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Ethical Dilemmas Surveyed Through Attorney-Client Confidentiality: The Lawyer & The Navy Seal

Article By:

Michael Shammas

The afternoon sun beats down, yet you persist. Your three comrades—tempered into friends by shared hardship—walk behind you. One ushers you over, whispers: “Look.” And you look. Beyond a sun-lit haze you see two red-bearded goatherds abreast their flock—and they, the goatherds, they too look—straight at you. One yields a crooked smile, waves. But deep down, this feels wrong; intuitively, you fear the men will compromise your mission, setting the lives of your fellow SEALs at risk.

What do you do? There is little time as the goatherds walk away and recede into the valley. You agree to vote. “Shoot them,” whispers one comrade. “No,” says another. The third abstains. You have the deciding ballot, and your moral instinct says no (not to mention the natural and positive laws of war), and so you yourself say “no.” Despite the anomalous situation, suggesting governing ethics rules—especially international principles against killing civilians—might result in a less-than-optimal outcome, the problem is tough, so you gladly defer to guidelines long-ago dictated by custom, culture, the U.S. Navy. To obey is easy; to reason, hard.

Two hours later, your friends lie dead, peppered with bullets by Taliban dutifully alerted by the goatherds. Sixteen would-be rescuers perish, too, when their chopper is shot down. But somehow *you* survive, tumbling down the mountainside, crawling seven miles to a Pashtun village whose residents bind your wounds.

The thought lands like a sledgehammer: *I made a bad trade.* Two lives could have been lost instead of nineteen.

If this were a “trolley problem,” you did not even pull a switch. The trolley was *already* hurtling towards nineteen men, yet your fickle impassivity, your vacillating fear over the uncertain import of action, meant the two men on the other side of the track lived at the expense of nineteen others.

But that is all hindsight. Bitter, brutal hindsight. And as Søren Kierkegaard observed, though life must be lived forwards, it can only be understood backwards. So you must live with your flawed decision for the rest of your life. You suspect your inability to do so will add your life to the body-count as well, whether through the long degradation of substance abuse or through a quicker, more intentional sort of suicide.[1]

The SEAL in the above scenario is real. His name is Marcus Luttrell. While few attorneys will ever face scenarios quite so wrenching, the implicit issues apply to us all. How do we balance moral considerations? How much weight should we grant the level of certainty over possible bad outcomes—for Luttrell, the prospect of the goatherds alerting the Taliban—when engaged in ethical reasoning? Would the SEAL who cast a "kill" vote have been justified in ignoring the group's collective decision, like an attorney flouting his law firm's wishes, and shooting the goatherds himself? Finally, would a SEAL or an attorney be justified in ignoring well-settled ethical codes if those very codes seem certain to result in a less-than-optimal moral outcome in a specific scenario? The answers to these questions are important, for they have real, practical meaning. Attorneys habitually face moral problems—extraordinary circumstances challenging our dedication to accepted rules of legal ethics in the same way that Luttrell's dilemma challenged his commitment to use of force guidelines.

Consider the position of a prosecutor in a capital case. Like Luttrell, the prosecutor does not possess one-hundred percent certainty he is making the correct moral decision (a decision to prosecute). The real-life prosecutor who convicted Michael Morton,[2] later exonerated, of murdering his wife did not *know* that Morton was guilty. He used imperfect information to make a morally-saturated decision that ultimately proved frighteningly, horrendously wrong.

Or consider the prosecutor who lacks probable cause[3] but is certain, in his heart of hearts, that a man committed five murders, is in fact the most perfect serial killer there is, and that so long as the despicable creature roams free more will perish. Should the prosecutor lodge charges with imperfect probable cause in hopes of pressuring the killer into a plea deal, thus extricating the monster from society? Should he take a more extreme tack, manufacturing evidence? Certainly, most attorneys would say "no." But would they change their minds after learning the alleged serial killer, ten murders later, was brought to justice due to an infallible informant? I suspect hindsight would indeed change their moral intuitions, as it did for Luttrell, further highlighting the difficulty of making weighty moral decisions using imperfect information.

