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The Boundary Claim's Caveat: Lawyers and Confidentiality Exceptionalism

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The Boundary Claim's Caveat: Lawyers and Confidentiality Exceptionalism

Rebecca Aviel

University of Denver Sturm College of Law

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The Boundary Claim's Caveat: Lawyers and Confidentiality Exceptionalism

Rebecca Aviel*

In legal ethics scholarship, the “boundary claim” stands for the idea that lawyers must represent clients zealously but within the bounds of the law. The idea has long been embraced by the legal profession as both a description of—and justification for—the unique moral, social, and political space occupied by lawyers. This Article asserts that this professed commitment to obey the law comes with a caveat: the legal profession has been unwilling to acknowledge that lawyers must comply with laws that require the disclosure of client confidences. In fact, the bar has a fairly extensive history of suggesting or asserting that lawyers are exempt from such laws. This Article traces that history and then considers its significance. Properly located within the state and federal constitutional structures that should form the framework for this assessment, the idea that lawyers are exempt from laws that require disclosure is, in some of its manifestations, really quite radical, raising questions about the role of lawyers in a constitutional democracy that the bar has never satisfactorily addressed.

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I. INTRODUCTION

The “boundary claim”¹ has been described as “the one relatively fixed star in the legal ethics universe.”² It posits that lawyers, while

* © 2012 Rebecca Aviel. Assistant Professor, University of Denver Sturm College of Law. The author is grateful for the illuminating feedback received from Alan Chen, Stephen Pepper, Eli Wald, and the participants of the Rocky Mountain Junior Scholars Forum.

certainly expected to engage in zealous advocacy on behalf of their clients, must respect the boundaries of the law.³ This idea is pervasive in legal ethics codes,⁴ and Professor William Simon characterizes it as “so obvious that it is rarely examined within the profession.”⁵ But, as Professor David Wilkins has observed, matters are considerably more complicated; the command is more contested and less categorical than it might at first appear.⁶ The work of Professor Susan Koniak, in particular, reveals numerous instances in which lawyers assert the right to disregard law and are counseled to do so by the bar.⁷

This phenomenon is most pronounced when lawyer compliance with law would involve disclosure of client confidences.⁸ For those steeped in the view that an attorney’s protection of client confidences is a subordinating obligation, the idea that law might demand exactly the opposite is astonishing. As I have previously noted, however, disclosure obligations are popping up across a wide array of regulatory regimes as lawmakers increasingly turn to mandatory reporting to solve problems ranging from elder abuse to insurance fraud.⁹ Some of these laws specifically include attorneys (along with many other professionals) within their scope.¹⁰ Other such laws apply to “any person” who comes to possess the desired information and often show

1. See, e.g., David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468 (1990).

2. David B. Wilkins, *In Defense of Law and Morality: Why Lawyers Should Have a Prima Facie Duty To Obey the Law*, 38 WM. & MARY L. REV. 269, 269 (1996).

3. *Id.*

4. See, e.g., MODEL RULES OF PROF’L CONDUCT pmbll., para. 9 (2010) (setting forth “the lawyer’s obligation zealously to protect and pursue a client’s legitimate interests, within the bounds of the law”); see also MODEL CODE OF PROF’L RESPONSIBILITY Canon 7 (1980) (“A Lawyer Should Represent a Client Zealously Within the Bounds of the Law”).

5. William H. Simon, *Should Lawyers Obey the Law?*, 38 WM. & MARY L. REV. 217, 217 (1996).

6. Wilkins, *supra* note 2, at 277.

7. Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1390-92 (1992) [hereinafter Koniak, *The Law Between*]; see also Susan P. Koniak, *When the Hurlyburly’s Done: The Bar’s Struggle with the SEC*, 103 COLUM. L. REV. 1236 (2003) [hereinafter Koniak, *When the Hurlyburly’s Done*].

8. Koniak notes, “[I]t is confidentiality, and particularly the duty to keep client confidences from the state, more often than any other norm, that triggers the obligation to resist competing state norms . . .” Koniak, *The Law Between*, *supra* note 7, at 1427.

9. Rebecca Aviel, *When the State Demands Disclosure*, 33 CARDOZO L. REV. 675, 676-77 (2011).

10. See, e.g., NEV. REV. STAT. ANN. § 432B.220(4)(i) (West 2010).

no signs of intent to exempt lawyers from their demands;¹¹ sometimes, in fact, the contrary is apparent.¹²

Nonetheless, the bar has a fairly extensive history of treating these laws as outside of the purview of laws which lawyers must obey. That disclosure laws are often considered an exception to the otherwise acknowledged duty to obey the law belies the professed commitment to the boundary claim, at least in its unqualified form. This history suggests the strength and influence of what I am calling the boundary claim's caveat: the idea that lawyers have to obey the law—except when that law treads on attorney-client confidentiality, the value we have deemed preeminent and subordinating. The persistence and significance of this idea's influence on the legal profession is worth some attention. While confidentiality, along with its justifications and shortcomings, has been so exhaustively studied that the voluminous quality of the literature has itself become a recurrent trope,¹³ its singular relationship to the profession's views on law compliance remains underexplored.¹⁴ The goal of this Article is to

11. See, e.g., S.C. CODE ANN. § 38-55-570(A) (2011); TEX. INS. CODE ANN. art. 701.051 (West 2011).

12. See, e.g., TEX. FAM. CODE ANN. § 261.101 (West 2011).

13. See Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 612-13 (1985) (noting some twenty-five years ago that the “profession’s conventional defense” of attorney-client confidentiality “is too familiar to warrant extended exegesis [sic] here”); Fred C. Zacharias, *Harmonizing Privilege and Confidentiality*, 41 S. TEX. L. REV. 69, 69-70 (1999) (“The subject of attorney-client confidentiality has assumed more significance in recent scholarship than it deserves. Since its promotion as the core of the adversary system and the attorney-client relationship, numerous authors—including myself—have focused on the importance of strict confidentiality, the appropriateness of broadening or narrowing exceptions, the validity of the assumptions underlying strict confidentiality rules, and even proposals for new formulations of the principle.” (footnotes omitted)).

14. Other scholars have certainly discussed, in Koniak’s terms, “the divergence between the bar’s vision and that of the state.” Koniak, *The Law Between*, *supra* note 7, at 1431. She notes work by Deborah L. Rhode, as well as Harry I. Subin, Wayne D. Brazil, David J. Fried, and L. Ray Patterson. See *id.* at 1409 n.81, 1431 n.171. To this we could add the scholarship of Roger Cramton, and Sung Hui Kim, work that is discussed in Part II of this Article and its accompanying footnotes. See *infra* notes 131-133 and accompanying text.

This Article seeks to make three distinctive contributions to this literature. First, it provides a chronology of this divergence that focuses on the bar’s instruction to lawyers in the form of its ethical codes; it uses primary materials from the hearings and deliberations of the Ethics 2000 Commission to conclude that ambivalence about lawyer compliance with disclosure law continues to pervade the drafting and interpretation of these codes. Second, it highlights the significance of this divergence for the boundary claim, providing a bridge between these two bodies of scholarship. Third, at the risk of revealing a “naïve positivism,” see Koniak, *The Law Between*, *supra* note 7, at 1398, or a “statist” conception of law, see Koniak, *When the Hurlyburly’s Done*, *supra* note 7, at 1278 n.135, it subjects these claims to the sort of structural and substantive scrutiny that should attend assertions of exemption from generally applicable law.

study that relationship, with a special focus on generally applicable disclosure laws that include within their scope lawyers and nonlawyers alike.¹⁵

I begin in Part II with a closer look at the boundary claim as it has been contemplated and discussed in the scholarly literature. Scholars have explored numerous ways in which the claim does not do everything that it promises in relieving the tension between the pursuit of client-directed ends and the public good.¹⁶ What I am proposing is that in its seemingly straightforward acknowledgement of the boundaries on lawyer conduct imposed by law, it does not capture the profession's history of ambivalence and resistance toward those laws that require attorney disclosure.

In Part III, then, I offer a sketch of this history, showing that it is persistent enough to pose real challenges for the boundary claim's descriptive force.¹⁷ I look at the text of the relevant ethical rules, and

Unlike the position criticized by Koniak, I do not see the divergence between the bar and the state as "some sort of continuing blunder" that the profession and the courts repeatedly "have failed to see and correct." Koniak, *The Law Between*, *supra* note 7, at 1431. Rather, informed by her work, I view it as the product of the profession's intensely "strong competing normative vision" and its effort to "assert the primacy of that vision." *Id.* at 1391. I do, however, intend to criticize these efforts on the grounds that they cannot be justified within a democratic system that exists for the very purpose of resolving disputes over just this type of normative vision. (However imperfectly the system does so is beside the point, as it does not answer why lawyers should have a special dispensation to exempt themselves from the results of a regrettably flawed process.) To the extent that this resorts to "traditional legal analysis," with its narrow view of what counts as law, I do so deliberately, because this is the view of law that confronts nonlawyers who seek to assert some sort of challenge to the results of the process. Constitutional law textbooks are filled with unsuccessful attempts to assert exemption from law on grounds of conscience, even where the First Amendment seems to countenance such exemption. For one particularly prominent example, see *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990). I will contend that lawyers should consider themselves bound by the same constraints and should acknowledge this forthrightly in their ethical codes.

15. Thus I do not discuss, for example, the lawyer's obligation to reveal client perjury to the presiding tribunal, *see* MODEL RULES OF PROF'L CONDUCT R. 3.3 (2010), or the reporting-up requirements for lawyers representing securities issuers before the SEC, *see also* 15 U.S.C. § 7245 (2006) and 17 C.F.R. § 205.1-.7 (2011). As I will explain, there are interesting insights to be gained from the novel approach I take here. By deliberately tabling the question "What should be the special disclosure obligations required of a lawyer?" we can ask, "Does a lawyer share the disclosure obligations imposed on her fellow citizens?" It helps us see most clearly the profound implications of the profession's unwillingness to acknowledge the force of these obligations.

16. *See infra* note 27 and accompanying text.

17. In canvassing roughly one hundred years of bar regulation, I have attempted to focus on the most pertinent developments to provide a chronology that is condensed and manageable; nonetheless, Part II is fairly detailed so as to lay the necessary groundwork for the discussion that follows. Readers who are familiar with this history may wish to proceed directly to Part III.

associated commentary, tracing how they have changed over the years. As of 2002, Rule 1.6(b)(6) expressly permits attorneys to reveal confidential client information to comply with “other law” or court order.¹⁸ But this has not always been the case, and as a result, lawyers, judges, and scholars have had considerable difficulty understanding whether, and if so when, the ethical duty of confidentiality yields to disclosure obligations set forth in other law. This Part outlines the schizophrenic and baffling treatment of lawyer disclosures necessary to comply with other law, showing that this has been a particularly troublesome area for the bar. Rather than treating the confidentiality duty as if it were constrained by such disclosure laws, the profession has at times treated the two as incompatible—and, at times, assumed or asserted that confidentiality trumps.

In Part IV, I explore the significance of this position. Properly located within the state and federal constitutional structures that should

18. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(6) (2010). Forty-one jurisdictions have incorporated this provision into their confidentiality rules. See ALASKA RULES OF PROF'L CONDUCT R. 1.6(b)(6) (2009); ARIZ. RULES OF PROF'L CONDUCT R. 1.6(d)(5) (2004); ARK. RULES OF PROF'L CONDUCT R. 1.6(b)(6) (effective 2005); COLO. RULES OF PROF'L CONDUCT R. 1.6(b)(7) (2011); DEL. RULES OF PROF'L CONDUCT R. 1.6(b)(6) (2010); D.C. RULES OF PROF'L CONDUCT R. 1.6(e)(2)(A) (2007); HAW. RULES OF PROF'L CONDUCT R. 1.6(c)(6) (2004); IDAHO RULES OF PROF'L CONDUCT R. 1.6(b)(6) (2004); ILL. RULES OF PROF'L CONDUCT R. 1.6(b)(6) (2010); IND. RULES OF PROF'L CONDUCT R. 1.6(b)(6) (2012); IOWA RULES OF PROF'L CONDUCT 32:1.6(b)(6) (2010); KAN. RULES OF PROF'L CONDUCT R. 1.6(b)(2) (2007); KY. RULES OF PROF'L CONDUCT R. 3.130(1.6)(b)(4) (2009); LA. RULES OF PROF'L CONDUCT R. 1.6(b)(6) (2011); ME. RULES OF PROF'L CONDUCT R. 1.6(b)(6) (2012); MD. RULES OF PROF'L CONDUCT R. 1.6(b)(6) (2011); MASS. RULES OF PROF'L CONDUCT R. 1.6(b)(4) (2011); MICH. RULES OF PROF'L CONDUCT R. 1.6(c)(2) (2011); MINN. RULES OF PROF'L CONDUCT R. 1.6(b)(9) (2011); MISS. RULES OF PROF'L CONDUCT R. 1.6(b)(6) (2005); MO. RULES OF PROF'L CONDUCT R. 4-1.6(b)(4) (2007); MONT. RULES OF PROF'L CONDUCT R. 1.6(b)(4) (2010); NEB. RULES OF PROF'L CONDUCT § 3-501.6(b)(4) (2008); NEV. RULES OF PROF'L CONDUCT R. 1.6(b)(6) (2010); N.H. RULES OF PROF'L CONDUCT R. 1.6(b)(4) (2008); N.M. RULES OF PROF'L CONDUCT R. 16-106(B)(6) (2009); N.Y. RULES OF PROF'L CONDUCT R. 1.6(b)(6) (2009), N.C. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2003); N.D. RULES OF PROF'L CONDUCT R. 1.6(c)(5) (2006); OHIO RULES OF PROF'L CONDUCT R. 1.6(b)(6) (2012); OKLA. RULES OF PROF'L CONDUCT R. 1.6(b)(6) (2005); OR. RULES OF PROF'L CONDUCT R. 1.6(b)(5) (2012); R.I. RULES OF PROF'L CONDUCT R. 1.6(b)(4) (2007); S.C. RULES OF PROF'L CONDUCT R. 1.6(b)(7) (2009); S.D. RULES OF PROF'L CONDUCT R. 1.6(b)(5) (2004); TEX. RULES OF PROF'L CONDUCT 1.05(c)(4) (2005); UTAH RULES OF PROF'L CONDUCT R. 1.6(b)(6) (2006); VT. RULES OF PROF'L CONDUCT R. 1.6(c) (2011); VA. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2009); WIS. RULES OF PROF'L CONDUCT R. 20:1.6(c)(5) (2011); WYO. RULES OF PROF'L CONDUCT R. 1.6(b)(4) (2011). Georgia's rule states that attorneys must protect client confidences “except for disclosures that are impliedly authorized in order to carry out the representation, or are required by these rules or other law, or by order of the Court.” GA. RULES OF PROF'L CONDUCT R. 1.6(a) (2001). New Jersey's rule permits disclosure to comply with other law, but does not address court orders, while Washington's rule permits disclosure to comply with court orders but does not address other law. See N.J. RULES OF PROF'L CONDUCT R. 1.6(d)(3) (2004); WASH. RULES OF PROF'L CONDUCT R. 1.6(b)(6) (2011).

form the framework for this assessment, the idea that lawyers are exempt from laws that require disclosure is, in some of its manifestations, really quite radical. Where the idea is presented without mooring in the particular constitutional principles that are understood to limit legislative power,¹⁹ it amounts to the assertion that lawyers can be excused from the commands that bind the polity because their professional commitment to the substantive ideal of confidentiality is superior. This is, I submit, an extraordinary proposition. (It is a mark of how influential the boundary claim's caveat really is that this takes some reminding.)

Professor Koniak's depiction of lawyers battling against the state—two separate communities asserting normative supremacy—is an enormously useful and insightful one.²⁰ But if we are to continue to imagine visions of the legal profession that might be described as integrated—in which lawyers operate within the system of which they and the state are each a part—then the notion of lawyer exemption from disclosure laws would have to be supported by justifications that can bear the weight of this structurally radical proposition. In this Part, I evaluate the policies underlying the confidentiality norm, concluding that they do not provide the requisite support.

I conclude by pointing out that the current version of the confidentiality rule—permitting but not requiring lawyers to comply with laws that require disclosure—stops short of affirming the basic law-compliance principle that the boundary claim presupposes. I discuss the flaws of the current approach and conclude by suggesting yet another revision for this provision.

II. THE BOUNDARY CLAIM

As Professor Wilkins has observed, the traditional model of legal ethics posits two distinct responsibilities for the lawyer: “On one hand, the lawyer is an advocate for the private interests of particular clients. On the other, she serves as an ‘officer of the court’ with a separate duty of loyalty to the fair and efficient administration of justice.”²¹ Ascribing to lawyers these two different roles offers the promise that

19. As I have shown previously, lawyer exemption from disclosure laws can only rarely be traced to constitutional commands. See Aviel, *supra* note 9, at 689-721.

20. Koniak, *The Law Between*, *supra* note 7, at 1390-92.

21. Wilkins, *supra* note 1, 470-71 (footnotes omitted). *But see* Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39, 39 (1989) (asserting that the term “officer of the court,” while conveying the impression that lawyers owe special duties to the justice system or to the public, lacks meaningful content).

