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CIVIL DISOBEDIENCE AND THE LAWYER'S OBLIGATION TO THE LAW

JUDITH A. MCMORROW*

Lawyers work with, under, for, and around the law as their professional livelihood. Lawyers are called "officers of the court," "officers of the law," and "ministers," and swear allegiance to support and defend the Constitution of the United States.¹ Even the title "lawyer" reinforces the relationship between the person and the law. The very nature of law binds the lawyer to the content of law because, as every lawyer knows, the law is not a series of set rules plucked from universal concepts of right and good. Rather, law is an ongoing process that reflects shifting societal views.² This ever changing nature of the law forces lawyers to be active participants in the shaping of law.³ Because the lawyer plays a significant role in the shaping of law and benefits materially from and has special knowledge of the law, scholars and aspirational codes assert strongly and persuasively that the lawyer has special obligations both to uphold the law and to strive to make the law just.⁴

* Associate Professor, Washington & Lee University School of Law. I would like to thank Rosemary Globetti and Mark Grey for their invaluable research assistance and comments, Denis J. Brion, David S. Caudill, Sam Calhoun, Gwen T. Handelman, Steven Hobbs, Louis Hodges, and Rick Kirgis for their helpful comments and advice, and the Frances Lewis Law Center of Washington and Lee University School of Law. I would also like to thank the fifteen undergraduate students in Legal Ethics who provided thoughtful and vigorously presented perspectives on this complex topic.

1. C. WOLFRAM, *MODERN LEGAL ETHICS* § 1.6 (1986) (discussing officers of the court), § 13.2.1 (discussing officers of the law), and § 15.3 (discussing oath of office); ABA *CANONS OF PROFESSIONAL ETHICS* Canon 32 (1908) ("[n]o client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law whose ministers we are. . ."). States generally require an oath of office. *See, e.g.,* VA. CODE ANN. § 54.1-3903 (1988) ("[b]efore an attorney may practice in any court in the Commonwealth, he shall take the oath of fidelity to the Commonwealth, stating that he will honestly demean himself in the practice of law and execute his office of attorney-at-law to the best of his ability"). *See generally* Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39 (1989) (arguing that phrase "officer of the court" is "vacuous and unduly self-laudatory" and that lawyers should "either stop using the officer of the court characterization or give meaning to it").

2. Consequently, the law is constantly at tension with itself as society attempts to find the appropriate balance between tradition (heritage) and change (heresy). *See* Brion, *An Essay on LULU, NIMBY, and The Problem of Distributive Justice*, 15 B.C. ENVTL. AFF. L. REV. 437, 439 (1988).

3. This phrasing is the product of Claire Horisk, Oxford University exchange student at Washington & Lee University. *See also* Phelps, *No Place to Go, No Story to Tell: The Missing Narratives of the Sanctuary Movement*, 48 WASH. & LEE L. REV. 123 (1991); Wilkins, *Legal Realism For Lawyers*, 104 HARV. L. REV. 468, 477 (1990) ("lawyers have more practical power than judges to manipulate the legal terrain").

4. *See, e.g.,* Gibson, *Civil Disobedience and the Legal Profession*, 31 SASKATCHEWAN

If indeed lawyers have two special obligations—to uphold the law and to work to assure the law is just—then we understandably are confused about whether a lawyer should engage in civil disobedience or should counsel clients to engage in civil disobedience.⁵ Civil disobedience is the public and nonviolent violation of law for which the actor accepts punishment willingly.⁶ Civil disobedience is a commonly accepted method of attempting to make the law more just. If the lawyer's primary obligation is to take all necessary steps to make the law just, then the lawyer would be free to engage in civil disobedience or counsel clients to do so. If the lawyer's primary obligation is to uphold the law, then the lawyer's ability to engage in civil disobedience or counsel clients to do so might be reduced.⁷

The purpose of this essay is to propose and justify a theory of the proper role of the lawyer faced with issues involving civil disobedience. I begin with an initial assumption that in certain circumstances an individual, including a lawyer as an individual, may feel morally compelled to engage in acts of civil disobedience.⁸ The authors in this symposium have debated the scope and extent of the use of civil disobedience, but no author has

BAR REV. 211, 219 (1966) ("[t]hat a person is a lawyer imposes on him an obligation to uphold the authority and dignity of the law, but it also involves a duty to ensure that the law remains just and adequate"); MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 8 (1981) [hereinafter MODEL CODE] ("[a] Lawyer Should Assist in Improving the Legal System") and MODEL CODE EC 8-2 ("[i]f a lawyer believes that the existence or absence of a rule of law, substantive or procedural, causes or contributes to an unjust result, he should endeavor by lawful means to obtain appropriate change in the law"); MODEL RULES OF PROFESSIONAL CONDUCT 6.1 (1983) [hereinafter MODEL RULES] ("[a] lawyer should render public interest legal service . . . by service in activities for improving the law, the legal system or the legal profession") and Preamble ("[a] lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice").

5. This article discusses the lawyer as counselor and does not address directly other roles that a lawyer might play, such as lawyer as judge, legislator, or law-enforcement officer. The conclusions drawn in this article, however, obviously would affect the lawyer's role in these other circumstances.

6. Civil disobedience writers have multiple definitions of civil disobedience. Indeed, authors in this symposium reflect various shades of meaning when they discuss civil disobedience. See, e.g., Phelps, *supra* note 3, at 127 n.17 and accompanying text. In this article I use civil disobedience to mean the public, nonviolent breaking of the law and the willing acceptance of the punishment. Cf. J. RAWLS, A THEORY OF JUSTICE 364 (1971) (stating civil disobedience is "a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government"). Philosopher John Rawls distinguishes between civil disobedience and conscientious refusal. He defines conscientious refusal as "noncompliance with a more or less direct legal injunction or administrative order." *Id.* at 368.

7. Throughout this introduction the word "law" is used in its "generic sense" to refer to the "rules of action or conduct duly prescribed by controlling authority, and having binding legal force." *United States Fidelity & Guar. Co. v. Guenther*, 281 U.S. 34 (1930).

8. The assumption that civil disobedience is sometimes at least morally correct necessarily includes the recognition that law and morality do not overlap completely. This is hardly a startling conclusion. See Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

asserted that civil disobedience is *never* appropriate.⁹ If one believes civil disobedience is wrong for *everyone*, then it is wrong for the lawyer, and the question of the lawyer's responsibility is easy.¹⁰

Given the assumption that civil disobedience sometimes is morally proper, the more difficult question concerns whether civil disobedience might be proper in certain circumstances for general (nonlawyer) citizens, yet still improper for the lawyer, either as individual or as counselor. As described in Part IA, by becoming a member of the legal profession the lawyer takes on special responsibilities, which require the lawyer to make certain personal and professional sacrifices. As described in Part IB, our American legal system, with its Constitution, Bill of Rights, and emphasis on democracy, causes many people to see a close correlation between the rule of law (the notion that there are certain principles of justice with which both governments and individuals must comply) and positive law (the pronouncements of legislatures, courts, and administrative entities). Part IC sets out why, in light of this close identification between positive law and the rule of law, lawyers have a special obligation to act in accordance with the law. Because lawyers are essential agents of the positive law and voluntarily enter into that agency relationship, lawyers must recognize that legal professionals are more identified with the positive law than general citizens. Consequently, to protect the rule of law, lawyers have a special obligation to exercise caution before engaging in civil disobedience.¹¹ I conclude Part I with a discussion of how the lawyer's special obligation should be manifest and what role professional regulation should play in implementing this special obligation.

Part II of this article discusses the lawyer as counselor. When serving as a counselor, the lawyer provides both raw information and discussion to help the client make a fully informed decision. The lawyer's role as counselor includes informing the client of his or her options within the law. In order to fulfill this responsibility the lawyer must be able to have a wide ranging discussion with the client. Any limitations on the lawyer's discussion come from according proper respect for the client's autonomy.

9. Nazi Germany provided us with a recent horrifying example of why positive law should not be blindly followed in all circumstances. I find it personally troubling that the Nazi regime assumed control of the German legal system with relative ease. Exploring whether this takeover was made easier by the nature of lawyers is, unfortunately, a topic too far afield to discuss here.

10. See, e.g., Powell, *A Lawyer Looks at Civil Disobedience*, 23 WASH. & LEE L. REV. 205 (1966) (labeling civil disobedience as "heresy" and stating that "lawyers, of all people, must retain a wholesome degree of rational detachment in the face of emotional causes"). As discussed in the next section, lawyers occasionally are exempt from general obligations due to some superseding duties to the client. If civil disobedience is wrong for everyone, I can think of no special reason to exempt the lawyer from the general prohibition.

11. From my discussion with both lawyers and nonlawyers, I have learned that this conclusion is believed by many individuals to be either obviously right or obviously wrong. This was not the conclusion I thought I would draw when I began to explore this question. As much as I may wish to deny it, as a lawyer I am part of the power structure.

