1986

The Lawyer as Informer

Gerard E. Lynch

*Columbia Law School, glynch@law.columbia.edu*

Follow this and additional works at: [https://scholarship.law.columbia.edu/faculty_scholarship](https://scholarship.law.columbia.edu/faculty_scholarship)

Part of the [Legal Ethics and Professional Responsibility Commons](https://scholarship.law.columbia.edu/faculty_scholarship)

Recommended Citation


Available at: [https://scholarship.law.columbia.edu/faculty_scholarship/2120](https://scholarship.law.columbia.edu/faculty_scholarship/2120)

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact donnelly@law.columbia.edu.
THE LAWYER AS INFORMER

GERARD E. LYNCH*

From the schoolyard "tattletale" to the police officer's "confidential informant" to the Pentagon "whistle blower," our society is deeply ambivalent toward those who report the wrongdoing of others to the authorities. On the one hand, society values informers. Without informers, serious misbehavior would certainly escape correction. The police officers' code of silence with respect to fellow officers' crimes, for example, may be a major obstacle to eliminating police corruption and brutality. On the other hand, society scorns informers as betrayers of confidence. Even one who violates an antisocial pact such as the police officers' code of silence is viewed as having breached a trust. Such breaches leave all of us less secure in our reliance on the confidence of others.

Lawyers, one would think, would be among the last to make a virtue of informing. At the center of their professional code of conduct is a special obligation of confidentiality that is honored even at the cost of serious suffering and injustice. Although this strong obligation applies only within the limited area of client "confidences" and "secrets," the heroes of the legal profession tend to be those who keep secrets faithfully rather than those who blow the whistle on wrongdoers. The ethos of the legal profession is not one that emphasizes the importance of uncovering the truth at the expense of other social values. Nevertheless, the codes of professional conduct have uniformly required lawyers to report the misconduct of fellow lawyers to the appropriate disciplinary bodies.

* Associate Professor of Law, Columbia University. B.A. 1972, J.D. 1975, Columbia University. Special thanks are due to Richard Uviller for his encouragement and his comments in connection with this piece.

4. A recent treatise on professional responsibility maintains that "[i]t is probably no exaggeration to say that the public defines lawyers as 'those who keep secrets' as much as it considers them to be 'those who litigate cases' or 'those who draft documents.'" G. HAZARD & W. HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT 89 (1985). Lay observers often see this devotion to secrecy as characteristic of the profession's villains as well as of its heroes. Witness the sinister lawyer Tulkinghorn in Bleak House, who "is surrounded by a mysterious halo of family confidences, of which he is known to be the silent repository. There are noble mausoleums rooted for centuries in retired glades . . . which perhaps hold fewer noble secrets than walk abroad among men, shut up in the breast of Mr. Tulkinghorn." C. DICKENS, BLEAK HOUSE 13-14 (W.W. Norton & Co. 1977).
5. See infra notes 12-104 and accompanying text.
This obligation is extraordinary. Generally speaking, citizens are not placed under a duty to report crimes that have come to their attention.\(^6\) It might be argued that this dispensation is part of a rough compromise by which society resolves its ambivalence toward informers: although citizens must, however reluctantly, come forward and give truthful information when summoned by the courts, they generally are not under any duty to volunteer information. Clear exceptions to this generalization are rare,\(^7\) but we are sufficiently uncomfortable with its implications that we sometimes pretend otherwise.

The purpose of this article is to explore the obligation placed upon lawyers to act as informers against other lawyers.\(^8\) First, the article will discuss the substance of the ethical reporting requirements and the extent to which the general ambivalence toward informing has blurred the contours of those obligations.\(^9\) Second, it will compare the obligation imposed upon lawyers with the obligations imposed upon other citizens in analogous situations.\(^10\) Finally, it will offer some conclusions about the appropriateness of the present ethical reporting requirements.\(^11\) The thesis of this article is that society's general ambivalence toward informing is rooted in moral values that deserve more respect than the codes of professional conduct have accorded them. The article will conclude by suggesting ways in which the rules governing lawyers' conduct can be brought into conformity with those values.

I. INFORMING UNDER THE NORMS OF LEGAL ETHICS: TWO HYPOTHETICALS

Let us imagine two situations. The first involves two law students, Cool and Straight. Though he is a capable and conscientious student, Cool lives in the fast lane after hours. An equally successful student,

---

6. See infra notes 106-23 and accompanying text.
7. See infra notes 120-23 and accompanying text.
8. Academic attention to this ethical obligation has been negligible. A few articles addressing this topic have appeared in academic journals. See Thode, The Duty of Lawyers and Judges to Report Other Lawyers' Breaches of the Standards of the Legal Profession, 1976 UTAH L. REV. 95; Note, The "Stool Pigeon" Canons: A Comment on Certain Sections of Canons 28 and 29 of the ABA Code of Ethics, 41 CONN. B.J. 339 (1967). Discussions in bar journals, often written by counsel for disciplinary bodies, are usually limited to reminding lawyers of the existence of code provisions requiring reporting and deploring widespread noncompliance. See, e.g., Gentile, Reporting Misconduct by Other Lawyers, N.Y.L.J., Oct. 23, 1984, at 1, col. 1. Although most professional responsibility casebooks contain problems or materials calling attention to the obligation, see, e.g., T. MORGAN & R. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 139-42 (1976), only one includes any material encouraging critical discussion of the rules in this area. See A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 307-12 (1976).
9. See infra notes 12-104 and accompanying text.
10. See infra notes 106-64 and accompanying text.
11. See infra notes 165-95 and accompanying text.
Straight disapproves of Cool's life-style, but is content to live and let live. At a graduation party thrown by a mutual friend, Straight observed Cool openly using cocaine and supplying the drug to others. Now, Cool and Straight are applying for admission to the bar. Straight meets Cool just prior to his interview with the Character and Fitness Committee. When asked by Straight if he is at all nervous about the impending interview, Cool replies, "Nah. They've got nothing on me. And you know how respectable I can be when I want to."

Meanwhile, inside the interview room, two members of the committee, Pinstripe and Mouthpiece, are talking about taxes. Pinstripe is bemoaning her huge tax bill. Mouthpiece remarks: "You just practice the wrong kind of law. Corporate clients pay by check. My guys pay in paper bags full of cash. That way, you can make the tax rate whatever you want." Pinstripe is shocked by this statement. Mouthpiece continues: "Let me teach you a little bit about the difference between tax avoidance and tax evasion. If you're reasonable about it and not too greedy, you can bend the rules a little bit. That's avoidance. If you steal like a bandit and get caught at it, that's evasion."

In each of these situations, an individual has gained knowledge of information suggesting that another has committed a criminal offense. Both Straight and Pinstripe are free to report the misconduct that has come to their attention. But they violate no law if they do not. Nor, I submit, do they violate any generally held norm of right behavior if they keep the information to themselves. On the contrary, it is likely that most people in their respective social circles would think less of them if they did inform. The openness of drug use in the university setting demonstrates a tacit expectation that students who do not themselves indulge in drugs will tolerate usage by others. And open discussion of petty tax cheating is sufficiently commonplace in business and professional spheres to demonstrate a similar expectation of tolerance. Violators of these "codes of silence" are probably subject to the type of ostracism experienced by police officers who report the misconduct of their colleagues.

But Pinstripe is a lawyer, and Straight wants to be a lawyer. Does membership in the bar carry with it a duty to inform that is not applicable to the nonlawyers in their respective social circles?

12. Even an enthusiast of the rule requiring informing by lawyers agrees that the act of informing in these circumstances "seems contrary to the nature of most of us." Thode, supra note 8, at 100. Another enthusiast concedes that the rule "is viewed as cowardly, underhanded, dishonorable and disloyal . . . a bad thing, even when more harm is suffered if the misdeeds are not revealed." Gentile, supra note 8, at 2, col. 1. These authors regard such "natural" reactions as mere sentiments to be curtly dismissed by serious moralists.
A. Informing and Bar Applicants.

1. The Code of Professional Responsibility. Under the American Bar Association's Model Code of Professional Responsibility (the "Code"), Straight apparently is under no duty to inform because he is not yet a lawyer. The Code is clearly intended to govern only the behavior of lawyers. Nonetheless, the Code does impose at least one obligation upon the prospective lawyer. DR 1-101 indirectly requires a bar applicant to be truthful in his application for admission. The way in which this obligation is imposed, however, is oddly ex post facto. Because the Code's sanctions apply only to lawyers, Cool could not be disciplined if he were to be denied admission for falsely claiming that he had never used drugs. Cool could be disciplined only if he were first to secure admission to the bar.

The rule under which Cool would be disciplined—DR 1-101—requires disclosure of material facts only in connection with one's own bar application. Therefore, it would not apply to Straight, who has damaging information about another applicant. This is not to say, however,
that Straight is entirely free to follow the usual social practice of avoiding involvement. State bar admission standards that require "good character" or "fitness to practice law" are notoriously vague.\footnote{See, e.g., Konigsberg v. State Bar, 353 U.S. 252, 262-64 (1957) (noting vagueness of "good moral character" requirement); Schware v. Board of Bar Examiners, 353 U.S. 232, 248 (1957) (Frankfurter, J., concurring) (determination of moral character "involves an exercise of delicate judgment"); see also Rhode, Moral Character as a Professional Credential, 94 YALE L.J. 491, 512-46 (1985) (discussing standards of moral character); Committee Report: The Character and Fitness Committees in New York State, 33 REC. A.B. CITY N.Y. 20, 37 (1978) (noting the "total absence of stated standards for determining when an applicant is unfit to be licensed for the practice of law") [hereinafter Committee Report].}

A state court or admitting authority might well conclude that the nonlawyer applicant should be denied admission to the bar if he has exhibited conduct that would subject a lawyer to professional discipline.\footnote{Insofar as membership in the bar carries with it special responsibilities, one could argue that instances of behavior that would constitute clear misconduct in the case of a lawyer would not necessarily indicate a lack of good moral character in the case of a nonlawyer.}

Thus, the nature of Straight's ethical obligations had he been a member of the bar at the time Cool applied for admission becomes relevant. Are lawyers required to report derogatory information concerning bar applicants to admission authorities? The aspirational norms of the Code\footnote{See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement (1981) ("The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive.").} certainly suggest the existence of such a duty. EC 1-3 states that a lawyer "should report to proper officials all unfavorable information he possesses relating to the character or other qualifications of an applicant."\footnote{See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 1-3 (1981).} Taken literally, this sweeping command completely reverses the social norm that guides the conduct of other professionals. There can be little doubt that Cool's drug use consti-
tutes "unfavorable information" relating to his qualifications to practice law in at least three ways. First, it constitutes a violation of a criminal law that carries substantial penalties. Under EC 1-5, lawyers should "refrain from all illegal . . . conduct" because "even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession." Second, drug usage amounting to abuse or addiction may be a sign of mental or emotional instability, a ground for disqualification from practice. Third, because Straight has reason to believe that Cool has deceived or will deceive the character committee by concealing his history of drug use, Straight's information may be used to establish a separate violation of the rules of professional conduct by Cool.

There is reason to doubt, however, that the bar genuinely aspires to the norm suggested in EC 1-3. The very sentence that contains the admonition to report all "unfavorable" information opens with a warning that the lawyer "should not become a self-appointed investigator or judge of applicants for admission." This curious warning seems to reflect an unconscious ambivalence toward informing rather than a carefully reasoned limitation on the duty to report. There is, admittedly, some identifiable substance to a rule providing that a lawyer should not become an investigator of bar applicants; a meaningful distinction can be made between reporting unfavorable information already known and searching out undetected wrongs.

22. The phrase "unfavorable information" plainly encompasses material that would not in itself disqualify an applicant, but would reflect negatively on the applicant's qualifications.
24. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 1-5 (1981). Whether any such violation of the law automatically constitutes a disciplinary violation is discussed at length in the text accompanying notes 76-85 infra. It should be noted, in connection with that discussion, that possession and distribution of illegal drugs have universally been found to constitute crimes of moral turpitude. See, e.g., In re Preston, 616 P.2d 1, 7-8 (Alaska 1980) (distribution of cocaine); In re Moore, 453 N.E.2d 971, 974-75 (Ind. 1983) (possession of marijuana); In re Rabideau, 102 Wis. 2d 16, 29-30, 306 N.W.2d 1, 7-8 (1981) (possession of marijuana), appeal dismissed, 454 U.S. 1025 (1981). On the other hand, the infrequency of cases involving marijuana suggests that although courts will affirm disciplinary sanctions in such cases, little active enforcement is occurring. See Rhode, supra note 18, at 552.
26. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-101(A) (1981) (prohibiting false statement in admission application); see also supra note 16 and accompanying text.
28. One does wonder, however, why it was thought necessary explicitly to condemn investigation. The affirmative reporting requirement, which refers to "information [the lawyer] possesses," already plainly makes this point. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 1-3 (1981). Few lawyers have the time or inclination to undertake uncompensated private investigation in any event. Notably, EC 1-3 goes beyond merely stating that a lawyer is not required to seek out unfavorable information about applicants; it specifically counsels against doing so.
But the rest of the warning contained in EC 1-3 is practically indecipherable. What can it mean to say that the lawyer should not be a "judge" of the applicant for admission? Of course the lawyer is not the ultimate judge of the applicant's qualifications; that role is left to the admitting authority. Yet the ethical admonition requires the lawyer to judge whether he has "unfavorable" information concerning the applicant. The related Disciplinary Rule requires the lawyer to make an even more absolute judgment with regard to the qualifications of the applicant. What are we to make of the statement that the lawyer not be a "self-appointed" investigator or judge? Any appointment to either role necessarily comes from the Code itself—a code drafted by lawyers for their own self-regulation. Under the Code, then, each lawyer is in a sense a self-appointed guardian of the profession's ethical virtue. Thus, the admonition not to be a "self-appointed investigator or judge" cannot provide an intelligible norm for those seeking to fulfill their professional obligations. Rather, the Ethical Consideration demonstrates our emotional ambivalence about informing by grafting language associated with attacks on informers onto an admonition to inform.

A moment's thought suggests that there is good reason for the ambivalence evident in EC 1-3. Would a rule requiring lawyers to report all unfavorable material concerning the qualifications of bar applicants really be desirable? Some restriction undoubtedly should be placed on the kind of material required to be reported. Consider, for example, the situation facing those members of the bar who happen to be law professors. Most law professors probably do not have information about their students that would raise serious doubts about the students' qualifications to practice law. But the "unfavorable" standard is broader. Presumably, an applicant's consistent failure as a student to be prepared for class, although not in itself a reason to deny admission, is "unfavorable information" relating to the applicant's qualifications. It is probable that if some more significant dereliction came to the attention of the admitting authorities, and the question arose whether that dereliction constituted an isolated episode or indicated a general character flaw, the admitting authorities would at least consider the professor's information relevant.

Yet to burden character committees with accounts of law school derelictions would certainly be undesirable. Such information would usually have little or no bearing on the applicant's qualifications to be-


30. Model Code of Professional Responsibility DR 1-101(B) (1981) ("A lawyer shall not further the application for admission to the bar of another person known by him to be unqualified . . .") (emphasis added). The words "known by him to be unqualified" impose a standard that is difficult to satisfy. See infra notes 32-34, 60-68 and accompanying text.
come a member of the bar. The point is not merely that the ethical consideration admonishing complete disclosure should make an exception for information that is de minimis. An unrestricted obligation to report is undesirable for other reasons. Even where the law professor can recount a series of incidents showing irresponsibility, selfish lack of concern for others, dismal judgment, and marginal academic achievement, it is doubtful that admitting authorities really want such information. Too much information about the character flaws of bar applicants would leave the admitting authorities with the difficult choice of either admitting very few attorneys or acknowledging that some character failings do not detract from one's ability to practice law.

Moreover, an unrestricted obligation to report would be disruptive of important relationships. After all, society's general unwillingness to impose a legal or moral obligation to report rests largely on the realization that confidential social relationships would be impossible to maintain were every member of society obligated to report the failings of his colleagues. Although few social relationships are regarded as sufficiently important to warrant the protection of an evidentiary privilege, many are at least important enough to warrant exemption from a mandatory reporting requirement. If such an exemption is justified with respect to society in general, then a restricted obligation to report is justified with respect to lawyers, even in the special context of admission to the bar.

