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Living "Top-Down" in a "Bottom-Up" World: Musings on the Relationship Between Jewish Ethics and Legal Ethics

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Russell Pearce pointed out an interesting phenomenon.

Last Spring, ... I had the opportunity to help lead a[ ] ... program for Jewish and Christian lawyers on the role of religion in a lawyer's work. At the first session, the lawyers received text sources and heard talks from a leading Christian theologian and a prominent Rabbi on religious perspectives on professional role. I then separated the lawyers into a Christian group and a Jewish group and asked them to construct a religious concept of the lawyer's professional role. The Christian lawyers debated whether the concepts of vocation and calling applied to their work. Despite explicit guidance from the Rabbinic speaker, the Jewish lawyers ignored the religious implications of their practice. Instead, they focused on how their minority status and the resulting experience of discrimination influenced their approach to lawyering, including their commitment to rule of law and social justice.

tion gave me the opportunity to write about the intersection of Jewish ethics and legal ethics. It’s not surprising that I chose that topic, given my background.

I’ve been fascinated by legal ethics ever since I was a first-year associate at my former law firm. Even then, I was trying to understand how the generalist ethics rules—“be zealous in representing your client”; “protect the client’s confidential information”; “be loyal to the interests of your client”—fit particular types of legal situations. Once I became an academic, I was able to spend much more time thinking about some difficult ethical questions. Virtually all of my research has, in some way, been tied to legal ethics, especially bankruptcy ethics.\footnote{See, e.g., \textit{Model Rules of Professional Conduct} Rule 3.1 cmt. 1 (1993) [hereinafter \textit{Model Rules}] (“The advocate has a duty to use legal procedure for the fullest benefit of the client’s cause, but also a duty not to abuse legal procedure.”); \textit{Model Code of Professional Responsibility} DR 7-102 (1983) [hereinafter \textit{Model Code}]. Model Rules 3.2-3.9 spend a lot of time describing what is not considered appropriate zeal. \textit{See} \textit{Model Rules}, supra, Rules 3.2-3.9.}

\footnote{See, e.g., \textit{Model Rules}, supra note 2, Rule 1.6 (general rule regarding confidentiality), Rule 1.2 cmt. 7 (“lawyer is not permitted to reveal the client’s wrongdoing, except where permitted by Rule 1.6”), Rule 1.17 cmt. 11 (lawyer selling her law practice must protect dissemination of confidential information); \textit{Model Code}, supra note 2, DR 4-101 (general rule regarding confidentiality).}

\footnote{See, e.g., \textit{Model Rules}, supra note 2, Rule 1.7 (general conflict of interest rule), Rule 1.7 cmt. 1 (“Loyalty is an essential element in the lawyer’s relationship to a client.”), Rule 1.8 (conflicts relating to prohibited transactions), Rule 1.9 (conflicts relating to former clients), Rule 1.10 (imputed disqualification); \textit{Model Code}, supra note 2, DR 5-101 (general conflict of interest rule).}

In the Nemzer lecture, I ventured outside my comfort zone of bankruptcy ethics into the zone of Jewish ethics. That was a bit scary for someone who grew up as one of a handful of Jews in a small town in Texas. Our house was chock-full of Jewish knowledge—everything from the Encyclopedia Judaica to books and articles written by my own family—and still, with such a small Jewish population, my Jewish upbringing was vastly different from Jews growing up in areas like New York or Los Angeles. I was, and am, Jewish-identified and somewhat (erratically) observant, but I'm not someone who was immersed in orthodox culture growing up. In this essay, then, I have the opportunity to unite my two worlds: my Jewish world and my academic world.

Let's start with two different ways of looking at ethics. One way is what I call the "top down" view. The rules of behavior are given to the society by the leader (the governing authority) of that society. Jewish ethics are, by their nature, "top down" rules. We get them from God (although, in a few pages, I'll discuss some vastly different conceptions of Jewish ethics). Although the meaning of various Jewish ethical rules can be—and are—debated hotly, the legitimacy of these rules comes from a single authority, rather than from a consensus of opinion.

Contrast that with the way that legal rules of ethics are developed in the United States. There's no one single source that issues ethics edicts in law in the same top-down manner of Jewish ethics. Instead, lawyers debate what rules should be adopted to describe the common ground of ethical behavior. After they reach a consensus, they draft the rules. I'd call this more of a "bottom-up" approach: the community as a whole agrees on the rules and then enforces them.