“pursuit of private ends will not unduly frustrate public purposes,” but it also sets up a tension between obligations that could potentially be at odds with each other; clearly, what is good for a particular client may be exactly contrary to the public interest in the fair administration of justice.²² What resolves the tension, allowing lawyers to fulfill both sets of expectations, is the professional command that lawyers zealously represent their clients “within the bounds of the law.”²³ Calling this the “boundary claim,” Professor Wilkins revealed the normative premises underlying the claim—in short, that the boundary formed by legal rules is objective, consistent, and legitimate—and the vulnerability of these premises to the indeterminacy critique of the legal realists. If, as the legal realists so influentially argued, law is indeterminate, susceptible to multiple contradictory interpretations, and offering little in the way of objective, ascertainable “correct” answers, then “the bounds of law” do little if anything to constrain lawyers in their pursuit of client ends.²⁴

Professor Wilkins, while rejecting the most radical form of the indeterminacy thesis as an accurate depiction of the practicing lawyer’s perspective and experiences, nevertheless describes as “well-founded” the “suspicion that legal realism substantially undermines the normative foundation of the boundary claim Lawyers have both the power and the incentive to manipulate the very boundaries that are supposed to provide an independent source of constraint.”²⁵ Scholars have built on Professor Wilkins’s work by positing that the qualities of law emphasized by the legal realists—vague, open-textured, manipulable²⁶—result in two distinct failures of the boundary claim: the promise to the public is unraveled by “lawyers’ instrumentalist manipulation of the ‘bounds of the law’ that are supposed to constrain their partisanship,” while clients’ interests are threatened by the possibility that in the course of the representation, their lawyers will deploy interpretations of law that reflect the lawyer’s “own financial or reputational interests” or “personal or idiosyncratic views.”²⁷ Legal

22. Wilkins, *supra* note 1, at 471-72.

23. *Id.* at 471 (quoting MODEL CODE OF PROF’L RESPONSIBILITY Canon 7 (1980)).

24. *Id.* at 475-76. As Professor Stephen Pepper has observed, the boundary ostensibly provided by law serves not only to constrain lawyers in the pursuit of client ends, but to mitigate the undue influence of the particular lawyer’s moral judgment. See Stephen L. Pepper, *The Lawyer’s Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 617-18.

25. Wilkins, *supra* note 1, at 497.

26. Pepper, *supra* note 24, at 624.

27. Katherine R. Kruse, *The Jurisprudential Turn in Legal Ethics*, 53 ARIZ. L. REV. 493, 507-08 (2011).

ethics scholars have thus labored to offer criteria by which lawyers might choose among plausible interpretations of a legal rule in ways that “appropriately balance the public and private interests at stake.”²⁸

That scholars are still endeavoring to proffer a jurisprudential theory of lawyering that accommodates the indeterminacy thesis demonstrates the article’s lasting influence. But Professor Wilkins’s insight encompasses more than the importance of applying the realist critique to theories of lawyering and legal ethics. It was to recognize first that the boundary claim requires scrutiny precisely because it is load bearing, because it expresses something essential about the way the discourse of the legal profession harmonizes the competing demands of the lawyer’s role. The boundary claim continues to function as the profession’s prevailing description of, and justification for, the unique moral, social, and political space occupied by lawyers.²⁹ The current version of the Model Rules reiterates that “[a] lawyer’s conduct should conform to the requirements of the law” and extols “the lawyer’s obligation zealously to protect and pursue a client’s legitimate interests, within the bounds of the law.”³⁰ An influential treatise, after noting that “total commitment to client is the dominant ideology and ethos of most American lawyers today,” asserts that “the tension between service to clients and public service is sometimes addressed and at least partially alleviated within the formal ethical rules of the profession.”³¹ By way of explanation, the authors note that “[a]fter agreeing to accept a client’s case, lawyers must work zealously to maximize a client’s interests, but the work must be carried forward *within* the bounds of law.”³²

28. *Id.* at 508.

29. For an argument that modern lawyer regulation contemplates the exercise of “professional conscience, which captures norms that lawyers should be aware of and that strike a fair balance between duties to the client and the court,” see Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 51 (2005). See also Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677, 686-87, 736-37 (1989) (noting provisions in the 1969 Code of Professional Responsibility that did not require lawyers to disregard their own consciences or pursue every conceivable lawful tactic on behalf of a client).

30. MODEL RULES OF PROF’L CONDUCT pmbl., para. 9 (2010).

31. 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 1.7, at 1-14 (3d ed. 2004 & Supp. 2009). Hazard and Hodes describe the idea that “helping a client attain legal ends through legal but arguably immoral means is actually a moral undertaking” as “plainly the predominant view held by American lawyers.” *Id.* § 1.4, at 1-8.

32. *Id.* § 1.7, at 1-14. Professor Alan Dershowitz invokes the idea paradigmatically when discussing the role of criminal defense attorneys:

The boundary claim now occupies an interesting place in legal ethics scholarship. It continues to be criticized for doing too little to provide real controls on lawyer conduct that undermines the public purposes of the law.³³ Professor W. Bradley Wendel calls it “[t]he most shopworn aphorism in legal ethics.”³⁴ The derision is meant to signify that the bounds do too little to constrain and thus do not justify a manipulative, instrumentalist, partisan stance toward the law.³⁵ For present purposes, it is important to recognize that this engagement with the realist critique, with its necessary acknowledgement that the law’s indeterminacy reduces its power to constrain, *presupposes* that whatever minimal constraint is left must indeed bind the lawyer as well. Indeed, the idea that a functioning system requires some constraints on lawyer conduct seems implicit in the lament that indeterminate legal rules do not provide them. To put it differently: to assert that expecting lawyers only to obey the law is to ask very little of them necessarily implies that lawyers should do at least that much. Indeed, the boundary claim, as discussed in the introduction, has come to be accepted as something obvious, as far as it goes.³⁶

The careful attention to the theoretical and operational shortcomings of the boundary claim, along with the assumption that lawyer compliance with law is an obvious if toothless proposition, may have obscured the extent to which even the meager constraints on lawyer conduct that the boundary claim proffers have been a source of

My job and the job of criminal defense attorneys is . . . to get guilty people acquitted on technicalities or on any other ethical or legal basis possible. And that very often conflicts with third-party interests, the interest of victims, the interest of witnesses, the interest of police, the interest in faith in the system.

See Deborah L. Rhode, *Legal Ethics in an Adversary System: The Persistent Questions*, 34 HOFSTRA L. REV. 641, 667 (2006) (a lecture, with a question and answer session, in which Professor Dershowitz participated).

33. See Kruse, *supra* note 27, at 497-500, 506-07.

34. W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167, 1181 (2005).

35. See *id.*

36. Even for Professor Simon, who takes on the challenge of complicating the profession’s commitment to the boundary claim, the question is whether the law to be obeyed should be understood in narrow positivist terms that focus on the law’s “pedigree” at the expense of substantive notions of justice. Simon, *supra* note 5, at 217-20 (“The basic difficulty is that the plausibility of a duty of obedience to law depends on how we define law. If we define law in narrow Positivist terms, then we cannot provide plausible reasons why someone should obey a norm just because it is ‘law.’ In order to give substance to the idea that law entails respect and obligation, we have to resort to broader, more substantive notions of law.”).

controversy and resistance.³⁷ The continuing currency of the boundary claim in defining the lawyer's role, however, makes it all the more remarkable that the profession has at times been unwilling to acknowledge that its members are constrained by laws that require disclosure. In the next Part, I trace this history, endeavoring to show that the bar's ambivalence about lawyer compliance with disclosure laws is pervasive enough to suggest something like a caveat to the boundary claim as it has thus far been understood.

III. THE CAVEAT FOR DISCLOSURE LAWS: A HISTORY OF AMBIVALENCE ABOUT LAWYER COMPLIANCE

That an attorney is obligated to protect the confidences of her clients is not only to state the obvious but to invoke perhaps the defining, paradigmatic feature of the lawyer's role.³⁸ But does this obligation give way to the demands of other law? That is, does a lawyer's duty of confidentiality allow her to reveal client confidences where necessary to comply with a statute or regulation that requires such disclosure? A straightforward application of the boundary claim would seem easily to resolve this in the affirmative, but the drafters of the profession's ethical rules, and the attorneys, courts, and commentators who consult and interpret those rules, have had a remarkably difficult time answering that question. References to the so-called "forced exception" sometimes take for granted that this is an obvious, settled corner of confidentiality, but a close look at the history of this provision reveals otherwise, as I will demonstrate in this Part.³⁹

37. This is not to suggest that this dynamic has received no attention. As Susan Koniak in particular has repeatedly pointed out, it would be a mistake to conclude that the law is so indeterminate that lawyers cannot actually find a way to violate it; rather, the history of lawyers reveals a significant pattern of lawbreaking, sometimes accompanied by the open assertion that disobedience to law is a professional virtue. Susan P. Koniak & George M. Cohen, *In Hell There Will Be Lawyers Without Clients or Law*, 30 HOFSTRA L. REV. 129, 131-32 (2001) ("Just as in Watergate, lawyer involvement in the savings and loan debacle and in the tobacco industry's longstanding pattern of deception involved zealotry not within the bounds of law but outside those bounds." (footnotes omitted)).

38. See MODEL RULES OF PROF'L CONDUCT R. 1.6 (2010) ("Confidentiality of Information"); see also *id.* cmt. 2 ("A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 (2000) ("A Lawyer's Duty To Safeguard Confidential Client Information"); 1 HAZARD & HODES, *supra* note 31, § 9.2, at 9-6 ("It is probably only a slight exaggeration to say that in the public mind, lawyers are regarded as people who know how to keep secrets, as much as they are regarded as litigators or advisors or draftsmen of contracts and wills.").

39. See 1 HAZARD & HODES, *supra* note 31, § 9.25, at 9-107 to -110 (asserting that disclosures required by law constitute a "'forced' exception" to confidentiality that "will be supplied by interpretation whether appearing in the text of the rule or not").

I focus on the confidentiality rules promulgated by the American Bar Association (ABA) because the ABA has emerged as the profession's single most influential source of model codes governing lawyer conduct.⁴⁰ As scholars have noted, the ABA seeks to be, and essentially is regarded as, the "lawgiver for the practice of law."⁴¹

Studying the ABA's confidentiality rule, and the way it has changed and been interpreted over the course of its history, yields three interesting observations with implications for the boundary claim's caveat. First, the exception to confidentiality for disclosures required by "other law" has vanished and reappeared in the text of the rule over the course of the rule's amendment, reflecting a mercurial stance toward the wisdom of making such an exception explicit. Second, during times that the exception was absent from the text of the rule, a number of disciplinary authorities and commentators concluded that the rule had no such exception, making it difficult to characterize the revision as a trivial change, simply a happenstance of the ABA's rule-drafting process without relevance for the rule's practical operation.⁴² Third, even after the exception was restored to the text of the rule, commentators and bar leaders continued to suggest or assert it would be unethical for lawyers to reveal client confidences even where necessary to comply with other law. In this Part, I flesh out this chronology, revealing the profession's struggle to define the

40. The ABA "is the world's largest professional organization, with nearly 400,000 members." STEPHEN GILLERS ET AL., REGULATION OF LAWYERS: STATUTES AND STANDARDS, at xv (2010). Among its many functions, the ABA drafts model codes of professional conduct that have been overwhelmingly adopted—sometimes with very little if any revision—by the highest court of each state, which are the entities responsible for adopting the legally binding rules of conduct that govern the jurisdiction's lawyers. See *id.* at 3 ("Forty-nine states and the District of Columbia have adopted the Model Rules numbering system and most of the language suggested by the Model Rules."); see also Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1171 (2003) ("[S]tate supreme courts govern the regulation of lawyers in all fifty states . . ."); RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY 5-6 (2009) (describing similar success with previous versions of the ABA model codes).

41. Ted Schneyer, *The ALI's Restatement and the ABA's Model Rules: Rivals or Complements?*, 46 OKLA. L. REV. 25, 27 (1993); see also Schneyer, *supra* note 29, at 688 (asserting that the ABA's primacy in this regard had already been established by 1920). For nearly a hundred years, what the ABA proffers has been, for the most part, used by the states—with some adaptation—as the basis for lawyer discipline.

42. It has been asserted that "*in practice*" the other law exception was read back into the rule, "one way or another, by courts, disciplinary authorities, and practicing lawyers, during the 20 years between 1983 and 2003." See I HAZARD & HODES, *supra* note 31, § 9.25, at 9-108. This was not uniformly the case, however, and I think it is useful to highlight those instances to the contrary.

relationship between a lawyer's duty of confidentiality and disclosure obligations set forth in other law.

A. *The Early Years: Confidentiality Makes Accommodation for Other Law*

The ABA's first attempt at drafting a model ethical code was in 1908, with the ABA Canons of Professional Ethics. The Canons were written in vague, hortatory terms invoking general ethical principles without delineating specific parameters.⁴³ Canon 37, for relevant example, declared, "It is the duty of a lawyer to preserve his client's confidences."⁴⁴ Canon 37 clarified that this obligation did not include a client's intention to commit a crime but did extend beyond the lawyer's employment, and that a lawyer could disclose confidences to defend against a client's accusation.⁴⁵

While the Canons did not explicitly instruct whether a lawyer could (or should) disclose client confidences where necessary to comply with other law, little can be inferred from this silence—the Canons were meant to provide guidance only at the most general level, and in fact explicitly disavowed anything like a comprehensive framework for resolving ethical issues as they might arise in practice.⁴⁶ The Canons themselves state, in an introductory paragraph: "The following canons of ethics are adopted by the American Bar Association as a general guide, *yet the enumeration of particular duties should not be construed as a denial of the existence of others equally*

43. Leonard M. Niehoff, *In the Shadow of the Shrine: Regulation and Aspiration in the ABA Model Rules of Professional Conduct*, 54 WAYNE L. REV. 3, 7 (2008) ("Their principal failing was that they did not provide sufficiently clear notice of the sorts of conduct they prohibited. . . . [M]any of the Canons used vague and general language, and others included abstract exhortations that set a high moral tone but did not lend themselves to actual enforcement.").

44. CANONS OF PROF'L ETHICS Canon 37 (1908). Canons 33-45 were adopted later at the ABA's 1928 meeting. See James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 FORDHAM L. REV. 2395, 2396 n.8 (2003).

45. See Niehoff, *supra* note 43, at 14 n.64.

46. Assertions that the Canons needed reform often emphasized this attribute: the ABA committee chartered to study the matter suggested in 1958 that the Model Canons needed improvement in "form, whereby the ideals and general principles are more clearly applicable to concrete situations." Walter P. Armstrong, Jr., *A Century of Legal Ethics*, 64 A.B.A. J. 1063, 1069 (1978). In 1965, at the ABA's annual meeting, the president discussed the need for revision, expressing his view that "the canons must be capable of enforcement. They must lay down clear, peremptory rules in the critical areas relating most directly to the duty of lawyers to their clients and to the courts." *Id.* As Fred Zacharias has noted, the Canons "consisted largely of general principles of conduct that did little to govern actual behavior." Fred C. Zacharias, *Foreword: The Quest for a Perfect Code*, 11 GEO. J. LEGAL ETHICS 787, 787 (1998).

*imperative, though not specifically mentioned.*⁴⁷ The ABA has interpreted this language:

We think the language of the canon wherein it states specific applications of the general rule and of exceptions thereto *is not intended to be all inclusive*; rather that it was the purpose to state with particularity important applications and exceptions, and that it was not intended to exclude other well-recognized exceptions.⁴⁸

In 1969, the ABA adopted the Model Code of Professional Ethics, described by Professor Fred Zacharias as the point at which “American jurisdictions began to take the function of regulating lawyers seriously.”⁴⁹ The Code was organized around a three-tiered structure: a set of nine axiomatic Canons that stated basic principles and themes; a set of aspirational “Ethical Considerations” for each Canon; and mandatory “Disciplinary Rules” accompanying each Canon.⁵⁰ Regarding confidentiality, the Model Code set forth in Canon 4 that “A Lawyer Should Preserve the Confidences and Secrets of a Client.”⁵¹ The accompanying disciplinary rule (DR 4-101) permitted disclosure under certain circumstances, explicitly allowing attorneys to make those disclosures “required by law or court order.”⁵²

This is important enough standing alone as an early expression of the view that the lawyer’s duty of confidentiality yields to disclosure obligations set forth in other law. But alongside this permissive exception stood DR 7-102(A)(3), which *required* that a lawyer not

47. CANONS OF PROF’L ETHICS (emphasis added).

48. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 250 (1943) (emphasis added).

49. Zacharias, *supra* note 46, at 787.

50. GILLERS ET AL., *supra* note 40, at 4; *see also* Armstrong, *supra* note 46, at 1069.

51. MODEL CODE OF PROF’L ETHICS Canon 4 (1969).

52. MODEL CODE OF PROF’L RESPONSIBILITY DR 4-101(C)(2) (1980). The ABA has issued a formal opinion citing this rule only once, in ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 94-385 (1994). Using this version of the rule, the New York City Bar issued a formal opinion permitting a lawyer to disclose client confidences if state law so required. N.Y.C. Ass’n B. Comm. Prof. Jud. Ethics, Formal Op. 1997-2 (“If the lawyer concludes that the law requires the lawyer to report suspected child abuse or mistreatment in certain classes of cases, the lawyer may make such a report when the law so requires. If the lawyer is not certain that he has a legal obligation to disclose otherwise confidential information, however, the lawyer should take available legal steps to seek clarification of the law before making disclosure.” (citation omitted)). To support the latter proposition, the bar cited an earlier opinion that held that “where it is uncertain whether lawyer who is member of town board must disclose client information under town’s ethics and disclosure law, lawyer must seek judicial determination before making such disclosure by, for example, commencing a declaratory judgment action or triggering legal action by filing a report with client confidences omitted.” *Id.* (citing *In re* Advisory Opinion No. 544 of N.J. Sup. Ct. Advisory Comm. on Prof’l Ethics, 511 A.2d 609, 612 (N.J. 1986)).