I. THE LAWYER ENGAGING IN CIVIL DISOBEDIENCE

A. *The Lawyer and Special Duties*

If we decide that lawyers should never be held to different standards than those standards imposed on the general public, then determining the lawyer's role in civil disobedience is easy. Lawyers would be just like everyone else: if a certain situation did not warrant an act of civil disobedience by a general citizen, a lawyer would be wrong to commit an act of civil disobedience; if a particular circumstance justified an act of civil disobedience committed by a citizen, a lawyer also would be justified in engaging in civil disobedience.

Attorneys, however, have been held to special standards. For example, the attorney-client privilege can protect a lawyer from criminal sanctions for failing to reveal known information even though a nonlawyer possessing the same information might be criminally liable.¹² More commonly, the lawyer may have affirmative obligations not applicable to general citizens. For example, a lawyer may have a special duty to disclose lawyer wrongdoing,¹³ to rectify the consequences of having offered material evidence that the lawyer later learns was false,¹⁴ and to disclose known adverse legal authority.¹⁵

Lawyers even give up some essential attributes of our free society when representing a client. For example, under the provisions of professional regulation a lawyer's right to comment on pending cases is limited.¹⁶ A state may constitutionally impose a character and fitness requirement on persons seeking admission to the bar and may compel a bar applicant to take an oath of office stating that the applicant believes in the form of government in the United States and is loyal to the government, even if a similar oath could not be demanded of general citizens.¹⁷ State bars may

12. See, e.g., *People v. Belge*, 50 A.D.2d 1088, 376 N.Y.S.2d 771 (1975), *aff'd*, 41 N.Y.2d 60, 359 N.E.2d 377, 390 N.Y.S.2d 867 (1976) (holding attorney client privilege shielded lawyer from being charged with criminal violation of state statute requiring persons to report unburied corpses); see also Levinson, *To a Young Lawyer: Thoughts on Disobedience*, 50 Mo. L. REV. 483, 486 n.6 (1985).

13. MODEL CODE DR 1-103(A); MODEL RULES Rule 8.3(a).

14. MODEL RULES Rule 3.3(a)(4) and comment (addressing false evidence and remedial measures).

15. MODEL CODE DR 7-106(B)(1) and MODEL RULES Rule 3.3(a)(3).

16. MODEL CODE DR 7-107(A) (limiting "extrajudicial statement[s] that a reasonable person would expect to be disseminated by means of public communication"); MODEL RULES Rule 3.6(a) (same). The lawyer's duty of loyalty to the client also requires that the lawyer not publicly speak against a client's position while advocating that position in court. MODEL CODE DR 7-101(A)(3) ("[a] lawyer shall not intentionally prejudice or damage his client during the course of the professional relationship. . . ."); see also *Gentile v. State Bar of Nev.*, 106 Nev. 60, 787 P.2d 386 (1990), *cert. granted*, 111 S. Ct. 669 (1991).

17. *Law Students Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154, 166 (1971) (involving approved oath and finding that bar is entitled to make inquiry into associations when applicant seeks membership "to a profession dedicated to the peaceful and reasoned settlement of disputes between men, and between a man and his government"); see also C. WOLFRAM, *supra* note 1, at §§12.2.3, 15.3; C. WARREN, *A HISTORY OF THE AMERICAN BAR* (1911) (tracing use of English oath in American colonies).

also constitutionally exclude applicants who believe in the violent overthrow of the government and have a specific intent to bring revolution about.¹⁸

The dominant ethic of our adversary system, as well as a dominant theme taught in law school, is that the lawyer should "represent a client zealously within the bounds of the law."¹⁹ This representational ethic requires the lawyer to engage in what has been called "role-differentiated behavior."²⁰ The extent to which lawyers should engage in role-differentiated behavior is debatable, but I know of no legal theorists who argue that a lawyer has no special obligations whatsoever. By accepting the role of lawyer, the lawyer takes on additional responsibilities which, in turn, may require that the lawyer give up certain freedom of action.²¹

Consequently, there is nothing conceptually startling about the idea that a lawyer may have special obligations or limited rights as a lawyer, distinct from or in addition to one's obligations or rights as a general citizen. The difficulty lies in transforming the general notions about special obligations into mandates for concrete responsibilities in practice. Given that a person may feel compelled to engage in civil disobedience and given that in theory

18. *Wadmond*, 401 U.S. at 165-66. See C. WOLFRAM, *supra* note 1, at §§12.2.3 (discussing freedom restrictions on lawyers) (cites other cases), 15.3 (discussing competence and character).

19. MODEL CODE Canon 7; MODEL RULES Rule 1.3 comment ("[a] lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf").

20. Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 3 (1975). This theme is sounded repeatedly in professional responsibility literature. See, e.g., Freedman, *Legal Ethics and the Suffering Client*, 36 CATH. U.L. REV. 331, 333 (1987) (arguing that after lawyer agrees to represent client, lawyer's autonomy is significantly limited "because the lawyer's principal function is to serve the client's autonomy"); Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relationship*, 85 YALE L.J. 1060, 1066 (1976) (stating that it is "morally right that a lawyer adopt as his dominant purpose the furthering of [the] client's interests—that it is right that a professional put the interests of his client above some idea, however valid, of the collective interest"); Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 614 (1986) (stating that "[o]nce a lawyer has entered into the professional relationship with a client, the notion is that conduct by the lawyer in service to the client is judged by a different moral standard than the same conduct by a layperson").

21. The idea of role-differentiated behavior pervades more than just the lawyer's role. In all walks of our society, we willingly impose both legal and moral responsibilities because of special relationships. For example, parents have special obligations to care for their children. See H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 6.2 (2d ed. 1988) (discussing parental duty to support children). The notion of special responsibility also pervades the many justifications for engaging in civil disobedience. For example, in explaining why she was defying a court order to allow her child to have unsupervised visits with the child's father, Dr. Elizabeth Morgan referred to two special duties she felt were imposed upon her by her special roles: "[I]t's my obligation to my daughter as her mother and also within my moral obligation as a physician to take a stand to protect both my child and as a physician to see that another human being does not come to a point of destruction." Address by Stephen H. Sachs, Rule Day Club, Baltimore, Md. (March 12, 1990). Similarly, Professor McThenia discusses how he felt that his position as a Christian in society imposed on him a certain responsibility. McThenia, *Civil Resistance or Holy Obedience? Reflections from Within a Community of Resistance*, 48 WASH. & LEE L. REV. 15 (1991).

lawyers may have special obligations, we can now address the harder question of what special obligations ought to be imposed on the lawyer.

B. Ideal of "Rule of Law"

Even assuming that civil disobedience is a morally appropriate method for citizens to challenge unjust laws, a necessary predicate to effective civil disobedience is a functioning legal and social system. We have in our jurisprudence two closely related concepts that support our legal system. First, most members of our society believe in the rule of law. The phrase "rule of law" carries mythic connotations for most of us, including lawyers. Functionally, the rule of law requires that both individuals and government are subject to the same general rules of fair play. The rule of law encompasses ideas of fair administration, procedural due process, and (for some) substantive fairness.²² The rule of law, however, must be implemented. In our legal system we implement the rule of law through a defined process of democratic decisionmaking. We established a Constitution, including a Bill of Rights, that establishes a democratic republic. This political system was designed to be relatively close to the ideal of the rule of law in light of our pluralistic society and flaws of human nature.

The result of this law making process is positive law—the legislation produced by our legislative process and decisions by courts and administrative entities.²³ The ideal of the rule of law—of fair administration, procedural due process and certain just results—pervades our political myth and legal

22. See generally Caudill, *The Rechtsstaat: Magic Wall or Material Necessity*, 4 HOUSTON J. INT'L L. 169 (1982); J. RAWLS, *supra* note 6, at 235-43 (1971).

23. In order to justify the importance of lawyers adhering to law, we must justify the idea of law itself, a topic that is far beyond the scope of this article. As a basic premise, however, to justify law requires that we accept at least three foundation points. First, we must accept that political authority is legitimate under certain circumstances. Second, we must agree that there is a generalized duty to obey law issued by legitimate political authority. Finally, we must agree that our United States legal system represents a legitimate political authority. Philosophers have written for centuries justifying the legitimacy of political authority. Whether we justify political authority to curb humankind's natural tendencies, as a method to enhance virtue in citizens, or as part of a social contract, we know that as social beings we function in political units. See, e.g., ARISTOTLE, *POLITICS*; J. LOCKE, *OF CIVIL GOVERNMENT: THE SECOND TREATISE* (1st published 1690); T. HOBBS, *LEVIATHAN* (1st published 1651) (when men live without power to keep them in awe, war emerges and the life of man is "solitary, poore, nasty, brutish, and short"). A reader who does not believe that political authority is legitimate will conclude that civil disobedience, and probably anarchy as well, is justified for all persons. Consequently, for purposes of this argument we assume that the idea of political authority is legitimate.

