

ESSAY

CAN LAWYERS BE TRUSTED?*

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I. TWO TYPES OF MORAL CONFLICT

I am honored to be speaking as an Owen J. Roberts Memorial Lecturer, and to be doing so as perhaps the first emissary from the field of philosophy. It is clear, however, from previous lectures that philosophical questions have been centrally at issue from the beginning. This is not to be wondered at, since it is hard to find a legal issue that does not raise such questions—epistemological ones, perhaps, concerning what can and cannot be known, or moral ones having to do with what is right or wrong. What the British philosopher Mary Midgley said of philosophy applies equally to legal analysis: Philosophy, like speaking prose, “is something we have to do all our lives, well or badly, whether we notice it or not. What usually forces us to notice it is conflict.”¹

Among the reasons for public distrust of the legal profession is a common perception that too many lawyers violate basic moral principles when it suits their purposes. This perception often conflates two types of conflict that arise for lawyers. In both, lawyers confront choices about observing common moral constraints such as those on lying or the concealment of crimes; but in conflicts of the first type, the primary motive is self-interest, whereas, in the second, it is the interest of the client. About the first, there is little dispute in principle. Representatives of the bar agree with the public that lawyers should not exempt themselves from common moral constraints for the sake of personal gain, and codes of professional responsibility reinforce that consensus.

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¹ M. MIDGLEY, *BEAST AND MAN: THE ROOTS OF HUMAN NATURE* xiv (1978).

About the second type of conflict— between the lawyer's duty to serve the client's interests and common moral constraints— there is no such uniform agreement. Lawyers disagree among themselves about where to draw the line with respect to certain forms of deception, to confidentiality about the criminal activities of their clients, and to other forms of morally problematic behavior; and the lines drawn by codes of professional responsibility are far from universally endorsed even in principle, let alone always observed in practice.

Many in the public see the two types of conflict as linked. They assume that lawyers who claim the right to violate common moral constraints in order to serve their clients are merely rationalizing what is in their own or the legal profession's collective self-interest. But lawyers often regard the two types of conflict as profoundly different. In law, they argue, as in medicine and other professions, the calling generates its own requirements that at times must override ordinary moral constraints. It is only by adhering scrupulously to these requirements that they truly deserve the trust of their clients and thereby serve long-run societal interests.

Central to such debates are questions of confidentiality with respect to clients who place third parties at risk.² Health professionals, priests, and lawyers have long stressed the obligation to keep what individuals confide to them secret. In most instances a guarantee of confidentiality poses no problem. Conflicts arise, however, when what professionals keep secret misleads and thereby risks harming others. The conflict is difficult enough when the secrets concern past wrongdoing; it becomes even more severe when professional guidelines require confidentiality with respect to present or future criminal activities.

Such is the case with the 1984 revision of the Model Rules of Professional Conduct. Most controversial is Model Rule 1.6, which requires that lawyers not reveal client confidences about most planned, even ongoing violations of the law.³ As of 1987, a number of the twenty-two states that had adopted versions of the Model Rules had amended Model Rule 1.6 after considerable debate; others had used it as a model.⁴

² For a discussion of these and other issues of confidentiality referred to in this Lecture, see S. BOK, *SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION* 116-35 (1983).

³ MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983).

⁴ See 2 G. HAZARD & W. HODES: *A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 865 (Supp. 1987). The authors note that Model Rule 1.6 "was by far, the most controversial focal point in the drafting and debate stages," and

Controversy within the legal profession regarding such a rule was to be expected, the more so because it represented a change in the stance of the bar with respect to revealing crimes planned by clients. Since 1908, the Canons of Professional Ethics, succeeded in 1970 by the Model Code of Professional Responsibility, had permitted lawyers to reveal confidences in order to prevent crimes contemplated by their clients.⁵

The new Rule was bound to add to existing public distrust of lawyers. Arguably, the collective exemptions granted by the Rule put lawyers in league not only with countless disparate crimes, but with conspiracies of a magnitude that make bank robberies look like petty theft by comparison. Critics regarded as bizarre the Rule's delineation of only one circumstance under which lawyers may violate confidentiality about crimes planned by their clients: when disclosure is necessary to "prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm"⁶ These critics saw as equally bizarre the phrasing of the Rule's exception so as to merely *permit*, but not require, lawyers to disclose such plans of wrong-doing.