6. To the extent that some Jewish laws are derived from interpreting certain Jewish principles, some of these laws are "human-reasoned" and not directly "God-derived."
7. I'd hazard a guess that, in civil-law countries, the formation of legal ethics rules would be more of a "top-down" approach than a "bottom-up" approach.
9. Well, technically, a state supreme court will adopt the rules, often based on the Model Rules or the Model Code, and enforce them. Typically, though, a court will seek input from lawyers before adopting the rules. Reasonable minds can disa-
We can draw several conclusions from the way that the top-down and bottom-up approaches differ. One obvious conclusion is that the top-down approach spends more time emphasizing aspirational goals. It’s not good enough merely to “not be” a “bad” Jew; we must constantly strive to be “better” Jews. The bottom-up approach, on the other hand, has aspirational aspects, which suggest how to be a “good” lawyer. Still, the bottom-up approach—because it is developed by compromise and consensus—focuses much of its efforts on prohibiting “bad” behavior. If a lawyer doesn’t commit an ethical violation, she can’t be punished—even if her behavior doesn’t live up to the aspirational goals of the ethics rules.\(^\text{10}\)

Another distinction is the “absolute rightness” of the rules. In a top-down world, the “rightness” of the rules is a “given.” Much like a parent’s phrase, “because I said so,” the rules simply “are” and, as such, are “right” by definition. In a bottom-up world, on the other hand, the rules are created through debate and compromise, and the result can be “mostly right” but not necessarily “absolutely right.”\(^\text{11}\) The “rightness” isn’t right by definition but is due to an overlap between what the community decides is right and our notions of moral “rightness.”

That’s my first distinction: the top-down approach vs. the bottom-up approach. But before we can really examine the differences and similarities of Jewish ethics and legal ethics, we need to make a few more distinctions. I base the next set of distinctions on what would make someone decide to follow any ethics rules. What gives ethics rules their power is the willingness of the “governed” group to be governed by those particular rules. That, in turn, means that people have to decide just which group they’re in.

It’s a fallacy to say that anyone is a member of just one group.\(^\text{12}\) Typically, people are members of several groups simultaneously: for example, I’m a married, female, Ashkenazic, Reform Jewish law professor living in Lincoln, Nebraska. Depending on what context I’m in, any one of these (or any other of my myriad of group identities) may

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\(^{10}\) I don’t mean to say that lawyers shouldn’t aspire to “good lawyer” behavior—just that they can’t be punished for not living up to the “best” behavior.

\(^{11}\) Note that Monroe Freedman finds “Jewish sources” for themes in legal ethics, including “the dignity and sanctity of the individual, compassion for fellow human beings, individual autonomy, and equal protection of the laws.” Freedman, supra note 8, at 1134. Still, the very non-uniformity of state ethics codes demonstrates the murky nature of compromise and consensus inherent in a bottom-up approach.

\(^{12}\) See, e.g., Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581 (1990) (discussing the overlapping identities of being female and African-American).
come to the fore. Each of my identities is important, although some are more important than others.\footnote{Cf. GEORGE ORWELL, ANIMAL FARM 112 (Harcourt, Brace & Co., 1946) ("All animals are equal. But some animals are more equal than others.").}

Let's start by examining one area of identity: Jewishness.\footnote{Sandy Levinson has written about five different types of Jewish lawyers. See Sanford Levinson, Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity, 14 CARDOZO L. REV. 1577 (1993). I'm using his article as a jumping point for my discussion.} Although we all know that there's an infinite range of ways in which people can identify as Jewish, I'm just going to talk about the Big Three and One Other: observant/Orthodox Jews, Conservative Jews, and Reform Jews, on the one hand, and socially or ethnically identified (but nonreligious) Jews, on the other.\footnote{There are, of course, also unaffiliated Jews: Jews by birth who don't think, one way or another, about their Jewishness. Levinson presents "five models of the Jewish lawyer"— roughly speaking: (1) nonaffiliated Jews who are lawyers; (2) ethnically identified Jews who are lawyers; (3) Jews who observe some of the commandments while practicing law; (4) Jews practicing in Jewish court settings; and (5) observant/Orthodox Jews who practice outside of the Jewish court setting. See Levinson, supra note 14, at 1585-1605. I find his typology intriguing but ultimately not very useful for my purposes. Cf. Russell G. Pearce, Jewish Lawyering in a Multicultural Society: A Midrash on Levinson, 14 CARDOZO L. REV. 1613 (1993).}

One way of viewing Jewishness is by the degree to which the top-down rules are taken literally by the Big Three and One Other. Another, closely related, way of viewing Jewishness would be the degree to which all of the other “memberships” are governed by those same top-down rules.

Take observant/Orthodox Jews: everything in their life is governed by these top-down rules (work, prayer, food, relationships, etc.).\footnote{See Pearce, supra note 1, at 1266 ("Godly actions have been a necessary part of being a religious Jew."); Steven H. Resnicoff, A Jewish Look at Lawyering Ethics, 15 Touro L. Rev. 73, 77 (1998) ("Indeed, the nature of Jewish law is that it is a 24-hour a day, 7-day a week religion with prescribed rules for virtually every activity.").} There's a beauty to that way of life—a beauty born of appreciating, and ritualizing, every aspect of life: from seeing something wonderful for the first time (which has its own bracha) to eating an ordinary meal (ditto). Because of the ways in which observant Jews must conduct their daily lives, they tend to gather in communities composed of other observant Jews, if that's at all possible.\footnote{It certainly makes their lives easier that way. They have better access to kosher food, to a minyan, and to other necessities of observant life.} Their goal is to follow God's commandments as fully as they possibly can, and all of their other memberships relate to their "top-down" world.

