



2011

## Fred Zacharias's Skeptical Moralism

David Luban

*Georgetown University Law Center*, [luband@law.georgetown.edu](mailto:luband@law.georgetown.edu)

This paper can be downloaded free of charge from:  
<https://scholarship.law.georgetown.edu/facpub/1893>

---

48 San Diego L. Rev. 303 (2011)

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.  
Follow this and additional works at: <https://scholarship.law.georgetown.edu/facpub>



Part of the [Legal Ethics and Professional Responsibility Commons](#), and the [Legal Profession Commons](#)

# Fred Zacharias's Skeptical Moralism

DAVID LUBAN\*

I met Fred Zacharias near the start of his academic career, after his first publications on torts and on the First Amendment,<sup>1</sup> but before he became a legal ethics scholar. We met for the coincidental reason that Fred and my wife were second cousins, and his family was spending the year in Washington; Fred and Sharon invited us to dinner. I had already been working on legal ethics for several years, and Fred was becoming interested. I am unsure whether he had already begun his research on lawyer confidentiality, but within a year he sent me the draft of *Rethinking Confidentiality*, eventually published in two parts.<sup>2</sup>

The confidentiality articles were a sensational start to an illustrious career. Fred conducted the first and one of the best empirical studies of confidentiality in years, surveying lawyers and clients in Tompkins County, New York, about what lawyers actually told clients about confidentiality and its exceptions, and what difference the exceptions made in whether clients withheld information from their lawyers. Of course, the standard justification for strong protection of client confidences is that without it, clients would withhold vital information from their lawyers.<sup>3</sup> This justification rests on empirical claims about

---

\* University Professor and Professor of Law and Philosophy, Georgetown University Law Center. Thanks to Bruce Green and Deborah L. Rhode for their comments on my draft.

1. Fred C. Zacharias, *Flowcharting the First Amendment*, 72 CORNELL L. REV. 936 (1987); Fred C. Zacharias, *The Politics of Torts*, 95 YALE L.J. 698 (1986).

2. Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989); Fred C. Zacharias, *Rethinking Confidentiality II: Is Confidentiality Constitutional?*, 75 IOWA L. REV. 601 (1990).

3. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2010) ("[Confidentiality] contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate

lawyer and client behavior that had never really been tested—they were always accepted as a matter of what might be called faith, common sense, or professional ideology. Fred’s Tompkins County Study showed that in fact clients frequently misunderstood the limits of confidentiality, lawyers were seldom accurate in explaining them, and in any event clients revealed facts to their lawyers because they trust them as professionals, not because of confidentiality rules.<sup>4</sup> Although Fred believed that the results of the study were not necessarily inconsistent with the dominant theory,<sup>5</sup> they were counterintuitive and very important. Unsurprisingly, the articles have been cited hundreds of times.

Following this remarkable debut, Fred focused his energy almost entirely on ethics and began a remarkable outpouring of scholarship. He published sixty law review articles, almost all of them quite substantial—even his short forewords to law review symposia were thoughtful and worthwhile.<sup>6</sup> About a decade after the confidentiality articles, Fred began his collaboration with Bruce Green, and between 2001 and 2009, they published ten splendid articles together, including five on the role and regulation of prosecutors.<sup>7</sup> This was surely the most successful collaboration ever in the field of professional responsibility. I once asked Bruce how it is that they agreed about so much, and he laughed. “Fred and I disagree about everything,” he answered. “We argue it out, and those are the arguments that go into the articles.” Even the onset of Fred’s illness did not stop him. Incredibly, Fred published

---

fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct.”)

4. See Zacharias, *Rethinking Confidentiality*, *supra* note 2, at 381.

5. See *id.*

6. For a list of Professor Zacharias’s law review articles, see Frank Partnoy, *A List*, 48 SAN DIEGO L. REV. 37 (2011).

7. See generally Fred C. Zacharias & Bruce A. Green, “Anything Rather than a Deliberate and Well-Considered Opinion”—Henry Lord Brougham, *Written by Himself*, 19 GEO. J. LEGAL ETHICS 1221 (2006); Fred C. Zacharias & Bruce A. Green, *Federal Court Authority To Regulate Lawyers: A Practice in Search of a Theory*, 56 VAND. L. REV. 1303 (2003); Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265 (2006); Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837; Fred C. Zacharias & Bruce A. Green, *Rationalizing Judicial Regulation of Lawyers*, 70 OHIO ST. L.J. 73 (2009); Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1 (2005); Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors’ Ethics*, 55 VAND. L. REV. 381 (2002); Fred C. Zacharias & Bruce A. Green, *The Duty To Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1 (2009); Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207 (2000); Bruce A. Green & Fred C. Zacharias, “The U.S. Attorneys Scandal” and the Allocation of Prosecutorial Power, 69 OHIO ST. L.J. 187 (2008).

half a dozen articles in 2009<sup>8</sup> and one posthumously in 2010, completed at Fred's request by his colleagues Shaun P. Martin and Frank Partnoy.<sup>9</sup> In their words, "It is a testament to, and typical of, Professor Zacharias that even in the final days of his life, he wanted to complete his academic work and fulfill what he felt were his obligations to the law review students who had accepted his piece."<sup>10</sup> Despite his illness, the article displayed no falling off in his creativity: quite the contrary. It elaborates an unexpected but convincing analogy between baseball's steroid scandal and the professional regulation of lawyers;<sup>11</sup> I will discuss it shortly. We owe Professors Martin and Partnoy a debt of gratitude for preparing it for publication.