Confronted with such a narrow interpretation of a lawyer's responsibility, commentators both inside and outside the legal profession might ask: what about a duty to report criminal plans in cases where the victims will not otherwise be warned in time? What about criminal conduct likely to result in deaths that are not "imminent"? What about cases of ongoing child or spouse abuse, whether or not such conduct risks killing victims or subjecting them to "substantial bodily harm"? What about crimes causing grievous psychological harm? What about financial fraud that can bankrupt unsuspecting investors? What, finally, about the vast drug-trading and money-laundering schemes that span the globe and ultimately cause innumerable deaths?

Such questions will hardly be deflected by the unsubstantiated and counterintuitive claims made in the comment to Model Rule 1.6:

Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. . . .

was "the most likely to be amended as each state put the final touches on its version of the Model Rules." *Id.* at 855-56; *see also* D. LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 185 (1988).

⁵ CANONS OF PROFESSIONAL ETHICS, Canon 37 (1908); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(c)(3) (1970).

⁶ MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1983).

Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.⁷

Rhetoric of this kind merely reinforces the critics' distrust. They see it as further evidence that lawyers guard their prerogatives, not to uphold the noble goals they claim for their profession, but simply to protect themselves and camouflage abuses from which they benefit.

Yet it would be wrong to leap to the conclusion that there is little or no difference between moral conflicts in which the motives are primarily of a self-serving nature and those that involve a professional obligation to clients. The tension for lawyers between their sense of professional duty and their awareness of the damage that preserving a client's confidence can cause to third parties and to public trust need contain no self-serving element. Often, that tension stems from a conflict between the moral constraints on betrayal and excessive secrecy. These constraints, along with those on violence and deceit, are fundamental to the functioning of any society. In turn, they play a central role in reducing distrust, whether it is directed toward individuals, professions, or other collectivities.

II. FUNDAMENTAL MORAL CONSTRAINTS⁸

Violence and deceit are the two most important ways by which human beings deliberately injure one another. You can hurt someone as much through deceit as through violence; and deceit, being surreptitious, often brings results that violence cannot muster. Consequently, every major religious, moral, or legal tradition has recognized the need for at least some restraints on both types of behavior. No matter how different their social customs, religion, or attitudes about sexual conduct, these traditions uniformly condemn force and fraud—and, through them, the many forms of harm, such as theft and torture, that people can do by means of one or both. True, societies have differed in how they define and delimit the forms of violence and deceit that they reject. Yet the universal insistence on firm

⁷ *Id.* at Rule 1.6 comment 3. See Bok, *supra* note 2, at 115, for a discussion of how rationales justifying different practices of collective secrecy serve a double function “as *reasons* that defend practices on grounds of fundamental human needs such as trust and survival, but also as *rationalizations* that shield practices from scrutiny.”

⁸ The following few paragraphs are adapted from S. Bok, A STRATEGY FOR PEACE 81-89 (1989).

constraints on both speaks to the need for any community to keep them within bounds.

A third fundamental moral constraint is likewise universally stressed: that on betrayal, or going back on one's word. Promises, vows, covenants, and laws therefore play a central role in most societies, as does the related virtue of trustworthiness. *Whatever* principles one has promised to uphold, whatever laws one acknowledges, fidelity to them becomes essential; unless a principle or law is shown to be invalid, breaching it constitutes betrayal.

Whether expressed in religious or secular form, these three values are shared by every civilization, past and present. Any community, no matter how small or disorganized, no matter how hostile toward outsiders, no matter how cramped in its perception of what constitutes, say, torture, has to impose at least *some* internal curbs on violence, deceit, and betrayal in order to survive.