As we move farther away from the observant side of the observant/nonobservant continuum, we see less of a willingness to follow all of
the rules literally. Now, I'm not saying that Conservative Jews aren't observant or that their Jewishness doesn't govern their daily conduct. Far from it. But they have elected to modernize the application of the commandments, which means that, at the very least, they're engaging in a different level of interpreting the rules. And Reform Jews tend toward even more interpretation, and more selection, in terms of which rules to follow.

What of nonreligious but still Jewishly identified Jews? Their group membership doesn't seem to come from a top-down basis but from other, still strong, ties. I'm finding it difficult to fit them into my typology, but we need to note their presence. In order to round out the continuum, I also have to consider a fifth group: Jews who don't identify with Judaism at all. It would be convenient if I could draw a continuum of Jewish identity, with observant/Orthodox Jews on one side and unaffiliated Jews on the other side. I'm not sure that it's that simple, but we'll use the continuum construct for now.

Now let's look at the bottom-up system of legal ethics. The two most common models of ethics rules, the Model Code of Professional Responsibility and the Model Rules of Professional Conduct, presume a level of generality about lawyer behavior that is extremely abstract. Under the Model Code or the Model Rules, the rules are designed to cover all lawyers. Even though the ethics rules recognize that lawyers can play several different types of roles—advocate, counselor, mediator—and even though certain rules take those different roles into account, the rules are still designed to be multipurpose in

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18. Yes, this is a gross generalization. And a lot depends on whether ritualism is being used for its own sake or as a way of connecting with the world. See Pearce, supra note 1, at 1265 ("The modern versions of Judaism which emphasize 'pure ritualism' or other forms which reject the command 'to go out into the world' permit the Jewish lawyer to subscribe to the idea of professional ethics trumping individual ethics or some limited religiosity compatible with [that concept].").

19. See Pearce, supra note 1, at 1266-67 (describing how Reform, Conservative, and Orthodox Jews all embrace Judaism as a way of life, inseparable from life itself).

20. Observant Jews interpret the rules, too (that's half the fun of religious scholarship), but their goal in interpretation isn't necessarily to modernize the rules.

21. Heck, I began writing this essay on Shabbat, using a computer. I'm pretty far on the non-observant side of the continuum for that, even though I try not to eat treife food (mostly because I want to make a symbolic statement about being Jewish). Recently, though, Reform Judaism has become more willing to embrace some traditions, at least for those Reform Jews who feel a need to embrace such traditions. See Nadine Brozan & Gustav Niebuhr, Reform Judaism Reforms Its Tenets: New Platform Encourages Old Rituals, Chi. Trib., May 27, 1999 at 6, available in 1999 WL 2877387.

22. One of my Ohio State colleagues, Mary Beth Beazley, taught me about how she uses the "abstraction ladder." I love that ladder image. The level of abstraction of the ethics codes is somewhere near the top rung of the ladder.

23. See, e.g., Model Rules, supra note 2, Article 2 (rules governing the lawyer in her role as a counselor), Article 3 (rules governing the lawyer in her role as an advo-
nature. Other codes of legal ethics are more subject-matter specific: there are rules for groups such as matrimonial lawyers and military lawyers, and I'm in the process of proposing (in another article) a set of rules for bankruptcy lawyers. 24

One thing to note about the codes of legal ethics is that they are designed to do two things: to punish departures from the "floor" of acceptable, minimally ethical conduct, and to guide lawyers toward improvements upon that floor. But only one of these purposes carries with it the threat of punishment: departures from the floor of acceptable conduct. In other words, the bottom-up effect of legal ethics is that it punishes the worst behavior of the group. The bottom-up nature doesn't reward improvements upon decent behavior. 25

In addition, because these rules are bottom-up, there's a lot more leeway in "opting in" and "opting out" of the rules if they don't seem to apply to a particular situation, although lawyers who make the wrong decision about "opting out" are subject to sanctions for violating those ethics rules. For example, there are lawyers who don't "do" litigation, and those lawyers probably don't spend a lot of time thinking about the litigation-oriented rules in the ethics codes. Litigators, likewise, are not likely to be as concerned with things that transactional lawyers care about, like scriveners' errors (mistakes in drafting a document). 26 If a bottom-up code is created by consensus, and not from a unitary authority, then the justification for following the code loses some of its force if the relevant consensus group wasn't part of the rule-drafting.

In essence, what I'm saying is that following the Jewish ethics rules depends in large part on how literally one takes those rules. I see concentric circles of literalness 27 that can predict how closely those rules are going to be followed. Observant Jews will be the most likely to follow all of the rules; Conservative Jews will follow most, but not all, of the rules; and Reform Jews will follow some, but not others.

Obviously, there are some overlaps between top-down and bottom-up ethics codes. Both top-down and bottom-up codes will frown on, say, the crime of murder. And yet, if we were to draw a Venn dia-

cate); Model Code, supra note 2, EC 7-3 (distinguishing the lawyer as advisor from the lawyer as advocate).