Perhaps because of considerations such as these, as well as the practical difficulty of enforcement, the Code's drafters were unable to endorse a reporting requirement—even as an aspiration—without including a rhetorical swipe at those who would too eagerly enforce it. This ambivalence is reflected even more strongly in the Disciplinary Rule that serves as the enforceable alter ego of EC 1-3. Even though lawyers should "aspire" to the goal of reporting all "unfavorable information" about bar applicants, the Disciplinary Rule does not require authorities to impose sanctions for failure to do so. Instead, DR 1-101(B) requires only that a lawyer not "further the application of" one "known by him to be unqualified" with respect to character, education, or other qualification.

31. See infra notes 139-57 and accompanying text.

32. The Code's professed intention is that the Ethical Considerations be merely hortatory and the Disciplinary Rules be mandatory minimum standards. Some courts, however, have held that sanctions may be imposed for conduct that falls short of violating a Disciplinary Rule. See e.g., Stratmore v. State Bar, 14 Cal. 3d 887, 889-90, 538 P.2d 229, 230, 123 Cal. Rptr. 101, 102 (1975).

33. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-101(B) (1981). In contrast, the code proposed by the American Trial Lawyers Foundation requires that a lawyer "who has material, adverse information about a candidate for the bar, shall convey that knowledge to the appropriate . . . admission authorities." THE AMERICAN LAWYER'S CODE OF CONDUCT Rule 8.2 (The Roscoe...
The difference between DR 1-101(B) and EC 1-3 is significant. If lawyers take as a guide the language of DR 1-101(B) rather than that of EC 1-3, very little information about bar applicants need be disclosed to admitting authorities. DR 1-101(B) requires action only if the bar applicant is "known by [the lawyer] to be unqualified" for admission. If any weight at all is put on the word "known," the reporting obligation will rarely arise. The character requirements for admission to the bar are notoriously vague; it is often difficult for lawyers or prospective lawyers to learn precisely what kind of information would be relevant. Moreover, a character committee probably bases its ultimate judgment regarding qualifications on an overall assessment of character rather than on a single incident. A lawyer is therefore almost always in a strong position to argue that he does not "know" that an applicant is unqualified with respect to character.

But even where the lawyer is sufficiently familiar with both the applicant's relevant activities and the admitting authority's standards to "know" that the applicant is not qualified, DR 1-101(B) requires only that the lawyer not "further [that individual's] application for admission to the bar." It would be unreasonable to regard a passive failure to report misconduct as conduct furthering an individual's application for admission. But then, what does DR 1-101(B) mean? Presumably a lawyer who knows that an applicant is morally unfit yet nevertheless files an affidavit of good character on behalf of that applicant has violated DR 1-101(B). If DR 1-101(B) applies only in such situations, it is not inconsistent with society's general ambivalence toward informing. Society may be reluctant to impose an affirmative obligation to inform, but it does not hesitate to condemn outright deceit. In cases of perjury, for example, the perjurer's reluctance to inform is not as a general rule considered in mitigation of guilt. Yet an obligation to avoid outright deceit with regard to an applicant's qualifications hardly needs to be expressed in a separate rule; filing a false affidavit of good character is professional
It is not clear what kind of conduct short of vouching for the applicant's moral character in an official recommendation would constitute furthering his application. It might be argued that a law school admissions director furthers the application of a morally unfit lawyer by offering law school admission to a morally unfit student. It might also be argued that a law school professor furthers the application of a morally unfit lawyer by giving a passing grade to a morally unfit student. But neither of these actions apparently would qualify as furthering an "application for admission to the bar" because in neither case has an application actually been filed.

Even if an application had been filed, it is not clear that DR 1-101(B) would apply to such indirect means of furthering an application. For example, it might be argued that if a lawyer knows that a law school graduate is unfit yet hires him as a clerk or paralegal pending his application for admission, that lawyer is "furthering" the graduate's application by helping him build a record of useful employment. But surely, DR 1-101(B) cannot be meant to apply to such indirect actions. "Furthering" cannot mean doing anything whatsoever that might ultimately make it easier for an applicant to become admitted to the bar. Otherwise, a lawyer could not ethically pay for his child's bar review course if that child were unqualified for admission to the bar. It is reasonable to conclude, then, that "furthering" an application occurs only when the action in question is specifically intended to advance the application itself.

Thus, Straight seems to be in the clear. As a bar applicant, he is not obligated under the Code to volunteer information about another applicant.

---

37. The Code provides that "[a] lawyer shall not ... [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(4) (1981). Cf. id. DR 7-102(A)(5) ("In his representation of a client, a lawyer shall not ... [k]nowingly make a false statement of law or fact.").

38. Some conduct that might be regarded as furthering an application would surely be privileged. A lawyer is presumably entitled to further the bar applicant's cause by representing him in connection with his application, regardless of the lawyer's knowledge concerning the applicant's moral fitness. The first amendment would presumably protect advocacy of the admission of candidates unqualified under current standards on the ground that bar admission standards constitute an issue of public significance. Cf. Keyishian v. Board of Regents, 385 U.S. 589, 598-604 (1967) (distinguishing between advocacy of an abstract position and incitement of unlawful activities).

39. Arguably, if admitting authorities required employers to certify the fact of employment, providing the requisite certificate could be seen as furthering the application. This would probably have little practical effect because character committees requiring such certification would presumably also require the employer to express some sort of opinion regarding the applicant's qualifications. Unless such forms were carelessly worded, the employer's obligation to answer truthfully would once again require reporting the damaging information. This sort of procedure, however, takes us out of the realm of "informing" and into the area of truthful response to lawful requests for information—an area that does not involve the same moral implications as unsolicited informing.
cant. Even if he were already an admitted lawyer, he could not be disciplined for failing to report Cool's drug use, although EC 1-3 encourages him to do so. Assuming the admitting authority holds applicants to the profession's enforceable disciplinary norms rather than to its aspirational goals, Straight is apparently free to follow his conscience in the matter.

2. The Model Rules of Professional Conduct. The American Bar Association's newly promulgated Model Rules of Professional Conduct (the "Model Rules") considerably modify the standards applicable to Straight's dilemma. Unlike the Code, the Model Rules do not attempt to express both aspirational goals and enforceable obligations. Nonetheless, there is still a distinction between what the Model Rules urge and what they require. As the introductory commentary acknowledges:

Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has professional discretion . . . . Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.40

Like the Code, the Model Rules are thus structured in a way that permits them to reflect society's ambivalence toward informing by separating "rules" from "aspirations."

The first question with regard to Straight's dilemma is again: What, if anything, do the Model Rules require bar applicants to disclose about their own conduct? Like the Code, the Model Rules are intended to regulate the conduct of lawyers. The Model Rules appear to make no distinction between the candor required of lawyers in the bar admissions process and that required of applicants themselves. Rule 8.1 applies to the "applicant for admission to the bar" as well as the "lawyer in connection with a bar admission application."41 The Model Rules thus avoid the awkward retroactive application of conduct requirements found in

---

41. Id. Rule 8.1. Rule 8.1 provides in full:

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or
(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admission or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by rule 1.6.

Id.
Rule 8.1 straightforwardly prohibits bar applicants from engaging in certain kinds of dishonest conduct.43

In addition, Rule 8.1 strengthens the requirement of candor for bar applicants, at least with respect to their own applications. Although Rule 8.1(a) merely carries forward DR 1-101(A)'s rule against making false statements on an application, the Model Rules impose a stricter obligation upon the bar applicant to reveal unfavorable information about himself. Under the Code, the bar applicant is inviting later discipline if he "deliberately fail[s] to disclose a material fact requested in connection with" his application.44 Thus the enforceable obligation to disclose information about oneself applies only with respect to information actually requested by the bar examiners.45 Under Rule 8.1(b), in contrast, a bar applicant is required to disclose any fact "necessary to correct a misapprehension known by the person to have arisen in the matter."46 Rule 8.1(b) still stops considerably short of requiring the applicant to fully disclose all facts that he believes are material to his application for admission. Unlike the Code, however, the Model Rules do not limit the self-reporting requirement to requested information.47 Rule 8.1(b) appears to require the applicant to correct any misapprehension he knows has arisen, whether or not he is personally responsible for the misapprehension and whether or not the misapprehension concerns a matter material to the admitting authority's inquiry.48

The Model Rules, then, may require Cool to correct any misapprehension the bar examiners may have regarding his character. But what

42. See supra notes 15-17 and accompanying text.
43. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.1 (1983). Although this formulation is less awkward, it does not solve the problem of sanctions. Presumably, candidates whose falsehoods are discovered before admission may be denied admission and only those who are successful in attaining admission are subject to professional discipline.
45. Although it may be putting too much strain on a mere "aspiration" to subject it to such close statutory analysis, it might be argued that EC 1-3 encourages the lawyer who is himself a bar applicant to report any unfavorable information about himself, just as he would about any other applicant. EC 1-3 refers to "applicants" and not, for example, to "others applying for admission to the bar."
46. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.1(b) (1983).
47. Rule 8.1 carries forward the Code's requirement that an applicant disclose material requested information. Although Rule 8.1(b) requires only that the applicant not "fail to respond to a lawful demand for information from an admission . . . authority," Rule 8.1(a) requires that the response not be "false." MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.1(a), (b) (1983). A response that omitted a material requested fact would presumably be within that prohibition.
48. It is noteworthy that a lawyer or applicant apparently must correct any misapprehension and respond to any lawful demand for information in connection with disciplinary or admission matters, regardless of whether it is material. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.1(b) (1983). Thus, any reporting obligation Straight may have under this provision does not depend on whether Cool's dereliction renders him unqualified for admission.
about Straight? Is he obligated to correct the examiners' misapprehensions regarding Cool's character?

Once again, it is helpful to begin by assuming that Straight is already a member of the bar. Rule 8.1(a) requires a "lawyer in connection with a bar admission application" as well as an "applicant for admission" to correct any misapprehensions on the part of the admitting authorities. The phrase "a lawyer in connection with a bar application" might be interpreted to refer only to lawyers who are themselves applying for admission to the bar of another jurisdiction. The language of Rule 8.1(a) as a whole, however, does not support this interpretation. The commentary following Rule 8.1(a) clearly suggests that the duty imposed by Rule 8.1(a) relates both to "a lawyer's own admission" and to "that of others." Rule 8.1(a) therefore goes further than DR 1-101(A) of the Code by requiring the lawyer not only to refrain from furthering the application of an unqualified applicant, but also to furnish unsolicited information to the admitting authorities whenever he knows that a "misapprehension [has] arisen in the matter." The rule appears to require that lawyers inform even where silence would neither constitute an implied false representation nor advance the applicant's prospects for admission.

One significant limitation, however, makes it probable that lawyers will rarely be obligated to report information concerning bar applicants. Because Rule 8.1(a) applies only when the lawyer comes to know that the admitting authority is operating under a misapprehension, no ethical duty arises if the lawyer simply avoids knowledge of the admitting committee's collective state of mind. In our example, even though Straight has reason to believe that Cool is prepared to deceive the character committee with regard to his use of drugs, he does not "know" whether the committee will inquire into the matter, or alternatively, whether it will actually be misled. Straight therefore will not violate Rule 8.1(b) if he

49. Id. Rule 8.1(a).

50. First of all, the rule applies generally to "a" bar admission application, not to "his" application. Id. Cf. Model Code of Professional Responsibility DR 1-101(A) (1981) (using the phrase "his application for admission to the bar"). In any event, because Rule 8.1(a) explicitly applies to any "applicant for admission to the bar," a special provision for applicants who were already lawyers would be surplusage. Moreover, the phrase "in connection with a bar admission application" is parallel with "in connection with a disciplinary matter"; the latter phrase suggests an application not confined to a lawyer's own disciplinary matter. Finally, the reference to an exception for confidential information suggests that the rule applies to admission matters involving others; one's own application for admission would not ordinarily involve privileged information.


52. Id. Rule 8.1(b).
keeps his knowledge of Cool's drug use to himself.\textsuperscript{53}

In short, although the approach under the Model Rules varies somewhat from that under the Code, the conclusions reached are similar. The Code clearly imposes an obligation to report unfavorable information regarding applicants only upon admitted lawyers. Bar applicants such as Straight are not obliged to report. The Model Rules are more obscure on this point. Although they appear to govern both lawyers and applicants, a close reading of the relevant language reveals an ambiguity about the breadth of the obligation imposed upon applicants.

Apart from the question of \textit{who} is subject to the applicable rules, the Model Rules and the Code contain somewhat different standards regarding \textit{what kind} of information must be disclosed. The Code does not require a lawyer who is not himself somehow implicated in the admission

\textsuperscript{53}. In fact, Rule 8.1 may impose no reporting duty at all upon Straight. Although the obligations set out in Rule 8.1 apparently apply equally to lawyers and applicants, a closer reading suggests that if Straight were not already admitted to the bar, he would not be obliged to report Cool's drug use even if he knew that the character committee labored under a misapprehension. Rule 8.1 provides in part:

\begin{quote}
An applicant for admission to the bar... shall not... fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen \textit{in the matter}... . . .
\end{quote}

\textsc{Model Rules of Professional Conduct} Rule 8.1(b) (1983) (emphasis added). The italicized phrase has no antecedent reference. This portion of Rule 8.1 makes sense only if "the matter" refers to the applicant's own application. To be contrasted is the rule's coverage of lawyers:

\begin{quote}
[A] lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not... fail to... correct a misapprehension known... to have arisen in the matter... . . .
\end{quote}

\textsc{Id.} Here, "the matter" clearly refers to a "bar admission application" or "disciplinary matter." It is clear that "the matter" in this case refers to \textit{any} bar application, not just the lawyer's own. \textit{See supra} notes 49-52 and accompanying text; \textit{see also} \textsc{Model Rules of Professional Conduct} Rule 8.1 comment (1983) (noting that Rule 8.1 applies to lawyers in connection with both their own and others' applications, but containing no reference to applicants). Although this result was probably not intended, \textit{see id.} ("The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers."): one can nonetheless argue that despite its otherwise equal treatment of lawyers and applicants, Rule 8.1 imposes no obligation at all upon bar applicants, as distinct from bar members, to volunteer information concerning \textit{other} applicants.

Applicants are, however, required by Rule 8.1(b) to respond to any lawful demand from an admission authority, a requirement not limited to any particular "matter," and therefore presumably applicable to demands for information about other applicants. \textit{See Model Rules of Professional Conduct} Rule 8.1(b) (1983). An interesting anomaly would exist, however, if applicants were required to volunteer information concerning other applicants. Our discussion of Straight's obligations under the Code assumed that although Straight is not directly governed by the Code, he should nevertheless be concerned about the possibility that the admitting authority would hold him to those standards that govern admitted lawyers. \textit{See supra} notes 14-19 and accompanying text. Thus Straight's failure to report Cool—assuming that a like failure on the part of an admitted lawyer would warrant disciplinary action—could lead to the denial of Straight's admission. Would the same scenario be possible under the Model Rules, which directly regulate Straight's conduct in the preadmission phase and yet do not require one in his position to volunteer information? In the final analysis, this conundrum raises the question whether admitting authorities can or should apply stricter standards than those found in the mandatory rules of the profession.
application to disclose information; his only mandatory obligation is to avoid "furthering" the application, and then only when he "knows" that the applicant is unqualified. In contrast, the Model Rules require lawyers to disclose any information that they know is necessary to correct "misapprehensions" on the part of the admitting authorities. The obligation under the Model Rules is broader in that it extends to derogatory information that is not totally disqualifying. The obligation under the Model Rules is at the same time narrower, however, in that it does not arise until the lawyer becomes aware of a specific factual misapprehension.

Although differences between the two standards can thus be identified, one similarity is clear: the obligations imposed by the Code and the Model Rules are both exceptionally narrow. Whatever the differences in formulation and applicability, it would be an extremely rare case in which either standard would require a lawyer to report information bearing on the character of an applicant. Indeed, far from requiring lawyers to play active roles in policing the bar admission process, both rules tend to encourage lawyers to distance themselves from that process and avoid any knowledge pertaining to the character of applicants.