In addition to recognizing the concept of political authority, we also accept the general duty to obey the law issued by a legitimate political authority. We may conclude that the political obligation to obey law flows automatically from the political authority, or we may find that it is independently justified. See, e.g., Sartorius, *Political Authority and Political Obligation*, 67 VA. L. REV. 3 (1981) (treating as two distinct questions).

The final point, that our U.S. legal system represents a legitimate political authority, is discussed in the text.

system. As a result, rightly or wrongly many people tend to closely correlate the ideal of the rule of law with the enactments and pronouncements of our political system.²⁴

Because lawyers are involved intimately with the law and indeed swear to uphold and defend the Constitution of the United States, the reasonable assumption is that lawyers do accept the legitimacy of our legal system.²⁵ Our legal system, however, occasionally (and sometimes systemically) causes or allows an injustice. Sometimes—often in painful circumstances—our positive law deviates more than a *de minimus* amount from the ideal of the rule of law. What is the proper response of the lawyer when the legal system perpetuates an injustice?

As several commentators have noted, when a person engages in the public, nonviolent breaking of law and submits to punishment willingly, that person is demonstrating respect for the general concept of the rule of law.²⁶ In other words, by submitting oneself to punishment, the individual is acknowledging that all persons should be subject to law.²⁷ Consequently, if the lawyer engages in civil disobedience and accepts any punishment that may accrue, the lawyer is not denying the underlying validity of the rule of law. Yet given that the lawyer in this instance simultaneously acts both as an agent of the law and violator of the law, it seems too simplistic to stop at this point. It is one thing to say that a general citizen can both show respect for an institution and defy some of its dictates. It is more troublesome, however, to assert that lawyers can legitimately uphold and defy the law simultaneously.

C. *Lawyers and the Rule of Law*

Civil disobedience by definition requires persons to rebel against something. That “something” is an acknowledged legitimate political system that

24. Cf. T. TYLER, *WHY PEOPLE OBEY THE LAW* 4, 170-78 (1990) (if people “regard legal authorities as more legitimate, they are less likely to break any laws, for they will believe that they ought to follow all of them, regardless of the potential for punishment”).

25. See *supra* note 17. When oppressed groups are legally precluded from having a political voice in their system, such as civil disobedience against apartheid in South Africa, we have significant questions about the underlying political legitimacy of the government. Many protesters essentially challenge the legitimacy of the United States political system. If one does not believe in the legitimacy of the United States political system, then there are far fewer constraints on civil disobedience.

26. Lippman, *Towards a Recognition of the Necessity Defense for Political Protesters*, 48 WASH. & LEE L. REV. 235, 242 (1991). Several writers in this symposium address the theoretical and practical propriety of using the necessity defense as a “legal” defense to civil disobedience. Even when a civilly disobedient defendant raises a necessity defense, the person usually became a defendant by a public and nonviolent act.

27. If the individual is violating a law that the person deems unjust, then the individual is engaging in direct civil disobedience by directly violating the law to be challenged. In direct civil disobedience the individual is most sharply demonstrating the division between the ideal of the rule of law and the practical product of the legal process. When the individual is violating a law for the purpose of challenging a larger social or political issue, the individual is engaging in indirect civil disobedience.

the actor believes has erred. Despite the error, there nonetheless remains an underlying structure—a foundation—of legitimate law-making. Those who uphold that foundation of the political system are necessary and arguably play a morally correct role. At the risk of being labeled naive, lawyers are those who uphold the foundation of the legal system.²⁸

Our legal system, like a corporation, cannot act except through individual agents. Lawyers are; along with judges and police officers, the most common agents of the law. Much of the force of law comes not from judicial opinions and legislatures, but from the lawyers' interpretation and advice to clients about what the law means.²⁹ Consequently, by serving as the conduit and translator of the law the lawyer is a major actor in implementing both the law and the rule of law.

If the rule of law means, in ordinary language, that rules have some moderate constraining force on the individual predilections of decision-makers ("rule of law not men"),³⁰ then the individual actors who are charged with implementing the law *must* take seriously the goal of having something beyond purely individual choice govern the implementation of law.³¹ If these essential actors implement the law, we cannot help but look to them for affirmation—or disaffirmation—of the legitimacy of our system. The legitimacy of a legal system, in turn, is closely correlated to why people obey the law.³² When these essential actors—lawyers and judges—disregard law unequivocally, individual citizens cannot help but question the legitimacy of our political system and the ideal of the rule of law. Adherence to the rule of law then becomes a central definition of being a "law"yer.

The lawyer's special role in the law derives not just from the fact of the lawyer's involvement with the law, but also from the nature of the lawyer's involvement. Lawyers voluntarily enter into this agency relationship with the law. Lawyers *choose* to study law, *choose* to take a bar exam and become admitted to a bar, and *choose* to take an oath of office. Lawyers then accept the benefits that flow from being a lawyer and take advantage of the opportunities that accompany professional status.³³ Like a bond of

28. The "naive" label presumably would come from those who argue that the law is strongly indeterminate. See generally Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 14-19 (1984). But see Kress, *Legal Indeterminacy*, 77 CALIF. L. REV. 283 (1989) (arguing that law is only "moderately indeterminate").

29. See, e.g., Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

30. See MODEL CODE EC 7-1 ("[i]n our government of laws and not of men, each member of our society is entitled to have his conduct judged and regulated in accordance with the law . . ."); *supra* note 27.

31. The civilly disobedient lawyer's decision to violate the law undoubtedly is based on a well-grounded analysis of why the law is unjust. Consequently, the lawyer would argue that the decision is not based on "purely individual choice," but rather is following the higher principle of the rule of law. But because the lawyer cannot know how her or his decision to break the law will be perceived, the lawyer is taking the rule of law seriously by fulfilling a responsibility of caution. See *infra* note 41 and accompanying text.

32. See *supra* note 24.

33. See generally J. RAWLS, *supra* note 6, at 108-14, 342-43 (1971).

sisterhood, lawyers take on the special responsibility to protect and care for the rule of law. Because of the close identification our society makes between the positive law and the rule of law, lawyers cannot defy the positive law without raising at least the *possibility* of harming the rule of law.

Any legal system must maintain a core level of acceptance and legitimacy to function effectively.³⁴ Even so, in times of social turmoil our United States legal system has been able to tolerate a certain amount of civil disobedience. As proponents of civil disobedience aptly observe, our society has benefitted as a result of that civil disobedience. No solid evidence exists that a *de minimis* amount of civil disobedience, including disobedience by lawyers, will cause permanent harm to the rule of law. Unfortunately, however, no empirical studies indicate how much civil disobedience is tolerable before causing harm to the concept of law.³⁵ Logic and intuition tell us that dangers exist if society, in effect, institutionalizes civil disobedience, particularly when conducted by the law's own agents—the lawyers.³⁶

We must recognize, however, that the lawyer's relationship to the law may enhance the effectiveness of civil disobedience. Lawyers are systemically part of the power structure, and the lawyer's intimate connection with the law may make the lawyer an even more effective symbol of civil disobedience.³⁷ Consequently, perhaps more of the general public will notice the underlying message of civil disobedience when "even lawyers" will rock the boat and disobey the law. Yet the general public may have another reaction: if even lawyers feel they are not bound by the law, why should we be bound? St. Thomas Aquinas, the most noted spokesman on natural law, recognized that even when a law is unjust by being contrary to human good it may bind in conscience "in order to avoid scandal or disturbance."³⁸

34. H.L.A. HART, *THE CONCEPT OF LAW* 54-60, 89-96 (1961) (discussing acceptance of rules).

35. See J. RAWLS, *supra* note 6, at 374 (stating that "I assume . . . that there is a limit on the extent to which civil disobedience can be engaged in without leading to a breakdown in the respect for law and the constitution, thereby setting in motion consequences unfortunate for all").

36. See generally *Rubin v. State*, 490 So. 2d 1001, 1005 (Fla. Dist. Ct. App. 1986) (stating that "[s]urely Rubin—one trained in the law—should know that if persons may with impunity disobey the law, it will not be long before there is no law left to obey"). See also Levinson, *supra* note 12, at 511; Powell, *supra* note 10, at 205 (stating that one would expect lawyers, as "guardians of our legal system," to "denounce civil disobedience as fundamentally inconsistent with the rule of law"); *Cox v. Louisiana*, 379 U.S. 559, 584 (1964) (Black, J. dissenting) (stating that "it is not a far step from what to many seems the earnest, honest, patriotic, kind-spirited multitude of today, to the fanatical, threatening, lawless mob of tomorrow").

