INTRODUCTION

Ultimately, all questions of professional responsibility are reducible to questions of personal ethics.¹ That this is so in the case of a question on which no moral consensus exists (the question of how convinced of guilt a prosecutor should be before he brings charges, for example) is obvious. In such situations, any judgment made is necessarily an individual one that has reference to no externally imposed standard. Less obvious is that the same singular ethical responsibility obtains even in a case involving an issue on which the profession has clearly spoken. To take the most elementary example, Disciplinary Rule 1-102 (A) (1) of the A.B.A.'s Code of Professional Responsibility states that "A lawyer shall not . . . violate a Disciplinary Rule." Should a lawyer find himself in one of those freakish situations in which the bland Disciplinary Rules authoritatively speak to an ethical problem, his decision to obey DR-1-102 (A) (1) and not to transgress the Code's imperative may uncritically be seen as one for which he has no personal responsibility, such conduct having been dictated by the profession. Moral decisions, however, ought not to be justified merely by appeal to authority. Even in cases seemingly governed by an external norm there must be the additional, usually implicit judgment that the authority whose commands are to be followed is morally right. Responsibility for this commonly unarticulated decision must rest with the individual, in this case, the lawyer who elects to obey the Code. Although the existence of a clear Disciplinary Rule exerts a pressure on a lawyer's judgment not present in the case of a question on which no professional agreement has been reached, the decisions made in each instance are in an ultimate sense personal ones that draw deeply from the values and tastes of the ethically-accountable individual.

*In the past few years there has been a marked increase in courses dealing with legal ethics and professional responsibility. Many law schools have made such a course a required part of their curriculum. Although these courses vary both in content and emphasis, it is hoped that this essay is illustrative of the kinds of issues students are asked to consider. These three discussions constitute a greatly expanded version of a final examination by a University of Pennsylvania Law School student, Mark L. Alderman, written for the Law School's course, The Legal Profession, taught by Professor Howard Lesnick.

¹ "Professional responsibility," "ethics," and "mores" are here used in the grand sense of making and applying judgments of good, bad, right, wrong, and the like.
That ultimate ethical responsibility always rests with a single individual does not immunize personal moral judgments from the scrutiny of others. When the decisions of individual lawyers on a question of legal ethics coincide to an extent sufficient to constitute a consensus within the profession, an attorney who elects not to conform his conduct to that position may at times legitimately be disciplined for that election. (The legitimate scope of disciplinary action by the Bar is pursued below.) Even in such a situation, however, the individual process of decision is the fundamentally relevant focus of study. The dissenting attorney must individually decide not to obey the professional consensus. Further, the majority position from which he is dissenting must itself be seen as generated by multiple individual judgments. A consideration of professional responsibility, then, cannot be confined to an exegesis of the Code, both because that document is and can be no more than a collection of individual decisions, and because obedience to that collection by a dissenter requires yet another personal judgment. Rather, inquiry is most profitably concerned with the identifiable factors that guide individual judgment—of which the professional consensus, albeit important in those rare cases in which it is discernible, is only one.

A beginning in the direction of intelligible moral decision-making is to articulate with as much precision and candor as possible the reasons behind a particular judgment. To the extent that a particular moral judgment is explained, rather than merely announced, it becomes a less private affair. The explanation necessarily reveals a bit of the personal principles and prejudices that animate the decision and, if explanation is conscientious, factors undoubtedly will surface that others also have considered in arriving at their personal positions. These shared considerations constitute a common vocabulary for discussions of professional responsibility. As individual judgments are in this way exposed they possibly will become less singular and more informed. Ultimate singularity is inescapable; but, articulation by individuals of their judgment process, which is what I have attempted in the following discussions, increases the likelihood of our understanding one another’s moral conclusions and perhaps thereby attaining a measure more consensus on these mutual concerns.

I.

Consider first the case of a tax lawyer confronted with a client whose announced intention is to evade the "gift in contemplation
of death" provision of the tax laws. The question presented is where to draw the fine line between advising as to the law and suggesting perjury or false evidence. Rather than pursue this question directly, I would like to look instead at what would be wrong with simply giving the advice on how to avoid the gift tax—and how such conduct differs from other lawyerly behavior. This inquiry will, I think, help refine certain unannounced and amorphous notions that animate many discussions of legal ethics.