B. Informing and Lawyers.

1. The Model Code of Professional Responsibility. The case of Pinstripe and Mouthpiece differs from that of Cool and Straight in that it involves a disciplinary problem rather than a bar admission problem. With respect to disciplinary matters, the Code is much less equivocal; it backs its encouragement of whistle-blowing with a specific requirement in the Disciplinary Rules. DR 1-103(A) states that a lawyer having "unprivileged knowledge of a violation" of any Disciplinary Rule "shall report such knowledge to a tribunal or other authority empowered to

---

54. See supra notes 32-39 and accompanying text.
55. See supra notes 49-53 and accompanying text.
56. Thus, under the Model Rules, a lawyer presumably may even further the application of a concededly unqualified applicant, so long as he can do so without making a false statement and without failing to correct a known misapprehension.
57. Although both operate to discourage lawyers from becoming too involved in bar admission matters, the rules are not identical: the Code requires only that the lawyer not involve himself affirmatively in supporting the application of one having a dubious character, MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-101(B) (1981); the Model Rules, in effect, require lawyers to avoid learning anything about such applications. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.1 (1983).
58. EC 1-4 provides that "[a] lawyer should reveal voluntarily to [the proper] officials all unprivileged knowledge of conduct of lawyers which he believes clearly to be in violation of the Disciplinary Rules." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 1-4 (1981).
investigate or act upon such violation.”

Assuming Pinstripe suspects that Mouthpiece has violated a Disciplinary Rule, what degree of certainty on her part is required to trigger the mandatory reporting requirement? The knowledge requirement in DR 1-103(A) presumably applies both to the factual question whether Mouthpiece has actually cheated on his taxes and to the legal question whether such conduct violates a Disciplinary Rule. Uncertainty may exist in this case with regard to both questions. As to the factual question, Pinstripe has not actually seen Mouthpiece do anything illegal; she has only heard him say that he has cheated on his taxes. Mouthpiece could merely be bragging. As to the legal question, it is not immediately clear that Mouthpiece's proclaimed acts constitute a violation of a Disciplinary Rule. Where should Pinstripe look for guidance?

Any uncertainty about whether a violation has actually occurred undermines the obligation to report under DR 1-103(A). The rule does not require lawyers to report mere information suggesting that a violation may have occurred. The disclosure requirement applies only to one having "knowledge" of a violation. The term "knowledge" is not defined in the Code, although it is an important term in several provisions. Interpretative problems have consequently arisen, most notably with respect to the provision prohibiting a lawyer from "[k]nowingly" using perjured testimony.

59. Id. DR 1-103(A) (emphasis added). Literally, DR 1-103 requires lawyers to report violations of DR 1-102. Because DR 1-102(A)(1) forbids violation of any Disciplinary Rule, the reporting requirement applies to all ethical violations.

Of those jurisdictions that have adopted some version of the Code, only three seem to have had serious qualms about its formulation of the reporting requirement. Although no state has amended EC 1-4, Massachusetts, Washington, and the District of Columbia have declined to adopt DR 1-103(A). CODE OF PROFESSIONAL RESPONSIBILITY BY STATE, supra note 33, Canon 1 at 5-6. For a reference to the legislative history of the Massachusetts Code, see Kaufman, supra note 8, at 307-08. The California Rules of Professional Conduct do not contain a provision requiring reporting of misconduct. See CALIFORNIA RULES OF PROFESSIONAL CONDUCT (1983).

60. A comparison of DR 1-103(A) with DR 1-103(B), which requires revelation of "knowledge or evidence upon proper request of a [disciplinary] tribunal," MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103(B) (1981) (emphasis added), suggests that "knowledge of a violation" does not mean "evidence of a violation." Thus, "evidence" is to be supplied on request, but only "knowledge" is to be reported sua sponte.

61. See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A) (1981) (adopting a knowledge standard in several prohibitions). The Model Rules, in contrast, define knowledge as "actual knowledge of the facts in question." MODEL RULES OF PROFESSIONAL CONDUCT Terminology (1983). This definition sets a high standard of factual knowledge, but may not require knowledge of the legal effect of known facts.

62. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(d) (1981) ("In his representation of a client, a lawyer shall not . . . [k]nowingly use perjured testimony or false evidence."). Some commentators have taken a cynical view of the knowledge requirement. The American Trial Lawyers Foundation has noted:
As we might expect, the Code's Ethical Considerations encourage reporting in a broader range of situations. EC 1-4 uses the more expansive term "belief" in at least one place: a lawyer is admonished to report any unprivileged "knowledge of conduct . . . which he believes clearly to be in violation of the Disciplinary Rules."63 Yet on close reading, the apparent breadth of this admonition evaporates. In the first place, the "belief" standard applies only to the legal question, i.e., the question of whether a violation has been committed. As to factual matters, EC 1-4 is consistent with DR 1-103(A): the lawyer is urged to report only conduct of which he has "knowledge."64

Even with respect to the legal question, EC 1-4 does not require the lawyer to report conduct that he merely believes constitutes a violation of the Code. Only conduct he believes is clearly in violation falls within EC 1-4. This formulation is perhaps a bit broader than that found in DR 1-103(A). For if a lawyer has any question at all about the meaning or scope of a rule, he can plausibly claim that he does not "know" that a particular type of conduct violates that rule. In such case, the actual knowledge standard found in DR 1-103(A) would not be met. The same lawyer, however, might nevertheless believe it is clear that a violation has occurred. In that case, the lawyer would be obligated to disclose under EC 1-4. But this distinction is not an easy one to make. In any event, EC 1-4 is hardly a sweeping mandate to report any conduct that might fairly be thought to violate a Disciplinary Rule.

It is doubtful whether Pinstripe could be found to have actual "knowledge" of misconduct on the part of Mouthpiece. In criminal cases,65 a finding of "willful blindness" or "conscious avoidance" may satisfy the mens rea requirement of knowledge.66 As the Model Penal Code, supra note 33, Introductory Comment at 5. See also G. HAZARD & W. HODES, supra note 4, at 339-44.

64. Id.
65. See, e.g., MODEL PENAL CODE §§ 2.02(2)(b), 2.02(7) (1962); N.Y. PENAL LAW § 15.05(2) (McKinney 1975). The definitions of knowledge used in the criminal context provide a useful analogy in construing the codes of professional conduct because they have proven practicable in the context of judging human behavior against statutory norms. Furthermore, it cannot plausibly be argued that the knowledge standard should be more solicitous of defendants in professional grievance proceedings than of defendants in criminal cases.
66. See, e.g., United States v. Cano, 702 F.2d 370, 371 (2d Cir. 1983) (affirming conviction for knowingly and intentionally importing and possessing cocaine based on charge that the jury might find the requisite knowledge if they found that the defendant "was aware of a high probability that
Code puts it, knowledge can be established "if a person is aware of a high probability of [a fact], unless he actually believes that it does not exist."\textsuperscript{67}

But even this broader standard may not be applicable here. Can it really be said that Pinstripe is "aware of a high probability" that Mouthpiece has in fact violated the tax laws—particularly since she has neither a duty nor the capability to conduct a further investigation into the matter?\textsuperscript{68}

As noted earlier, Pinstripe’s duty to report under DR 1-103(A) arises only if she has knowledge both that Mouthpiece actually engaged in misconduct and that his misconduct violated a Disciplinary Rule. Even assuming Pinstripe does "know" that Mouthpiece is a tax evader, it does not necessarily follow that she also "knows" that he has violated a Disciplinary Rule. Pinstripe presumably would be charged with knowledge of the Code’s content. However, there may be a question whether the particular conduct violated a specific Disciplinary Rule.

This question raises the problem of the lawyer’s ethical duty to obey the law. Of course, it goes without saying that lawyers are not exempt from the general obligation to obey the law. On the contrary, one is tempted to say that lawyers have a special obligation to obey the law—though what is “special” about this obligation is not immediately obvious.

The Code flirts with the rhetoric of special obligation. EC 1-5 states:

A lawyer ... should refrain from all illegal and morally reprehensible conduct. Because of his position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession. Obedience to law exemplifies respect for law. To lawyers especially, respect for the law should be more than a platitude.\textsuperscript{69}

This exhortation perhaps gives some meaning to the notion of a special obligation. Although all members of society are generally bound to obey laws, the average citizen probably makes some distinction between major

\textsuperscript{67.} Model Penal Code § 2.02(7) (1962).

\textsuperscript{68.} “Conscious avoidance” cases typically involve defendants who deliberately ignore the existence of certain facts, or who have some responsibility for the situation about which they claim to be ignorant. See, e.g., United States v. Jewell, 532 F.2d 697, 700-04 (9th Cir.) (en banc) (affirming conviction for possession of marijuana), cert. denied, 426 U.S. 951 (1976).

\textsuperscript{69.} Model Code of Professional Responsibility EC 1-5 (1981). Only North Carolina has seen fit to tamper with this formulation; that state’s version omits the first full sentence of the excerpt quoted in the text. Code of Professional Responsibility by State, supra note 33, Canon 1 at 2.
and minor violations. The sentiment expressed in EC 1-5 seems to be that the lawyer, having a special relation to the law, ought to have a particular reverence for even minor regulations and should strive to be a model of responsible behavior.

But even if lawyers have a special obligation to respect the law scrupulously, it does not follow that any deviation from the law is inconsistent with the fundamental obligations, or even aspirations, of the bar. Two areas can be identified in which professional discipline for violations of the law should perhaps be limited.

The first area is that of de minimis violations. Intentional double-parking, for example, does not indicate to most people disrespect for the law. Where the line separating substantial from de minimis violations is to be drawn is, of course, an issue about which considerable disagreement is possible. But wherever the line is drawn, it seems clear that some violations are properly viewed as too minor to warrant professional discipline.

The second and more controversial area is that of violations that have no direct bearing on the lawyer's capacity to perform his job. It could be argued that even a serious offense should not be grounds for professional discipline unless the offense bears on the lawyer's professional attributes. When we speak of a lawyer's moral fitness to practice law, we do not mean that a lawyer must possess irreproachable morals, but only that a lawyer should have those moral traits necessary to carry out specific professional responsibilities. A lawyer who commits an assault may be a reprehensible person, but it is at least questionable whether such conduct has a direct enough bearing on his professional competence to warrant professional discipline.

70. See generally G. HAZARD & W. HODES, supra note 4, at 565-66 (if criminal conduct is "wholly unrelated to the lawyer's professional life," professional discipline may not be warranted).

71. The code proposed by the American Trial Lawyers Foundation recognizes this point by providing that "[a] lawyer shall not engage in criminal or otherwise unlawful conduct that creates a substantial doubt that the lawyer will comply with this Code of Conduct." ATLF CODE, supra note 33, Rule 8.1. This formulation seems preferable to both the Code's "moral turpitude" standard and the Model Rules' "fitness as a lawyer" standard. The Model Rules' standard suggests an attempt to identify those who are in some absolute way "unfit . . . for membership in an honorable profession." G. HAZARD & W. HODES, supra note 4, at 568. Such an enterprise is highly dubious. For accounts of the class origins of rules designed to ensure that all lawyers would be, in a literal sense, gentlemen, see generally J. AUERBACH, UNEQUAL JUSTICE (1976), and Rhode, supra note 18, at 529-45.

72. Professors Hazard and Hodes discuss the example of assault in a way that illustrates both the right and the wrong way to approach the question. For them, an assault may or may not reflect adversely on fitness to practice law, depending on the circumstances. An isolated emotional outburst, perhaps influenced by intoxication, may be irrelevant; a premeditated assault growing out of a long-nurtured grudge, on the other hand, might "manifest a character not to be trusted with important controversies." G. HAZARD & W. HODES, supra note 4, at 568. Although this particular assessment seems faulty, the inquiry is properly focused on the extent to which the particular conduct
that dishonesty in personal affairs—for example, cheating on one's personal income tax—is not predictive of a lawyer's inability to conduct himself honestly in the course of his professional endeavors. On the other hand, an infraction that appears de minimis in an objective sense might be of major significance when committed in connection with a lawyer's job. For example, a minor misstatement on a form submitted to a federal agency may be innocuous in a generic sense, but a misstatement of a lawyer's fee in a declaration filed in a bankruptcy proceeding bears directly on that lawyer's professional integrity.

Whether the ethical obligation to obey the law should be suspended in these two areas depends in large part on the purpose of the Code itself. To the extent that the object of the Code is to define the types of offenses that warrant serious professional sanctions, it seems obvious that a lawyer should not be disbarred for de minimis violations such as double-parking. On the other hand, all systems of conduct regulation include general prohibitions that are intended to encompass de minimis violations. A code of professional conduct, like a criminal code, sets standards of behavior. To the extent that the object of the Code is to set a standard of conduct higher than that imposed upon the general population, it might well be reasonable to expect strict adherence to the law, even the most trivial traffic regulation. It might then be left to the discretion of disciplinary authorities to determine the need for enforcement and punishment in particular cases.73

The Code looks in two directions with respect to the ethical obligation to obey the law. The Ethical Considerations state a very broad norm against even de minimis violations.74 The Disciplinary Rules, however, set a much narrower standard. Under DR 1-102(A)(3), a lawyer may be disciplined for engaging in "illegal conduct involving moral turpitude."75 "Moral turpitude" is hardly a precise standard,76 but it would seem to reflects adversely on fitness to practice law. But when Professors Hazard and Hodes go on to consider whether such an offense bears on the lawyer's fitness "for decent society, let alone for membership in an honorable profession," id. at 568, the inquiry becomes perverted. 73. Of course, if the question is what sort of violation or suspected violation by one lawyer should another lawyer be required to report to a disciplinary body, additional considerations come into play. It is not obvious that a reporting obligation should be coextensive with the full range of conduct subject to criminal prosecution, much less with that of conduct that should be subject to disciplinary sanctions.

75. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(3) (1981). Of the states that have adopted the Code, only Massachusetts has deleted this rule. CODE OF PROFESSIONAL RESPONSIBILITY BY STATE, supra note 33, Canon 1 at 4.
76. The District of Columbia Court of Appeals has observed, with some degree of understatement, that this phrase "eludes precise definition." In re Wolff, 490 A.2d 1118, 1119 (D.C.), vacated, 494 A.2d 932 (1985) (en banc). The court's observation is borne out by its own attempt to define moral turpitude:
encompass only serious violations of the law.\textsuperscript{77} Whatever the precise meaning of the "moral turpitude" restriction, it is clear that a lawyer's violation of the law, even the criminal law, is insufficient \textit{in itself} to warrant professional discipline.

The question of Pinstripe's obligation to report thus turns in part on whether tax evasion is "illegal conduct involving moral turpitude" under DR 1-102(A)(3). The Code fails to provide clear guidelines; case law could presumably provide interpretative guidance in particular jurisdictions.\textsuperscript{78} In any event, the fact that Mouthpiece's suspected conduct is criminal does not definitively resolve the matter.

Even if the "moral turpitude" provision does not cover tax evasion, other rules of conduct may apply. As already noted, EC 1-5 states that a lawyer should refrain not only from illegal conduct, but also from all "morally reprehensible conduct."\textsuperscript{79} Although opinions concerning this provision's substantive content may vary, many people would no doubt interpret it to mean that lawyers should not engage in adultery, malicious gossip, or shabby business practices. Tax evasion would presumably fall well within this category.\textsuperscript{80}

At first blush, this observation has no direct bearing on Pinstripe's problem because the reporting requirement in DR 1-103(A) applies only to violations of Disciplinary Rules. A failure to live up to the aspirational norms set out in the Ethical Considerations would seem to be irrele-

\begin{itemize}
  \item\textsuperscript{77} The act denounced by the statute offends the generally accepted moral code of mankind;
  \item The act is one of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man; or
  \item Conduct contrary to justice, honesty, modesty, or good morals.
\end{itemize}

\textit{Id.} (citing \textit{In re Colson}, 412 A.2d 1160, 1168 (D.C. 1979)). The confusion that has resulted from this definition is documented in Rhode, \textit{supra} note 18, at 552-55.

\textsuperscript{78} As might be expected, decisions have gone both ways. \textit{See In re Fahey}, 8 Cal. 3d 842, 852-53 \& nn. 7-10, 505 P.2d 1369, 1375 \& nn. 7-10, 106 Cal. Rptr. 313, 319 \& nn. 7-10 (1973) (noting split among state courts on question whether failure to file a tax return involves moral turpitude).

\textsuperscript{79} MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 1-5 (1981).