A true scholar like Fred would want to be remembered for his work. This is not the place for a full overview—and in any event, a full overview of such a large body of work is hardly possible. Instead, I will simply discuss some of the themes to which Fred kept circling back, with some illustrations drawn from my own favorites among his articles. In places, I will also do him the courtesy of criticizing his views. That, too, is the way a scholar wants to be honored.

In one way, the Tompkins County Study is unrepresentative of Fred's scholarship. At heart, he was not a social scientist or legal empiricist. Nor was he a doctrinalist, in the familiar sense of an analyst of case law. Neither did Fred consider himself a moral philosopher—although in my experience, Fred had a sophisticated understanding of philosophical arguments. Rather, he was a theoretician of professional regulation who examined large moral and philosophical topics through the lens of the regulatory codes and the arguments of principle and policy that underlie them. A strong moral vision pervades his writing: he saw the regulatory enterprise as a moral one through and through. If he did not often say so explicitly, it is because he abhorred pretensions, and typically took a

---

8. See generally Fred C. Zacharias, *Integrity Ethics*, 22 GEO. J. LEGAL ETHICS 541 (2009); Fred C. Zacharias & Bruce A. Green, *Rationalizing Judicial Regulation of Lawyers*, 70 OHIO ST. L.J. 73 (2009); Fred C. Zacharias & Bruce A. Green, *The Duty To Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1 (2009); Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147 (2009); Fred C. Zacharias, *True Confessions About the Role of Lawyers in a Democracy*, 77 FORDHAM L. REV. 1591 (2009).

9. See generally Fred C. Zacharias, *Steroids and Legal Ethics Codes: Are Lawyers Rational Actors?*, 85 NOTRE DAME L. REV. 671 (2010).

10. *Id.* at 671 (in memoriam tribute to Professor Zacharias from Professors Shaun P. Martin and Frank Partnoy).

11. See generally *id.*

deflationary stance toward them in his writing. He continually came up with creative ways to think about ethics issues, but he elaborated them in a careful, analytical way, and took pains not to overclaim. One of the characteristic vices of legal scholarship is the tendency to jump from single instances—a Supreme Court decision, a newsworthy story, a scandal—to large, portentous general conclusions. Fred’s skeptical cast of mind was always in the opposite direction: to show that large-scale generalizations blur significant distinctions and that the yen for global scope misses a more complex reality. Montaigne wrote, in a comically self-referential sentence, “All judgments in gross are loose and imperfect.”<sup>12</sup> Fred would have agreed wholeheartedly with the sentiment.

His final article illustrates his way of thinking beautifully. His chief target is rational choice or “bad man” theories of ethical regulation, which “assume that ethics provisions that do not result in discipline have little, or perhaps even counterproductive, effects.”<sup>13</sup> And yet legal ethics codes are filled with hortatory, unenforceable—or barely enforceable—rules. Does this signify a regulatory mistake by code drafters—perhaps even a self-interested desire by lawyers to avoid enforceable rules? Fred argues that the answer is “no” and suggests that we look at baseball’s steroids scandals to see why not.<sup>14</sup> Although some ballplayers jumped on the performance-enhancing drugs bandwagon with no apparent reservations, many did not. Fred classifies ballplayers into five categories: cheaters—the classical “bad [men]”; those who did not cheat because they thought the costs outweighed the benefits—“Complementary Rational Actor[s]”; or because they factored in reputational costs—“Nuanced Rational Actor[s]”; or because they self-consciously value law-abiding behavior—“Clean Rational Actors”; or because they unquestioningly follow rules—“Socialized Persons.”<sup>15</sup> Clearly, a similar typology of lawyers exists, to which Fred adds one further category, those who are willing to violate codes when they believe morality compels it—“Moral Cheater[s].”<sup>16</sup> Although the cheaters will simply ignore hortatory or unenforced rules, code drafters must consider that lawyers who fall into the other categories may well guide their behavior by hortatory rules, or discretionary rules that implicitly call for non-self-interested judgment. Bad man theories of rational choice oversimplify

---

12. MICHEL DE MONTAIGNE, *Of the Art of Discussion*, in THE COMPLETE ESSAYS OF MONTAIGNE 703, 721 (Donald M. Frame trans., 1958) (1585).

13. Zacharias, *supra* note 9, at 672.

14. The example is dear to my own heart. See generally David Luban & Daniel Luban, *Cheating in Baseball*, in THE CAMBRIDGE COMPANION TO BASEBALL (Leonard Cassuto & Stephen Partridge eds., forthcoming Feb. 2011).

15. See Zacharias, *supra* note 9, at 679.

16. See *id.* at 689.

the moral world by supposing that only the first category matters. Although only a fool would deny the existence of “bad men” in the legal profession—and, therefore, only a fool would deny that enforceable rules with real consequences belong in the code—other rules also have their place, directed to the other categories of lawyers. The point of the steroids analogy is that it illustrates that the noncheaters were a prominent category even in a highly competitive market with millions of salary dollars at stake.

