Fred Z.

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I.

My friend Fred Zacharias was a stubborn and in many ways an unreasonable man. That is why I liked him. He was also a very decent man, which is why I admired him. To say he was decent is not to damn with faint praise, for decency is underrated in the law, or so I argue below. I miss my conversations about legal ethics with Fred, so for my argument I take this opportunity to continue one of them.

II.

Fred had two main academic concerns. He wanted the rules of professional conduct to have coherent purposes and to adopt means reasonably calculated to achieve those purposes. Our discussions on this topic were short. I maintained the rules had a coherent purpose, at least insofar as they deviated from agency law principles: to make life easier and more profitable for lawyers. The mandatory rules tend to cut costs, while the discretionary rules make room to maximize income. The claim is not uniformly true, I admit, but it explains more than any competing theory and does so more simply.[1]

Fred would listen indulgently to my reductionist rants and smile an amused smile. He would not necessarily disagree with me, and he would point out that he himself dabbled in law and economics from time to time. He would insist, though, that there was another, more charitable

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1. For example, it does not explain Model Rule 3.8, setting forth ethical obligations of prosecutors.

way to look at the rules, and he held out hope that they could be improved.

Fred's insistence drew strength from his second main concern, which is my topic here. Fred worried about the abuse of power. He knew power must be located somewhere and that locating it anywhere puts some persons at risk. He cared about the potential victims of power—often reminding me of his background as a public interest lawyer and contrasting it with my own work for big companies—but his concern went deeper than that.

Fred was concerned about how power affects those who hold it. His concern was fundamental, rooted in very old-fashioned notions of propriety—some things are simply "not done." In his work he chose the term integrity to describe what he had in mind. I prefer a different term to describe the light that came to Fred's eyes when we ventured into certain territory. In my terms, Fred insisted on a role in legal ethics for the maddeningly diffuse but absolutely fundamental notion of decency.

The nature of discretion offers a good example of this aspect of Fred's thinking, and I explore his views through a particular problem he and I debated. Here it is: Disciplinary rules permit but do not require lawyers to disclose a client's intention to injure or kill a third party.[2] The ABA's rules, though not California's, also permit disclosure to prevent or rectify financial harm to a third party caused by dealings in which the lawyer's services were used.[3] Assume clients prefer that lawyers not disclose their planned or consummated crimes or frauds, and that lawyers intuitively understand this preference. May a lawyer act on this understanding by promising clients never to blow the whistle on them, thereby competing more effectively for their work?

In a piece I wrote several years ago I recounted a conversation with Fred in which he argued that a grant of discretion to a lawyer to disclose client misconduct might be read to imply that the lawyer actually must exercise that discretion. On this view a lawyer may not promise clients never to disclose their misdeeds, for to do so would be to disavow the discretion lawyers are bound to exercise.[4] Fred later articulated this

2. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2) (2010); CAL. RULES OF PROF'L CONDUCT R. 3-100 (2010).

3. *Compare* MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2)–(3) (2010), *with* CAL. RULES OF PROF'L CONDUCT R. 3-100.

4. David McGowan, *Why Not Try the Carrot? A Modest Proposal To Grant Immunity to Lawyers Who Disclose Client Financial Misconduct*, 92 CALIF. L. REV. 1825, 1825 n.1 (2004).

view in a very fine piece with Bruce Green,[5] and he alluded to it in several other pieces as well.[6]

I did not say much about Fred's argument when we discussed the issue. I think I told him I could not see disciplinary boards actually pursuing such a theory and that "may" is an awfully odd way of saying "must." I may have added that in my view lawyers in fact do cultivate reputations for silence, but they do so by not disclosing rather than by promising not to disclose. The implication was that the duty to exercise discretion that Fred contemplated either was commonly violated or, more likely, just did not exist. Fred smiled his amused smile and said I should not be so quick; I needed to expand my view of what the rules might do.

III.

