Criminal Justice Section Report to the A.B.A. House of Delegates*, in ANNUAL MEETING REPORTS WITH RECOMMENDATIONS TO THE HOUSE OF DELEGATES 3-5 (1986) (reported in Item No. 125A). It prevents the IRS from requiring lawyers to submit the names of their clients. See, e.g., NACDL Brief in *Fischetti*, *supra* note 149, at 25-39. It may even prevent the SEC from prosecuting or otherwise disciplining lawyers who do not disclose their clients' fraudulent schemes. See generally Freeman, *supra* note 49 (discussing Sixth Amendment problems with SEC disclosure requirements).

286. See, e.g., ABA Amicus Brief in *Caplin & Drysdale*, *supra* note 285, at 11-12; NACDL Brief in *Fischetti*, *supra* note 149, at 34-39.

287. See, e.g., NACDL Amicus Brief in *Caplin & Drysdale*, *supra* note 262, at 49-50; Guild Amicus Brief in *Konigsberg*, *supra* note 263, at 13-14 & n.15; Randall, *supra* note 68, at 317; William L. Ransom, *The Organized Bar Must Remain Independent*, 10 CAL. ST. B.J. 315, 315 (1935); T.P. Wittschen, *Letter to W.C. Jacobsen*, 11 CAL. ST. B.J. 27, 30-32 (1936).

288. See, e.g., ABCNY Brief in *Fischetti*, *supra* note 70, at 2-15.

289. See, e.g., NACDL Brief in *Fischetti*, *supra* note 149, at 40-46; ethics opinions cited *supra* notes 128, 133.

290. Professor Cover writes:

The principles that establish the nomian autonomy of a community must, of course, resonate within the community itself and within its sacred stories. But it is a great advantage to the community to have such principles resonate with the sacred stories of other communities that establish overlapping or conflicting normative worlds. Neither religious churches . . . nor utopian communities . . . nor cadres of judges . . . can ever manage a total break from other groups with other understandings of law.

Cover, *Nomos*, *supra* note 1, at 33.

an eye to state doctrine, particularly when arguing to the state. This does not mean that the bar's understanding of the boundary is disjointed, externally determined or a matter of mere convenience.<sup>291</sup> For on the bar's side of the wall the boundary inheres in, and is rendered relatively stable by, narrative—not constitutional precept or other state law.

For the bar, the moral of its narratives is duty to client first.<sup>292</sup> The precept that above all represents this moral is the duty to keep client confidences—the bar's constitutional norm.<sup>293</sup> This is the key to understanding why confidentiality is a constitutional norm for the bar. Confidentiality presupposes and implements the duty of loyalty to one's client—the moral of the bar's sacred tales. Confidentiality aids in creating a mini-community between lawyer and client—an island of immunity in which the client is sovereign and the lawyer is, so to speak, grand vizier.<sup>294</sup> The maintenance of such islands can be seen as one of the guiding purposes of the *nomos*, and a strong barrier of confidentiality is the *sine qua non* of such a world. Confidentiality is the bar's constitutional norm because, notwithstanding the bar's use of other precepts to reinforce (and convince the state to accept) the boundary between the bar (and the islands it is dedicated to protecting) and the state, it is *the* barrier from the bar's side of the wall.

Various provisions of state law, particularly the Sixth Amendment and the attorney-client privilege, reflect the norm of confidentiality and provide a means of arguing to the state that it is obligated to honor the boundary, to recognize the bar's right to *nomie* autonomy. But from the perspective of the group, the *nomos* exists with or without state recognition—that is what it means to claim the right to one's own law.

The third thing to notice about the bar's stories is that the central theme of fearless advocate versus government oppression generates a preferred hierarchy of norms. The Zenger story celebrates ethical obligation over state law and, among ethical obligations, devotion to client over obedience to law or court order—precisely the hierarchy we found exists in the bar's *nomos*. It also dictates a privileged position and a generous reading of state precepts that embody the norm of devotion to client (and which implicitly acknowledge a sphere of *nomie* autonomy for the bar)

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291. "Even an accommodationist sectarian position—one that goes to great lengths to avoid confrontation or the imposition upon adherents of demands that will in practice conflict with those imposed by the state—establishes its own meaning for the norms to which it and its members conform." *Id.*

292. The Brougham quotation, *see infra* text accompanying note 296, makes this moral explicit. *See* Patterson, *supra* note 77, at 909-11 (discussing the effect of the Brougham story and moral on the bar's ethos).

293. *See supra* text accompanying notes 159-60.

294. I am indebted to Professor Hazard for this phrase.

like the Sixth Amendment and the attorney-client privilege. Another classic bar story, Lord Brougham's defense of Queen Caroline,<sup>295</sup> provides a summary statement of the bar's normative hierarchy, which is, not surprisingly, oft-quoted by members of the bar:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring on others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.<sup>296</sup>

The fourth aspect of the bar's *nomos* elaborated by the bar's narratives is the connection between the normative and material worlds: between a norm and circumstances in the world and between the norm and action in the world. Narratives infuse norms with "history and destiny."<sup>297</sup> By providing history and destiny, narratives connect the norms embedded in them to both the material world of the past and the material world of the realizable future—to what the world was when the norm was dormant (or nonexistent) and to what the world might be, if the norm fulfills its destiny.<sup>298</sup> In the NACDL Amicus Brief in *Caplin & Drysdale* the Zenger story performs this function for the Sixth Amendment.<sup>299</sup> It explains the world out of which the norm evolved, and thereby provides the norm with its purpose: to change that world.

Narratives connect the normative world not only to the material worlds of past and future, but also to the material world of the present by providing a "repertoire of moves—a lexicon of normative action"<sup>300</sup> that communicates which acts threaten the norm and which acts are licensed to protect it. Narratives thus imbue the actions of state officials and

295. See Hazard, *supra* note 257, at 1244; see also 2 PROCEEDINGS IN THE HOUSE OF LORDS, TRIAL OF QUEEN CAROLINE, *supra* note 266, at 5 (discussing origins of the story).

296. 2 PROCEEDINGS IN THE HOUSE OF LORDS, TRIAL OF QUEEN CAROLINE, *supra* note 266, at 5.

297. Cover, *Nomos*, *supra* note 1, at 5.

298. This is what Professor Cover meant when he wrote, "Law may be viewed as a system of tension or a bridge linking a concept of a reality to an imagined alternative—that is, as a connective between two states of affairs, both of which can be represented in their normative significance only through the devices of narrative." *Id.*

299. "The most famous trial of the colonial era, one that had a profound effect on the Framers [of the Sixth Amendment]—the trial of printer John Peter Zenger—stands as a vindication of the right to appear through chosen counsel rather than one appointed by the court." NACDL Amicus Brief in *Caplin & Drysdale*, *supra* note 262, at 17-18.

300. Cover, *Nomos*, *supra* note 1, at 9.

group members with normative significance by establishing "paradigms for behavior."<sup>301</sup>

In the Zenger tale, for example, the government is tyrannical, and its judges and prosecutors are partisan or corrupt. All state action is therefore, at best, suspect, and the story makes it clear that state action aimed at controlling counsel is not only specifically included in the list of suspect activity; it is especially suspect. State laws may be conceived and employed as instruments of oppression. Such unjust laws may therefore be vigorously opposed, and a jury—and perhaps the people in general as represented by Zenger—may specifically be encouraged to disobey them. Court orders are unfair—excessive and unprecedented. Faced with unjust court orders, lawyers may disobey. The state is dangerous, and all its power is arrayed against the client Zenger, a victim of oppression.<sup>302</sup> Apparently, once in the clutches of the law, the client is capable of no further action and must depend on his lawyers for redemption.<sup>303</sup> The lawyers are clever, noble and brave.<sup>304</sup> Given the respective characters of

301. *Id.*

302. While the imperiled situation of the client is a constant in bar stories, the worthiness of the client or the cause is not. Some stories give no information by which to judge the client's cause. For example, we are given little information on which to judge Queen Caroline or her cause in the standard version of that story. See Hazard, *supra* note 257, at 1244, for a classic description of the case. More important, in other sacred stories the client himself is the oppressor. For example, consider the story of John Adams's defense of the British soldiers charged with murder in the Boston Massacre. See Morris L. Ernst & Alan O. Schwartz, *The Right to Counsel and the "Unpopular Cause"*, 20 U. PITT. L. REV. 727, 728 (1959); see also Lawry, *supra* note 77, at 362-63 (recounting the Adams story and the story of lawyer David Goldberger's defense of the Nazis who wished to march in Nazi regalia through Skokie, Illinois, a town with a large population of concentration camp survivors). Read together, these stories communicate that the norms and hierarchy of norms expressed by the stories are valid without regard to the particular client or cause.

303. The portrait of the client as vulnerable and passive is common in bar narratives. The client in these tales is often a mere shadow of a character. To the degree the tales include client action at all, that action takes place off-stage, so to speak, and is ancillary to the main drama. This feature of the bar's narratives celebrates the lawyer's authority to decide and act *as the lawyer sees fit* and, correspondingly, minimizes the client's role as participant in the representation. These are not tales that celebrate the norms of consultation with the client or client involvement in decisionmaking. Many commentators have criticized lawyers for treating clients just as these narratives suggest. See, e.g., Derrick A. Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 482-93 (1976); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 30, 52-75 (a brilliant contribution to the literature); Wasserstrom, *supra* note 24, at 1. I know, however, of no one who has connected this attitude with the bar's central stories.

304. Notice that even the lawyer Chambers, "a Governor's man," is "competent," if not as clever as he should be. More significant, even he is relatively independent of the state—at least compared to the judge. Chambers apparently cooperates with Hamilton to the extent of staying on the case and making an opening statement, however mild compared to Hamilton's. See *supra* text accompanying note 262.

the state, the client and the lawyers, and the nature of the state's instruments and institutions, the lawyer's actions are justified and heroic. In this tale the lawyers' dedication to the *nomos* celebrated by the story is expressed by challenging the judge's authority, disobeying court orders, and appealing to the jury to ignore the law and acquit. In the Brougham story, dedication to the *nomos* justifies, according to the moral, bringing "destruction" on others and "involv[ing one's] country in confusion."<sup>305</sup>

Other tales, which emphasize what I called earlier the second creation motif (the people pose the real threat to the state), suggest another paradigm: the lawyer as instrument of reconciliation, the lawyer as purveyor of the state's *nomos*. The remote and impersonal state can perpetuate its *nomos* only through force or the threat of force. The lawyer, on the other hand, in her mini-community with the client can bring the state's *nomos* to the client personally using dialogue instead of violence to further the state's aims.<sup>306</sup>

These stories and the paradigms embedded in them are used to interpret the actions of the state and to justify the bar's responses in modern tales of struggle—struggles outside the criminal context, struggles without obvious political import, and struggles in which the defendant is neither poor, nor helpless, nor otherwise obviously vulnerable to the power of the state. For example, it was through these stories and paradigms that the securities bar understood and explained the importance of resisting the SEC's efforts to require lawyers to reveal securities frauds committed by their clients in the course of the representation.<sup>307</sup>

305. As Professor Hazard recently pointed out, it also licenses more particular action: obtaining an advantage in a civil case by threatening criminal prosecution. Hazard, *supra* note 257, at 1244. This tells us something about the status of the ethics rule that prohibits such threats. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-105 (1981). This rule was dropped from the Model Rules, which confirms its low status within the profession.

306. "Crooked lawyers," i.e. those who use the mini-community to encourage actively the client's violations of state law or who join with the client in performing blatantly illegal acts under state and bar law, are outside the paradigm. They threaten the bar's *nomos* autonomy by undercutting the reconciliation role promised by the second creation motif. Thus they may be ostracized and hated by the rest of the profession for threatening the *nomos*.