This final article revisits themes that Fred, both in his solo-authored work and in his collaboration with Bruce Green, discussed more than once. Together, they provided a pioneering analysis of permissive rules in the ethics codes.<sup>17</sup> Permissive rules, for example, rules permitting but not requiring lawyers to reveal client confidences under specified circumstances, rely on lawyers’ discretion over when to avail themselves of the permission; they are rules directed to what, in another article, Green and Zacharias label a lawyer’s “professional conscience.”<sup>18</sup> In *Integrity Ethics*, Fred once again argues that lawyer regulatory codes contain, and should contain, multiple categories of rules.<sup>19</sup> Fred first singles out several categories of what he calls “rules of role,” which define the various roles lawyers must play: as clients’ agents or champions, as officers of the court, and as fair players.<sup>20</sup> In addition, there are rules that adjust the roles to certain special situations, without wholly redefining the roles.<sup>21</sup> But beyond all of these role-related rules, American ethics codes have always included “integrity rules” that mesh lawyers’ roles with non-role-related standards of conduct. Some aim to mesh lawyers’ professional responsibilities with other bodies of civil and criminal law, but others “highlight aspects of morality that the drafters assume are simply part and parcel of good citizenship, which lawyers should not cede merely because they are assigned particular tasks in the legal system.”<sup>22</sup> Fred argues that rules of role are often counterintuitive, in the sense that they impose obligations that sometimes clash with lay moral intuitions, for example, that lawyers must keep information confidential

---

17. See Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265 (2006).

18. Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 21 (2005).

19. Fred C. Zacharias, *Integrity Ethics*, 22 GEO. J. LEGAL ETHICS 541, 541 (2009).

20. See *id.* at 554.

21. See *id.* at 555–56.

22. *Id.* at 561.

even when it pertains to a client's past crimes.<sup>23</sup> Because rules of role can be counterintuitive, code drafters must make them as specific and enforceable as possible.<sup>24</sup> Integrity rules, by contrast, function so that lawyers do not "carry too far the notion that they are unique moral actors. A core purpose of the codes is to put lawyers on the *same* moral footing as everyone else."<sup>25</sup> These rules may be more hortatory, general, or discretionary than the rules of role. Fred argues that they should not be drafted in precise and enforceable terms because their principal function is to remind lawyers that their roles have boundaries.<sup>26</sup> He offers an in-depth analysis of the implications his distinctions carry for rule drafters, which I shall not summarize here. This article strikes me as very characteristic of Fred's procedures. He takes a large topic about which a great deal has been written—integrity in the legal profession—and transposes it from a set of imponderable generalities to discrete issues of professional regulation that can be subjected to detailed analysis.

Although my main purposes in this brief Article are not critical, I must add that in my view Fred did not go far enough in examining the function of integrity rules. One important legal question is always what effect rules have on how we should interpret other rules. Here it seems to me that integrity rules can serve as an interpretive guide to rules of role, a point that Fred does not consider in *Integrity Ethics*.

As an example, I would offer an opinion written by the D.C. Bar's Ethics Committee on the issue of whether it is unethical for lawyers to peek at metadata embedded in documents sent to them by counsel for other parties.<sup>27</sup> Metadata include information about who wrote a document and when, changes from earlier drafts, and comments by additional readers. Ordinarily they are invisible, but it is easy to retrieve them. A lawyer who unthinkingly sends a contract draft, for example, to another party without scrubbing the metadata gives that party a chance to see what might turn out to be vital confidential information. The question of whether to peek at the metadata is a technologically current version of whether to read an "errant fax" mistakenly sent by an adversary, or—more fancifully—whether to paw through the briefcase that the adversary carelessly left unlocked on the table while taking a bathroom break.

---

23. See *id.* at 566.

24. See *id.*

25. *Id.*

26. See *id.* at 571–75.

27. See D.C. Bar Legal Ethics Comm., Op. 341 (2007), available at [http://www.dcbar.org/for\\_lawyers/ethics/legal\\_ethics/opinions/opinion341.cfm](http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion341.cfm) (discussing the review and use of metadata in electronic documents).

I was a member of the D.C. Bar's Ethics Committee as it considered the metadata issue, in an opinion that required hours of discussion and many drafts—discussions which, I hasten to add, were not confidential: our committee meetings are open to the public. All members of the committee agreed that the sending lawyer has a duty to scrub metadata from documents before transmitting them; that is a straightforward corollary of the duty to keep client confidences. The hard part was determining the obligation of the receiving lawyer. To peek or not to peek, that is the question. One could argue that rule 1.3's requirement of diligence on behalf of the client actually obligates lawyers to peek at metadata.<sup>28</sup> However, the *D.C. Rules of Professional Conduct* contain a specific no-peek rule for the "errant fax" problem:

A lawyer who receives a writing relating to the representation of a client and knows, before examining the writing, that it has been inadvertently sent, shall not examine the writing, but shall notify the sending party and abide by the instructions of the sending party regarding the return or destruction of the writing.<sup>29</sup>

The problem is that the rule is too specifically geared toward the errant fax problem, and on its face, it does not prohibit examining the metadata in a writing unless the writing was inadvertently sent. Plainly, this rule is precisely drafted and not at all hortatory—it is an example of a rule of role, belonging in Fred's category of rules of fair play. Because it does not explicitly prohibit peeking at metadata and carries punitive consequences, one might argue that it must be strictly construed. Under the *expressio unis* canon, the rule must be read to permit rather than forbid peeking at metadata.