I never was persuaded by Fred's view, but I always admired the convictions I saw behind it. It is those convictions I want to assess here. I said above that Fred believed there might be an argument that lawyers may not bind themselves not to blow the whistle on clients under circumstances when the rules permit them to do so. What might that argument look like?

One argument for such a position takes the form of a third-party beneficiary theory. The claim would be that the intended or actual victims of client misconduct are intended beneficiaries of the lawyer's ability to disclose, and the lawyer wrongs them by promising never to use that ability. A variation on this theme is the claim that the exception allowing disclosure aims to grant third parties some degree of protection by not subjecting to punishment lawyers who might try to help them. Lawyers who promise not to help third parties, the argument goes, frustrate this purpose.

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

6. *See, e.g.*, Fred C. Zacharias, *Effects of Reputation on the Legal Profession*, 65 WASH. & LEE L. REV. 173, 178 (2008); Fred C. Zacharias, *Integrity Ethics*, 22 GEO. J. LEGAL ETHICS 541, 568 (2009) [hereinafter Zacharias, *Integrity Ethics*]; Fred C. Zacharias, *Steroids and Legal Ethics Codes: Are Lawyers Rational Actors?*, 85 NOTRE DAME L. REV. 671, 685 (2009); Fred C. Zacharias, *The Images of Lawyers*, 20 GEO. J. LEGAL ETHICS 73, 99 (2007); Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147, 1186 (2009).

The third-party beneficiary argument seems to me unsound because the rule grants third parties no right to be warned by lawyers who represent harm-causing clients. The rules themselves state that they are not intended to create causes of action,[7] and anyone familiar with lawyers' paranoia over this subject should be quick to conclude that the ABA did not intend to create *Tarasoff* liability by allowing such disclosure.[8] California was even clearer on this point.[9] The best explanation for expansion of the ABA rule to allow disclosure to prevent or rectify financial harm is actually a self-interested one: lawyers saw momentum for reform building in the wake of various corporate scandals and changed the rule in an effort to control reform rather than have it imposed on them.[10] A lawyer who promises not to warn therefore deprives third parties of nothing to which they are legally entitled.

The purposive claim seems to me to falter as well. The rule was changed to permit disclosure without risk of discipline. That purpose is fulfilled when lawyers are free to disregard discipline as a reason for acting. The language of the rule does not foreclose lawyers from restraining themselves, and no such interpretation is needed to accomplish the rather narrow purpose the exception aims to fulfill.

I rehearse these arguments because I know well that Fred was fully aware of them and understood their significance. Rejoinders to the third-party beneficiary argument did not bother him because he was making a different argument. He viewed exceptions to the general confidentiality rule as "integrity exception[s]."[11] By this he meant the exception was one of a particular type of rule "designed to assure that lawyers do not take the demands of role too far. These provisions encourage lawyers to act in the same way as other moral individuals when systemic conditions do not demand a departure from ordinary behavior."[12] For Fred, these rules serve as a reminder that lawyers "do not shed the obligation to behave ethically—and should not even adopt a position of amorality—just because they are members of the bar."[13]

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7. MODEL RULES OF PROF'L CONDUCT pmbl. para. 20 (2010). Paragraph 14 in the scope note to the ABA rules reinforces this conclusion; it states that certain rules "generally cast in the term 'may,' are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion." *Id.* para. 14.

8. *See* Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334 (Cal. 1976) (recognizing failure to warn theory of liability against psychotherapists in some circumstances).

9. CAL. RULES OF PROF'L CONDUCT R. 3-100(E).

10. McGowan, *supra* note 4.

11. *See* Zacharias, *Integrity Ethics*, *supra* note 6, at 572–73.

12. *Id.* at 545.