The reconciliation paradigm is, however, not as powerful in the most common versions of the bar's sacred tales as the paradigm of lawyer as champion. It nonetheless can be found. See *supra* notes 267-71 and accompanying text. It is thus available for those who seek to re-form the *nomos*. See Gordon, *supra* note 15, at 9; Hazard, *supra* note 257, at 1277-80.

307. On the corruption or partisanship of the lawyers for the SEC:

Of course, the government officials will say that they are not like George III's minions, that they are much nicer fellows. This may very well be . . . , although I cannot help noting the fact that the opening shot in this attack on the bar—the complaint in the *National Student Marketing* case—was signed by a General Counsel of the SEC who was later forced to resign in the Watergate scandal.

Given the fact that our government officials do not seek to rule us from overseas



Without narratives precepts lack meaning, direction and a sense of immediacy. Without narratives we do not know when our law is threatened or what it demands we do in response. The narratives give meaning, purpose and direction not merely to precepts but to the group itself. They bring the bar's *nomos* to life and entrust it to the group, which the tales themselves define.

## VII. COMMITMENT

Because the *nomos* is but the process of human action stretched between vision and reality, a legal interpretation cannot be valid if no one is prepared to live by it.<sup>308</sup>

We call the state's normative vision "law" because we know that the state *means* it. It is committed to its interpretation. It is prepared to act, using all the resources of violence at its disposal, if necessary, to enforce its interpretations.<sup>309</sup> Earlier, to justify my use of the word "law" to describe the profession's normative vision, I argued that the profession *means* it too, that it too is committed to its interpretations.<sup>310</sup> If, however, the profession's law diverges from that of the state, how can the profession maintain its commitment, given the state's imperfect monop-

but are quite close, King George's tax collectors and Commissioner Kurtz [of the SEC] have the same kind of powers . . . .

Freeman, *supra* note 49, at 1797. The *National Student Marketing* case is discussed *infra* text accompanying notes 314-43.

On the courts as "lieutenants" of the executive:

[E]xperience has shown that . . . courts with relatively little securities litigation tend to adopt rules of decision which more closely reflect the SEC viewpoint than [courts] where both the bench and bar have developed the sophistication . . . to match that of the Commission. Consequently, the SEC can establish a favorable precedent in a court receptive to its views in order to hold that precedent over the heads of lawyers elsewhere.

Lipman, *supra* note 200, at 475 (footnote omitted).

On returning to the world as it existed before the bar's norms emerged:

[C]onsider carefully the overall policy of the [Kutak proposals,] which is to place the "interests of the justice system in a position of primacy over the interests of the client when the two interests conflict."

Is this policy so different from that of William The Conqueror, or Henry II, who insisted that those who would be "attorneys" must be more loyal to the King than to the client? And that they must be prepared to sacrifice the interests of those seeking their assistance to the interests of the King?

The securities bar should ask itself if progress in the justice system can be achieved by returning to eleventh century England.

Pickholz, *supra* note 49, at 1853 (quoting Harold C. Petrowitz, *Some Thoughts About Current Problems in Legal Ethics and Professional Responsibility*, 1979 DUKE L.J. 1275, 1289).

308. Cover, *Nomos*, *supra* note 1, at 44 (footnote omitted).

309. See Cover, *Violence*, *supra* note 1, at 1607-08.

310. See *supra* text accompanying notes 76-81.

oly over violence?<sup>311</sup> The answer lies in understanding that commitment is not an all-or-nothing proposition for either the state or the community.<sup>312</sup> “[M]ost communities will avoid outright conflict with a judge’s interpretations, at least when he will likely back them with violence.”<sup>313</sup> But, as we shall see, judges are particularly unlikely to assert their interpretive power or back their interpretations with violence in cases in which their understanding of law diverges from the bar’s. The state’s commitment is weak. On the other hand, the bar’s commitment is relatively strong. Built as it is on a central narrative that predicts just such a crisis between state demands and professional demands, the bar’s law is rich in norms and narratives of resistance. We shall see that the bar’s law is fairly sophisticated in elaborating what is allowed and required of lawyers caught in this basic dilemma.

#### A. *The Weakness of the State’s Commitment*

In cases involving the law governing lawyers, the courts show a weak commitment to state law—to the maintenance of a state *nomos*—in two basic ways. First, they are reluctant to create legal meaning and as a consequence create little. Second, they show little inclination to back with violence the legal meaning they do create. Consider the court’s decision in *SEC v. National Student Marketing Corp.*<sup>314</sup>

In 1972, the SEC asked the district court to hold that several lawyers and their law firms had violated the securities laws by failing to stop their clients from closing a merger deal that the lawyers discovered had been approved by the shareholders on the basis of materially misleading documents.<sup>315</sup> The SEC asked the court to hold that under the securities law these lawyers should have: (1) insisted that their clients postpone the deal, revise the documents, and resubmit them to the shareholders;

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311. To appreciate the importance of the question posed in the text, consider the following quotation:

Certain efforts to [maintain a separate *nomos*] have a strange, almost doomed character. The state’s claims over legal meaning are, at bottom, so closely tied to the state’s imperfect monopoly over the domain of violence that the claim of a community to an autonomous meaning must be linked to the community’s willingness to live out its meaning in defiance. Outright defiance, guerrilla warfare, and terrorism are, of course, the most direct responses. They are responses, however, that may—as in the United States—be unjustifiable and doomed to failure.

Cover, *Nomos*, *supra* note 1, at 52.

312. “Some interpretations are writ in blood and run with a warranty of blood as part of their validating force. Other interpretations carry more conventional limits to what will be hazarded on their behalf.” *Id.* at 46.

313. *Id.* at 53.

314. 457 F. Supp. 682 (D.D.C. 1978).

315. *National Student Marketing* Complaint, *supra* note 144, at 91,913.

(2) tried to thwart the closing by refusing to issue their opinion letters; and (3) resigned and disclosed the fraud to the shareholders or the SEC, if the clients had closed the deal against the lawyers' advice and despite their efforts to thwart it.<sup>316</sup> The narrative the SEC told in its complaint implied a precept: a lawyer who knows the client is committing securities fraud must stop the client, and failing that, must disclose.<sup>317</sup> The relief requested by the SEC—the commitment it asked the court to demonstrate to the interpretation of law it offered—was a permanent injunction.<sup>318</sup> The SEC asked the court to enjoin permanently these lawyers from violating the securities laws.

The SEC put forth, in other words, a complete vision of law—norm, narrative and commitment—that was at odds with the bar's *nomos*.<sup>319</sup> The court's decision showed commitment neither to the law it articulated nor to the court's role as interpreter of law.

According to state doctrine, the judiciary's interpretations of state law are authoritative.<sup>320</sup> To demonstrate commitment to its role as au-

316. *Id.*

317. Notice the close connection between this precept and the language of canon 41 and DR 7-102(B)(1) before its amendment. See CANONS OF PROFESSIONAL ETHICS Canon 41 (1908); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1) (1969).

318. *National Student Marketing Complaint*, *supra* note 144, at 91,913.

319. That the SEC's theory of required disclosure violated the bar's understanding of confidentiality should be obvious from all that has preceded. The complaint also threatened the bar's *nomos* autonomy because it claimed that state law should elaborate and limit the most basic of a lawyer's duties, the duty to keep confidences. The bar reacted to defend its normative vision. While the case was pending, the ABA amended DR 7-102(B)(1) and issued Opinion 341 to clarify its law on confidentiality and client fraud. In addition, the ABA House of Delegates addressed the questions at issue in *National Student Marketing* more directly by adopting a policy upon the recommendation of the ABA's Section of Corporation, Banking, and Business Law. See ABA Policy on Advising on Securities Matters, *supra* note 150, at 1085-86. The bar's position was stated succinctly in the Section's report to the House:

We do not believe that the policy of disclosure as embodied in the SEC laws warrants an exception to the basic confidentiality of the attorney-client relationship. Such exceptions have to date been carefully reserved by the [Model Code] for far more critical and limited situations. The statutes administered by the SEC give it no power to require disclosure by lawyers concerning their clients beyond what is provided in the [Model Code].

*American Bar Association, Report to the House of Delegates: Section of Corporation, Banking and Business Law Recommendation*, 31 BUS. LAW. 544, 547 (1975). For another example of organized bar reaction to this case, see *ABCNY Report on Securities Transactions*, *supra* note 144.

320. The claim that judicial interpretations of state laws trump private interpretations is implicit in all court decisions. An extreme instance of this claim is made in *Walker v. Birmingham*, 388 U.S. 307 (1967), which asserts that a judicial interpretation of the Constitution has the power to trump a private interpretation even if a more authoritative judicial interpretation, i.e., one made by a higher court, later states that the initial judicial interpretation was wrong. *Id.* at 320-21. The courts justify the privileged status of their interpretations by appealing to the texts of jurisdiction. "The most basic of the texts of jurisdiction . . . are the

thoritative interpreter, the court need not rule in one way instead of another.<sup>321</sup> What it must do, however, is affirm its power to decide and affirm the power of state law to control the decision. The court may affirm its power to decide by holding that it lacks the jurisdiction to decide,<sup>322</sup> and it may affirm the power of state law to control the decision by holding that state law cannot control the decision.<sup>323</sup> But, if it makes

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apologies for the state itself and for its violence—the ideology of social contract or the rationalizations of the welfare state.” Cover, *Nomos*, *supra* note 1, at 54. The connection between the authoritative status of state interpretations and the state’s existence is explicit in this passage from Hobbes:

“And therefore the Interpretation of all Lawes, dependeth on the Authority Sovereign; and the Interpreters can be none but those, which the Sovereign, (to whom only the Subject oweth obedience) shall appoint. For else, by the craft of an Interpreter, the Law may be made to beare a sense, contrary to that of the Sovereign; by which means the Interpreter becomes the Legislator.”

*Id.* at 54 n.147 (quoting THOMAS HOBBS, *LEVIATHAN* 211-12 (W.G. Pogson Smith ed., 1909) (1651)).

State doctrine in this country also provides that judicial interpretations trump interpretations of other state institutions or actors, although the various texts of jurisdiction that elaborate this general principle require more or less deference to the interpretations of other state institutions or actors depending on the law being articulated, the sphere of state action involved, and the agents or agencies that are offering their own interpretation. *See, e.g.*, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 866 (1984) (stating that courts should defer to an administrative agency’s reasonable interpretation of a statutory term); *Baker v. Carr*, 369 U.S. 186, 209 (1962) (explaining that constitutional interpretations of other branches will not be reviewed by the courts when they involve “political questions”).

321. In other words, in *National Student Marketing* the court could have shown commitment to this role by exonerating the lawyers or condemning them—by deciding in accordance with the bar’s law or against it. “Among warring sects [here the bar and the SEC], each of which wraps itself in the mantle of a law of its own, [judges] assert a regulative function that permits a life of law rather than violence.” Cover, *Nomos*, *supra* note 1, at 53. They do this by asserting that one vision is law and the other not, attempting to kill off the version of law they exile. “Theirs is the jurispathic office.” *Id.* That judges characteristically kill off law rather than create it is one of the more important insights of Professor Cover’s work.