24. See Rapoport, Uniform Code, supra note 5.

25. Although there are awards for "lawyer of the year," not every lawyer who behaves ethically is going to receive one and not everyone who wins one wins it because of ethical behavior.

26. For an excellent discussion of the differences between litigation ethics and transactional ethics, see John S. Dzienkowski, Positional Conflicts of Interest, 71 Tex. L. Rev. 457 (1993).

27. Except for my group of ethnically but not religiously identified Jews.
gram of the two types of rules, there’d be a shaded area where the two types of codes overlap, but there’d still be a lot in each circle without overlaps."

By now, you should be wondering where I’m taking this discussion. I’ve set up two types of codes, each with a different basis for legitimacy. What I want to spend the rest of this essay discussing is how a Jewish lawyer might reconcile Jewish commandments with the commandments of legal ethics.

Let’s first clear up a simple but common mistake: we can’t refer to the top-down Jewish code as “the world of the spirit” and the bottom-up code of lawyers as “the real world.” The Jewish code has many “real world” imperatives and the lawyer code has some traditionally moral precepts. But that still begs the question: how does a top-down Jewish lawyer behave in the bottom-up world of legal ethics?

That raises several issues facing the Jewish lawyer: issues of Jewish identity (the continuum from religious identity to ethnic identity to non-identity); and issues of other group affiliations that intersect with Jewish identity, such as race, gender, politics, and socio-economic class. There’s also the issue of how discrimination has tended to shape our attitudes toward law and justice. As I’ve already mentioned, each person is an amalgam of several different group identities. No one’s ever just Jewish: there are too many overlapping affiliations in a person’s life. I’m Jewish; I’m a lawyer; I’m a law professor; I’m an administrator; I’m female; I’m married; I’m an only child of two living parents. The list goes on and on.

But even though every person has several overlapping affiliations, those affiliations must have differences in strength. Try this pop test. If I asked you to tell me about yourself, what would be the first thing

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28. That’s the one with the universe of possibilities as a square and each of the domains as circles within the square.
29. Someday, when I have more time, I’m looking forward to exploring other areas in which Judaism and secular law intersect. The intersection of Judaism and business ethics (and, naturally, the intersection between Judaism and bankruptcy law) intrigues me. In the meantime, there are plenty of good articles exploring these issues. See, e.g., Steven H. Resnicoff, A Jewish Law Perspective on the Propriety of Discharging Personal Debts, 31 BANKR. CR. DEC. A3 (February 3, 1996); James Scheinman, The Evolution and Impact of Jewish Law: Jewish Business Ethics, 1 U.C. DAVIS J. INT’L L. & POL’Y 63 (1995).
30. See Pearce, supra note 1, at 1256 (“The separation of work from religion, like the separation of ‘holiness-through-works [from] holiness by grace,’ is ‘alien’ to Judaism.”).
31. For a wonderful discussion on this topic, see Resnicoff, supra note 16.
32. See Pearce, supra note 1, at 1261-62. As Pearce points out, “[e]xtensive hiring discrimination against Jewish lawyers was documented as late as the 1960s and stereotypes of Jewish lawyers, both positive and negative, persist today.” Id. at 1262 (citation omitted).
33. See supra note 12 and accompanying text.
out of your mouth? We tend to self-order affiliations in terms of their importance. Listen to how people describe themselves: "soccer mom"; "liberal Democrat." Obviously, the self-ordering is context-dependent. But if you look at self-ordering over a wide variety of contexts, some patterns are going to emerge. Listen to the ways in which a lawyer might identify herself. What comes first in the description? Do you hear "lawyer"? "Litigator"? "Inside counsel"? "Public interest lawyer"? "African-American lawyer"? Another combination of personal and professional identity? What I've been listening for recently is how many lawyers identify themselves first as Jewish lawyers. Not only have I been listening for that, but I'm really interested in defining what that means.

For those unaffiliated Jews who really don't add their religious affiliation to their core self-identity, there shouldn't be much difficulty in trying to deal with issues where Jewish ethics and legal ethics may conflict. The question doesn't come up because the twin affiliations aren't, in the person's own mind, equally strong. Sandy Levinson refers to this as the "bleaching out" of lawyers: washing away individual lawyers' other affinities as we educate them to be lawyers, so that their "lawyerness" overwhelms any of their other characteristics.

Much has been written on the socialization of law students into lawyers, starting from the premise that law schools train law students to "think like lawyers," and then questioning whether that presumption, in fact, holds true. Several studies have confirmed that law

34. Of course, the complicating factor is that we also self-order in terms of context. In a group of law professors, I won't say I'm a law professor. I'll say that I teach bankruptcy, or that I'm also a Dean, or something else that has resonance to the group as a whole (since "law professor" is, in that context, a "given").

35. I've never heard people identify themselves as "white male lawyers." Either it doesn't happen, because the dominant paradigm of lawyering is still "white male," or it doesn't happen in my presence. (Of course, I don't go around identifying myself as a "woman lawyer," both because I hate that phrase and because one look at me is a dead giveaway.) People identify themselves in a way to give context and to distinguish themselves from the others in the group.