Thus, our choices as attorneys are hard for similar reasons that Luttrell's decision was hard. (1) We have imperfect knowledge about probabilities; (2) it is impossible to accurately weigh moral decisions since we must make choices *ex ante* rather than *ex post*; (3) we owe occasionally-conflicting obligations (to clients, to the legal profession, to the public); (4) though our conduct is governed by our respective jurisdiction, as reflected by the ABA Model Rules of Professional Conduct ("MRPC," or "the Rules"), the mandates of legal ethical rules and those of morality sometimes diverge; and (5) people value moral outcomes differently depending on deeply held values (e.g., Kantian, Christian, Utilitarian).

The ABA Model Rules of Professional Conduct are insightful, since they lay out the moral imperatives that most jurisdictions agree should guide attorneys. Although the very first sentence of the Rules describes the lawyer as "[1] a representative of clients, [2] an officer of the legal system, and [3] a public citizen," the MRPC recognize that these three considerations must be balanced. Sometimes, to competently represent clients, one must act in a manner that a good public citizen should not. Often, our obligations to legal professionals are narrower than our obligations to the public. And so on.

Like Stephen Pepper, and unlike Richard Wasserstrom,[4] the Rules seem to embrace the "first-class citizenship model" of representation, stemming from our common law adversarial system, which contemplates the notion that "the professional is to subordinate his interests to [those] in need of his services" so that non-lawyer citizens can effectively exercise individual autonomy.[5] Under this

framework, an attorney is akin to a prosthetic; a lawyer serves the client unflinchingly, to the degree that he or she becomes *in principle* an extension of the client and, *in practice*, the client. As Pepper writes, much of "the legal profession's ethical code … appears designed to [set] the client's interest above that of the lawyer, to protect the client from the lawyer's self-interest." Nothing highlights this notion better than the Rule's consistent characterization of the relationship between lawyer and client as the "client-lawyer" relationship rather than the "lawyer-client" relationship.[6] Accordingly, the Rules grant the client instead of the lawyer authority to determine the representation's objectives.[7]

But what should an attorney do if the client's purposes and interests are immoral—not arguably immoral, not probably immoral, but *clearly* immoral? Like the SEAL Marcus Luttrell, attorneys operate under guidelines—the ethics rules of their particular jurisdictions and the mandates of both statutory and judge-made law. As the ethics of the soldiering profession guide a SEAL's decision when deciding whom to kill, the ethics of the legal profession—fundamental principles like confidentiality,[8] diligence,[9] loyalty[10]—seep into a good attorney's consciousness over years of practice, influencing his or her moral decision-making even when he or she is not explicitly aware of that influence.

More saliently, when one confronts a hard moral problem like Luttrell and his comrades, a problem where the governing ethical rules conflict with moral instinct, *one's ethical intuitions rise to the level of consciousness*. One is forced to examine what is required or suggested by the ethical rules, and how those requirements comport or *do not* comport with morality. It is easy to envision scenarios where the contrast will be vast.[11] Deciding how to bridge such a Promethean gulf—or whether to bridge it—can have sharply different consequences depending on whether one privileges the concerns of the client, the public, or the legal profession. Such a decision is all the more vexing because, as noted *supra,* you have duties to all three groups.[12]

Confidentiality & the Faulty Airplane

The duty of confidentiality is instructive. While ethics rules on confidentiality like ABA Model Rule 1.6 recognize moral dictates might, sometimes, necessitate exceptions to general principles, the rules do not (since they cannot) cover *every* scenario where an attorney will feel moral compunction. Consider the following: You are in-house counsel for a company that manufactures metal for use in a certain model of airplanes, which we will call the 687. The company representative tells you, in strict confidence, that the latest business venture is "a bit risky." "What do you mean?" you ask. "Well, there's a thirty percent possibility that the metal we've developed grows defective after repeated exposure to cold air," he says. "We lack funds for more testing, which is why we've gone ahead and sold the metal to the biggest airplane manufacturers, but just so you know, I wouldn't fly in a 687 if I were you."