322. Professor Cover called this phenomenon the “irony of jurisdiction.” *Id.* at 8. “*Marbury* is a particularly powerful example of a general phenomenon. Every denial of jurisdiction . . . is an assertion of the power to *determine* jurisdiction and thus to constitute a norm.” *Id.* at 8 n.23 (emphasis added); *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

Every denial of jurisdiction does not, however, assert the same amount of power as every other denial of jurisdiction. *Marbury*’s deep irony places it at one end of a continuum: the Court’s holding that it lacked the power to decide the case is all but eclipsed by the power it asserted. While other cases denying the court’s jurisdiction may express considerable court power, the norm may be closer to the other end of the spectrum, where the denial of jurisdiction expresses a power so diminutive that the irony is more pretense than substance. *See LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW* § 4-7, at 231 (2d ed. 1988) (“[T]he reluctance of most courts to embroil themselves in the resolution of ‘political disputes’ between the other branches of government in the United States Indochina intervention [the Vietnam War], have combined to leave meager elucidation in the cases.” (footnote omitted)).

323. We can think of this as the irony of boundaries. To paraphrase Professor Cover: Every assertion by a court that the state’s law includes a boundary rule is an assertion of the power of state law to determine the boundaries and thus to constitute a norm, i.e., that state

either of these choices, it must—if it is to show commitment to its role—articulate why those decisions are correct as a matter of state law, i.e., it must identify some boundary rule for the court's power or the state's law that is itself a matter of state law.<sup>324</sup> In *National Student Marketing*, the court showed a weak commitment to its own power to decide and a weak commitment to the power of state law to control the decision.

The court agreed with the SEC that the lawyers had violated the securities laws by knowingly and substantially assisting their clients to commit fraud.<sup>325</sup> It held that it is wrong under state law for lawyers who are assisting their clients in securities transactions to keep silent when they discover that their clients are committing fraud in those matters.<sup>326</sup> It held that silence or inaction in such a situation is wrong under state law because lawyers have a duty "to their corporate client[s] . . . to take steps to ensure that the information [will] be disclosed to the shareholders."<sup>327</sup>

Having articulated these precepts, however, the court failed to connect them to the lawyers' actions in this case: "[I]t is unnecessary to determine the precise extent of their obligations here, since . . . they took no steps whatsoever to delay the closing . . . . But, at the very least, they were required to speak out [to their clients] at the closing . . . ."<sup>328</sup> In failing to provide a narrative, in failing to connect norms to the actions of the past, the court showed a weak commitment to its role as creator of legal meaning. The court refused to explain what parts of the world as it exists (represented in this case by the actions of the lawyers) are to be changed by its norms. It thus created little law to project into the future. Was it wrong under state law that the lawyers failed to resign? That they failed to inform officers of the corporate client not present at the meeting? That they failed to inform shareholders or the SEC? Does the law demand that lawyers in the future do any of these things?<sup>329</sup> With the

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law is supreme to the extent it says it is. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 236 (1972) (holding that state law on compulsory education must accommodate the requirements of the Amish religion to be valid under the First Amendment).

324. For example, in *Yoder* the Court did this by asserting the power of, and elaborating on the meaning of, the First Amendment. *Id.* at 219-29.

325. *SEC v. National Student Mktg. Corp.*, 457 F. Supp. 682, 715 (D.D.C. 1978) ("Thus, the Court finds that the attorney defendants aided and abetted the violation of § 10(b), Rule 10b-5, and § 17(a) through their participation in the closing of the merger.").

326. *Id.* at 713.

327. *Id.*

328. *Id.*

329. The answer to these questions will, of course, help determine how successful a lawyer will be in delaying the closing by speaking to the clients. Is the lawyer limited to urging the client to comply with state law? May the bar limit what the lawyer may do after this point and thus what she may legitimately threaten to do in seeking to delay the closing?

words "at the very least," the court admits that the narrative is incomplete, that state law has more meaning, but it does not assert its power to control that meaning. Instead, it invites the bar to provide that meaning: "The very initiation of this action . . . has provided a necessary and worthwhile impetus for the profession's recognition and assessment of its responsibilities in this area."<sup>330</sup>

The court indeed appeared to concede its role as authoritative interpreter simultaneously to the bar and to the SEC. It speaks approvingly of the prospect of bar law changing in response to the SEC's initiation of proceedings, in response to the SEC's threat to invoke state violence in the name of its interpretation. But the court refused to approve the SEC's interpretation. By telling a community that it should reconsider its behavior and beliefs in light of state power whether or not the use of that power is legitimate, a court abandons its commitment to a state built on the meaning of shared principles and helps constitute a state built instead on obedience to authority. When I wrote above that to show commitment to its role the court must affirm the power of state law to control the decision, I did not mean the power of that law apart from its legitimacy as interpretation. Only in a police state could such an affirmation by a court demonstrate a strong commitment to its role. This is not to say that courts in our system never side with power apart from its interpretive legitimacy.<sup>331</sup> It is to say that whenever a court credits state power apart from its interpretive legitimacy, the court shows a weak commitment to its institutional role.<sup>332</sup>

To the extent the court in *National Student Marketing* conceded its role as authoritative interpreter to the bar as opposed to the SEC, the court again showed a weak commitment to its institutional role and to state law. The concession itself is not what makes the court's move weak; it is the ambiguous nature of the concession. A court can make such a concession and still demonstrate a strong commitment to its role and to state law by articulating a boundary rule of state law that the court interprets as limiting the scope of state law and leaving a corresponding realm of law to another group. Because the boundary itself is state law and the court is elaborating its nature and shape, a strong com-

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330. *National Student Mktg.*, 457 F. Supp. at 714.

331. Professor Cover provided a powerful indictment of court decisions that accord deference to the violent acts of the state on the ground that they are violent acts of the state. Cover, *Nomos*, *supra* note 1, at 56-58.

332. The decision in *National Student Marketing* has left the bar in just the position predicted by the analysis in the text, making law in the shadow of the SEC's power. For a detailed discussion of how the state's failure of commitment leaves the bar in just such a position, see Steven C. Krane, *The Attorney Unshackled: SEC Rule 2(e) Violates Clients' Sixth Amendment Right to Counsel*, 57 NOTRE DAME L. REV. 50 (1981).

mitment is demonstrated both to state law and the court's role. Consider, for example, the strong commitment to both the First Amendment and the court's own power demonstrated in cases affirming the principle of religious freedom against state interference.<sup>333</sup>

In *National Student Marketing*, however, the court's allusions to a state boundary rule are not a demonstration of strong commitment. The court explained its failure to create law by stating that further explication would be "unnecessary [to resolve the case before it]"<sup>334</sup> and that it "must narrow its focus to the present defendants and the charges against them."<sup>335</sup> These statements are allusions to the rule against rendering advisory opinions.<sup>336</sup> By definition the advisory opinion rule creates at most a temporary boundary. Its use affirms neither the limits of state law nor the group's *nomie* space. Assuming the advisory opinion rule may ever serve as an affirmation of the court's power,<sup>337</sup> it did not serve that

333. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). In *Yoder* the Supreme Court held that the First and Fourteenth Amendments prevented a state from compelling Amish parents to send their children to high school. In so ruling the court elaborated on the nature and scope of the First Amendment as a boundary rule that prevented state law from interfering with religious law. *Id.* at 215, 220-26. By interpreting the First Amendment the Court showed commitment to its role as elaborator of the state's law. By invalidating the Wisconsin trial court's conviction of the Amish parents who had not sent their children to high school, the Court showed commitment to its power to decide whose law should win when a conflict emerges between state law (Wisconsin's compulsory education law) and the group's law (the Amish religion's principles against secondary education). *Id.* at 234.

334. *National Student Mktg.*, 457 F. Supp. at 713.

335. *Id.* at 714. Various persons charged in the SEC's initial complaint settled with the SEC before the court's decision and thus were no longer before the court. *Id.* at 687 & n.2.

336. The principle against rendering advisory opinions is grounded in the "case or controversy" requirement of Article III of the United States Constitution and in the general principle of separation of powers implicit in the Constitution. See 28 U.S.C. § 2201 (1988); FED. R. CIV. P. 57. Moreover, in addition to the constitutional and statutory sources of the rule in both the federal and state systems, it is understood as a boundary rule implicit in the common-law system. See, e.g., EUGENE WAMBAUGH, *THE STUDY OF CASES* 9 (2d ed. Boston, Little Brown 1894) ("[T]he court's duty is to consider the whole case to the extent, and only to the extent, requisite in order to decide what . . . to do.").

According to traditional theory, the rule serves to avoid the "sheer . . . dispersion of thought" that would occur if legal questions were considered in the abstract, minimizes "the play of personal convictions or preferences" because judges can only decide questions put to them, and promotes the judiciary's role as "organs of the sober second thought" by limiting it to judging actions already taken. All of this, according to the theory, helps ensure social acceptance of the courts' decisions and their authority to decide. HENRY M. HART & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 67 (2d ed. 1973); see ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 113-17 (2d ed. 1986).

337. The traditional justifications for the rule emphasize the court's weaknesses. This is not in itself a bar, however, to using the rule to express strength. Law is capable of expressing irony. *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), may serve as an example of the use of the advisory opinion rule to express court power. In that case a statute provided that the federal circuit courts were to certify to the Secretary of War which persons were eligible to receive pensions and the amount of the pension they were to receive. Most of the justices, sitting on

function here. The case was before the court to determine whether an injunction was warranted against the defendants. The test for that relief articulated by the court was whether the defendants had acted badly prior to engaging in the conduct that was before the court and *how bad their conduct was in the case before the court*.<sup>338</sup> What exactly the lawyers did wrong and the degree to which it was wrong were thus issues directly before the court. The court had to reach for the advisory opinion rule to avoid discussing these issues. This stretch demonstrates the court's weak commitment. The court used the advisory opinion rule in a case where it did not naturally apply, as an excuse not to make law. Moreover, the advisory opinion rule assumes "an ironic cast"<sup>339</sup> in this case: the court's refusal to grant any relief against the defendants, a matter to which we turn next, renders the entire opinion no more than advice.

The court refused to enjoin the lawyers from further violations of the securities laws; it granted the SEC no relief against the defendants. By denying relief, the court showed a weak commitment to the little law it did create and to whatever more the securities laws might mean as applied to lawyers whose clients are engaged in fraud. It refused to back its interpretation with force, and more striking, it explained that force was unnecessary, in part because the defendants were lawyers. The court expressed its confidence that the defendants' "professional responsibilities as attorneys and officers of the court"<sup>340</sup> would lead them to honor the court's interpretation without force.<sup>341</sup> In other words, state law de-

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circuit, denied the statute's power to assign this function to the courts. Among the reasons given was that under the statute the judges' decisions would be advisory because they could be revised by the legislature or a member of the executive branch: "Such revision and controul [sic] we deemed radically inconsistent with the independence of that judicial power which is vested in the courts." *Id.* at 411.

For the most part, however, Justice Rutledge's opinion in *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549 (1947), provides a succinct summary of how courts use the advisory opinion rule. While defending the principle that the Court should decide only those constitutional questions "strictly necessary," he nonetheless stated: "[E]very application [of the advisory rule] has been an instance of reluctance, indeed of refusal, to undertake the most important and the most delicate of the Court's functions, notwithstanding conceded jurisdiction, until necessity compels it in the performance of constitutional duty." *Id.* at 569.

338. *National Student Mktg.*, 457 F. Supp. at 716.

339. Cover, *Nomos*, *supra* note 1, at 7. Professor Cover used this phrase to describe the thickness of legal meaning. In his example, it was the Due Process Clause's reference to "life" that had taken on an ironic cast both for opponents of the death penalty and opponents of abortion. *Id.* When a precept takes on an ironic cast for a community or for the society at large, those who perceive the irony will view the state's invocation of the precept with suspicion. *See id.*

340. *National Student Mktg.*, 457 F. Supp. at 716.