36. Russell Pearce suggests that identified but nonreligious Jews would use their background to fight for justice and fairness. See Pearce, supra note 1, at 1263-64.

37. See Levinson, supra note 14, at 1578. Monroe Freedman has called into question Levinson's use of the phrase "bleaching out." See Freedman, supra note 8, at 1134 ("I was taken aback when I learned that I am being used, or misused, by Professor Sanford Levinson as representing those lawyers whose religious identity and personal ethics have been 'bleached out' by their professional ethics.").

38. See John Jay Osborne, Jr., The Paper Chase (1971); The Paper Chase (Twentieth Century-Fox 1973).

students evolve during law school to focus more on unemotional legal reasoning (what some call a “rights” focus) and less on questions of community-centered caring (what some call the “ethics of care”). Other studies indicate that law students enter law school with particular “lawyer attributes”—in other words, that some self-selection goes on in the law school application process.

But what I’m particularly concerned about is what other attributes in addition to gender and race—in particular, the ethical attributes—law students bring into, and take out of, law school. The literature talks about the socialization into law school of women and people of color. I haven’t seen much written on the socialization into law school of observant Jews or Christians or Moslems or secular human-
ists. Moreover, I wonder how people who enter law school with deeply ingrained ethical beliefs handle the particular issues faced by lawyers.

Overall, do I think that some bleaching out occurs? Maybe. But I also think that it's easier to bleach out things that aren't so deeply woven into the entire fabric. The problem is that strong ethical beliefs can conflict with legal ethics to the point of making the conflicted lawyer choose between her identity as a lawyer and her identity as a member of a group holding particular ethical beliefs.

Let's assume that we don't want "bleaching out" as much as we want some sort of "interweaving." Then if we progress along the continuum from "unaffiliated" to "ethnic but not religious" to "religious," we see the problem: those Jews who are more affiliated might well have a problem when Jewish ethics conflict with legal ethics.

I've spoken in generalities up to this point, and now it's time to give my generalizations some context. One way to do this is to examine some identifying characteristics of lawyers as professionals: there's loyalty (including zealous representation of the client), confidentiality, the dual (and sometimes dueling) roles of the lawyer as advocate for (or counselor to) the client and as officer of the court, and the notion that the lawyer, as a professional, owes a duty of service to the com-

44. But see, e.g., Guinier, supra note 39 (arguing that attitudinal differences between women and men are homogenized by the conclusion of law school); cf. Rhode, supra note 39, at 1554 ("Legal practice responds to a complex interplay of forces; law school socialization is only one, and in many arenas, hardly the most influential.").

Not everything is, or should be, "bleachable." As Pearce suggests, "[i]nstead of trying to 'bleach out' difference, we should try to 'create community' by speaking frankly about how to realize a legal system which results in equal justice given our differences and our similarities." Pearce, supra note 1, at 1269-70.

45. See Rabouin, supra note 39, at 15 ("In order to do an adequate job of ethical education . . . one has to combine the insights of Kohlberg [and his stratified ladder of ethical reasoning] and Gilligan [and her observations about gender differences in ethical reasoning]. An integrative approach incorporates thinking, action, and moral affect that often serves as a motivational bridge between knowing what is right and actually doing it.").

46. I'm oversimplifying here. There's also "ethnic and religious," at least, and probably there are other categories as well. But we'll stick to oversimplifying for now.

47. As Steve Resnicoff explains,

[As a practical matter, Jewish lawyers exist in a secular environment which, because of its emphasis on the attorney-client relationship and the adversary process, exhorts attorneys to represent clients irrespective of the moral repugnance of their causes and trains them to employ techniques that, at least in individual cases, are not designed to reach a just result - or a result that complies with Jewish law. This ambience operates to deaden a Jewish lawyer's sensitivity to Jewish law[']s obligations and aspirations.

Resnicoff, supra note 16, at 103.

48. Traditionally, Jewish doctrine has been uncomfortable with the idea of advocacy. Maimonides feared that lawyers would manipulate facts so as to obscure the let-
munity. These characteristics have both client-based and community-based qualities. They’re client-based in the sense that most of the duties relate to the trust that the client places in the lawyer. The lawyer is supposed to honor the client’s needs to the exclusion of the needs of non-clients. However, there’s still that troubling issue of balancing the needs of the client with the needs of the legal system as a whole—the “officer of the court” problem.

Now let’s look at some identifying characteristics of Jews. This one’s more difficult because it depends on where along the continuum we look. At some points along the continuum, there are, for example, the obligation to fulfill the commandments (halacha and how far to take that) and the obligation of tikkun olam (repairing the world). Unlike the obligations of lawyers as professionals, which are both community-centered and client-centered, these Jewish obligations seem much more community-focused, even though the obligations are individual in nature. In other words, Jews are supposed to help make the world better through their individual actions.