“[c]onceal or knowingly fail to disclose that which he is required by law to reveal.”⁵³ This provision, as one scholar has so aptly captured, is “patently ambiguous through circularity.”⁵⁴ Its practical application is elusive because it rests entirely on the obligations imposed by laws external to the Code.⁵⁵ But it nonetheless embodies something essential, especially in contrast to later versions.

These provisions of the Model Code express the core principles of the profession’s boundary claim as it has thus far been understood: vigorous advocacy—in this context, taking the form of protection of the client’s confidences—that yields to the demands of law, even where those demands are contrary to the client’s interests. In the Model Code, confidentiality—and its limitations—fit within the boundary claim rather than posing an exception to it. This changed rather dramatically with the ABA’s next code drafting effort.

53. MODEL CODE OF PROF’L RESPONSIBILITY DR 7-102(A)(3). There is little consensus as to the meaning of this oddly-phrased provision. The ABA has mentioned this provision in only one formal opinion, ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 346 (1982). Scholars have discussed its application across a wide variety of contexts: the obligation to reveal material facts in contract or settlement negotiations, Nathan M. Crystal, *The Lawyer’s Duty To Disclose Material Facts in Contract or Settlement Negotiations*, 87 KY. L.J. 1055 (1999); compliance with discovery rules in litigation, including the prosecutor’s obligation to reveal *Brady* evidence, Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693 (1987); and the prohibitions against destruction or concealment of physical evidence, Lawrence Solum & Stephen Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085 (1987). One scholar assumes that the provision is limited to the concealment of evidence, and that the provision thus merely restates the criminal prohibition against obstruction of justice. Gaetke, *supra* note 21, at 49 n.56.

54. Kenneth L. Penegar, *The Five Pillars of Professionalism*, 49 U. PITT. L. REV. 307, 342-43 (1988) (“The reference in DR 7-102(A)(3) to the lawyer not concealing what the law requires him to reveal is patently ambiguous through circularity. For instance, the law of evidence includes the traditional attorney-client privilege of confidence. Possibly this disciplinary rule meant to limit the lawyer’s duties by invoking this law of evidence, but as we shall see in the next Section, the Code itself has created a category of client secrets which clearly goes beyond the evidentiary privilege. Thus, if the reference to external law is meant to invoke or permit the application of a state statute on citizen cooperation with the police by turning in evidence of crime, the question remains whether DR 7-102(A)(3) is designed to facilitate the policy of the statute by including the lawyer in the statute’s reach, or whether it simply means that if such a statute explicitly required the lawyer to comply with the statute’s command, then the Code should not stand in its way. If the latter interpretation is the correct one, then the Code does little more than recognize the primacy of statutes or other positive law over rules for the regulation of professions and vocations in our society. Such a limitation on the theory of professional advocacy is not a substantial one if a state (or other jurisdiction) has not addressed the question of how to define the reach and limits of that role. In the most favorable interpretation, the rule in question reflects positive law only and does not call the advocate to any higher standard.”).

55. It should be noted that this is not exceptional; many ethical duties incorporate by reference the obligations of other law. See *infra* Part IV.

B. The 1983 Model Rules of Professional Conduct: The Other Law Exception Becomes Invisible

Responding to the growing sense that the Model Code needed reforms that would reflect the reality of a rapidly changing profession—one commentator colorfully describes the Code as a “serviceable old friend, but one with warts that could no longer be overlooked”—the ABA convened a commission to undertake the effort.⁵⁶ After six years of study, debate, and successive proposals for revision,⁵⁷ the ABA proffered the Model Rules of Professional Conduct.⁵⁸ Rule 1.6, which set forth the obligations of an attorney with regards to confidentiality, was the source of intense conflict among various sectors of the bar with differing views on its appropriate scope.⁵⁹ Given the foundational nature of the confidentiality norm for the legal profession, this is hardly surprising.⁶⁰ At the same time, however, the boundary claim suggests that whatever disputes we might entertain about discretionary exceptions to client confidentiality, there should be little if any controversy over disclosures necessary to comply with other law. In fact, the contrary was true.

The discussion draft that was proposed by the Kutak Commission in January 1980 made *mandatory* lawyer disclosure of client

56. W. William Hodes, *The Code of Professional Responsibility, the Kutak Rules, and the Trial Lawyer's Code: Surprisingly, Three Peas in a Pod*, 35 U. MIAMI L. REV. 739, 744 (1981) (footnote omitted). For a discussion of some of these concerns, see *id.*; Geoffrey C. Hazard, Jr., *Rules of Legal Ethics: The Drafting Task*, 36 REC. ASS'N B. CITY N.Y. 77, 81-93 (1981) (describing various shortcomings of the Code, including its syntactic and structural defects); William B. Spann, Jr., *The Legal Profession Needs a New Code of Ethics*, B. LEADER, Nov.-Dec. 1977, at 2, 2-3 (voicing his opinion as then-ABA president).

57. For one description of the lengthy drafting process, see Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1252 (1991) (“[T]he Rules of Professional Conduct were published in Discussion Draft form in 1980, substantially revised into a 1981 ‘Proposed Final Draft,’ further revised before submission to the ABA House of Delegates in 1982, debated at length at the ABA’s annual meeting in 1982 and midyear meeting in 1983, revised yet again in the spring of 1983, and finally adopted in August of that year.”).

58. The drafting and adoption of the 1983 Model Rules, along with the intense controversies that accompanied the various proposals and the significance of these disputes for foundational questions about the legal profession, has received a fair amount of academic attention. See, e.g., Hazard, *supra* note 57, at 1252-55; Hodes, *supra* note 56, at 739; Koniak, *The Law Between*, *supra* note 7, at 1441-47; Schneyer, *supra* note 29, at 688. I rely on much of this work here but do not fully retread this terrain or explore all of the implications of that process. I focus in on the history of the one provision that speaks most directly to the disclosure of client confidences where necessary to comply with other law.

59. ABA Comm’n on Evaluation of Prof’l Standards, *Final Draft, Model Rules of Professional Conduct*, A.B.A. J., Nov. 1982, at 1 [hereinafter *Final Draft*]; see R.W. Nahstoll, *The Lawyer's Allegiance: Priorities Regarding Confidentiality*, 41 WASH. & LEE. L. REV. 421, 421 (1984).

60. Koniak, *The Law Between*, *supra* note 7, at 1441.

confidences where necessary to comply with other law.⁶¹ Responding to criticism of this and numerous other provisions, the Kutak Commission circulated a final draft in May 1981 that contained a number of revisions, including a change to the confidentiality rule that permitted rather than required disclosure to comply with other law.⁶² The version of the rule that was finally adopted by the House of Delegates in 1983 *omitted altogether* the provision allowing disclosures to comply with other law.⁶³ Thus, as adopted, the text of Rule 1.6 did not explicitly authorize lawyers to disclose confidences to comply with other law.⁶⁴ Nor did the drafters explain why the exception that had been part of DR 4-101 was not part of the text of the new rule.⁶⁵

The comments did suggest the continued existence of such an exception, explaining that disclosure of confidential information was prohibited “except as authorized or required by the Rules of Professional Conduct or other law.”⁶⁶ It is a bit difficult to know what to make of the drafters’ decision to demote the exception from the text of the rule to the commentary. Professors Geoffrey Hazard and William Hodes note that according to the “Scope” section in the preamble of the Model Rules, comments are to do no more than

61. See Hodes, *supra* note 56, at 754. Note that at the time of the Discussion Draft, the confidentiality rule was numbered as 1.7. MODEL RULES OF PROF'L CONDUCT (Discussion Draft, Jan. 30, 1980).

62. Hodes, *supra* note 56, at 790-92; William D. Popkin, *Client-Lawyer Confidentiality*, 59 TEX. L. REV. 755, 760 n.33 (1981); *Final Draft*, *supra* note 59, at 6.

63. MODEL RULES OF PROFESSIONAL CONDUCT (1983); 1 HAZARD & HODES, *supra* note 31, § 9.25, at 9-108. The Preamble did acknowledge, somewhat, the force of other law, instructing lawyers to “keep in confidence information relating to representation of a client *except so far as* disclosure is required or permitted by the Rules of Professional Conduct or other law.” Irma S. Russell, *Unreasonable Risk: Model Rule 1.6, Environmental Hazards, and Positive Law*, 55 WASH. & LEE L. REV. 117, 126 (1998) (quoting AM. BAR ASS'N, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES 12-13 (1987) (emphasis added) (internal quotation marks omitted)).

64. H. Geoffrey Moulton, Jr., *Federalism and Choice of Law in the Regulation of Legal Ethics*, 81 MINN. L. REV. 73, 92-93 (1997).

65. See MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 155-56 (3d ed. 2004) (noting that MR 1.6 had no exception either permitting or requiring disclosure of client information to comply with law or a court order and thus asserting that the 1983 Model Rules “left unclear” the scope of “a lawyer’s obligation when a law or a court order requires the lawyer to reveal a client’s confidence or secret”).

66. AM. BAR ASS'N, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005, at 12 (2006).

“provide guidance for practicing in compliance with the Rules.”⁶⁷ Thus, as Hazard and Hodes point out:

[Comments] could not change the legal effect of the text or re-introduce an exception to confidentiality that the House of Delegates had deliberately removed. . . . Yet the Comment in question, although totally at odds with the text, was accurate nonetheless, for it laid bare the impossibility of the literal language of Rule 1.6 as it stood between 1983 and 2002.⁶⁸

What the comments actually said about the scope and operation of the exception is also noteworthy. The comments noted that whether any particular law required disclosure, thus superseding an attorney’s confidentiality obligation, was a “matter of interpretation.” But the comments then immediately instructed that “a presumption should exist against such a supersession.”⁶⁹ It is unclear how this presumption, which Ted Schneyer has aptly termed an ABA-endorsed canon of statutory construction, is to operate.⁷⁰ Without further elaboration (not to mention justification for such an approach), such a “presumption” illuminates little more than what Schneyer describes as “the ABA’s hostility to legislative or executive branch rulemaking for lawyers.”⁷¹

In my view, the ABA’s treatment of the “other law” exception to confidentiality in the 1983 Model Rules is itself noteworthy. The ABA

67. 1 HAZARD & HODES, *supra* note 31, § 9.25, at 9-109 (quoting MODEL RULES OF PROF’L CONDUCT pmb., para. 14 (2010)).

68. *Id.*

69. AM. BAR ASS’N, *supra* note 66, at 123.

70. Ted Schneyer, *Legal Process Scholarship and the Regulation of Lawyers*, 65 *FORDHAM L. REV.* 33, 43 n.52 (1996); see also Jean Fleming Powers, *Going Too Far To Achieve Harmony*, 41 *S. TEX. L. REV.* 203, 207 (1999) (“[The 1983 rules and comments] create confusion in the suggestion that, generally, other rules of law will not supersede the requirements of Rule 1.6. The rules give little guidance as to exactly what kinds of rules are contemplated, or how that ‘presumption’ is to be overcome.” (footnote omitted)).

71. Schneyer, *supra* note 70, at 43 n.52. Schneyer suggests that another sign of the ABA’s hostility to external regulation can be found in ABA Resolution 103 (Feb. 7, 1989), resolving that the ABA opposes the regulation of law practice “by executive or legislative bodies, whether national, state or local.” *Id.* (internal quotation marks omitted). See also Statement of ABA President Caroylnn Lamm, expressing victory over the exclusion of the practice of law from the regulatory authority of the new Consumer Financial Protection Bureau. Carolyn B. Lamm, *ABA President Lamm Statement re: “Exclusion for the Practice of Law” in “Dodd-Frank Act of 2010,”* ABA NOW (June 26, 2010), <http://www.abanow.org/2010/06/aba-president-lamm-statement-re-exclusion-for-the-practice-of-law-in-dodd-frank-act-of-2010/> (“As ‘officers of the court,’ lawyers are required to adhere to extensive regulations governing all aspects of the practice of law, and those who fail to comply are subject to severe penalties. There is no need for a federal layer of regulatory authority over these lawyers, as was first proposed in this legislation, and the ABA, along with state and local bars and our concerned members, has been diligent in engaging and assisting Congress on this subject. Our efforts have paid off.”).

is the “de facto ethical voice of the bar,” in spite of occasional efforts to “decertify” it as such.⁷² While it is true that state supreme courts have no obligation to follow ABA rules, nor does the ABA have any formal government affiliation or designation as the “official voice of the bar,” no other “bar organization has effectively challenged the ABA’s preeminence at the national level.”⁷³ By some accounts, the very decision to develop a new code was an attempt by the ABA to assert its authority over the rules that would govern lawyer conduct and “refurbish its image as lawgiver for the entire profession.”⁷⁴

Seen in this light, the fact that the ABA refused to acknowledge in the text of its confidentiality rule the lawyer’s duty to comply with laws requiring disclosure is itself remarkable. If, as one scholar has suggested, codes “represent a snapshot of the bar’s self understanding at a given time,” the snapshot provided by the 1983 Model Rules suggests the bar’s ambivalence about a lawyer’s obligation to comply with laws requiring disclosure.⁷⁵ But that is only a small part of the story. Lest one be tempted to view the revision as a trivial one, something only an unrepentant formalist could find significant, it is worth taking note that in the years following the ABA’s adoption of the Model Rules the confidentiality rule was repeatedly interpreted as if it contained no exception for disclosures necessary to comply with other law.⁷⁶ Hazard and Hodes characterize the literal language of Model Rule 1.6 in the 1983 Model Rules as an “impossibility,” scoffing at the idea that a lawyer’s obligation to comply with other law is anything but obvious regardless of the language of the confidentiality rule.⁷⁷ But practitioners, ethics committees, and commentators grappling with an

72. Schneyer, *supra* note 29, at 690-91.

73. *Id.* at 692.

74. *Id.* at 693.

75. See John M.A. DiPippa, *Lon Fuller, the Model Code, and the Model Rules*, 37 S. TEX. L. REV. 303, 308 n.16 (1996).

76. It has been suggested that disclosure to comply with other law or court order was available “as a matter of common law right of the lawyer” even when it was not explicit in the text of the rules. See Patrick T. Casey & Richard S. Dennison, *The Revision to ABA Rule 1.6 and the Conflicting Duties of the Lawyer to Both the Client and Society*, 16 GEO. J. LEGAL ETHICS 569, 572 n.24 (2003) (quoting Irma S. Russell, *Memorandum to Ethics 2000 Commission*, ABA (Feb. 9, 2001), http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_witness_russell.html). But others have asserted that the rule failed to provide adequate guidance as to disclosures required by other law. See, e.g., *Testimony of Roger C. Cramton Before the Ethics 2000 Commission*, ABA, http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/cramton.html (last visited Apr. 16, 2012).

77. Hazard and Hodes assert that “even where a code has no such textual exception, the operation of law will create a ‘forced’ exception, effectively converting ‘may reveal’ into ‘must reveal’ in any event.” 1 HAZARD & HODES, *supra* note 31, § 9.25, at 9-81.

attorney's ethical obligation under that version of the rule took seriously the absence of an exception explicitly permitting the attorney to disclose where necessary to comply with other law. Time and time again the rule was interpreted to foreclose rather than permit such disclosure; the commentary's instruction regarding other law was invisible at times when it would have been most pertinent.

A Nevada ethics committee, evaluating the conflict between a state law requiring attorneys to report child abuse and the state's confidentiality rule, which did not contain the other law exception at the time of the opinion, concluded that an attorney could not comply with both obligations.⁷⁸ A scholar writing about child abuse reporting laws and the duty of confidentiality concluded that "mandatory reporting statutes potentially place attorneys in the position of violating *Model Rule 1.6*."⁷⁹ Another scholar, writing about attorney disclosure to comply with elder abuse reporting laws, concluded that disclosure would be permissible under DR 4-101 of the Model Code but not under Rule 1.6 as it appeared in the 1983 Model Rules.⁸⁰ Similar examples abound,⁸¹ and in some sense it is hardly surprising

78. State Bar of Nev., Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 30 (2005).

79. Ellen Marrus, *Please Keep My Secret: Child Abuse Reporting Statutes, Confidentiality, and Juvenile Delinquency*, 11 GEO. J. LEGAL ETHICS 509, 525 (1998).

80. Carolyn L. Dessin, *Should Attorneys Have a Duty To Report Financial Abuse of the Elderly?*, 38 AKRON L. REV. 707, 711-17 (2005).

81. Professor Heidi Li Feldman, discussing the duty of confidentiality as articulated in the 1983 Model Rules, characterizes the duty as having several exceptions:

It allows the revelation of information the lawyer believes reasonably necessary to prevent the client from committing a crime likely to lead to "imminent death or substantial bodily harm"; the disclosure of matters necessary to resolve a controversy between the lawyer and client; and the revelation of information necessary to a lawyer's defense against any criminal charge or civil claim based on the client's conduct or the attorney's defense against any allegations made in a proceeding regarding the legal representation of the client.