A fourth curb, on excessive secrecy, has been stressed in many societies including our own. It is not as general and does not have roots as ancient as the first three. On the contrary, secrecy has long been a primary means of bringing about group cohesiveness and of guarding against oppression and betrayal. But whenever secrecy shields, or contributes to, violence, deceit, and breaches of promises or of the law, it undercuts the first three constraints. The harm that secrecy can then do is magnified when it is linked to the exercise of power, whether by individuals, organizations, or governments. Like deceit, secrecy protects abuses of power and in turn invites further abuses.

This is why the constraint—not on secrecy in its own right, but on excessive government secrecy—has been seen as so important for democratic states.⁹ In the United States Constitution, as in the writings of the Enlightenment philosophers, the public's right to know is regarded as fundamental to its capacity to exercise judgment and to share in decision-making.

As our societies have become more complex and the powers of professions, businesses, and other organizations have grown, they too have increasingly been subjected to requirements of public accountability. Like government agencies, however, these organizations also require a degree of secrecy, especially in the form of confidentiality, in order to maintain internal cohesion and function effectively. As a result, conflicts over what constitutes excessive

⁹ See S. Bok, *supra* note 2, at 171-81.

secrecy on their part have become as wrenching as those involving government secrecy.¹⁰

Viewed in this light, it is easy to see why the controversy among lawyers over the legal profession's present rules about confidentiality continues unabated, and why these rules generate such distrust among outsiders. The public has little reason to trust practices of professional secrecy that may conceal or contribute to violence, deceit, and breaches of promises or law. Many lawyers feel correspondingly torn when their professional rules—and, in a number of states, the law—require them to protect their clients' plans to commit preventable crimes.

Such conflicts are present, for instance, when an attorney representing a corporation cannot lawfully disclose, without the corporation's permission, confidences made by the chief executive officer regarding fraudulent activities causing the company serious harm. Likewise, attorneys representing firms planning to market a dangerously defective automobile, drug, or other consumer product have to weigh whether to disclose confidential information regarding such plans. It is not always clear that marketing such a product violates a law. Even if it does and even if the product in question is life-threatening, the risk of death or of substantial bodily harm may not be "imminent" as Model Rule 1.6 specifically requires to allow a violation of confidentiality, but rather constitute a risk to unknown victims in the indefinite future. Quite apart from risks to life and limb, large-scale corporate crime causes damage on a scale far vaster than that of individual crime, challenging, each time, the limits of confidentiality.¹¹

When it comes to individual wrong-doing, the conflict that many lawyers experience is acute whenever the suffering inflicted, even if it is not life-threatening, is imminent, indeed on-going, for victims who cannot speak for themselves. Thus, a lawyer may have a client who reveals that he is unable to refrain from sexually abusing his small children, yet insists on pressing a lawsuit to gain custody over them. Often, however, the conflict is rendered murkier due to the difficulty of ascertaining the facts in such situations. At times, attorneys merely suspect sexual abuse; their clients, even if asked, will either deny it or claim that they have stopped.

¹⁰ See *id.* at 102-280.

¹¹ For a discussion of how Model Rule 1.6 combines with Model Rule 1.13 in such cases, see Gillers, *Model Rule 1.13(c) Gives the Wrong Answer to the Question of Corporate Counsel Disclosure*, 1 GEO. J. LEGAL ETHICS 289, 299-305 (1987).

A number of states now have reporting statutes that abrogate the privilege of attorney-client confidentiality when child abuse is suspected. In other jurisdictions, the privilege still prevents the reporting of such suspicions. Still others, pursuant to the Model Rules, permit but do not require lawyers to report if they suspect that their client intends to commit future crimes of a life-threatening nature.¹² Similar variations obtain with respect to revealing client confidences about corporate fraud and the marketing of dangerous products.

Such varied requirements contribute to the uncertainty lawyers have about their own responsibilities. Doubts about the facts surrounding many cases of suspected abuse and about how victims are best protected compound the problem. From the point of view of the victims, the resulting haphazard protection is clearly inadequate. It is no consolation to hear lawyers explain that they keep such secrets only reluctantly and strictly to serve their clients. It matters little to the victims or to those concerned with their plight that lawyers claim to have no intention that anyone be harmed, and that, on the contrary, they hope to dissuade their clients from unlawful activities.