In certain areas, legal obligations and Jewish obligations mesh or at least overlap. Examples range from a zero tolerance of scriveners’ errors (in order to maintain honesty in dealing with opposing parties), to making society accountable for—and accessible to—the underprivileged, 49 to upholding education as an affirmative good. 50

Nonetheless, there are conflicts, and those conflicts are serious. The most widely discussed conflict is between the lawyer’s duty of confidentiality and the Jew’s obligation to the community or to basic moral precepts. 51 Here, we see two competing lines of authority,
which are given much different weights in Jewish ethics and legal ethics. One line of authority is based on the sanctity of life;\textsuperscript{52} the other is based on the need to honor confidences.\textsuperscript{53} In Judaism, the sanctity of life will trump the obligation of confidentiality.\textsuperscript{54} In legal ethics, confidentiality will often trump the sanctity of life.

If it’s true that, in Judaism, saving a life will trump the obligation of confidentiality,\textsuperscript{55} then what is a Jewish lawyer to do when the lawyer’s obligation of confidentiality conflicts with the Jew’s obligation to protect a life?

Let’s start with a version of a legal ethics rule governing confidentiality: Model Rule 1.6. It provides:

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

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was

\begin{quote}
Gross Schaefer & Peter S. Levi, Resolving the Conflict Between the Ethical Values of Confidentiality and Saving a Life: A Jewish View, 29 Loy. L.A. L. Rev. 1761, 1761 (1996) ("The Jewish ethical tradition occupies a different vantage point based upon a clear principle that spiritual values will trump socially based rules.").
\end{quote}

\textsuperscript{52} See Schaefer & Levi, supra note 51, at 1763-64.

\textsuperscript{53} See id. at 1764-65 (noting the prohibitions against revealing a confidence without permission and against tale-bearing).

\textsuperscript{54} As Schaefer and Levi have stated:

Strangely enough, the two values in question [saving a life and confidentiality] . . . are alluded to in the same verse of Scripture, Leviticus 19:16: “Thou shalt not go up and down as a talebearer among thy people; neither shalt thou stand idle by the blood of thy neighbor: I am the Lord.” The juxtaposition of the two parts of this verse is not an accident. The latter half is brought to bear on the former. The first part of the verse provides that privacy and confidential information cannot generally be divulged. This prohibition is limited and modified by the latter phrase[,] which is traditionally interpreted that one should do everything possible to protect life and property from loss and injury, directly or indirectly, including [by] providing information . . . . Hence, saving a life takes precedence over preserving a confidential communication. The absolute spiritual value of life ranks higher in the hierarchy, thus precluding any possible need for a calculation weighing disparate values.

\textit{Id.} at 1766-67. The exceptions to the rule that saving a life trumps all other duties are (1) avoiding idolatry, (2) avoiding adultery, (3) avoiding incest, and (4) avoiding premeditated murder. \textit{See id.} at 1763-64.

\textsuperscript{55} But see supra note 54 (exceptions to that rule).
involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.\textsuperscript{56}

Note several important aspects of Rule 1.6.\textsuperscript{57} First, a lawyer \textit{is not permitted} to reveal a confidence based on a confession of a past transgression. The rule permits the lawyer to disclose a confidence only "to prevent the client from committing a criminal act"—present tense—"that the lawyer believes is likely to result in imminent death or substantial bodily harm." Second, the rule permits—\textit{but does not require}—the lawyer to reveal a confidence under these limited circumstances (imminent death or substantial bodily harm). A lawyer could get along perfectly well her entire career without revealing any unconsented confidences at all, even ones involving imminent harm by her client.

Jews, though, are commanded to revere life. This is where the dilemma traditionally is joined. The best description of this dilemma is one written by Russell Pearce.\textsuperscript{58} Pearce posits the following situation. A rabbi, who's also a lawyer, hears a congregant's confession.

\textsuperscript{56} The counterpart to the more modern Model Rule 1.6 is Model Code DR 4-101, which provides:

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

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

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

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

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101 (C) through an employee.

\textsuperscript{57} Because Model Rule 1.6 is just that—a model rule that serves as a jazz riff for particular state-adopted versions of confidentiality rules—there are significant variations among the states regarding what confidential information a lawyer may reveal.

The congregant killed a police officer but was never caught; instead, an innocent person was scheduled to be executed for the crime. May the rabbi inform the authorities that she has information exonerating the condemned man? Must she?

Pearce walks us through the reasons favoring confidentiality, both in terms of Jewish ethics and legal ethics. First, Jewish law values confidentiality highly, and the congregant certainly wasn't about to give his permission for the rabbi to waive that confidentiality. In addition, the principle that "the law of the land is the law," insofar as the "law of the land" doesn't conflict with fundamental Jewish concepts, would cut in favor of protecting confidentiality (as long as the confidential information wasn't needed to save a life). After all, the rabbi-turned-lawyer is also a lawyer, and the confidentiality rules wouldn't give her carte blanche to disclose under this circumstance. (The congregant isn't threatening to go out and commit a crime; he's confessing about a crime already committed.) Finally, confidentiality is typically justified on the grounds that it's better to create a "safe haven" for the client, so that the lawyer has the benefit of knowing all of the facts, than it is to expose client confidences to disclosure.