Heidi Li Feldman, *Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?*, 69 S. CAL. L. REV. 885, 893 (1996) (footnote omitted). Similarly, Professor Deborah Rhode characterizes the 1983 Model Rules as requiring disclosure only where necessary to avoid assisting a client's criminal or fraudulent act in proceedings before a tribunal, and permitting disclosure "in only two other circumstances: to prevent crimes likely to result in imminent death or substantial bodily harm, or to assert their own claims in a controversy with the client." Rhode, *supra* note 13, at 612. No mention is made of the Rules' position with regards to disclosures required by other law. See also Gilda M. Tuoni, *Society Versus the Lawyers: The Strange Hierarchy of Protections of the "New" Client Confidentiality*, 8 ST. JOHN'S J. LEGAL COMMENT. 439, 440 (1993) ("[U]nder the Model Rules, a lawyer may reveal confidential client information only with client consent, or if impliedly authorized; if reasonably necessary to prevent only certain types of crime; or, if reasonably necessary for the lawyer to succeed in a controversy with a client or to defend himself or herself.").

that a rule without an explicit exception was treated as materially different than one that had contained it.⁸²

If the duty of confidentiality in the 1983 Model Rules was widely understood to be cabined by disclosure requirements in other law despite the lack of such exception in the text of the rule, one might expect this to have surfaced more readily during the sustained conflict over an attorney's tax reporting obligations. Since 1984, the Internal Revenue Code has required particularized reporting from any person who receives in the course of trade or business a cash payment of more than \$10,000.⁸³ Using Form 8300, the recipient must file with the Internal Revenue Service (IRS) a report that includes the person from whom the cash was received, the amount of cash received, the date and nature of the transaction, and "such other information as the Secretary may prescribe."⁸⁴ The law neither applies specially to attorneys nor excludes attorneys from its scope,⁸⁵ and it was received by some legal scholars as the sort of threat that would result in "the demise of law as a profession."⁸⁶ Practitioners reacted similarly, submitting incomplete forms to the IRS along with assertions that their professional

82. In the most general sense, arguments, inferences, and conclusions from the text of legal language are central to the very practice of law; we would expect legal readers to view these two rules differently. More particularly, it has been suggested that the members of the profession participated in the Model Rules process because "lawyers expected the Model Rules to have real significance as a guide to lawyers with ethical questions, as enforced in the disciplinary process and, perhaps especially, as a source of other law." Schneyer, *supra* note 29, at 737. The actual text of the rule would seem to be highly relevant in the subsequent interpretive process of fleshing out what exactly it was that lawyers had been instructed.

83. This provision was part of the Deficit Reduction Act of 1984, codified at 26 U.S.C. § 6050I (2006).

84. *Id.* The IRS states, in the directions to Form 8300: "Drug dealers and smugglers often use large cash payments to 'launder' money from illegal activities. [Thus] compliance with these laws provides valuable information that can stop those who evade taxes and those who profit from the drug trade and other criminal activities." *Publication 1544*, IRS, <http://www.irs.gov/publications/p1544/ar02.html> (last visited Apr. 16, 2012).

85. Congress rejected lobbying efforts to include a specific exclusion of the legal profession from the definition of "trade or business." *See United States v. Goldberger & Dubin, P.C.*, 935 F.2d 501, 503-06 (2d Cir. 1991). The IRS regulations implementing the statute include an attorney's representation of a criminal defendant as one of the transactions that falls within the scope of the statute. *See* 26 C.F.R. § 1.6050I-1(c)(7)(iii) (Example 2) (2011); *see also United States v. Sindel*, 854 F. Supp. 595 (E.D. Mo. 1994), *aff'd in part, vacated in part*, 53 F.3d 874 (8th Cir. 1995).

86. *See, e.g.*, Ellen S. Podgor, *Form 8300: The Demise of Law as a Profession*, 5 GEO. J. LEGAL ETHICS 485 (1992). In the literature commenting on 6050I and Form 8300, I have not yet found any assessment of the interplay between confidentiality and fees. In other words, attorneys in this context are fighting not only for confidentiality principles writ large but for confidentiality principles as they apply to how attorneys get paid.

obligations prohibited them from disclosing the missing information.⁸⁷ The IRS sent letters to nearly a thousand such lawyers, demanding that they provide the information previously withheld, but it was for the most part unsuccessful in eliciting compliance.⁸⁸

The lawyers continued to withhold the information, invoking ethics opinions issued by the ABA, various state bar organizations, and the ethics advisory committee of the National Association of Criminal Defense Lawyers, “stating or strongly suggesting” that ethical obligations prevented the lawyers from complying with the demands of the IRS.⁸⁹ The State Bar of New Mexico, for example, issued an advisory opinion in 1989 regarding the relationship between an attorney’s confidentiality obligation and the disclosure requirements set forth in 26 U.S.C. § 6050I. Setting out the respective parameters of each, the committee then concluded, “It appears the intent of the New Mexico Rules of Professional Conduct is that attorney should not reveal exactly what the federal law requires attorney to reveal.”⁹⁰ The Committee expressly disavowed any intent to “resolve the conflict,” but offered some “guidance to New Mexico attorneys encountering it.”⁹¹ This guidance, for the most part, simply informed attorneys that they were permitted to decline or withdraw from representation where the client both insisted on paying in cash and yet refused to authorize the report required by 26 U.S.C. § 6050I.

The Committee did suggest “another possibility,” which it identified as “consistent with the highest ideals of the profession.”⁹² The Committee explained: “Since we have identified a conflict between the New Mexico ethical rules and the federal law, an attorney

87. See, e.g., Alexander Stille, *On Disclosure of Attorney Fees: A Strategic Retreat for the IRS*, NAT’L L.J., May 14, 1990, at 10. A typical statement explained, “The information requested violates the attorney client privilege, conflicts with the broader ethical obligation of an attorney[,] . . . and violates the First, Fifth and Sixth Amendment rights of attorneys and their clients.” *United States v. Gertner*, 873 F. Supp. 729, 732 (D. Mass. 1995) (alterations in original) (internal quotation marks omitted); see also *Sindel*, 53 F.3d at 875 (“[Attorney] claimed that disclosure would violate ethical duties owed said client, and constitutional and/or attorney-client privileges that the reporting attorney is entitled or required to invoke . . .” (internal quotation marks omitted)).

88. See Stille, *supra* note 87.

89. See Koniak, *The Law Between*, *supra* note 7, at 1405-06 n.68.

90. N.M. Ethics Advisory Comm., Advisory Op. 1989-2. This is particularly interesting given that up until 1986, Rule 7-102 of the New Mexico Code of Professional Responsibility prohibited a lawyer from “conceal[ing] or knowingly fail[ing] to disclose that which he is required by law to reveal.” See N.M. Ethics Advisory Comm., Advisory Op. 1984-2.

91. N.M. Ethics Advisory Comm., Advisory Op. 1989-2.

92. *Id.*

may, with the client's consent, agree to 'make a good faith effort to determine the validity, scope, meaning or application' of the law at issue."⁹³ The opinion goes on to make clear that what is meant is a nonfrivolous challenge to the law. There is nothing in the opinion that suggests that the attorney can make the federally required disclosure without violating the ethical obligation of confidentiality.⁹⁴ And indeed, commentators have characterized this opinion as among those that "actively and openly encourage disobedience of other law."⁹⁵

These assertions were predicated on ethical rules rather than principles derived from the United States Constitution or evidentiary doctrine of attorney-client privilege. As noted by Hazard and Hodes:

Presumably aware that arguments based on privilege and constitutional right had become nearly frivolous, the organized bar increasingly relied on the confidentiality principle embodied in Model Rule 1.6.

In amicus briefs and policy statements, some couched in almost frantic language, organizations as diverse as the Washington Legal Foundation, the National Association of Criminal Defense Lawyers, the New York Civil Liberties Union and the American Bar Association all urged that lawyers should not be required to obey the law in this instance, *because to do so would be "unethical."*⁹⁶

The wry tone of this observation highlights the absurdity of the claim that compliance with law might be unethical. But what must be pointed out is that the ethical argument can only possibly be viable where the confidentiality obligation contains no exception for "other law." The demotion of the "other law" exception to the commentary was significant in the way people thought about the rule.

93. *Id.*

94. *See id.* This is all the more remarkable given the operation of the Supremacy Clause, which allows Congress to enact federal law (within its enumerated powers, of course) that supersedes conflicting state law. *See* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 234-35 (2000). The New Mexico opinion fails to so much as mention preemption or otherwise discuss the significance of the IRS reporting requirement being federal rather than state law. Federal courts, however, rejected the contention that lawyers were excused from compliance with IRS reporting requirements on account of the duty of confidentiality set forth in state codes of professional conduct. *See* *United States v. Sindel*, 53 F.3d 874, 876 (8th Cir. 1995).

95. *See* Koniak, *The Law Between*, *supra* note 7, at 1419.

96. 1 HAZARD & HODES, *supra* note 31, § 9.12, at 9-48.

C. Ethics 2000 Commission: The Exception Is Returned to the Text of the Rule, but Ambiguities Persist

In 2002, responding to the recommendation of the Ethics 2000 Commission, the ABA restored the exception to the text of the rule.⁹⁷ Rule 1.6(b)(6) now sets out the sixth enumerated exception to the duty to maintain client confidences, permitting disclosure where necessary to comply with other law.⁹⁸ The reporter's notes provided only the following explanation for the change:

The current Rule does not address whether lawyers are permitted or required to disclose information when such disclosure is required by other law or a court order. Current Comment [20], however, states that a lawyer must comply with the final orders of a court or other tribunal requiring the lawyer to give information about the client, and current Comment [21] refers to other law that may supersede Rule 1.6. The Commission recommends that the text of Rule 1.6 be amended to explicitly permit, but not require, disclosure to comply with law or court orders. No change in substance is intended.⁹⁹

97. In 1997, the president of the ABA called for a comprehensive review of the rules to be undertaken by the end of the century. The project was called "Ethics 2000," and a commission was formed to conduct the review and prepare proposals for revision. Debra Baker, *Ethics 2000 Marches On: Reviewers of Lawyer Conduct Rules on Schedule To Issue Report*, A.B.A. J., Apr. 1999, at 85, 85. The Commission solicited input at various points in the process, holding both public and private hearings during which interest groups within the bar engaged in "intense lobbying." See Fred C. Zacharias, *Limits on Client Autonomy in Legal Ethics Regulation*, 81 B.U. L. REV. 199, 201 n.5 (2001); see also E. Norman Veasey, *Ethics 2000: Thoughts and Comments on Key Issues of Professional Responsibility in the Twenty-First Century*, 5 DEL. L. REV. 1, 5 (2002) ("[The Commission held] fifty days of meetings, all of which were open, and at least ten public hearings. There were a large number of interested observers at most of our meetings and hearings."). For additional discussion of the Ethics 2000 project, see Lisa H. Nicholson, *A Hobson's Choice for Securities Lawyers in the Post-Enron Environment: Striking a Balance Between the Obligation of Client Loyalty and Market Gatekeeper*, 16 GEO. J. LEGAL ETHICS 91, 142 n.334 (2002); Amanda Vance & Randy Wallach, *Updating Confidentiality: An Overview of the Recent Changes to Model Rule 1.6*, 17 GEO. J. LEGAL ETHICS 1003 (2004).

98. Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441, 451 (2002) ("[T]he Commission decided that disclosure should in no case be mandatory under Rule 1.6, even where disclosure is required by another rule or by a law or court order. At the same time, however, Rule 1.6 should not forbid disclosure in such situations. Thus a final new section of paragraph (b) permits, but does not require, the lawyer to disclose information where she is otherwise legally obliged to do so. As a result, Rule 1.6 does not add an ethical dimension, or the possibility of discipline, to whatever legal disclosure obligation the lawyer may otherwise have. New commentary deals with a lawyer's duty to raise non-frivolous challenges to disclosure requirements external to the *Rules*, including disclosures required by order of a court or other tribunal.").

99. *Reporter's Explanation of Changes*, ABA, http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule16rem.html (last visited

It was, of course, true that the rule as then drafted did “not address” whether lawyers were permitted or required to disclose information to comply with other law. But this was not simply an oversight or an accidental silence. As explained above, the reason that the rule did not address the issue is because in 1983, the ABA House of Delegates for unexplained reasons rejected the Kutak Commission’s recommendation that it do so and relegated to the commentary a provision that had appeared in the earlier version of the rule.¹⁰⁰ Whatever the 1983 House of Delegates intended by this refusal, it simply cannot be viewed as anything other than a deliberate choice—one that was then affirmatively reversed by the 2002 revision. Whether or not it was a change in substance, it was a change that had more significance than suggested by the Reporter’s comments, especially in light of the interpretive history described above.¹⁰¹

What is even more interesting is that early drafts of the Ethics 2000 Commission’s proposals for Rule 1.6 would have made mandatory those disclosures necessary to comply with court order or other law. As of March 1999, the Public Discussion Draft of Rule 1.6 contained numerous permissive disclosure provisions in 1.6(b) and then set forth in subsection (c) the following: “A lawyer shall reveal information relating to the representation of a client or a former client to the extent required by law or court order or when necessary to comply with these Rules.”¹⁰² The proposed accompanying Comment [15] reiterated that a lawyer must “comply with lawful orders of a tribunal, an administrative or executive agency, or a legislative body,” but it also instructed that a lawyer must “assert on behalf of the client all non-frivolous claims that the information sought is protected against disclosure by the attorney-client privilege or other applicable law.”¹⁰³

Apr. 16, 2012); *see also* Charlotte (Becky) Stretch, *Overview of Ethics 2000 Commission and Report*, ABA, http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission.html (last visited Apr. 16, 2012) (characterizing the Commission as having “clarified the lawyer’s ability to disclose information to comply with law or court order”).

100. *See supra* notes 61-64 and accompanying text.

101. Hazard and Hodes, asserting that several of the Ethics 2000 Commission’s recommendations “could not fairly be characterized as ‘minimalist,’” offer as one example the Commission’s recommended restoration of the “‘required by law’ exception that the House had removed from the Kutak Commission’s final drafts in 1983.” 1 HAZARD & HODES, *supra* note 31, § 1.7, at 1-35.

102. Memorandum from Ethics 2000 Comm’n, Proposed Rule 1.6—Public Discussion Draft, Reporter’s Explanation of Changes (Mar. 23, 1999) (on file with author and available through the ABA Center for Professional Responsibility).

103. *Id.*

The Commission received a great deal of commentary expressing concern with this provision. A memorandum prepared by the Commission's Reporter in December 1999, summarizing the response to the March 1999 Public Discussion Draft, noted the following:

Considerable concern has been voiced about paragraph (c) and Comment [15] as imposing an overbroad requirement that a lawyer make disclosures as required "by other law." A major concern is that there is such a variety of rules and regulations governing disclosure to a wide variety of governmental bodies—many of whom do not have jurisdiction to resolve competing claims with respect to confidentiality—that a broad duty to disclose confidential information to the extent required by law could lead to the wholesale erosion of confidentiality.¹⁰⁴

The resistance to the mandatory disclosure provision summarized in this passage raises fascinating questions about the view of lawyer compliance expressed by the commentators. In what respect is it "overbroad" to require a lawyer to comply with all laws requiring disclosure? What, in this view, is the principle that distinguishes the core set of acknowledged obligations (if any) from those that run into the overbreadth territory? Is a government body "without jurisdiction to resolve competing claims with respect to confidentiality" any government body other than a court? If so, then what precisely is being expressed about the authority of nonjudicial bodies to require disclosure from lawyers? And what would constitute "competing claims" that might legitimately be offered in support of a lawyer's resistance?

The context, invoking as it does jurisdiction, suggests that such claims would be legal claims—meritorious defenses to the enforcement of a statute, regulation, or other source of law, submitted to a court for resolution.¹⁰⁵ But there is no discussion of what such a claim would look like, if something other than the mere reassertion of the professional duty of confidentiality. If the idea is that lawyers are not obligated to comply with a statute unless and until ordered to do so by a court, then what is the doctrinal principle that supports such an

104. Memorandum from Ethics 2000 Comm'n, Proposed Rule 1.6—Public Discussion Draft, Issues Raised by Comments Received 2 (Dec. 3, 1999) [hereinafter Dec. 1999 Memo] (on file with author and available through ABA Center for Professional Responsibility).

105. Cf. Geoffrey C. Hazard, Jr., *Law and Justice in the Twenty-First Century*, 70 *FORDHAM L. REV.* 1739, 1743 (2002) (noting that the term "legal" tends to "signify resolution through judicial decision obtained in the course of litigation").

assertion? And who else might be entitled to assert such a prerogative by virtue of their professional obligations?

The memo goes on to discuss how the provision might be revised to address the commenters' concerns:

The primary suggestion is to make such disclosure permissive rather than mandatory, as was the case in the Model Code. . . . This would afford the lawyer discretion—as a matter of professional responsibility—to refuse to breach confidentiality even in cases in which the lawyer would be required by other law or a court order to do so and could be subject to other legal sanctions because of the refusal.¹⁰⁶

Perhaps most interesting of all is the frank acknowledgement that making such disclosures permissive rather than mandatory “would afford the lawyer discretion—as a matter of professional responsibility—to refuse to breach confidentiality even in cases in which the lawyer would be required by other law or a court order to do so.” The idea that rules of professional conduct might define a space in which a lawyer's ethical obligation was not coextensive with legal obligation does a lot to unsettle the traditional boundary claim's premise that lawyers are bound by the constraints of law.

The memorandum also addresses alternative solutions; I reproduce this passage in full to show that each of the possibilities conveys considerable ambivalence about lawyer compliance with disclosure laws:

If disclosure is still to be required, the commentators propose that the duty should be more narrowly defined so it only requires disclosure when it is necessary to comply with “a final order of a court or other appropriate adjudicative tribunal.” The duty might also be qualified so that the lawyer is expressly permitted to refuse disclosure for the purpose of testing the validity of the law or court order Another commentator has suggested elevating the duty to resist to the text of the rule.