Certainly, Rule 1.6 authorizes you to breach confidentiality in *some* circumstances. For instance, 1.6 lets you reveal information "to prevent reasonably certain death or substantial bodily harm."[13] Let's say your jurisdiction adopts this rule word-by-word; even *with* that provision, can you reveal the confidential information? More to the point, *should* you?

The answer to both the empirical and the normative question is unclear—for the same five reasons that Luttrell's decision was unclear. This ambiguity highlights shortcomings in legal ethics rules that, like shortcomings in the bright-line laws of war, might prompt an individual to make a decision deviating from external moral guidelines.

(1) We have imperfect knowledge about probabilities.

First, as for Luttrell, the *real* probability of each outcome, as opposed to that assigned by fallible humans like the hypothetical company representative, is uncertain. More, even if a given probability *were* certain, the outcome is not; *sometimes flukes happen.*[14]

The company representative only possesses thirty percent certainty that the metal is defective; there is a seventy percent chance the metal is just fine. Let's change the scenario to render the outcome, and thus the propriety of breaching confidentiality, even more doubtful; perhaps the company representative told you the chance of defect is only "one percent." Surely, death or substantial bodily harm are not "reasonably certain" in such a scenario? But this highlights a major flaw in the ABA rule adopted by your jurisdiction. Suppose that 687's transport hundreds of millions each year. Even if there is only a one percent chance that the metal is defective, the consequences of defective metal are utterly disastrous. If there is just *one* 687 crash, it might take months or even *years* for the FAA to correctly pinpoint the metal as the culprit; and if the metal is indeed the culprit, then in that time, *thousands* might have perished. Recognizing Rule 1.6 possesses this key flaw (it does not distinguish between the "reasonably certain death or substantial bodily harm" of just one person or of multiple people, so long as the likelihood of harm remains the same), should you break the rule? Would you be justified in doing so—not under the code of legal ethics but under the deeper code of moral intuition felt by all humans?

My instinct would be "yes" in the thirty percent scenario, especially if hundreds of millions of people travel on the 687 each year. Unlike "reasonable suspicion" in the criminal procedure context, "reasonable *certainty*" necessitates a much higher probability before kicking in. Yet, when the thirty percent probability is combined with the *massive* amount of potential deaths from a single 687 crash, the seventy percent gamble seems thoroughly immoral. A "yes" answer is considerably less justifiable in the one percent scenario, though there is still a powerful argument to be made in that context as well, as explicated below.

(2) It is impossible to accurately weigh moral decisions since we must make choices *ex ante* rather than *ex post.*

This first comparison to Luttrell's plight highlights a related, **second** concern: Like the SEALs deciding whether to spare the goatherds, we attorneys cannot foresee the consequences of our actions, so that what *seems* moral *ex ante* might be the clearly immoral decision *ex post*. This is because we have imperfect foresight but perfect hindsight.

The "baby Hitler" problem is illustrative. The baffling metaphysics of time travel aside, what if I told you that you could go back in history and kill a certain, fortuitous Austrian baby named Adolf Hitler? Under the simple assumption that the killing would result in the sacrifice of one life for forty million spared, many people would indeed murder the young Adolf.[15] But precisely because we live in *this* world, the one where Hitler lived, we cannot accurately envision a counterfactual universe where Hitler died at the age of five months. Maybe if you attacked baby Hitler, Hitler would perish and, lacking a charismatic leader, any Nazi movement would never gain sufficient momentum to overthrow the Weimar Republic. *Maybe.* But perhaps another charismatic demagogue, call him Eric von Blum, would rise to the forefront. Maybe Blum, unlike Hitler, would possess a solid grasp of military tactics, a grasp meaning that he does *not* foolishly invade the Soviet Union until he has finished the fight on the Western front and that he is then able to establish an impenetrable fortress of Nazi control within Continental Europe. Perhaps Blum starts a German Manhattan Project, develops nuclear missiles, conquers the United Kingdom, nukes St. Petersburg and Moscow to neutralize the Soviets, and sparks a Cold War with the United States lasting until modern times. Perhaps the death toll from all

this *far* exceeds the grisly death toll of World War II—one *billion* perish instead of a "mere" forty million.

