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TOWARD MORAL RESPONSIBILITY IN LAWYERING: FURTHER THOUGHTS ON THE DEONTOLOGICAL MODEL OF LEGAL ETHICS

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I. INTRODUCTION

Since the epic battle over the Kutak Commission's promulgation of a new code of lawyers' ethics,¹ the legal profession has un-

* Assistant Professor of Law, Oklahoma City University. This Article was written primarily while a Visiting Assistant Professor of Law at New England School of Law, and I wish to acknowledge their support. I would like to thank Professors Anthony D'Amato of Northwestern, Geoffrey Hazard of Yale, and Richard Huber of Boston College, and Mary Shacklett, all of whom reviewed earlier drafts of this Article, for their many useful comments. I would also like to acknowledge the seminal influence in differing ways of two important recent articles—Stephen Pepper's *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613 and Deborah Rode's *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589 (1985). Finally, and very importantly, I would like to thank Pat Gresham and PJ Jorgensen for their very able assistance, and good will and cheer, in helping prepare this Article. I alone am of course responsible for all remaining errors and shortcomings.

¹ The ABA formed the Commission on Evaluation of Professional Standards in 1977 and assigned it the task of "a comprehensive rethinking of the ethical premises and problems of the profession of law." MODEL RULES OF PROFESSIONAL CONDUCT, Chairman's Introduction (Proposed Final Draft 1981) [hereinafter MODEL RULES]. The Kutak Commission, named after its chairman, Robert Kutak, promulgated a new code of ethics, the *Model Rules of Professional Conduct* (the "Model Rules"), which the ABA adopted. The process of promulgating and adopting a new code of ethics involved numerous meetings, widespread public comment and published commentary, and significant redrafting, rethinking, and revision. See Armstrong, *Retrospect and Prospect: The Kutak Commission Report*, 11 CAP. U.L. REV. 475, 486 (1982) (account of events leading to creation of commission). Several provisions of the Model Rules were very controversial. Dissatisfied with the Model Rules, the Association of Trial Lawyers of America proposed an alternative code. See AMERICAN TRIAL LAWS. ASS'N, THE AMERICAN LAWYER'S CODE OF CONDUCT, reprinted in SELECTED

dergone serious and sustained reflection over its course, practice and ethics. The ensuing literature has been vast and insightful. Excellent empirical data have helped paint a vivid portrait of the working professional.² Further justifications of the mainstream autonomy model of the practicing bar have been crafted.³ Moral philosophers have continued to critique this mainstream paradigm.⁴ Others have faulted moral philosophers for critiquing without adequately understanding the practicing bar's actual concerns, conditions, and attitudes.⁵ Still others have attempted nothing less than a fundamental rethinking of the profession, including the role ethics should play in contemporary practice.⁶

The focus of all this scholarly work continues to be the mainstream autonomy model of the practicing bar, which views the lawyer as a facilitator of the client's autonomy within the legal system. An attorney's fidelity to the client serves the fundamental interests

STATUTES, RULES AND STANDARDS ON THE LEGAL PROFESSION 364-68 (1989) [hereinafter AMERICAN LAWYER'S CODE]. Many are still dissatisfied with the end product.

² See, e.g., J. HEINZ & E. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 3-17 (1982) (systematic study of character of Chicago bar); F. ZEMANS & V. ROSENBLUM, THE MAKING OF A PUBLIC PROFESSION 5-12 (1981) (examining law school's role in development of lawyers and legal profession); Heinz, *The Power of Lawyers*, 17 GA. L. REV. 891, 905 (1983) (focuses on client influences and concludes "autonomy of lawyers as individuals or as firms may be greatly overrated"); Heinz & Laumann, *The Legal Profession: Client Interests, Professional Roles, and Social Hierarchies*, 76 MICH. L. REV. 1111, 1113 (1978) ("the legal profession is, to a great degree, externally oriented, and in consequence is shared and structured by its clients"); Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503, 504 (1985) (examines relationship between practice in large firms and their political, legal, and professional attitudes).

³ See Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 634 (suggesting "the moral values of autonomy and equality are imperative in relation to access to the law"); Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1066 (1976) ("it is not only legally but also morally right that a lawyer adopt as his dominant purpose the furthering of his client's interests"); see also FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 24 (1975) (defending zealous advocacy of client interest as a "precious safeguard . . . against a hostile world"). Pepper's piece follows and elaborates on the classic justifications of the autonomy model of professions.

⁴ See Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637, 639.

⁵ See Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529, 1532 (philosophers tend to rely on "dubious empirical claims about law practice and legal ethics as body of lawyers' thought").

⁶ See Rhode & Schwartz, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 651 (1985) ("the profession must create more opportunities for normative interchange not only in law schools, but also in law firms and bar associations").

of individual dignity, autonomy, equality, and privacy.⁷ By serving these interests, lawyers, invisibly and perhaps unwittingly, serve society at large.

The plausibility of the autonomy model depends, however, on acceptance of a kind of moral insulation which allows lawyers to facilitate their clients' interests to the exclusion of most other concerns, including those of morality, society, or another individual. Lawyering on behalf of clients' autonomy should indeed occur within the bounds of the law. But within those bounds lawyers tend to represent their clients zealously, without considering the means or ends of their representation and without recognizing fundamental responsibility for their actions, except insofar as they aid and abet their clients in accomplishing their objectives. By acting as professionals, lawyers are seemingly privileged to operate in this moral vacuum, detached from society and its general ethical norms.

The important, and intriguing, question raised by the autonomy model is the extent to which an attorney, acting in a professional role, can (or should) be insulated from moral norms.⁸ Under current legal practice, lawyers may easily retreat to an amoral professional role in the face of normative conflict. But should lawyers be excused from any (or all) personal responsibility for their professional actions? Indeed, should professional rules of conduct prohibit lawyers from exercising personal responsibility for their professional actions?⁹ At a minimum, the extent to which the professional role preempts personal responsibility calls for close

⁷ See *supra* note 3.

⁸ See, e.g., *infra* note 86 and accompanying text. Whether lawyers should be excused from moral accountability for their actions is not a novel issue. See, e.g., Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 63 (1980) ("lawyers . . . claim special warrant for engaging in some activities which, were they performed by others, would be likely to draw moral censure"); Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 5 (1975) ("What is characteristic of this role of a lawyer is the lawyer's required indifference to a wide variety of ends and consequences that in other contexts would be of undeniable moral significance").

⁹ See, e.g., MODEL RULES, *supra* note 1, Rule 1.6(b)(1) (1983). Rule 1.6(b)(1) states: "A lawyer may reveal such 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." Accordingly, this rule would prohibit a lawyer from disclosing a client's intention to commit an economic crime, such as securities fraud. For a rationale of the underlying policies of the confidentiality rule, see Schaffer, *Christian Theories of Professional Responsibility*, 48 S. CAL. L. REV. 721, 724-25 (1975). See generally Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061 (1978); Popkin, *Client-Lawyer Confidentiality*, 59 TEX. L. REV. 755 (1981).

scrutiny.

Lawyers, like the rest of society, should not be beyond the reach of morality in most contemporary practice situations. Like other members of society, lawyers should confront, and be accountable for the ethical dimensions of their judgments and actions. This Article re-examines an alternative approach to legal ethics, the deontological model, which provides a means of bringing current professional rules of conduct into better congruity with moral norms.¹⁰ It is the purpose of this Article to elaborate on this deontological model of legal ethics.

The impetus behind the deontological model is easily explained. Current professional practices undervalue relevant moral considerations in relation to the admittedly important client interests of dignity, autonomy, equality, and privacy—the “autonomy” interests.¹¹ Three interrelated factors cause this undervaluation of moral concerns. The first is the dominant “autonomy” model of legal ethics, discussed above. The second is the so-called “patronage alliance,” that is, the alliance existing between mainly higher status or resource elements of society and elite corporate lawyers. The third factor is the modern legal realist view of law that urges lawyers to see “law” in instrumental terms, as a tool to promote client autonomy interests. Together, these factors operate to undervalue, if not completely devalue, relevant moral considerations. This moral dilemma of modern practice, and each of its contributing factors, will be described more fully in section two of this Article.

For the sake of the working professional, and the legal profession, it is important to resolve this moral dilemma in a manner which is more ethically satisfying. To this end, this Article will elaborate on the deontological model of legal ethics and demonstrate how it can better account for the moral considerations relevant to the attorney-client decision-making process. The model is not intended to “tilt” decisions in favor of moral considerations, nor is it designed to encourage lawyers to superimpose their moral standards on clients and thereby form an “oligarchy of lawyers.”¹²

¹⁰ The term “deontological” is one which Professor D’Amato and I have previously used to refer to a model of legal ethics which recognizes that “some acts are morally obligatory regardless of their consequences for human happiness.” D’Amato & Eberle, *Three Models of Legal Ethics*, 27 ST. LOUIS U.L.J. 761, 772-73 (1983).

¹¹ See *id.* at 764-65.

¹² See Wasserstrom, *supra* note 8, at 11.

Rather, its purpose is to incorporate more effectively moral considerations into the rendering of legal advice so that they become inherently relevant to the formulation of such advice, in contrast to the autonomy model approach. In any situation, while a relevant moral consideration may or may not predominate, it should always be evaluated along with other relevant considerations, such as autonomy interests, to determine which values should ultimately guide the structuring of advice and conduct.

The argument, then, is simply that there is an appropriate place for moral concerns in practice, and lawyers should not be shy about raising them when relevant. The deontological model elaborated here offers a more rigorous ethical framework for evaluating contemporary questions of professional responsibility by assuring that moral considerations are adequately taken into account, along with the concerns of client autonomy, dignity, and equality.

Like any model of legal ethics, the deontological model cannot be effective if addressed to a world of ideals and angels. It must address our very real world of imperfect justice, hard-headed and hard working attorneys, and difficult moral choices. Therefore, this Article will first examine the portrait of the contemporary bar as depicted in recent empirical literature. This examination is necessary to understand better the actual concerns, conditions, and attitudes of the practicing bar.¹³ This section will primarily examine American private law—the body of law governing relations between essentially private, nonpublic parties—with a focus on corporate practice, the most powerful, populous, and influential segment of this sphere. Drawing on moral philosophy, this Article will then sketch, in section three, the philosophical foundations of the deontological model, based upon the work of Kant, Ross, and Rawls. Section four will demonstrate how the deontological model can indeed function by applying it to contemporary practice situations. In section five, a method will be suggested as to how the deontological model may provide a better means for bringing contemporary practices into closer congruity with moral norms. In

¹³ See Rhode & Schwartz, *supra* note 6, at 643. Understanding the reality of the working bar is a necessary precondition to formulating (or reformulating) rules of ethical behavior. Lawyers "must confront the consequences of their decisions," and rules of professional conduct must be formulated "against a realistic social backdrop." *Id.* There has recently been a wealth of excellent empirical data regarding the attitudes, practices, and customs of practicing attorneys in contemporary America. See *supra* note 2; F. ZEMANS & V. ROSENBLUM, *supra* note 2, at 172-73, 176, 179-84, 187.

particular, the deontological model can be useful in helping to identify and resolve moral choices and conflicts in modern practice.¹⁴ Finally, in section six, this Article will offer a proposal for codification of the deontological approach. The goal is to show how a dimension can exist for a responsible, ethical view of lawyering in the context of a capitalist society.