Pearce concludes, though, that the rabbi-turned-lawyer should disclose this information. An innocent person is about to be executed, and the congregant's interest in confidentiality is outweighed by the need to save the innocent person's life. If there were a way to save the life without the disclosure, then the rabbi-turned-lawyer must try to reconcile confidentiality with the obligation to preserve life. Here, though, there's no other way than through disclosure. Pearce's version of this allegory is far more lyric than my recapping of it. Unlike Sandy Levinson's attempts to sidestep the issue in his article discussing this age-old problem, Pearce meets the problem head-on. He concludes that the rabbi's Jewishness must trump her lawyerness and that she must reveal the congregant's confidences. Pearce doesn't

59. See id. at 1771-72.
60. See id. at 1773.
61. See id. at 1773-74.
62. See id. at 1774.
63. See MODEL RULES, supra note 2, Rule 1.6; MODEL CODE, supra note 2, DR 4-101.
64. See Pearce, supra note 58, at 1771-72.
65. Pearce's conclusion is, of course, not the only possible one under Jewish law. Because there are as many possible conclusions about what Jewish lawyers should do in this type of situation as there are Jews who spend time thinking about the situation itself, the answers will vary enormously. From my point of view, though, it is important for a lawyer to spend time thinking about where her moral code would take her if she is ever faced with such a situation, even if her ultimate conclusion is difficult (or impossible) to reach.
66. See id. at 1776.
67. See id. at 1776-79.
68. See Levinson, supra note 14, at 1610-11.
spell out the consequence of such a decision, but the consequence is nonetheless clear: the rabbi will, in all likelihood, be giving up her license to practice law.69

Whew! That's heavy stuff. An observant Jew may well not be able to continue being a practicing lawyer, at least under difficult circumstances such as these.70 An unaffiliated Jew, on the other hand, wouldn't face the same struggle.

What about the ethnically identified but nonobservant Jew? This poses a much tougher case. Observant—and even semi-observant or erratically observant—Jews are able to point to other (Jewish) rules that conflict with the rules of legal ethics. I'm not sure what ethnically identified Jews would point to: perhaps historical tradition or social policy. But will historical tradition or social policy trump actual legal ethics? I just don't know, and I'll have to leave the resolution of this to another time. It all comes down to this: it's crucial to be aware of what parts of your identity are dictating your life choices—and career choices are life choices.

One important point to remember is that the affiliation applies just as well in terms of other group membership: the stronger the affiliation to the other group, and the more different that group's ethical rules are from legal ethics, the more tension there will be between that group's ethics and legal ethics. Even if we venture away from religious ethics to cultural ethics, we see the same result.71

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69. Freedman has proposed a confidentiality rule that would reconcile these conflicting principles. See Freedman, supra note 8, at 1136-17. He sums it up nicely: Because of the strong influence of Jewish tradition on fundamental American rights, this means that ethical rules should reflect Jewish moral ideals. These ideals include the sanctity and the dignity of the individual, compassion for fellow human beings, individual autonomy, equal protection of the laws, and zealous representation. I believe, therefore, that my professional life and my faith are consistent with each other. It is difficult to see how it could be otherwise.

70. Id. at 1138. I admire Freedman's views, although I don't accept them wholeheartedly. I believe that, in certain types of law practices, it's very difficult to combine—let alone balance—Jewish and legal ethics rules.

71. Of course, that's also true for observant Jews who have to decide what career paths other than law are open to them, given their desire to remain observant. (Thanks to Art Greenbaum for pointing this out in an earlier draft.)
So where do we go from here? I believe that it comes down to knowing who you are and what you believe. This reminds me of a scene from one of my favorite movies, Dead Again. In that movie, Robin Williams, playing a therapist, is talking to Kenneth Branagh, who plays a detective. During their conversation, it's clear that Branagh desperately wants to smoke, but he's trying just as desperately not to. Williams, in exasperation, tells Branagh to decide what he is—a smoker or a non-smoker—and then just be it. That's my advice, too.

Where I come down on the self-identification line is that, if an affiliation forms any part of someone's self-identification, then it's dangerous to try to compartmentalize away that affiliation. If I do think of myself as a Jewish, female lawyer, then I can't put on just my Jewish hat, or just my female hat, or just my lawyer hat. Without getting too Freudian here, I can't suppress one part of my essential self at the expense of another part unless I want to get my whole psychological system out of whack.

Conversely, when Black attorneys take on advocacy obligations that require the subordination and decontextualization of issues of race in the service of other objectives, they may be labeled as "sellouts" who have abandoned their communities. Whatever the choice, the focus of such cases inevitably becomes not just race, but their race and their lawyerly merits as well. Unlike white attorneys, who have the relatively luxurious comfort of invisibility and transparency in raising issues of race in the lawyering process, Black attorneys must always brace themselves to have their racial, professional, and personal identities placed in issue as well. This additional layer of scrutiny and suspicion may in turn raise for the Black attorney difficult professional and personal questions of identity, autonomy, authenticity, and loyalty. Unless, as suggested above, Black attorneys steel themselves mentally and emotionally for the extra demands of race work in a legal system that still operates on the unspoken assumption that fixing race problems is naturally the work of minorities, they are destined to lead professional lives of fatigue, frustration, and perhaps exploitation. This in turn significantly undermines the social-justice imperatives that lead public-spirited Blacks — whether in the private or public sectors — to select law as a career path in the first place.