For a lawyer deliberately to counsel evasion of the tax law is considered professionally irresponsible. I hope the consensus on this is nearly unanimous; the existence of EC7-6 of the Code,\footnote{EC 7-6 reads in part:

Often a lawyer is asked to assist his client in developing evidence relevant to the state of mind of the client at a particular time. He may properly assist his client in the development and preservation of evidence of existing motive, intent, or desire; obviously, he may not do anything furthering the creation or preservation of false evidence. In many cases a lawyer may not be certain as to the state of mind of his client, and in those situations he should resolve reasonable doubts in favor of his client.} to the extent that it says anything, suggests so. On the other hand, for a lawyer calculatedly to use existing evidence to establish in court that a gift was not made in contemplation of death, despite the lawyer’s knowledge that the gift was so made,\footnote{If the attorney learned of his client’s true intention in the course of representation, there would be a confidentiality problem in the lawyer's refusal of the case. To avoid this problem, assume that such knowledge was obtained outside the course of representation.} is not clearly unethical. Indeed, my hunch is that a majority of tax practitioners daily find such a state of affairs perfectly unobjectionable.\footnote{I say “hunch” because my knowledge of the realities of tax practice is negligible. Of necessity, much of this essay is written in the luxurious, hypothetical manner known only to the academic community. I do not apologize for this detachment, because I think it provides me with an impartial perspective. I do caution, however, that some of my conclusions might best be approached with a grain or two of salt at hand.} Why does the advocacy of a course of action creative of evidence that will rebut a statutory presumption that a particular gift was given in contemplation of death [Situation A] bother most of us, while the successful use of that same deceptive evidence in court by a lawyer not present at its creation [Situation B] is not so troublesome? Invocations of the lawyer's duty to see that the law is upheld will not suffice because in both cases the effect of the lawyer’s involvement is the same frustration of the tax law. Nonetheless, the intuition persists that Situation A is morally inferior to Situation B, and articulation of that feeling is a pre-requisite to further line-drawing in this area.
An explanation of the different moral textures of Situations A and B is rooted for me in an obvious but insufficiently articulated distinction that underlies a major portion of questions of professional responsibility. That truth is central to the legal profession is unmistakable; witness Justice Sharswood in his nineteenth century classic on Professional Ethics identifying it as “the polar star of a lawyer.” Less clear, because infrequently discussed in the course of routine practice, is that the universe inhabited by lawyers consists of two related but distinct realms of truth: the truth that exists in fact, and the truth that is provable in court. In an ideal world, the two realms of truth would be precisely congruent; in the American legal system they are not. We have decided, for largely noble reasons beyond the scope of this essay, that a “fight theory” of adjudication is most contributive to the determination of in fact truth. Implementation of this jurisprudential approach has required the development of elaborate decision procedures, such as rules of evidence and allocations of variable burdens of proof, that have resulted in the transformation of the courtroom into a realm of truth where what can be proved according to the rules, not what in fact happened, is true. We implicitly acknowledge this, for example, in our style of criminal pleading: certainly no one thinks a lawyer lies when he pleads a defendant “not guilty” regardless of the in fact truth of the matter.

This is not of course the only way in which a justice system could be structured. The Hispanic legal world, in contrast, evolving directly as it did from the Roman system without the intervening influence of Anglo-Saxon thought, insists to a considerably greater extent on an identity of in fact and in court truth. Its commitment to the rules of adjudication is discernibly less than ours, and a result inconsistent with the in court rules but in conformity with the in fact truth is not an unheard-of occurrence. Here, however, the two realms of truth are often distinct. Consider the situation presented by ABA Opinion 287 (1958): records of a prior conviction of a criminal defendant awaiting sentencing have been lost, although the defense attorney has discovered the earlier conviction from his client; the judge asks the defendant if he has previously been convicted and he replies that he has not been; is it unethical for the attorney to remain silent? The ABA Commit-

5 G. SHARWOOD, AN ESSAY ON PROFESSIONAL ETHICS 167 (5th ed. 1896).
6 The Scots explicitly acknowledge this in court/in fact distinction in their three-tiered verdict scheme: “guilty,” “not guilty,” and “not proven.”
A committee held that preservation of attorney/client confidentiality, one of the rules of the game, requires the lawyer not to speak. The defendant has in fact a prior criminal record. This record has not been established in court. For purposes of the American system of justice the defendant has no record.

Thus, a lawyer in our system lives in a schizophrenic universe composed of two kinds of truth. Each individual can, and must, arrive at a personal resolution of this tension, and that resolution will depend principally on an individual's appraisal of the final justice of the adversary model of adjudication that underlies the in fact/in court distinction. [I pause here to note my doubt that a person is entirely free to resolve this tension however he so desires and still remain a lawyer—my sense is that a person committed to perfect congruence of in fact and in court truth cannot achieve such an identity in his career without unfairly foisting his personal style on certain clients deserving of the benefits of the adversary rules.]