\textsuperscript{80} Presumably, conduct can be "morally reprehensible" under EC 1-5 without necessarily involving "moral turpitude" under DR 1-102(A)(3). Once again, however, it must be borne in mind that the Ethical Considerations are not drafted with the precision of statutes.
relevant for disciplinary purposes. Nonetheless, other Disciplinary Rules pick up the theme found in EC 1-5 and forbid conduct that is not necessarily illegal. Thus, Pinstripe might be obliged to report Mouthpiece's conduct even if DR 1-102(A)(3) does not apply.

For example, DR 1-102(A)(6), which forbids "conduct that adversely reflects on [a lawyer's] fitness to practice law,"\(^1\) may be applicable. Because this rule specifically focuses on the lawyer's fitness to practice law, the moral quality of the lawyer's life outside the office should arguably be irrelevant. But it is not clear that the Code's drafters intended such an interpretation. After all, the Code makes few distinctions between private and professional integrity and in fact imposes many obligations that apply outside the courtroom and office.\(^2\) Moreover, DR 1-102(A)(6) itself prohibits not only conduct that demonstrates unfitness, but also conduct that "adversely reflects on"\(^3\) the lawyer's fitness—an expansive formulation indeed.

Of course, Mouthpiece's conduct is by no means borderline. Mouthpiece has committed a serious criminal act. One could readily conclude that such conduct does indeed reflect adversely on Mouthpiece's fitness to practice law and, therefore, violates DR 1-102(A)(6). But the imprecise language of the rule and the existence of rules more specifically applicable to the situation make it difficult to conclude with certainty that Pinstripe has a duty to report under DR 1-102(A)(6).

One of those more specific rules clearly covers the situation. DR 1-102(A)(4) forbids any "conduct involving dishonesty, fraud, deceit, or misrepresentation."\(^4\) Under this standard, even acts that are not illegal may be subject to professional discipline. Thus, although the Code does not require one to report all criminal conduct, it can easily be read to require one to report any instance of conduct involving deception or mendacity. Accordingly, if Pinstripe knows that Mouthpiece has failed to report taxable income, she has a duty to report that information to the disciplinary authorities. If she fails to do so, Pinstripe herself may be subject to disciplinary action.

---

82. See, e.g., id. DR 1-102(A)(3), 1-102(A)(4) (forbidding "illegal conduct involving moral turpitude" and "conduct involving dishonesty, fraud, deceit, or misrepresentation").
83. Id. DR 1-102(A)(6). As a practical matter, of course, it is difficult to conclude that DR 1-102(A)(6), in combination with DR 1-103(A), imposes an enforceable obligation on lawyers to report their colleagues' noncriminal misconduct outside the professional context. Despite the Code drafters' apparent desire to leave open the possibility of discipline for noncriminal, "morally reprehensible" conduct unrelated to professional shortcomings, examples of discipline on the basis of such a theory are few. In such cases it is difficult for a lawyer, even with full knowledge of the relevant facts, to conclude that he has "knowledge" that a colleague's conduct violates DR 1-102(A)(6).
84. Id. DR 1-102(A)(4).
2. The Model Rules. Model Rule 8.3(a) deviates from DR 1-103(A) in several respects. The Model Rules require a lawyer "having knowledge that another lawyer has committed a violation of the rules of professional conduct" to inform the disciplinary authorities only if the violation "raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." As the commentary following Rule 8.3 acknowledges, compliance requires "a measure of judgment." Clearly, the rigid reporting requirement found in DR 1-103(A) is absent.

Rule 8.3(a) specifically requires that the misconduct be serious before any obligation to inform arises. The conduct must raise a "substantial question" concerning the lawyer's professional competence. The commentary following Rule 8.3 notes that "[t]he term 'substantial' refers to the seriousness of the possible offense and not to the quantum of evidence of which the lawyer is aware." The meaning that this comment affirmatively attributes to the rule seems so obvious that the comment appears curiously superfluous. The syntax of the rule makes clear that "substantial" refers to the degree to which the violation affects one's assessment of the lawyer's fitness, rather than the degree to which one is certain that an actual violation has occurred. Nevertheless, the negative implication of the comment is quite suggestive. Deviating from the approach taken in the Code, the commentary following Rule 8.3 seems to suggest that something less than a substantial quantum of evidence could trigger the reporting obligation. The statement that the reporting requirement is conditioned upon the seriousness of the "possible" offense gives rise to the same implication.

Under this interpretation, it would appear that Pinstripe has a clear duty to report. The language of Rule 8.3, however, does not fully support this interpretation. Under Rule 8.3, as under DR 1-103(A), a duty to report arises only if the lawyer has "knowledge" of a violation. Because the commentary following Rule 8.3 only clarifies what the adjective "substantial" is intended to modify, Rule 8.3 probably requires the

---

85. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(a) (1983).
86. Id. Rule 8.3 comment. The American Trial Lawyers Foundation criticizes the "undefined standard of 'fitness to practice law,'" finding it just as "unfairly vague" as the "elusive concept of moral turpitude." ATLF CODE, supra note 33, at 44. One of the drafters of the Model Rules concedes that Rule 8.3 "is not wholly free from vagueness," but correctly notes that "its focus on the relationship to fitness as a lawyer is a major improvement." G. HAZARD & W. HODES, supra note 4, at 566.
87. See supra note 59 and accompanying text.
88. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 comment (1983).
same kind of knowledge that is required under DR 1-103(A).90

Assuming that the same knowledge requirement applies, we must first ask whether Pinstripe knows that Mouthpiece has violated one of the Model Rules. Again, the question arises whether a lawyer who violates the law automatically violates the rules of professional conduct. Here, too, the Model Rules deviate from the Code. Unlike the Code, which focuses on acts involving “moral turpitude,”91 the Model Rules focus directly on how the act in question bears on the lawyer’s professional relationships.92 Thus, the Model Rules require disciplinary action where the lawyer “commit[s] a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects.”93 This standard covers tax evasion more clearly than does the Code’s “moral turpitude” standard.94 Thus, it seems clear that Mouthpiece’s conduct violates his professional obligations under the Model Rules.95

But the analysis does not stop there. Rule 8.3 requires that lawyers report only serious violations of professional discipline.96 In determining whether the violation is serious, consideration is to be given to the same

90. The Model Rules might even be read as precluding application of the criminal law concept of “conscious avoidance.” The Model Rules, unlike the Code, include a brief definitions section. That section states that “knowledge” denotes only “actual knowledge.” MODEL RULES OF PROFESSIONAL CONDUCT Terminology (1983).

91. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(3) (1981); see supra notes 75-77 and accompanying text.

92. It is interesting to note, however, that the Model Rules drop the Code’s prohibition of noncriminal conduct “adversely reflect[ing] on . . . fitness to practice law.” MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(6) (1981). This is an appropriate change; the Code’s formulation is too broad to be of value.

93. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(b) (1983). The phraseology of the rule suggests that “honesty,” “trustworthiness,” and “fitness” are distinct concepts, but the distinctions are nowhere spelled out.

94. Indeed, the comment to Rule 8.4 explicitly states that “willful failure to file an income tax return” is the kind of misconduct to which Rule 8.4(b) applies, and that the “reflects adversely on . . . honesty [or] fitness” standard was deliberately chosen over the “moral turpitude” standard to eliminate the possibility of professional discipline for “offenses concerning some matters of personal morality, such as adultery and comparable offenses.” MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4 comment (1983).

95. Interestingly, the Model Rules retain the Code’s prohibition of “conduct [whether or not in violation of law] involving dishonesty, fraud, deceit, or misrepresentation.” Compare MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(c) (1983) with MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(4) (1981). This prohibition would seem to make redundant the portions of Rule 8.4(b) that are specific, because criminal acts that would “reflect[] adversely on [a] lawyer’s honesty [or] trustworthiness” would already be covered by the prohibition of conduct “involving dishonesty, fraud, deceit or misrepresentation.” MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(c) (1983). Rule 8.4(b) then has separate force only insofar as it allows discipline for criminal acts that reflect adversely on “fitness as a lawyer in other respects,” a standard no less vague, but at least more appropriately framed, than the Code’s “moral turpitude” standard.

96. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 (1983).
factors that define what crimes constitute violations in the first place. In each case, the focus is on the impact upon one's assessment of the lawyer's honesty, trustworthiness, or professional fitness. The degree of impact required, however, does differ slightly: Mouthpiece violates Rule 8.4(b) if his crime "reflects adversely"97 on those qualities; Pinstripe must report him under Rule 8.3 if the crime "raises a substantial question"98 about them. Although there may be a narrow category of offenses involving dishonesty that do not raise such substantial questions,99 tax evasion is probably not among them. Thus, if Mouthpiece did indeed commit the crime in question, Pinstripe is obliged to report him under the Model Rules.100

C. Some Preliminary Observations.

The foregoing analysis suggests that a lawyer's obligation to report the misconduct of other lawyers is far from absolute. First, the obligation has limited application in the bar admission process. Under the Code, bar applicants generally have no express duty to report the misconduct of other applicants. Similarly, bar members have no duty to volunteer information, however devastating that information may be.

97. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(b) (1983).
98. Id. Rule 8.3.
99. Some might argue that a minor theft of services, such as an unauthorized splicing into a cable television connection, or the use of a slug in a subway turnstile, does not raise substantial questions. But see Fellner v. Bar Ass'n, 213 Md. 243, 247, 131 A.2d 729, 731-32 (1957) (lawyer disbarred for regularly using slugs in parking meters).
100. For criminal conduct not involving dishonesty, the outcome would be considerably less clear. Consider the outcome under the Model Rules if Cool and Straight were lawyers rather than bar applicants. Under the Code, as we have seen, the analysis would be straightforward: a lawyer must report any violation of a Disciplinary Rule of which he has knowledge; it is a violation of a Disciplinary Rule to commit a crime involving moral turpitude; and the distribution of controlled substances is generally considered to fall within this category. See supra note 24. Under the Model Rules, the question is whether Cool's use or distribution of drugs "reflects adversely on [his] honesty, trustworthiness or fitness as a lawyer in other respects" so as to constitute professional misconduct under Rule 8.4, and, if it does, whether it "raises a substantial question about" those qualities so as to require Straight to inform under Rule 8.3. See MODEL RULES OF PROFESSIONAL CONDUCT Rules 8.3, 8.4 (1983).

With respect to drug use, the answer to this question is hardly free from doubt. The Model Rules give no guidance. The commentary following Rule 8.4 states that the rule does not cover "offenses concerning some matters of personal morality, such as adultery and comparable offenses." MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4 comment (1983). But the comment does not discuss whether consumption or noncommercial distribution of controlled substances fall within this category.

Some would no doubt argue that offenses involving certain drugs concern matters of personal morality. Cf. Ravin v. Alaska, 537 P.2d 494, 511 (Alaska 1975) (possession of marijuana by adults at home protected under state constitutional right to privacy). Others might see a direct link between controlled substances and erratic behavior, financial irresponsibility, or violent crime. In any event, it would seem difficult to say on the basis of the available materials that Straight has knowledge of a violation of Rule 8.4.
The Code merely prohibits admitted attorneys from furthering the application of persons known to be unqualified—a singularly narrow category of candidates.

The Model Rules impose a stricter reporting requirement. Despite some ambiguity in drafting, the Model Rules apparently impose equivalent obligations upon applicants and admitted attorneys. The Model Rules, like the Code, do not generally require that adverse or even disqualifying information be reported. The disclosure requirements found in the Model Rules come into play only when the lawyer is aware that the admitting authorities labor under some misapprehension about the applicant's qualifications. Because a lawyer who is not in some way actively involved in the admissions process will rarely satisfy this condition, the disclosure requirements found in the Model Rules probably do not in a practical sense differ significantly from those found in the Code.

The Code is more demanding with respect to the lawyer's obligation to report the misconduct of other members of the bar. The Code requires lawyers to report ethical violations of which they have "unprivileged knowledge." This requirement is in fact quite narrow. Misconduct other than known violations of Disciplinary Rules is not covered at all. Moreover, the "knowledge" requirement seems to exempt the lawyer who has good faith questions about whether a violation has actually occurred. Because a lawyer will rarely know all the facts, and because the Disciplinary Rules are riddled with difficult interpretative questions, rarely will a duty to report actually arise.

Nonetheless, the Code's reporting requirement does apply to any known violation of the Disciplinary Rules, regardless of the seriousness of the violation or its bearing on professional fitness. In contrast, the Model Rules limit the reporting obligation to known violations that "raise[] a substantial question as to [the violator's] honesty, trustworthiness, or fitness as a lawyer."101 This standard requires the would-be informer to exercise his own judgment in the matter, thus injecting additional uncertainty into any effort to enforce the duty to report.

The overall pattern reveals a consistent ambivalence toward reporting. On the one hand, the Code's aspirational provisions exhort lawyers to report all misconduct having any bearing on bar admission or disciplinary matters.102 Even the Code's enforceable rules include a reporting obligation that is ostensibly quite broad. On the other hand, the commitment to informing that the rules purport to embrace is circumscribed in a number of ways. Even the aspirational norms warn against judging

---

101. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(a) (1983).
102. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 1-3 to 1-5.
others and meddling in others' affairs and contain expressions of hesitancy about the principal thrust of the rule. Moreover, the duty to report diminishes drastically in the transition between moral aspiration and enforceable rule.

It is inevitable that some slippage will occur in any such transition. The practical realities of enforcement surely have something to do with this. Furthermore, considerations of fairness counsel the inclusion of carefully specified and manageable standards of knowledge and intent. Yet the difference between aspirations and binding rules cannot fully explain the contradictory rhetoric found even in the hortatory portions of the Code. I suggest that the failure of the model codes to follow through on the general proclamations of a duty to inform stems from a deep ambivalence that lawyers share with other members of society about the moral status of informing. Moreover, I assert that this ambivalence is appropriate.

To substantiate this assertion, I turn to the reporting obligations that society imposes upon persons outside the legal profession.

II. INFORMING AND THE LAW: HOW NONLAWYERS LIVE

The hypothetical cases discussed above share a common feature. In each, the misconduct of the lawyer or bar applicant constitutes not merely a violation of a professional code, but also a serious criminal offense. These examples have been chosen deliberately for the purpose of highlighting the contrast between the reporting obligations imposed upon lawyers and those imposed upon the general population. Although the duty of lawyers to report the misconduct of their fellow lawyers is in some respects ambiguous, this duty is not matched by any comparable obligation on the part of the general population to report criminal activities to law enforcement authorities.

A. The Absence of an Obligation to Inform.

Some courts and commentators have asserted that members of the general population are under, or should be under, an enforceable obligation to report crimes, or at least felonies, that come to their attention. Failure to report a known felon was supposedly a misdemeanor at com-

---

103. See supra note 27 and accompanying text.
104. See supra notes 63-64 and accompanying text.
105. The absence of any general legal obligation to inform was noted by former Justice John Spalding of the Massachusetts Supreme Judicial Court in his recommendation against Massachusetts' adoption of DR 1-103(A). See A. Kaufman, supra note 8, at 307-08.
106. See, e.g., Sykes v. Director of Public Prosecutions, 1962 A.C. 528, 555 (1961) ("Ever since the days of hue and cry, it has been the duty of a man, who knows that a felony has been committed,
This misdemeanor—misprision of felony—evidently still exists in England. Nonetheless, its history hardly supports the view that informing is genuinely regarded as a moral duty. Some commentators have expressed doubt whether the offense "ever had a meaningful existence beyond the textbook writers." In any event, by Victorian times, the offense was already considered "practically obsolete." Only a handful of successful prosecutions have been reported in England since 1938.

On this side of the Atlantic, the common law offense of misprision never took root. The United States Supreme Court criticized the doctrine in an early case. Chief Justice John Marshall stated:

to report it to the proper authority so that steps can be taken to apprehend the felon and bring him to justice.


109. W. Lafave & A. Scott, Criminal Law 526 (1972) (citing Glazebrook, Misprision of Felony—Shadow of Felony: An Old Concept in a New Context, 52 A.B.A. J. 148 (1966)); see also Model Penal Code § 242.5 commentary at 256 (1980) ("[T]here is scant evidence of enforcement of misprision penalties in the absence of affirmative acts of assistance that would in any event render the actor liable at common law as an accessory after the fact to the original crime.").