37. Justice Stone aptly stated a common criticism that most of the bar are "obsequious servant[s] of business . . . tainted . . . with the morals and manners of the marketplace in its most anti-social manifestations." Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 7 (1934).

38. ST. THOMAS AQUINAS, *TREATISE ON LAW (SUMMA THEOLOGICA, Questions 90-97)*, Question 96, Fourth Article (Gateway ed. 1987) (law contrary to Divine good, as opposed to human good, "must nowise be observed"); see also Wright, *Legal Obligation and the Natural Law*, 23 GA. L. REV. 997, 1009 (1989).

What more compelling disturbance exists than the disturbance of an eroding legal system?³⁹ This obligation to obey an unjust law "is not based on the good of *being* law-abiding, but only on the desirability of not rendering ineffective the just parts of the legal system."⁴⁰

We do not know whether onlookers will see the civilly disobedient lawyer as upholding the rule of law or whether they will confuse the rule of law with the positive law. The question becomes how to deal with this uncertainty. Caution is the usual way in which we deal with uncertainty. To minimize harm to the rule of law, philosophers argue that certain preconditions, guidelines of caution, should be met before *anyone* engages in civil disobedience.⁴¹ For example, John Rawls places three conditions on engaging in civil disobedience. First, Rawls argues that civil disobedience should be limited to "instances of substantial and clear injustice, and preferably to those which obstruct the path to removing other injustices."⁴² Second, before engaging in civil disobedience an individual should ascertain that "normal appeals to the political majority have already been made in good faith and . . . they have failed."⁴³ In other words, "[s]ince civil disobedience is a last resort, we should be sure that it is necessary."⁴⁴ Finally, "[i]n certain circumstances the natural duty of justice may require a certain restraint" to avoid too many groups with equally sound cases from simultaneously engaging in civil disobedience and thereby diminishing the effectiveness of their disobedience.⁴⁵ In addition to these conditions, every person electing to engage in civil disobedience must consider whether it is "wise or prudent" in certain circumstances.⁴⁶

Here again we turn to the concept of lawyer as agent of the law. Whatever liberties a general citizen might undertake in applying these conditions, certainly lawyers as agents charged with protecting and implementing the law have a special duty to err on the side of caution in

39. See J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 361-62 (1980).

40. *Id.* at 361 (the "degree of compliance will vary according to the time, place, and circumstance; in some limiting cases (e.g., of judges and other officials administering the law) the morally required degree of compliance may amount to full or virtually full compliance, just as if the law in question had been a just enactment") (emphasis in original).

41. See, e.g., J. RAWLS, *supra* note 6, at 371-74; Keeton, *The Morality of Civil Disobedience*, 43 TEX. L. REV. 507 (1965) (arguing that understanding requirements of responsible civil disobedience is necessary to enhance its effectiveness for constructive change).

42. J. RAWLS, *supra* note 6, at 372 (stating that civil disobedience should be limited to situations that appeal to public's conception of justice).

43. *Id.* at 373.

44. *Id.*

45. *Id.* at 373-74. Rawls states that "[t]he ideal solution from a theoretical point of view calls for a cooperative political alliance of the minorities to regulate the overall level of dissent." *Id.* at 374. In practice, he urges that minorities suffering from injustice develop a "political understanding" by coordinating their actions so that while each has an opportunity to exercise its right, the limits on the degree of civil disobedience are not exceeded." *Id.* at 375.

46. *Id.* at 376.

evaluating each of these steps.⁴⁷ Consequently, those who argue for civil disobedience—and the lawyer's ability to counsel and engage in civil disobedience—should have the burden of proving that such conduct is an exception to the norm of obedience.⁴⁸

Before engaging in civil disobedience a lawyer should take special care to examine whether the law or policy being opposed produces a clear and substantial injustice. Is the injustice far removed from the ideal of the rule of law? Because of the lawyer's special knowledge of both the law in general and the particular law at issue, a lawyer may have a broader basis than the general citizen to make this assessment.

Similarly, lawyers also have a special obligation to pursue "legitimate" means of redress. Any person who has pursued a controversial issue in judicial or legislative forums knows the disparity between the myth and the reality of American political and legal action. To pursue legal change requires enormous amounts of time, money, and expertise. Because of their special relationship to the law, lawyers have a greater expertise to pursue legal and legislative change. Given that as individuals lawyers have only a limited amount of time, energy, and expertise to give, there is a powerful utilitarian basis for saying that lawyers' efforts should be directed at making legal change for which others may lack the necessary expertise. Consider the fair or proper allocation of activity when a natural disaster strikes. A strong argument can be made that a doctor facing a natural disaster should devote his or her energies to giving medical care rather than to working in an office assisting in arranging the transport of supplies. Similarly, when injustice occurs, the lawyer has a special duty to use his or her expertise to correct that injustice.⁴⁹

That a lawyer has a special duty to obey the law does not force the lawyer into a position of blind adherence to law. Lawyers cannot ignore unjust laws by pointing to the general legitimacy of the system. The very reasons that bind a lawyer so strongly to the rule of law also impose on the lawyer a duty to make the law just. Because of their special relationship with the law, lawyers arguably have a special duty to respond not just to active injustice but also to passive injustice—those instances in which public officials and private citizens (including themselves) fail to prevent wrongdoing or harm.⁵⁰ Our legal system possesses, however, an ability to tolerate

47. See also Levinson, *supra* note 12, at 511; J. RAWLS, *supra* note 6, at 342-50, 376 (asserting that more favored members of society have clear political obligation as opposed to political duty to uphold any just constitution).

48. See generally Levinson, *supra* note 12, at 510-11.

49. Charles Houston, civil rights leader and former dean of Howard Law School, provides a powerful example of this vision of a special obligation. Houston devoted himself to developing a "cadre of lawyers trained in the art of social engineering" and "designed strategies commensurate with the task." Hobbs, *From The Shoulders of Houston: A Vision for Social and Economic Justice*, 32 How. L.J. 505, 512-13 (1989). See Cowen, *The Lawyer's Role in Civil Disobedience*, 47 N.C.L. REV. 587, 596-97 (1969).

50. J. SHKLAR, *THE FACES OF INJUSTICE* 5 (1990).

a significant amount of "legal" dissent and significant—though imperfect—avenues of reform. Expansive interpretations of the First Amendment allow for vigorous public debate. Consequently, a person—including a lawyer—can take part in a public or mass protest without engaging in civil disobedience. When individuals or groups—including lawyers—exercise constitutionally protected rights, such as the right to assemble peacefully and protest, they are using lawful means to attempt to persuade the larger community to embrace the protesters' goals.⁵¹

Similarly, the United States legal system makes room for the "test case," in which individuals perform an act to create a controversy in order to give the legal system an opportunity to change the offending law.⁵² The test case method allows an individual to mount a direct challenge to a law by violating the law and bringing the dispute to court.⁵³ Test case litigation is possible in instances of "direct" civil disobedience, in which the individual is challenging the very law being broken.⁵⁴ Additionally, test case litigation requires that the individual have some good faith basis for believing that his or her position is justified by the extension, modification, or reversal of existing law.⁵⁵

The ABA Model Rules of Professional Conduct implicitly endorses the rationale behind the test case technique of challenging the existing law when it states that a lawyer "may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."⁵⁶ Similarly, both the Model Rules and ABA Model Code of Professional Responsibility provide that lawyers may make a good faith argument for the extension, modification, or reversal of existing law, again creating a

51. See Allen, *Civil Disobedience and the Legal Order*, 36 U. CIN. L. REV. 1, 4-5 (1967). See, e.g., Winn, *A New Idea: Life Chains*, FOCUS ON THE FAM. CITIZEN, June 18, 1990, at 1 (describing how, without breaking laws, participants stood in line holding sign stating "Abortion Kills Children").

52. See, e.g., *Brown v. Louisiana*, 383 U.S. 131 (1966) (reversing breach of peace conviction from sit-in to protest segregation of public library; statute unconstitutional as applied to petitioners); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (reversing conviction of physician and Planned Parenthood director who gave contraceptive information to married couples in violation of Connecticut law).

53. Many of the civil rights cases and challenges to birth control laws follow this model in which the individual creates a bona fide dispute and tests it within the bounds of the law. See, e.g., *Cox v. Louisiana*, 379 U.S. 536 (1965) (involving breach of peace statute). See generally Allen, *supra* note 51, at 6-7 (discussing conflict between federal system of law and political authority versus state legal system); Gibson, *supra* note 4, at 212 (discussing distinction between test case and civil disobedience).

54. Indirect civil disobedience, in which the individual violates a valid law to bring to the public attention a larger social policy or issue, will seldom, if ever, be the basis for a test case.