But several committee members insisted that a lawyer of integrity simply does not go around looking through other peoples' briefcases, even though doing so may help the client—nor should a lawyer peek at metadata. Such conduct, even though not expressly prohibited, is dishonest, and violates rule 8.4(c)'s ban on deceit and dishonesty.<sup>30</sup>

---

28. As the D.C. Bar's opinion notes, citing an earlier opinion, "[W]here the privileged nature of the document is not apparent on its face, there is no obligation to refrain from reviewing it, and the duty of diligent representation under D.C. Rule 1.3 may trump confidentiality concerns." *Id.* Our opinion did not discuss one thorny issue: whether, if lawyers are forbidden from peeking at the metadata, clients can demand that their lawyers send copies of the documents to them so that the clients can do what the lawyers cannot.

29. D.C. RULES OF PROF'L CONDUCT R. 4.4(b) (2010).

30. The opinion distinguishes between peeking at metadata in documents that an adversary is required to produce in discovery or pursuant to a subpoena and other documents.



Once the committee agreed on that conclusion—and it took some discussion to get there—we concluded that the dishonesty of peeking should affect our reading of rule 4.4(b): we should read rule 4.4(b) broadly rather than narrowly. And that is what we did: the published version of the opinion reasons that “[a]lthough the purpose of Rule 4.4(b) was to address the inadvertent disclosure of entire documents (whether electronic or paper), we see no reason why it would not also apply to an inadvertently transmitted portion of a writing that is otherwise intentionally sent”—the metadata portion.<sup>31</sup> In other words, we used the integrity-based rule 8.4(c) as an interpretive guide to the rule of rule.<sup>32</sup> This is not a preordained conclusion: one could readily argue it the other way around and insist that rule 8.4(c) should be read narrowly. Fred’s vision of integrity rules as reminders that role is not everything lends itself, I think, to the committee’s approach rather than the alternative. It seems to me that Fred’s analysis could readily have been expanded to include discussion of integrity rules as interpretive guides to rules of role.

I also think that integrity rules could form a firmer basis for discipline than Fred acknowledges. A case in point is Model Rule 2.1 and its state equivalents. This rule, governing lawyers in their role as client advisers, requires lawyers to offer candid and independent advice.<sup>33</sup> I have argued in several venues that the so-called torture memos written by lawyers in the Justice Department’s Office of Legal Counsel (OLC) violated rule 2.1 by providing grossly distorted legal advice on the legality of CIA interrogation techniques.<sup>34</sup> The Justice Department’s Office of Professional

---

*See* D.C. Bar Legal Ethics Comm., *supra* note 27. For documents in the former category, the metadata may have evidentiary force, and in such cases it is not prohibited to search and examine the metadata. My discussion in this Article concerns documents outside this category.

31. *See id.* (footnote omitted).

32. And, of course, the other way around: it was partly because of the similarity between peeking at metadata and the conduct prohibited by D.C. Rule 4.4(b) that we concluded that peeking at metadata is dishonest. I regard this as a virtuous, not a vicious, circle.

33. *See* MODEL RULES OF PROF’L CONDUCT R. 2.1 (2010).

34. I first made the argument in David Luban, *Selling Indulgences*, SLATE (Feb. 14, 2005, 6:07 PM), <http://www.slate.com/id/2113447/>. I subsequently developed it in DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 157–58, 192–202 (2007); David Luban, *Tales of Terror: Lessons for Lawyers from the ‘War on Terrorism,’* in REAFFIRMING LEGAL ETHICS: TAKING STOCK AND NEW IDEAS 56 (Kieran Tranter et al. eds., 2010); *Department of Justice to Guantanamo Bay: Administration Lawyers and Administration Interrogation Rules: Hearing Before the Subcomm. on the Constitution, Civil Rights & Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 15–16 (2008) (testimony of David Luban, Professor of Law, Georgetown University Law Center); and—in greater detail—*What Went Wrong: Torture and the Office of Legal Counsel in the Bush Administration: Hearing Before the Subcomm. on Admin. Oversight & the Courts of the*

Responsibility (OPR) report on the torture memos agreed and recommended referring two of the memos' authors for professional discipline.<sup>35</sup> The client plainly wanted the advice: according to a Senate Intelligence Committee report, OLC approval was the last hurdle before beginning the "enhanced" interrogation of the prisoner Abu Zubaydah.<sup>36</sup> In my view, a lawyer cannot distort legal advice to give the client what he wants. Doing so violates rule 2.1.