111. Professor Williams in 1961 noted only four such cases since 1938. See G. Williams, supra note 107, at 424-26. Only one successful prosecution has been reported since 1961. See Regina v. Lucraft, 50 Crim. App. 296 (1966). Counsel for appellant in Sykes claimed that there had been no misprision prosecutions at all between 1900 and 1938. They also noted a few cases not discussed by Williams in which either defendants pleaded guilty to misprision as part of a plea bargain or the misprision charge was dropped or dismissed. Sykes, 1962 A.C. at 535-36.

The sentences imposed in reported misprision prosecutions have been light. In the three cases since 1940, the defendants were either sentenced concurrently with another offense, unconditionally discharged, or sentenced to time served. G. Williams, supra note 107, at 424-26. In most of the cases, the defendant was apparently guilty of more than a mere failure to inform. In Sykes, for example, the evidence showed that the defendant, charged with misprision of the theft of a large quantity of weapons from a United States Air Force base, had approached a police informer with an offer to arrange the sale of the weapons to the Irish Republican Army. Sykes, 1962 A.C. at 552. See also id. at 535-36 (discussing prior cases).

Even against this backdrop of relatively infrequent prosecutions, commentators have criticized the sweep of the common law formulation as "unreasonably wide." G. Williams, supra note 107, at 423. The more recent decisions have responded to this criticism. In Sykes, the House of Lords apparently held that misprision is applicable not to all felonies, but only to those so serious in nature that anyone would know that they ought to report. Furthermore, the House of Lords apparently held that nondisclosure would not be punishable when the nondisclosing party acted under a good faith claim of right. Sykes, 1962 A.C. at 563. But see id. at 570-71 (concurring speech of Lord Morton of Henryton). Modern cases have also suggested that some benefit to the defendant from the failure to report is an element of the offense, see, e.g., Regina v. Aberg, [1948] 1 All E.R. 601, 602, and that one who is himself under investigation and fears self-incrimination cannot be prosecuted for misprision. See, e.g., Regina v. King, 49 Crim. App. 140, 145-46 (1965).

112. W. Lafave & A. Scott, supra note 109, at 526; G. Williams, supra note 107, at 424; Note, Criminal Law—Common Law Offense of Misprision of Felony Held Not Part of Modern Crimi-
It may be the duty of a citizen to accuse every offender, and to proclaim every offense which comes to his knowledge; but the law which would punish him in every case, for not performing this duty, is too harsh for man.\textsuperscript{113} Professors LaFave and Scott report that only one state court has affirmed the existence of the common law offense of misprision in recent years.\textsuperscript{114} The Model Penal Code, purporting to accord with the “vast majority” of jurisdictions, “assign[s] no penalty to simple failure to inform authorities of criminal conduct.”\textsuperscript{115}

Despite this pervasive disfavor, the United States Code has had a general misprision of felony statute since the enactment of the first federal criminal statutes in 1790.\textsuperscript{116} It is a felony under the statute to “conceal[,] and . . . not as soon as possible make known” to officials the commission of a federal felony.\textsuperscript{117} Despite this straightforward language, the statute has long been interpreted to require an affirmative act of concealment; courts have not penalized individuals for passive nondisclosure.\textsuperscript{118} Under this limited interpretation, prosecutions have been...

\textsuperscript{113} Marbury v. Brooks, 20 U.S. (7 Wheat.) 556, 575-76 (1822).

\textsuperscript{114} See W. LAFAVE & A. SCOTT, supra note 109, at 526 n.65 (citing State v. Flynn, 100 R.I. 520, 217 A.2d 432 (1966)). Professors LaFave and Scott do not refer to a Washington statute that makes it a misdemeanor (punishable by up to one year in prison and a $5000 fine) for one who has witnessed the actual commission of or preparation for a felony involving violence or threat of violence to fail to make a report to the authorities. WASH REV. CODE ANN. §§ 9.69.100, 9.92.020 (1977 & Supp. 1986). The limitation to actual eyewitnesses of violent crimes suggests that this statute, enacted in 1970, was intended to apply to the situation where witnesses stand idly by and ignore a crime victim’s cries for help. Its narrow focus prevents it from being a true exception to the absence of a general duty to report.

Since the publication of the LaFave and Scott treatise, Ohio has reenacted a slightly modified general misprision statute, the violation of which is a fourth degree misdemeanor punishable by a maximum of thirty days imprisonment and a $250 fine. OHIO REV. CODE ANN. §§ 2921.22(A), 2929.21(B)(4), 2929.21(C)(4) (Page 1982). Colorado has a curious penal code section imposing a duty upon “every corporation or person who has reasonable grounds to believe that a crime has been committed to report promptly the suspected crime to law enforcement authorities.” COLO. REV. STAT. § 18-8-115 (Supp. 1985). No penalty is assigned for breach of this duty.

There have been no reported successful prosecutions under any of these statutes; the only two reported cases arising under any of them both resulted in appellate reversals. See Ohio v. Wardlow, 20 Ohio App. 3d 1, 4, 484 N.E.2d 276, 280 (1985); In re Stichtenoth, 67 Ohio App. 2d 108, 109-10, 425 N.E.2d 957, 958-59 (1980).

\textsuperscript{115} MODEL PENAL CODE § 242.5 commentary at 251 (1962).

\textsuperscript{116} 18 U.S.C. § 4 (1982) provides:

\begin{quote}
Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined not more than $500 or imprisoned not more than three years, or both.
\end{quote}

\textsuperscript{117} Id.

\textsuperscript{118} See, e.g., United States v. Davila, 698 F.2d 715, 717 (5th Cir. 1983); United States v. Sampol, 636 F.2d 621, 653 (D.C. Cir. 1980); United States v. Hodges, 566 F.2d 674, 675 (9th Cir. 1977).
infrequent.\textsuperscript{119}

It seems clear, then, that Straight and Pinstripe, in our hypotheticals, have no legally binding obligation to report to law enforcement authorities the felonies of which they may have knowledge. It is safe to say that a private citizen has no legal duty to report serious crimes, even when that citizen is fully aware that a felony has been committed and knows the identity of the wrongdoer.

Despite this absence of a general duty to report, numerous statutes exist requiring individuals to report particular information. For example, many jurisdictions require physicians to report gunshot wounds.\textsuperscript{120} In recent times, physicians, mental health professionals, and school personnel have been required to report instances of suspected child abuse.\textsuperscript{121} Courts have held that psychiatrists who learn that a patient has threatened to injure another have a duty to contact that person and the authorities and advise them of the potential danger.\textsuperscript{122} Undertakers, hospital administrators, and others are required to report deaths.\textsuperscript{123}

Each of these miscellaneous reporting obligations reflects a particularized judgment that society has a special need for the information involved. In each case, a departure from the ordinary rule is justified. Two observations are in order. First, these situations generally involve information pertaining to grave misconduct. At a minimum, each involves a danger of serious physical injury. Most of the situations addressed by the statutes are literally matters of life and death. Second, these reporting obligations apply only to particular classes of persons. In each case, the obligation is imposed on individuals particularly well-situated to provide necessary information that would be difficult to obtain from other sources.


\textsuperscript{120} See, e.g., \textsc{Ohio Rev. Code Ann.} § 2921.22(B) (Page 1982).

\textsuperscript{121} See, e.g., \textsc{N.Y. Soc. Serv. Law} § 413 (McKinney Supp. 1986).


The Model Rules of Professional Conduct permit a lawyer to reveal client confidences under circumstances analogous to those in \textsc{Tarasoff}. \textsc{Model Rules of Professional Conduct} Rule 1.6(b)(1) (1983) (disclosure appropriate to prevent a crime "likely to result in imminent death or substantial bodily harm"). \textsc{Cf. Model Code of Professional Responsibility} DR 4-101(C)(3) (1981) (allowing disclosure in order to prevent any crime on the part of a client).

\textsuperscript{123} See, e.g., \textsc{N.Y. Pub. Health Law} §§ 4140-4143 (McKinney 1985).
In short, although lawyers have a duty to report to the appropriate authorities the misconduct of other lawyers, the rule for society at large is quite the contrary. There is no general duty to report criminal acts. Where the law does impose a duty to report, that duty is circumscribed with respect to both the class of persons upon which it is imposed and the type of conduct to which it applies. Is this alternative system justified?


One might think that it would be a good thing, all in all, if citizens felt an obligation to report criminal activity. It does not necessarily follow, however, that society should penalize those who fail to fulfill such an obligation; the difficulty and cost of enforcement might be thought to outweigh the benefits of compulsory informing. Nonetheless, the notion that citizens should feel an obligation to report information concerning criminal activity has considerable appeal.

A strong argument can be made, however, that the absence of such an obligation stems primarily from a pervasive distaste for informing in general. The moral status of informing is sufficiently in doubt that a broad legal requirement to inform simply would not be just. This analysis helps to explain why society imposes a duty to report only in situations of necessity.

To illustrate, let us return to our hypothetical cases and make all of the participants business executives. It is highly probable that Straight and Pinstripe would not bring the information they have learned to the attention of the police. This should not be surprising. Of course, one could explain their unwillingness to report in a number of ways without necessarily disputing the existence of a generally felt moral duty to inform. Many felt moral obligations are not acted upon for self-interested reasons. Fear of retaliation, unwillingness to withstand the inconvenience that attends involvement in legal proceedings, doubt regarding the effectiveness of law enforcement officials—any of these factors may inhibit individuals from reporting known criminal activities. But to focus on these factors is to miss the true basis of the prevailing attitude toward informing. The hesitation to report on the part of our hypothetical characters is not merely the product of fear or laziness, with the result being the evasion of a moral duty. Rather, I assert that the ordinary person in the position of either Pinstripe or Straight would feel no moral

---

124. Victimization surveys routinely uncover more crime than is reported to the police. See C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 450-51 (1978) (noting congruence of statistical studies indicating that victimizations far exceed reported crimes).
compulsion to report and indeed would find the idea of reporting to be morally reprehensible.

The basis of this assertion may not be immediately apparent. Indeed, as noted above, the idea of an affirmative duty to report does have certain appeal. Reporting furthers the social goals expressed in the criminal laws themselves. Enforcement of these laws would be impossible without the cooperation of witnesses. It might be enough to require only those individuals who have already been identified as witnesses to cooperate. Yet often the most difficult task for law enforcement officials is not obtaining evidence for trial, but ferreting out crime in the first place. It is precisely this sort of information that often only informers can provide.

But whatever the general importance of informer information, its utility in any particular case can vary considerably, depending on the nature of the crime in question and the nature and amount of other information available to the authorities. First, society's interest in the enforcement of criminal laws varies according to the particular social policies at stake. For example, most people would agree that investigation and prosecution of homicides should be given priority over the enforcement of marijuana laws. By the same token, the damage caused when citizens do not cooperate with enforcement authorities also varies. Second, the need for informers varies from case to case, and from crime to crime. Many of the most serious crimes leave physical traces that provide at least some starting point for investigation. The classic contexts in which informers are necessary involve crimes that are either victimless or are so widely dispersed that the victims do not realize that they have been victimized. Nonetheless, informer information is often essential, particularly in cases involving organized crime. Third, the amount of criminal activity actually reported may be unaffected by a general moral endorsement of informing. The informers involved in most criminal cases are typically not disinterested citizens responding to a sense of moral duty. Instead, they are usually associates of the perpetrator who have been offered cash payments or promises of leniency for their cooperation.

In every case, however, we must presume that informing results in some social benefit. Unless there exist important countervailing considerations, this consideration alone would be enough to justify making informing obligatory in all cases. But if there are moral costs to mandatory informing, those costs must be weighed with sensitivity, not against a general claim of necessity, but on a case-by-case basis against widely varying degrees of benefit.

I contend that such important countervailing considerations do in fact exist. Several factors shape our perceptions about informing. Three
of the most important factors are the connection between the potential witness and the crime, the relationship between the witness and the perpetrator, and the seriousness of the crime.

1. The Special Case of Victims. One reason we do not typically think of the victim as being under an obligation to inform is that the victim usually has an obvious incentive to report. Natural desires for retribution or compensation lead directly to an impulse to seek out and cooperate with those who might be of aid in realizing those desires. In fact, however, many victims do not report crimes to the police. So-called “victimization studies,” which survey random samples of people, routinely yield much higher crime figures than do police statistics.125 Any number of reasons may account for the failure of many victims to report. Many may feel that the police can do little to help them. Others may feel that the costs and inconvenience of becoming involved with the police are too high. Still others may fear retaliation. Fear of public humiliation may be a factor in some cases.126 Finally, some people may be simply unable to report because of complex psychological factors.127 Whatever the reason, the point is that the desire for retribution will not always induce the victim to report. If it is desired that all crimes be prosecuted, additional incentives may be necessary.

Historically, such incentives have been provided. With regard to the crime of misprision, for example, no distinction was made between victims and nonvictims; anyone who failed to report information concerning a felony was subject to prosecution.128 In addition, the threat of prosecution under the common law crime of compounding discouraged arrangements whereby the victim would forgo reporting the crime in exchange for a private settlement. Originally applicable only to crimes involving theft, compounding came to apply to any situation in which one agreed to show favor to a felon in exchange for a material benefit.129 The law made no exception for victims; indeed, the fact that the offense

125. Id. at 451.
126. This point applies not only to rape victims, but also to fraud victims who may be embarrassed about their greed or gullibility.
127. See McLeod, Victim Noncooperation in the Prosecution of Domestic Assault, 21 CRIMINOLOGY 395, 400 (1983) (noting that psychological factors may account for victim noncooperation in domestic violence cases).
128. The noted Australian case, Regina v. Crimmins, 1959 V.R. 270, is a good example. Crimmins was shot and wounded in a gun battle. Although he evidently knew the identity of his assailant, he refused to tell the police, perhaps because he preferred private vindication. The Victoria Supreme Court sustained his conviction for misprision. Id. at 272-74.
originated in the concept of theftbote suggests that the crime was at one time specifically applicable to victims.\footnote{130}{Theftbote, a felony, was committed when a thief and his victim entered into an agreement that the stolen property would be returned “in exchange for an undertaking not to cooperate in prosecution.” MODEL PENAL CODE § 242.5 commentary at 244 (1980). See also id. at 251 (“Traditionally, the law of compounding has been thought to have its distinctive impact on the victims of crime.”).}

Modern thinking, however, grants a victim far more control over the decision to prosecute. The application of compounding statutes to victims is typically limited.\footnote{131}{The Model Penal Code's treatment of compounding reflects modern attitudes regarding the victim's duty to report. The drafters of the Model Penal Code thought that “[t]he central issue in the law of compounding is whether to except from liability the victim of a crime who agrees to drop criminal charges if the alleged offender makes restitution for the harm caused.” MODEL PENAL CODE § 242.5 commentary at 249 (1980). The drafters' solution was to exempt victims who refrain from informing in exchange for a benefit only if the benefit does “not exceed an amount which the actor believe[s] to be due as restitution or indemnification for harm caused by the offense.” Id. § 242.5.}

Moreover, victims have considerable practical influence over the decision to institute prosecution in many types of cases. Although it is true that the state is the prosecuting party and can institute prosecution even over the objection of the victim, few prosecutions proceed where cooperation from the victim is not forthcoming. Often the victim is the only witness, or at least the only one known to police in the early stages of an investigation. Without the victim's testimony, there is nothing on which to base a complaint. Even if the victim cooperates in the early stages and the police develop a viable case, prosecutors generally feel that lack of enthusiasm on the part of a victim-witness at trial thwarts a successful prosecution.

These practical considerations, however, do not fully account for the control that victims often exert over the conduct of criminal prosecutions. We generally regard it as an appropriate exercise of prosecutorial discretion when a prosecutor takes the victim's attitude into account. The victim's attitude toward the crime is seen as an appropriate factor in assessing its seriousness and, indeed, may be the critical factor in the decision whether or not to prosecute if the crime is otherwise at the margin of social attention.

It is appropriate that the victim's attitude should influence the decision whether or not to prosecute. Although any crime in some sense injures the entire state, such injury is obviously abstract compared to the
injury borne by the victim. It is therefore entirely reasonable that the system’s response should be influenced by the victim’s desire to pursue justice.

Even these considerations, however, do not establish a firm basis for exempting victims from any obligation to report crimes. At most, they establish that prosecutorial deference to the victim’s wishes may be appropriate in certain situations. The state, not the victim, appropriately controls the decision to waive prosecution. That control is a significant practical factor in many prosecutions. Serious crimes involving corruption, fraud, or violence are frequently investigated and prosecuted without victim cooperation. Courts may even compel reluctant victims to testify. Even when the prosecutor gives controlling weight to a victim’s wishes in a particular case, the state still makes the ultimate decision. Thus, the victim who fails to report the crime in effect arrogates prosecutorial discretion to himself.