Nor are such claims reassuring to the public at large. The lack of accountability for lawyers makes it impossible to assess responsibility for many avoidable tragedies. While the resulting public distrust sometimes may be misplaced, it is not easily stilled once it has been awakened, least of all when it combines with the more general distrust aroused by lawyers who violate moral and legal standards for personal gain.

III. A BROADER PERSPECTIVE

Might seeing the legal profession's ethical concerns in a broader perspective permit a different approach to moral conflicts? One that does not damage public trust by allowing or forcing lawyers to violate common moral standards? Such a broader perspective would encourage lawyers and students of the law to weigh moral standards more explicitly and to reconsider the role of the legal profession in society.

By virtue of the power they exert, professionals cannot avoid arousing a certain amount of cautious distrust. There is every reason

¹² See Note, *Child Abuse Reporting: A Challenge to Attorney-Client Confidentiality*, 1 GEO. J. LEGAL ETHICS, 243, 247-49 (1987).

not to add to it through any appearance of disregard for the common good. The economist Kenneth Arrow has written of trust as a public good that increases the efficiency of any system, but that cannot easily be bought: "If you have to buy it, you already have some doubts about what you've bought."¹³ Albert Hirschman has further argued that the supply of trust, as of other moral resources, may actually increase through use but can become depleted and atrophy if not used.¹⁴

I would like to pursue this view of trust both as a public good and as a moral resource by extending the analogy between the social atmosphere—of which it is a crucial component—and our natural atmosphere.¹⁵ The social atmosphere may now be as much at risk as the natural one. With respect to the latter, we witness the cumulative damage to the earth's oceans and waterways, its atmosphere, even its ozone layer from countless disparate activities. Consensus is growing that nations must combat this damage together in order to survive and that merely allowing present policies to continue invites ecological disaster.

It is every bit as urgent to preserve the minimum of trust that is the prime constituent of the social atmosphere in which all human interaction takes place. To be sure, a measure of caution and distrust is indispensable in most human interaction. Pure trust is no more conducive to survival in the social environment than is pure oxygen in the earth's atmosphere. But too high a level of distrust stifles efforts at cooperation as much as severe pollution impairs health.

The economist Partha Dasgupta has recently argued that it is because of the many ways in which trust among persons and agencies is interconnected that it is such a fragile public commodity. For instance, to the extent that government is less trusted, its capacity to safeguard personal transactions and agreements will be more endangered. The same holds for the professions. "If [trust] erodes in any part of the mosaic it brings down an awful lot with it."¹⁶ The erosion of trust is especially dangerous now that cooperative efforts to over-

¹³ K. ARROW, *THE LIMITS OF ORGANIZATION* 23 (1974). For a related view, see Gordon, *The Independence of Lawyers*, 68 B.U.L. REV. 1, 18 (1988).

¹⁴ See Hirschman, *Against Parsimony: Three Easy Ways of Complicating Some Categories of Economic Discourse*, 74 AM. ECON. REV. 89, 93 (1984).

¹⁵ This paragraph and the one following are adapted from S. BOK, *supra* note 8, at ix-xvi.

¹⁶ Dasgupta, *Trust as A Commodity*, in *TRUST: MAKING AND BREAKING COOPERATIVE RELATIONS* 49, 50 (D. Gambetta ed. 1988).

come urgent social, economic, and environmental problems are needed as never before; for these efforts will suffer to the degree that trust is impaired. It matters greatly to society, therefore, that professionals see their activities in a larger social perspective. This requires them to take the public good or moral resource of trust as seriously as our natural resources, and to ask how their actions reinforce or impair trust.