Bringing this primary distinction back to the estate tax case, we now have a crude vocabulary with which to discuss Situations A and B. Situation B involves the participation of the lawyer only in the in court realm of truth. Although the attorney has knowledge of the in fact truth, he is involved only in the courtroom search for that truth. Situation A, in contrast, involves the lawyer in both the in fact and in court realms. Unlike the attorney in Situation B, the Situation A attorney is not merely presented with a kernel of in fact truth,—that the gift was made in contemplation of death—and a portion of evidence tending to disprove that truth, and then asked to argue the misleading evidence in court. Rather, he is presented with a kernel of in fact truth and asked to help create in fact a portion of evidence that will disprove in court the truthful kernel. The essential difference between Situations A and B, then, is the timing of the lawyer's entrance.

Why this difference in timing, though, should constitute a moral distinction between the two cases must now be considered. In Situation B, all relevant facts are settled: all that remains open is whether what is true in fact can be proved in court. In Situation A, all is plastic; no facts that will be looked to as evidence have yet been settled. The lawyer in Situation A can thus promote the coincidence of in court and in fact truth, by declining to assist in the creation of deceptive evidence, in a direct way not available to the attorney in Situation B. Stated conversely, the attorney in Situation A participates in the incongruence between in fact and
in court truth in a more intimate way than does the attorney in Situation B. Whether this higher degree of participation in the promotion of an in fact/in court incongruence rises to the level of a moral distinction is, as all such questions ultimately are, a matter left to the personal conscience. That decision, however, need not be utterly private. A crude scheme for evaluation having been provided in the in fact/in court distinction, the individual determinations made and explained within that framework may now be more intelligible to others. My hunch is that for most members of the Bar the extents of involvement in Situations A and B are different enough to render Situation A professionally irresponsible and Situation B ethically acceptable. Such a distinction would be consistent with the high commitment to the adversarialism in which the in fact/in court division is rooted; once settled, as it is in Situation B, in fact truth apparently has little importance to the pure "fight" theorists.

Other lawyers, to whom the eclipse of in fact truth by rugged adversarialism is disturbing, would decline to handle not only Situation A but Situation B as well. Because this is not a criminal case (which would present importantly different considerations); 8 because a person involved in an estate tax situation would very probably be the sort who could easily enough find another attorney; and especially because their commitment to as high a degree of identity between in fact and in court truth as is attainable consistent with necessary rules (none of which is implicated here) is very strong, these dissenters from the conventional view would find it distasteful to participate in Situation B. They are uncomfortable with the notion of knowingly participating in an in court/in fact incongruence in a case involving an estate tax because the stakes are not important enough to them to overcome even the incremental harm to the ideal of a unitary truth that is worked by this incongruence. This conclusion is, I think, where I personally come out on the question, although my academic convictions have never been tested in the laboratory of practice. From my present perspective, and for the reasons just discussed, I would prefer to avoid both Situations A and B. Again, though, I must emphasize that in the final sense, this is a judgment peculiar to my taste and temperament. Others must of course decide for themselves and personally absorb the consequences of that decision.

II.

For my second discussion, I would like to consider yet another version of the infrequent but "classic" question whether a lawyer ethically may use false or perjured testimony. To put the problem in its most confounding form, assume you are the attorney for a young man who convincingly insists that although he was at his father's closed store the night that it mysteriously burned down he did not set the fire. Assume that none of the dilemma-avoiding devices commonly urged as solutions to this problem are available. Trial is imminent and you have been appointed by the court such that graceful withdrawal is impossible. Your client insists on taking the stand. He refuses to plead the Fifth when asked by the prosecutor if he was at the store that night; his intention is to lie and say that he was not. Further, he demands that you ask him this question on direct examination, arguing that its omission will be a prejudicial signal to the jury. What should an attorney in these circumstances do? 9

I put the case so extremely because evaluation of it serves to illuminate the ultimately personal character of all questions of professional responsibility, and further generates vocabulary for discussing ethical issues in shared terms.

At first glance, this question seems settled for the profession by the Code. DR7-102 (A) (4) unhesitantly states: "In his representation of a client a lawyer shall not knowingly use perjured testimony or false evidence." DR7-102 (A) (4) is one of the rare absolute mandates in a generally ambiguous Code and for that reason comes to this question with a certain momentum for acceptance. Indeed, Chief Justic Burger considers the categorical prohibition of using perjured testimony to be so "fundamental to the integrity