341. Subsequent events suggest how misguided the court's confidence was and how the court's weak commitment helps the bar maintain its divergent understanding of law:



pends on the bar's *nomos* for vindication.

The court thus implied that the bar's law is somehow stronger and more binding on group members than state law.<sup>342</sup> The power of the bar's law did not trouble the court because in the court's vision the paramount precept for lawyers must be (and therefore for the court is) the obligation to comply with state law. This understanding of the hierarchy of norms contained in the ethics rules is, however, a state understanding. In the bar's *nomos* the duty to comply with other law does not, as we have seen, trump all other norms. That the court ignored the bar's competing vision of law is not odd; to acknowledge it overtly would be too threatening, given how dependent courts and state law are on the bar. What *is* odd is that this court and others<sup>343</sup> continue to nurture a vision (the bar's vision) that is so threatening by demonstrating so little commitment to state law or the courts' own role.

The evidence of weak commitment found in *National Student Marketing* is common in cases involving the law governing lawyers. Another striking example is provided by the opinion in the Pennsylvania case *Commonwealth v. Stenhach*.<sup>344</sup> In *Stenhach* the conviction of two lawyers for concealing evidence and hindering prosecution was before an intermediate appellate court in Pennsylvania.<sup>345</sup> In the course of representing a client charged with murder, the lawyers had withheld from the state physical evidence that incriminated their client in the crime. The

According to the allegations contained in two lawsuits that Lord, Bissell [& Brook, the firm involved in *National Student Marketing*,] recently settled for twenty-four million dollars, shortly after the decision in *National Student Marketing*, the firm began aggressively representing National Mortgage Equity Corporation (NMEC), a controversial venture designed to capitalize on the newly emerging market in second mortgages. . . . [A]ccording to the deposition testimony of the firm's managing partner, the firm changed virtually none of its practices as a result of the SEC's prosecutions in *National Student Marketing*.

David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 801, 870-71 (1992) (citing Tim O'Brien, *Some Firms Never Learn: Lord, Bissell's Second Escape from Fraud Charges Cost \$24 Million—And It Could Happen Again*, AM. LAW., Oct. 1989, at 63, 64).

Professor Wilkins uses this example to counter bar arguments that lawyers will be unduly chilled by agency and other state regulations. I agree that *National Student Marketing* is unlikely to "chill" many lawyers, but I disagree that this shows that state regulation is unlikely to "chill" many lawyers. It shows, instead, that state regulation lacking significant commitment is unlikely to "chill" many lawyers.

342. The court not only cedes to the ethics rules the power to guarantee compliance with the securities law, but also assures the bar that the courts will accord great deference to the bar's interpretation of the securities laws: "Courts will not lightly overrule [the] attorney's determination" that state law has been fulfilled. *National Student Mktg.*, 457 F. Supp. at 713.

343. See *infra* notes 369-72.

344. 356 Pa. Super. 5, 514 A.2d 114 (1986), *appeal denied*, 517 Pa. 589, 534 A.2d 769 (1987).

345. *Id.* at 5, 514 A.2d at 114.

court said that under state law—the state’s ethics rules—the lawyers had done wrong,<sup>346</sup> and in theory could be punished by the state supreme court for such conduct.<sup>347</sup> On the other hand, the court held that the state could not prohibit the same conduct under its criminal laws because those laws were both vague and overbroad as applied to lawyers.<sup>348</sup> In other words, the court said the state must not use too much force against lawyers to back its norms.

Like the advisory opinion rule in *National Student Marketing*, the boundary rules used in *Stenhach* were stretched and laden with irony. In *Stenhach* the boundary rules that the court used to avoid applying state criminal laws to lawyers were the rules against vague and overbroad criminal laws.<sup>349</sup> The court stated that vague and overbroad statutes

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346. “We . . . reject appellants’ contention that their conduct was proper and that they had no duty to deliver the rifle stock to the prosecution until they were ordered to do so.” *Id.* at 24, 514 A.2d at 123.

347. “We note . . . that the courts have the power, outside the context of criminal sanctions, to regulate the conduct of attorneys practicing before them, and that the Pennsylvania Supreme Court [sitting in review of a bar Disciplinary Board decision, may deal] . . . with apparent attorney misconduct.” *Id.* at 31, 514 A.2d at 127. I say “in theory” because in a later proceeding the Pennsylvania Bar’s Disciplinary Board unanimously recommended that the lawyers not be disciplined. *Office of Disciplinary Counsel v. Stenhach*, No. 479, slip op. at 28 (Pa. Super. Ct. Disciplinary Bd. Aug. 8, 1989) (on file with author). Parts of the Disciplinary Board’s opinion strongly suggest that the appellate court’s interpretation of the ethics rules is wrong and that the lawyers acted in accordance with those rules. “By retaining the evidence, Respondents protected their client’s constitutional rights and by not tampering or destroying the evidence and keeping the evidence where it could be readily recovered upon lawful request, Respondents served their duty to the court.” *HAZARD & KONIAK, supra* note 144, at 52 (quoting *Stenhach*, slip op. at 25).

Other parts suggest that the interpretation might be right but that the facts of this particular case make a penalty inappropriate. The Disciplinary Board emphasized that in trying the *Stenhach* brothers’ client, the prosecution chose, after the *Stenhachs* turned over the evidence, not to introduce it against their client. “[T]he integrity of the legal system was maintained [in this case, and discipline is inappropriate] because there was no reason to believe the evidence was of importance to the resolution of a disputed fact or the successful prosecution of Respondent’s client.” *Id.* (quoting *Stenhach*, slip op. at 27). This last bit of reasoning seems particularly stretched when one considers that the Pennsylvania statutes on concealing evidence and hindering prosecution make the admissibility of the evidence irrelevant. *See* 18 PA. CONS. STAT. §§ 4910(1), 5105(a)(3) (1991).

Even though, according to the intermediate appellate court, these statutes do not apply to lawyers, they express the state’s general position that the legal system may be threatened by inadmissible evidence, not to mention evidence that is admissible but not admitted. The Disciplinary Board’s suggestion that the intermediate appellate court was wrong on the meaning of the ethics rules is further evidence of my point that the bar’s understanding of law is different from the state’s. The Supreme Court of Pennsylvania did not have an opportunity to review the Disciplinary Board’s determination because no appeal was taken from the Disciplinary Board’s decision. Telephone Interview with John M. Dinguss and Kenneth M. Argentieri, attorneys for the *Stenhach* brothers (Feb. 27, 1992).

348. *Stenhach*, 356 Pa. Super. at 26, 514 A.2d 124-25.

349. These boundary rules are grounded in state and federal constitutional precepts. The

“deny due process in two ways:” by failing to “give fair notice to people of ordinary intelligence that their contemplated activity may be unlawful” and by “inviting arbitrary and discriminatory enforcement.”<sup>350</sup> The rule against overbroad laws, however, is generally considered to be grounded not in due process concerns, as the *Stenhach* court asserted, but in the special need to protect free speech.<sup>351</sup>

The overbreadth rule runs counter to rules on standing and the rule against advisory opinions.<sup>352</sup> Traditional state doctrine explains that these normal rules of procedure give way to the overbreadth rule in cases involving speech because speech is an especially important and peculiarly vulnerable right.<sup>353</sup> In *Stenhach* the court used the overbreadth rule to suspend normal procedural constraints apparently because the defendants were criminal defense lawyers, who are “charged with the protection of [their clients’] fourth, fifth and sixth amendment rights.”<sup>354</sup> The court thus freed the rule from its traditional First Amendment moorings.

rule against vague laws is grounded in the twin due process concerns that fair notice of what is unlawful be given and that arbitrary enforcement of the laws be avoided. Constitutional rules prohibiting ex post facto laws also reflect those two concerns. See U.S. CONST. art. I, § 9, cl. 3. The rule against overbroad laws prevents state law from “chilling” the exercise of constitutional rights by striking down laws that arguably reach constitutionally protected activity. It is almost exclusively used to protect First Amendment rights, see, e.g., Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 860 (1970), although in theory it could be used to protect other constitutional rights.

350. *Stenhach*, 356 Pa. Super. at 26, 514 A.2d at 124-25.

351. See generally Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 859-63 (1990) (explaining that overbreadth is an exception to normal procedural rules generally reserved to First Amendment cases).

352. The overbreadth doctrine allows a party to challenge a law by arguing that the law as applied to someone else in some other context would be unconstitutional. Under the overbreadth doctrine it is irrelevant whether the law as applied in the case before the court is constitutional or not. The law is invalid if the court can imagine a situation in which it might infringe constitutional rights. By definition, then, the overbreadth doctrine runs counter to the rules on standing and the rules against advisory opinions. See generally *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) (explaining the exceptional nature of the overbreadth doctrine). But cf. Henry P. Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1 (arguing that the overbreadth doctrine, properly understood, involves first- and not third-party standing); Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277 (1984) (same).

353. See, e.g., *Broadrick*, 413 U.S. at 615 (explaining that the overbreadth rule is limited to laws that potentially infringe on constitutionally protected speech; moreover, when the law regulates conduct along with speech, “the overbreadth of a statute must not only be real, but substantial as well”); see also *Bates v. State Bar*, 433 U.S. 350, 379-81 (1977) (refusing to use the overbreadth rule in a case involving commercial speech—in fact, the commercial speech of lawyers).

354. *Stenhach*, 356 Pa. Super. at 27, 514 A.2d at 125. I say “apparently” because the court did not clearly separate the overbreadth concerns from the vagueness concerns. *Id.* Although the claims of vagueness and overbreadth are often raised together, in theory they are different: “[A] statute can be quite specific, i.e., not vague—and yet be overbroad.” GERALD GUNTHER, CONSTITUTIONAL LAW 1202 (12th ed. 1991).

This stretch might signify a strong commitment to the *nomie* autonomy of the bar, amounting to an assertion that criminal law must tread extremely lightly in trying to punish lawyers (at least criminal defense lawyers) for acts committed in the course of representing a client.<sup>355</sup> But the move here was ambiguous, and therefore weak, because the court never acknowledged the special power of the overbreadth rule and avoided explaining with any particularity what triggered it here.<sup>356</sup> We are thus left

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355. The argument that criminal laws not otherwise overbroad are overbroad when applied to lawyers has been put forth by bar organizations. See Amicus Brief for the Massachusetts Assoc. of Criminal Defense Lawyers and the National Network for the Right to Counsel at 21-22, *United States v. Cintolo*, 818 F.2d 980 (1st Cir. 1987) (No. 85-1615). *Cintolo* is discussed *infra* text accompanying notes 374-78.

356. The court gave only one concrete example of conduct that possibly comes within the terms of the statute and which the Constitution arguably protects, i.e., conduct that would render the statute overbroad. It is a lawyer's withholding of "a handwritten account of involvement in the crime." *Stenhach*, 356 Pa. Super. at 26, 514 A.2d at 125. The court, however, did not explain why withholding such material would be protected conduct. The lawyer might be privileged to withhold the handwritten account of the crime because the Supreme Court has held that the attorney-client privilege protects material given to the lawyer by a client when it would have been privileged under the Fifth Amendment had the client kept the material herself. *Fisher v. United States*, 425 U.S. 391, 404-05 (1976). The catch is that hardly any physical material in the hands of the client would be protected under the Court's current approach to the Fifth Amendment. See HAZARD & KONIAK, *supra* note 144, at 215-16. Thus, once one moves away from the "handwritten account of the crime" example, it is difficult to find examples of physical material protected by the attorney-client privilege.