One alternative would be to permit rather than require compliance with other law and then add text or commentary that would limit the lawyer's discretion by imposing a duty to resist disclosure until there has been a final order of an appropriate adjudicative tribunal. On the other hand, the Commission could retain the duty to make disclosures required by law, but add text or comment that would limit the lawyer's duty in line as suggested by the commentators. Believing that lawyers have a special obligation to abide by the law just as much as they have a special obligation to preserve confidentiality, the Reporter recommends

106. Dec. 1999 Memo, *supra* note 104, at 2.

retention of the duty to disclose but that it be narrowed in response to the concerns voiced by the commentators.¹⁰⁷

A common theme emerging from these alternatives is the sense that the authority to impose disclosure obligations on lawyers resides only in the judiciary (or another tribunal with similar “adjudicative” qualities). This may seem to follow naturally from the long tradition of assigning to the judiciary the authority to regulate the practice of law.¹⁰⁸ But as I have previously argued, the authority to regulate lawyers as lawyers, even to the extent that we agree that this is an exclusively judicial function,¹⁰⁹ is conceptually distinct from the authority to include lawyers in the generally applicable disclosure obligations the legislature seeks to impose on everyone.¹¹⁰ The assumption that lawyers would be exempt from the direct effects of such legislative power, answerable only to “a final order of an appropriate adjudicative tribunal,” raises profound questions about the way lawyers fit into a constitutional democracy. Although the various alternatives presented in the memorandum acknowledge the lawyer’s duty to obey *the court*, the unwillingness to articulate a similar duty toward the product of legislative decision making nonetheless suggests a significant caveat to the boundary claim’s central premise.

When this draft was next discussed at the February 2000 meeting, the mandatory disclosure provision was unanimously rejected. The Commission’s February 2000 minutes reveal the following:

A motion to change *shall* to *may* in paragraph (c) passed unanimously. This change was suggested by a number of commentators who felt that, given the large number of rules and regulations governing disclosure to a wide variety of governmental bodies, paragraph (c) could lead to a wholesale erosion of confidentiality. The Reporter pointed out that *shall* should be retained to the extent that a lawyer must reveal information relating to the representation when necessary to comply with these Rules. The

107. *Id.* at 2-3.

108. See Andrew L. Kaufman, *Ethics 2000—Some Heretical Thoughts*, PROF. LAW., 2001, at 1. Or, in its deference to the body with the contempt power, it may simply reflect the Holmesian “bad man” view of the law. See Koniak, *The Law Between*, *supra* note 7, at 1484.

109. For the argument that this is a contestable and “legally exotic” proposition, see Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics-II The Modern Era*, 15 GEO. J. LEGAL ETHICS 205, 212 (2002) (describing this “most peculiar” doctrine as “almost laughably wooden and ill-defended”).

110. Aviel, *supra* note 9, at 689-97.

Commission agreed and asked the Reporter to add a new paragraph (b)(6) that states: to the extent required by law or court order.¹¹¹

Here as well, the reasoning expressed by the commentators in opposition to the mandatory disclosure provision is a bit puzzling. In its emphasis on the *number* of rules and regulations concerning disclosure to government bodies, it mistakes the significance and scope of the problem for the appropriate analytical framework necessary to solve it. To be sure, there is reason to be concerned about the proliferation of disclosure requirements and the ease with which legislatures, agencies, and other regulators might assert a public interest in ever bolder, broader, and more numerous disclosure obligations. As worrisome as such a scenario might be for the vitality of the confidentiality norm, the numerosity and variety of such obligations do not tell us anything about whether a lawyer may, should, or must comply with them. Put crudely, these government bodies either do or do not have the power to demand lawyer disclosure, and if so, they either have or have not exercised it. This is, of course, an obvious simplification, but it is meant only to illustrate that the questions do not lend themselves to a *quantitative* assessment.

And if we posit that the “wholesale erosion of confidentiality” would be a regrettable, even disastrous thing, how is it a solution to make the “other law” exception in the ethical rule permissive rather than mandatory? Such a move, it should be obvious, has no effect on the operative force of the other laws. Only if the permissive version leaves open the possibility that lawyers will choose not to disclose *regardless* of what the other law requires does it counter the erosion feared by the commentators.

This is what is so interesting: this commentary does something more than to simply assert that it would not serve the purposes of lawyer discipline to sanction a lawyer who did not comply with other law requiring disclosure. This has that effect, superficially—where the exception is absent or merely permissive, it means that the lawyer

111. *Meeting Minutes (Feb. 11-13, 2000), Ethics 2000 Commission*, ABA, http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/021100mtg.html (last visited Apr. 16, 2012) (emphasis added). Note that Rule 1.6 was not discussed at any of the Commission’s meetings between February 1999 and February 2000. The minutes make it a bit difficult to understand the changes finally agreed upon at the conclusion of this discussion. It seems that the agreement of the Committee was to add paragraph (b)(6) adding a permissive disclosure provision for law or court order, and to retain “shall” in paragraph c, where disclosure would be necessary to comply with other Rules of Professional Conduct.

cannot be disciplined for failing to disclose as required by statute.¹¹² (The permissive exception also means, of course, that the lawyer cannot be disciplined for compliance.)¹¹³ But the commentary hints at the recognition that the rule's operative effect is broader than simply whether the lawyer will be disciplined—rather, that what the ethical rule says actually drives whether the lawyer will comply with the other law.

Even after disclosure to comply with other law was made permissive rather than mandatory in the Commission's working draft, hesitation persisted about the exception. Although it has been suggested that such an exception should be "noncontroversial," controversy there was.¹¹⁴ The minutes of the March 2000 meeting reflect that one member of the Commission "felt that the change seemed to abandon any requirement that the lawyer resist disclosure."¹¹⁵ In the September 2000 meeting, a proposal was made to delete the provision altogether—the suggestion, which was rejected by the Commission, would have retained the existing rule's silence with regards to disclosure necessary to comply with other law.¹¹⁶

112. "Failure to reveal that which may be revealed, as opposed to that which must be revealed, is not a basis for disciplinary action." *Attorney Grievance Comm'n of Md. v. Rohrback*, 591 A.2d 488, 496 (Md. 1991). In discussing the decision to make the other law exception permissive rather than mandatory, the Ethics 2000 Commission noted that if the lawyer does not disclose, "the lawyer won't be disciplined under 1.6 but may still be required to disclose by other law." *Meeting Minutes (May 5-7, 2000)*, *Ethics 2000 Commission*, ABA, http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/050500mtg.html (last visited Apr. 16, 2012).

113. As one state court has explained, "Under the structure of MR 1.6, the lawyer who reveals confidential information, reasonably believing the revelation to be necessary in order to comply with other law, is not in violation of the general prohibition against disclosure and is not subject to professional discipline." *Harris v. Balt. Sun Co.*, 625 A.2d 941, 945 (Md. 1993).

114. See Russell, *supra* note 76.

115. *Meeting Minutes (Mar. 24-25, 2000)*, *Ethics 2000 Commission*, ABA, http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/032400mtg.html (last visited Apr. 16, 2012).

116. *Meeting Minutes (Sept. 15-17, 2000)*, *Ethics 2000 Commission*, ABA, http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_09_15mtg.html (last visited Apr. 16, 2012). At the time the suggestion was made, the Commission had already heard testimony from Professor Cramton criticizing the rule's silence:

[T]he current rule fails to provide adequate guidance to lawyers concerning situations in which current law and other rules permit or require a lawyer to disclose client confidential information. The text of the rule does not make it clear that there are a number of circumstances in which other law or another rule may permit or require disclosure: a court order (e.g., a court's rejection of a claim of attorney-client privilege), another rule (e.g., Rule 3.3(a)), or other law (e.g., a valid law requiring a matrimonial lawyer to disclose child abuse to authorities).

Notwithstanding the extent to which the Commission struggled with this provision, it is tempting to view the matter as having run its course. The rule now clearly permits lawyer disclosure to comply with other law.¹¹⁷ The commentary's presumption against supersession is gone—the comments now simply declare: “Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules.”¹¹⁸ This declaration, while not terribly helpful to lawyers consulting the rule, is nonetheless eminently sensible—whether a law requires the disclosure of client information must be ascertained by reference to the law in question, in conjunction with whatever interpretive tools might assist in construing the law and ascertaining its application to lawyers.¹¹⁹ In some instances, constitutional principles might limit the law's enforceability against lawyers, and certainly, all this is beyond the scope of the Model Rules.¹²⁰

But the restoration of the exception to the text of the rule has not quite put to rest the profession's uncertainty about compliance with disclosure laws. Take, for example, the guidance offered in the ABA/BNA *Lawyers' Manual on Professional Conduct*.¹²¹ The manual instructs that a lawyer “asked under claim of law for information relating to the representation of a client must make all nonfrivolous arguments that the information is protected from disclosure by Model Rule 1.6 and, if applicable, by the attorney-client privilege.”¹²² The manual notes that lawyers are typically asked for client information through discovery requests or subpoena, and then instructs that

Language so providing was present in Model Code DR 4-101(C)(2) and has been included in the ethics codes adopted by a substantial number of states. The delphic statement in Comment [5] of Rule 1.6, to the effect that a lawyer may disclose information ‘as authorized or required by the Rules of Professional Conduct or other law’ is not enough. These requirements should be made explicit in the text of the rule so that lawyers will not be misled.

Testimony of Roger C. Cramton Before the Ethics 2000 Commission, supra note 76.

117. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(6) (2010).

118. *Id.* R. 1.6 cmt. 12.

119. For the argument that courts should require a clear statement of legislative intent to abrogate attorney-client confidentiality before construing a disclosure statute to that effect, see Aviel, *supra* note 9, at 726-36.

120. See Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265, 279 n.59 (2006) (noting that Rule 1.6 requires “the lawyer (and other lawmaker) to decide whether confidentiality or other law should take precedence, based on considerations not apparent in the professional rules”).

121. ABA, *Disclosure: Required by Law or Court Order*, in ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 55:1201 (Supp. 2006).

122. *Id.*

“[u]nless the client has directed otherwise, the lawyer’s professional obligation is to resist disclosure unless and until a court or other tribunal acting in an adjudicative capacity has specifically determined that disclosure is indeed required by law, and thus permitted as a matter of ethics.”¹²³ At best this guidance is confusing, because it does not differentiate between situations in which an attorney is “asked” for information via discovery request or subpoena and situations in which a disclosure obligation is set forth in a generally applicable statute. Does the latter also present a scenario in which the lawyer is “asked under claim of law for information relating to the representation of a client”?¹²⁴ Or is the manual’s guidance simply inapplicable in that situation? Having failed to acknowledge the distinction, much less to answer these questions, the language suggests to attorneys that they generally may not disclose to comply with “other law” until ordered to do so by a court or other adjudicative tribunal.¹²⁵ This seems to be in tension with the rule’s delineation of “other law *or* a court order” as distinct and alternative sources of authority for lawyer disclosure.¹²⁶

For attorneys seeking to comply with both the ethical rules and “other law,” the problem is a very practical one. The text of the rule suggests that an attorney whose client has admitted abusing his children might consult the jurisdiction’s child abuse reporting statute and determine whether she is a mandated reporter; if so, she may pick up the phone and call child protective services. The manual suggests, or at the very least leaves open the possibility, that to do so without court order is an ethical violation. The ABA’s approach suggests an unwillingness to acknowledge the force of “other law” unless and until addressed personally to an attorney in the form of a court order. Even with the “other law” exception back in the text of the rule, there persists the sense that an attorney must only disclose client confidences if ordered to do so *by a court*. There is little to no

123. *Id.*

124. *Id.*

125. One federal district court, responding to a law firm’s challenge to a grand jury subpoena obtained by federal prosecutors, determined that it did not need to assess whether a subpoena was or was not a “court order,” because it was a “lawful act of compulsion,” such that compliance would constitute disclosure require by “law.” *See In re Grand Jury Subpoena*, 533 F. Supp. 2d 602, 604-05 n.5 (W.D.N.C. 2007). Interestingly, in asserting that its ethical obligations prevented the law firm from complying with the subpoena, the law firm selectively quoted Rule 1.6, omitting the language permitting disclosure necessary to comply with “law” and suggesting that only a “court order” would satisfy the demands of the ethical rule. *Id.* at 604.

126. MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(6) (2010) (emphasis added).

engagement with the legislature's authority, if any, to impose disclosure obligations upon lawyers directly.

Moreover, while the text of the governing rule is certainly significant, it has not always been sufficient to compel the conclusion that lawyers must comply with disclosure laws, or even that they may do so without violating their ethical obligations. Commentators writing after the 2002 revision, while acknowledging the other law exception now present in 1.6(b)(6), continue to assert that "reporting and disclosure requirements would pose an intractable ethical conflict."¹²⁷ In 2005, the Social Security Administration proposed a rule that would require claimants, when requesting a hearing, to submit all information available to them, including information that would undermine or contradict their allegations.¹²⁸ In a written submission to the Social Security Commissioner, the president of the ABA objected to the proposed rule on the grounds that its application to claimants represented by attorneys would present a grave ethical dilemma for the attorneys:

[T]his requirement has the potential for causing significant conflicts for lawyers torn between following an agency rule and complying with their professional responsibilities towards their clients. . . .

. . . They are prohibited by ABA Model Rule 1.6 from disclosing privileged and confidential client information, except with consent from the client and under some very limited circumstances. Indeed, to reveal client confidences would expose them to disciplinary action.¹²⁹

As another scholar has noted, 1.6(b)(6) would seem to speak to precisely such a situation, explicitly allowing lawyers to disclose the information necessary to comply with the Social Security Administration's proposed rule.¹³⁰ Instead, the president of the ABA invoked Rule 1.6 to support the contention that lawyers would *not* be able to follow the agency's rule without running afoul of their professional responsibilities.

127. Eric J. Gouvin, *Bringing Out the Big Guns: The USA Patriot Act, Money Laundering, and the War on Terrorism*, 55 BAYLOR L. REV. 955, 985 (2003) (characterizing reporting requirements as "inconsistent with our tradition" and asserting, without further analysis, that legislative enactments or executive orders to that effect could raise "difficult separation of powers questions").

128. Robert E. Rains, *Professional Responsibility and Social Security Representation: The Myth of the State-Bar Bar to Compliance with Federal Rules on Production of Adverse Evidence*, 92 CORNELL L. REV. 363, 379-81 (2007) (statement of then-ABA president that disclosure of adverse evidence as required by proposed SSA rule would violate 1.6).

129. *Id.* at 381.

130. *Id.* at 391.

D. Making Sense of This Chronology

The core tenet of the boundary claim—that in pursuit of client-directed ends the lawyer must obey the constraints of the law—has been anything but obvious when the laws in question require attorney disclosure. On multiple levels, including most prominently the drafting of code language and its subsequent interpretation and application, the lawyer’s obligation to comply with laws requiring disclosure has been intensely contested. At its fever pitch, the contest gave rise to pronouncements of irreconcilable conflict between an attorney’s ethical duties and compliance with disclosure law. While conditions have mellowed significantly, the idea reflected in the current version of 1.6—that a lawyer’s compliance with other law is a matter of the lawyer’s own discretion—stops well short of reaffirming the basic principle of law compliance that lies at the heart of the original boundary claim.

I am not the first to observe that the profession’s record of fidelity to law is not uncompromised. Discussing whether federal lawyers might reveal government misconduct under whistleblower provisions, Professor Roger Cramton commented that “[t]here is a long tradition of lawyers assuming that general legal requirements applicable to others do not apply to them.”¹³¹ Cramton then specifies that this assumption is particularly trenchant where the legal requirements in question would override the professional duty of confidentiality.¹³² Professor Sung Hui Kim, discussing the bar’s resistance to increased Securities and Exchange Commission (SEC) regulation in the wake of the Enron scandal, describes a discourse of “lawyer exceptionalism,” which posits that lawyers perform a unique social function so “valiant and virtuous” as to require their exemption from obligations imposed on other professionals.¹³³ Professor Koniak, as noted in the introduction, has repeatedly observed the bar’s tendency to repudiate and resist state law that conflicts with the bar’s own sacred norms.¹³⁴

131. Roger C. Cramton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 GEO. J. LEGAL ETHICS 291, 314 (1991).

132. *Id.* at 315.

133. Sung Hui Kim, *Lawyer Exceptionalism in the Gatekeeping Wars*, 63 SMU L. REV. 73, 76 (2010); see also Ted Schneyer, *How Things Have Changed: Contrasting the Regulatory Environments of the Canons and the Model Rules*, J. PROF’L LAW., 2008, at 161, 163 (noting “frequent wrangling between the organized bar and external regulators”).

134. See *supra* note 7 and accompanying text. Nancy Moore, the Reporter for the Ethics 2000 Commission, has specifically disclaimed the influence of this dynamic in the context of the Commission’s decision to recommend that disclosure of client confidences to comply with other law be permissive rather than mandatory under the new version of the rule.

What I want to emphasize here is that this tradition poses a challenge to the vitality of the original boundary claim. In the face of this history, for the boundary claim to retain descriptive power as the dominant model of the lawyer's role, it must be adjusted to account for the profession's tendency to exclude disclosure laws from the scope of laws that lawyers must obey. To the extent that the profession maintains a commitment to the ideal of zealous advocacy within the bounds of the law, the commitment is qualified by the pervasive unwillingness to acknowledge that laws requiring attorney disclosure are among those that bind.