However, Associate Deputy Attorney General David Margolis rejected OPR's finding of misconduct and also its use of Model Rule 2.1;<sup>37</sup> he concluded that the rule 2.1 theory fails to set out "a known and unambiguous obligation or standard."<sup>38</sup> I disagree and think the Margolis Memo is deeply flawed.<sup>39</sup> The torture memos omitted to mention significant adverse case law, misrepresented at least one source that it cited by attributing the opposite view to what it actually said at the page cited, and offered bizarre statutory interpretations.<sup>40</sup> This can

*S. Judiciary Comm.*, 111th Cong. (2009) (testimony of David Luban, Professor of Law, Georgetown University Law Center) (on file with author).

35. DEP'T OF JUSTICE, OFFICE OF PROF'L RESPONSIBILITY, REPORT: INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF "ENHANCED INTERROGATION TECHNIQUES" ON SUSPECTED TERRORISTS 16-17, 21-22, 254-60 (2009), available at <http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf>. In the interest of candor, I should report that former Attorney General Michael B. Mukasey and Deputy Attorney General Mark Filip assert that OPR drew on my analysis, and they criticize the OPR Report for failing to disclose that I am not a lawyer and was a critic ("to be sure, thoughtful and sincere, but longtime") of the Bush Administration. Letter from Michael B. Mukasey, Attorney Gen. & Mark Filip, Deputy Attorney Gen., to H. Marshall Jarrett, Counsel, Office of Prof'l Responsibility 7-8 (Jan. 19, 2009), available at <http://judiciary.house.gov/hearings/pdf/Mukasey-Filip090119.pdf>. I can attest that no OPR personnel ever discussed their investigation or anything else with me, and I had no inkling that OPR's report would cite my work.

36. SENATE SELECT COMM. ON INTELLIGENCE, 111TH CONG., RELEASE OF DECLASSIFIED NARRATIVE DESCRIBING THE DEPARTMENT OF JUSTICE OFFICE OF LEGAL COUNSEL'S OPINIONS ON THE CIA'S DETENTION AND INTERROGATION PROGRAM 3-4 (2009), available at <http://intelligence.senate.gov/pdfs/olcopinion.pdf>.

37. Memorandum from David Margolis, Assoc. Deputy Attorney Gen., to the Attorney Gen. & the Deputy Attorney Gen. 14-24 (Jan. 5, 2010), available at <http://judiciary.house.gov/hearings/pdf/DAGMargolisMemo100105.pdf>.

38. *Id.* at 10.

39. For my rejoinder to the Margolis Memorandum, see David Luban, *David Margolis Is Wrong*, SLATE (Feb. 22, 2010, 11:49 AM), <http://www.slate.com/id/2245531>.

40. I discuss the gory details in the sources cited in *supra* note 34, especially my Senate testimony. In brief, the significant omissions are *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 490-91 (2001), which expresses doubts, although reserves the question, whether a necessity defense exists in federal criminal law unless explicitly provided by statute; *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 585-89 (1952),

hardly be squared with the injunction to give candid and independent advice; the standard is simply not *that* ambiguous.

Fred wrote about the “torture memo” issue but concluded that rule 2.1 offers scant constraint on the authors of the torture memoranda; his view is closer to that of Mr. Margolis’s than to mine or to that of the OPR Report, which had not been released at the time Fred wrote.<sup>41</sup> This conclusion is in line with his analysis of integrity rules in general, which holds that integrity rules such as rule 2.1 are largely hortatory and should not be enforced. However, rather than appeal to his overall regulatory philosophy, Fred offered more specific arguments. One is that John Yoo, the author of the best-known torture memos, may have been asked only “to identify the best arguments supporting the interrogation tactics in question” rather than to objectively evaluate the law.<sup>42</sup> Nothing in rule 2.1 prohibits a lawyer from answering the narrower question.

As a matter of fact, however, the memos themselves deny that they are addressing the narrower question. Professor Yoo’s August 1, 2002, “techniques” memorandum instead states, “We wish to emphasize that this is our best reading of the law,”<sup>43</sup> while Mr. Bradbury describes his May 10, 2005, “techniques” memorandum in similar terms: “the legal standards we apply in this memorandum . . . constitute our authoritative view of the legal standards applicable under [the torture statutes].”<sup>44</sup> It is very likely Fred had not read these memos at the time he was preparing his article—they were not released until spring of 2009. But I believe that even under Fred’s hypothetical he reached the wrong answer. OLC opinions bind the executive branch, and OLC is charged with the President’s constitutional obligation to faithfully execute the law. A request by the client to provide arguments for only one side of a crucial

---

which finds that President Truman’s commander-in-chief power did not authorize otherwise-unlawful seizure of steel mills; *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177–78 (1804), which holds that President Adams’s authority as commander in chief could not authorize the seizure of a ship contrary to an act of Congress; and *United States v. Lee*, 744 F.2d 1124, 1125 (5th Cir. 1984), which calls waterboarding “torture.” Each of these cases undermines major arguments in the torture memorandum, but the memorandum cited none of them.

41. See Fred C. Zacharias, *Practice, Theory, and the War on Terror*, 59 EMORY L.J. 333, 348–50 (2009).

42. See *id.* at 349.

43. Memorandum from the U.S. Dep’t of Justice Office of Legal Counsel to John Rizzo, Acting Gen. Counsel for the CIA, *Interrogation of al Qaeda Operative* (Aug. 1, 2002), reprinted in THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE 127 (David Cole ed., 2009).