The *Stenhach* court did not explain any of this or even assert any of it. It merely states that "no one would suggest the attorney should give [such evidence] to the prosecutor," asserting without explanation that "to do so would be an egregious violation of the attorney's duties to his client." *Stenhach*, 356 Pa. Super. at 27, 514 A.2d at 125. By failing to mention the privilege, the court avoided explaining why the laws at issue in *Stenhach* could not have been cured of any constitutional defect by limiting them to physical evidence not covered by the privilege. Is the privilege itself too vague? Too limited to protect constitutional rights? All this shows how ambiguous the court's cursory treatment of overbreadth was, how little legal meaning it created.

Contrast *Stenhach* to *Amusement Devices Ass'n v. Ohio*, 443 F. Supp. 1040 (S.D. Ohio 1977), in which a three-judge panel held that an Ohio criminal statute that prohibited furnishing legal services to a "criminal syndicate" for the purposes of maintaining it was unconstitutionally overbroad and vague. *Id.* at 1054. The court grounded its overbreadth analysis in the First Amendment's protection of the associational rights of "syndicate" members and its particular protection of the right of individuals and groups to be protected from government interference in the exercise of associational rights through access to counsel. *Id.* By connecting the overbreadth rule to the material world in this manner, the court demonstrated a stronger commitment to the *nomie* autonomy of the bar than the *Stenhach* court did, and rendered the rule a stronger boundary to state interference with the bar. Further, by explaining what triggers the overbreadth analysis, it provided some shape to the boundary rule—a shape that is a function of state law.

The Ohio court's discussion of vagueness also demonstrated a stronger commitment than the court in *Stenhach*. As it did with the overbreadth rule, the court in *Amusement Devices* turned the vagueness rule into a stronger boundary rule than it normally is by explaining why the due process concerns that underlie the rule are especially implicated in this case:

Limiting the availability of pre-accusatory legal services to persons engaged in such a

uncertain about the nature and shape of the boundary between lawyers and the criminal laws.<sup>357</sup>

While in theory overbreadth decisions might demonstrate a strong commitment, in practice they usually do not:

[The] attractiveness [of the overbreadth rule for the Court] may be . . . its relatively technical, tentative appearance. It strikes down the law at the behest of challenger *A* without saying much about the First Amendment dimensions of *A*'s behavior; it strikes down the law because of a possible application to third party *B* not before the Court, an application that is often only briefly discussed, rather than fully explored.<sup>358</sup>

Moreover, the rule against advisory opinions makes every decision that

regulated field can have a substantial and direct impact upon the accusatory and post-accusatory stages of a criminal investigation.

. . . We are convinced that it is fundamentally unfair for a state on the one hand to regulate with criminal sanctions certain modes of conduct, and on the other hand to enact a penal statute which, because of its breadth and its *lack of definition*, discourages the rendering of legal services to persons in the regulated field.

*Id.* at 1052-53 (emphasis added). The court thus connected the vagueness rule to the material world of the past and future; in doing so, it created legal meaning.

357. At the end of the decision in *Stenhach* the court noted "that other jurisdictions have enacted criminal statutes which . . . do not subject [criminal defense attorneys] to rules identical with those applicable to the public." *Stenhach*, 356 Pa. Super. at 31, 514 A.2d at 127. This remark suggests a preference by the court, but certainly does not demand one. It is interesting that the only jurisdiction the court cited as exempting lawyers in this way is Texas, which to my knowledge is the only jurisdiction to have such a rule. *See id.* (citing *Clark v. State*, 159 Tex. Crim. 187, 261 S.W.2d 339, *cert. denied*, 346 U.S. 855 (1953)).

Again, contrast *Amusement Devices* with *Stenhach*: "We do not decide whether the General Assembly of Ohio can regulate the practice of law with penal enactments. Nor do we hold that all purely legal services are constitutionally protected; it may be that legislation drafted with more precision could reach such activities without exceeding constitutional bounds." *Amusement Devices*, 443 F. Supp. at 1054. This also leaves uncertain the barrier between criminal law and the bar, but its language, consistent with the rest of that decision, suggests a stronger commitment to the bar's *nomie* autonomy than that demonstrated in *Stenhach*. Moreover, its language suggests a stronger commitment to the court's role in defining the boundary between the state and the group.

358. GUNTHER, *supra* note 354, at 1193. *See generally* Fallon, *supra* note 351, at 853 (arguing that the "overbreadth doctrine is frequently a far weaker potion than either its champions or its critics have appreciated").

*Amusement Devices* is a good example of the potential for, and limits of, demonstrating commitment in an overbreadth decision. The court demonstrates strong commitment not only in the ways discussed above, *see supra* note 356, but also in its refusal, relying on *Younger v. Harris*, 401 U.S. 37 (1971), to abstain from deciding the case. *Amusement Devices*, 443 F. Supp. at 1053; *cf. Zalman v. Armstrong*, 802 F.2d 199 (6th Cir. 1986) (using *Younger* to refuse to decide a challenge to a similar Kentucky statute). Nonetheless, at the end of *Amusement Devices*, one is still uncertain what conduct is constitutionally protected and what may be reached by the state through its criminal laws. *See supra* note 357 (quoting from *Amusement Devices*).

rests on overbreadth grounds ironic, i.e., subject to the charge that *it* is overbroad.

The second of the boundary rules in *Stenhach*, the vagueness rule, may also signify a weak commitment to the creation of legal meaning. It is "most frequently employed as an implement for curbing legislative invasion of constitutional rights other than that of fair notice."<sup>359</sup> By resting on general due process concerns about fair notice, the courts can avoid elaborating on the substantive dimensions of the rights involved.<sup>360</sup> They do not commit themselves to any particular connection between the normative and material worlds. They create little law.

In *Stenhach* the use of the vagueness rule is particularly ironic.<sup>361</sup> The first half of the decision is devoted to explaining what the second half of the decision contends is too vague to be explained—i.e., what a lawyer should do with incriminating physical evidence.<sup>362</sup> It is also ironic that the court cited the "distressing paucity of dispositive precedent"<sup>363</sup> as one reason for holding that the law was vague, given that the court relies (in the first half of the case) on that precedent to state what a lawyer should do and given the ambiguous precedent it created in this decision.

Most interesting, the court found the law vague in part because "[v]olumes are filled with . . . potential sources of guidance [other than court decisions], such as ethical codes and comments thereto . . . and

359. Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 87-88 (1960).

360. *But see Amusement Devices*, 443 F. Supp. at 1052 (connecting the vagueness rule to the normative and material issues in the case).

361. In general, decisions resting on the vagueness rule are ironic. As Amsterdam put it, "[There is] an actual vagueness component in the vagueness decisions." Amsterdam, *supra* note 359, at 88.

362. In the first half of the decision the court reviewed case law from other jurisdictions and found that the lawyers did wrong. It explained what they should have done differently:

[A] criminal defense attorney in possession of physical evidence incriminating his client may, after a reasonable time for examination, return it to its source if he can do so without hindering the apprehension, prosecution, conviction or punishment of another and without altering, destroying or concealing it or impairing its verity or availability in any pending or imminent investigation or proceeding. Otherwise, he must deliver it to the prosecution . . . .

*Stenhach*, 356 Pa. Super. at 23-24, 514 A.2d at 123. In the second half of the opinion, the court asserted that one reason the law here is void for vagueness is that no one can actually tell what a lawyer should do in such situations: "Beyond the obvious example stated above [concerning a client's handwritten account of involvement in the crime, *see supra* note 356], there is little or no guidance for an attorney to know when he has crossed the invisible line into an area of criminal behavior." *Stenhach*, 356 Pa. Super. at 27, 514 A.2d at 125.

363. *Stenhach*, 356 Pa. Super. at 27, 514 A.2d at 125.

myriad articles in legal periodicals."<sup>364</sup> This sentence suggests that it is in fact the plethora of law, not the paucity of it, that makes the lawyer's obligation vague. And what the court refused to say explicitly is that those "other sources" are for the most part inconsistent with the law the court found in the court cases<sup>365</sup> and on which it relied in the first half of the opinion. The real vagueness is thus not a function of "too little law" but of "too much law."<sup>366</sup> Faced with legal interpretations that line up—other sources (read: bar law) on one side and court cases (read: state law) on the other—the court refused to commit itself to either side. Thus, it affirmed neither state law nor the bar's *nomie* autonomy.

The *Stenhach* opinion is also important because in discussing other court decisions it provides evidence of how common weak court commitment is. The court in *Stenhach* noticed that while virtually all of the court opinions agreed that incriminating physical evidence should be delivered to the prosecution, all "express a great deal of doubt . . . as to the grayer areas of ethical usage of evidence of all sorts."<sup>367</sup> Moreover, the court's summary of the case law shows that court doubt is always greatest when the court must decide whether to use force against lawyers to back its law.<sup>368</sup>

There are numerous other examples of the courts' weak commitment in cases involving the law governing lawyers: cases in which the court refuses to use force to back its interpretation;<sup>369</sup> cases in which the

364. *Id.*

365. For example, the court described three articles as "helpful and noteworthy." *Id.* at 30 & n.3, 514 A.2d at 127 & n.3 (citing Stephanie J. Frye, Comment, *Disclosure of Incriminating Physical Evidence Received from a Client: The Defense Attorney's Dilemma*, 52 U. COLO. L. REV. 419 (1981); Jane M. Graffeo, Note, *Ethics, Law and Loyalty: The Attorney's Duty to Turn over Incriminating Physical Evidence*, 32 STAN. L. REV. 977 (1980); Comment, *The Right of a Criminal Defense Attorney to Withhold Physical Evidence Received from His Client*, 38 U. CHI. L. REV. 211 (1970)). The first two of these articles disagree with the law the court explicates in the first half of the opinion and with the law that the court finds is accepted by virtually all courts to have considered the question. *See id.* at 23-24, 514 A.2d at 123.

366. *See supra* note 2.

367. *Stenhach*, 356 Pa. Super. at 27, 514 A.2d at 125.

368. *Id.* at 28-29, 514 A.2d at 125-26 (quoting *People v. Belge*, 83 Misc. 2d 186, 189, 372 N.Y.S.2d 798, 801 (Onondaga County Ct.) (threatening lawyers with criminal prosecution), *aff'd*, 50 A.D.2d 1088, 376 N.Y.S.2d 771 (App. Div. 1975), *aff'd*, 41 N.Y.2d 60, 359 N.E.2d 377 (1976); *In re Gartley*, 341 Pa. Super. 350, 365-67, 491 A.2d 851, 859-60 (1985) (state wanting to search lawyer's office for evidence)).

369. *See, e.g., In re Thompson*, 416 F. Supp. 991, 996 (S.D. Tex. 1976) (refusing to hold lawyer in contempt of court's order of discharge in bankruptcy, although his threats against discharged bankrupt on behalf of unsecured creditor were "inexcusable and in obvious disregard of the purposes" of the Bankruptcy Act); *Mozzochi v. Beck*, 204 Conn. 490, 497, 529 A.2d 171, 174 (1987) (holding that lawyers who breach their duty "to their clients and to the judicial system" by filing suit after learning that the allegations are wholly without merit are not liable for abuse of process because "[a]ny other rule would ineluctably interfere with the

court refuses to create legal meaning,<sup>370</sup> cases using temporary or inherently weak boundary rules,<sup>371</sup> and cases in which the court suggests that the bar's understanding of law controls the court's interpretation.<sup>372</sup>

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attorney's primary duty of robust representation"); *In re Corboy*, 124 Ill. 2d 29, 45, 528 N.E.2d 694, 701 (1988) (imposing no sanction because the lawyers "acted without guidance of precedent or settled opinion, and there was, apparently, considerable belief among members of the bar that they had acted properly"); *Herbster v. North Am. Co. for Life & Health Ins.*, 150 Ill. App. 3d 21, 30, 501 N.E.2d 343, 348 (1986) (holding that in-house counsel cannot sue client for wrongful discharge when fired for refusing to break state law), *cert. denied*, 484 U.S. 860 (1987).