II. PORTRAIT OF THE CONTEMPORARY BAR

The portrait of the contemporary bar depicted in recent empirical literature removes some of the myth surrounding American legal practice by revealing a growing gap between attorneys' self-image of autonomy and their actual dependence on clients. Lawyers adhere to an ideology of professional autonomy in their professional role with clients, which has little relation to actual practice.¹⁵ In practice, clients dominate the activities of lawyers. Far from being autonomous, lawyers are, in fact, dependent on their clients for reputation, prestige, and wealth.¹⁶

Clients' dominance of their attorneys has significant consequences for contemporary professional practice. First, lawyers do not now (if they ever effectively did) serve as mediators between the needs of their clients and society. In contrast to earlier sociological thought, lawyers do not preserve or enhance the workings of society by resolving conflicts or drawing disparate elements together.¹⁷ Nor do they typically display any "collectivity orientation,"¹⁸ or subscribe to Justice Brandeis' "counsel for the situation" ethic, by which attorneys seek to bring disputing parties

¹⁴ F. ZEMANS & V. ROSENBLUM, *supra* note 2, at 172-73, 187.

¹⁵ See Nelson, *supra* note 2, at 504-05.

¹⁶ See *id.* at 528.

¹⁷ See Heinz, *supra* note 2, at 892-93. The sociological reference is to a group of sociologists known as the "functionalist school," the most prominent of which was Talcott Parsons. *Id.*; see also Nelson, *supra* note 2, at 505 (large-firm lawyers do not serve mediating function in legal system; instead, approach to issues is "ultimately . . . determined by the positions of their clients"). But see Schneyer, *supra* note 5, at 1546 (lawyers do act as mediators). Schneyer's work, among others, demonstrates that a portion of the bar (generally those in the personal client sector) does at times perform a "mediating" function. *Id.* However, I believe that lawyers, especially corporate lawyers, do not tend to perform such a function, but instead focus predominantly on the interests of their clients and themselves, to the exclusion of competing concerns.

¹⁸ But see Heinz, *supra* note 2, at 893. "Parsons argued that professionals are characterized by a 'collectivity orientation.'" *Id.* (citing T. PARSONS, THE SOCIAL SYSTEM 434-36 (1951)) (emphasis added).

together to achieve a fair result.¹⁹ To the contrary, the data suggest not only that lawyers seldom change their clients' goals, but that they do not even attempt to mediate those goals when such goals may be at odds with social norms.²⁰ Second, lawyers focus on maximizing their clients' interests, and not on mediating them with the disparate interests society may have as a whole.²¹ Since lawyers are dependent on their clients for reputation, prestige, and wealth, it stands to reason that most lawyers will perceive maximization of their clients' welfare as the clearest path to success. Thus, lawyers' self-interest lies in promoting their clients' self-interest. Third, this mutuality of self-interest does not arise simply from a desire to pursue wealth or power. Complex economic, social, and ideological dynamics are responsible for lawyers sharing clients' interests,²² and it is a mischaracterization of the range of forces at work to attribute this mutual self-interest to the "lawyers' feeble moral fiber or crass material preoccupation."²³ This system of mutual self-interest and interdependence has been called the "patronage alliance or organization."²⁴

In this context, it is not surprising that most attorneys do not wrestle with their clients over fundamental moral questions, and rarely disagree with the broader implications of their clients' conduct.²⁵ There are three primary reasons for this "amoral" role. First, most work that lawyers perform is highly technical. Second, there tends to be a congruence of values between attorneys and their clients. Attorneys either have a similarity of values with their clients, or they tend to adopt the values of the clients they represent.²⁶ In large firms, clients have greater wealth and power

¹⁹ See Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683, 702 (1965).

²⁰ See J. HEINZ & E. LAUMANN, *supra* note 2, at 368-73; Nelson, *supra* note 2, at 544-45; see also Rhode & Schwartz, *supra* note 6, at 629 (strong coincidence in attitudes between counsel and clients).

²¹ Nelson, *supra* note 2, at 538.

²² See Rhode & Schwartz, *supra* note 6, at 629 ("economic, social, and ideological forces converge to cement a patronage alliance" which displaces normative decision making).

²³ Schneyer, *supra* note 5, at 1543, 1571 (common financial, psychological, and organizational pressures of law practice, rather than permissive ethics rules, explain lawyers' tendency to resolve moral conflicts in favor of client).

²⁴ Heinz, *supra* note 2, at 898-99.

²⁵ Nelson, *supra* note 2, at 538.

²⁶ Studies involving broad segments of the lawyer population, ranging from large corporate practice to small firms and solo practitioners, indicate that attorneys strive to maximize their clients' self-interest, and thereby take on the values of their clients in the process. See J. HEINZ & E. LAUMANN, *supra* note 2, at 360-65; Heinz, *supra* note 2, at 898-99.

than their attorneys, and the lawyers are dependent on a few large clients for their revenues. Small firms and solo practitioners, what may be termed "personal sector lawyers,"²⁷ usually represent parties on the lower end of the socio-economic scale against individuals and organizations of generally greater status and resources. As a result, personal sector lawyers are typically less beholden to individual clients for their revenues. However, the "patronage alliance" often extends beyond the personal sector lawyers' client base to higher status parties, such as judges, bureaucrats, or insurance claims adjusters. Thus, in either context, social or moral questions simply do not arise, since lawyers are likely to acquiesce to the demands of their respective patronage alliance.²⁸

Third, the pervasive climate of "modern" legal realism that marks contemporary professional education, training, and practice operates to transform potentially troublesome value questions into professional matters of technique and strategy. Lawyers thus have little inclination to inject normative concerns into their practice.²⁹

The perception that the bar, especially the legal elite, has allied itself with business is not new.³⁰ What is new is the recognition of the depth of that alliance and its apparent transformative effect on lawyers' values. Lawyers perform the bulk of their services for

²⁷ Heinz and Laumann call lawyers who serve persons, as compared with corporations, "personal sector lawyers." Heinz, *supra* note 2, at 898-99. Lawyers serving corporate clients comprise the "corporate" sector of practice. *Id.* (summarizing results reported in J. HEINZ & E. LAUMANN, *supra* note 2, at 360-65).

²⁸ See *id.* at 899-900. In the personal client sector, the "patronage alliance" seems to extend beyond the client base to a range of higher status elements of society, such as "judges, court clerks, insurance claims adjusters, bail bondsmen and local bureaucrats." *Id.*; see J. HEINZ & E. LAUMANN, *supra* note 2, at 364. In this way, lawyers in the personal client sector may be subject to more intense pressure than their corporate sector counterparts, since they have more masters to serve. Heinz, *supra* note 2, at 899-900. However, personal client sector lawyers generally remain independent of their clients, even if constrained by other actors with whom they deal in the course of their practice. See J. HEINZ & E. LAUMANN, *supra* note 2, at 364. Thus, personal sector attorneys may be free from the controls of their clients, but answerable to other patronage callings necessitated by the nature of their practice. *Id.*

²⁹ See Pepper, *supra* note 3, at 625-26.

³⁰ See L. BRANDEIS, THE OPPORTUNITY IN THE LAW BUSINESS — A PROFESSION 313, 321 (1914) ("able lawyers have, to a large extent, allowed themselves to become adjuncts of great corporations and have neglected the obligation to use their powers for the protection of the people"); see also A. A. Berle, Jr.: *Modern Legal Profession*, 9 *ENCYCLOPEDIA OF THE Soc. Sci.* 340, 342 (1933) (corporate firms "have contributed little to legal literature, social responsibility or public leadership; but they have been highly profitable and have safeguarded the position of the new business organizations").

corporations or other organizations.³¹ Most of these lawyers no longer view themselves primarily as officers of the court, mediators of justice, or other traditional ideals of the bar. Instead, many see themselves as technicians with a simple desire to conduct law practice as a business according to the morals of the marketplace.³² If at one time there was a debate as to whether the practice of law would remain a profession or become a business, there is little argument now: modern law practice, particularly corporate law practice, is primarily a business, run as any other business. Pressures to produce, within organizational structures, and to accommodate clients play pervasive roles in the daily lives of lawyers, at significant personal and social cost.³³

The above portrait of the contemporary bar takes place within the current climate of "modern" legal realism. Much recent commentary has spelled out the view that law is vague and changeable, not precise, certain, clear-cut, or always predictable, but rather that law is instrumental and manipulative, not normative.³⁴

³¹ That is the conclusion of one seminal study. See Heinz & Laumann, *The Organization of Lawyers' Work: Size, Intensity, and Co-Practice of the Fields of Law*, 1979 AM. B. FOUND. RES. J. 217, 225 (47% of total legal effort is performed for corporate clients). Professor Rhode notes that 95% of recent entrants into the law provide services to some kind of organization rather than to individuals. Rhode & Schwartz, *supra* note 6, at 590.

³² See Rhode & Schwartz, *supra* note 6, at 592-93; Stewart, *Professional Ethics for the Business Lawyer: The Morals of the Marketplace*, 31 BUS. LAW. 463, 467 (1975) ("the ethics of the business lawyer are, indeed, and perhaps should be, no more than the morals of the marketplace").

³³ Indicative of the business-oriented nature of modern legal practice are the comments by American Bar Association President Morris Harrell, who has expressed concern that firms may reduce continuing legal education for associates because such programs have become economically undesirable. See Harrell, *Preserving Professionalism*, 69 A.B.A. J. 864, 864 (1983).

³⁴ See Pepper, *supra* note 3, at 624-26. My choice of the phrase "legal realism" is influenced by, and attributable to Professor Pepper in the manner he describes it. *Id.* at 624 n.42. Pepper chose "legal realism" as a term to describe modern law because it "derives from a perception that it will have the highest recognition level as descriptive of 'the dominant view of law inculcated in the law school.'" I use "modern" legal realism simply to distinguish it from "classical" legal realism as developed by Frank, Llewellyn and Pound. See, e.g., J. FRANK, *LAW AND THE MODERN MIND* 46-52 (1930); Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1248-55 (1931); Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697, 710-11 (1931). Pepper cites much of the key "modern" legal realist literature. See, e.g., F. ZEMANS & V. ROSENBLUM, *supra* note 2, at 191-92; Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 248-52 (1978); Cramton, *Beyond the Ordinary Religion*, 37 J. LEGAL EDUC. 509, 513 (1987); Luban, *Legal Modernism*, 84 MICH. L. REV. 1656, 1691 (1986); Woodard, *The Limits of Legal Realism: An Historical Perspective*, 54 VA. L. REV. 689, 728-32 (1968); For an important critique of legal realism, see D'Amato, *The Limits of Legal Realism*, 87 YALE L.J. 468 *passim* (1978).