9 Admittedly, the case I put is a highly unlikely one. Far more probable is a scenario in which the client's intentions are revealed at a time when withdrawal without prejudice is possible. In such circumstances I would advocate, as does the ABA, refusal to represent the defendant if he cannot be dissuaded. Professor Freedman argues that such action will simply insure eventual perjury by sending the accused to another lawyer from whom the true facts of the case will be concealed. See Freedman, Professional Responsibility of the Criminal Defense Lawyer, 64 Mich. L. Rev. 1469 (1969). This point seems to be an accurate prediction of the consequences of a refusal to represent, and in strictly operative terms a refusal will likely work the same concrete harm as will representation, i.e., the introduction of perjured testimony. Nonetheless, I personally find refusal a morally superior situation. In the case of representation, perjury is participated in by a defendant and a lawyer. In the case of refusal and subsequent hiring of another lawyer ignorant of the intention to lie, perjury is directly perpetrated only by a defendant. Were I the lawyer to whom this client first came, and dissuasion seemed impossible, I would prefer refusal because (1) abstract as the difference is, the system seems less undermined by a defendant's perjury of which his attorney was ignorant than one in which the attorney shares; and (2) I personally would be relieved of direct participation in an unpreventable lie. These reasons are not beyond challenge; they are, though, determinative for me.
of our system” that “it can never admit of any exceptions, under any circumstances.” 10 Were this so, the issue would largely become one of allegiance to a clear consensus of professional opinion rather than one of deciding how to act morally in an uncharted area. Not surprisingly, things are not so clear as Burger suggests. Despite the self-evidently true character that the Chief Justice ascribes to this absolute rule, important arguments have been advanced that the blanket prohibition is wrong because it is corrosive of the attorney-client relationship. The tension here, of course, is between two values equally and inconsistently enshrined in the Code: on the one hand, candor, and on the other, confidentiality; between the lawyer’s obligation as an officer of the justice system to promote the coincidence of in fact and in court truth by disclosing known perjury, and the lawyer’s duty as counsel for a client to encourage utterly uninhibited communication of all facts by keeping knowledge gained in the course of representation in the strictest confidence. A recapitulation of the able cases made on all sides of this issue is not necessary here. Sufficient for present purposes is to conclude, as did Addison M. Bowman speaking of the present Code’s ancestors, that “the Canons of Ethics are . . . so ambiguous and so contradictory that they are of little or no help in resolving these problems.” 11

To what sources, then, is the attorney to look for resolution of this problem? One source is that to which attention is instinctively drawn: the nature of the judicial process. By this I mean not a political evaluation, either normative or empirical, of that process [these appraisals enter below] but rather a logical consideration of what the model in theory is and what guidance it provides on the candor/confidentiality tension. I detect heavy reliance on this approach in Professor Freedman’s well-known arguments. 12 Freedman, it seems to me, grounds his case in a certain vision of the adversary process, from which he draws principles of right conduct. Thus, confidentiality is celebrated above all else because for Freedman a trial is not a serene quest for “wise and informed decisions,” as it is for Professor Noonan, 13 but is rather a fight, with the lawyer’s allegiance owed exclusively to his client. So far as I can discern, Freedman consults no source other than his theory of ad-

12 See Freedman, supra note 9.
versary justice: He posits our system as A, and then deduces that all lawyers are B and should do C.

Now, as an explanation of Freedman's personal ethics on this question, his argument is intelligent and understandable. As a model of moral deliberation, however, Freedman's approach is not one that I can recommend. I seriously doubt that questions such as that of representing a client who intends to commit perjury can or should be resolved solely by deductive reference to a theory of the judicial process. First, I have no understanding of the theoretical operation of adversary justice from which coherent principles of conduct can be deduced, and I cannot believe that I am alone in this regard. Second, and more important, even if I were able to draw such deductions, I would reject a purely logical analysis of this sort. Underlying the single-source deductive approach is the unspoken notion that the person confronted with an ethical dilemma such as this one exists only as a lawyer for purposes of the moral question; the adversary system places certain demands on lawyers, and those demands alone are relevant to what the person confronted with a perjurious client should do. This extreme role differentiation, as Richard Wasserstrom has heuristically characterized it, is unacceptable for the several reasons advanced by Wasserstrom in his perceptive piece. Rather than trace his fine discussion of this problem, I would instead like to pick up where Wasserstrom leaves us. As I read him, Wasserstrom essentially turns us back to our undifferentiated individual consciences for evaluation of questions of legal ethics. The relevant moral agent is not an abstraction known as a "lawyer" but rather a flesh-and-blood person who happens to work in the law—an important, but not controlling fact. The question thus becomes what considerations, other than an abstract notion of what the system expects of lawyers, are important?