55. The cumulative effect of these multiple ways to challenge laws creates significant opportunity to appeal to the public sense of justice. In the words of Professor Francis A. Allen, "frequently in the American system an appeal to conscience and morality is an appeal to law." Allen, *supra* note 51, at 7; see also Cowen, *supra* note 49, at 589-93 (discussing test case).

56. MODEL RULES Rule 1.2(d) & 3.1.

legal outlet for challenging law and reflecting the fluidity of our legal system.⁵⁷ Because so many volatile issues have a constitutional basis for challenge, "the range of moral issues that cannot be tied in good faith to a constitutional provision is relatively narrow."⁵⁸

Identifying a "special obligation" to obey the law, however, does not indicate that it is never right for a lawyer to break the law. Perhaps a lawyer who feels compelled to commit an act of civil disobedience, but who is uncertain what effect disobedience as a lawyer would have on the legal system, may feel compelled to resign from the bar.⁵⁹ Perhaps a lawyer as individual would conclude that, even using the "extra caution" above, civil disobedience was appropriate. Thus, in correspondence with the idea of civil disobedience, the lawyer would willingly subject him or herself to the punishment of the law. The next question to consider is whether the lawyer should be subject to any additional professional sanction for engaging in civil disobedience?

D. Professional Regulation and Civil Disobedience

How should the obligation to obey the law affect how lawyers regulate themselves? Because only licensed attorneys may practice law, state bars control who may be admitted to practice and what justifies expulsion from the practice.⁶⁰ All jurisdictions have adopted a code or standard of ethics. The two dominant models, the ABA Model Code of Professional Responsibility [Model Code] and the ABA Model Rules of Professional Conduct [Model Rules], provide two ways to address the question of the lawyer's relationship to the law.⁶¹ Both models contain broad ambiguities. Those ambiguities, however, are both tolerable and appropriate.⁶²

57. MODEL RULES Rule 3.1; MODEL CODE EC 7-22 ("a litigant or his lawyer may, in good faith and within the framework of the law, take steps to test the correctness of a ruling of a tribunal"); see also ABA Formal Opinion 314 (1965); *In re Tamblyn*, 298 Or. 620, 695 P.2d 902 (1985) (requiring no discipline against lawyer who advised client to disobey preliminary injunction that Supreme Court held legally void).

58. Levinson, *supra* note 12, at 510 n.81.

59. Cf. Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DE PAUL L. REV. 1047, 1064 (1989) (quoting Justice Scalia's confirmation hearing statement that he would recuse himself from a case if he could not separate his personal moral feelings from his duties as servant of the law). Jurisdictions also require that attorneys take an oath of office before being admitted to practice. That oath requires that the attorney swear to support and defend the Constitution of the United States. "A lawyer who is willing to violate a statute or a provision of the Code of Professional Responsibility on the belief that higher values predominate, may yet hesitate before violating the oath of office that the lawyer took upon entering upon the practice of law. The oath was, after all, a voluntary act, in a solemn setting purporting to bind the new lawyer in conscience." Levinson, *supra* note 12, at 492-93.

60. See generally C. WOLFRAM, *supra* note 1, at §2.1-7.

61. The Model Code and Model Rules were drafted by the American Bar Association. Like a uniform law, they have no force until adopted, with whatever amendments might be made, by the individual jurisdiction. See generally C. WOLFRAM, *supra* note 1, at § 2.6.

62. Every jurisdiction requires that a lawyer meet some criteria of "character." Rhode,

The Model Code prohibits a lawyer from engaging in "illegal conduct involving moral turpitude" or engaging in "conduct prejudicial to the administration of justice."⁶³ The ABA formal pronouncements under the Model Code reject any distinction between professional and personal conduct, stating that a lawyer must comply with applicable rules at all times whether or not the lawyer is acting in a professional capacity.⁶⁴ In contrast, the Model Rules state that it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects" or to "engage in conduct that is prejudicial to the administration of justice."⁶⁵ This language reflects a conscious policy in the Model Rules to cover only offenses that "indicate lack of those characteristics relevant to law practice."⁶⁶ Although both statements are sufficiently vague to allow for a variety of interpretations, the Model Rules seem to narrow the range of possible illegal conduct that would affect a lawyer's professional status.

Which vision, the full or part-time lawyer, is correct? Is an individual a lawyer, and therefore charged with upholding the integrity of the rule of law, only when doing lawyer-like things? Or, like a priest or a parent, do lawyers hold their role all the time?

Moral Character as a Professional Credential, 94 YALE L.J. 491, 493 (1985). Most jurisdictions generally list some relevant characteristics, usually focusing on "qualities that demonstrate a lack of good moral character." Brennan, *Defining Moral Character and Fitness*, 58 THE BAR EXAMINER 24 (1989). The list of qualities, both positive and negative, varies with the jurisdiction. "Criminal conviction is by far the most commonly reported reason for denying admission, but very few, if any, offenses are so disabling that a person will be excluded from the bar in every state because of the offense." C. WOLFRAM, *supra* note 1, at § 15.3.2. The few opinions to deal with the issue have concluded that not every intentional violation of law shows lack of fitness to practice law. See *Hallinan v. Committee of Bar Examiners of State Bar*, 55 Cal. Rptr. 228, 237, 421 P.2d 76, 85 (1966). Although bar admission information often is confidential, one study indicated that only about 50 bar applicants a year are denied admission to practice on character grounds. Rhode, *supra*, at 516. Denying admission requires a prediction, which we tend to be hesitant to make, so that the concept of good moral character in practice "quickly becomes meaningless, conceptual, and highly individualized." C. WOLFRAM, *supra* note 1, at § 15.3.2; see also Rhode, *supra*; cf. Sciortino, *A Rite of Passage*, 58 THE BAR EXAMINER 14, 15 (1989) (stating that it is "difficult to validate theory of the linkage" between past behavior and future conduct; but that "it may be prudent for bar examiners to act as if the hypothesis has not been disprove[d]"). Admission to the bar, then, gives us few insights into what role breaking the law should play in professional discipline. Decisions whether to discipline a practicing lawyer provide a better vehicle for discussion.

63. MODEL CODE DR 1-102(A)(3) & (A)(5).

64. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 336 (1974) (stating that lawyer should not engage in conduct that tends to lessen public confidence in legal profession).

65. MODEL RULES Rule 8.4 (b), (d). The preamble to the Model Rules, which is aspirational rather than directive, states that "[a] lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs." MODEL RULES, preamble.

66. MODEL RULES Rule 8.4 comment 1 (stating that "[a]lthough a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice").

As a practical matter one cannot draw sharp lines between the lawyer and personal self.⁶⁷ Lawyers struggle constantly with the question of how to reconcile personal beliefs with their role in the legal system.⁶⁸ One cannot humanly shed all personal perspectives when acting as a lawyer, even when one might have a responsibility to minimize them.⁶⁹ Certainly some acts performed in the privacy of one's home and late in the evening might spill over to one's role as a lawyer. For example, most would question the fitness of a lawyer to practice law if that lawyer had sought to embezzle funds, even if the embezzlement concerned strictly personal business dealings. That act shows a defiance of the basic rules of how to allocate rights and responsibilities in our society.

We can envision other contexts in which there is no clearly identifiable person whose rights have been violated, but rather the amorphous concept of the public interest. When Washington, D.C. Mayor Marion Barry was sentenced to six months in prison for a first-time misdemeanor drug offense, some found the sentence, as "compared to other sentences of people equally situated, to be surprisingly harsh."⁷⁰ The judge candidly stated that "[o]f greatest significance to me in sentencing this defendant is the high public office he has at all relevant times occupied . . . [B]ecause of the defendant's unique position, he's not an ordinary misdemeanor."⁷¹ As Mayor, Marion Barry had a special duty to obey the law and that duty extended even into "private" time.

Consequently, a lawyer does not avoid the problem of special responsibility simply by asserting publicly that the act of civil disobedience is being done as a citizen, not a lawyer. Nonetheless, this does not mean that the formal bar mechanism should sanction all attorneys who engage in civil disobedience. The bar as a regulator of conduct suffers from serious limitations. The lawyer's system of self-regulation struggles under mixed motives—or at least a strong perception of mixed motives. One reason lawyers work to develop codes is altruistic: they seek to develop standards to educate both lawyers and the public, to reinforce notions of right and wrong, and to provide a method of deterring misconduct.⁷² Those with a more jaundiced view see the system of self-regulation as motivated by economic and class self-interest.⁷³

67. Trying to sharply distinguish between the lawyer and person is like trying to make sharp, clear distinctions between public and private law. See generally *A Symposium: The Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982).

68. See, e.g., Calhoun, *Conviction Without Imposition: A Response to Professor Greenawalt*, 9 J. L. & Religion (1991) (forthcoming); Levinson, *supra* note 12.