As a "scientific" description of law, the modern legal realist view can be seen as essentially accurate. For it realistically describes law as complex—that law "cannot be reduced to a simple set of rules," or "mechanical determinacy."³⁵ Rather, law "relies on a collection of shared values, assumptions and techniques,"³⁶ which Thomas Kuhn classically described as science.³⁷ From this perspective, the "modern" legal realist view comprises one set of assumptions and techniques making up "law," or in Kuhn's language a "paradigm." In Kuhnian terms, "modern" legal realism can thus be viewed as only one of the several competing paradigms at work in the formulation of "law," but it is probably the "dominant" paradigm. Likewise, the autonomy model of legal ethics is one paradigm within which to view legal ethics, but it is also currently the dominant paradigm. However, there are competing paradigms at work in law (and legal ethics) from which eventually a more settled Weltanschauung, or world view, may emerge.

However, mixing the autonomy model of legal ethics with the modern legal realist view of law can provide a noxious cocktail. It means that lawyers intent on realizing their clients' total autonomy can view law as a malleable commodity to be used, bent, or manipulated as needed to achieve client goals. This is the "morally pernicious effect" of legal realism.³⁸ All of this occurs within the bounds of the law, to be sure, but only by redefining and stretching the limits of the law to accommodate client autonomy interests, thus redefining society itself in the process. This process operates to transform or redefine the terms and meaning of law so that law can take on concrete value in promoting autonomy interests.

The dominant "modern" legal realist view of law, combined with the traditional amoral role of the lawyer, and the "patronage alliance" between lawyer and client, posits the moral dilemma of contemporary American legal practice: law is essentially neutral and can seemingly be viewed as conveying no moral force while lawyers view their function as primarily technical and instrumental and not one of imparting normative guidance. Moreover, since lawyers aim to please their clients, they naturally perceive their suc-

³⁵ See Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1335 n.24 (1988); Luban, *supra* note 34, at 1691.

³⁶ See Farber, *supra* note 35, at 1335 n.24; Farber & Frickey, *Practical Reason and the First Amendment*, 34 U.C.L.A. L. REV. 1615, 1629-31 (1987).

³⁷ T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 10, 24 (1962).

³⁸ Luban, *supra* note 4, at 646.

cess as dependent on satisfaction of this goal. Thus, neither the law nor lawyers seem to be much of a source of morality insofar as both work, or can be put to work, to realize client autonomy.

Professor Pepper has outlined this modern moral dilemma well: clients seeking access to the law frequently have "weak internal or external sources of morality," while lawyers advising them view their professional role not as one of imposing moral constraints on clients' desires, but rather understand and interpret the law to deemphasize its moral content and perceive it primarily as a manipulative instrumentality.³⁹ To realize their clients' goals within this legal structure, lawyers "systematically screen out or deemphasize moral considerations and moral limits."⁴⁰ It is hardly surprising, then, that lawyers mainly guide clients so as to maximize their autonomy without regard to the ends or consequences of client conduct, or the means used to accomplish those ends, or their own conduct insofar as they promote autonomy interests. Such an approach allows attorneys to promote client autonomy while still acting within the "bounds of the law."

In this way, contemporary law practice tends to undervalue moral concerns. The normative uncertainty of the law, combined with lawyers' agnosticism and dependence on clients, results in lawyers' propensity to resolve most doubts in favor of their clients,⁴¹ just as Professor Llewellyn observed decades ago.⁴² This is the social and moral cost of the autonomy model, which practitioners themselves recognize and grapple with.⁴³ Carried to its logical extreme, this form of moral agnosticism—the desire to do business according to the morals of the marketplace—means that normative judgment can be suspended in favor of clients, clients' means, clients' ends, clients' goals, and lawyers' own personal actions in aiding and abetting these autonomy interests. Without a mediating function performed by law, lawyers, or society, there is nothing to arbitrate client autonomy interests. Autonomy interests may then be fulfilled to the fullest in the market economy.

There is obviously much in this portrait that is disturbing, at

³⁹ See Pepper, *supra* note 3, at 627.

⁴⁰ *Id.*

⁴¹ See J. HEINZ & E. LAUMANN, *supra* note 2, at 1137; Rhode & Schwartz, *supra* note 6, at 629.

⁴² Llewellyn, "The Bar Specializes—with what Results?", 169 ANNAL 177, 181-82 (1933).

⁴³ F. ZEMANS & V. ROSENBLUM, *supra* note 2, at 172-73, 178-81.

least to some. But so long as legal services are distributed through a market system, as are other services and products in our economy, there exists little prospect for fundamental change. It seems inevitable that lawyers will align themselves with their business interests and, in the process, echo the values of their clients. In this context, the focus of legal reform efforts must lie in ameliorating market failures or other anomalies resulting from the dominant autonomy model. As we approach the end of the millennium, efforts designed to make current practices more congruent with moral norms seem to be the most realistic course for attempting to solve the moral dilemma of modern practice caused by the dominant autonomy model.

Since current private legal practice tends to confine moral vision, a more ethically rigorous framework for approaching questions of professional responsibility is needed, if for no other reason than to make lawyers more sensitive to the normative dimensions of their advice, decisions, and conduct. Even practicing lawyers perceive a need to strike a better balance between client interests and moral values in modern practice.⁴⁴ This Article now turns to an articulation of a moral vision, namely the deontological model.

III. THE DEONTOLOGICAL MODEL

This section will outline the philosophical foundations of the deontological model so that its application to contemporary practice situations—which will be illustrated in section four—will be more sensible. The goal is to show that the deontological model is far easier to grasp, and to apply, than its name would suggest.

"A deontological theory of ethics says that some acts are morally obligatory regardless of their consequences."⁴⁵ It is an ethical theory that is opposed to utilitarianism. For example, Peter would have no moral right to rob Paul even if Peter's intention would be to use Paul's money to buy food for the homeless. A lawyer would likewise have no moral right to misrepresent a material fact to a bank so that a client, a shelter for the homeless, could obtain a

⁴⁴ *Id.* at 180-81. The authors report that 30.6% of practitioners responding to one survey stressed that a "'sense of social responsibility,' . . . 'humanity,' and standards 'above the current morality of the marketplace'" be included in professional responsibility courses in law school. *Id.* at 180. The practitioners surveyed were using "moral" in a much broader sense than used in this article.

⁴⁵ D'Amato & Eberle, *supra* note 10, at 772 (citing W. FRANKENA, *ETHICS* 16-17 (2d ed. 1973)).

needed loan. These acts are wrong, even though they serve greater, and morally worthwhile ends.

The leading philosopher of deontological ethics, Immanuel Kant, formulated a basic moral command, the categorical imperative, against which all individual actions would be judged. According to Kant, only those maxims which a *rational being* could conceive as valid bases of action for all other rational beings are moral. He stated the categorical imperative as follows: "Act only according to that maxim by which you can at the same time will that it should become a universal law."⁴⁶ Kant expressed the classic *a priori* and categorical approach.

The underlying dynamic in Kant's theory applicable to legal ethics is the power of critical reasoning. People must critically reason, first, to identify moral values, then to formulate ethical principles based on those moral values by which to justify their actions.

Kant's reasoning is, of course, far more technical. In moral philosophy, Kant "wishes to discover the origin in the practical reason of the fundamental principles according to which we all judge when we judge morally."⁴⁷ The moral philosopher should "lay bare the *a priori* element freeing it from all empirically derived elements, and . . . show its origin in the practical reason."⁴⁸

Reason must be used to accomplish these goals, and Kant envisioned two uses for reason. One form of reasoning is concerned with theoretical knowledge—with isolating the *a priori* elements in our knowledge in the manner described above. Kant calls this "pure practical reason." The other form of reasoning is concerned with choice—"the production of moral choices or decisions in accordance with the law which proceeds from itself." This Kant calls "practical reason." "In plain language, theoretical reason is directed towards knowledge, while practical reason is directed to-

⁴⁶ I. KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 39 (L.W. Beck trans. 2d ed. 1959). Kant restated his categorical imperative in four ways: 1) "Act as though the maxim of your action were by your will to become a universal law of nature," *id.*; 2) "Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only," *id.* at 47; 3) Act in accord with "the idea of the will of every rational being as a will giving universal law . . . (E)verything be done from the maxim of its will as one which could have as its object only itself considered as giving universal laws," *id.* at 50; 4) "[A]ct as if [you] by [your] maxims, [are] at all times a legislative member in the universal realm of ends . . . [a]ct as if your maxims should serve at the same time as the universal law (of all rational beings)." *Id.* at 57. Each of these formulations is really a restatement of the basic categorical imperative, and each has the same essential meaning.

⁴⁷ 6 F. COPLESTON, A HISTORY OF PHILOSOPHY, pt. IV, at 309 (1960).

⁴⁸ *Id.*

wards choice in accordance with moral law and, when physically possible, to the implementation of choice in action."⁴⁹ Reason thus forms the basis of obligation that makes for moral choice.

To ground moral law in reason, Kant links "subjective" principles of volition with "objective" reason. He does this by making a fundamental distinction between principles and maxims.⁵⁰ "[A] principle [is an axiom] on which all men would act if they were purely rational moral agents. A maxim is a subjective principle of volition . . . a principle on which an agent acts as a matter of fact and which determines his decisions."⁵¹ Specific maxims are then tested against his ultimate criterion, the categorical imperative, in order to establish fundamental "objective" principles applicable to all. The categorical imperative demands that one "act only according to that maxim by which you can at the same time will that it should become a universal law."⁵²

To test whether a maxim—a person's moral choice—accords with "rational" moral law we must ask ourselves whether we would desire that our maxim, *i.e.*, our choice, be a universal law applicable to all. If so, then our maxim will stand up as a principle (a universal law). But if not, we must reject the maxim.⁵³ In either case, it is the categorical imperative that serves as the ultimate criterion for judging actions. "[A]ll concrete principles of conduct must partake in this universality if they are to qualify for being called moral."⁵⁴

Assuming that each person strives for objective moral goodness, critical rational reasoning, in the manner suggested by Kant, is the only method by which one can obtain that rarefied state. Critical reasoning, in this technical sense, "seeks to reveal the moral imperatives imbedded in the structure of normative ration-

⁴⁹ *Id.* at 310.

⁵⁰ I. KANT, *supra* note 46, at 38 n.9.

A "maxim" is the subjective principle of acting, and must be distinguished from the objective principle, *i.e.*, the practical law. The former contains the practical rule which reason determines according to the conditions of the subject . . . [so that it is] the principle which the subject acts[; b]ut [t]he law is the objective principle valid for every rational being, and the principle by which it ought to act, *i.e.*, an imperative.

Id.

⁵¹ 6 F. COPLESTON, *supra* note 47, at 318-19 (emphasis added).

⁵² I. KANT, *supra* note 46, at 39. As Professor Copleston explained, the categorical imperative "commands . . . that the maxims which serve as our principles of volition should conform to universal law." 6 F. COPLESTON, *supra* note 47, at 323.

⁵³ 6 F. COPLESTON, *supra* note 47, at 320.