In *In re Carter*, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,847 (SEC Feb. 28, 1981), the SEC reversed an administrative law judge's decision to suspend two lawyers from practicing before the SEC, holding that while it was "a close judgment" whether the lawyers had aided and abetted securities fraud, *id.* at 84,167, and while they had acted improperly under the interpretation of rule 2(e) set forth by the SEC in this opinion, *id.* at 84,169-72, discipline was not appropriate because "generally accepted norms of professional conduct . . . did not . . . unambiguously cover the situation in which [the lawyers] found themselves," *id.* at 84,173. Notice that the conduct, which the SEC says was not clearly understood by the bar to be improper, is conduct that the SEC finds to be almost enough to constitute criminal activity under the securities laws. In a forceful dissent from the SEC's refusal to discipline the lawyers, Commissioner Evans criticized the incoherence of the SEC's position and the weak commitment it demonstrates to state law. *Id.* at 84,173-78 (Evans, Comm'r, concurring in part and dissenting in part).

370. One striking example of this phenomenon is provided by *In re Grand Jury Subpoena (Reyes-Requena)*, 926 F.2d 1423 (5th Cir. 1991). In that case the Fifth Circuit refused to say whether and when a trial court should grant a hearing to determine whether a lawyer refusing to answer questions before a grand jury has a valid claim of attorney-client privilege. *Id.* at 1433. The court said the issue was moot because the trial court had ultimately granted a hearing and upheld the lawyer's claim of privilege. *Id.* at 1425.

The use of the "mootness" doctrine to avoid making law in *Reyes-Requena* is striking, given what the lawyer had to endure at the hands of the trial court before the court sustained the claim of privilege. The trial court first denied the claim of privilege on several occasions. *Id.* at 1427. It refused the lawyer's request for a hearing on three occasions. *Id.* at 1427-28. It granted several of the government's motions to compel the lawyer to answer the questions. *Id.* Faced with the lawyer's continued resistance, the trial court finally gave in, held a hearing, and reversed its initial determination on the question of privilege. *Id.* at 1425-29. In light of this history, to hold that the question of when a lawyer is entitled to a hearing is moot shows an extreme reluctance to create legal meaning. See also *United States v. Feaster*, No. 87-1340, 1988 U.S. App. LEXIS 4953, at \*6 (6th Cir. Apr. 15, 1988) (holding that a lawyer was properly charged with a crime for advising an undercover agent, posing as a client, on how to avoid paying taxes), *cert. denied*, 488 U.S. 898 (1988); *Barker v. Henderson*, 797 F.2d 490, 497 (7th Cir. 1986) (refusing to discuss "[t]he extent to which lawyers . . . should reveal their clients' wrongdoing—and to whom they should reveal," noting that "[t]he professions and the regulatory agencies will debate questions raised by cases such as this one for years to come").

371. See, e.g., *Reyes-Requena*, 926 F.2d at 1426-27 (mootness); *Financial Gen. Bankshares, Inc. v. Metzger*, 680 F.2d 768, 775 (D.C. Cir. 1982) ("[T]he unsettled nature of District of Columbia law regarding the fiduciary duties of an attorney to a client" rendered it an abuse of discretion by the district court to decide that pendent-jurisdiction claim.").

372. See, e.g., *United States v. Klubock*, 832 F.2d 649, 654 (1st Cir. 1987) (en banc) (four judges stating that local court rule adopting bar's understanding of when and how lawyers are to be called before grand juries is valid, despite lack of support in case law or federal procedural rules for such limits on the grand jury, because the "fundamental underlying problem



There are, of course, counter-examples.<sup>373</sup> For example, in *United States v. Cintolo*<sup>374</sup> bar organizations arguing as amici asked the court to overturn a lawyer's conviction for obstruction of justice because, unlike other people, lawyers should not be liable for obstructing justice when the means used to do so are themselves lawful. To allow an intent to obstruct justice to turn lawful activity into unlawful activity, they argued, would be overbroad as applied to "criminal defense attorneys—indeed [as applied to] all lawyers—[who would then] be 'chilled' from undertaking legal maneuvers and tactics the success of which is in doubt."<sup>375</sup>

In *Cintolo* the lawyer's "lawful" act was advising his client to refuse to testify before the grand jury when the client had a valid grant of im-

. . . is an ethical one"). Citing bar reports and recommendations, the four judges in *Klubock* concluded that "[t]he subpoenaing of attorney/witnesses . . . appears to present ethical concerns of a widespread nature." *Id.* at 657; see also *Barker*, 797 F.2d at 497 ("[A]n award of damages under the securities laws is not the way to blaze the trail toward improved ethical standards in the legal and accounting professions. . . . The securities law . . . must lag behind changes in ethical and fiduciary standards."); *Florida Bar v. Rubin*, 549 So. 2d 1000, 1003 (Fla. 1989) ("If [the lawyer] had been cited for violation of the Code [of Professional Responsibility] for following the [court's order], his good faith reliance on the trial court's order and the mandate of the district court would have been a good, and most likely a complete, defense." (emphasis added)).

373. See, e.g., *In re Grand Jury Subpoenas ex rel. United States v. Anderson*, 906 F.2d 1485, 1499 (10th Cir. 1990) (upholding district court order jailing lawyers for contempt for refusing to reveal the source of their fees to the grand jury, and rejecting lawyers' argument that their refusal was justified by their ethical obligations); *Parker v. M & T Chems., Inc.*, 236 N.J. Super. 451, 463, 566 A.2d 215, 222 (1989) (allowing in-house counsel to sue for damages when fired for refusing to help client break the law); *Tennessee v. Jones*, 726 S.W.2d 515, 521 (Tenn. 1987) (holding that lawyer could be held in contempt of court for refusing to obey a court order that correctly rejected the rule and reasoning of an ethics opinion upon which the lawyer relied, notwithstanding the lawyer's "lofty motivation and respectful and impeccable conduct").

For an example of strong court commitment that also reveals the active clash between the bar's normative vision and the court's, see *In re Solerwitz*, 848 F.2d 1573 (Fed. Cir. 1988), cert. denied, 488 U.S. 1004 (1989). In *Solerwitz*, despite testimony by three "experts in the field of legal ethics" that the lawyer's conduct was proper, the court held that "clear and convincing evidence [showed] that [the lawyer's] continued course of conduct in filing and maintaining multiple frivolous appeals in the face of this court's orders, notices, instructions, rules, precedents and previous sanctions" was improper and justified a one-year suspension. *Id.* at 1576, 1578. As for the ethics experts' testimony to the contrary, the court quoted with approval the trial judge's assessment: "[W]hile based in part on established tenets of the legal profession, [their views] do not fully outline the duties of a lawyer . . ." *Id.* at 1577 (quoting trial judge). Specifically, the experts ignored case law upon which the court relied. *Id.* (citing *In re Bithoney*, 486 F.2d 319 (1st Cir. 1973)).

374. 818 F.2d 980 (1st Cir.), cert. denied, 484 U.S. 913 (1987).

375. Brief for the Massachusetts Assoc. of Criminal Defense Lawyers and the National Network for the Right to Counsel as *Amici Curiae* Supporting Appellant at 3, *Cintolo* (No. 85-1615).

munity.<sup>376</sup> The corrupt intent was proved by introducing tape recordings that showed that the lawyer had reported regularly to third parties (allegedly organized crime figures whom the lawyer also represented) on whether the primary client would keep quiet to protect those people from indictment and that the lawyer was present when those people discussed plans to kill the client should he decide to talk.<sup>377</sup>

In a demonstration of strong commitment, the court soundly rejected the view of the amici bar groups:

The appellant and *amici* pay lip service to th[e] principle [that a corrupt motive can transform lawful acts into unlawful ones], but maintain that different considerations come into play where criminal defense lawyers are concerned. In those [situations], they assert a corrupt motive may not be found in conduct which is, itself, not independently illegal . . . . [T]he conversion of innocent acts to guilty ones by the addition of improper intent—is what this case is all about. . . .

. . . .  
*Nothing in the caselaw . . . suggests that lawyers should be plucked gently from the madding crowd and sheltered from the rigors of 18 U.S.C. § 1503 [obstruction-of-justice statute].*<sup>378</sup>

Although detecting trends in something as complex as the degree of state commitment is a difficult business, there are many indications that the commitment is increasing.<sup>379</sup> On the other hand, given how perva-

376. *Cintolo*, 818 F.2d at 984.

377. *Id.* at 984-89.

378. *Id.* at 992-93 (emphasis added); see also *United States v. Benjamin*, 328 F.2d 854, 863 (2d Cir. 1964) (affirming the criminal convictions of a lawyer and an accountant for mail fraud and conspiring with their client to commit securities fraud). In *Benjamin* the court wrote:

In our complex society the accountant's certificate and the lawyer's opinion can be instruments for inflicting pecuniary loss more potent than the chisel or the crowbar. Of course, Congress did not mean that any mistake of law or misstatement of fact should subject an attorney or an accountant to criminal liability simply because more skillful practitioners would not have made them. But Congress equally could not have intended that men holding themselves out as members of these ancient professions should be able to escape criminal liability on a plea of ignorance when they have shut their eyes to what was plainly to be seen or have represented a knowledge they knew they did not possess.

*Id.*

379. The Supreme Court's decision in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 793 (1975), holding that activities of a mandatory bar association are not exempt from the antitrust laws, may be one of the first and most significant signs of an increased commitment to the role of state law vis-a-vis the profession. Another important sign is the significant erosion in the traditional rule that a lack of privity prevents third parties from suing lawyers for negligence. See *Greycas v. Proud*, 826 F.2d 1560 (7th Cir.), cert. denied, 484 U.S. 1043 (1987); *Lucas v. Hamm*, 56 Cal. 2d 583, 364 P.2d 685 (1961) (en banc), cert. denied, 368 U.S. 987 (1962).

The 1983 amendment of rule 11 of the Federal Rules of Civil Procedure and the adoption

sive and longstanding the practice of low commitment has been and how sympathetic to the bar's vision many judges are, I would not predict a complete about-face in the immediate future.<sup>380</sup>

### B. *The Bar's Commitment: Texts of Resistance*

Whenever a community resists . . . some . . . law of the state, it necessarily enters into a secondary hermeneutic—the interpretation of the texts of resistance.<sup>381</sup>

As we have seen, the bar's sacred stories predict a crisis between a lawyer's obligations to her client and the demands of state law put forth by prosecutors, judges and other state actors. The stories glorify resistance to such demands, but at the same time they emphasize the extreme risks of resistance—risks, that is, to the hero-lawyers, not risks to the state. Indeed, in the bar's stories the state is not threatened by the lawyer's resistance but saved by it. On the other hand, the lawyer, in the name of redeeming the state (and its law) and/or in the name of protecting the individual's freedom and dignity, is threatened with loss of life or liberty.<sup>382</sup>

Thus, the central theme in the bar's narratives is a theme of resist-

of similar rules in the states may be another sign of the courts' increased commitment to its vision of lawyering. FED. R. CIV. P. 11 (holding lawyers to a greater level of candor in pleadings and other court papers); see generally 1 HAZARD & HODES, *supra* note 255, at 544-46 (discussing the changes in the rule).