69. See *infra* notes 74-88 and accompanying text.

70. Gellman, *Barry's 'High Public Office' Led Judge to Stronger Sentence*, Wash. Post, Oct. 27, 1990, at A14, col. 1.

71. *Id.*

72. See C. WOLFRAM, *supra* note 1, at § 2.6.1 (explaining possible reasons why group might agree on code of member conduct); Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669, 682 (1978) (stating three limitations on enforcing professional standards that restrict lawyers from counseling civil disobedients).

73. See C. WOLFRAM, *supra* note 1, at § 2.6.1 (explaining possible motivation of

Even assuming that the altruistic goals dominate, the codes evidence the struggle to identify which altruistic goal should dominate. Should the codes serve primarily to educate lawyers, reinforce their notions of right and wrong, or deter the most harmful conduct? The codes have evolved from the 1908 "Canons of Professional Ethics," which were largely aspirational, to the 1969 "Model Code of Professional Responsibility," which contained a blend of aspirational and directive statements, to the 1983 "Model Rules of Professional Conduct," which contain only a limited number of aspirational statements. This evolution from "ethics" to "responsibility" to "rules of conduct" indicates that the bars have functionally—and perhaps properly—recognized the inherent limits of trying to use aspirational goals rather than concrete standards. These self-developed standards, which require group approval and, consequently, a certain measure of consensus, inevitably focus on the lowest common denominator.⁷⁴ Even assuming that lawyers would all agree that they should exercise special caution before engaging in civil disobedience, lawyers inevitably will disagree about what constitutes special caution. The resolution of that issue is grounded in how much one believes our legal system deviates from the norm of perfect justice, how much one weighs the harm caused by the injustice, and other variables not subject to even quasi-objective proof. As a system based on consensus, lawyer regulation is particularly ill-suited to be a directive basis for setting standards of caution.⁷⁵

Lawyer self-regulation can pick up the most egregious cases of repeated defiant acts, and the current standards are sufficient to capture those instances. For example, one state bar committee suggested that a single act of civil disobedience did not call into question an attorney's fitness to practice law, but concluded "that frequent and/or continual misdemeanor convictions of this nature may result in more serious professional consequences."⁷⁶

professional code drafters); Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639 (1981); DiSalvo, *The Fracture of Good Order: An Argument for Allowing Lawyers To Counsel the Civilly Disobedient*, 17 GA. L. REV. 109, 135 (1982) (stating that elite of bar often undertake actions to punish lawyers who exercise their right to challenge authority); Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689 (1981) (discussing concerns of codification and wisdom of placing codification under bar control).

74. C. WOLFRAM, *supra* note 1, at § 2.6.1 (stating that professional code by necessity can regulate only narrow range between marginally enforceable rules and insubstantial rules).

75. *Id.* (stating that once a number of lawyers defy a code rule, other lawyers will ignore the rule based on competitive pressures and sense of unfairness); Luban, *Calming the Hearse Horse: A Philosophical Research Program for Legal Ethics*, 40 MD. L. REV. 451, 460-61 (1981) (ethics and regulation do not coincide). Any issues in which deeply felt views of what is right or wrong arise are inevitably inappropriate for self-regulation. C. WOLFRAM, *supra* note 1, at § 2.6.1. If a critical mass of lawyers disagree with whether the lawyer is disqualified from practicing law because of engaging in civil disobedience, then they will act to keep the bars from either expressly or impliedly developing that standard. *Id.* If a critical mass of lawyers disagree with a standard, the rule will probably be ignored. *Id.*

76. *Virginia Legal Ethics Opinion No. 1185*, Virginia Lawyer Register, October 1989, at 14, col. 1.

The standard of special caution, then, is one that each lawyer should assume individually. The law is not well suited to command all aspects of moral behavior.⁷⁷ Given that law and morality do not always dictate the same behavior and given the possible existence of unjust laws within a valid legal system, individual lawyers must define some standards for themselves.

II. COUNSELING THE CLIENT: A WORKING CONCEPT OF LAWYER

Even when lawyers are not breaking the law themselves, they are likely to have some relationship with nonlawyers who engage in civil disobedience. Many acts of civil disobedience are part of a broad-based attack on an unjust law or situation. The "war" against the injustice will have many fronts, both legal and illegal. For example, the civil rights movement proceeded not only through lawsuits and political action, but also through acts of civil disobedience used to highlight and reinforce the judicial and legislative fronts.⁷⁸ Lawyers obviously will be integrally involved in judicial and legislative battles. (As argued above, that is also where the lawyers' energies ought to be directed.) Many individuals contemplating civil disobedience may turn for legal advice to the same lawyers who are pursuing the social goal through traditional means. Even when a person anticipating civil disobedience is not part of a larger social movement, the individual contemplating a known violation of the law likely will seek the advice and counsel of an attorney, if only to arrange to have counsel available after arrest.

We are not likely to learn what passes in those conferences because of the attorney-client privilege.⁷⁹ We nonetheless can develop a model of what ought to happen. In order to answer this seemingly simple question of how a lawyer should counsel a civilly disobedient client, we need to develop a working model of counseling. The idea of "counseling" can be used in the layperson's sense that one "tells" another what to do. In its richer and broader sense, however, "counseling" envisions a more complex process.

It is axiomatic that a client is an autonomous individual whose views on the major issues involved in the representation are to be respected. The attorney-client relationship is an agency relationship in which the client is

77. See ST. T. AQUINAS, *supra* note 38, at 95 (stating that human law does not bind man in conscience).

78. See Whitehead, *Civil Disobedience and Operation Rescue: A Historical and Theoretical Analysis*, 48 WASH. & LEE L. REV. 77 (1991) (stating that civil disobedience activities provided unity and focus to civil rights movement and educated those not witnessing movement first hand).

79. See generally MCCORMICK ON EVIDENCE §§ 87-97 (E. Cleary ed., 3d ed. 1984) (discussing client privilege and communications between client and lawyer); MODEL CODE DR 4-101 (1990) (stating that lawyer shall not reveal confidences or secrets except under certain circumstances); MODEL RULES Rule 1.6 (1990) (stating that lawyer shall not reveal information relating to representation except under limited circumstances). See also DiSalvo, *supra* note 73, at 134 (stating that no reported cases exist in which bar associations have disciplined lawyers for counseling civil disobedients).

the principal.⁸⁰ As the person who has the legal problem and who will suffer any legal consequences, the client's wishes and views must be respected. Consequently, legal scholars and codes regulating lawyer conduct recognize that the client is entitled to make all significant decisions in the legal representation.⁸¹ Wherever we draw the dividing line between the lawyer's and the client's responsibilities, we can confidently state that the decision whether or not to engage in an act of civil disobedience is uniquely a personal decision solely for the client. Not only is the client's decision uniquely personal, but the lawyer's role in implementing that decision usually is limited to giving the client information sufficient to allow the client to make the difficult choice of whether to break the law or not. Consequently, the lawyer as counselor does not play an instrumental role in the act of civil disobedience.⁸² This personal decision is not to be lightly made by any concerned citizen and requires thoughtful introspection. A lawyer would no more "tell" a client to engage in civil disobedience than a lawyer would "tell" a client to get a divorce. Consequently, a lawyer may not "counsel" in the narrow sense of the word.

This client-centered vision of counseling, however, does not require that the lawyer become simply a passive recipient of the client's goals.⁸³ Although a lawyer may not "tell" a client to engage in civil disobedience, the lawyer possessing any respect for the client's autonomy must consider what information should be given the client concerning civil disobedience. The client is entitled not merely to make his or her own decisions, but to make an "informed" decision.⁸⁴ To make an informed decision requires that the

80. See C. WOLFRAM, *supra* note 1, at § 4.2 (explaining that law of agency binds clients to acts of their lawyers).

81. See, e.g., D. BINDER & S. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977); Lehman, *The Pursuit of a Client's Interest*, 77 MICH. L. REV. 1078 (1979) (discussing relation between lawyer and client); Wasserstrom, *supra* note 20 (discussing moral objection to relationship between attorney and client because lawyer tends to dominate relationship and treat clients impersonally and paternalistically).

82. See Hazard, *How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct*, 35 U. MIAMI L. REV. 669, 671 (1981) (compares least instrumental act of providing definitions of the limits of the law with providing "the means without which the client could not achieve the illicit purpose").