⁵⁴ *Id.* at 324.

ality.”⁵⁵ Moral principles are objects of rational choice and define the moral law which people can rationally utilize to govern their conduct.⁵⁶ The goal of this form of reasoning is to universalize, to formulate fundamental, universal principles of conduct which are “objectively necessary, without regard to any other end.”⁵⁷ Using these principles as guidelines for individual conduct enables one to behave as a free and rational person;⁵⁸ that is, in harmony with universal practical reason, the idea of the will of every rational being as a will giving universal law.⁵⁹ In this manner, people may realize moral autonomy; they receive their place, in effect, in Kant’s universal “realm of ends.”⁶⁰

Kant’s general theory of ethics is fundamentally sound. His universal kingdom of ends, where purely rational beings live according to self-imposed universal rules, is probably not a feasible goal in our “phenomenal” world. In fact, Kant himself believed that reason had limits and that it was not possible to derive all moral laws and precepts from reason.⁶¹ Likewise, the categorical imperative may or may not be *directly* applicable to our world, even “as a means for generating rules of conduct or moral claims.”⁶² Despite this, however, the importance of Kant’s theory for us is as “an ideal toward which the rules of the phenomenal world can strive,”⁶³ so that our conduct can better achieve moral worth—if that is our goal. In this way, Kantian critical reasoning can serve as a means for identifying moral values, resolving moral choices, and ultimately generating “universal” rules of conduct.

Restated in non-metaphysical and secular terms, Kant’s form of reasoning requires that one morally appraise one’s action in order to accept the critical principle—the moral value—involved in the moral appraisal. This is true for both the actor and those affected by the action, and regardless of what was hoped to be ac-

⁵⁵ Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U.L. REV. 885, 913 (1981).

⁵⁶ See J. RAWLS, A THEORY OF JUSTICE 251 (1971).

⁵⁷ See I. KANT, *supra* note 46, at 31.

⁵⁸ See J. RAWLS, *supra* note 56, at 252.

⁵⁹ See I. KANT, *supra* note 46, at 51.

⁶⁰ *Id.* Kant describes his realm of ends as “a systematic union of rational beings through common objective laws . . . [which] have in view . . . the relation of these beings to each another as ends and means.” *Id.* at 52.

⁶¹ See 6 F. COPLESTON, *supra* note 47, at 205.

⁶² Mashaw, *supra* note 55, at 917.

⁶³ *Id.*

complished.⁶⁴ This self-evaluation demands an impartial point of view, so that in formulating conduct one must consider oneself as both agent and object of action, as actor and subject—as if a “veil of ignorance” had been imposed.⁶⁵

But morality is not simply treating others as one would like to be treated. It is also a matter of not treating others in ways one would find intolerable were the situation reversed. Kant's approach requires one to behave in accordance with rules of conduct equally applicable to all, and precludes one from fashioning exceptions to these rules for one's own actions.⁶⁶

For legal educators and practitioners, Kant's theory provides a framework for making professional practices more congruous with moral norms. First, it affords a rational, impartial, and rigorously principled form of reasoning which can identify moral values present in contemporary practice situations. Second, having identified relevant moral values, it requires that they be addressed when resolving moral choices and formulating conduct. Third, it provides a means of formulating “universal” rules of conduct. Thus, when faced with moral choices in practice, Kant's theory provides a means by which lawyers can and should accept more responsibility for their actions, instead of seeking to avoid it by retreating behind the professional role as encouraged by the autonomy model. To be credible in the Kantian sense, professional actions and judgments must be scrutinized to ensure that they provide a basis for maxims which are consistent, dispassionate, universal foundations for conduct.⁶⁷

However, Kant's position can be too rigid. Kant argued that a moral duty could not be transgressed even if obeying it would result in harm to others. His famous example was that a person

⁶⁴ See generally Richards, *Moral Theory, The Developmental Psychology of Ethical Autonomy and Professionalism*, 31 J. LEGAL EDUC. 359, 362 (1982). Richards' article is an interesting and sensitive exploration of the interdisciplinary relevance of moral philosophy and developmental psychology to legal education, and especially to ethical reasoning. This is a vast, as yet largely untapped, field that might prove to be very insightful.

⁶⁵ Mashaw, *supra* note 55, at 917 n.133 (citing J. RAWLS, *supra* note 56, at 11-22, 118-92). Rawls' “original position” is a hypothetical situation he poses that “forms an initial *status quo* from which a group of rational and mutually disinterested people reach a set of agreements that provide the basis of a just society.” *Id.* at 917 n. 132. “The veil of ignorance” is a condition Rawls imposes upon the participants in the original position; none of them knows anything about him or herself, such as social status or natural abilities, that could differentiate him or herself from the other participants.” *Id.*

⁶⁶ ETHICAL THEORY AND BUSINESS 19 (T. Beauchamp & N. Bowie eds. 1979).

⁶⁷ See Rhode & Schwartz, *supra* note 6, at 643.

could not tell a lie to a would-be murderer even if necessary to save the life of another.⁶⁸ Significantly, this example posits a conflict between the moral duty not to lie and the moral duty to prevent harm to others.

W.D. Ross thus argued that moral conflicts can arise even in deontological theory. Hence, "it is incoherent to insist upon universal validity of any one moral rule to the exclusion of all others."⁶⁹ Ross' approach of recognizing moral choices and conflicts, and then seeking to resolve them, better focuses deontological theory for application to our world of uncertainty and difficult choices. After all, we do not live in the universal kingdom of ends. We live in the phenomenal world—the here and now of ordinary reality—where many practical situations pose just the type of conflict of competing values that Ross hypothesized.

As previously argued, under the deontological model, moral rules cannot be eclipsed by nonmoral considerations (*e.g.*, client interests or autonomy), but they may conflict with other moral rules.⁷⁰ When such a conflict does exist, it becomes necessary to critically analyze the situation so that it may be resolved in an ethically satisfying manner.

Rawls characterized this approach as "intuitionism," a doctrine containing "an irreducible family of first principles which have to be weighed against one another by asking ourselves which balance . . . is the most just."⁷¹ Under the Ross analysis, however, a more direct moral philosophical reference remains. Ross' approach calls for the distribution of goods according to moral worth (distributive justice). But, "while the principle to produce the most good ranks as a first principle, it is but one such principle which must be balanced by intuition against the claims of the other *prima facie* principles."⁷² One other such *prima facie* principle rec-

⁶⁸ See D'Amato & Eberle, *supra* note 10, at 772. Professor D'Amato and I have previously noted Kant's example:

[An individual] who intends to murder your sister asking you if your sister is at home. If in fact she is at home, Kant requires that you tell the truth and answer in the affirmative. Later, pressed by his students, Kant further explained that if you answer truthfully, the would-be murderer would probably not believe you!

Id. at n.35.

⁶⁹ *Id.* at 773 (citing W. D. ROSS, *THE FOUNDATIONS OF ETHICS* (1939); W. D. ROSS, *THE RIGHT AND THE GOOD* (1930)).

⁷⁰ See *id.* at 772-73.

⁷¹ J. RAWLS, *supra* note 56, at 34.

⁷² *Id.* at 40 (citing W.D. ROSS, *THE RIGHT AND THE GOOD* 21-27 (1930)).

ognized by the deontological model is the preservation of attorney-client confidentiality. Hence, one conflict to be resolved (through intuition or intuitive reasoning) at this level of *prima facie* first principles is the primacy of confidentiality in relation to other concrete moral claims, such as the duty to prevent harm to third persons.

This raises, in rather direct fashion, what is known in moral philosophy as the "priority problem." When presented with a conflict between competing moral claims, how does one provide a "constructive answer . . . to the problem of assigning weights to competing principles of justice[?]"⁷³ Ross again provides one answer for the deontological model through a form of reasoning technically identified by Rawls as "lexicography."

Lexicography calls for a serial or lexical ordering of values. It "requires us to satisfy the first principle in the ordering before we can move on to the second, the second before we consider the third, and so on."⁷⁴ In this manner, Ross ranked moral worth as lexically superior to nonmoral values, a classic example of lexicographical reasoning in moral philosophy.⁷⁵

On this basis, the deontological model acknowledges that, while moral rules clearly outweigh nonmoral claims, they may conflict with other moral rules. At this second level, the value of confidentiality is juxtaposed with the moral duty to prevent harm to others. The relevant deontological rules state:

(1) If A intends to harm B and the harm is serious either physically or financially, and if C discovers A's intention, then C is charged with the ethical duty to act to prevent the harm to B, such as by warning B; (2) any person is under a moral obligation not to commit fraud or perjury, perjury being defined as a material falsehood; (3) if C elicits information from A "in confidence," then unless there is a conflict with another moral obligation, C has a duty to keep the information confidential; (4) there is a moral value in some people becoming professional attorneys, so as to give others access to the content of the law and access to informed predictions about the probable behavior of officials.⁷⁶

The obvious danger in using a lexical ordering of values is that

⁷³ *Id.*

⁷⁴ *Id.* at 43.

⁷⁵ See J. RAWLS, *supra* note 56, at 43 n.23 (citing W. D. ROSS, *THE RIGHT AND THE GOOD* 149-54 (1930)).

⁷⁶ D'Amato and Eberle, *supra* note 10, at 773.

principled results may not be obtained by applying "intuitionism" to the resolution of moral conflicts. There will always be a "plurality of principles"⁷⁷ which must be balanced when determining which single principle in the plurality is "most just." This balancing will inevitably require the exercise of some discretion, but the problem is not irreducible. Reliance on intuitionism can be reduced by substituting Rawls' prudential, rational judgment for "unguided" moral judgment.⁷⁸ Expressed in classical terms, prudential judgment is what Aristotle called "practical judgment" or "practical wisdom;"⁷⁹ what Kant termed "universal practical reasoning;"⁸⁰ or, what contemporary constitutional and first amendment theorists call "practical reason,"⁸¹ "prudence," "prudential reasoning or judgment,"⁸² or "intuitionism."⁸³

The task then is one "of reducing and not of eliminating entirely the reliance on intuitive judgments."⁸⁴ It is unrealistic to think that all elements of discretion can be eliminated. Rather, the "practical aim" is to "reach a reasonably reliable agreement" as to ethical judgments.⁸⁵ The broad ideal aim of legal ethics is to formulate reasonable, consistent, and universal foundations for rules of conduct. The practical aim is to reach results that are ethically satisfactory, yet fair to the client. Kantian critical reasoning can go a long way to reaching a workable solution to these problems. Ultimately, however, even this deontological approach may at best only be an "illuminating approximation" of what inevitably remains a quest for more certain resolution.⁸⁶

⁷⁷ J. RAWLS, *supra* note 56, at 41.

⁷⁸ *Id.* at 44.

⁷⁹ See ARISTOTLE, *NICHOMACHEAN ETHICS*, bk. VI (M. Ostwald trans. 1962).

⁸⁰ I. KANT, *supra* note 46, at 47.