13. *Id.*

But how does a permissive exception with so few teeth serve this function? Fred rightly found the answer by looking to the context in which lawyers must decide to disclose or remain silent. He pointed out that lawyers operate under a general command not to use or disclose client confidences. For lawyers, silence is normal and requires no explanation; disclosure deviates from this norm. In addition, lawyers are taught and may believe that silence is necessary to maintain client trust. The salience of this concern might lead them to underestimate the social value of stopping or rectifying client harm. Finally, Fred well knew that lawyers' economic interests reinforce the norm of silence. No one is likely to land a future client by pointing out they blew the whistle on the last one.

Against the background of these constant features of practice, Fred saw the exception allowing disclosure of confidential information as a "moral reminder" to lawyers that they may "act with the same moral impulses as ordinary citizens."[14] For Fred these impulses were clear: one must safeguard others unless doing so causes fear for one's own safety.[15] To the extent one cares about actually preventing lawyers from contracting away their right to act morally, Fred understood the rules might need tweaking. His point was that the need for alteration did not imply that the exception is meaningless as written. It serves to remind lawyers of something the circumstances of practice may lead them to forget: they are human.

IV.

Appeals to "integrity" and similar concepts always break down if they are pushed too hard. One cannot use them to prove anything in the sense of a logical entailment. Whatever proof one might conceive will have the form, as Arthur Leff so memorably put it, of a definition asserted early in the game and whispered much later as a conclusion.[16]

Here is how easy it is. Take integrity and the exception allowing disclosure to avoid or remedy client harm. What are we actually talking about? It is an obvious mistake to start the analysis at the moment the lawyer learns what the client did or plans to do. We have to go back to

14. *Id.* at 573.
15. *Id.* at 572–73.
16. Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 454 (1974).

the point when the lawyer induces the client to confide in her. Having succeeded in cultivating trust the lawyer then, for reasons of her own—call them moral if you will, but they are hers and not the client's—betrays the trust she cultivated. Where is the integrity in that?

The argument then takes a series of very familiar turns. The lawyer replies that the client is doing or has done wrong and has no right to expect the lawyer to hide his conduct. Suppose that is so (though betraying a wrongdoer is not obviously justified; after all, two wrongs need not make a right). What about clients in general? Will not other clients learn of the lawyer's disloyalty and distrust their own lawyers even when they intend no wrong? Why do wrong in many cases to do right in one? Except, of course, there is no way to prove any of this. The moves are just nice—because possibly true—rhetorical moves. They are unproved and probably unprovable assertions flying past each other at ever-greater speeds and volume. How dreary.

So far as I know, Fred never engaged this problem directly when discussing his integrity exception. He recurred instead to the "moral impulses of ordinary citizens" and the notion of the ordinary moral individual. I think the key word here is *ordinary*. Fred understood that people are imperfect. They tend to do what they can, but what they can do depends on their circumstances. The common sense and common practice of a community is one of the most important of those circumstances.

Fred knew that. He knew as well that in legal ethics at least two sets of communities always have claims to assert: professional communities of lawyers and the broader communities in which they practice. Professional communities vary in many ways and have widely disparate views—prosecutors and defense lawyers are both members of such communities after all—but they share a sense that there is such a thing as a lawyer's role, and they share as well the sense that they have agreed to assume that role. How far it extends is therefore a common concern for lawyers. It is a concern as well to any community in which lawyers practice, for the nonlawyers in that community will feel the effects of different conceptions of proper and improper lawyerly conduct. The exception allowing lawyers to disclose client misconduct straddles a boundary between the claims of these communities: confidentiality is a core element of the lawyer's role, but it is nonlawyer members of the community who are likely to suffer from an excessive commitment to confidentiality.

For Fred, I think, integrity rules are a way for lawyers to remind themselves of the claims of these different communities and of the need to navigate the boundaries of those claims with care. His argument rightly implied that it is not only unrealistic for lawyers to pretend they

can ignore the moral claims of the broader communities in which they work but probably unhealthy as well. Counterexamples may be found—the common morality of Southern States in the 1950s and 1960s was not a sound guide to lawyer's ethics, though it was asserted that way[17]—but in general the point is both right and important.