83. See C. WOLFRAM, *supra* note 1, at § 13.2.1 (describing counseling and client-lawyer relationship). Charles Wolfram refers to the lawyer as "non-preemptive counselor," which means that "[t]he lawyer neither attempts to preempt important areas of client autonomy nor is willing to accede to unreasonable client demands for sacrifices of the lawyer's personal or professional autonomy in performing legal services." *Id.*

84. This obligation to help the client make an informed decision appears in the Model Code and the Model Rules. See, e.g., MODEL CODE DR 5-105(C) (stating that client can consent to lawyer representing multiple clients after full disclosure of possible effect of such representation on exercise of lawyer's independent professional judgment on behalf of each client); MODEL CODE EC 7-8 (stating that lawyer should exert best efforts to insure that decisions of client are made only after client has been informed of relevant considerations); MODEL RULES Rule 1.2(a) (stating that lawyer shall abide by client's decisions concerning objectives of representation and consult with client as to means by which objectives of

client know the pros and cons of various anticipated actions.⁸⁵ Certainly when a client contemplates breaking the law, the client must be aware of the consequences of the legal violation. (The mere explanation of the consequences of engaging in illegal conduct might affect significantly the client's decision.⁸⁶) The client also needs to consider the political and social consequences of engaging in civil disobedience. The lawyer can be very helpful in assisting the client to consider thoroughly all the positive and negative consequences of his or her acts.

The legal consequences of civil disobedience are more complex than simply noting the punishment for the anticipated legal violation. A fully informed client is entitled to know that our legal system reflects an often contradictory attitude toward violations of the law that do not fall tidily into the category of common criminality. For example, many jurisdictions recognize a necessity defense to criminal charges.⁸⁷ The necessity defense envisions that an individual may be justified in violating the law in order to avoid a greater harm.⁸⁸ (The necessity defense again exemplifies the pockets of flexibility built into our seemingly rigid legal system by providing another vehicle by which our legal system recognizes that "[t]he law ought to promote the achievement of higher values at the expense of lesser ones."⁸⁹) Although a necessity defense is rarely allowed for "political" protests, it nonetheless remains a theoretical possibility.⁹⁰ If the client is entitled to

representation shall be pursued); MODEL RULES Rule 1.4(b) (stating that lawyer shall explain matter to extent reasonably necessary to permit client to make informed decisions regarding representation); MODEL RULES, preamble at "Terminology" (stating that "consult or "consultation" denotes communication of information reasonably sufficient to permit client to appreciate significance of matter in question).

85. See Martyn, *Informed Consent in the Practice of Law*, 48 GEO. WASH. L. REV. 307 (1980) (discussing necessity of informed consent between attorney and client); Spiegel, *Lawyer and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979) (discussing informed consent between attorney and client).

86. This full counseling is an important way in which lawyers tend to dissuade clients from engaging in illegal acts not tied to civil disobedience. Many lawyers have dissuaded clients from engaging in unlawful acts, such as shading the truth or lying in depositions or in court, by pointing out the *practical* difficulties and dangers raised by that conduct.

87. See Apel, *Operation Rescue and the Necessity Defense: Beginning a Feminist Deconstruction*, 48 WASH. & LEE L. REV. 41 (1990) (describing instances when individuals raise necessity defense); Lambek, *Necessity and International Law: Arguments for the Legality of Civil Disobedience*, 5 YALE L. & POL'Y REV. 472 (1987) (discussing that courts should permit peace activists to assert necessity defense); Note, *Applying the Necessity Defense to Civil Disobedience Cases*, 64 N.Y.U. L. REV. 79 (1989) (discussing relationship between necessity defense and indirect civil disobedience); Note, *Political Protest and the Illinois Defense of Necessity*, 54 U. CHI. L. REV. 1070 (1987) (discussing Illinois necessity defense and lack of availability in political protest cases).

88. See Apel, *supra* note 87, at 42 (stating that under certain circumstances individual may be justified in breaking law to prevent greater harm).

89. Lambek, *supra* note 87, at 476; see also Apel, *supra* note 87, at 67 (stating that necessity defense is not set of rules to be applied in mechanistic fashion).

90. Lippman, *Towards a Recognition of the Necessity Defense for Political Protesters*, 48 WASH. & LEE L. REV. 235 (1991) (stating that courts should accept defense in certain circumstances).

information about the legal consequences of his or her act, then the client is entitled to know about the necessity defense and the possibility—perhaps weak in many jurisdictions—to urge its modification or expansion. Similarly, some jurisdictions expressly or impliedly allow for “jury nullification” in which a jury declines to apply a facially valid law to particular facts.⁹¹ A fully informed client also should recognize that police may choose to ignore the criminal violation, which avoids the legal consequences of civil disobedience, but may also undermine its effectiveness.⁹²

Consequently, to “counsel” a client who is considering whether to engage in civil disobedience does not mean the words “civil disobedience” may never be uttered in a lawyer’s office.⁹³ In order to assist the client in making an informed decision, the lawyer must conduct a meaningful dialogue with the client involving legal, social, moral, and political factors.⁹⁴ To fulfill his or her role, a lawyer must “counsel” the client when counseling is used in its richest sense. A lawyer who respects the client’s autonomy also will recognize that in some cases the lawyer holds a position of power and persuasiveness that can interfere with the client’s autonomy.⁹⁵ Consequently, even if the lawyer personally is persuaded that the client would do the right thing by engaging in civil disobedience, the lawyer must be careful not to pressure the client.

91. See generally Schefflin & Van Dyke, *Merciful Juries: The Resilience of Jury Nullification*, 48 WASH. & LEE L. REV. 165 (1991); HOROWITZ, *Jury Nullification: The Impact of Judicial Instructions, Arguments, and Challenges on Jury Decision Making*, 12 LAW & HUM. BEHAV. 439 (1988) (discussing evaluation of jury nullification statistics received from research); Schefflin & Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 LAW & CONTEMP. PROBS. 51 (1980) (discussing that nullification instruction lets jury operate in more honest and just fashion).

92. See, e.g., Valentine, *D.C. Protesters Chilled, Thwarted by No Arrests*, Wash. Post, Jan. 29, 1991, at A16, col. 1 (“[t]o hear anti-war demonstrators tell it, it’s getting harder to be arrested in this town, even when you want to be”).

93. See DiSalvo, *supra* note 73, at 110 (stating that it is no longer honest for profession to refuse to recognize importance of civil disobedience in creating change in law and public policy). Consequently, I disagree that “[t]he profession’s official view of civil disobedience and the lawyer’s role in it, embodied in the Model Code of Professional Responsibility, is that would-be civil disobedients have no place in the office of the lawyer qua counselor.” *Id.*

94. See *id.* at 142-49 (discussing how to counsel civil disobedients). “[A lawyer] can attempt to help the disobedient clarify and integrate his belief structure by asking searching questions founded in the beliefs already expressed by the disobedient. By more probing he can then help the disobedient apply this belief structure to the options available.” *Id.* at 147.

95. See Lehman, *supra* note 81, at 1082 (stating that people consider lawyers to be worthy advisors and take seriously what they have to say).

The lawyer obviously knows more about the intricacies of law than the average citizen. The client must believe that the lawyer is more knowledgeable on the subject, else she would not have sought the lawyer’s advice. With this assumed knowledge often comes a certain amount of authority in the eyes of the client, and with authority comes persuasiveness. Thus the lawyer should be cautious in distinguishing between making the client aware of her options and convincing the client to do something she might not ordinarily do.

L. Goodman, *The Lawyer and Civil Disobedience* (undergraduate Legal Ethics paper on file with J. McMorrow).

This vision of full counseling is not inconsistent with the Model Code or the Model Rules. The Model Code and Model Rules do not expressly address the issue of civil disobedience. Although the language of both the Model Code and Model Rules seems to create an absolute line between legal and illegal acts, both reveal that identifying this dividing line is not always easy.⁹⁶ The Model Code states that the lawyer should not "[c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent."⁹⁷ By linking "counsel" and "assist," this language seems to use counseling in its narrow sense of telling and thereby encouraging.⁹⁸ This language also prohibits the lawyer only from counseling or assisting; it does not require the lawyer to counsel the client *not* to engage in illegal activity.⁹⁹

Other provisions of the Model Code show a particular ambivalence and ambiguity about the meaning of counseling and possible illegal acts. Ethical Consideration 7-5 provides that "[a lawyer] may continue in the representation of his client even though his client has elected to pursue a course of conduct contrary to the advice of the lawyer so long as he does not thereby knowingly assist the client to engage in illegal conduct or to take a frivolous legal position. A lawyer should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law *and* avoid punishment therefor."¹⁰⁰ The use of the "and" emphasizes the concept of counseling surreptitious violations.¹⁰¹

The Model Rules send an even stronger message that discussing and "counseling" (used in its broadest sense) a client to engage in civil disobedience is not inappropriate.¹⁰² Model Rule 1.2(d) states that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client *and* may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."¹⁰³ The last clause "recognizes that determining the validity or interpretation of a statute or

96. See generally Wilkins, *Legal Realism For Lawyers*, 104 HARV. L. REV. 468 (1990) (arguing against notion that bounds of the law are objective, consistent, and legitimate restrictions on zealous advocacy). But see DiSalvo, *supra* note 73, at 109-10 (describing official view of profession as strict division between civil disobedience and lawyers' role in it).