It is equally important for the professions to ask that question with respect to the effect of distrust on their own functioning within the larger society. Professions, like all other groups, have to be able to count on a minimum of trust in the social climate. Doubts about the legal profession grow to the extent that any of its guidelines and regulations are perceived as going against fundamental moral constraints in order, say, to protect clients who are themselves untrustworthy, perhaps dangerous. And when lawyers choose or are forced to compromise their scruples by violating such constraints, their trust in themselves can be shaken, both as persons capable of a consistent moral stance and as individuals worthy of trust on the part of others. Some eventually set aside their doubts; others find themselves increasingly alienated from the profession. Law students report experiencing such alienation; a number of those who leave the profession give it as their reason.¹⁷

The distrust that perceived violations of fundamental moral constraints engender in victimized third parties and in the general public, moreover, combines with the distrust resulting from similar violations on the part of public officials, health professionals, members of the financial community, and so many others. The cumulative damage to trust is daunting. The burden of proof, therefore, must rest heavily on those who hold that lawyers or members of any other profession should be free to act in ways that violate common moral constraints. They should take into account not just the harm they are then seen as inflicting on individuals but the damage to trust as well.

This is not to say that professions will lose public trust if they

¹⁷ A recent poll by the Maryland State Bar Association documented a growing dissatisfaction among many lawyers in the state and found that eighty percent of those surveyed believed that an increasingly negative public view of the profession was a main cause of lawyer dissatisfaction. See *Maryland Lawyers' Attitudes*, WASH. POST, Jan. 24, 1989, at B5, col.3. For a bibliography and a discussion of moral and other reasons for lawyer dissatisfaction, see Holmes, *Structural Causes of Dissatisfaction Among Large Firm Attorneys: A Feminist Perspective*, in WORKING PAPERS, SERIES 3, INSTITUTE FOR LEGAL STUDIES (1988).

invoke particular moral ideals or single out unusual traits of character as especially desirable. On the contrary, if the professions succeed in holding members to higher than ordinary standards of competence and integrity, these differences will redound to their credit. Trust is only at risk when professionals ask to be held less accountable than others in regard to such standards.

Of the four fundamental moral constraints set forth above, codes of professional responsibility hold lawyers to stringent standards with respect to those on deceit, violence, and breaches of promises, contracts, and laws. But because these codes also call for a level of secrecy denied to others, they undercut the moral constraint on excessive secrecy and in turn tempt lawyers to violate the constraint on deceit in order to buttress confidentiality.

IV. CONFIDENTIALITY, DECEIT AND TRUST

Beyond the moral legitimacy for individuals of keeping most secrets and choosing with whom to share them, and beyond the added obligation to keep confidences that a promise creates, lawyers and certain other professionals, have special reasons to offer a strong guarantee of confidentiality: without such a guarantee those in the greatest need of help might withhold crucial information or forego assistance entirely. As a result, confidentiality is in society's interests as well as the client's. But it is unwise to conclude from these special reasons that some insuperable barrier exists between personal and professional duties of confidentiality with respect to factors that render confidentiality dangerous in particular cases. Setting up such a barrier jeopardizes public trust and risks corrupting the personal moral standards of practitioners.

It is equally unwise to imagine that the moral principles of the legal, or any other, profession derive from some unique source of its own rather than from sources common to all of society.¹⁸ In the

¹⁸ William Simon argues that lawyers should have the discretion to decide whether or not "assisting the client would further justice." Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988). Doing so, he suggests, does not require appealing to moral concerns outside the legal system against values associated with the legal role. Rather, these values suffice to found ethical conduct by lawyers. *Id.* at 1083-84. He ultimately concedes, however, that his argument "simply takes for granted that lawyers are substantially motivated to act ethically and that they have a capacity for reasonably good normative judgment," and admits that the premises on which he founds his arguments require debate in their own right. *Id.* at 1144. In his discussion, Simon contrasts rule-making by the elite of the bar and decision-making by the rank-and-file lawyer, arguing that it is not clear that one should have more trust in the former than in the latter. Public distrust, however, is directed at both

practice of law as in all other professions, any exceptions to common moral principles should be few in number, capable of public justification, and subject to the strictest requirements of accountability. Once these exceptions have been publicly granted, they can also be publicly curtailed if they turn out to be exploited or injurious.