A consideration that seems to me relevant is that of the stakes involved: what sort of potential for harm exists on each side of the issue? In the present case, a refusal by the attorney to participate in any way in the presentation of the perjury could not be implemented without adversely prejudicing the young man's defense. If, then, a decision is made not to further the perjury, the potential

14 See Wasserstrom, supra note 8.
15 Freedman is convincing in his argument that even the mildest implementation of such a refusal—conducting examination of the defendant in such a way as to preclude the opportunity for him to lie in response to your question—is necessarily harmful, especially where the issue is one strongly implicative of guilt like presence at the scene of the fire. See Freedman, supra note 9, at 1477,
harm is that the defense of an innocent young man will be under-
mined to the extent that he will be convicted of arson and suffer
severe consequences, possibly even long imprisonment. On the
other hand, if the perjury is acquiesced in, the harm is not poten-
tial but realized: false testimony has been knowingly introduced in
court by a member of the bar. This realized harm, however, is of
an intangible sort compared to the potential harm of conviction.
The injury inflicted by use of perjury in these circumstances would
be a philosophical one that does violence not to specific individuals
but to a collective commitment to in court truth as a means to
in fact truth; indeed, the practical bearings of this perjury would
be to decrease the likelihood of violence being done to a specific
individual. Philosophical injuries should not be generically dis-
missed as insubstantial; they can often be as damaging as a physical
blow. Here, however, the palpability of the potential personal
harm to the defendant seems indecipherably more compelling.

Consideration of the “stakes” factor, then, suggests that a deci-
sion must be made between a specific potential harm and a vague
realized harm. This choice seems guided by another consideration
suggested by the potential nature of the specific harm: the prob-
ability of that injury being worked by a decision not to further the
perjury. Evaluation of this factor is essentially a testing of a per-
son’s faith in the ability of our system to do justice in a case like
this. I use justice here to mean not punishing someone for some-
thing he did not do—a definition with which I expect no disagree-
ment. My sense is that this defendant might very well be con-
victed if his defense is at all prejudiced, as I think it will be if his
lawyer tries somehow to avoid participation in the perjury.

That the conviction is not merely theoretically possible, but
rather is actually, palpably possible might be determinative for
defendant’s counsel. If the relative weight that he places, as a per-
son, on the moral wrong worked by conviction of an innocent
defendant is greater than the importance that he attaches to pre-
venting diminution of an abstract commitment, as it might be for
an attorney who shares to a significant extent the Hispanic in-
sistence on an ultimate identity of in fact and in court truth, then
defendant’s attorney has all but made his decision. If the defend-
ant did not in fact set the fire, then he should not in court be held
to have done so. If such a disposition requires, as it by hypothesis
does here, the passive participation in perjury envisioned by this
case, then a lawyer committed to a unitary truth could decide
on these facts to do as Freedman suggests, although for significantly
different reasons: he could put the defendant on the stand just as he would any other.

Such a decision, if reached by informed deliberation of the sort suggested above, would be an utterly situational one, addressed only to the particular extreme case presented here: an innocent defendant in a criminal case who himself insists on the perjury at a time when withdrawal without prejudice is impossible. Different facts could call for an opposite conclusion. Two situations that I think even the staunchest advocates of a unitary truth would find importantly different from the main hypothetical can be sketched. The first is the easy case in which a confessedly guilty defendant insists on perjuring himself. A lawyer committed to a congruence of *in fact* and *in court* truth would not, for obvious reasons, participate in the perjury there but rather would follow the avoidance devices in the ABA Standards Relating to the Defense Function, Section 7:7. This position, of course, raises problems. It is subject to all Freedman's criticisms that the ABA approach is destructive of the attorney/client relationship because, in breaching to any extent a client's expectation of confidentiality, future communications between lawyers and clients are chilled. More telling yet is the criticism that in drawing a line between guilty and innocent perjurious defendants here the attorney not only promotes lying, by providing an incentive for clients deceitfully to protect their innocence, but he further co-opts the function of the court system by attaching serious consequences to his perception of a defendant's guilt or innocence in advance of that verdict being rendered at trial by jury. Granted, a degree of co-option persists in the conclusion that the case of a "guilty" defendant is easier than that of an "innocent" one. I can only respond with candor, not logic: we deal here with decisions on the fringe of legal practice, decisions that defy ideal resolution; for the reasons discussed above (especially the ultimate identity of *in fact* and *in court* truth) I personally can respect a decision to put on the stand and unrestrainedly examine a witness who intended to perjure himself if non-prejudicial withdrawal were not possible and if counsel deeply believed on the basis of vigorous investigation that defendant was innocent (though I might not make that same decision myself); I cannot support a decision to do so where counsel believes in his

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10 The avoidance devices advocated by the ABA Standards are: (a) advise the client against false testimony; if unsuccessful, (b) withdraw from the case; if not feasible, (c) refuse to engage in direct examination and refuse to argue the false testimony to the jury.
heart and mind that defendant is guilty because the comparative harms would then be very different.