The commitment of state actors, outside of the judicial branch, appears to be increasing in a more dramatic fashion. In March 1992 the Office of Thrift Supervision (OTS) sought \$275 million in restitution from a New York law firm that had represented Charles Keating's now-defunct Lincoln Savings and Loan, claiming that the firm had unlawfully concealed information about its client from bank examiners. Edward A. Adams, *Agency Sues Kaye Scholer for \$275 Million*, N.Y. L.J., Mar. 3, 1992, at 1. More significant, the OTS invoked its power to freeze most of the law firm's assets. *Id.* The firm settled with the OTS, agreeing to pay \$41 million, but refused to admit wrongdoing. See Jolie Solomon, *U.S. Did In S&L Adviser by the Book*, BOSTON GLOBE, Mar. 10, 1992, at 35; see also George C. Kern, Jr., Exchange Act Release No. 29,356, 1991 SEC LEXIS 1222, 1991 WL 284795 (S.E.C.) (June 21, 1991) (announcing the SEC's intention to renew efforts to discipline securities lawyers who "cause" or help their clients in the violation of securities laws). If the courts' commitment to their role as official and final arbiters of such clashes between state actors and the profession does not increase apace, we may find ourselves in the worst of all possible worlds. See *supra* text accompanying note 331.

380. See the more recent cases cited *supra* notes 369-72.

381. Cover, *Nomos*, *supra* note 1, at 49.

382. Recently, attorney William Kunstler invoked this theme when the United States Court of Appeals for the Fourth Circuit held that he should be sanctioned under rule 11 for his conduct in suing state prosecutors for harassing Native American activists. *In re Kunstler* (Robeson Def. Comm. v. Britt), 914 F.2d 505, 525 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1007 (1991). As reported in the *ABA Journal*, Kunstler, who asked the Supreme Court to hear the case said: "I'll tell you this: I'm not going to pay any fine. I'm going to rot in jail if that's what I have to do to dramatize this thing. I think I could do no better thing for my country."

ance, but one which, by emphasizing the extreme risks attendant upon disobedience, suggests caution and invites further interpretation by the community—interpretation that elaborates the circumstances in which resistance is the appropriate response, the degrees of resistance demanded, and the degrees of resistance authorized in this *nomos*.<sup>383</sup> Texts of resistance normally include both an interpretation of the community's law that explains whether (and, if so, why) a norm demands protection from the acts of the state or other communities (I will call this interpretation primary), and an interpretation of how much resistance is required and how much is authorized in the name of the norm (a secondary interpretation).<sup>384</sup> In the bar's texts of resistance, the primary interpretation usually centers on the norm of confidentiality, which, as we have seen is the norm that most often triggers a call for resistance. The content of the primary interpretation has already been suggested above<sup>385</sup> and will not be reviewed here, but it is important to keep in mind that the bar's texts of resistance generally devote much time and attention to recounting the importance of the norm of confidentiality and the reasons for resisting the state's infringement of it.

Having recounted these reasons for resistance, the bar texts shift to discussing and justifying the moves of resistance. It is in this secondary interpretation that we find the bar's understanding of its obligation to the state and its law. The texts do not deny the obligation; they interpret it. The questions at the heart of these texts are what counts as state law and what counts as an authoritative interpretation of that law. In other words, they provide the bar's understanding of what is and what is not legitimate state law for purposes of the obligation to obey. In the bar's *nomos*, the obligation to obey state law is significantly qualified by the

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Don J. DeBenedictis, *Rule 11 Snags Lawyers*, A.B.A. J., Jan. 1991, at 16, 17 (quoting Kunstler).

383. As Professor Cover wrote:

Bentham could criticize natural rights phraseology as "nonsense on stilts;" he could assert its tendency to "impel a man, by that force of conscience to rise up in arms against any law whatever that he happens not to like," because, in characteristic fashion, Bentham failed to recognize that texts of resistance, like all texts, are always subject to an interpretative process that limits the situations in which resistance is a legitimate response.

Cover, *Nomos*, *supra* note 1, at 50 (quoting Jeremy Bentham, *A Critical Examination of the Declaration of Rights*, in BENTHAM'S POLITICAL THOUGHT 257, 269 (Bhikhu Parekh ed., 1973)).

384. By using the term "secondary" I mean to recall Professor Cover's reference to a "secondary hermeneutic." See *supra* text accompanying note 381. I do not mean to suggest by the use of the word "secondary" that this interpretation is less important in establishing the contours of a *nomos*.

385. See, e.g., *supra* notes 119-27 and accompanying text.

bar's interpretation of what counts as state law for purposes of this norm. Implicit through much of this Article, this point must be made explicit here because it is critical to understanding the divergence between the bar's and the state's understanding of law: if the bar counted as state law everything the state counts as state law for purposes of interpreting the duty to obey state law, bar law would incorporate state law and the tension between the two normative worlds would be alleviated. The courts understand the ethics precept containing the duty to obey law this way and they thereby reconcile bar and state law.<sup>386</sup> In the bar's *nomos*, on the other hand, the duty to obey state law functions more as a boundary rule than a rule of reconciliation, and the shape of this boundary is determined for the bar by its interpretation of what counts as legitimate state law and legitimate interpretation of that law.

Before describing the bar's interpretation of what counts as state law and the various moves of resistance in the bar's repertoire, two common characteristics in the texts of resistance of groups that claim *nomos* autonomy warrant our attention. First is the plea to be spared the crisis of choosing between group law and state law.<sup>387</sup> This plea expresses the understanding of all such groups that their existence within the state is contingent on the state's toleration. Insular *nomos* communities may choose to exit from the state should the state's accommodation to their vision prove insufficient on the group's terms, but the bar, dependent as it is on the state for definition and purpose, cannot exit.<sup>388</sup> Like other communities that seek to redeem the state by transforming state law to fit the group's vision, the bar must win or see its *nomos* (and itself) forever transformed or destroyed. The crisis for redemptive groups is, if anything, more critical because, for the group, everything turns on its resolution.<sup>389</sup> Bar texts often appeal to the state not to place members "in the untenable position of either violating their professional and ethical responsibilities, or incurring the risk of civil or criminal sanctions."<sup>390</sup>

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386. See, e.g., *supra* text accompanying note 343.

387. See, e.g., Brief of Amicus Curiae in Support of Petition for Writ of Certiorari on Behalf of Church of God in Christ, Mennonite at 3-4, *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (No. 81-3), *quoted in Cover, Nomos, supra* note 1, at 27. "When [our religious] beliefs collide with the demands of society, our highest allegiance must be toward God, and we must say with men of God of the past, 'We must obey God rather than men', and *these are the crisis* [sic] *from which we would be spared.*" *Id.* at 4 (quoting *Acts* 5:29).

388. For a discussion of the differences between insular *nomos* communities and redemptive ones, see *Cover, Nomos, supra* note 1, at 35-40.

389. For a brilliant examination of how one such redemptive group, the American labor movement, had its vision and itself transformed after continued confrontation with the state, see William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109 (1989).

390. Florida Bar, Resolution on Section 6050I of the Internal Revenue Code (1989). Such

This plea asks the state to exercise caution and engage in further interpretation to avoid the crisis. In effect it says to the state, "You act to redeem yourself and your law so that we do not have to risk being destroyed for your sake."

Second, texts of resistance typically stop short of *requiring* resistance. Instead of speaking of what one "must" do, they speak of what one "ought" to do. This move to the "ought" is not, however, necessarily indicative of weak commitment. When the state refuses to use force in the name of its law—when it refuses to speak of "must" and resorts to "ought"—we may infer a weak commitment because the state is licensed to use force and thus the presumption is that when it "means it" it will use that force. Of course, even the state runs some risk when it chooses to use force in the name of its interpretations because its monopoly on violence is imperfect; revolution is always a possibility, however remote,<sup>391</sup> and massive disobedience, which raises an important challenge to the state's legitimacy, is another considerably less remote possibility.<sup>392</sup> For the state the greater risk is posed, however, by not demonstrating commitment to its law because it thus concedes a critical attribute of sovereignty. Conversely, for the group, particularly a redemptive group, the greater risk is posed by demonstrating (or insisting that its members demonstrate) too strong a commitment to its law: if the group's commitment is strong enough, the state may effectively, if not literally, kill off those who dare to live the group's vision of law and the vision of law with them. The power of the state "put[s] a high price on [the group's] interpretations. But an 'economic' approach here is misleading. For the understanding of law is the projection not only of what we would in fact do . . . , but also of what we ought to do."<sup>393</sup> Communities, unlike the state, thus typically express their commitment in terms of what "ought" to be done, not what must be done. To do otherwise would be to risk weakening the commitment of individual members of

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pleas are nearly incomprehensible according to the state's understanding of the hierarchy of norms, which includes an understanding that the duty to obey state law trumps other ethics rules. See, e.g., *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 633 n.10 (1989) (responding to the bar's pleas that a federal statute conflicted with lawyers' ethical obligations by stating that even if the forfeiture of attorney fees "is at odds with model disciplinary rules or state disciplinary codes," that "hardly renders the federal statute invalid"). In a *nomos* in which the general hierarchy of norms is different and the obligation to obey state law contained in the ethics rules has a different and lower status, however, the plea has meaning.

391. Some of the antebellum decisions of the Supreme Court on slavery show a concern with avoiding revolution. See, e.g., *Prigg v. Pennsylvania*, 41 U.S. 539, 609, 611-12 (1842).

392. See RICHARD KLUGER, *SIMPLE JUSTICE 678-747* (1975) (discussing the concern of the justices of the Supreme Court that an order to desegregate the schools would be met with massive disobedience).

393. Cover, *Nomos*, *supra* note 1, at 50.

the group to the *nomos* by imposing on them obligations of extreme heroism. We must then judge the group's commitment by how willing it is to say one "ought" to resist, not how willing it is to demand resistance.

In the bar's texts of resistance, after deciding that something the state calls "law" conflicts with bar law (a question that is resolved in the primary interpretation in the text), the question becomes: is that troublesome thing, which the state calls law, law for purposes of the lawyer's obligation to obey? The first interpretive move is that legislation and regulation conflicting with bar law are not "law" for purposes of this norm. The comment to rule 1.6 itself suggests this move by omitting reference to legislation and regulation. It reads: "The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client."<sup>394</sup> It may be that the bar treats judicial decisions as a higher form of law, in part because it regards judges as semi-brothers and hence mediators between the state and the bar. The point here is that what counts as law is limited by this first interpretive move.

While neither legislation nor regulation is law that requires obedience, bar texts emphasize that their nonlaw status is strictly limited to the extent that they conflict with bar law and no further. For example, while client confidentiality, according to the bar, precludes a lawyer from complying with tax law and regulations that require the lawyer to provide the client's name and other identifying information, "confidentiality . . . do[es] not relieve the lawyer of the statutory duty to file [the required form] . . ." <sup>395</sup> It "must still be filed, but the lawyer should insert . . . in place of the client's name . . . a statement that the lawyer and the client are asserting client confidentiality, the attorney-client privilege and, if applicable, the Fifth and Sixth Amendment privileges."<sup>396</sup> Resistance is to be tailored to contest the "invalid" portion of the legislation or regulation and should not otherwise show disrespect to the state's legislation or regulation.<sup>397</sup>

Moreover, while for the bar neither legislation nor regulation is "law" for purposes of the duty to obey (when they conflict with bar law),

394. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. (1991).