⁸¹ See Farber, *supra* note 35, at 1334-35; Farber & Frickey, *supra* note 36, at 1639-56; Michelman, *The Supreme Court 1985 Term—Foreward: Traces of Self-Government*, 100 HARV. L. REV. 4, 17-36 (1986).

⁸² Sagoff, *The Limits of Justice*, 92 YALE L.J. 1065, 1080-81 (1984).

⁸³ See Schiffrin, *Liberalism, Radicalism, and Legal Scholarship*, 30 U.C.L.A. L. REV. 1103, 1192-1215 (1983).

⁸⁴ J. RAWLS, *supra* note 56, at 44.

⁸⁵ *Id.*

⁸⁶ *Id.* at 45. Indeed, I am trying to do nothing other than what Charles Fried perceptively recognized in his seminal article *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*:

I do not imagine that what I have said provides an algorithm for resolving some of these perennial difficulties. Rather, what I am proposing is a general way of looking at the problem, a way of understanding not so much the difficult borderline cases as the central and clear ones, in the hope that the principles we can there

To summarize, the proposed model for critically reasoning through ethical questions is as follows. When confronted with situations involving moral values, a person must critically evaluate the factors at issue and must make a reasonable, disinterested assessment of the situation utilizing the dynamic of Kantian critical reasoning in order to identify the moral values at issue. This is a type of moral dialogue which can be characterized as an internal moral dialogue. This can result in application of either of the lexicographical rules. If a moral value conflicts with a nonmoral claim, application of the first level lexicographical rule causes the moral rule to prevail over nonmoral considerations. Thus, confidentiality would outweigh other client interests of a nonmoral dimension, for example, a corporate officer's desire to know the source of a confidence placed with corporate counsel by a lower-level corporate employee. But if a moral rule conflicts with another moral rule, the second level lexicographical rule applies, *i.e.*, confidentiality versus the duty to prevent harm. This means that individuals must then make a *moral choice* of which value or values will provide a foundation of principled justification upon which to base their actions. This involves employing Ross' theory of going beyond identifying the moral values at issue and recognizing the moral conflict in deontological theory. One must then use a Rawlsian form of prudential judgment to resolve the conflict.

Put another way, having identified the moral conflict among the first order of values, they must next be weighed to determine which is most just or moral in the circumstances. Once a moral choice is made in this manner, the lawyer is ready to enter into a moral dialogue with the client. This can be characterized as an external moral dialogue, advice involving an open exchange of views over all matters, values, and interests at issue (including moral values) designed to formulate principled conduct.

IV. APPLYING THE DEONTOLOGICAL MODEL

The core values of a deontological model of legal ethics have

discern will illuminate our necessarily approximate and prudential quest for resolution on the borderline.

Fried, *supra* note 3, at 1087. In this way my process seems the reverse of Fried's. I am engaged in a quest for more resolution on the borderline in the hope that this effort will illuminate our quest for harmonization of practice norms with ethical principles, including resolution of "central and clear" problems.

previously been articulated.⁸⁷ This section will apply the deontological model to contemporary practice situations and demonstrate how the deontological view can better inculcate ethical considerations into attorney-client deliberations. The examples involve challenges to the rule of confidentiality, still the most hotly debated area of contemporary legal ethics and a good subject for demonstrating the deontological approach. Here, the value of confidentiality will be juxtaposed against countervailing moral values, in this case the duty to warn innocent third parties of imminent harm. One example deals with imminent and substantial physical harms, while the other addresses similar economic harms. Both examples are drawn from the world of practicing attorneys.

A. Imminent Physical Harm—Intent to Distribute Adulterated Apples

1. Magnitude “4” Risk

Let us suppose that a lawyer represents Apple-Food Incorporated, a wholesale distributor of apples and apple products. It is common practice for growers to apply a chemical additive to apples. This additive, chemical compound XYZ, enhances the “redness” of the apples, making the fruit more physically attractive to consumers.

The problem with XYZ is that recent in-house scientific studies seem to indicate that the substance causes cancer in laboratory mice. The effects of XYZ are especially pronounced in young mice, leading scientists to hypothesize that the product is especially dangerous to children. The potential threat is substantial since XYZ has been widely used, and apples are a staple of children’s diet—applesauce, juice, baby food, etc. However, the test results at this stage are inconclusive. On a scale of 1 to 10, with 1 denoting the least probability and 10 the greatest probability of a link to cancer, the test results suggest a statistical probability of 4. More tests have been ordered, but these results will not be available for months. Apple-Food Inc. has already purchased this season’s crop

⁸⁷ See D’Amato & Eberle, *supra* note 10, at 773, 783-84, 787, 795-98. These core values include: preservation of confidentiality in attorney-client relations; the duty to prevent physical and financial harms to innocent third parties; providing access to the legal system; the belief that lying, perjury, misrepresentation, fraud, and cheating are moral wrongs and ultimately debilitating to the legal profession; and the questioning of allegiance to unjust laws. *Id.*

of apples, and quality control spot checks reveal that ninety percent of the apples contain XYX. Company officials estimate the value of these apples at one million dollars. Plans are underway to distribute the product, since the apple season in which Apple-Food makes most of its profits is at hand.

How should Apple-Food's lawyer advise the company? From an autonomistic view, it is clear that the lawyer should assist in maximizing the client's welfare. Apple-Food has made a significant investment in its product, which it must sell in order to make profit. As a professional, the lawyer has an obligation to educate Apple-Food on the law so that Apple-Food knows the framework in which it can maximize its interests; Apple-Food is entitled to know its "rights."

But what is the law in this case? There is a suggestive but, ultimately inconclusive, threat of harm which is difficult to assess. Scientists' best estimate is that XYX poses a magnitude 4 threat on the probability scale of causing cancer. The lawyer is obligated to point out potential liability, probably in tort, in addition to advising Apple-Food of its rights, even though liability seems relatively remote at this point. Intentional tortious conduct seems improbable since a "4" is not definite evidence of a present harm. Even negligent conduct seems unlikely since a "reasonable" person in this circumstance might conclude that a risk of 4 is a statistically less than probable event and, therefore, is too remote to justify any prophylactic measure. Thus, Apple-Food could distribute the product within "manageable," and justifiable, risk proportions. Moreover, no law or regulation prohibits the distribution of apples in these circumstances. Accordingly, it seems proper to advise Apple-Food in good conscience that selling the apples is within its legal rights.

However, law is not synonymous with morality.⁸⁸ A legal right to do something does not make the act moral. A deontologist would look to the moral concerns at issue, whether reflected in the law or not. From a deontological perspective, the moral concern at issue is the potential threat of harm to the apple-eating public, and a deontologist would feel "obligated" to assess this threat. However, at this stage, the threat, while suggestive, is ultimately incon-

⁸⁸ See *id.* at 778, 793-98; D'Amato, *The Moral Dilemma of Positivism*, 20 VAL. U.L. REV. 43, 48 (1985); D'Amato, *Lon Fuller and Substantive Natural Law*, 26 AM. J. JURIS. 202, 206-10 (1981).

clusive. Having conducted this "internal moral dialogue" by identifying the moral values at issue—here, a threat of questionable magnitude posed to the public by XYX—the lawyer must decide whether it is necessary to make the moral choice to discuss the moral value with the client. As I have argued, moral concerns should be included in attorney-client discussions, where appropriate, along with other important factors, such as client autonomy interests, which include the client's rights under the law.⁸⁹

Assuming you made the moral choice to discuss the concerns posed by XYX with your client, what would be the result of this attorney-client dialogue? Summarily stated, the client interest in making a profit would likely prevail over acting to address the threat of harm, even though it is conceivable that some companies would do everything possible to minimize the harm, and some might go so far as to withhold the apples from distribution. Ultimately, the decision is in the client's hands, where it belongs.

If the client decides to distribute the apples, should the lawyer take any further action? Should an attorney breach confidentiality and warn the public? In Ross' framework, this presents a conflict in deontological theory. The moral conflict here is between maintaining confidentiality and disclosing a potential harm in order to protect innocent third parties. Both concerns are *prima facie* first order moral values. Confidentiality has important moral value in the deontological system, but is it outweighed by the threat of harm to innocent third parties? In Rawlsian terms, the solution can only be reached by determining which of these moral values—confidentiality or the duty to prevent harm—is "more just" in these circumstances. This is not an easy question, and it forces an analysis of the weight to be given to one set of moral concerns over another, to ask, within the deontological framework, which principle in the "plurality of principles" is "more just." Under the

⁸⁹ The view that moral concerns are relevant to rendering legal advice has some support in the codes. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1981) [hereinafter MODEL CODE]. The Model Code states that "[i]n assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible." *Id.* The Model Rules provide that "[i]n rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." MODEL RULES, *supra* note 1, Rule 2.1 (1983). Implementation of this view in practice would be consistent with what Lon Fuller has called a "morality of aspiration," as compared to the "morality of duty" that marks obedience to most professional rules of conduct. L. FULLER, *THE MORALITY OF LAW* 5-6 (rev. ed. 1969).

facts posed the lawyer should maintain confidentiality. Why?

Conscience might seem to indicate that even the threat of harm should be disclosed. But this harm must also be evaluated in order to formulate principled conduct. Here a magnitude 4 threat of harm is suggestive but less than probable; it is ultimately indefinite, unknowable, and by no means "concrete." It is likely that quantifiably indefinite threats like this arise often in the food industry. On the other hand, the threat is inchoate; it could manifest into a concrete imminent harm, but has not yet done so. Therefore, a warning could be issued. Unfortunately, if warnings were disseminated on this basis—that is, a quantifiably indefinite state of knowledge—companies faced with threats which are manifestly more concrete might find that their warnings in these circumstances lose persuasive force. Or, after issuing the warning, a company such as Apple-Food could suffer a precipitous drop in business. Profits would then have been sacrificed for a perceived duty to the public arising from a suggestive, but less than probable, threat of harm. Apple-Food's duty to the public would, in effect, have been determined to outweigh its duties to its stockholders, employees, and community. This would clearly be an unacceptable result in the autonomy model, but it might also be unacceptable in the deontological model. These and other points are debatable. Reasonable minds could differ, but without more "hard" data indicating a greater statistical link to cancer this threat of harm is not sufficiently concrete to outweigh the value of confidentiality in attorney-client relations, and the lawyer should therefore maintain the confidence.

Can such conduct be justified? Does it provide the grounds for a universal maxim? I think so. A responsible attorney would recognize the need to confront and discuss with the client the moral concerns at issue in this situation. The attorney would first assess the moral value imbedded in the situation and then make a moral choice about it. The consequences of this decision would then be confronted and discussed frankly with the client. In terms of professional responsibility, the attorney would have evaluated a relevant moral concern in structuring advice, and then determined whether to include that value as a factor on which to base the advice to be given to the client. In this example, the attorney has determined to give advice based on this value. This is defensible moral conduct. Reasonable minds may differ, but the maintenance of secrecy is justifiable in this circumstance.