This unwillingness is, of course, grounded in the profession's embrace of confidentiality as the paradigmatic professional virtue for lawyers.¹³⁵ It is not an exaggeration to characterize the commentary as having approached the point of asserting that without confidentiality, there is no law practice.¹³⁶ That the profession has defended confidentiality with ferocious intensity is hardly a novel observation; at this juncture, it is important to put aside the circumstances in which these arguments are proffered in an abstract discussion of attorney-client confidentiality, or in the context of debates over other proposed exceptions to the confidentiality rule. These are conceptually distinct because they do not engage the question of law compliance with which the boundary claim is concerned.

Consider, for example, the exceptions to confidentiality set forth in 1.6(b)(1)-(3), allowing lawyers to disclose client confidences in certain carefully delineated circumstances in which substantial harm is imminent. These have been among the most controversial changes to the Model Rules in recent years.¹³⁷ Critics charged that these exceptions would eviscerate the confidentiality obligation and foster mistrust between attorney and client; supporters, on the other hand, asserted that with these new exceptions the rule achieved a more appropriate balance between the attorney's loyalty to the client and the competing interests of third parties and the public.¹³⁸ But regardless of

See Nancy J. Moore, *Lawyer Ethics Code Drafting in the Twenty-First Century*, 30 HOFSTRA L. REV. 923, 938-39 (2002). The rationale she proffers in support of the provision is discussed in the concluding Part of this Article.

135. The ABA vigorously opposed the recognition of a limited accountant-taxpayer privilege. See Sung Hui Kim, *Naked Self-Interest? Why the Legal Profession Resists Gatekeeping*, 63 FLA. L. REV. 129, 140 (2011).

136. See *id.*; see also Podgor, *supra* note 86.

137. 1 HAZARD & HODES, *supra* note 31, § 9.2, at 9-7; Emiley Zalesky, *When Can I Tell a Client's Secret? Potential Changes in the Confidentiality Rule*, 15 GEO. J. LEGAL ETHICS 957 (2002).

138. See Zalesky, *supra* note 137, at 973-74, 976.

where one stands on these exceptions, they concern disclosures that the law does not make mandatory *for anyone*—lay people generally do not have a duty to warn others when they learn of imminent financial ruin or even death.¹³⁹ Lawyers can debate whether they should impose upon themselves a *special* duty to warn, without raising implications about compliance with law.¹⁴⁰

The confidentiality exception discussed in this Article is fundamentally different. I take as a special case those instances, like the ones described above, in which the importance of attorney-client confidentiality is invoked as a basis for exempting lawyers from generally applicable law, suggesting that lawyers occupy a role so unique that they cannot be expected to comply with the demands that law makes on other citizens. In the next Part, I want to explain how extraordinary this notion is.

IV. STRUCTURAL RADICALISM AND POSSIBLE JUSTIFICATIONS

There are several ways to understand the claim that lawyers need not, indeed should not, disclose client confidences even where a statute or regulation requires it.¹⁴¹ One way is to understand it as a constitutional contention. When lawyers assert that they cannot be held to compliance with disclosure laws, they might be making a structural claim about the legislature's lack of power to demand disclosure from them.¹⁴² While the claim is very rarely meritorious, it

139. See Leslie C. Levin, *Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend To Harm Others*, 47 RUTGERS L. REV. 81, 87-88 (1994); Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences To Prevent Harm*, 70 IOWA L. REV. 1091, 1175 (1985).

140. See, e.g., Nancy J. Moore, "In the Interests of Justice": *Balancing Client Loyalty and the Public Good in the Twenty-First Century*, 70 FORDHAM L. REV. 1775, 1785-86 (2002) ("In sum, lawyers may be officers of the legal system and public citizens having special responsibility for the quality of justice, but they are not thereby law enforcement officers akin to police or prosecutors. They should be free to act as independent moral agents when the limits of client loyalty have been reached, but at the same time, they should not be obligated to perform as agents of the state *in situations where private citizens have no similar obligation*." (emphasis added) (footnote omitted)); cf. James E. Fleming, *The Lawyer as Citizen*, 70 FORDHAM L. REV. 1699, 1715 (2002) (asserting that professional role does "not give lawyers license to abrogate fully their responsibilities as citizens").

141. I put aside for the moment the question of whether the legislature *intended* to include lawyers in the statutory disclosure obligation, or instead did so inadvertently, failing to anticipate that among those the statute might reach would be lawyers with confidential client information. I have addressed this question in Aviel, *supra* note 9, at 721-23, and I return to it again at the end of this Part.

142. See, e.g., Moore, *supra* note 134, at 939 ("Even when the purported reach of a statute is clear, it may constitute an unconstitutional violation of the separation of powers

is at least jurisprudentially familiar.¹⁴³ In this vein, lawyers are engaged in a form of argument that acknowledges the central tenets of constitutional democracy: the idea that the various branches of government have discrete (but sometimes overlapping) powers and duties; that power is further divided between state and federal sovereigns; and that these governmental powers are further constrained by the guarantees of individual liberty found in the Bill of Rights.¹⁴⁴ In such a framework, some legislative enactments may very well be invalid, at least as applied, because they concern matters outside the scope of the legislature's authority or tread on constitutionally guaranteed liberties. As pertains to the validity of enforcing disclosure laws against attorneys, it has been asserted that the regulation of lawyers is an inherently judicial function, such that any legislative attempt to affect or control attorney conduct violates separation of powers principles.¹⁴⁵ It has also been asserted that requiring attorney disclosure in criminal cases might violate the Fifth Amendment privilege against self-incrimination and the Sixth Amendment guarantee of effective assistance of counsel.¹⁴⁶ I have shown in a previous piece that such will very rarely be the case; nonetheless, to resist or challenge disclosure statutes by invoking these principles at least locates lawyers, and the professional duties we espouse, within the framework of American constitutionalism.¹⁴⁷

doctrine, at least in jurisdictions that have adopted the more extreme version of the inherent power of courts to regulate the power of attorney[s].”)

143. Aviel, *supra* note 9, at 689-721.

144. See generally Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L.J. 1119 (2011); J. Harvie Wilkinson III, *Our Structural Constitution*, 104 COLUM. L. REV. 1687 (2004).

145. See Moore, *supra* note 134, at 939. Constitutional requirements aside, it has been suggested that insulating lawyers from legislative control is desirable because it ensures the kind of independence that is crucial to the lawyer's ability to challenge government action. On occasion, however, the judiciary has certainly shown itself capable of the sort of reprisal and retaliation that threaten the lawyer's independence as well as basic functioning. Professor Bruce Green demonstrates this with his retelling of *In re Austin* and *People v. Jones*. Bruce A. Green, *The Lawyer's Role in a Contemporary Democracy*, 77 FORDHAM L. REV. 1229, 1240-43 (2009). In both cases the appellate court reversed the retaliatory orders of the lower courts. *Id.* at 1242-43. But, as Green observes, “[O]ne can easily imagine any of the lawyers folding their tents before achieving vindication or the reviewing court adopting a less protective legal understanding.” *Id.* at 1243. The Zenger trial provides another example. See also Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 772-73 (2001) (discussing judicial abuse of the contempt power before the United States Supreme Court imposed some limits).

146. See Aviel, *supra* note 9, at 701.

147. See *id.*

But this engagement with constitutional principles is not a constant feature of discussions about the lawyer's obligation, or lack thereof, to comply with laws requiring disclosure. It is repeatedly asserted or suggested that lawyers need not (or even should not) comply, with little or even no attention paid to these concepts—the preceding Part contains numerous such examples.¹⁴⁸ A closely related

148. To be sure, debating whether the ethical rule should require compliance with other law is conceptually distinct from discussing directly whether or not lawyers should comply with those other obligations, much less does it necessarily suggest that they should not. To illustrate, the ABA Standing Committee on Ethics and Professional Responsibility, writing to the Ethics 2000 Commission to express its concerns with the mandatory disclosure provision in the early proposed draft, questioned whether it was “wise” to make violation of a law or court order “an ethical transgression.” Letter from Donald B. Hilliker, Member of the ABA Standing Comm. on Ethics and Prof'l Responsibility, to ABA Comm'n on the Evaluation of the Rules of Prof'l Conduct (Sept. 16, 1999) (on file with author and available through the ABA Center for Professional Responsibility). Professor Love's summary of how the Commission resolved the matter captures the distinction perfectly: “Rule 1.6 does not add an ethical dimension, or the possibility of discipline, to whatever legal disclosure obligation the lawyer may otherwise have.” Love, *supra* note 98, at 451. It is thus quite plausible to argue that statements like these, discussing only the ethical ramifications of lawyer decision making, do not even address the lawyer's legal obligations and do not in fact propose that lawyers need not comply with disclosure laws. But I want to suggest that the space between these two notions is not that great. When it is asserted that the ethical code should permit but not require disclosure to comply with other laws, lawyer noncompliance is, at the very least, implicitly on the table. As Koniak queries, “How else can one understand the question, do the ethics rules permit compliance with other law? How else can one understand the answer, compliance is permitted?” Koniak, *The Law Between*, *supra* note 7, at 1420.

Moreover, lawyer noncompliance is sometimes explicitly on the table in discussions about the proper parameters of the ethical rule. The Standing Committee's submission referenced above goes on to assert, “A lawyer who chooses to suffer a contempt citation rather than reveal what he or she believes to be privileged information should not, we think, necessarily be regarded as acting unethically.” Hilliker, *supra*. And the Reporter's Memo discussed in Part II acknowledges that making the provision permissive rather than mandatory “would afford the lawyer discretion—as a matter of professional responsibility—to refuse to breach confidentiality even in cases in which the lawyer would be required by other law or a court order to do so and could be subject to other legal sanctions because of the refusal.” *Reporter's Explanation of Changes*, *supra* note 99.

As these examples illustrate, there seems to be little point in preserving a space for a lawyer to maneuver without suffering professional discipline unless it is contemplated that lawyers may use it, or at least that lawyers should be able to use it. These examples not only explicitly contemplate lawyer noncompliance, but do so in the context of advocating for fewer rather than greater consequences for such noncompliance. That they do so without grounding such noncompliance in some constitutional framework makes them relevant to this Part.

For a somewhat different take on the permissive nature of the other law provision, see Green & Zacharias, *supra* note 120, at 279 n.59:

Another interesting example of this phenomenon is Model Rule 1.6, which provides that a lawyer “may” reveal otherwise confidential information when necessary “to comply with other law or a court order.” Because the exception does not require a lawyer to comply with other law, it suggests that the drafters envision

phenomenon is to present the confidentiality obligation alongside or in the alternative to such contentions, as if it stands independently, with no structural explanation for how or why an ethical rule would have the same foreclosing effect on the enforcement of legislative enactments as a constitutional provision.

Instead, if indeed any explanation is offered at all, the discourse is extraconstitutional in nature because it does not proceed in terms of separation of powers or the constraints imposed by the guarantees of individual liberty found in the Bill of Rights and the relevant state counterparts. It speaks, rather, in substantive terms about the importance of confidentiality as an element of the lawyer-client relationship. It does not purport to locate any constitutional authority for exempting lawyers from generally applicable laws duly enacted by the legislature, but offers instead the idea (either explicitly or implicitly) that the confidentiality values that lawyers protect when they resist disclosure laws are precious and indispensable. Be that as it may, to go from there to the conclusion that lawyers need not (or should not) comply with disclosure laws involves a significant missing piece.¹⁴⁹ That is the idea that lawyers have some sort of prerogative to identify a subordinating value, among the many that compete for primacy in the political process, and embrace that value *over the legislature's contrary result*. Even the more nuanced version, which is that lawyers should initially resist disclosure laws but then comply if and when ordered by a court to do so, manifests an attitude of exemption from—at the very least ambivalence about—the direct effects of legislative power that bears some scrutiny. As Professor Wendel has argued, “[I]t is incumbent upon someone who would permit the lawyer to disrespect the law to address how it is that the lawyer came to object to the result mandated by the legal norm.”¹⁵⁰ Can the confidentiality value support this kind of exceptionalism?

instances in which disobedience may be appropriate—perhaps in situations in which a lawyer seeks to challenge the “other law.” However, the permissive language certainly is not meant to imply that compliance with the law is purely discretionary; it simply articulates the boundaries of the otherwise mandatory confidentiality rules while requiring the lawyer (and other lawmaker) to decide whether confidentiality or other law should take precedence, based on considerations not apparent in the professional rules.

Id. (citation omitted).

149. The boundary claim’s caveat for laws requiring disclosure is rarely directly and candidly explicated in full; one has to identify the claim’s necessary constituent parts by inference.

150. W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363, 415 (2004). As Professor Wendel recognizes, and as is important for this discussion, the law “does not always

Answering such a question requires an attempt to pin down an authoritative account of the policies underlying the duty of confidentiality. As I have previously noted, the careful and sustained attention given to this question has not made the task any easier.¹⁵¹ It continues to be challenging even to summarize faithfully the multiple justifications underlying the confidentiality principle, much less to draw working conclusions around which there is anything resembling consensus. This is partially because confidentiality is studied and debated not only as a stand-alone principle, but as a lens through which to evaluate broader claims about whether the legal profession should be governed by a role-differentiated morality in which it is not only acceptable, but required, for lawyers to do things that would be immoral for a nonlawyer to do.¹⁵² Nonetheless, I attempt a sketch—a caricature, really—of the rich literature exploring confidentiality’s justifications. These justifications can be characterized as falling into three distinct groups: the necessity of confidentiality for the effective functioning of an adversary system, the client counseling/law compliance rationale, and the promotion of trust, dignity, and autonomy on the part of the client.¹⁵³

speak univocally. A statute or common law decision seemingly prescribing one result may conflict with other legal norms.” *Id.* at 419. Using the example of the “murdering heir” case, in which the court denied a bequest under a will that satisfied all statutory requirements, Wendel asserts that the court was engaged in the process of interpreting what the law was, not trying to decide whether to follow the law or conscientiously object in the interests of justice. *Id.* at 420. As I have discussed previously and will revisit here later in this Part, disclosure laws sometimes require a fair amount of interpretive effort to ascertain whether or not they abrogate attorney-client confidentiality; this is significantly different than the assertion that the lawyer is exempt from compliance.

151. See Rhode, *supra* note 13, at 612-13 (noting some twenty-five years ago, that the “profession’s conventional defense” of attorney-client confidentiality “is too familiar to warrant extended exegis [sic] here”); Zacharias, *supra* note 13, at 69-70 (“The subject of attorney-client confidentiality has assumed more significance in recent scholarship than it deserves. Since its promotion as the core of the adversary system and the attorney-client relationship, numerous authors—including myself—have focused on the importance of strict confidentiality, the appropriateness of broadening or narrowing exceptions, the validity of the assumptions underlying strict confidentiality rules, and even proposals for new formulations of the principle.” (footnotes omitted)); see also Aviel, *supra* note 9.

152. In 1837, Thomas Macaulay famously defined a lawyer as someone who would “with a wig on his head, and a band round his neck, do for a guinea what, without those appendages, he would think it wicked and infamous to do for an empire.” 3 THOMAS BABINGTON MACAULAY, *Lord Bacon, in ESSAYS, CRITICAL AND MISCELLANEOUS* (1874). Norman Spaulding describes role morality as “the idea, much maligned by legal ethicists, that lawyers should receive some degree of immunity from the general requirements of conscience on account of their distinctive social role.” Norman W. Spaulding, *The Rule of Law in Action: A Defense of Adversary System Values*, 93 CORNELL L. REV. 1377, 1378 (2008).

153. The commentary to Rule 1.6 explains:

The first justification begins by reference to the adversarial nature of the American legal system, a system characterized by the assumption that “the fairest decision can be obtained when the two parties to the immediate conflict argue in open court according to carefully prescribed rules and procedures.”¹⁵⁴ From this premise stems what Fred Zacharias has described as a three part syllogism: First, for the adversary system to operate, citizens must use lawyers to resolve disputes and the lawyers must be able to represent clients effectively. Second, attorneys can be effective only if they have all the relevant facts at their disposal. Third, clients will not employ lawyers, or at least will not provide them with adequate information, unless all aspects of the attorney-client relationship remain secret.¹⁵⁵ The argument then, as applied to our question, is (1) that by resisting disclosure laws, attorneys protect the adversary system from the dysfunction that would result if clients could not depend on attorney

[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 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. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2010).

154. Marian Neef & Stuart Nagel, *The Adversary Nature of the American Legal System from a Historical Perspective*, 20 N.Y. L.F. 123, 123-24 (1974) (“The confrontation of witnesses in open court is at the heart of the American legal system since it is thought that the best result is obtained when the parties face each other as adversaries in a kind of constrained battle procedure. The adversary theory of justice is premised on the assumption that the truth can best be discovered if each side strives as hard as it can, in a keen partisan spirit, to bring to the court’s attention the evidence favorable to its own side.” (footnotes omitted)). For an argument that this premise “is neither self-evident nor supported by any empirical evidence,” see Rhode, *supra* note 13, at 596. For an argument in favor of the adversary system that emphasizes the human failings of a supposedly neutral decision maker, see Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978). See also Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159 (1958). For a critique of this position, see David Luban, *Rediscovering Fuller’s Legal Ethics*, 11 GEO. J. LEGAL ETHICS 801 (1998).

155. Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989); see also *Professional Responsibility and In re Ryder: Can an Attorney Serve Two Masters?*, 54 VA. L. REV. 145, 156 (1968) (“The rationale involves four premises: that the basic purpose of a trial is the determination of truth; that in an adversary system this purpose is best served by presenting the judge and jury with a clash between proponents of conflicting views; that effective advocacy, in turn, rests upon the attorney’s knowledge of all the facts relevant to his case, both the favorable and the damaging; and that to ensure complete candor between attorney and client, the details of their professional relationship must be privileged.” (footnotes omitted)).

secrecy, and (2) this is important enough to justify the exemption of lawyers in spite of the legislature's apparent preference that they too report what they know.¹⁵⁶

The adversary system rationale rests on assumptions that have been somewhat vulnerable to empirical testing, as Zacharias himself demonstrated.¹⁵⁷ It also rests on the inherent virtues of the adversary system, which have been challenged,¹⁵⁸ defended,¹⁵⁹ and contested with a persistence that seems unlikely to abate.¹⁶⁰ Moreover, in its focus on the adversarial quality of dispute resolution that characterizes the business of courts, it has little to say about the larger system of democratic governance and private ordering of which courts are only a part.¹⁶¹ Even if it were uncontrovertibly true that confidentiality is necessary for the effective functioning of the adversary system, it is not obvious that this would justify the displacement of legislative choice even in nonlitigation circumstances where the adversary system is inapposite.¹⁶² Take, for example, an attorney who specializes in trusts and estates and is drafting a will for a wealthy client. Imagine that the attorney and the client have friends and acquaintances in common, and one remarks to the attorney, "I hope Clark is leaving those boys a good chunk of change because he sure beat the hell out of them when they were growing up." This is surely "information

156. As I think is becoming clear, I take this to be a cost, one that should be incurred only upon fairly convincing justification. I acknowledge that the analysis would look very different without this underlying premise.

157. Zacharias, *supra* note 155, at 376-96 ("The study suggests that many clients give information not because of confidentiality guarantees, but because they view lawyers as honorable professionals who customarily promise discretion—like doctors or accountants. . . . The study also revealed widespread misunderstanding among clients as to the nature of confidentiality and its scope."); *see also* Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 33 (1998).

158. *See, e.g.*, DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* 9-11 (2007).

159. *See, e.g.*, MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975); Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAP. L. REV. 57 (1998).

160. Spaulding, *supra* note 152.

161. For a discussion of the common assumption that advocacy in an adversary setting is the paradigmatic function of the lawyer, and the resulting reliance in disciplinary codes on premises that (at best) pertain only to such settings, see Fred C. Zacharias, *The Future Structure and Regulation of Law Practice: Confronting Lies, Fictions, and False Paradigms in Legal Ethics Regulation*, 44 ARIZ. L. REV. 829, 855 (2002) ("This paradigm incorporates at least two sets of faulty assumptions. First, much of the practice of law does not occur within an adversarial litigation setting. Second, the premises that the code drafters attribute to the adversary system sometimes do not hold true.").

162. This is not just the case for transactional matters—a state legislature could, for example, implement a new benefits scheme and then adopt a nonadversarial model of adjudication to resolve claims arising out of the denial of benefits.

relating to the representation of a client” and thus within the realm covered by the ethical duty of confidentiality.¹⁶³ But does the attorney’s refusal to report this information contribute to the effective functioning of the adversary system? None of the elements of the syllogism are present.¹⁶⁴ First, there is no dispute being presented to an adjudicator for resolution via adversarial testing. Second, without purporting to exhaust the purposes of the law of trusts and estates, let us venture that the attorney’s effectiveness in this scenario depends on her skill in drafting a document that reflects the testator’s intent and is enforceable against possible challenge; it may not at all be the case that she needs the facts given to her about the abuse to perform competently. Third, given that the information did not even come from the client, there is no reason to posit that the attorney would not have received the information had the client not been assured that communications would remain confidential.

At the very least, there seems to be a lack of fit between the adversary system rationale and the full scope of information covered by the duty of confidentiality.¹⁶⁵ This lack of fit makes it less attractive as a justification for categorically excusing lawyers from compliance with validly enacted, generally applicable disclosure laws whenever the information was obtained in the course of representing a client. One might reasonably take the view that confidentiality should overprotect, sweeping in these types of situations prophylactically to ensure that it does its job in situations that implicate more directly the functioning of the adversary system, with robust attorney-client consultation as its key component.¹⁶⁶ But one can envision other approaches that balance these goals against those furthered by a broad reporting obligation.

Consider a reporting law that applies to “any person,” and, rather than excluding attorneys categorically, excludes information relayed to

163. See MODEL RULES OF PROF’L CONDUCT R. 1.6 (2010) (“A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . .”).

164. Let me hasten to add that the scenario also presents a particularly weak case for the reporting obligation: the preventive attribute is missing, and the attorney is almost certainly not among the first adults to know of the abusive situation.

165. The adversary system rationale is more persuasive as a justification for the evidentiary privilege, which limits its protection to communications between attorney and client that are undertaken for the purpose of giving or receiving legal advice. And indeed, some “any person” reporting statutes include narrowly drawn exclusions for those communications that would meet the conditions for privilege.

166. In some ways this reintroduces an empirical question: in order to encourage full and frank revelation of all relevant facts from their clients, must attorneys refuse to report information provided by others?

the attorney *by the client*. (This is, by the way, exactly what some legislatures have done.)¹⁶⁷ Where the legislature has thus labored to protect the privacy of attorney-client consultation, the adversary system rationale is unconvincing to support the idea that lawyers should be exempt from reporting all remaining information left within the confines of the obligation defined by the statute. The point is this: At best—which is to say, tabling lingering questions about the syllogism’s empirical assumptions and putting aside doubts regarding the inherent virtue of the adversary system—the adversary system rationale fails to account for the full range of situations in which lawyers find themselves and fails to explain the exemption of lawyers from the full range of statutes that might require disclosure of information “relating to the representation.”

The second rationale also has a utilitarian appeal and likewise speaks to the distinctive role that attorneys play in the legal and social order. Rather than emphasizing the protection and vindication of rights in an adversarial system of dispute resolution, however, this rationale emphasizes the potential for attorney counseling to produce socially beneficial results. If clients are assured of confidentiality, the argument goes, they will consult with lawyers in advance of conduct that might be unlawful, giving lawyers the opportunity to advise clients of the limits of lawful choice and to urge that the client stay within the delineated boundary.¹⁶⁸ Even assuming that lawyers generally are effective in dissuading their clients from unlawful conduct, in our context this rationale suffers from some uncomfortable tensions between law compliance on the macro level and law compliance on the micro level. To excuse a lawyer from compliance with valid and applicable reporting law so that his silence will encourage clients to go to him with their problems and uncertainties and in turn be persuaded to comply with their legal obligations begs the very question at issue, returning us to the lawyer exceptionalism for which we were seeking theoretical grounding.¹⁶⁹ The idea that lawyers must have leeway to

167. See, e.g., NEV. REV. STAT. ANN. § 432B.220(4)(i) (West 2011).

168. See William H. Simon, *The Kaye Scholer Affair: The Lawyer’s Duty of Candor and the Bar’s Temptations of Evasion and Apology*, 23 LAW & SOC. INQUIRY 243, 281 (1998) (“[A] key part of the bar’s argument is that inducing people with a shaky commitment to law abidingness to seek legal advice is good because it *gives their lawyers an opportunity to dissuade* them from illegal conduct.”).

169. Not that such a phenomenon would be unprecedented. See, e.g., Kim, *supra* note 133, at 94 (“As a descriptive matter, lawyer exceptionalism claims that lawyers have a societal function that is unique and qualitatively different from that of other professionals, such as accountants, who have legal obligations to avert fraud. As a normative matter, lawyers’

disobey laws that facially apply to them so that they can, in full confidence, counsel and persuade their clients to obey the laws that apply to their conduct seems contradictory. It certainly fails to explain why it is more important for clients to comply with the law than for lawyers to do so.

The third rationale has a less systemic focus: It instead emphasizes the development of trust between the attorney and client and asserts that this relationship of loyalty is itself the value being promoted by confidentiality. Professor Alschuler, for example, asks us to imagine the client's sense of betrayal, after confiding in his attorney, upon learning that the attorney is "part of the official machinery that judges" him.¹⁷⁰ More recent work expands on the theme, reaffirming that confidentiality is "required by respect for a client's right of autonomy," although noting that the same notion of autonomy that justifies confidentiality also justifies some of its exceptions.¹⁷¹ While respect for client autonomy may satisfactorily explain why lawyers should forgo discretionary disclosures that harm clients and betray their trust, it should be readily apparent that an appeal to autonomy cannot justify an exemption from applicable law.

The most persuasive efforts to justify confidentiality transcend the categories just sketched. Professor Stephen Pepper begins from the premise that law is a "public good" that "is intended to channel and regulate behavior, as well as to enable complex forms of interaction, cooperation, and reliance."¹⁷² The key point is that law cannot function properly unless it is "known by those it is intended to regulate or enable. In our densely populated, technologically and socially complex society, much of the law cannot be known (and thus cannot be effective) without the assistance of a lawyer."¹⁷³ The lawyer, in turn, cannot provide competent assistance without facts that ordinarily must come from the client.¹⁷⁴ Pepper concludes by asserting:

[O]ne ought to be able to learn the law which governs one's conduct, past or future, without having to purchase that knowledge by putting oneself at risk of serious harm. One ought not have to open oneself to

function is so valiant, virtuous, and beneficial that lawyers should be free to perform it without constraints imposed by the state." (footnote omitted).

170. Albert W. Alschuler, *The Preservation of a Client's Confidences: One Value Among Many or a Categorical Imperative?*, 52 U. COLO. L. REV. 349, 355 (1981).

171. Alan Strudler, *Belief and Betrayal: Confidentiality in Criminal Defense Practice*, 69 U. CIN. L. REV. 245, 248 (2000).

172. Stephen Pepper, *Why Confidentiality?*, 23 LAW & SOC. INQUIRY 331, 334 (1998).

173. *Id.*

174. *Id.* at 335.

the world, the government, or one's adversaries in order to learn how the law affects one's life. In terms of basic fairness and the function of a democracy, it thus seems that one ought to have something approaching a "right" to know the law which governs one's conduct.¹⁷⁵

Thinking of confidentiality as the necessary incident to a right of access to the public good of law opens some interesting avenues. Using the language of rights helps explain the countermajoritarian posture of a lawyer's challenge to a generally applicable and validly enacted law. We might envision something along the lines of "strict scrutiny," an analytical model borrowed from due process and equal protection jurisprudence that would require the government entity defending the disclosure law to articulate the "compelling state interest" being furthered by the mandatory disclosure.¹⁷⁶ Perhaps this would be achievable for statutes that require reporting of child abuse, but not those concerned with ferreting out insurance fraud.¹⁷⁷ (This sort of statute seems like a public subsidy of insurance companies, who, unlike abused children, are perfectly able to protect their interests without the conscription of a class of nonvoluntary reporters so broad as to include attorneys.) Strict scrutiny's requirement that the law in question be narrowly tailored to infringe a fundamental right no more than is necessary also provides an interesting analogue.¹⁷⁸ Statutes that carve out exemptions to mandatory disclosure for information communicated to the attorney by the client would be much more likely to survive the searching inquiry than statutes that made no such distinction.

The analogy is a very rich one, but the problem is that the concepts still do not readily translate into the sort of contention that is cognizable in a constitutional jurisprudence driven by some commitment to textual specificity and understood to be primarily a "charter of negative liberties," one that does not guarantee access to a legal advisor.¹⁷⁹ Thinking of confidentiality as part of a larger right to know the law illuminates its importance and explains why it is

175. *Id.* at 336.

176. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 943 (3d ed. 2009) ("The Supreme Court has held that some liberties are so important that they are deemed to be 'fundamental rights' and that generally the government cannot infringe them unless strict scrutiny is met; that is, the government's action must be necessary to achieve a compelling purpose.").

177. *See, e.g.*, NEB. REV. STAT. § 44-393 (2011); TEX. INS. CODE ANN. art. 701.051 (West 2011).

178. CHERMERINSKY, *supra* note 176, at 949.

179. *See, e.g.*, *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 204 (1989) (Brennan, J., dissenting).

valuable, but it does not help locate a currently recognized boundary on legislative power. So then does this alternative vision of what could or should be protected against legislative incursion provide justification for a lawyer's resistance? We would need to accept that it is appropriate for the lawyer to prioritize the client's right to access the law without exposing herself to serious harm above the state's announced interest in seeing that abused children—some of whom may be too young to talk, much less to defend themselves—are brought to the attention of adults who can protect them.

There is both a substantive and a structural problem, and they are interrelated. The substantive problem is simply that the ranking of values suggested above is at the very least seriously contestable—the former does not trump the latter so obviously as to release the lawyer incontrovertibly from her duties to the law, especially if we think of law compliance as furthering rule-of-law values independent of the values embodied in the particular statute.¹⁸⁰ The structural problem is that however one might rank the comparative worth of these two values, in our system we presume that the legislature has already done this weighing: “The reconciliation of conflicting values or commitments—sometimes even widely held ones—is the very essence of legislation.”¹⁸¹ Law, as Professor Wendel has argued, provides “a framework for coordinated social action in the face of persistent moral disagreement.”¹⁸² In the circumstances of moral pluralism that necessitate law, attorney-client confidentiality, and its social worth

180. Rule of law has been described as “the equal application of legal rules to all members of a society, whether or not they are part of the ruling elite.” See, e.g., Samuel J. Levine & Russell G. Pearce, *Rethinking the Legal Reform Agenda: Will Raising the Standards for Bar Admission Promote or Undermine Democracy, Human Rights, and Rule of Law?*, 77 FORDHAM L. REV. 1635, 1636-37 (2009); W. Bradley Wendel, *Government Lawyers, Democracy, and the Rule of Law*, 77 FORDHAM L. REV. 1333, 1335 (2009) (“[T]he rule of law, which emphasizes the constraint on the arbitrary exercise of power by restricting the state to acting through relatively stable, determinate rules capable of being ascertained in advance by citizens.”). Deborah Rhode asserts that lawyers’ primary obligation is to the rule of law. Deborah L. Rhode, *Law, Lawyers, and the Pursuit of Justice*, 70 FORDHAM L. REV. 1543, 1546 (2002). If we posit that complying with law furthers rule of law values distinct from the particular values embodied in the statute, it becomes less tenable to approach attorney compliance with disclosure laws by comparing the interests furthered by the statute against the values underlying the confidentiality norm. Cf. Susan R. Martyn, *In Defense of Client-Lawyer Confidentiality . . . and Its Exceptions . . .*, 81 NEB. L. REV. 1320 (2003). Such an approach gives too little “deliberative significance [to] legality.” Wendel, *supra* note 150, at 374. One might, however, assert that the rule of law adds only marginal additional value to that side of the balance sheet, or does so only in limited circumstances.

181. John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 426 (2010).

182. Wendel, *supra* note 150, at 364-65.

relative to competing concerns such as the facilitation of an effective public response to child abuse, is exactly the sort of contestable value about which people might have intractable disagreement.¹⁸³ Confidentiality is part of the domain of law; it does not exist outside of or supersede it. Confidentiality is subject to the law's processes for resolving normative controversy, and the legislature is a dominant institution at the heart of those processes.

The discourse of lawyer exceptionalism in which the claim of confidentiality exceptionalism is grounded often emphasizes the unique and indispensable role that lawyers play in our constitutional democracy.¹⁸⁴ The idea that lawyers must be free to challenge governmental abuse of power is an alluring one, but it presents a difficult paradox: How can principles of constitutional democracy be invoked to justify the profession's claimed exemption from the decisions of duly elected bodies, following "tolerably fair procedures" and staying within currently recognized constitutional boundaries?¹⁸⁵ On what basis would lawyers claim the power to reject the legislature's result?

What we can claim—sometimes—is an inability to *understand* the legislature's result. As I have previously noted, it is not always clear that the enacting legislature contemplated the effect of the reporting statute on attorney-client confidentiality, much less that it engaged in the sort of deliberation that the model of legislative

183. See SCOTT J. SHAPIRO, LEGALITY 396, 398 (2011) ("The law is morally valuable . . . because we face numerous and serious moral problems whose solutions are complex, contentious, and arbitrary. The only conceivable way for us to address these moral concerns is through social planning. Morally and prudentially speaking, we desperately need norms to guide, coordinate, and monitor our actions. . . . [I]t would undermine the role of law as a system of social planning if interpreters relied on their own ideas about how to balance freedom versus constraint when construing the authoritative texts."); see also Geoffrey C. Hazard, Jr., *Tribute in Memory of Herbert Wechsler*, 100 COLUM. L. REV. 1362, 1367 (2000) (crediting Wechsler with the "[a]ppreciation of the normative pluralism that is a necessary basis for truly understanding American federalism").

184. For an illustrative discussion of "what makes lawyers special," see N. Lee Cooper & Stephen F. Humphreys, *Beyond the Rules: Lawyer Image and the Scope of Professionalism*, 26 CUMB. L. REV. 923, 932-33 (1996) ("The law is our source of rules for self-governance in a democracy. Who in society has standing to challenge any wrong, even if it means challenging any branch of government? That role is exclusively filled by lawyers, unless we would rather hand it over to militias. That is a huge responsibility, and the biggest reason we must take the independence of our profession seriously.").