A second situation that I find unmistakably distinct from the arson hypothetical is a case like In re Metzger, where a lawyer himself initiates the use of false evidence—to make it dramatic say the creation by the attorney of evidence unmistakably establishing a bogus alibi for a defendant he believes in his soul is innocent. As the degree of the attorney's participation in the deceit increases, the realized harm to our system's commitment to in court truth as a means to in fact truth becomes incrementally greater. Although the practical effect of a deception is the same regardless of the perpetrator, the philosophical effect is aggravated commensurate with the extent of an attorney's involvement, because the trust invested by our system in lawyers as officers of the court is increasingly breached as counsel enlarges his fraudulent contribution. Because the countervailing potential harm to the defendant—conviction, worked by the lawyer's non-participation—remains constant, increased participation in fraud by a lawyer at some point constitutes an injury deleterious enough to be, for me, more objectionable than a mistaken conviction. Assuming that the "stakes" and "probability" factors are the same as in the hypothetical arson case (if either were less the case against creation of false evidence would be easier to make; if either were more, the case would be harder to make) the Metzger-like deceit would be on the wrong side of the line for me. A balance must be struck, and despite the horror I would experience by seeing young man wrongly convicted, I would not fabricate evidence probative of an alibi for him. I offer this hypothetical not because it is exemplary of principled and rational decision-making in the area of legal ethics; it is not. Rather it demonstrates the unavoidably and intensely personal nature of these judgments. Ultimately, all that can be said is "Here are my factors; here is my line."

The line that I have hypothetically drawn in the principle arson case discussed above is controversial. Indeed, I have no doubt that some important lawyers—the Chief Justice among them—consider it to be a positively indefensible line. I would like quickly to present and attempt in terms to meet what I take to be the primary objection to the position that I ascribe to my hypothetical lawyer devoted to a congruence of in fact and in court truth. Objections to the use of deception to prove the truth are several; yet, I

17 31 Hawai‘i 929 (1931).
sense that they are all essentially grounded in the value judgment articulated in the maxim "the end does not justify the means." The use of lies in court, this argument contends, is so pernicious a means that no end—not preservation of the attorney-client relationship, not even acquittal of an innocent defendant—can justify such conduct. Proponents of this position often neglect to detail the assumptions and predictions underlying their conclusion, a negligence that is understandable because the statement feels so self-evidently right. Despite this quality of moral obviousness, however, I have trouble accepting the proposition that no end ever justifies deceitful means. Such a categorical statement is troublesome for me because judgment on these issues does not proceed abstractly but rather involves in each decision a specific end and a specific means. Characterizing the end in the arson hypothetical as the acquittal of an innocent defendant is not sufficiently precise for meaningful analysis. As discussed above, the relevant end includes within its network of considerations the stakes involved, the probabilities of the case, etc. Similarly, statement of the means as the use of deceit is inadequate. What kind of deceit is contemplated? What degree of participation in that deceit will the lawyer assume? These are among the multiplicity of factors that should enter the ends/means calculus. Individuals may, of course, repeat this situational calculus in enough hypothetical cases to induce that no circumstances exist in which a deceitful means would be justified by an end, no matter how noble. My response is twofold: (1) Induction of this sort, suspect even in the hard sciences, is especially dubious in the realm of legal ethics where each situation is likely discrete enough to be tantamount to a unique moral universe. I do not, indeed on my own theory of ultimate ethical individualism I could not, deny that informed moral deliberation can result for some in the erection of an absolute principle. I only counsel caution and flexibility. (2) Even if an ethical absolute does exist in this area for some, it need not for all. Although the standard of the profession may be set, of necessity, by majority rule—by which I mean that a lawyer might be disciplined were he to decide to examine his client here in the face of a clear consensus that to do so is wrong—that standard, while legitimately coercive, is not automatically dispositive of the ethical question. I close here where I

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18 Nor can I accept the converse; that certain ends justify any means. Ends and means are indissolubly linked along a continuum and an otherwise desirable end can be transformed into a less compelling one if attained by repulsive means.

19 A line of inquiry worth noting but impossible to pursue here is whether such decisions to act contrary to the Code for conscientious reasons might profitably be discussed in the well developed language of civil disobedience.
began above: morality is a personal enterprise. Each individual should strive to make his decision informed and intelligible, as I have tried to do above, and must subject his judgment on certain matters to the scrutiny of a community into which he has entered; but, the ultimate, as opposed to the consensus, evaluation of what is right and what is wrong is that person's alone.

III.