In weighing requests for such exceptions with respect to confidentiality, two kinds of cases that often overlap should receive special scrutiny: cases, such as those discussed above, where confidentiality increases the risk of harm to third parties, and cases where confidentiality involves or may slip into deceit.

Deceit by lawyers presents special dangers to trust. It exerts power and brings about results by stealth that could not have been achieved openly. To be sure, legal codes and guidelines rule out deceit unequivocally. But effective enforcement is lacking; those who suspect that deceit is at play have no way of ensuring that such guidelines will be observed. Deceit is tempting, moreover, since it comes so easily at first. One word spoken instead of another, a document backdated so as to deflect inquiry, a false claim made in the process of negotiation, some figures altered in a tax document—these neither call for the same physical effort nor arouse the same immediate suspicion as, say, acts of violence. This ease makes lies not only tempting but also peculiarly corrupting, especially as more and more concealment and deception may seem needed to keep up a false front.

The special dangers of deceit and the destructive impact it has on trust whenever suspected necessitate strong rejection by any profession, going beyond guidelines to strive for broad support in everyday practice. Deceit for professional purposes should be granted no special leeway—whether it be lying in court, forging or backdating documents, misleading clients about their chances of success, or exaggerating about the reach of legitimate confidentiality to make them more willing to confide their problems. To be sure, lawyers, like others, may encounter exceptional crises in which a lie offers the only alternative to save, say, an innocent life, and in which they are certain that they will be able to justify their choice publicly once the crisis is over. But there is nothing about being a lawyer which adds legitimacy to such choices.

Ruling out deceit is easiest when it already constitutes a clear

groups. Thus, the necessary accountability cannot be achieved if either group is simply assumed to be ethically well-motivated and capable of adequate moral reasoning.

violation of the law. It is equally important, however, to ensure that lawyers consider the many times when opportunities to deceive arise in circumstances where the law is silent or where lies are unlikely to be discovered. Such practices are sufficiently fluid and difficult to detect so that each lawyer's self-respect, sense of integrity, and concern for the reputation of the legal profession must, in the end, present the strongest barrier. It is helpful, for this purpose, to compare different models of professional integrity in these respects and to stress ways of reasoning through common moral conflicts, not only in law schools but in professional contexts at all levels of legal careers.

Cicero spoke of the links between personal integrity and truthfulness in *On Duties*,¹⁹ written for his son Marcus in 43 B.C. At the time Cicero knew that he would soon be arrested and killed for his outspoken political views on behalf of the Roman Republic which he had seen collapse. Intrigue and corruption were everywhere around him. He wanted to remind his son of the virtues, or excellences of character, without which corruption and injustice were bound to grow in Rome or any other nation. For courage and greatness of soul to be genuine, he wrote, they must be accompanied by wisdom and justice. He added: "And so we demand that men who are courageous and high-souled shall at the same time be good and straightforward, lovers of truth and foes to deception; for these qualities are the centre and soul of justice."²⁰

Because even lawyers who regard themselves as generally trustworthy may be led into practices of manipulation and falsehood by the felt need to keep their clients' secrets, the need for careful discussion of such cases is great. Ideally, students should encounter, early on, opportunities to consider alternatives to underhanded practices, so as not to be caught by surprise and slip into them by default.

In the course of weighing alternatives, it is necessary to ask which forms of secrecy are inherently deceptive. Prominent among these is silence regarding information one has a duty to convey. Consider, for example, a lawyer who urges a client to accept a guilty plea and who does not disclose, or sufficiently emphasize, a possibility of obtaining a favorable verdict. The failure to inform the client about the possibility of a favorable verdict misleads the client as much as falsely claiming that there is no such possibility. The same

¹⁹ CICERO, *DE OFFICIIS* (W. Miller trans. 1913).

²⁰ *Id.* at 65.

is true when lawyers who represent clients in tax matters or in business negotiations conceal facts that they have a duty to reveal.