44. Memorandum from the U.S. Dep’t of Justice Office of Legal Counsel to John A. Rizzo, Senior Deputy Gen. Counsel, CIA, *Application of 18 U.S.C. §§ 2340–2340A to Certain Techniques that May Be Used in the Interrogation of a High Value al Qaeda Detainee* (May 10, 2005), reprinted in THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE, *supra* note 43, at 152.

legal issue is a request for OLC to violate its obligations; given the binding power of OLC opinions, the request would be wholly out of order.

Fred also believed that Professor Yoo may well have satisfied the requirement of candor because he believed the views in the torture memos—as he has vehemently asserted.<sup>45</sup> It is indeed incumbent on any disciplinary authority to prove the requisite *mens rea* for a disciplinary infraction. That is not a problem with rule 2.1, however. Mental states are hard to prove, and it would be harder still to prove that a lawyer who has written an elaborate legal opinion justifying the lawyer's conclusions—and who stands by it—did not actually believe what was in those opinions. Hard, but not impossible: the question for the fact finder would turn on whether omitting all discussion of key adverse case law was really based on a good faith belief that it is irrelevant.

My hesitations about Fred's analysis of integrity rules should not mask my main point, however: Fred's regulatory philosophy, grounded in a very deep understanding of the moral significance of different categories of rules, is a notable and very important achievement.

I mentioned earlier that Fred and Bruce Green attach special significance to permissive or discretionary rules of ethics—a category that overlaps substantially with integrity rules. That is because they see the exercise of professional discretion, constrained by the basic contours of the lawyer's role, as the heart of professional conscience. They argue this point in one of their most significant articles, *Reconceptualizing Advocacy Ethics*.<sup>46</sup> This article aims at a goal Fred refers to often in his writing: to stake out a middle position between two extremes regarding the relationship between a lawyer's role morality and extralegal morality.<sup>47</sup> One position, sometimes identified with the work of Monroe Freedman, places zealous advocacy on the client's behalf in a paramount, trumping position over extralegal moral values.<sup>48</sup> The other, sometimes identified with the work of William Simon and me, gives primacy to the pursuit of justice (Simon) or morality (Luban).<sup>49</sup> Zacharias and Green seek to identify a middle position between the two—a role within our legal tradition for a “professional conscience” that is more tied with the

---

45. JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* 180–87 (2006).

46. See Zacharias & Green, *supra* note 18.

47. See *id.* at 44–45.

48. See *id.* at 44 & n.257.

49. See *id.* at 44 & nn.258–59.

lawyer's role than personal conscience but that nevertheless constrains lawyers in pursuing client interests.<sup>50</sup> In their words, professional conscience pertains to "uncodified but nonetheless enforceable limits on advocacy and partisanship."<sup>51</sup> They locate a paradigm for this notion of professional conscience in an important 1845 decision by Chief Justice Gibson in the Pennsylvania Supreme Court, *Rush v. Cavanaugh*.<sup>52</sup> The case involved a lawyer who refused to conduct a prosecution on behalf of a private client when he concluded that it was baseless.<sup>53</sup> After the client branded him a professional cheat, the lawyer sued for defamation, and the court concluded that it must decide whether the lawyer had acted properly by abandoning the prosecution—while nevertheless billing the client for services rendered.<sup>54</sup> Zacharias and Green provide an interesting historical account of why the case is important and a novel interpretation of it. The most important point, though, is their discussion of the meaning of "professional conscience." Crucially, it is not the same as "personal conscience," that is, norms of common morality. The latter reflects "individual, subjective ethical perspectives";<sup>55</sup> elsewhere, Fred uses the phrase "idiosyncratic unbounded notions of right and wrong."<sup>56</sup> In Chief Justice Gibson's conception, there is nothing subjective or idiosyncratic about professional conscience: the "professional requirement of conscience apparently dictated only one course of conduct,"<sup>57</sup> namely that the attorney must not continue in a prosecution that the attorney knew was unfounded. In line with the themes I have emphasized in this Article, Zacharias and Green locate professional conscience in the discretionary rules of professional codes, which set parameters for the execution of the lawyer's role but delegate to lawyers the hard moral deliberation about which actions within these parameters fulfill their duty as officers of the court.<sup>58</sup> I am not certain whether they agree with Chief Justice Gibson that professional conscience inevitably dictates "only one right course of conduct," but it is central to their vision that professional conscience is neither individual nor subjective, unlike personal conscience, and it gives content to the concept of an "officer of the court."

---

50. *See id.* at 45.

51. *Id.* at 50.

52. *Rush v. Cavanaugh*, 2 Pa. 187 (1845).

53. *See Zacharias & Green, supra* note 18, at 6.

54. *See id.*

55. Green & Zacharias, *supra* note 18, at 22.

56. Fred C. Zacharias, *The Lawyer as Conscientious Objector*, 54 *RUTGERS L. REV.* 191, 208 (2001).

57. Green & Zacharias, *supra* note 18, at 22.

58. *See id.* at 54–57.