To be sure, those are a lot of "maybes." Your gamble that Hitler was a necessary condition for Nazism's rise, rather than merely a man who exploited smoldering interwar sentiments within the Weimar Republic, might not fail in this spectacular fashion. It's quite possible that Hitler would die and World War II would never occur. Your moral gamble might result in a moral outcome. The point is simply that, sometimes, anomalous situations arise that are extremely difficult to predict *ex ante.* History unfolds in funny ways. Probability is not destiny.

Who could fault Luttrell for failing to predict that sixteen Americans would perish as an attenuated result of his decision to spare some *goatherds*? Likewise, if the hypothetical attorney breached confidentiality in the thirty percent scenario, and if this breach were indeed responsible for saving hundreds of lives from a 687 crash, less foreseeable events could occur that might *still* render the decision immoral. For instance, what if the company implodes after the revelation, causing the instant unemployment of tens of thousands, the consequent suicides of hundreds? What if the company's fall is just the first step in a "house of cards"-type collapse of the interconnected world economy, causing not only suicide but also intense economic hardship for millions? And, aside from these drastic possibilities, how should one measure the cascading effects of less and less confidence in attorneys resulting from such an egregious violation of the duty of confidentiality? After all, if *every* attorney believed he or she could disregard confidentiality in such a manner, does not the duty come to mean less?

(3) We owe occasionally-conflicting obligations—to clients, to the legal profession, to the public.

That last question undergirds the **third** consideration: As an attorney, you explicitly *and implicitly* assume different duties to different people. These duties may conflict with one another. In the same way Luttrell's moral duty to his comrades suggests a different path than his duty to the goatherds, in the same way his professional duty to the United States suggests a different path than his duty to international law, your duty as an attorney to other legal professionals and to your client may often suggest a different path than your duty—as a moral being *and* as an attorney—to the public. More to the point, your fiduciary duty. your duty of client loyalty, may prompt you to ignore other duties that you assume by simply being a member of this grand enterprise called humanity.

As one scholar suggests, our professional status means we have a complicated, special relationship with clients. "For each of the parties in this relationship, but especially for the professional, the behavior … involved is, to a very significant degree … role-differentiated behavior."[16] An attorney exhibiting a fully role-differentiated role in the airplane hypothetical, exemplifying full client loyalty,[17] *would not necessarily* avail himself of the Rule 1.6 exceptions permitting him to break confidentiality. Instead, he might set key considerations aside that—if he were *not* an attorney—would be crucial. While a non-attorney would breach confidentiality instantly, an attorney might recognize that Rule 1.6's confidentiality exceptions are discretionary and, upon balancing his role emphasizing client loyalty, act in a manner that may not be generically moral but that is proper for his role as an attorney (making the discretionary choice to keep quiet). This makes sense. In order to exemplify full client loyalty, one must be prejudiced towards that client, setting aside, to varying degrees, the interests of others.

Fittingly, an argument could be made that Luttrell's tragedy in Afghanistan came from his unwillingness to fully adopt a role-differentiated attitude to his mission as a Navy SEAL and to instead

stress considerations more suitable to a civilian—considerations involving the interests not of his country, of his fellow SEALs, but of the Afghani goatherds and of grand moral principles. Considerations defined by, in his own words, his "Christian soul" instead of a more role-differentiated "Navy SEAL-soul."

It must be noted, however, that this analogy to Luttrell's situation only goes so far; as hinted at earlier, as a SEAL Luttrell operates under rules of engagement and international law that probably sanctioned the same choice as his "Christian soul." Thus, perhaps Luttrell's mission failed not *because* he did *not* adopt a role-differentiated role, as suggested above, but precisely because he *did* attempt to abide by what a Navy SEAL should do. He *did* allow the rules of engagement and international law to influence his decision-making process. Under this view, if Luttrell had *left* his role-differentiated mindset, shooting the goatherds, then a *more* moral outcome would have occurred—suggesting that, for attorneys and for SEALs, complete dedication to role-differentiation yields less-than-optimal outcomes.