In the discussions above, I attempted to articulate certain considerations that do and ought to guide individual judgment on matters of professional responsibility. I now wish to take a case in which that personal decision process has resulted in both a conclusion probably contrary to the Code and an intention nonetheless to act on that conclusion. Assume as Dean Redlich does in #10 of his Professional Responsibility: A Problem Approach (1976) that an attorney is asked by a newspaper to cover a race discrimination case of great public interest. The judge presiding at the trial is not noted for his sympathy with suits of this kind, or for his erudition in civil rights matters. In a newspaper column critical of rulings by the judge that seem erroneous as a matter of law, the attorney/reporter writes that the way the judge is conducting the case is "a travesty of justice. He is not only woefully ignorant with regard to constitutional matters, but his racial bigotry is permeating his conduct of the entire trial". This column was written after informed deliberation by the attorney on identifiably relevant considerations [the stakes involved; the probabilities of the case, etc.], including EC 8-6 of the Code, which states that "while a lawyer as a citizen has a right to criticize such officials [judges] publicly, he should be certain of the merits of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system." [emphasis supplied]. Careful evaluation led the attorney to conclude that although he could not be certain of the merits of his complaint, and although his language was probably not of the "appropriate" sort envisioned by the Code, publication of the article was justified. I am not here concerned with cataloguing the factors that entered the attorney's moral calculus, nor with appraising the wisdom of his decision to criticize in just this way. The dimension of legal ethics I wish to discuss here is one distinct from any questions of sound deliberative methods or wise final decisions. What I would like to consider is: can disciplinary action legally be brought against this lawyer on the theory that he acted contrary to
the principles expressed in EC 8-6? 20 The question of what legal constraints on professional discipline exist is one that is infrequently addressed in law school ethics courses, the emphasis ordinarily being placed on interpretation of the Code; yet to the extent that ABA disciplinary measures represent state action—and the extent is surely considerable—I find important portions of the Code to be impermissible limitations on the constitutional rights of lawyers. EC 8-6 is, I think, one of these unconstitutional sections.

As suggested, certain moral decisions of individual attorneys can legitimately be scrutinized by the profession.21 Obviously, this scrutiny necessitates a consensus position—which most often means a bare numerical majority—on a particular question. Without at least a 51% agreement among lawyers on the irresponsible character of a specific kind of behavior no discipline for that conduct is practically possible and lawyers are left utterly to their own moral codes. If the requisite agreement is reached, however, scrutiny is practically possible and the next question is whether discipline is legally possible. Circumscription of an area within which professional discipline is legitimate—in the sense of legal—must eventually look, I believe, to the Constitution for guidance. This is so because to the considerable extent that the ABA disciplinary apparatus is for constitutional purposes state-imposed discipline, the ABA is legally constrained, as is the state, almost exclusively by the Constitution. The controlling nature of constitutional limitations can be seen by considering an example at each extreme of the legality-of-discipline spectrum. Take as a clear example of legitimate professional discipline the case of disbarment proceedings against a defense attorney who personally murdered the prosecution's star witness. Most would agree, I take it, that such a person, in addition to being punished criminally, could legally be disciplined by the profession. No legal objection would be raised because the Constitution does not prohibit the ABA-as-state from punishing this conduct; or, put conversely, nothing in the Constitution grants a person the right to murder prosecution witnesses. At the other extreme, assume a consensus of the profession expressed in a Dis-

20 The technical answer to this question is “no” because the charge of misconduct here is grounded in an Ethical Consideration which, unlike the Disciplinary Rules, is not mandatory. The Ethical Considerations are, however, guides to the interpretation of the Disciplinary Rules and a Bar Association with a mind to do so undoubtedly could work the “guidance” of EC 8-6 into an existing Disciplinary Rule and proceed against the attorney in that way.

21 The legitimacy of professional discipline involves considerations beyond the legality of such action; however, I deal here only with the constraints on professional discipline imposed by law.
ciplinary Rule calling for the wearing of navy blue, three-piece suits by all attorneys at all times. An ABA disciplinary proceeding against a lawyer who wore a khaki suit to the office would, I trust, be enjoinable under the Fourteenth Amendment as an invasion of the constitutionally protected privacy right to control of personal appearance. Such a Disciplinary Rule is not justified by any state/ABA interest sufficiently compelling to overcome the individual’s privacy right, and the Constitution would therefore disenable the Code from regulating a lawyer’s appearance in this way.

Moving away from these polar cases and towards the shadowy center regions of this question of constitutional constraints on professional discipline, the issue of the First Amendment rights of lawyers is encountered. In his headnotes to Problem 10, Redlich asks “does the First Amendment apply to lawyers?” The question would be laughable if there were not a discernible tendency in the Code to respond “NO” at critical points. Most of Canon 2, dealing with advertising and solicitation, seems constitutionally infirm in light of the recent decision in *Bates v. State Bar of Arizona.* Similarly, the bulk of Disciplinary Rule 7–107, on Trial Publicity, is for me violative of the First Amendment standards announced by a unanimous Court in *Nebraska Press Association v. Stuart* (the “gag order” case), although I am troubled by the Sixth Amendment ramifications of that result. Also raising serious constitutional problems is EC 8-6, quoted above. I leave aside discussion of the procedural objection that the operative terms of EC 8-6—“appropriate language,” for example—are intolerably vague and for that reason cannot constitutionally support a disciplinary action. Also I will not detail the reasons why EC 8-6 would be unconstitutional on its face if applied to criticism of a judge by a non-lawyer; I expect no dissent from that conclusion. What I wish to consider is the substantive scope of EC 8-6, to see if it is confined to an area within which the profession may legitimately regulate the speech of its members; and, rather than laden the discussion with First Amendment precedent, I would like to proceed at a largely theoretical level.