With such distinctions clearly in mind, a person can be a lover of truth and a foe to deception, in Cicero's words, and still keep secrets when it is right to do so. Whereas all deceit is *prima facie* wrong and requires strong justification, the same is not true for secrecy. When it is deceptive, it is as illegitimate as outright falsehood. In other instances, however, such as the protection of unpublished drafts or the sealing of wills, secrecy can be entirely legitimate.

Such a view of deceit and secrecy can help lawyers avoid many conflicts between their professional responsibility and their own moral integrity. Stressing shared moral constraints places such questions in larger societal perspective—one that weighs factors that affect trust more generally within and between societies, rather than merely the trust on the part of clients. It also requires recognition of the cumulative impact of social conditions in which ever growing legions of lawyers undertake increasingly complex transactions and in which the practices of banking, policing, governing, and the media add to the conflicts over confidentiality. Moral constraints have always been relevant to the atmosphere of trust; but now the cumulative effect of both large-scale and seemingly trivial breaches add a measure of urgency to all efforts at preventing damage to that atmosphere.

Just as countless industries, groups, and individuals contribute to polluting the earth's atmosphere, they also affect the social climate of trust through innumerable practices. It is therefore urgent for governments, professions, communities, and individuals to ask to what extent their actions worsen or improve the climate needed for effective cooperation. Because the professions play such a central role in that endeavor and have such a large stake in its outcome, they have every reason to reexamine professional roles in the light of fundamental moral constraints and of their contributions to the common good.

This process is already under way in many states through committees on professional ethics and other forums. For example, there is now increasing debate over whether lawyers should be allowed, or required, to report ongoing practices of child abuse by their clients. In a number of states, the question has been resolved by placing more restrictive limits on confidentiality.²¹

²¹ See Note, *supra* note 12, at 243-66.

V. THREE ARGUMENTS AGAINST CHANGE

There are three important and familiar cautions with respect to implementing such a broadened perspective on legal ethics. The first one asks whether doing so will not weaken the bond of full trust between lawyers and clients. A second envisages risks to the legal system, and in turn to society, from enlarging the domain of a lawyer's responsibility as currently conceived.²² A third argues that even if such changes present no great risks in their own right, the mere possibility of change might set the legal profession on a slippery slope leading inexorably to further, less desirable changes.

The first argument concerns potential damage to trust between lawyers and their clients resulting from the changes to the privilege of confidentiality that a new perspective on legal ethics might encourage. It is based on predictions of an empirical nature: clients will disclose less to their lawyers if they cannot count on full secrecy to protect even their most egregious plans for wrong-doing. If, for example, clients engaged in domestic abuse or fraudulent financial activities cannot expect their lawyers to keep such secrets, the argument goes, then the mutual confidence and trust that ideally should characterize their relationship will evaporate. As a result, clients may no longer provide lawyers with the information needed to provide effective representation and facilitate attempts to discourage criminal conduct.

This line of argument should not preclude all reforms of the present rules concerning confidentiality for several reasons. In the first place, the empirical predictions may be erroneous. It would seem rational for persons contemplating continued wrong-doing to weigh the risks of revealing such plans to their lawyers against the risks of receiving poor guidance stemming from not informing them fully. It may well be that many clients would assess the first set of risks more highly than the second and thus choose to reveal less to their lawyers. Others may make the reverse assumption and be more open, as a result, to pressure from their lawyers to abandon their plans rather than have them revealed to third parties. There is no persuasive body of evidence to show that clients would choose to inform lawyers less adequately were the present rules less protective of confidentiality.²³ Nor has it been demonstrated that clients at

²² This domain has not always been as narrowly circumscribed in English and American law as it is today. See Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1069-91 (1978).

²³ Indeed some argue that the reverse may often be the case:

present make such choices regarding plans for criminal conduct endangering human life, even though lawyers are already at liberty to report what they learn about such plans.

Second, even if clients did decide to withhold information about planned criminal conduct, many lawyers might prefer the resulting freedom from perceived complicity in crime. One commentator has argued that the "promise of complicity in serious wrong-doing is too high a price to pay for a chance to be let in on [a client's] intention to commit it."²⁴

Third, it may even be that the clients might envisage fewer rather than more crimes if they were not able to count on the silence of their legal advisers. Again, however, no solid empirical evidence supports speculation either way, in part because the very effort to conduct research on such choices would present problems of confidentiality between the researchers and their subjects.