(4) Although our ethical conduct is governed and restricted by our respective jurisdiction's rules, as noted by the MRPC, sometimes the mandates of legal ethical rules diverge from the mandates of morality.

Fourth, ethics rules like the ABA's confidentiality provision in Rule 1.6 of the MRPC might result in an immoral outcome absent individual disobedience in specific scenarios. For such rules are set up as normative considerations of what will *usually*—not *always*—work best. Luttrell's hesitation to kill comported with international law; it comported with what would usually result in a more moral outcome. But did it ultimately comport with morality in this *specific* scenario? Similarly, refusing to disclose the metal's flaw when there is a one percent chance of defect would conform to Rule 1.6's *general* exhortations, but if thousands of lives are at stake, would that decision comport with the *specific,* ever-changing mandates of morality?

Luttrell's tough decision is illustrative when applied to legal ethics because it stresses that breaking rules for the right reasons may be more advisable than following rules for the wrong reasons. For often, the easy thing to do is to follow rules, derogating decision-making to someone else. Luttrell's decision, sanctioned by use of force guidelines, was easier than making his own decision. He did not have to exercise agency; he simply allowed pre-existing rules to fill the gap of uncertainty. (Note that if Luttrell exercised independent reasoning and his decision simply *happened* to comport with guidelines, this critique loses force.) Likewise, attorneys are risk-averse people, certainly more so than your average SEAL, and an attorney who unthinkingly follows the rules is taking substantially less professional risk than one who wades into the ocean of uncertainty that comes with unmooring oneself from the Rules or the ethics guidelines of one's jurisdiction. There is a value in being one's own person, in charting one's own path, especially if we desire the outcome that takes into account *all* considerations, including individualized ones, and that is thus more likely to be moral. But instead of morality, many of us simply desire *certainty*—and an exercise of moral reasoning is anything *but* a certain enterprise. In that sense, keeping the defective metal a secret is the easiest path.

(5) People value moral outcomes differently depending on their values.

Fifth, how do we weigh the ethical cost of each outcome? Different people value different ends; depending on their moral outlook, the principles undergirding that outlook, they will profess vastly different opinions about the proper course. An attorney or soldier who grew up in a Protestant tradition will stress different goals than a Utilitarian who grew up reading Jeremy Bentham and John

Stuart Mill, who will stress different goals than an ethical Kantian.

Just What Does Morality Mean?

The fifth point is worth elaborating because “morality” (like most fundamental concepts) is bandied about constantly yet rarely defined. We humans love debating the moral thing to do. But what *is* the “moral thing”?

Is it abiding by one’s promises and duties? If so, then an attorney would rarely be justified in breaking the ethics rules of his or her jurisdiction, or in acting for the public rather than the client. The lawyer, as a professional enabling citizens to exercise “first-class citizenship,”[18] has contracted with a client to serve as an extension of that client’s will. To derogate from that duty against a client’s express desires is anathema to the implicit and explicit promises contained within the client-lawyer relationship.

Is the moral thing the Utilitarian thing, in which the correct path is simply that which yields the highest sum of happiness? You *still* might not be justified in breaking the ethics rules, even if it were absolutely certain that failure to do so yields death. For instance, as noted in the 687 example, the metal-manufacturing company’s implosion could result in suicides and widespread unemployment; in this scenario, the proportion of pain versus pleasure produced from a failure to uphold confidentiality might well exceed that created by a plane crash or two. In fact, under classical Utilitarian philosophy stressing the ratio of pleasure to pain, a spate of deaths might actually *not* be as troublesome as an outcome resulting in *no* deaths but plentiful suffering. Dead people can’t suffer.