395. Ethics Advisory Comm. of the Nat'l Ass'n of Crim. Def. Lawyers, Formal Op. 89-1 (1989); see also State Bar of Wis., Formal Op. E-90-3 (1990) (approving and incorporating NACDL Op. 89-1).

396. Ethics Advisory Comm. of the Nat'l Ass'n of Crim. Def. Lawyers, Formal Op. 89-1 (1989).

397. *Id.* The opinion explains what the lawyer should do if she receives a letter from the IRS asking her to supply the information omitted from the form: "[T]he lawyer should respond to the letter and state in clear and respectful terms the nature of the objection to providing the information and the legal bases for it." *Id.*

bar texts typically distinguish between the two; the obligation to resist regulation is generally greater than the obligation to resist legislation. For example, the Statement of Policy adopted by the ABA House of Delegates on the duties of lawyers to comply with the securities laws states:

[A]ny principle of law which, except as permitted or required by the [Code of Professional Responsibility], permits or obliges a lawyer to disclose to the S.E.C. otherwise confidential information should be established *only by statute* after full and careful consideration of the public interests involved and should be resisted unless clearly mandated by law.<sup>398</sup>

Implicitly, this suggests that greater resistance is owed to SEC regulations inconsistent with bar law than to legislation, which must be resisted too, but not if "clearly mandated by law." How one decides whether legislation is "clearly mandated by law" is not fully described by this ABA Statement, although a suggestion of the bar's answer is provided in the last paragraph of the opinion, which bemoans the possibility that lawyers would be deterred in the exercise of their responsibilities to their clients by either an "erroneous position of the S.E.C. or a questionable lower court decision."<sup>399</sup> Thus, we may infer that an interpretation of legislation that conflicts with the bar's law and that is supported by only a lower court decision is not "clearly mandated by law."

This brings us to the bar's next interpretive problem, whether court orders and decisions are law that must be obeyed. It is at this point that we may gauge the true nature of the bar's commitment, for at this point the state's use of force may be imminent.<sup>400</sup> The comment to rule 1.6 states that lawyers "must comply with the final orders of a court or other tribunal of competent jurisdiction."<sup>401</sup> The qualifications in this sentence—"final orders" and "competent jurisdiction"—are important indicators of the bar's understanding. Generally, bar texts of resistance *allow* a lawyer to comply with court orders, but do not require that she do so.<sup>402</sup> For example, the ABA has explained its understanding of the

398. ABA Policy on Advising on Securities Matters, *supra* note 150, at 1086 (emphasis added).

399. *Id.* (emphasis added).

400. I say "may be" because although standard state doctrine provides that one may be jailed for violating even an unconstitutional court order. *Walker v. Birmingham*, 388 U.S. 307, 319-21 (1967). When it comes to lawyers who assert "ethical" grounds (or, in our terms, "bar law") to justify noncompliance, the courts are quite reluctant to use force or to authorize its use to affirm the trial court's authority.

401. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. (1991).

402. *E.g.*, Alabama State Bar, Op. 88-76, summarized in [Ethics Opinions 1986-1990] Laws. Man. on Prof. Conduct (ABA/BNA) 901:1046 (Sept. 1, 1988) ("If ordered to testify by the court, the lawyer may either do so or may seek appellate relief."); Virginia State Bar, Op.



ethics rules as follows:

If the motion to quash is denied, the lawyer must either testify or run the risk of being held in contempt. . . .

The lawyer has an ethical duty to preserve client confidences and to test any interference with that duty in court. . . .

If a contempt citation is upheld on appeal, however, the lawyer has little choice but to testify or go to jail. Both the Model Rules and the Model Code recognize that a lawyer's ethical duty to preserve client confidences *gives way* to final court orders.<sup>403</sup>

Notice that while this quote carefully avoids explicitly requiring resistance, the message is clear that a lawyer *should* resist—at least, she should resist a lower court order: ethical duty “gives way” according to the text only after a final court order, and “final court orders” are, according to the quote, orders of an appellate court. Even more telling of the bar's commitment to its law than the strong encouragement to resist lower court orders is the suggestion that bar law “gives way” to appellate orders not because they are legitimate and authoritative interpretations but because the state at this point is *extremely* likely to use force: “the lawyer may have little choice but to testify or go to jail.”<sup>404</sup> It is accommodation pure and simple that is being expressed, not concession to the appellate court's role as authoritative interpreter of its law.

The view that it is the state's force and *not* its interpretation or its right to interpret that relieves a lawyer of the obligation to resist appellate orders is also expressed by the bar's understanding of the reach of such orders. Bar texts do not contain any suggestion of an obligation to check controlling precedent in the relevant jurisdiction before deciding whether to comply.<sup>405</sup> Moreover, given the weight of authority on such

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787 (1986) (stating that a lawyer subpoenaed to testify about a client confidence must present a motion to quash the subpoena and may testify only if the motion is denied); *see* the ethics opinions cited *supra* notes 133-134.

403. *Disclosure: Lawyer Subpoenas*, [Manual] Laws. Man. on Prof. Conduct (ABA/BNA) 55:1301, 55:1307 (Oct. 25, 1989) (emphasis added) (citations omitted). While I have omitted the citations to court cases in this quotation, I want to point out that the text is scrupulous in its citation of court cases that justify the position of the text. This attention to court cases that justify resistance is typical in the bar's texts of resistance. When, after all, could it be more important to demonstrate loyalty and attention to state law than at the moment that one is claiming to be resisting state law in the name of redeeming state law?

404. *Id.*

405. Some bar opinions, although not all, emphasize that the lawyer's right to disobey a trial court order exists only so long as a “good faith argument” may be made that the order is wrong. *See, e.g.*, Kentucky Bar Ass'n, Op. 315 (1987). But these opinions do not define “good faith argument.” For a glimpse of how broad this term might be in the bar's *nomos*, see the bar's position cited in *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1540 & n.4 (9th Cir. 1986). I have found no bar opinion explicitly stating that a lawyer should

issues as whether a client's identity or the fees she paid her attorney are privileged,<sup>406</sup> it is clearly the message of these bar texts that court decisions contrary to bar law are to be understood as having decided the question before them and no more. As the NACDL put it in testifying before Congress: "Our members will litigate these issues at every turn

..."<sup>407</sup>

This posture "is an attempt to separate completely the projection of understanding from the decree that is the direct exercise of court power. Such separation allows one to 'acquiesce' by refraining from resistance while simultaneously refusing to extend the social range of the Court's hermeneutic."<sup>408</sup> The efficacy of this move is dependent on the level of the courts' commitment. Courts, after all, have the means to insist that their interpretations are projected into the future: injunctions. But the likelihood of the courts using such a tool against lawyers is remote, given how weakly committed they are to their role when they find themselves at odds with the bar.<sup>409</sup> The bar's commitment, on the other hand, is, as we have just seen, strong. It is the interaction of these two levels of commitment that allows the divergence in normative understanding to continue.

### VIII. CONCLUSION

If I have demonstrated a lack of sympathy for the bar's normative understanding, it is neither from a desire to curtail divergent understandings of law nor from a belief that in all or even most respects the state's vision is morally superior to the bar's or more in line with my political

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consider the relevant authority in the jurisdiction in deciding what is a good-faith argument upon which one can rely to resist state law.

406. See *supra* note 64.

407. *Hearings, supra* note 48, at 204 (statement of Alan Ellis, President-Elect of the National Association of Criminal Defense Lawyers).

408. Cover, *Nomos, supra* note 1, at 54 n.146. Professor Cover was discussing Lincoln's famous remarks on the *Dred Scott* decision. See *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). Professor Cover quoted the President:

"I do not resist [*Dred Scott*]. If I wanted to take *Dred Scott* from his master, I would be interfering with property. . . . But I am doing no such thing as that, but all that I am doing is refusing to obey it as a political rule. If I were in Congress, and a vote should come up on a question whether slavery should be prohibited in a new territory, in spite of that *Dred Scott* decision, I would vote that it should."

Cover, *Nomos, supra* note 1, at 54 n.146 (quoting speech by Abraham Lincoln in Chicago, Illinois (July 10, 1858), reprinted in 2 ABRAHAM LINCOLN, THE COLLECTED WORKS OF ABRAHAM LINCOLN 484, 495 (Roy P. Basler ed., 1953)). Professor Cover explained that what Lincoln was saying is that "[o]ur future actions are to be governed by *our own* understanding, not the Court's." *Id.*

409. Contrast the court's use of the injunction against the labor movement and the power of that tool to kill that group's existing vision of law. See Forbath, *supra* note 389, at 1148-78.

views. As to normative understandings that diverge from the state's, I believe we should welcome them because, as my teacher put it, "[l]egal meaning is a challenging enrichment of social life, a potential restraint on arbitrary power and violence."<sup>410</sup> I believe, therefore, that "[w]e ought to stop circumscribing the *nomos*; we ought to invite new worlds."<sup>411</sup>

Moreover, the "we" in Professor Cover's sentences and in mine includes not just those of us in private life, but those in the courts as well. Thus, my implicit criticism of the courts' weak commitment in this area of law should not be read as an invitation for courts to expand dramatically the normative space accorded state law. The courts' commitment could just as easily be demonstrated by more clearly articulating where the boundaries of state law lie; those boundaries could leave considerable space for the bar's *nomos* autonomy. In fact, this is what the bar itself is asking when it asks the courts to explicate more fully how much protection for the attorney-client relationship is accorded by the Fifth and Sixth Amendments to the Constitution.

As for the moral superiority of one view over another, I believe that state control over lawyers poses a serious threat to freedom, as the bar's sacred stories imply. These are, to that extent, my stories too, and they lead me to support strong barriers that preserve a significant sphere of *nomos* autonomy for the bar. But these stories do not lead me to support the *nomos* I have described in these pages—the *nomos* the bar has created and which it seeks to preserve. Celebrating the proliferation of divergent normative understandings and even celebrating the particular importance of *nomos* autonomy for the bar are not the same as celebrating the particular normative understanding I have described here. As Professor Cover states:

It is not the romance of rebellion that should lead us to look to the law evolved by social movements and communities. Quite the opposite. Just as it is our distrust for and recognition of the state as reality that leads us to be constitutionalists with regard to the state, so it ought to be our recognition of and distrust for the reality of the power of social movements that leads us to examine the nomian worlds they create.<sup>412</sup>

In assessing whether and, if so, how the bar's *nomos* should be reformed, it is important to consider not just the bar's sacred stories but the acts of lawyers in our real and present world that those stories justify; one must look not just at the hierarchy of norms and the substantive

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410. Cover, *Nomos*, *supra* note 1, at 68.

411. *Id.*

412. *Id.*

understanding of norms in the *nomos*, but also at the situations in which the *nomos* is actually used to justify departures from state norms. To the extent the current hierarchy of norms and the current understanding of the scope of client confidentiality and the demands of client loyalty are used primarily to justify lives dedicated to the powerful and their right to remain powerful—lives dedicated to circumventing the normative space left for the rest of society—I find the bar's *nomos* in need of repair.

By elaborating the content of the bar's *nomos* and by revealing (and affirming) its power in these pages, I hope to contribute to a reexamination of our *nomos* and to the construction of a *nomos* that yields lives closer to the lives I see celebrated in our sacred stories—lives dedicated to resisting not just the state but any center of arbitrary power and violence, not just the state but any sector that threatens to dominate the normative space of our society and to kill off emerging and competing visions. In action, as our stories suggest, the bar has the power to weaken the state and its norms—and implicitly to weaken other communities. We owe ourselves and the rest of society a *nomos* that suggests some limits (other than the ability to pay our fee) on the exercise of such power. It is time we re-formed and repaired our world.