Nevertheless, we are reluctant to require victims to report crimes. In part, this reluctance stems from sympathy for their suffering. A crime victim has suffered a deprivation of rights that society has an interest in protecting. That interest is attenuated, though, if the victim chooses not to cooperate in a prosecution. Therefore, it seems unduly harsh to impose on victims a further obligation—an obligation that may well entail substantial financial and emotional costs beyond those already suffered—without carefully evaluating the specific social need to do so.

Ultimately, however, the reluctance to require victims to report crimes is rooted in respect for human autonomy. The victim of a crime has not, after all, deliberately chosen to perform any act that carries with it the expectation of special duties or burdens. By definition victims are people whose rights have been violated in a grievous way. How an individual responds to such a violation is an intensely personal matter. A victim may, out of moral conviction or legitimate self-interest, prefer to deal with the offender by some appropriate means other than official punishment. Forgiveness, private settlement, or civil redress may well be the preferred response for many victims, especially in cases involving ongo-

132. Minor offenses against persons and property may represent little significant harm beyond that suffered by the victim, particularly when the persons involved have a continuing relationship of some kind. In such cases, giving weight to the victim’s preferences is especially appropriate. In some instances, of course, a victim’s unwillingness to cooperate in prosecution might reflect a preference for private vindication rather than a lack of desire for any vindication at all. See supra note 128. A person’s reluctance to prosecute may also stem from psychological vulnerability. See supra note 127. In such cases the victim’s desire to forgo prosecution would not necessarily merit deference.

133. See supra notes 126-27 and accompanying text.
ing personal or commercial relationships.\textsuperscript{134} An employer who chooses to accept repayment from an embezzling employee, and give him another chance, would generally be perceived as acting nobly rather than wrongly.

Of course, few would question the victim's right to report a crime.\textsuperscript{135} Although such reporting in effect inflicts harm on the criminal, that harm is justified under most moral systems because the criminal has forfeited his right not to be punished and society as a whole is better off by imposing punishment.\textsuperscript{136} Indeed, society should do whatever it can to minimize the inconvenience and indignity to which crime victims are subjected, and to protect them from retaliation should they decide to report the crime.\textsuperscript{137}

But I would deny the existence of any moral duty on the part of victims to seek punishment of the guilty.\textsuperscript{138} The likelihood that the com-

\textsuperscript{134} Of course, the reason for noncooperation must be socially acceptable. Preference for private retaliation cannot be a permissible reason to forgo legal remedies. Receipt of financial benefits beyond reasonable compensation for harm appropriates payment due to society rather than to the victim, and is thus appropriately treated as blackmail. See Lindgren, Unraveling the Paradox of Blackmail, 84 COLUM. L. REV. 670 (1984).

\textsuperscript{135} One might argue that even a crime victim should not report information that would lead to a person's conviction under a legal system that was totally unjust, or that imposed grossly disproportionate punishment for the crime in question. One might also argue, at least from a consequentialist perspective, that there are situations where the harm to others that would result from reporting a crime would far outweigh the harm of allowing the crime to go unpunished. Some of these situations (e.g., a kidnapper threatens to harm a child if the kidnapping is reported) raise questions of duress or necessity, defenses that would be available even if a general obligation to report were imposed.

\textsuperscript{136} Children sometimes appear to disapprove reporting of offenses to the authorities even by victims. This disapproval does not stem from any feeling that it is wrong to seek the punishment of wrongdoers. Rather, it is based on the admiration children feel for the victim's direct retaliation. Adult society rightly seeks to repress this sentiment and to encourage resort to socially-mediated forms of punishment. But there may be a more sophisticated rationale for children's disapproval of "tattlers." At least where the violation is not serious enough to outweigh such concerns, the social bonds among children, and their lack of understanding of (and hence dissent from) adult notions of justice may present reasons for refusing to inform similar to those prevailing in an unjust society. In an occupied country, for example, there may be considerable popular feeling that disputes should be settled "among ourselves," rather than referred to authorities not perceived as legitimate.


\textsuperscript{138} It might be argued that a victim of a particularly heinous crime such as rape owes a moral duty to society to report the crime and cooperate in prosecution so as to help ensure that others do not suffer the same fate. This argument suggests that the social benefit of reporting under such circumstances outweighs the imposition on the victim's interests and autonomy. I would not accept this argument. The social benefits are too contingent to outweigh the concrete anguish the victim stands to suffer. Of course, it might be that the victim does better to sacrifice her interests to achieve a benefit for others. Our society, however, as a rule does not impose legal duties of this kind. If society is unwilling to impose a legal duty on a bystander to intervene at no risk to himself to rescue a stranger, it is difficult to see how society could require acts that would, at some cost to the crime victim, effect so uncertain a rescue of unidentified potential future victims. But see Weinrib, The
munity will be unable to eliminate entirely the suffering and risk entailed by a crime victim's choice to report, and the possibility that a victim may choose for moral reasons not to seek punishment, at least make it appropriate as a general matter to respect the victim's decision not to report.

Existing law appropriately accommodates the victim's interest in personal autonomy with the state's interest in retaining ultimate control over the conduct of criminal prosecutions. The state retains the power to initiate an investigation and pursue a prosecution without a victim's complaint. When necessary, it may compel the victim to testify. But the state does not require the victim to make an unsolicited initial report of the crime. A victim's liberty to select a reasonable response to the experience of victimization is only disregarded after a focused judgment determining that in particular cases society's need for the victim's cooperation outweighs the burden on the victim that such cooperation entails. The limited social utility of mandatory reporting by reluctant victims does not outweigh the moral autonomy of and practical costs to the victim. Thus, the decision to impose no duty to report upon victims appears to be morally as well as pragmatically correct.

2. Nonvictim Witnesses. Society's reluctance to impose additional burdens on victims does not explain the absence of an informing obligation applicable to nonvictims. The moral questions surrounding the problem of informing reach their greatest intensity when the potential informer is not the victim, but a third party witness. This is the situation that brings to mind the unsavory image of the informer as a betrayer of confidence. The vividness of the image evoked depends upon two factors: the witness's relationship to the perpetrator and the gravity of the offense.

a. The relationship to the offender. Obviously, the relationship between the wrongdoer and the witness is a key factor in our assessment of the morality of informing. The very term "informer" evokes a sense of betrayal. Victor Navasky defines an informer "in accordance with... popular usage... as someone who betrays a comrade, i.e., a fellow member of a movement, a colleague, or a friend, to the authorities." Thus, the person who calls the police to report a fight in the street between two strangers is probably not thought of by most people as an informer.

Three kinds of bonds between people would seem to alter this license to report. The first is the bond established when one makes a

---

*Case for a Duty to Rescue*, 90 *Yale L.J.* 247, 268-92 (1980) (arguing that a general duty to rescue can be justified within the ethical traditions that inform the common law system).

139. *V. NAVASKY, NAMING NAMES* xviii (1980).
promise to another. Ordinarily, we regard the keeping of promises as a moral duty. Someone who has explicitly promised not to reveal the contents of a communication will ordinarily feel bound to respect that promise. For example, suppose Cool had approached his friend Straight, elicited a promise of confidentiality, and then revealed that he had used drugs and was worried about his impending interview before the Character Committee. Given these circumstances, most people would think it improper were Straight to reveal Cool's misdeeds. At best, the situation would be regarded as involving a conflict of duties. The same situation can arise even where no express promise has been made. Depending on the conversation's context, for example, one might find an implied promise of confidentiality in the conversation between Pinstripe and Mouthpiece.

The second bond is what might be called affinity. In certain situations, this bond stems from an implied promise. For example, when a person reports a fellow member of a movement, that person's action may be perceived as a breach of an implied promise mutually exchanged by all those involved in the movement. Relationships involving affinity, however, do not always involve implied promises. Family relationships, for example, create a certain loyalty regardless of the existence of any express or implied agreement to maintain confidentiality. Ethnic loyalties constitute an extended version of this sort of involuntary identification with others. Friendship, while in part the product of implicit promises, may be seen as a choice to incorporate the friend into a family-like affinity group.

Perhaps this type of bond is best viewed as an extension of one's primal loyalty to oneself. This loyalty is derivative of the drive for self-

---

140. The degree of conflict would depend on the circumstances. For example, if Straight had made the promise before Cool confided in him, Straight might feel that Cool had deceived him into making a promise without full awareness of the consequences and might, therefore, find the promise less binding. Some would argue that one should never honor a promise to do wrong. Whether or not one agrees with this generalization, in a complex case it seems to beg the question. The existence of the promise may be one of many factors relevant to determining whether a particular act is right or wrong. Obviously, the benefits that result from breaking the promise are relevant as well. For example, an explicit promise of confidentiality should be broken if necessary to prevent a murder. For different assessments of the seriousness of the harm necessary to justify breaking one kind of pledge of confidentiality, compare MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1983) (intended criminal act must threaten imminent death or serious bodily harm) with MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (1981) (any intended criminal act is sufficiently serious). These and other variations need not be explored in detail here. For my purposes, it is sufficient to note that a promise creates a bond between people that further complicates the moral ambiguity of informing.
preservation. To the extent that others are within this zone of self-identification, they partake of the same loyalty. In circles radiating outward from the individual, then, there are bonds of varying strength within which it seems wrong to do harm, even for the greater good of society.

Informing is also viewed as morally wrong in the context of relationships founded on certain social roles. A lawyer's general duty to preserve the secrets of a client exists not because of an interpersonal bond of affinity, or because of some kind of implied or express promise, but rather because society deems the attorney-client confidential relationship to be essential to the proper functioning of the adversarial system. This type of relationship is less interesting from a moral perspective than the other types of relationships discussed above because it is based so obviously on identifiable social goals.

Because society values such relationships, it strives to protect them through means such as evidentiary privileges. The reasoning behind these privileges provides guidance in determining the appropriate scope of the obligation to report. For even where the societal need for information is great, the law has determined that the social benefits of preserving some relationships outweigh the need for information. Since evidentiary privileges permit one to refuse to answer questions in proceedings in which compulsory process is available, it follows that the less immediate

---


145. One might derive the first two types of relationships from some deontological ethical premise, and dismiss the third type as a mere matter of social policy—a morally neutral “positional duty.” See A. Simmons, MORAL PRINCIPLES AND POLITICAL OBLIGATIONS 21 (1979). Alternatively, one might derive all three types from purely consequentialist premises, and identify all three as special examples of a general duty to maximize social benefits. One can find the three types to be morally relevant under either view. The first two bonds are more interesting, however, because they require us to inquire more deeply into basic human needs. Only the first two types of bonds are sufficient to imply a right not to do what is most socially beneficial or, in utilitarian terms, a deeper reason not to do what seems on the surface most beneficial.

obligation to report misconduct should be inapplicable to these kinds of relationships.

But these privileges are exceedingly narrowly drawn. Only a few relationships of extraordinary importance are protected at all, and in most of these cases, the evidentiary privilege applies only to certain sorts of communications.

Nevertheless, the reasoning behind these privileges provides some guidance in understanding the limitations of a duty to report. A person will not be required to testify against his or her spouse because that exemption "fosters the harmony and sanctity of the marriage relationship," and also because of "the natural repugnance in every fair-minded person to compelling a wife or husband to be the means of the other's condemnation." The relationship is protected both because of its social benefit and because it is intrinsically valuable to the parties involved. To impose on such a fundamental relationship would be to violate human dignity.

Other kinds of relationships are neither as fundamental to the sort of society we desire, nor as essential to individual dignity, as the marital relationship. Such relationships are nevertheless of enormous value, both to society and to the individual. Family relationships, professional associations, religious affiliations, friendships, and even the vague ties of acquaintance and fellowship that bind neighbors or people from the same hometown are all relations essential to both social and individual well-being. The state should encourage rather than disrupt these relations to the extent consistent with other social needs.

147. For example, courts have not found the parent-child relationship to be of sufficient social importance to warrant the protection of an evidentiary privilege. See, e.g., In re Grand Jury Subpoena (Santarelli), 740 F.2d 816, 817 (11th Cir. 1984); United States v. (Under Seal), 714 F.2d 347, 349 n.4 (4th Cir.), cert. dismissed sub nom. Doe v. United States, 464 U.S. 978 (1983); In re Grand Jury Proceedings (Starr), 647 F.2d 511, 512-13 (5th Cir. 1981). But see In re Grand Jury Proceedings (Agosto), 553 F. Supp. 1298, 1325 (D. Nev. 1983) ("[T]he confidence and privacy inherent in the parent-child relationship must be protected and sedulously fostered by the courts.").


149. 8 J. WIGMORE, EVIDENCE § 2228, at 217 (McNaughten rev. ed. 1961).

150. I would include within the term "marital relationship" a range of equivalent relations outside the formal institution of marriage. See Levinson, Testimonial Privileges and the Preferences of Friendship, 1984 DUKE L.J. 631.

151. Even the bond that unites criminals joined in a common venture has moral value as an expression of human solidarity. Hence, some have ambivalent feelings about criminals who become government witnesses against their former comrades. The "stand-up guy" may be a crook, but at least he possesses a certain sense of honor; the "stoolie" only compounds his wrongdoing by his act of betrayal. In this situation, however, the danger posed—criminals can increase the scope and efficiency of their activities by banding together—may well outweigh any benefit that results from the relationship. Moreover, in most such instances, factors such as the seriousness of the offenses involved and the need to rejoin the larger society tip the balance in favor of informing. For an interesting meditation on informing as an inevitable consequence of a shift in loyalties, see...
These relationships also serve another important function: they provide a buffer between the individual and society at large. Such buffers are essential to the preservation of pluralistic society. Indeed, a person's very identity is in large part defined by the networks of communities and connections to which he belongs.\textsuperscript{152} At the same time, they infuse an otherwise abstract loyalty to the larger society with concrete content—one who goes to war to defend his country probably draws more strength from the image of his family and friends than from that of the flag or the Constitution. But such relationships, founded on trust, are impossible in a society of informers.

The value of such relationships, however, does not make informing always a moral wrong. The impulse to protect one's friends and associates from harm—even from deserved punishment—is a moral and socially useful impulse precisely because it reaches beyond individual self-interest; it assimilates another's well-being to that of oneself. But this impulse can take on a selfish character if it is felt only with respect to a narrowly defined group. The altruistic bonding process that gives moral weight to particular relationships may then ironically produce group alienation and hostility. Recognition of the interests of members of even broader communities may represent a still more mature expression of the same search for bonds beyond the self. Thus, abstract interests such as "social good" and "justice" will in some instances take precedence over loyalty to a friend, so that informing can become a moral duty. The moral content of the narrower loyalties is never fully dissipated, however, and it is for this reason that society is deeply ambivalent toward reporting.

The moral conflict thus presented is, essentially, the one suggested by E.M. Forster's famous aphorism placing loyalty to friends over loyalty to country.\textsuperscript{153} Forster's absolutism is clearly mistaken. The desire to prevent harm to large numbers of innocent but unidentified people will sometimes override narrower bonds of loyalty and emotional identification. Yet it surely goes too far to urge, as some utilitarians might, that

\textsuperscript{152} W. Chambers, Witness 453-56 (1952). In any case, with respect to a legal obligation to inform, the question is essentially academic. There is little point in adding to the liability of accomplices and coconspirators an additional liability for failing to report the crimes in which they were involved. Cf. Marchetti v. United States, 390 U.S. 39, 54 (1968) (fifth amendment forbids government to compel person to register illegal activities for tax purposes); Regina v. King, 49 Crim. App. 140, 145-46 (1965) (alleged conspirator not required to report crime of coconspirator if to do so would tend to incriminate himself).