185. Wendel, *supra* note 180, at 1337-38. The qualification built into the phrase is meant to communicate an acknowledgement of the realities of regulatory capture and rent-seeking behavior by firms like insurance companies. These defects, as grievously as they compromise the political process, do not confer upon lawyers a special dispensation to treat the results of that process as nonbinding.

decision making assumes. A statute that appears by its plain text to impose a reporting obligation on “any person” may reflect simply a failure to anticipate that among those the statute might reach would be lawyers in possession of client confidences; if so, assuming that the statute abrogates attorney-client confidentiality because the text sets forth no exceptions may not achieve the best approximation of legislative intent. Given the salience of attorney-client confidentiality as a background principle, a reporting statute that is silent as to its effect in this regard can be said to be ambiguous even where it appears to require disclosure without exception. I have suggested that courts presented with the question might use something like a clear statement rule, requiring legislatures to announce clearly in the text of the statute the intent to abrogate confidentiality before interpreting a disclosure statute to that effect.¹⁸⁶

Does it then follow that lawyers may seek out an authoritative interpretation of an unclear statute before disclosing client confidences? Yes, but the posture is one of seeking clarification from the legal institution tasked with interpreting statutes, not resisting a statutory obligation because it conflicts with a professional norm. To see how this difference might matter in practice, consider this statute:

A person having cause to believe that a child’s physical or mental health or welfare has been adversely affected by abuse or neglect by any person shall immediately make a report as provided by this subchapter.

....

... The requirement to report under this section applies without exception to an individual whose personal communications may otherwise be privileged, including an attorney¹⁸⁷

Or take Nevada’s statute, which provides a list of mandated reporters and requires reporting from anyone appearing on the list “who, in his or her professional or occupational capacity, knows or has reasonable cause to believe that a child has been abused or neglected.”¹⁸⁸ The

186. See Aviel, *supra* note 9, at 735-36.

187. TEX. FAM. CODE ANN. § 261.101 (West 2010). This statute has an additional subsection, delineating a reporting obligation with overlapping but distinct parameters, that may apply to some attorneys. This subsection applies to anyone who is a “professional,” defined as “an individual who is licensed or certified by the state or who is an employee of a facility licensed, certified, or operated by the state and who, in the normal course of official duties or duties for which a license or certification is required, has direct contact with children.” *Id.* Another interesting note about the Texas statutory scheme: while it specifies that the reporting requirement applies without exception even to attorneys, it does preserve the attorney-client privilege as a basis to exclude evidence from an abuse or neglect proceeding. *Id.* § 261.202.

188. NEV. REV. STAT. ANN. § 432B.220 (4)(i) (West 2010).

statute specifies that included among those required to report is “[a]n attorney, unless the attorney has acquired the knowledge of the abuse or neglect from a client who is or may be accused of the abuse or neglect.”¹⁸⁹

These statutes each communicate very explicitly that the legislature considered the statute’s interplay with attorney-client confidentiality and made deliberative choices—two very different ones, in these examples—about how to resolve the tension. These statutes would meet the requirement of a clear statement rule as it might look in this context. There would be no need for a court to impose it, and it would be difficult for an attorney to assert in good faith that she was unable to ascertain from the text of the statute whether she was expected to comply with its terms when receiving the sought-after information in the course of representing a client. Barring the narrow class of circumstances in which an attorney might have viable constitutional claims to raise against the statute’s enforcement, it is hard to see what would justify an attorney’s refusal to comply with these statutes unless and until ordered to do so by a court.¹⁹⁰

Of course, generating material ambiguity out of the everyday imperfections of language is perhaps the consummate professional skill, and I do not mean to suggest that these statutes (or any others drafted by ordinary lawmakers) are invulnerable. (On the contrary, I would expect my students and other competent legal technicians to be able to perform the task with ease.) But to the extent that any legal language is determinate enough to eliminate some interpretations and compel others, these statutes eliminate the possibility that the legislature failed to consider the matter of attorney-client confidentiality. They in fact compel the conclusion that the legislature intended to include attorneys possessing confidential client information in the scope of the statute.

To suggest that lawyers may seek an authoritative interpretation of an ambiguous statute before divulging client confidences does not, therefore, devolve into a wholesale embrace of the position that lawyers should resist all disclosure statutes unless ordered by a court to comply. It is, rather, to acknowledge the difficult line drawing—the

189. *Id.*

190. Another illustration can be found in the written comments submitted to the Ethics 2000 Commission by the Center for Law and Social Policy, which asked the Commission not to impose a duty to seek a court order that would apply even where the scope and application of a reporting statute was very clear.

retail sorting, as some would say¹⁹¹—that differentiates statutes whose application to lawyers is reasonably clear from those that fairly present interpretive questions appropriate for judicial resolution.

Moreover, to the extent that lawyers may enlist the assistance of courts as to the latter category, it is part of a very general entitlement that they share with other persons potentially affected by a statute but uncertain about how, if at all, the enactment has changed the scope of their rights and obligations.¹⁹² Across a variety of contexts ranging from in rem actions to marital status determinations, and further vested with authority by state and federal declaratory judgment acts, courts engage in what one commenter has called “preventive adjudication,” in which the sole output of the court’s decision making is a declaration of how the law applies.¹⁹³ Parties bring these cases to obtain clarification about a statute’s application, not necessarily to vindicate claims that the statute is invalid or unenforceable. Likewise, as unpalatable and jarring as it might seem, it is possible for an attorney to be uncertain about whether a statute applies to her and yet be without viable challenges to its enforcement if indeed it does.¹⁹⁴ Acknowledging that in some instances a lawyer may seek judicial interpretation of an unclear statute, therefore, does not reflect a confidentiality-centered lawyer exceptionalism that puts lawyers out of reach of generally applicable law.

Even where confidentiality is at stake, lawyers do not enjoy, and cannot justify, a special exemption from legislative power that leaves

191. See, e.g., Samuel L. Bray, *Preventive Adjudication*, 77 U. CHI. L. REV. 1275 (2010).

192. See, e.g., FLA. STAT. ANN. § 86.011, .021 (West 2011); see also UNIF. DECLARATORY JUDGMENTS ACT § 2 (1922) (“Any person . . . whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.”). In determining whether to exercise its discretion to hear cases brought under the federal Declaratory Judgment Act, a federal district court is to weigh a number of factors, including efficient judicial administration, and consider whether the declaratory judgment will serve a useful purpose. See Gary F. Smith & Nu Usaha, *Dusting Off the Declaratory Judgment Act: A Broad Remedy for Classwide Violations of Federal Law*, CLEARINGHOUSE REV., July-Aug. 1998, at 112; see also Donald L. Doernberg & Michael B. Mushlin, *The Trojan Horse: How the Declaratory Judgment Act Created a Cause of Action and Expanded Federal Jurisdiction While the Supreme Court Wasn’t Looking*, 36 UCLA L. REV. 529 (1989).

193. Bray, *supra* note 191, at 1275 (suggesting that preventive adjudication is appropriate for cases involving lexical indeterminacy, where the declaratory judgment can resolve legal uncertainty across a swath of similar cases).

194. Take for example, the fictional client Clark described earlier in this Part; neither the Fifth nor the Sixth Amendment hold any prospect of relief in the circumstances presented.

them answerable only to judicial orders directed at them individually. Such a notion is fundamentally insupportable.

V. CONCLUSION

A recurring criticism of the ABA's ethics rules is that at too many junctures, the rules have made an attorney's ethical obligation simply coextensive with what other law already required.¹⁹⁵ For some commentators, this renders somewhat hollow the claim that the document proffers a true code of ethics—a statement of professional responsibilities that imposes special, higher obligations on lawyers rather than simply a reminder that lawyers should refrain from conduct that might get them sued or jailed.¹⁹⁶ It is one thing for the Model Rules to travel too little distance beyond what civil and criminal law already requires; but for the Model Rules to purport to require *less than that* is quite another thing altogether.

It does not serve the profession well to maintain this disconnect between what the law requires and what the ethical rules require. The most persuasive rationale for Rule 1.6's current form emphasizes the vastness of the terrain and the ambiguity lawyers confront when

195. See Benjamin H. Barton, *The ABA, The Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 N.C. L. REV. 411 (2005); Stephen Gillers, *What We Talked About When We Talked about Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243, 248 (1985) (“One could count up the words or duties in the Rules in an effort to determine what proportion of either largely restates law, but an exact figure is not necessary. A substantial number of the Rules require that lawyers do what the law already requires lawyers do to avoid civil or criminal liability. The fact that an ethical duty is also a legal one does not make it redundant. Placing an obligation in both categories may enhance compliance by providing a second, perhaps more influential sanction. But while it may not for compliance purposes be redundant to define some illegal or actionable conduct as unethical, the greater the portion of an ethical code that merely incorporates legal duties (especially ones, like those in penal laws, that already carry persuasive force), the less may the resulting document seek credibility as a profession's code of *ethics*. In unveiling such a code a profession presumably says more than that its members must refrain from certain conduct that will get them sued or jailed. It is this extralegal realm that defines ethics. As we will see below, when we take its measure alone the Rules shrink considerably.” (footnote omitted)).

196. Gillers, *supra* note 195; see also Rhode, *supra* note 13, at 601 (“[T]he [1983] *Model Rules* do little more than incorporate general prohibitions on crime and fraud.”); cf. Gaetke, *supra* note 21, at 43-44 (“The characterization [as officers of the court] inherently suggests that lawyers owe a special duty to the judicial system or, perhaps, to the public that other participants in the legal process do not owe. At least implicitly, this special duty elevates the interests of the judicial system or of the general public above those of the client or lawyer. So viewed, the officer of the court model contemplates that clients hire something other than a zealous advocate when they enlist the services of a lawyer. Rather, they hire a legal representative whose obligations to the judicial system at times supersede the undivided fidelity and enthusiasm an agent owes to his principal.” (footnotes omitted)).

ascertaining the scope of their obligations, and thus concludes lawyers should be afforded some discretion in this challenging territory.¹⁹⁷ But making disclosure ethically permissible where other law requires it confers only the most illusory sort of discretion, as my students point out every time I teach this provision.¹⁹⁸ Its primary effect is to tell the lawyer who chooses not to disclose: “You will not be judged as a wrongdoer in *our* normative community or suffer the penalties that *we* can impose.” It is logical in the abstract to suppose that lawyers contemplating noncompliance with an applicable disclosure law would prefer to have fewer rather than more consequences attached to that decision. But it is questionable whether this marginal benefit outweighs the potentially serious communicative costs. As has been suggested before, “[U]ntil we say clearly what it is we expect from the various officers of the law, we invite more chaos.”¹⁹⁹ The message sent by the permissive provision is a chaotic one, inviting speculation about what is meant by the bar’s tenuous and ambivalent acknowledgement of “other law[’s]” demands. Moreover, lawyers are not the only ones to receive the messages encoded in the profession’s ethical rules. As William Hodes argued nearly thirty years ago: “The purpose of careful selection of code language is thus only partially to educate and regulate lawyers; the choice of code language is also part of a legitimate process of public relations and public education.”²⁰⁰ The ethical rule should require disclosure where necessary to comply with other law, clarifying that compliance with other law is a part of an attorney’s ethical obligation.

Revised in this way, the provision would be right at home with numerous other provisions throughout the current Model Rules that remove discretion from lawyers on the basis of what other law says, either requiring or prohibiting conduct on the basis of other law.²⁰¹ Rule 3.4 states, “A lawyer shall not . . . unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a

197. See Moore, *supra* note 134, at 938-39.

198. They see immediately that, as a practical matter, the discretion provided in the ethical rule does little to expand a lawyer’s room to maneuver if other law does in fact require the disclosure; the scope of choice is constrained by the colorable readings of the statute and the accompanying penalties.

199. Robert P. Lawry, *The Central Moral Tradition of Lawyering*, 19 HOFSTRA L. REV. 311, 326 (1990) (arguing that the lawyer’s primary obligation is to the law).

200. Hodes, *supra* note 56, at 753.

201. These are, of course, some of the very provisions that give rise to the criticism, expressed at the beginning of this Part, that the Model Rules demand of lawyers too little beyond what other law already requires. See *supra* notes 195-196 and accompanying text.

document or other material having potential evidentiary value.”²⁰² Rule 1.7(b)(2) requires a lawyer to confirm that a particular concurrent representation is not prohibited by law before proceeding.²⁰³ Rule 4.1(b) states that a lawyer shall not knowingly fail to disclose a material fact when disclosure is necessary to avoid assisting criminal or fraudulent act, and supplementing this is Rule 1.0, which states that “fraud” refers to conduct that is fraudulent under the law of the applicable jurisdiction.²⁰⁴ In every one of these instances, the lawyer is subject to discipline on the basis of laws that are external to the Rules and no doubt as extensive, complex, and indeterminate as the ones that require disclosure.²⁰⁵

Moreover, concerns about affording lawyers sufficient leeway should be assessed frankly in the context of the untrammelled discretion exercised by disciplinary authorities regarding which attorneys to investigate, prosecute, and sanction.²⁰⁶ In a system characterized by gross underenforcement of professional responsibility,²⁰⁷ it is perhaps not excessively foolish to hope that the

202. MODEL RULES OF PROF'L CONDUCT R. 3.4(a) (2010).

203. *Id.* R. 1.7(b)(2). The comments add:

[I]n some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

Id. R. 1.7 cmt. para. 16.

204. *Id.* R. 1.0(d), 4.1(b).

205. In any event, requiring rather than permitting lawyers to make disclosures necessary to comply with other law is hardly unprecedented; it would simply revive in altered form the essential component of DR 7-102(A)(3), that long-gone provision of the Model Code that required a lawyer not to “[c]onceal or knowingly fail to disclose that which he is required by law to reveal.” *See supra* notes 52-54 and accompanying text.

206. *See, e.g.*, Fred C. Zacharias, *The Purposes of Lawyer Discipline*, 45 WM. & MARY L. REV. 675 (2003).

207. *See, e.g.*, Zacharias, *supra* note 161, at 857 (“Many aspects of the codes are not seriously enforced.”). Zacharias elaborates:

The resources of the disciplining bodies are limited. They must choose among the policies of pursuing violations they consider to be the worst, pursuing a random assortment of code violations, or targeting prosecutions that will produce the most general deterrence. They must choose between acting on cases that come to their attention easily or proactively seeking out and investigating violations. In practice, most jurisdictions have focused on lawyer mishandling of client funds, to the exclusion of most other misconduct.

The result is that many rules simply go unenforced or are patently underenforced. The most notable examples include advertising and lawyer reporting rules. But one could safely hazard the assertion that few rules truly are enforced in a way that makes lawyers fear discipline for violating them.

bar's inadequate enforcement resources will not be spent pursuing a lawyer whose infraction was to disclose client confidences in order to comply with an interpretation of ambiguous "other law" that others would reject.²⁰⁸ Better yet, the rule could include a safe harbor provision similar to that in Rule 8.5. Recognizing that the disciplinary rules of the various jurisdictions sometimes directly conflict, this rule sets out a choice of law method and then states that a lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction where the lawyer reasonably believes the predominant effect will occur.²⁰⁹ Disclosures to comply with "other law," while mandatory, could thus be subject to a provision insulating a lawyer from discipline where the lawyer reasonably concludes that other law did or did not actually require the disclosure at issue.

I have argued before that legislatures imposing disclosure obligations should state clearly the intention to trump a lawyer's confidentiality duties, and that courts should require legislatures to provide such clear statements before interpreting disclosure statutes to such effect.²¹⁰ The bar, in turn, should convey with commensurate clarity that complying with these laws is part of an attorney's ethical responsibility. Doing so would bring the profession's approach to confidentiality back in line with the respect for law that the boundary claim presupposes, eliminating the caveat that undermines the boundary claim's persuasive and descriptive power.

As the Ethics 2000 Commission experienced firsthand, there is sure to be resistance. Notwithstanding the generally professed commitment to the boundaries imposed by law, mandatory disclosure as an ethical principle strikes many practitioners and scholars as anomalous and anathema. The legal profession continues to embrace "the traditional understanding that the confidentiality principle serves public policies important enough to warrant a basic rule that is unstintingly observed, despite its admitted social costs."²¹¹ Identifying public policies to be furthered despite social costs, however, is not something the bar can do unilaterally in a regulatory space unimpeded by state and federal legislatures. First of all, it is highly unlikely the bar has such authority.²¹² But more importantly, the articulation of the

Id. at 861-62 (footnotes omitted).

208. Popkin, *supra* note 62, at 760 n.33 ("[T]he uncertainty about this requirement will probably mitigate discipline.").

209. MODEL RULES OF PROF'L CONDUCT R. 8.5(b)(2).

210. See Aviel, *supra* note 9, at 677.

211. 1 HAZARD & HODES, *supra* note 31, § 9.3, at 9-95.

212. See Aviel, *supra* note 9, at 676.

relationship between confidentiality and disclosure should be a cooperative, mutually respectful endeavor between the bar and the state, a joint effort to balance the value of lawyer-client confidentiality against the multiplicity of other policy concerns furthered by disclosure laws. Lawyers are part of the system in which the debate takes place, in which legislative bodies weigh the competing concerns (albeit grossly imperfectly), in which judicial actors endeavor to interpret the results (and assess whether the results offend constitutional principles), and in which those results have some claim to be authoritative settlements of intense normative controversy. Lawyers, like any other political constituency, can be bitterly disappointed by how it turns out, convinced that the legislature's result strikes the wrong balance between competing concerns. Like any other political constituency, however, lawyers ought to understand and acknowledge that they are nonetheless bound by it. The framework of professional responsibility that lawyers draft, adopt, and enforce should recognize that—especially since the boundary claim represents that we already do.