What if the moral thing to do is the Kantian ideal? The weeds of Kantian philosophy exceed this essay’s scope, but suffice it to say that Immanuel Kant and his “categorical imperative” condemn most forms of deception while promoting the treatment of humans as “ends” rather than means to ends. As individual ends, humans possess moral responsibility, and thus—in the retributive manner—should face consequences for immoral actions. To treat the metal manufacturer as an end would mean holding it responsible for its deceptive actions. Kantian philosophy—unlike Utilitarian philosophy or a viewpoint rendering promises sacrosanct—recommends breaking the confidentiality obligation. To do otherwise would reward the metal manufacturer for negligence.

Finally, someone growing up in a devout Christian tradition stressing life’s value might, like Luttrell (who, remember, wrote that his “Christian soul” stayed his trigger-finger), find it difficult to *ever* take an action necessitating the killing of a civilian as a means to an end. (Whether that end happens to be pecuniary profit or *potentially* saving one’s SEAL comrades.)

Of the above perspectives, the Kantian conception is the toughest. It demands the most. For in addition to treating others as ends, we must recognize *ourselves* as ends, as beings simultaneously blessed and burdened by a potential to grow through moral decision-making. This recognition necessitates an assumption of personal responsibility before making tough decisions. More, it implicitly disregards Wasserstrom’s notion of “role-differentiated” behavior. Humans can *never* disregard the responsibilities they assume from merely being human. Because it accounts for both the sanctity of others *and of oneself,* the Kantian perspective is the one most concerned with the impact of a lawyer’s choices *on the lawyer*—a very real consideration for all attorneys.

Altering Rule 1.6

This essay’s airplane hypothetical highlights a central flaw of Rule 1.6: the discretionary permission it

grants attorneys to reveal confidences in the case of substantial harm or death is static rather than dynamic.

This inflexibility manifests in two ways. (1) What if substantial harm or death is “reasonably certain” to occur to not one person, but to thousands, as in the defective metal example? Should the exception still be discretionary, or should an attorney *definitely* reveal confidences in such a scenario? (2) As discussed above, sometimes there might be only a ten, twenty, or thirty percent chance of substantial harm occurring—yet, again, what if that harm could occur to thousands? Death in such a scenario would not be “reasonably certain”—even in the thirty percent scenario, there is a seventy percent chance that everything turns out just fine—but though the *chance* of a negative consequence is not “reasonably certain,” the consequence itself, with hundreds or thousands dead, is devastating.

A simple way to alter Rule 1.6 to accommodate these concerns would be to create a two-pronged sliding scale. First, if substantial harm or death is “reasonably certain” to affect more than one person, disclosure should become mandatory rather than discretionary. Second, the more people that are affected, the less “certain” one should be required to be in order to break confidentiality. Altering Rule 1.6 in this way would make an attorney’s decision to conform to fully “role-differentiated” behavior less apt to stray from commonly accepted moral principles lending greater value to higher numbers of human life.

Conclusion

For an attorney to adopt an amoral role to the extent a scholar like Stephen Pepper recommends causes the attorney to lose something valuable—himself. The attorney derogates his or her human responsibility to engage in moral reasoning. This is admittedly a Kantian perspective. But it encompasses a consequentialist intuition as well: Insofar as one desires consequences that are more moral than immoral, one must *always* engage in moral reasoning. *Completely* role-differentiated behavior is at best the incomplete path, at worst the unethical one. Whether acting as a Navy SEAL or as an attorney, to be fully human, one must *always* decide whether or not derogating moral decision-making to an external authority—whether that authority is the ABA Model Rules of Professional Conduct, the rules of one’s jurisdiction, or the laws of war—is justified.

Often, the outcome of one’s personal moral reasoning will recommend the same course of action as moral reasoning engaged in *ex ante* by a third party like the ABA. But when the benefit of following the rules laid down by an authority is *vastly* outweighed by potential cost, a fraught choice—whether to follow instructions crafted by a legitimate authority—arises. The moral choice in such a difficult scenario is rarely clear *ex ante* (this is precisely what makes such a scenario “difficult”). But the choice must be made. For the more comfortable path, the cushioned one devoid of hard thought, is likely the more destructive one.