\textsuperscript{153} See E. Forster, Two Cheers for Democracy 68 (1951) ("[I]f I had to choose between betraying my country and betraying my friend, I hope I should have the guts to betray my country.").
we ought to treat all persons as moral equivalents.\textsuperscript{154} For example, it is not clear that it is morally wrong to devote resources to the education of one's child rather than to the nourishment of famine victims on the other side of the world.\textsuperscript{155} If Forster's particularism is far too absolute, there is also "no obvious reason why 'more general social concerns' as such should in all cases defeat more local or particular concerns merely in virtue of their generality."\textsuperscript{156} Loyalties to units smaller than humanity at large or the nation-state serve psychic needs and social purposes that are important enough to justify the subordination of larger loyalties under certain circumstances.\textsuperscript{157} Loyalty to friends and loyalty to country are too closely connected for the choice between them to be anything but tragic.

b. \textit{The gravity of the offense.} Society's misgivings about the propriety of informing vary with the gravity of the offense in question. At one extreme, informers are subject to criticism if the information they provide concerns activities not generally perceived as harmful to society. Thus, commentators have severely criticized those who "named names" before the legislative committees investigating Communist activities in the early 1950's, despite the fact that this information was given in response to government questioning conducted under considerable pressure, including compulsory legal process.\textsuperscript{158} Although the case against these witnesses is based in part on the presumption against reporting the activities of close friends or political associates, it depends crucially on the claim that the threat of Communist infiltration was overblown by unscrupulous politicians and in fact posed no real danger to American society.\textsuperscript{159}

At the other extreme, few would doubt that the public duty to prevent widespread harm at some point overrides even the strongest inter-

\textsuperscript{154} Commentators on legal ethics are sometimes remarkably superficial on this point. Thus, one article criticized Charles Fried's thesis that the lawyer's special relationship to the client has moral weight justifying actions that would not be permissible absent that special relationship, see C. FRIED, \textit{supra} note 143, at 134, and argued that a defining characteristic of relationships such as "family, friend or nation" is their "amorality." D'Amato \& Eberle, \textit{Three Models of Legal Ethics}, 27 St. Louis U.L.J. 761, 766 (1983). But that is plainly wrong. Such relationships do not, as D'Amato and Eberle would have it, transcend moral considerations; they are instead an important factor in moral calculations.

\textsuperscript{155} See C. FRIED, \textit{supra} note 143, at 1066.

\textsuperscript{156} M. SANDEL, \textit{supra} note 143, at 146.

\textsuperscript{157} See id. at 62-63, 147-52, 179-83.

\textsuperscript{158} For a presentation of the case against informing in this context, see V. NAVASKY, \textit{supra} note 139.

\textsuperscript{159} Thus, Navasky argues that the investigating bodies in this instance "had been careless with individual rights and reputations and... had not demonstrated a seriousness of public purpose." \textit{Id.} at xiii.
personal loyalties. Could one seriously doubt the propriety of a former Communist reporting an actual plot by Communists within the military to stage a \textit{coup d'état}? Or, looked at from the opposite political point of view, would not a member of a revolutionary cell be justified in informing his superiors of actions taken by a comrade that endangered the movement?\footnote{160} Under any consequentialist moral system, the harm that the informer seeks to prevent must be weighed against the wrong that will result from the betrayal of friends or associates. Likewise, any system that considers particular relationships or associations to be sacred must recognize that certain conditions must exist and certain principles must be preserved if such relationships are to develop and flourish. Surely conduct that violates the very principles on which a particular association is based causes more harm in a global sense than does the act of reporting that conduct.\footnote{161}

It seems clear then that the moral status of informing is determined by both the strength of the interpersonal loyalties involved and the gravity of the harm the informer seeks to prevent. Many would feel that it would be wrong for Straight to report the wrongdoing of his associate Cool. This conclusion would not necessarily represent a denigration of the seriousness of the misconduct involved—though it would obviously follow more easily for one who regarded recreational use of drugs as only a minor character flaw. Even some who feel strongly that the conduct in question is morally reprehensible may nevertheless pause before they conclude that Straight should alert the authorities. These people may conclude that the social benefit of requiring Straight to inform is outweighed by society's interest in the bonds created by membership in their respective professional circles.

\footnote{160. The need felt in some circles to denounce informers points up the moral ambivalence of informing. One commentator claims that Jewish law treats informing as a vile act and that the person who informs against the life or property of another Jew to non-Jews may be liable to gruesome punishments ranging up to execution. \textit{Id.} at xii. This commentator then goes on to point out, without visible irony, that "Jewish law requires reporting the informer to the Jewish legal authorities." \textit{Id.} The purported rule requiring Jews to report informers reminds us once again that the question of informing involves a conflict among various bonds of loyalty. Personal loyalty to a friend may be at odds with loyalty to the group, which in turn may be at odds with legal demands for loyalty to a larger political entity. As Michael Sandel has stated:}

\begin{quote}
Each of us moves in an indefinite number of communities, some more inclusive than others, each making different claims on our allegiance, and there is no saying in advance which is the society or community whose purpose should govern the disposition of any particular set of our attributes and endowments.
\textit{M. SANDEL, supra} note 143, at 146.
\end{quote}

\footnote{161. \textit{Cf.} C. FRIED, \textit{supra} note 143, at 1083 ("If personal integrity lies at the foundation of the lawyer's right to treat his client as a friend, then surely consideration for personal integrity—his own and others'—must limit what he can do in friendship.").}
It is not clear, however, just how serious the misconduct would have to be before the balance shifted. Even one who thought that Pinstripe should not report Mouthpiece's tax evasion would probably feel differently if Mouthpiece had admitted he had embezzled a large sum of money. Neither is it clear just how much the balance is affected by the precise relationship in question. For example, were Mouthpiece and Pinstripe brother and sister rather than professional colleagues, wouldn't misconduct of an even more serious nature be required before the balance shifted in favor of informing?

This article makes no attempt to resolve these questions. Whether one should report a friend or associate is a complex question the answer to which will depend upon not only the closeness of the relationship and the seriousness of the wrongdoing, but also upon a wide variety of other considerations. The only point sought to be made here is that in some situations, under some moral systems, suppressing information detrimental to interpersonal relationships will be the correct moral course of action.

It seems unquestionable that the general disapproval of informers has a moral basis and that the law has correctly refused to impose an obligation to inform. If there is no social consensus about the circumstances in which informing is morally acceptable, and if any consensus that could develop would likely involve a multiplicity of imprecise factors not easily susceptible to objective proof, it would be a mistake for society to impose a generalized legal obligation to report all misconduct.

The law, a somewhat blunt moral instrument in any event, is particularly ill-suited to deal sensitively with the kind of moral issues presented in this area. After all, the very conflict in question is between allegiance to interpersonal loyalties and allegiance to the goals of society as a whole. Because the law in a sense represents one side of this conflict—society as a whole—it cannot easily accommodate all the interests at stake.

In considering ways in which an accommodation can be effected, the

---

162. For example, one may wish to consider the possibility that reporting will prevent harm, result in victim compensation, and serve necessary social goals through punishment.

Under a consequentialist moral theory, the approach may be characterized as balancing the long-term social advantages of protecting the relationship in question against the immediate advantages of detecting and punishing the wrongdoer. A truly refined calculation would consider not only the seriousness of the offense, but also how valuable the information would actually be in securing a conviction, and what benefit would accrue from imposing punishment. But because precise quantification of these factors will often not be possible, the gravity of the offense will in most cases be the primary consideration.

For those who view the issue as one involving a duty arising from a relationship of trust, the gravity of the offense is directly relevant to the extent to which the informing party has forfeited a right to claim the benefit of that relationship.
law of privileges provides a useful analogy. As noted above, the law does not recognize evidentiary privileges that turn on an ad hoc balancing. Instead, it exempts only a few types of relationships, despite the likelihood that in certain cases a balancing of harms would not favor such an exemption. The limited scope of the law of privileges results in large part from a realization that an ad hoc approach would involve consideration of factors that are not susceptible to objective proof. By limiting the scope of evidentiary privileges, society has expressed a judgment that the need for testimony is great enough to outweigh all but the most vital personal relationships.

Similar considerations counsel against the imposition of a generalized duty to inform. Although it would sometimes be morally correct to report wrongdoing that comes to one's attention, such action would be morally incorrect in a great number of situations. The considerations relevant to sorting out these cases are highly complex. The preference for laws that are narrowly drawn and easy to apply would thus counsel that the law leave individuals free to follow their consciences in deciding whether or not to inform, except in a few carefully defined situations. Moreover, given the likelihood that people would disregard an unfocused and unpopular obligation to report the misconduct of others, little social benefit can be expected from a general rule, even in those instances in which the moral obligation to inform is clearest. Whatever the reasons, the law has generally declined—correctly I believe—to impose a duty to provide unsolicited information, except in situations in which the information is especially vital and a definable category of persons is particularly likely to obtain it. The possibility of harm is too great, and the rewards too slim, to justify a general duty to inform.

III. LAWYERS: A SPECIAL CASE?

The ethical codes applicable to lawyers ought to reflect the same approach that has proven acceptable to society as a whole. The tension in the ABA's codes of professional conduct stems from the combination of a desire to profess a high-minded duty to society and a practical recognition of the difficulties of enforcing such a broad obligation. The result in the Model Code of Professional Responsibility has been a broad but ambiguous endorsement of informing that has, as the drafters of the Model Rules of Professional Conduct correctly noted, "proved to be unenforceable." Although the Model Rules have moved in the right di-

163. See supra note 147.
164. See supra notes 106-23 and accompanying text.
165. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 comment (1983). As commentators have noted, "enforcement [of the present rule on informing] is virtually non-existent. The research
rection by limiting the obligation to inform to situations in which the violation is serious, they have not carefully defined the categories of information subject to the mandatory reporting obligation. Instead, the Model Rules create an obligation that imports into the old rule yet another ambiguous exercise of judgment.\textsuperscript{166}

Before attempting to refine the rule further, an obvious question should be addressed. Aren't lawyers different? Should society subject lawyers to special rules because of their special status in society?

A. \textit{Are Lawyers Different?}

The moral and legal standards applicable to lawyers may be distinguished from those that apply to the general population by noting that lawyers have a special role in the legal system. Because of this special role, one might argue, their obligations to the rule of law are greater than those of ordinary people and they accordingly should be required to give greater weight to certain social considerations.

Claims that special standards should apply to lawyers because of their unique role in society are sometimes more rhetorical than analytical. Occasionally, such claims seem more calculated to buttress the elite social position of lawyers than to impose additional responsibilities upon them.\textsuperscript{167} The high standards pledged by the profession often lack concrete, enforceable substance. In assessing any claim that lawyers automatically should adopt a higher obligation to inform, it is necessary to examine the actual conduct that lies behind the rhetoric of adherence to strict behavioral standards.

The ABA's frank recognition that the Code's broad reporting requirement has "proved to be unenforceable"\textsuperscript{168} suggests that in balancing intraprofessional loyalty against even an explicit command to inform, lawyers have acted no differently than other citizens. Lawyers have generally determined that awareness of another lawyer's wrongdoing does not automatically impose a moral duty to inform.

It is difficult to see why the sort of complex moral balancing dis-

\textsuperscript{166} See Model Rules of Professional Conduct Rule 8.3 comment (1983) ("A measure of judgment is . . . required in complying with the provisions of this Rule."); see also supra notes 85-100.

\textsuperscript{167} See Morgan, The Evolving Concept of Professional Responsibility, 90 Harv. L. Rev. 702, 706 (1977) (current ethical rules place interests of lawyers before those of the client and the public).

\textsuperscript{168} Model Rules of Professional Conduct Rule 8.3 comment (1983).
cussed above should be different with respect to lawyers. Suppose, for example, that in the hypothetical involving the tax evasion disclosure, Pinstripe had been an accountant rather than a lawyer. Would this affect either the social benefit that would result from bringing Mouthpiece to justice or the moral character of the personal and professional relationship between Pinstripe and Mouthpiece? The assertion that lawyers are special and should abide by higher moral standards turns out to have little content as a moral argument.

Even if one assumes that the legal system’s claims have special gravity with respect to lawyers, the argument against a generalized obligation to inform remains essentially unaffected. After all, that argument is not based on a claim that informing is usually a morally incorrect choice; there are situations in which all would agree that a witness is obligated to inform. Rather, the argument is based on the proposition that the moral calculation is so complex that reasonable people will disagree about the proper outcome in a wide range of cases. It is difficult to imagine that the special circumstances of the lawyer’s position in society alter the balance in every case to the point that the complexity of the moral calculation disappears. In other words, it is not clear, even for lawyers, that the moral basis of informing will be so clear in so many cases that a generalized obligation to inform should be imposed.

The case for a special obligation can be made in a more concrete fashion. It could be argued that lawyers should have a special duty to report the misconduct of other lawyers not because of an abstract obligation to the law, but because of a particular facet of their position in society. Because lawyers are members of a self-governing, self-policing profession, one could argue that a reporting obligation would serve a special need of the bar.

Yet a logical connection between self-regulation and a duty to inform is not immediately apparent. After all, our society is itself self-regulating in the sense that its members are ultimately responsible for the laws that govern conduct. And yet it does not follow from this that there should be a legally enforceable duty to report violations of those laws. But lawyers, it might be noted, are also self-policing: if they do not take the lead in uncovering the misconduct of other lawyers, no one else will. Once again, however, it is not clear how to distinguish ordinary civil

169. See supra notes 105-64 and accompanying text.

170. See Abel, Why Does the ABA Promulgate Ethical Rules?, 59 Tex. L. Rev. 639, 668 (1981) (arguing that purpose of Model Rules is “to create a myth about what lawyers might be in order to disguise what they are”).

171. See Gentile, supra note 8, at 2, col. 2 (“The reporting requirement is nothing less than essential to the survival of the profession . . . .”).
society. In a democratic society, the actors charged with policing conduct are not members of an outside force, but members of the population who have the special task of enforcing the norms agreed upon by all. Society is thus self-policing, but with specialists performing the police function. The legal profession also has its own disciplinary apparatus responsible for investigating and punishing violations of the rules of professional conduct. If these organs of discipline inadequately control lawyers, the bar should certainly act to strengthen them. But the disappointing experience of mandatory informing hardly suggests that such a rule has been or can be the answer to inadequate self-policing.\textsuperscript{172}

The rhetorical invocation of the "self-regulating, self-policing" notion is more of a public relations gimmick than anything else. As one advocate of the reporting obligation candidly puts it:

We have long been a self-policing, self-regulating profession. That we have retained control of the admission, scrutiny, and discipline of our own members is a measure of the trust and esteem accorded lawyers today, public grumbling to the contrary notwithstanding. That trust, ever fragile, rests upon our assurance that lawyers who continue in good standing at the Bar are trustworthy and honest and that, if they are not, the profession's disciplinary arm will deal with them appropriately.\textsuperscript{173}

Under this view, the duty-to-report rhetoric is aimed as much at persuading the public to let the bar remain a self-policing entity as it is at encouraging the bar to effectively police itself.

The motives underlying such rhetoric are not likely to inspire compliance with a distasteful obligation. Protecting the bar's monopoly over the admission and discipline of lawyers is a worthwhile goal only to the extent that it generates improved legal services. Both the reality and the appearance of improved lawyer discipline would be better served by increasing the resources available to disciplinary bodies. Increased informing by lawyers surely is not the answer.

B. \textit{Applying Lessons from the Outside World.}

If lessons from the outside world apply to the legal profession, it follows that the proper approach is to impose upon lawyers no generalized duty to report. Such a duty conforms neither to the average person's moral intuitions nor to realistic expectations. Accordingly, lawyers are unlikely to comply with a broad informing requirement. Thus, the Model Rules correctly move away from the Code's broad formulation to

\textsuperscript{172} Once again, the experience of general law enforcement seems relevant. No one urges the imposition of an obligation to inform on private citizens as a substitute for more and better-trained police and prosecutors.

\textsuperscript{173} Gentile, \textit{supra} note 8, at 2, col. 3.
a more circumscribed one. By limiting the informing obligation to “those offenses that a self-regulating profession must vigorously endeavor to prevent,” the Model Rules recognize that the seriousness of the violation is a crucial determinant of the morality of informing. The more serious the violation, the more likely it is that people will universally agree that there is a moral duty to report it.

The Model Rules nevertheless fail adequately to focus and particularize the obligation to report. As discussed above, the more focused the obligation, the more likely it is to reflect a moral consensus. The Model Rules simply graft a perfectly sensible criterion for determining what sort of violations should be reported—those violations that “raise[] a substantial question as to [a] lawyer’s honesty, trustworthiness or fitness as a lawyer” onto the Code’s general obligation to report “knowledge” of ethical violations. The Model Rules thus retain all of the ambiguities present in the Code and add an additional layer of ambiguity by not specifically defining the “seriousness” criterion.