Expressed as a Kantian rule of conduct, the attorney would have decided that confidentiality is more important, is "more just," than a countervailing duty to the public to prevent harm when the harm is of a suggestive, but less than probable nature. Having universalized this maxim, the attorney would be saying that such action would be consistent with this universal rule in this circumstance. The attorney also would be saying that others should act in this manner when faced with a comparable problem. Thus, the attorney would expect to be so treated by another attorney in a similar situation, inasmuch as the personal interests of the attorney and the interests of innocent third parties had been considered in determining what action to take.

2. Magnitude "8" Risk

Now let us change the hypothetical. Recent, more accurate tests prove with certainty that what was merely suspected is now true: *XYX* poses a definite threat of cancer particularly in children. On a scale of 1 to 10, the probability of cancer developing is now 8. This threat can be characterized as "highly probable." The moral concern is now clear: innocent people will likely be harmed by eating *Apple-Food's* apples. The lawyer recognizes the greater magnitude of the threat as well as the increased moral value in preventing harm. This is one of several factors which you discuss with your client in the process of rendering advice. There is still no immediate legal impediment to distribution of the apples in the sense of any positive law or regulation prohibiting dissemination in these circumstances. But now there is clearly potential, even probable, tort liability—on grounds of negligence, dissemination of an inherently dangerous product, and possibly intentional infliction of emotional distress, among other possible theories. The lawyer points all of this out, as required under any model of legal ethics.

The lawyer also notes that, while these potential tort liabilities are probable, they are not one-hundred percent certain to occur. Eating these apples merely increases the statistical risk that cancer may develop. Moreover, even if a consumer of *Apple-Food's* apples develops cancer, how can it be definitively linked to ingesting these particular apples? Could not cancer just as well arise from eating other food products (bacon, sausage, or saccharin), or from the environment (benzene, PCB's, asbestos, or other carcinogens present in the air, water, or earth), or simply by being a member of modern society (passive inhalation of cigarette smoke, x-rays, radon, etc.)?

How can eating these apples be proven to be the proximate cause of the disease? Even if these apples are the scientific proximate cause of the disease, plaintiffs would have a significant, possibly insurmountable, burden to prove that ingesting these apples is the legal proximate cause of the harm.

Officials of Apple-Food respond that they will nevertheless go forward with distribution of the apples. Too much money has already been invested and they need to make a profit. Otherwise, the company's fortunes may suffer, leaving company employees, including the lawyer, out of a job. Besides, there is nothing illegal in their proposed conduct; no positive or common law principle "prevents" them from distributing the apples at this time. While they regret the harms that may arise, these harms do not appear to be imminent in the sense of causing harm to this quarter's profit and loss statement, or even the annual results. Nor do they seem one hundred percent certain to arise in any event. After all, cancer may not actually develop from these apples, and even if it does, the apples may not be proven to be the legal proximate cause of the disease. Therefore, even under prevailing tort principles, Apple-Food's proposed conduct may not ultimately result in liability.

Apple-Food officials concede the propriety of the lawyer's warning of potential liability for which they wish to be prepared. Thus, they propose to set aside ten percent of profits per year, invested at ten percent per annum, as a reserve against potential claims.⁹⁰

The lawyer has now raised the relevant moral concerns, but they have been transformed into a quantifiable dollars and cents figure. The transaction costs of doing business in potentially carcinogenic apples, even in the face of potential legal liability, have been assessed and quantified in an autonomy model calculus of cli-

⁹⁰ Such hard-boiled economic valuation of life does go on in the real world, as the Ford Pinto cases demonstrate. Stewart McCauley noted that "[p]erhaps the most dramatic reaction to a manufacturer's judgments about the value of human suffering and death involved the Ford Pinto." McCauley, *Lawyers and Consumer Protection Laws*, 14 LAW & SOC'Y REV. 115, 157 n.6 (1979). In *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981), a 13-year-old boy suffered severe burns when a Ford Pinto's gas tank ruptured and ignited. *Id.* at 773, 174 Cal. Rptr. at 359. The jury was shown a memorandum in which Ford considered installing a check-valve on its fuel tanks to increase their safety. *Id.* at 776, 174 Cal. Rptr. at 361. The authors of the memorandum stated that if the valves were not installed, there would be a significant risk of death or injury due to fire which could be avoided at nominal (\$11) cost. *Id.* at 777, 174 Cal. Rptr. at 361. Management concluded that the benefits to be anticipated did not outweigh the cost. *Id.*

ent interests and determined to be less than the costs of halting distribution of the apples. Economically, it is in Apple-Food's best interest to continue business as usual and distribute the product; essentially the law is being stretched to accommodate the self-interest of the client. Law is being viewed here through modern legal realist lenses as non-normative and therefore "breakable" so long as the costs of transgression are paid. In this instance, the transaction costs of transgression are still less than the compliance costs of the "law," and so it makes economic sense to proceed in this manner.

In these circumstances, a deontologist would disclose the threat of harm to the public if such were the only way to prevent potential injury to consumers. The increase in statistical propensity of harm from 4 to 8 crosses the danger line, making "choate" the threat of harm, and, therefore, triggers a corresponding need to respond more directly to the harm out of a sense of moral responsibility by, for example, warning the public. Any warning to the public should of course be done in a manner which is least prejudicial to the client.⁹¹ The substantial and imminent harm posed by carcinogenic apples is too important to be outweighed by confidentiality. This would be the "more just" solution in the deontological model.

In these circumstances, an attorney should have the discretion to disclose. "Indeed, despite the impression that a deontological model of legal ethics would mandate the disclosure in order to prevent harm," Professor D'Amato and I have argued that "the deontological model of legal ethics should only allow, but not require, the attorney to reveal the confidence."⁹² By permitting the attorney to reveal the confidence and disclose the harm, the deontological model would simply remove any professional barrier that bars disclosure. Thus, there would be no *professional* reason why the attorney could not disclose the harm. The ethical dimensions of the attorney's decision would then have to be confronted by the

⁹¹ I am arguing here only that this confidence—the possibility of harm posed by *XYX*—should be disclosed if that is the only way to prevent its occurrence. Notwithstanding disclosure of this confidence, the lawyer still has other fiduciary and confidentiality obligations vis-à-vis the client, Apple-Food. These obligations include, at a minimum, nondisclosure of any information other than what is necessary to address the threat of harm here at issue and, even assuming disclosure of this confidence, disclosure of it in a manner that is least prejudicial to Apple-Food. How to so disclose this confidence to accomplish these goals is a subject for another article.

⁹² D'Amato & Eberle, *supra* note 10, at 776.

attorney not as a professional, but as a member of society.⁹³ The attorney's moral autonomy would be equal to that of others. In the hypothetical posed, any person would ordinarily have a *moral* obligation to make the disclosure to prevent harm to innocent third parties.

Is it justifiable not to disclose? Would nondisclosure form the basis for a universal maxim, for forming a generalizable rule of conduct? Application of a deontological analysis makes the answers to these questions self-evident. Would the attorney want to be treated this way as a member of the general public? Would the attorney want his children to be treated this way? What if the client was the neighborhood farmer and not a multi-million dollar business? It is fair to say that the vast majority of people, including Kant, would not regard nondisclosure in this case as being in the realm of universal law-making. Rather, the universal rule, in a Kantian sense, would be that confidentiality must be overridden when disclosure of the threat of an imminent, concrete, substantial, physical harm is the only way to prevent the harm. Here, the duty to prevent harm is "more just" than the maintenance of confidentiality.

B. Intent to Commit Economic Harm—Securities Harm

1. Harm Without Fraud

Now contrast the results reached in the above scenarios, involving threats of physical harm, to a situation involving the intent to commit an economic harm. The example I will use is one of the most pervasive phenomena of the bullish 1980s: the hostile take-overs.

Suppose you represent Jovan, a premier take-over "artist." He has his sights set on ABC Company, a well run medium-sized manufacturer of dairy products. ABC is run by John McFeely, who started the company from scratch and has put his heart and soul into the business. ABC is the anchor of the community. Generations have been employed there and it is a good place to work. McFeely pays a good wage and provides excellent benefits in return for which he gets good labor. He believes in giving back to the community.

ABC is vulnerable right now, however. Cash reserves are down

⁹³ See *id.*

because McFeely has poured significant funds into research and development ("R & D"), as is his custom, and has made several needed but expensive capital improvements. Also, ABC's wage and benefit structure is not cheap. All of this has had the effect of depressing the price of ABC's stock, which is freely traded over the counter. In short, ABC seems like a bargain to those interested in investing in its stock.

Jovan has had his sights on ABC for some time. He already owns an empire of food-related companies and ABC's product line would complement these companies. Upon acquiring ABC, Jovan will sell its units piecemeal while fitting the remainder within his existing product line. Should Jovan fail to acquire ABC, he will nevertheless make a tidy profit through greenmail.⁹⁴ Financing the take-over will not be a problem. Jovan has unlimited funds available through junk-bond financing, his standard funding source. Jovan has successfully used this strategy to build Jovan Consolidated. Under any scenario, he figures to "win."

In the strategy sessions in which the attorney has participated, everyone agrees that ABC is doomed to succumb to Jovan's strategy. The options available to ABC are not attractive. If ABC decides to fight the take-over, it will be able to do so only at a heavy cost. Money must be raised to buy back stock. Thus, assets will have to be sold, employee benefits slashed, R & D halted, and people will lose jobs. Even if ABC "wins" the battle, the company will become a shadow of its former self, probably vulnerable to another take-over attack, or worse. If Jovan wins, the results will be the same; that is, money will be needed to service ABC's acquisition debt, so assets will then have to be sold, employee benefits slashed, R & D halted, and people will lose jobs. What remains of ABC will then become part of Jovan Consolidated. Under any scenario, the personal and economic cost to McFeely and ABC will be severe: they face ruin personally, professionally, and economically, although ABC stockholders stand to profit financially, at least in the short term.

How should the attorney advise Jovan? Under the prevailing autonomy model, the attorney has an obligation to assist Jovan in maximizing his welfare. This is easy: Jovan must simply comply

⁹⁴ In the general scenario, in order to get rid of Jovan, ABC will buy out Jovan's stock at a price profitable to him. See generally Gilson, *Drafting an Effective Greenmail Prohibition*, 88 COLUM. L. REV. 329 (1988) (discussing how current prohibitions fail to control greenmail).

with the securities laws. Once his ownership interest in ABC rises above five percent, he must promptly file the appropriate reports with the SEC. During the take-over he must be careful to disseminate promptly and accurately any material information. The rest will take care of itself; the forces of the marketplace will come into play and Jovan will triumph.

Does this scenario present any moral concerns? There is of course the threat of imminent and substantial economic harm to McFeely and ABC. But the *Model Rules* make a strong distinction between physical and financial harm, recognizing certain obligations to others for physical, but not financial, harms.⁹⁵ Professor D'Amato and I previously argued that economic harm can be as ruinous as physical harm: a person could be deprived of essential shelter or nutrition that could have serious health consequences.⁹⁶ Thus, a deontologist would recognize the threat of economic harm as a moral concern and, accordingly, perceive an obligation to discuss this concern with Jovan. But Jovan's response is predictable: McFeely and ABC are simply other players in the marketplace. All are subject to the mores of the market, and that means that some must "lose" in order that others may "win." Viewed in this way, McFeely and ABC possess acquisition value that can be quantified in dollars and cents. Jovan simply has to pay the going price and ABC is his. Besides, Jovan thinks he can then use the ABC assets more efficiently, and thus the acquisition may better serve society's interests in the long run.