Russell, supra note 43, at 771-72 (footnotes omitted); see also Bill Ong Hing, Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses, 45 Stan. L. Rev. 1507 (1993); David B. Wilkins, Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?, 63 Geo. Wash. L. Rev. 1030 (1995); David B. Wilkins, Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers, 45 Stan. L. Rev. 1881 (1993).

73. And I'm paraphrasing.
74. Not about smoking, but about knowing yourself.
75. Actually, I think that compartmentalization forms a large part of lawyer dissatisfaction. Lawyers (especially beginning lawyers) mistakenly separate their humanness from their "lawyerness." That cognitive dissonance ("I have to do this as a lawyer, even though it makes me sick to my stomach.") leads to professional dissatisfaction, if not downright misery. For some more interesting reading on
That means that, to the extent that I am more aligned with observant Jews than with unaffiliated Jews, I have to be careful about what types of law I practice in order to avoid forcing myself into an inherent contradiction between my two spheres of rules. Being a criminal defense lawyer might cause problems because of the confidentiality issue. Being a transactional lawyer in a large and high-powered law firm may cause problems because of the prohibitions about working on Shabbat. If the pull of this particular affiliation is strong enough, then I can’t categorize it away in a neat little box. The stronger the affiliation, the more it should be honored. In particular, the more strongly someone feels about his belief system, the more that belief system should be shaping his other choices.

Now, let’s get personal. What does being a Jewish lawyer mean for me? The “top-down-ness” of being Jewish is important enough for me that I don’t want to force a showdown with the “bottom-up” world of legal ethics. I love being a lawyer. I love being Jewish. I don’t want to put myself into a position of having to choose. In a tie, though, I know what I’d do.

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76. As Steve Resnicoff explains,

_Halakha_ does not explicitly bar Jews from becoming secular lawyers. Indeed, lawyers can importantly promote Jewish interests. For example, they can defend individuals from physical, financial, or psychological oppression, they can protect children in family disputes, and they can advance communal interests by representing organizations committed to Jewish priorities.

Nonetheless, various Jewish law values powerfully militate against the acceptance of certain matters or the use of specific strategies or conventions. Among other things, Jewish law opposes actions that unfairly harm third parties, that cast the Jewish faith in a falsely unflattering light, or that, because of the actions’ spiritually corrosive character, eat away at the intrinsic holiness of the Jewish actor and, indirectly, of the entire Jewish people.

Resnicoff, _supra_ note 16, at 74 (footnote omitted).

77. _Cf._ Daicoff, _supra_ note 39, at 1402 n.404; Theresa Glennon, _Lawyers and Caring: Building an Ethic of Care into Professional Responsibility_, 43 Hastings L.J. 1175, 1180 n.25 (1992) (“This retreat to the personal realm to express one’s caring self was frequently identified in practicing lawyers by Dana and Rand Jack in their studies of women attorneys. According to the studies, women lawyers experienced this strategy as requiring a difficult and sometimes painful splitting of the self.”) (citing Dana Jack & Rand Jack, _Women Lawyers: Archetype and Alternatives_, in _Mapping the Moral Domain_ 263, 277-81 (Carol Gilligan et al. eds., 1988)); Rand Jack & Dana Crowley Jack, _Women Lawyers: Archetype and Alternatives_, 57 Fordham L. Rev. 933 (1989); Janoff, _supra_ note 39, at 229-30 (noting that the data in her study supported the Jack & Jack hypothesis that “a majority of their [Jack & Jack’s] subjects isolated their personal characteristics that were incompatible with the role of a lawyer and guarded against the resulting emotional struggle in one of two ways...[by] denying the conflict...[or] splitting their orientations so that their affectionate sides stayed at home and their stoic, detached sides came to the office.”) (footnotes omitted).
How do I avoid having to choose between my two worlds? For one thing, I can say “no” to representations that I can’t stomach—a luxury that, as a law professor, I can certainly afford. But I want to go beyond avoiding the conflict. I actually want to interweave both worlds, and I can do that. For one thing, as a lawyer and as a Jew, I can recognize that I’m an example in the community (both when I’m actually lawyering and when I’m doing non-lawyering things, like shopping for groceries), and I can behave accordingly. As a lawyer and as a Jew, I can treat people with kindness and with respect. I can enjoy both traditions’ enthusiasm for debate and interpretation—even when it comes to the hardest question of all: who am I?

78. Note: that may mean saying “yes” to *clients* I don’t particularly like if the point of the representation *itself* is important to me. My apocryphal story is foreclosing on a halfway house of a church in December: yes, I went to court to throw out the management; no, I didn’t throw out the residents. The reason that I could go into court (with, mind you, the observation rows filled with parishioners) and do that was that I believed that throwing out the management (who had allegedly “lost” approximately $500,000 of the halfway house’s funds) was better for the residents. I slept well that night.