As experience with the few criminal or regulatory statutes that impose a duty to inform has demonstrated, the more concrete the obligation imposed, the more likely it is to be effective. I submit that a more productive rule for the legal profession would (1) define the reporting obligation by listing violations determined by the bar to raise substantial questions of fitness, and (2) require lawyers to report any information that makes it reasonable to believe that such a violation has occurred. These two changes, of course, are linked: an objective standard as to the quality of the information to be reported will be effective only if (1) we are confident that the violations specified are sufficiently serious and the information is unlikely to be obtained from other sources, and (2) the obligation thus imposed on lawyers is sufficiently clear that it can be readily applied and enforced.

It is not the purpose of this article to specify the particular violations to which a duty to report should attach. I would, however, tentatively suggest three categories: professional misconduct involving dishonesty toward a client or the legal process; serious criminal conduct involving dishonesty, fraud, deceit, or misrepresentation; and incompetence clearly amounting to malpractice.

1. Professional Misconduct Involving Dishonesty Toward a Client or Toward the Legal Process. There can be little doubt that fidelity to the

175. Id. Rule 8.3(a).
177. See supra notes 120-23 and accompanying text.
interests of a client ranks among the lawyer's most definite professional obligations. Betraying a client's trust by fraud or by disclosure of confidences is a serious ethical breach. Such conduct certainly raises substantial questions of fitness.

Similarly, actions that obstruct judicial processes violate the very essence of the lawyer's role in the administration of justice. A lawyer who acts so as to compromise the fairness and integrity of legal processes not only abuses his special position in society, but also undermines the very system that defines that position. Because such misconduct strikes at the core of the lawyer's duties, it also raises substantial questions of fitness.

178 The criterion of special need for informer information is also met in such cases. When a lawyer acts dishonestly or disloyally toward a client, the client will not always be aware of the misconduct; lay people do not always fully understand the scope of the obligations that lawyers owe their clients. A lawyer who becomes aware of such misconduct is better able to judge whether a violation has occurred and knows how to lodge an appropriate complaint. Similarly, when a lawyer acts so as to distort the truthfinding processes of the legal system, those most likely to be aware of the misconduct and most able to assess its significance are the other lawyers in the case; without complaints from lawyers, disciplinary bodies would not be aware of the need to investigate. Because honesty toward clients and the legal system is so important, and because the pertinent ethical rules are inherently difficult to enforce absent cooperation from other lawyers, moral reservations about informing can appropriately be subordinated in this context.

2. Serious Criminal Conduct Involving Dishonesty, Fraud, Deceit, or Misrepresentation. When the misconduct in question occurs outside the lawyer's professional role, the duty to report becomes much more problematic. Without question, lawyers should scrupulously observe all

---

178. In discussing the lawyer's obligation to inform under the Model Rules, Professors Hazard and Hodes cite three paradigmatic cases: destruction of evidence under subpoena, subornation of perjury, and self-dealing with trust funds. G. HAZARD & W. HODES, supra note 4, at 556. Significantly, two of these examples deal with obstruction of justice, and the third with dishonesty toward a client.

179. Delineation of the responsibilities of the lawyer to the client is the primary enterprise of both the Code and the Model Rules. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canons 4-7 (1981); MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.1-1.16 (1983). For their treatment of the lawyer's responsibilities to the legal system, see MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1981); MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.2 (1983).
criminal laws. All citizens bear this obligation,\textsuperscript{180} and whether or not it makes sense to say that lawyers have a "special obligation" to do so, their legal training and the privileged social position they occupy both provide special incentives.

It is less clear that lawyers who violate criminal statutes ought to be subject, in every case, to professional discipline as well as criminal punishment.\textsuperscript{181} Given the broad use of the criminal sanction for sumptuary and regulatory purposes,\textsuperscript{182} one may legitimately question whether the willful commission of any prohibited act genuinely reflects on the offender's fitness to practice law.\textsuperscript{183}

But even assuming that it does, the moral and practical costs of imposing an obligation to inform in all such cases would be immense. Whatever the appeal of the theoretical principle that any criminal violation is ipso facto professional misconduct warranting discipline, one must acknowledge that ferreting out every instance of such conduct has never been given a high priority by professional disciplinary bodies. A rule that would generate complaints about minor criminal conduct would have the effect of diverting limited disciplinary resources away from more productive uses. After all, if the primary purpose of professional discipline is to deter misconduct,\textsuperscript{184} professional sanctions would be most productively applied to misconduct that criminal sanctions do not adequately deter.

Furthermore, a reporting requirement applicable to all criminal conduct cannot be justified on the ground that lawyers are likely to be the only available source of information. Nothing about the lawyer's professional role makes him more likely than any other witness to come upon evidence of the criminal activities of other lawyers.\textsuperscript{185} This is not, in other words, a case analogous to physicians and gunshot wounds or undertakers and deaths. In those situations, society imposes reporting re-

\textsuperscript{180} This statement is meant to be noncontroversial; questions of the legitimacy of civil disobedience or any special problems raised by obsolete, unjust, or trivial laws, see R. Dworkin, Taking Rights Seriously 206-22 (1977), are put to one side.

\textsuperscript{181} See supra notes 69-78 and accompanying text.

\textsuperscript{182} See generally H. Packer, The Limits of the Criminal Sanction 249-363 (1968) (arguing that criminal sanctions are applied in some cases where other responses may be more appropriate).

\textsuperscript{183} For a general discussion of the relevance of various kinds of criminal and noncriminal acts to bar admission and attorney discipline, see Rhode, supra note 18, at 529-46, 551-62.


\textsuperscript{185} Nothing, that is, except the attorney's role as advocate and counsel in criminal cases. But information obtained in this professional setting would, of course, be privileged and not subject to the reporting requirement in any event. See Model Code of Professional Responsibility DR 1-103 (1981); Model Rules of Professional Conduct Rule 8.3(c) (1983).
quirements because the actors are particularly good sources of the information in question. There is no evidence that requiring lawyers to report the criminal activity of other lawyers would substantially further general law enforcement policies. To the extent that the bar wishes to enforce the ethical obligation to obey criminal laws scrupulously, the present general practice of leaving law enforcement to the police and following successful criminal prosecutions with disciplinary proceedings seems adequate to make the point.

Although there is no special need for a reporting requirement applicable to all antisocial conduct on the part of lawyers, the balance shifts when the conduct in question is both serious in nature and directly related to the lawyer's fitness to practice law. The moral ambiguity of informing begins to dissipate when truly serious criminal conduct is involved. As the crime in question becomes more grave, the need to recognize countervailing moral considerations decreases, and a lesser showing of necessity for imposing the obligation is required.

In the particular context of professional discipline, however, the question of which crimes should be regarded as serious takes on a special twist. While the major crimes of violence obviously should be reported in most situations as a matter of private morality, it is questionable whether a special rule requiring lawyers to contact the grievance committee when they learn that another attorney has committed murder or rape makes much sense. The social and institutional context weakens the need for such a rule in three ways. First, there is nothing about being a lawyer that gives rise to a special temptation to commit such crimes. Second, there is no reason to expect that other lawyers will be particularly likely to come upon information concerning lawyer-committed crimes, and alternative sources of such information are usually available in any event. Third, professional disciplinary bodies are not the appropriate institutions to pursue cases of this kind. Thus, even if a lawyer, like any other citizen, would be morally obligated to report evidence of a violent crime to the authorities, it seems neither appropriate nor necessary to impose a professional obligation to report such crimes simply because another lawyer has committed them.

In contrast, the bar ought to be particularly concerned about crimes involving financial dishonesty. There is no reason to believe that lawyers are part of a social class unlikely to commit crimes motivated by greed. If anything, the opposite is true. Moreover, the nature of legal work frequently places a lawyer in situations in which dishonesty could be highly profitable. Crimes of fraud and misrepresentation, unlike crimes of violence, are often business-related, and business associates of the
wrongdoer will often be able to acquire information not readily available to the victims or other witnesses.

Furthermore, bar discipline has a special role to play in this context. First, because trustworthiness and fidelity are qualities essential to the lawyer's professional role, the bar has a particular interest in policing conduct that shows an absence of these qualities. Second, because law enforcement agencies are not always willing or able to devote the resources necessary to prosecute many white-collar crimes, it is more difficult to assume that regular law enforcement authorities will adequately handle the problem.

In light of these considerations, let us reexamine the hypothetical cases involving Cool and Straight. Although narcotics distribution is a serious offense the commission of which may well warrant the imposition of professional sanctions, the sale of cocaine is not sufficiently close to the heart of the professional enterprise to justify overriding the moral costs of a mandatory reporting requirement. The use of drugs by a lawyer, though a less serious criminal offense, may strike closer to the heart of the professional enterprise: drug use could signify emotional instability that could lead to diminished mental capacity which could in turn undermine a lawyer's professional performance. Heavy drug use can also leave one in financial straits, and this in turn could increase the temptation to commit a crime involving financial dishonesty. But surely such speculative consequences do not have such immediacy as to justify imposing a duty to report on Straight, who has merely observed one episode of drug use by Cool, and who has no reason to believe that Cool is mentally or emotionally incapacitated or in financial straits as a result of his drug use.

The hypothetical involving Pinstripe and Mouthpiece is not so readily resolved. Pinstripe has reason to believe that Mouthpiece has committed tax evasion, a crime involving financial dishonesty. In light of the foregoing discussion, reporting would seem to be obligatory in this case.

As already indicated, most lay people typically do not report their knowledge of such violations or believe that it would be right to do so. Within the domain of legal discipline, however, a similarly lax attitude toward tax evasion would be unwarranted. Crimes indicative of greed and dishonesty should concern the legal profession. Moreover, lawyers should not embrace the popular tendency to regard thefts from identifiable individuals as more serious than thefts from diffuse organizations.

As seriously as the bar ought to treat tax evasion for purposes of professional discipline, however, the lack of a general consensus on the

186. See supra notes 24, 100.
matter would suggest that no mandatory reporting duty should be imposed. It does not appear that tax evasion is generally thought to be as intrinsically wrong as other forms of fraud. Although cases involving extremely large amounts or other aggravating circumstances may cross the threshold of seriousness that gives rise to a reporting obligation, Pinstripe has no way of knowing whether Mouthpiece has engaged in monumental fraud or petty chiseling. Thus, Pinstripe is not in a position to judge the seriousness of this particular offense. I would find it hard to conclude that Pinstripe should be disciplined if she fails to report her conversation with Mouthpiece to a grievance committee.

In short, even within the area of criminal conduct involving false statements and financial dishonesty, mandatory informing seems questionable in at least some cases. Once more, the key is the seriousness of the misconduct. The Model Rules are on the right track in imposing an obligation to report only when the given misconduct “raises a substantial question as to [the offending] lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” But much clearer and more specific notice of the cases in which reporting is required must be provided. With regard to criminal activity conducted outside the professional context, the reporting requirement should be limited, at a minimum, to extremely serious misconduct involving dishonesty or breach of trust, with “extremely serious misconduct” operationally defined as conduct that would clearly be expected to result in imprisonment and/or disbarment. Ideally, illustrative examples that are sufficiently comprehensive to provide considerable certainty in the application of the rules should be provided as well.

3. Any Failure of Competence or Zeal that Would Clearly Amount to Malpractice. The need to ensure professional competence provides the clearest justification for a mandatory informing requirement. Any licensing and regulatory system must take the question of competent and attentive performance seriously, whether its goal is to eliminate inadequate practitioners, provide incentives for adequate performance, or protect the public image of the regulated profession.

Because failures of professional competence are essentially offenses against the client, much of what was said above with respect to disloyalty

---

187. The elaborateness of the deception involved and the source of the unreported income, for example, would bear on the question. See, e.g., United States v. Cunningham, 723 F.2d 217, 231 (2d Cir. 1983) (elaborate tax evasion scheme and coverup relevant to the “substantiality” of the violation), cert. denied, 466 U.S. 951 (1984).

188. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(a) (1983).

189. See Steele & Nimmer, supra note 184, at 999-1001 (identifying principal goals of the disciplinary system).
to clients applies here as well. Offenses against clients satisfy the seriousness standard as well as the special need standard. Clients will rarely be aware that their lawyer’s professional services have fallen below professional standards. Moreover, there is nothing about malpractice cases that provides other lawyers with an automatic incentive to report. Indeed, self-interest often will run against reporting.

The strongest argument against imposing an obligation in these circumstances is that it would be difficult to provide guidelines specifying exactly what kind of incompetence should be reported. As commentators have often recognized, neither courts nor disciplinary bodies have reached a consensus regarding what constitutes fundamental incompetence or lack of diligence. Moreover, even if courts and disciplinary bodies could reach a consensus, imposing an obligation to report incompetence would entail certain risks. The obligation to report would likely be so vague that many lawyers would simply refuse to take it seriously. If this were to happen, enforcement would be most difficult.

Despite the difficulty of objectively assessing the quality of representation when issues of judgment or tactics are involved, courts regularly do adjudicate questions of attorney malpractice. At least some gross failings of zeal, care, or competence leave no reasonable doubt that the attorney has not met a basic standard of care. It is not clear that the existing disciplinary system is the best means to regulate attorney competence. But as long as this system is used, some effort to judge competence will be required. A reporting obligation, if honored and enforced, would have the salutary effect of protecting clients who may often be unaware that they have been victimized by attorney malpractice.

The approach suggested here is designed to avoid the pitfalls found in the present codes of conduct. Unlike the approach sketched out above, which attempts to identify particular, reasonably concrete categories of conduct to which a reporting obligation would attach, Model Rule 8.3(a) imposes the reporting obligation in cases in which a rule violation raises a substantial question as to [the violator’s] honesty, trustworthi-

---

190. See supra notes 178-79 and accompanying text.


193. See Marks & Cathcart, supra note 191, at 230-36.
ness or fitness as a lawyer in other respects." The Model Rules are on the right track. Yet by stating the reporting obligation in such general terms, the Rules leave open considerable areas of uncertainty.

Restricting the reporting requirement to a few well-defined categories would permit the use of a more objective standard of knowledge. This would eliminate a principal loophole in the current formulations. Instead of requiring lawyers to report when they have "knowledge that another lawyer has committed a violation," a narrowly drawn reporting requirement could require a lawyer to inform whenever he has "reason to believe" that another lawyer has engaged in conduct of the sort specified. Such a formulation would relieve the potential informer of the burden of judging another lawyer's conduct in absolute terms and would eliminate the potential for confusion or evasion that the Code's formulation presents. A formulation along the lines here suggested would neither impose a crushing burden on those subject to it nor result in an excessive number of unfounded reports. Moreover, if the rules limited the reporting obligation to categories of serious misconduct, disciplinary resources could be channeled more effectively and the resulting gains in efficiency would probably offset any additional cost of investigating reports of conduct that proved to be innocent.

IV. Conclusion

The legal profession's rhetorical commitment to an ethical obligation to report is anomalous. Like many pronouncements of a "correct" standard of behavior, it is overinclusive and is so vague that calls for its enforcement will remain unanswered. A standard that more fully recognizes the moral status of informing might appear to be less high-minded; it would certainly apply to a much narrower range of cases. But the cases to which it would apply would be those in which enforcement is paramount and difficult to achieve by other means. Such a standard would provide fewer excuses for noncompliance and would facilitate fair enforcement. Accordingly, it would be far more useful to the enterprise of professional discipline than noble-sounding but generally disregarded exhortations.

If the true purpose of a lawyers' code of conduct is to present an image of the legal profession as a noble brotherhood of high-minded aristocrats living by austere standards to which ordinary folk cannot conform, the conventional informing rules will serve nicely. But if the

purpose of the code is to set enforceable norms of conduct for a profession made up of fallible human beings with complex and differing moral perceptions, a more limited and rigorous standard is required.

I do not believe, as some do, that lawyers' codes of conduct serve only public relations and self-legitimation functions. Many lawyers do care about doing the right thing and often look in vain to professional codes for guidance. An effort to refine the codes would therefore be worthwhile. Still, self-interest can distort the drafting of professional codes, and moralistic standards that are compromised by day-to-day pragmatism in enforcement can serve systemic purposes in such a way as to thwart rational reform. I offer my suggestions in the hope that the purposes of lawyers' codes can be served. It seems unlikely, though, that the legal profession will soon abandon its rhetorical commitment to informing in favor of a more realistic position.