Not having succeeded in moderating Jovan's conduct in this

⁹⁵ See MODEL RULES, *supra* note 1, Rule 1.6(b)(1). Model Rule 1.6(b)(1) allows a lawyer to "reveal such information to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." *Id.* The Final Draft of the Model Rules contained an exception to confidentiality that allowed disclosure for threats of financial harm. Disclosure was allowed "to prevent the client from committing a criminal or *fraudulent* act that the lawyer believe[d] [was] likely to result in bodily harm, or substantial injury to the *financial interest* or *property* of another." See *id.* (as finally submitted by the Kutak Commission in 1981) (emphasis added). This version of the Final Draft was very controversial and ultimately voted down by the ABA, which adopted the former version.

The Model Code provision is more ambiguous, but would probably support disclosure necessary to prevent an economic crime: "A lawyer may reveal . . . [t]he intention of his client to commit a crime and the information necessary to prevent the crime." MODEL CODE, *supra* note 89, DR 4-101(C)(3). The outcome here would depend on case law development of the "crimes" which one could disclose.

⁹⁶ See D'Amato & Eberle, *supra* note 10, at 791. Indeed, when Frank Lorenzo acquired one of his first big prizes in a hostile take-over, Continental Airlines, the then-President of Continental shut the door to his office after closing the deal and killed himself.

external moral dialogue, is the attorney now faced with a moral dilemma of whether to breach confidentiality and disclose the harm? Not really. There is, in fact, a moral concern in the threat of harm to ABC and its constituents. After all, they face personal and economic ruin. Yet, in the broader context of our market economy Jovan is right: ABC is merely another player. It is subject to the vicissitudes of the marketplace. You may or may not agree with Jovan's aims, as you may not agree with any client's aims, but he is committing no moral or legal wrong. Concern for ABC, however heartfelt, does not prevail over the value of confidentiality in this situation.

Applying Ross' first order lexicographical rule, confidentiality, a *prima facie* first order moral value trumps nonmoral considerations—in this case, the economic consequences to ABC and its constituents if they are viewed as other players subject to the mores of the marketplace. Even assuming that this harm that is about to affect ABC and its constituents is viewed as having moral value, Ross' second order lexicographical rule would apply. Summarily stated, confidentiality would be determined to be "more just" than the economic harm because the economic harm, though significant, has been brought about through legal and moral means. This has occurred in a setting which can be viewed as "essentially fair," in that risk and opportunity are available in an arguably equal manner to all who chose to play by market rules. Analysis under either lexical rule suggests that maintenance of confidentiality would be principled conduct under a deontological model, as it would be under the autonomy model, although the same result ensues for different reasons.

One might think that, out of concern for ABC and the ABC community, a lawyer operating under a socialist model of legal ethics would be inclined to disclose in these circumstances.⁹⁷ On the other hand, a lawyer might be persuaded by the Chicago school view of economic efficiency and conclude that state interests would best be served by Jovan's control of ABC assets since this would

⁹⁷ Professor D'Amato and I have previously argued that law in a socialist society is an expedient designed to carry out state objectives, and is evaluated from the standpoint of its utility in serving state and public interests. Thus, the lawyer's objective is to help conform the client's conduct to desirable state objectives. *See id.* at 770-71. The probable state objective here is the preservation of ABC as an employer of workers from the ABC community. This goal would likely take precedence over the more narrow economic self-interest of Jovan, unless of course Jovan's economic self-interest was viewed as serving society's economic self-interest.

maximize social wealth.⁹⁸ In this view, a socialist state law is simply an expediency to carry out state objectives, whatever form those objectives take from time to time, or even day to day.

2. Harm With Fraud

Once again, let us change the hypothetical. Jovan has obtained his information about ABC's vulnerability from an inside network of informants—other lawyers, accountants, stock analysts, etc. Jovan is trading on "inside" information. In fact, he has built his empire on this type of fraud, though his past frauds are not our present concern. Having obtained information that ABC considers to be "confidential" and proprietary, Jovan now desires to use this inside information to his advantage by trading on ABC stock before the inside information becomes publicly available. He views this scheme as a method better to assure the success of his strategy, even though he recognizes that his strategy might succeed even under normal market conditions. In calculating his interests, Jovan has placed a low probability factor on the likelihood of his being caught. Simply put, he is interested in maximizing the likelihood of his acquiring ABC, and therefore views "insider trading" as a tolerable risk and the most expedient means of realizing his objective.

Now how should Jovan be advised? Of course, the attorney now has pressing legal concerns. Jovan is clearly violating securities laws and faces potential punishment, even imprisonment, if he is caught and found guilty. The attorney is obligated as a professional to point this out. But Jovan believes that he can successfully evade the law, and pull off his scheme with impunity, and he is not dissuaded by legal impediments posed by the securities laws.

The moral concerns present here are also now more clearly drawn. The threat of imminent financial harm to ABC is still the same. But the means for bringing about that harm are no longer legal or moral; they are fraudulent, which is a legal *and* moral wrong. They have no place in our market economy, nor in our code

⁹⁸ See, e.g., R. POSNER, *ECONOMIC ANALYSIS OF THE LAW* (2d ed. 1977); Easterbrook & Fischel, *Optimal Damages in Securities Cases*, 52 U. CHI. L. REV. 611 (1985); Easterbrook & Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1165-68 (1981); Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 NW. U.L. REV. 913, 915-21 (1982); Fischel, *Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers*, 57 TEX. L. REV. 1, 42 (1978).

of professional conduct.⁹⁹

Fraud is clearly a legal wrong,¹⁰⁰ but why is it a moral wrong? Professor D'Amato and I have already concluded that the deontological model mandates that all persons are under a moral obligation not to commit fraud (or perjury),¹⁰¹ but why is this so? Fundamentally, it is because fraud involves some type of deliberate misrepresentation of fact, which is the data that comprises our phenomenal world. Fraud is thus deceit, a deliberate propagation of a falsehood on another.

A simple example of fraud is the one already posed: the misrepresentation of a material fact to obtain a needed loan, even if that loan is to be used for a "good" purpose.¹⁰² But while it seems "intuitively" obvious that such "common law" types of fraud are morally as well as legally wrong, why would "insider trading" be a fraud of moral dimension? After all, some believe use of inside information is acceptable conduct in our market system.¹⁰³

Insider trading does not seem to involve the type of direct deception that the above common law examples pose.¹⁰⁴ The insider is not asserting an untrue fact or failing to assert a material fact to get a loan or to achieve any other objective; or is he? The explanation lies partly in the structure of the market, and the rules that govern it. The explanation also lies partly in the conduct itself.

Turning first to the market structure, federal securities laws that govern the trading of securities emerged from the aftermath of the 1929 market crash and are designed to provide investors with full disclosure of material information concerning securities. The purpose of these laws is to protect investors against fraud and manipulation of stock prices and to promote "ethical" standards of

⁹⁹ See MODEL CODE, *supra* note 89, DR 7-102(A)(7) ("In his representation of a client a lawyer shall not . . . [c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent").

¹⁰⁰ Securities Exchange Act of 1934, §10(b), 15 U.S.C. §78(b) (1988); see *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 847-48 (2d Cir. 1968), *cert. denied*, 404 U.S. 1005 (1971).

¹⁰¹ See *supra* note 87 and accompanying text.

¹⁰² See *supra* notes 45-46 and accompanying text.

¹⁰³ See H. MANNE, *INSIDER TRADING AND THE STOCK MARKET: A SUGGESTION FOR REPLACING THE DOCTRINE OF PRIVACY* (1966); Comment, *Civil Liability Under Section 10B and Rule 10B-5*, 74 YALE L.J. 658, 675-76 (1965).

¹⁰⁴ However, insider trading is common law fraud and not a statutory violation. See Comment, *Securities Regulation—Newspaper Reporter's Trading on Basis of Misappropriated Prepublication Information as Rule 10b-5 Violation—United States v. Carpenter*, 60 TEMP. L.Q. 215, 226 (1987).

honesty and fair dealing,¹⁰⁵ not unlike rules of legal ethics. These rules were set up to guarantee an essentially fair market framework for exchanging securities by parties with essentially equal access to information, the key resource of the market. In other words, the laws are designed to make market conditions the same for all players, and all expect and are expected to play by these rules.

But what if you do not want to play by these rules; what if someone, like Jovan, wishes to trade on inside information? Of course this harms the "integrity" of the market, but does it involve moral impropriety; does it harm *the person's* integrity? I think it does.

Anyone engaging in insider trading intends to deceive, manipulate, and defraud others—either target companies or other investors—by controlling or artificially affecting the price of securities so that he may profit to their disadvantage. By manipulating the price of stock and thereby profiting, he is clearly using "immoral" means (manipulation, deceit, misrepresentation, etc.) to accomplish an arguably amoral or moral end, profit. Immoral conduct can result from either the pursuit of amoral or moral ends by immoral means or immoral ends by amoral or moral means. Thus, insider trading is at least the pursuit of amoral or moral ends by immoral means and is therefore immoral conduct. This analysis leads to the conclusion that insider trading is both legally and morally wrong.

Returning to the hypothetical, the responsible attorney feels obligated, of course, to discuss with Jovan the legal and moral impropriety of fraud and its potentially dire consequences for ABC, and, if it comes to light, for Jovan. But he is not deterred by these legal or moral arguments. The die is cast. There is a clear conflict among first order *prima facie* moral values—between confidentiality to the client and the threat of imminent and substantial economic harm to innocent third parties. Now what?

In this situation, an autonomist would not breach confidentiality and disclose the harm. The attorney might not personally agree with the client's decision, but would still abide by it. Confidentiality has a very high, nearly insurmountable value in the autonomy model,¹⁰⁶ and an autonomist would be supported by the codes of

¹⁰⁵ See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976) (discussing Securities Act of 1933 and Securities Exchange Act of 1934).

¹⁰⁶ D'Amato & Eberle, *supra* note 10, at 775-76, 790-91.

professional responsibility.¹⁰⁷

A deontologist would have a sharply different view. The intent to commit serious economic harm through fraud would morally outweigh the value of confidentiality. This means that the attorney would have the discretion to disclose in the manner described above. However, the attorney would not be shielded from the ethical responsibility of facing the consequences of the judgments and actions decided upon, and instead would face the moral choice as a non-lawyer would.