97. MODEL CODE DR 7-102(A)(7).

98. Cf. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CALIF. L. REV. 323, 343 (1985) (discussing what constitutes assistance).

99. Cf. C. WOLFRAM, *supra* note 1, at § 13.3.8 (stating that laws that are widely ignored and seldom or never enforced are problematic for lawyers counseling civil disobedients). "[O]n the whole, lawyers serve the interests of society better if they urge upon clients the desirability of complying with all valid laws, no matter how widely violated by others they may be." *Id.*

100. MODEL CODE EC 7-5 (emphasis added).

101. See ABA COMM. ON PROFESSIONAL ETHICS, Formal Op. 281 (1952) (stating that there is sharp distinction between advising what can lawfully be done and advising how unlawful acts can be done to avoid conviction); ABA COMM. ON PROFESSIONAL ETHICS, Formal Op. 155 (1936) (lawyer subject to discipline for failure to disclose whereabouts of fugitive client).

102. ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT § 1.3.

103. MODEL RULES Rule 1.2(d) (emphasis added).

regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities."¹⁰⁴ This provision expressly provides for violations to create a test case.

The comments accompanying Model Rule 1.2 also emphasize the full range of information to which the client is entitled. A lawyer has a duty to give an honest opinion about the actual consequences of the client's acts. The fact that the client uses the advice to commit an illegal act "does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed *with impunity*."¹⁰⁵

The Model Code and Model Rules, then, try to walk a delicate line by allowing full conversation between lawyer and client, but not allowing the lawyer to be involved in surreptitious violations of the law. Undoubtedly the Model Code and Model Rules can be read to allow state bar associations to sanction attorneys who counsel clients to engage in civil disobedience. Some scholars argue that the latent ambiguity of the Model Code and Model Rules places a "chilling effect" on counseling clients who engage in civil disobedience.¹⁰⁶ To credit this argument the lawyer must first fear that outsiders will pierce the attorney-client relationship and learn of the attorney-client conversations. In addition, this argument places a high value on the Model Code and Model Rules. I doubt that a lawyer who reflects conscientiously on this problem will be dissuaded from counseling clients who engage in civil disobedience. The Model Code and Model Rules, like most efforts to regulate conduct, are replete with ambiguities. Lawyers themselves are masters in recognizing and accommodating ambiguity.¹⁰⁷ Moreover, moral considerations, including a strong belief in justice and client autonomy, are likely to sway lawyers much more than the ambiguity of the Model Code and Model Rules. I am aware of no cases in which a lawyer has been sanctioned for counseling a client to engage in civil disobedience. Consequently, only the most timid of lawyers is likely to be chilled, and these timid lawyers are likely to stay miles away from any controversial client. Some commentators also fear that the bar will use political consid-

104. MODEL RULES Rule 1.2 comment.

105. *Id.* (emphasis added).

106. See DiSalvo, *supra* note 73, at 135-36 (arguing that penalty for violating DR 7-102(A)(2), even though chance of discovery is small, effectively prevents lawyers from counseling civil disobedients); Note, *The Disciplinary Dilemma Confronting Attorneys Seeking to Counsel Civil Disobedients*, 23 DUQ. L. REV. 715, 730 (1985) (stating that language of DR 7-102(A)(2) allows room for disciplining attorneys who encourage or advise client to engage in civil disobedience).

107. See Wilkins, *Legal Realism For Lawyers*, 104 HARV. L. REV. 470, 483 (1990) (when client's aim is novel or controversial, "the goal of achieving the client's objectives is destined to push the lawyer toward discovering gaps, conflicts, and ambiguities in the relevant legal materials").

erations and ambiguities in the Model Code or Model Rules to aggressively pursue lawyers who counsel their clients to engage in civil disobedience. The possibility of illegitimate political considerations, however, is inherent in the human condition of self-regulation.

The reality of counseling and the duty to respect the client's autonomy shape the nature of any counseling. Civil disobedience is a serious, personal choice because the client will suffer negative legal consequences from engaging in civil disobedience. The lawyer cannot tell the client how to make that serious personal choice. Consequently, the lawyer can never "advise" the client to engage in civil disobedience. The lawyer can, however, affirm the client's decision by stating that in light of the client's goals, civil disobedience indeed may be the only way to achieve those goals. Because of the complex conversation that lawyer and client will have, persuading a client to engage in civil disobedience against the client's inclinations is unlikely to happen.

The more troublesome counseling question is whether the lawyer *may* or *must* raise the possibility of civil disobedience. Perhaps the client's goals would justify civil disobedience as one possible alternative. Political reality confirms that in some situations civil disobedience has been extremely effective.¹⁰⁸ If one goal of counseling is to allow the client to come to morally correct decisions, then it is not wrong to give the client information about the possibility of civil disobedience.¹⁰⁹

Despite the lawyer's duty to provide information to the client, it is troubling to consider that information provided by the lawyer may instill the idea of civil disobedience in the client's mind.¹¹⁰ This question is similar to the question whether juries should be told that they have the power to ignore the law.¹¹¹ Only a handful of jurisdictions inform the jury that it has the power to disregard the law. The rest balance the precarious tension between the rule of law and positive law by not expressly telling the jury of its potential power. Presumably if the law is sufficiently unjust, then the jury's innate desire to do the right thing will give rise to the recognition that perhaps they should decline to apply the law.

Whatever the parallels between jury nullification and civil disobedience, civil disobedience has an additional significant factor. With jury nullification the jury is the representative of the state. The jury is meting out the punishment. With civil disobedience the individual actor is breaking the law of the state and will be the recipient of any punishment. This personalizes the question to an even greater extent. It involves the individual's most fundamental beliefs about the relationship between the individual and the

108. See *supra* note 78 and accompanying text.

109. See MODEL RULES Rule 1.2(d) comment (implying that what client does with raw information is not lawyer's responsibility).

110. Drinan, *Changing Role of the Lawyer in an Era of Non-Violent Action*, 1 LAW IN TRANSITION Q. 123, 125-26 (1964) (stating that lawyer may not only be justified, but also morally compelled to advise clients to disobey laws they regard as offensive).

111. See *supra* note 91 and accompanying text (discussing jury nullification).

state. The lawyer has a delicate role to play because the lawyer's superior position of power may unduly influence the client. Even telling the client about the option of civil disobedience implies that engaging in disobedience is a co-equal option with all others. That it is generated from the lawyer might give civil disobedience an additional imprimatur, despite disclaimers.

Affirmatively telling the client about the option of civil disobedience also reaches to the heart of the lawyer's relationship to the law. *Requiring* a lawyer to raise the possibility of civil disobedience would be like compelling a doctor who personally is opposed to abortion to tell a patient about the possibility of an illegal late-term abortion. It may be an option. It may be the right thing to do in the eyes of many. But it nonetheless reaches very deeply into the personal belief structure of the doctor (that late-term abortion is wrong) which has been affirmed by the state (that late-term abortion is illegal). Once the state has affirmed a well-considered value judgment (*e.g.*, one should obey the law), then I see no moral basis to compel the lawyer to raise the question of civil disobedience.

At the same time, the complex conversation that occurs between lawyer and client makes me hesitate to say that a lawyer should *never* raise the possibility of civil disobedience. Recognizing the potential for unduly influencing the client, recognizing the inherently personal nature of the decision, and recognizing the importance of the idea of the rule of law, the lawyer certainly should reflect very carefully before ever independently raising the topic with the client. But if the client appears to be strongly committed to seeking all available means to remedy the injustice, the lawyer may properly raise civil disobedience as one social response to the injustice. (These instances in which civil disobedience has not already occurred to the client will obviously be rare.) Although this solution will not satisfy those who wish clear lines and firm guidance, we have all lived long enough to know that sometimes nice, tidy lines are not available.

CONCLUSION

As essential agents of our legal system, lawyers have a special obligation to exercise special caution before engaging in civil disobedience. Because of the limitation of the concept of self-regulation, this standard appropriately is not incorporated into narrow "rules" of conduct, but should be part of the individual lawyer's consideration when evaluating an unjust law.

When counseling a client the primary focus is no longer on the lawyer and his or her special relationship with the law. Rather, the primary focus is on assisting the client to make a fully informed decision. The lawyer cannot "tell" a client to engage in civil disobedience because that is a uniquely personal decision and because to do so would violate the lawyer's duty to respect the decision-making authority of the client. To evaluate the legal consequences of engaging in civil disobedience, however, the lawyer will likely have to engage in a wide-ranging discussion about the necessity defense and jury nullification—both of which are "legal" ways of curing "illegality." Because of the reality of the complex conversation, placing

any practical limitations on the lawyer as counselor is inherently problematic. We can only urge the lawyer to respect the idea of the rule of law, to respect the inherently personal nature of the decision for the client, and to respect the client's autonomy.