A useful approach to this question of the constitutionality of EC 8-6 is the “stakes” inquiry: what is the harm that likely will result (a) if lawyers are permitted the same freedom of expression as non-lawyers generally; and (b) if lawyers are allowed lesser

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24 In fairness I must note that in the *Stuart* case the Court expressly did not reach the question of the applicability of its reasoning to the legal profession.
free speech rights than others? Certain groups in our society are allowed lesser First Amendment rights than other groups because the harm worked by granting them full freedom of expression is too great to be tolerated. Although the Supreme Court has recently diminished the free speech rights of some of these groups to an excessive extent [especially prisoners and military personnel], certain diminutions are necessary. A soldier in combat, for example, may constitutionally be disciplined for engaging in speech that would be untouchable if engaged in by a civilian. Now, is the criticism of the judge outlined above—speech that is unarguably protected by the First Amendment when uttered by an "ordinary" person—subject to discipline when presented by a lawyer because the harm to protectible state interests is distinguishably greater? I think not.

The justification for EC 8-6 offered by the Code is that "an adjudicatory official, not being wholly free to defend himself, is entitled to receive the support of the bar against unjust criticism . . . for unrestrained and intemperate statements tend to lessen public confidence in our legal system." Lessened public confidence in the legal system is, then, the harm that allegedly will result if lawyers are as free as others to criticize judges, and this harm purportedly justifies cutting back the freedom of expression of attorneys by stating that they act at their peril when they speak without certainty of the merits of their claim or with inappropriate language. Granted, criticism of judges by lawyers is more likely to lessen confidence in the legal system than is criticism by non-lawyers; lawyers are presumed by the public to speak with a special expertise on judicial matters, and the likelihood is that even when they speak with uncertainty of their claim, or with inappropriate language, they will be listened to and believed in a way that non-lawyers would not be. Because lawyers in this sense occupy a position of public trust, a strong—although paternalistic—argument can be made for imposing a greater burden of prudential speech on them. Were no considerations other than this potential for an immeasurable but credibly harmful lessening of public confidence relevant, EC 8-6 would be constitutionally unobjectionable.

Countervailing considerations, however, are of course relevant. Foremost among these is the other half of the "stakes" inquiry: what harm is likely to result if lawyers are held to a higher standard of accountability for their speech than other persons? The practical effect of stricter liability for lawyers, such as that imposed by EC 8-6, unquestionably seems to be that a chill is placed on the
inclination of attorneys publicly to criticize judges; indeed, such deterrence was intended to accompany EC 8-6. This chill is, I believe, positively harmful. Important here is the other side of the argument that because lawyers' criticisms of the judiciary are likely to be believed they must be carefully scrutinized by the profession. Precisely because such criticisms are presumptively credible I find it desirable that criticism of judges by lawyers be encouraged, not chilled. Among all possible critics of the American system of justice, lawyers uniquely are in a position to understand the working of the judiciary and to expose those failures of the system that undeniably occur. Professor Alan Dershowitz in a recent critical review of a book, written by a journalist, on civil liberties in America\textsuperscript{25} articulated the consequences of the "code of honor among lawyers . . . not to reveal the truth about the judiciary":

There is a high price paid in leaving to non-lawyers the primary responsibility for educating the lay public about the inadequacies of our courts. Practicing lawyers who are daily exposed to the law have a unique insider's understanding of the subtle relationships among the rules, institutions and personalities that comprise our legal system. Many books by non-lawyers . . . sometimes fail to grasp these subtleties.

I agree with Dershowitz that entrusting primary criticism of the judiciary to non-lawyers is costly and I think that the possibility of a lessening of public confidence in the legal system as a result of robust criticism of the judiciary by lawyers, while worthy of serious attention, does not finally justify the "high price" exacted by chilling guidelines like EC 8-6. Because this "high price," i.e., the indirect suppression by ABA/state action of incisive information about the functioning of the justice system, is the kind of price the First Amendment disenables government from charging absent more compelling justification than is offered here, I do not think that EC 8-6 can withstand constitutional scrutiny.

With the Code's position on the question of criticism of judges by lawyers invalidated, the discussion comes full circle. The individual attorney is left with his personal moral code to guide his conduct. To the extent that he engages in the sort of informed deliberation groped towards in essays I and II above, his decision is likely to be both more intelligible and agreeable to others. But, ultimately the morality of his conclusion is his alone to judge.

\textsuperscript{25}N.Y. Times, November 28, 1976, § 7, at 1.