Insofar as Luttrell’s decision to spare the goatherds was due to a derogation of individual moral authority to custom, international law, or the U.S. government, Luttrell took the easier path out. And in Luttrell’s scenario, this “easier path” yielded horrific consequences, resulting in the premature deaths of nineteen young Americans. While Luttrell condemned himself for his “lame-brained” decision, I believe Luttrell was too hard on himself—how many of us, facing a moral dilemma where cold-blooded murder seems the only correct choice—could do better? I suspect that, like Luttrell, I too would have spared the goatherds. Given the time pressures Luttrell faced, trusting the rules was probably the most rational decision.

It is every attorney's understandable hope that he or she will never have to stray from the easy path of his or her jurisdiction's prescriptions, will never have to make a decision that—though moral—could hurt his or her client or result in an arguable derogation of professional responsibility. But, sometimes, the hard path *is* the moral path—no matter how much we wish it weren't. Sometimes, individual scenarios call for different prescriptions than the solutions envisioned by a clique of legal scholars reasoning far away from the tough, on-the-ground facts.

Those are the moments that make this profession hard; they are also the moments that make this profession interesting.

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[1] As Michael Sandel writes, describing the SEAL this sad anecdote is based on, "Luttrell condemned his own vote not to kill the goat-herds. 'It was the stupidest, most … lamebrained decision I ever made,' he wrote…. "I must have been out of my mind. I had actually cast a vote which I knew could sign our death warrant…. At least, that's how I look back on those moments now…. The deciding vote was mine, and it will haunt me till they rest me in an East Texas grave.'" When deciding whether to shoot the goatherds, Luttrell admitted that his "Christian soul" stayed his hand, prevailing over cold,

impersonal logic.

[2] As he recounts in *Getting Life: An Innocent Man's 25-Year Journey from Prison to Peace,* Morton was wrongfully convicted on flimsy evidence of bludgeoning his wife to death in 1986.

[3] Model Rule of Professional Conduct ("MRPC") 3.8, "Special Responsibilities of a Prosecutor," instructs that a prosecutor should "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."

[4] *See* Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 Human Rights 1 (Fall 1975).

[5] *See* Stephen Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 Am. B. Found. Res. J. 613.

[6] *See* MRPC 1.2.

[7] MRPC 1.2: "… a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued."

[8] *See* MRPC 1.6.

[9] *See* MRPC 1.3.

[10] "Loyalty and independent judgment are essential elements in the lawyer's relationship to a client." MRPC 1.7.

[11] As discussed later, in scenarios where a gulf separates the ethics rules and one's moral intuition, whether one privileges the ethics rules or personal moral intuitions will depend on values—one's moral outlook. For example, Immanuel Kant defined enlightened human beings as those who trust in their *own* power of thinking—not in authority. Thus, pure Kantians would privilege their *own* moral conceptions over those decided *ex ante* by rulemaking authorities such as the ABA.

[12] As previously noted, the MRPC's preamble exhorts an attorney to consider the interests of the client, the legal profession, and the public—without striking an explicit balance.

[13] In order to breach confidentiality, the lawyer must have a "reasonable" belief that disclosure is necessary to prevent "reasonably" certain death or substantial bodily harm. *See* MRPC 1.6. This "reasonableness" requirement fails to consider that even if death is not "reasonably certain," a higher possible degree of harm absent disclosure (e.g., more deaths) would permit disclosure under the same policy rationale (preventing death) justifying the exception. This point is elaborated later.

[14] Another way to express the idea is to point out that people win the lottery. Or, in keeping with this essay's morbid themes concerning battles against the Taliban and airplane crashes, lightning sometimes strikes twice. *Probability is not destiny.*

[15] *The New York Times* actually conducted an unscientific poll on the question, finding that forty-two percent of people would kill baby Hitler, with thirty percent refraining from murder and twenty-eight percent being "unsure."

[16] *See* Wasserstrom, *supra* note 4.

[17] It should be kept in mind that in this thought experiment the client is the organization, the metal manufacturer, rather than an individual. *See* MRPC 1.13.

[18] *See* Pepper, *supra* note 5.

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