Again, my primary aim in the present Article is not critical, but I do want to offer my rejoinder to their critique of my own approach, which gives primacy to extra-professional morality. The rejoinder consists in three points. First, what Zacharias and Green label personal conscience is no more individual and subjective than professional conscience. There is nothing subjective about basic moral norms such as the duty to respect the human dignity of all people, including the adversary, or the requirement not to inflict grievous harm on the innocent. Time-honored moral requirements of honesty, benevolence, and reciprocity have at least as strong a claim to objective validity as any norms of professional conscience. Although it is true that reasonable people may disagree about what these norms require in hard cases, the same is surely true of discretionary professional norms. Second, what Zacharias and Green call personal conscience is not something we can simply set aside—it comes with the territory of being a human agent.<sup>59</sup> This gives it a certain primacy over professional conscience: we can walk away from a profession, but we cannot walk away from ourselves. Thus, third, in cases where moral norms conflict with the professional rules of conduct, the question always arises of whether to conscientiously disobey the rules, and the answer cannot be a blanket “no.”

Fred did not disagree with the latter conclusion. In his admirable article on lawyers as conscientious objectors, he insists that “no one has ever suggested that blind adherence to a professional code in a particular situation involving moral issues necessarily is ethical in the general sense.”<sup>60</sup> He proposes three requirements that would normally be necessary to justify conscientious disobedience to a legal and professional norm. First:

For a lawyer's beliefs to begin to rise to the level justifying conscientious objection, the lawyer must be able to identify a specific religious or religious-equivalent creed that governs the situation . . . .

. . . [A]s a participant in the legal system, a lawyer-objector should consider departing from the legal rules only when she can point to a specific core belief that controls her everyday behavior in more than an ephemeral sense. A deep-seated belief that she should not kill or tell a lie might qualify, while a belief that she should “be a good person” hardly helps her distinguish appropriate conduct in a

---

59. For my most recent effort to make the case for moral activism, see David Luban, *The Inevitability of Conscience: A Response to My Critics*, 93 CORNELL L. REV. 1437, 1438–44 (2008).

60. Zacharias, *supra* note 56, at 194.

measurable way. In general, the lawyer should not depart from the codes on the basis of a generalized sense of her superior moral capacity.<sup>61</sup>

Second, a lawyer should take steps to minimize whatever damage her disobedience causes.<sup>62</sup> And third, she ordinarily ought to disobey publicly, which entails a willingness to accept the consequences.<sup>63</sup>

These conditions are entirely plausible. But notice that Fred *does* accept the ultimate primacy of personal conscience over professional obligation, at least in the subset of cases that meet the three conditions. In my view, that concession softens the distinction between Green and Zacharias's theory of professional conscience and views such as mine. To the extent Green and Zacharias believe that personal and professional conscience complement each other, I agree with them, and to the extent they accept that in cases where personal and professional conscience conflict, personal conscience may rightly prevail, they agree with me.

Any appreciation of Fred's work must include prosecutorial ethics. By my count, he published ten articles on the subject, five in collaboration with Bruce Green and five on his own.<sup>64</sup> They include an extraordinarily fine article on plea bargaining,<sup>65</sup> but the article I wish to focus on is his first on the subject, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*<sup>66</sup> Here, Fred considered the meaning of the slogan that prosecutors should seek justice, not victory.<sup>67</sup> The dictum is intuitive, and enormously suggestive, but it is very hard to say exactly what it means. So far as I know, Fred's article was the first to tackle the problem.<sup>68</sup> Fred's view is modest and procedural: for him, the duty to seek justice "has two fairly limited prongs: (1) prosecutors should not prosecute unless they have a good faith belief that the defendant is guilty; and, (2) prosecutors must ensure that the basic elements of the adversary system exist at trial."<sup>69</sup> Or at any rate it seems modest and procedural if one focuses only on the

---

61. *Id.* at 208–09.

62. *See id.* at 218.

63. *See id.*

64. *See supra* note 7.

65. *See* Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121 (1998).

66. *See* Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45 (1991).

67. It appears in various forms in the MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. (2010); the MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (1982); and the ABA'S STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-1.2(c) (3d ed. 1993). Its ancestor is the Supreme Court's opinion in *Berger v. United States*, 295 U.S. 78, 88 (1935).

68. For another noteworthy attempt, written eight years later, see Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 612–13 (1999).

69. Zacharias, *supra* note 66, at 49.

second clause. The first clause turns out not to be modest at all. Presumably it means that prosecutors should not prosecute crime *C* unless they have a good faith belief that the defendant has committed *C*, as charged in the indictment—not just another crime like *C*. It follows that a prosecutor cannot prosecute someone for dealing drugs if the prosecutor thinks the defendant did not do it this time, even if the prosecutor is absolutely certain that the defendant is a drug dealer, and even if the prosecutor thinks the state could win the case. No mental gymnastics along the lines of, “He may not have really done it this time, but he does the same thing all the time.” Nor can a prosecutor overcharge a case in order to induce a plea bargain or to flip the defendant. Nor, finally, can a prosecutor with honest doubts about the case proceed with it and “let the jury decide.”<sup>70</sup>