Even though fraud is a moral wrong, perhaps not all financial fraud would or should outweigh confidentiality. This necessitates a second level serial rule analysis where one moral rule conflicts with another moral rule. Each moral rule (the duty to prevent harm through fraud and the duty to maintain confidentiality) would have to be individually assessed. The fraud would have to be assessed critically, accounting for the degree of harm which it poses, to determine if it is "serious" or "substantial." The problem is similar to assessing physical harm under the Model Rules, which seem to predicate discretionary disclosure of confidences on "imminent death or substantial bodily harm." The result as to which moral

¹⁰⁷ See MODEL RULES, *supra* note 1, Rule 1.6 (1981); AMERICAN LAWYER'S CODE, *supra* note 1, Alternative A, Rules 1.1-1.6, Alternative B, Rules 1.1-1.4. (The Roscoe Pound—American Trial Law. Found., Comm'n on Professional Responsibility, Discussion Draft, 1980). Although all drafts of the Model Rules up to the final document contained an intended fraud exception to confidentiality, the Revised Final Draft omitted that exception. Compare MODEL RULES, *supra* note 1, Rule 1.6(b)(2) (Proposed Final Draft 1981) with Rule 1.6(b)(1) (Revised Final Draft 1982); see also D'Amato & Eberle, *supra* note 10, at 790-91 (discussing question of intended fraud exception in Model Rules). Resolution of this issue under the Model Code is more ambiguous. See *supra* note 95.

Were this an *after-the-fact* question, then DR 7-102(B)(1) would apply. This rule provides that:

A lawyer who receives information clearly establishing that:

- (1) His client has, in the course of the representation, perpetrated a *fraud* upon a *person* or tribunal, he shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the *fraud to the affected person* or tribunal, *except* when the information is protected as a privileged communication.

MODEL CODE, *supra* note 89, DR 7-102(B)(1) (emphasis added). Assuming again the *after-the-fact* nature of the situation, DR 7-102(B)(1) would call for the attorney to reveal the "fraud upon a person"—here the securities fraud—if the form of this rule in effect is that which existed before the 1974 Amendment, which added the privileged communications exception. If the post-1974 form of the rule were in effect, assuming a privileged communication was the basis of his knowledge, the lawyer could not disclose the fraud. The exception would essentially swallow the rule. The Model Rules have no provision comparable to DR 7-102(B)(1), thus further evidencing the ABA's retreat from removing moral concerns from confidentiality rules.

value should predominate can only be obtained by applying some forms of prudential judgment in the manner described above.

It would provide more guidance if ethical rules could be based on terms more specific than "serious," "substantial," or "imminent." But perhaps this is not possible. For us, therefore, the practical aim is to reach a reasonably reliable agreement over ethical standards and judgments; in short, an illuminating approximation.¹⁰⁸

Under the deontological model, Jovan's intent to commit financial fraud has been "reasonably" determined to be "substantial" and therefore poses a "serious" or "substantial" moral concern. Thus, in this case a deontologist would put Jovan on notice that disclosure of the intended harm would be compelled if Jovan did not desist from this conduct and no other means of prevention were available. The attorney should also refrain from any further involvement in the matter. In the deontological world, an attorney cannot be a party to, nor acquiesce in, fraud.¹⁰⁹

Is the autonomist view justifiable? Does it provide the basis for a universal maxim? Not if conventional morality is to play a role in contemporary professional responsibility. Would you want to be treated as McFeely or an ABC employee? Would you want your brother, sister, son, or daughter to be so treated? Would you be as apt to maintain confidentiality if you did not get repeat business from Jovan worth millions? It seems clear that the autonomist view does not result in principled conduct under this form of analysis.

Few people would ordinarily subscribe to a maxim that mandates maintenance of confidentiality in the face of an imminent threat of serious economic harm brought about through fraud. Fraud—a moral and legal wrong—cannot displace the concrete moral rule to prevent harm to innocent third parties even when that fraud might be viewed as shielded by the moral claim of confidentiality. To conclude otherwise is to value confidentiality over this and probably most, if not all, other moral values. It is to allow confidentiality to trump all other concerns; thus, confidentiality would, and does, operate to "shield" moral vision.

Few of us would ascribe such an exalted position to confidentiality in formulating ethical rules. While this certainly would lead

¹⁰⁸ See *supra* notes 84-86 and accompanying text.

¹⁰⁹ See *supra* note 99 and accompanying text.

to a "simplified" moral (or amoral) universe,¹¹⁰ it would not reflect the "reality" of our diverse, disparate, contrary world. Thus, the better, and more realistic Kantian maxim would be that confidentiality must be outweighed by the disclosure of imminent, concrete, substantial economic harms committed through fraud if disclosure is the only way to prevent the harm.

V. WHAT IS WRONG WITH THE AUTONOMY MODEL?

The autonomy model is justifiable only if there is a professional reason for the kind of conduct suggested in the above hypotheticals. Many argue that the amoral technical role of the lawyer promotes worthwhile, and some think moral, goals of individual autonomy, dignity, and equality.¹¹¹ Further, by promoting these goals, societal interests are served as well. In a perfectly just society, where everyone has essentially equal access to resources and the ability to use them, where one person's autonomy would be limited only by that of another, and this dynamic of opposing forces always remains in equilibrium, this argument might make more sense. Perhaps it would apply in Kant's universal kingdom of ends or Rawls' original position. Almost everyone agrees that the autonomy model essentially makes sense in the context of the criminal adversary system, where the system is structured so that the defendant is entitled to a well-spirited and zealous defense in countering the resources of the state, and the contest is mediated and ultimately decided by a neutral decision-maker.

In these situations, and perhaps others, an attorney zealously representing a client seems justified in deferring most moral considerations because the system, viewed idealistically, presupposes that justice will prevail through an essentially equal battle of contestants. The attorney must perform the "amoral" role of zealous advocate in order to promote justice. It seems justifiable then to place moral responsibility with the system, and not the individual attorney.¹¹²

¹¹⁰ See Wasserstrom, *supra* note 8, at 8. "In this way, the lawyer as professional comes to inhabit a simplified universe which is strikingly amoral—which regards as morally irrelevant any number of factors which nonprofessional citizens might take to be important, if not decisive, in their everyday lives." *Id.*

¹¹¹ See M. FREEDMAN, *supra* note 3, at 9-23; Fried, *supra* note 3, at 1066, 1073-78; Pepper, *supra* note 3, at 616-19.

¹¹² See Bean, *A Proposal for the Moral Practice of Law*, 12 J. LEGAL PROF. 49, 54 (1987).

Unfortunately, our society is not perfectly just; it may not even be "more just" than another. Most contemporary practice situations do not involve cases where essentially equal contestants do battle within a pre-arranged set of rules that ultimately are arbitrated by a neutral judge. This rarely occurs in the private law model that I have hypothesized, where social status and economic resources, among other factors, can frequently determine outcomes. In these situations—the context of most legal practice—there is no good reason for abdicating personal moral responsibility for actions committed as a professional.

The problem with the autonomy model with which I have been concerned is its tendency to undervalue, if not submerge, moral concerns that may be relevant to structuring legal advice and conduct. The autonomy model suggests that we as professionals should place our skill, guile, and resources for hire, but not our conscience. Our conscience seems instead consigned to placement in a kind of blind trust—to be used only when our professional role ends. Autonomists would have us put our skills to work zealously to serve client ends without considering those ends, the means used to accomplish those ends, or even our own conduct in promoting those ends or means on behalf of others as "special-purpose friends."¹¹³ We should apply our skills as functionaries, or technicians, to do things that might embarrass or shame us as private persons. Unfortunately, this means that we have allowed clients—client autonomy interests—to circumscribe our own moral autonomy.

If the autonomy model was viewed as an ethical model, most philosophers would see it as "holding that the good of the individual, as defined by the individual, is the paramount goal."¹¹⁴ In philosophical terms this would be called "egoism" or "egotism." Many philosophers would agree that egotism, a philosophy "that allows unrestrained behavior by any individual[,] cannot be called 'moral.'"¹¹⁵ Egotism is not moral because "everyone is permitted to advance his interests as he pleases."¹¹⁶ Inevitably, if "wealth, position and influence, and the accolades of social prestige, are a person's final purposes," then "force and cunning" will determine

¹¹³ See Fried, *supra* note 3, at 1071.

¹¹⁴ See D'Amato & Eberle, *supra* note 10, at 798.

¹¹⁵ *Id.*

¹¹⁶ J. RAWLS, *supra* note 56, at 124.

outcomes.¹¹⁷ Egotism is what we are "stuck with" if we are "unable to reach an understanding" as to fundamental moral concerns.¹¹⁸ "We have concluded that surrogate egotism, in which one person acts on behalf of another's unbridled egotism, constitutes the 'autonomy' model of professional responsibility."¹¹⁹

Because of this moral deficiency in the autonomy model, I contend that outside the criminal adversary context, where moral conflicts arise in private law practice, there must be room for attorney moral autonomy which I have described as deontological. In these situations there should be no professional reason why lawyers should be shielded, or shield themselves, from ethical decision-making. Lawyers should confront the normative dimension of their professional lives, as other members of society must, and as lawyers must beyond their professional roles. After all, lawyers as individuals are ends too, not just means or functionaries. To realize a lawyer's own moral autonomy means that he must consider the purposes and ends of his judgments, actions, and services. I contend, simply, that a place should exist for this dimension of responsible, ethical lawyering in a capitalist context.

VI. A PROPOSAL TO CODIFY THE DEONTOLOGICAL APPROACH

It is no mean feat at this stage in the evolution of professional responsibility theory to codify a deontological approach to a professional rule of confidentiality. The work has already been essentially done by the drafters of the Model Rules, whose proposed draft provided that confidentiality should be maintained except when a lawyer reasonably believes it necessary to reveal information:

- (1) to prevent the client from committing a criminal or (intentional or) fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another;
- (2) to rectify the consequences of a client's criminal, (intentional) or fraudulent act [of the type described in 1.6(b)(1)] in the furtherance of which the lawyer's services had been used.¹²⁰

This rule would encompass all the foregoing hypotheticals

¹¹⁷ *Id.* at 129, 136.

¹¹⁸ *Id.* at 136.

¹¹⁹ See D'Amato & Eberle, *supra* note 10, at 798.

¹²⁰ MODEL RULES, *supra* note 1, Rule 1.6(b) (Proposed Final Draft 1983).

here discussed. Were this proposed version enacted as the professional rule of confidentiality, our code of ethics would "recapitulate the requirements of morality in its exceptions to the confidentiality principle."¹²¹ Clients would then be on notice that confidentiality can be limited by other moral norms. Lawyers acting on moral considerations would then also have stronger legal support for justifying their actions as professionals.¹²² This would be one way of bringing current professional practices into better congruity with morality.

VII. CONCLUSION

Ultimately, of course, the question of moral responsibility in lawyering is one for the professional bar, and, more broadly, society. Everyone has a stake in justice and morality. Efforts like this can only point the way. Although one epic battle has been contested, can anyone say this debate is over?

¹²¹ D'Amato & Eberle, *supra* note 10, at 776-77.

¹²² The practical ramifications of a rule of confidentiality that allows lawyers to "blow the whistle" out of a sense of moral responsibility, but then suffer the repercussions of their actions by being fired, is a very serious matter for the bar, and all professions. That problem is important and serious, but unfortunately beyond the scope of this article.