It is in this respect that I read Fred's argument as showing his concern for the abuse of power. In a society as legalistic as ours, lawyers have power. Clients who need help must confide in their lawyers. Possession of these confidences gives lawyers power over their clients, a fact prominent in nineteenth-century writings on legal ethics. The confidentiality obligations of agency law and, later, rules of professional conduct seek to constrain this power by requiring that it be exercised only for the client's benefit. In this respect the rules protect clients from lawyers but the constraint creates new risks: lawyers may be disabled from protecting innocent persons at risk of harm or from aiding persons who have been harmed already—thus the exception to the constraining rule.

Fred's integrity exception therefore reflects the inescapable problem that power must be created but, once created, may be misused. Power to harm a client may be power to save a member of the community. Whose claims should prevail? Fred did not pretend to answer that question. By implication he rejected any categorical answer. The only sensible answer—and, I think, Fred's answer—is that it depends. It depends on the relative strength of the claims of each community in a particular situation.

Thus, for Fred the point of the integrity exception was that the claims of each community count. Because lawyers invariably attend to the claims of whatever legal community they are a part, Fred insisted that integrity rules serve an important function in drawing lawyers' attention to the full range of claims morally worthy of consideration in a given case. Doing so entails no answer, but that is not the point; the point instead is that to act morally one must take all morally relevant considerations into account.

As I mentioned earlier, I am not sure integrity is the right term to describe the exception we have been considering or the class of rules of which it is a member. The term is too closely associated with notions of honesty and incorruptibility, and, for me at least, it therefore does not

17. *See, e.g.*, NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

capture the importance of "ordinary" moral considerations. I prefer an equally imprecise but humbler term: *decency*.

The term came to mind as I thought about my discussions with Fred on this topic, and it did so through an unusual route. In a justly celebrated essay on Charles Dickens, Orwell wrote that Dickens's moral message "is one that at first glance looks like an enormous platitude: If men would behave decently the world would be decent."[18] Thus, Orwell points out, in Dickens's novels bad situations often get better because powerful (rich) men act decently.[19] But Orwell also saw in Dickens a deep hatred of tyranny and thus a central problem implied by Dickens's work: "how to prevent power from being abused."[20] The problem was unsolved and is in fact insoluble. But from that perspective, "'[i]f men would behave decently the world would be decent' is not such a platitude as it sounds."[21]

Orwell was right. The difference between a platitude and an indispensible insight often depends on how seriously one takes the problem to which the platitude pertains. Fred took the abuse of power seriously, so he took the problem of integrity—decency, in my terms—seriously. He offered no algorithms or categorical answers. He insisted instead that lawyers take seriously the moral claims of each community in which they worked and affected; he insisted that lawyers not pretend the claims of their own community are always entitled to prevail. He knew no ready answer can withstand engagement with the conflicting claims lawyers face. He insisted that the best that can be done in such cases is to remember that decency has a role in law, which suffers when lawyers pretend otherwise.

Decency has one other virtue as a description of Fred's argument. May Sarton once wrote that in modern times "[o]ne must think like a hero to behave like a merely decent human being."[22] She was not writing about lawyers, but Fred saw the truth of that sentiment for our profession. He sensed a hero shortage in our line of work, and he hoped the rules could do a little to help make up the deficiency. He hoped so because he was a truly decent man.

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18. GEORGE ORWELL, *Charles Dickens*, *in* 1 THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL 413, 417 (Sonia Orwell & Ian Angus eds., 1968).

19. Good men but not lawyers. Tulkinghorn's pursuit of Lady Dedlock is the quintessential example of lawyers abusing the power that goes with obtaining a client's confidences.

20. ORWELL, *supra* note 18, at 427–28.

21. *Id.* at 428.

22. MAY SARTON, JOURNAL OF A SOLITUDE 101 (1973).

V.

I do not know if Fred would agree with my reading of his arguments. I like to think he would, but I am fairly sure he would have corrections. I wish I knew what they were. I would learn from them. So would we all.