The second clause, modest as it seems, exhibits one of Fred’s characteristic views: a commitment to the value of procedural justice, coupled with a skepticism about the direct pursuit of substantive justice. After all, some commentators might read “seek justice not victory” as a demand that prosecutors do what they can to seek the legally just outcome.<sup>71</sup> This assumes that prosecutors are able to tell what the legally just outcome is. Sometimes, no doubt, that is true.<sup>72</sup> But, just as Fred had real doubts about lawyers imposing their demands of personal conscience on clients, he had real doubts about anyone’s ability to discern legal justice better than a well-functioning legal process. A prosecutor who decides to seek legal justice regardless of procedural niceties might just as readily turn out to be a prosecutor who cuts corners to obtain convictions as a prosecutor who refrains from unjust prosecutions.

---

70. This is contrary to the well-known view of H. Richard Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA*, 71 MICH. L. REV. 1145, 1156–59 (1973). The ABA’s STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION take a weaker stand than Fred Zacharias: Standard 3-3.9 requires a prosecutor to refrain from prosecution without probable cause, but “the prosecutor’s reasonable doubt that the accused is in fact guilty” is merely a discretionary factor when a prosecutor is deciding whether to press charges. ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 3-3.9(b) (1993).

71. This is the view of WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS* (1998). Simon generalizes the “seek justice not victory” dictum from prosecutors to lawyers in general and argues that the “justice” to be sought is substantive legal justice. *See id.* at 9–11.

72. *See* David Luban, *The Conscience of a Prosecutor*, 45 VAL. U. L. REV. 1 (2010).



Something of this same skepticism about lawyers' direct or overt efforts to achieve moral ends appears in one of Fred's last—and most pessimistic—essays, *True Confessions About the Role of Lawyers in a Democracy*.<sup>73</sup> A former public interest lawyer himself, Fred had high hopes that practicing law could lead to progressive social change. Over time, these hopes came to seem “more wistful than realistic.”<sup>74</sup> The pursuit of client interests can actually undermine public interests, and public interest law practice need not be progressive, as the flourishing conservative public interest bar demonstrates. People's ideas about democracy vary widely, and the progressive vision of American democracy is only one of them.<sup>75</sup> As for a professional obligation to protect and enhance democracy, it is simply arrogant for lawyers to assume that their profession has a deeper obligation—or better insight into the requirements of democracy—than anyone else.<sup>76</sup>

The one thing that lawyers are particularly good at, Fred argues, is recognizing and protecting the process values that constitute the rule of law. In his view, the rule of law is not necessarily democratic: “the rule of law seems to be neutral as between democracy and tyranny, serving either equally well.”<sup>77</sup> But it may well be that constitutional democracy is impossible without the rule of law, and that is reason enough for lawyers in a constitutional democracy to work to maintain it.<sup>78</sup> Fred's conclusion is this:

Therefore, to the extent that lawyer involvement in producing social reform is important, our time may be better spent on identifying those limited enterprises for which lawyers are uniquely qualified and on developing mechanisms for encouraging lawyers to engage in those enterprises voluntarily. If I am correct that finding agreement about values inherent in all true democracies is nearly impossible, it seems anomalous to pursue the second order question of whether lawyers have a special obligation to those values. Rather, we should acknowledge that lawyers' contributions to democracy will stem from lawyers' individual moral decisions to act. This in turn would force us to justify particular endeavors as warranting the special attention of the bar.<sup>79</sup>

This paragraph explains a great deal about the ambition of Fred's work. The moral impulse is evident and strong—but so is the skepticism that direct, overt moralizing will do much good. A lawyer's contributions

---

73. Fred C. Zacharias, *True Confessions About the Role of Lawyers in a Democracy*, 77 *FORDHAM L. REV.* 1591 (2009).

74. *Id.* at 1599.

75. *See id.* at 1603.

76. *See id.* at 1601–02.

77. *Id.* at 1606. I do not agree with Fred on this point; instead, following Lon Fuller, I believe that tyrannies inevitably find the rule of law a constricting nuisance. *Id.* at 1605.

78. *See id.* at 1606.

79. *Id.* at 1607.

come from an individual moral decision to act—but taking such a decision *as a lawyer* puts the onus on that lawyer to justify the special attention of the bar. Inevitably, that presses lawyers toward those limited endeavors—paradigmatically, enhancing the rule of law—that lawyers are good at. Personal conscience transmutes into professional conscience. Much of Fred’s writing can be understood as the manifestation of his own professional conscience. In a brief essay, Fred explained that the reason legal practitioners need academics is that—contrary to the conventional wisdom that professors don’t understand the “real world”—it is more often the practitioners than the academics who engage in “wistful idealizations about the legal profession.”<sup>80</sup> In his view, “the bar often needs law professors to bring its approaches back to earth.”<sup>81</sup> Fred saw his job as bringing ethics to earth. He did it in a wise, knowledgeable, tough-minded, and inventive way. His loss is a great one.

---

80. Fred C. Zacharias, *Why the Bar Needs Academics—And Vice Versa*, 40 SAN DIEGO L. REV. 701, 702 (2003).

81. *Id.*