What, however, if it *were* to be shown that many more individuals, perhaps even some with no criminal plans whatsoever, might be discouraged from seeking legal advice by changes in requirements concerning confidentiality? In that case, the risks to them from such a loss of trust still have to be weighed against factors such as the protection of the prospective victims of such criminal plans as well as the more general damage to trust from existing legal practices.

As long as lawyers base their defense of strict confidentiality on the social benefits of such a policy, there is every reason to make sure that those benefits are demonstrable and not outweighed by the harm such policies make possible. Merely allowing lawyers to withdraw from a distasteful case, while requiring continued silence, does allow them to make partial peace with their consciences; but it does nothing to prevent harm to third parties or to public trust.

The objection is sometimes made that lawyers would have to issue "*Miranda* warnings" to their clients if breaches of confidentiality were permitted for larger categories of ongoing and future

People would have ample incentives to disclose adverse information to counsel even without confidentiality safeguards because they are honest and law-abiding, because they cannot make reliable judgments about when it is in their interest to withhold, or because in many business contexts they risk liability by failing to seek good legal advice. . . . More dramatically even sophisticated people often volunteer self-inculpatory information to the police after *Miranda* warnings, apparently from a natural compulsion to vindicate themselves.

Simon, *supra* note 18, at 1142.

²⁴ Goldman, *Confidentiality, Rules, and Codes of Ethics*, 3 CRIMINAL JUSTICE ETHICS 8, 14 (1984).

crimes, and that such a warning would inhibit free and uninhibited communication.²⁵ This objection would stand on firmer ground if there were not already certain exceptions to complete confidentiality. Clearly, the question of how to inform clients has to arise as soon as there is any exception whatsoever. Thus, enlarging the category of exceptions presents nothing new in terms of "warning" clients. "Miranda warnings," moreover, are only needed if it is otherwise assumed that lawyers do preserve full confidentiality. In the absence of rules or laws to that effect, few people could reasonably make such an assumption in the case of a present or future crime.

The second group of arguments against a broader perspective on legal ethics and the resulting possibility for change is even more speculative than the first. These arguments address the risks to the legal profession and to society at large, rather than to the relationship between clients and lawyers. They contend that the social system functions best when lawyers and other professionals look narrowly to fulfilling their appointed tasks.

Thus, some claim that the much-invoked adversary system of law functions most efficiently and fairly if all participants simply carry out their roles to the best of their ability, rather than seeking to promote justice through their actions.²⁶ Others make the same arguments for doctors or scientists and conclude by urging those professionals to do what they do best, rather than pausing to worry about the ultimate results of their activities or even, as in the case of atomic physicists, about the survival of humanity.

By their very nature, such arguments are difficult to prove or disprove. In part, their elusiveness stems from an underlying metaphysical assumption that someone or some process, independent of the discordance among participants, will set everything to rights. This force may be the judge or the jury in trials where lawyers on each side strive to present conflicting claims; it may be an invisible hand, operating perhaps through the workings of the market; it may be the unfolding of history—inscrutable to us but understood in retrospect as having a direction; or it may be Nature or Providence. According to such metaphysical assumptions, the system works best when individual members act as their role demands without worrying

²⁵ See Note, *supra* note 12, at 260.

²⁶ For discussions of the adversary system, see generally A. GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* (1980); L. WEINREB, *DENIAL OF JUSTICE* (1977); D. LUBAN, *supra* note 4; C. WOLFRAM, *MODERN LEGAL ETHICS* (1986).

about the overall picture. The prime temptation is seen as that of "playing God" by trying to improve on the disarray out of which order is destined to come. Consequently, those who experience a conflict between integrity and professional obligations can and should allow the latter to override their qualms of conscience in the certainty that a system where everyone does so will, in the end, work out for the best.

The British philosopher F.H. Bradley explored this metaphysical claim and the moral conclusions many have drawn from it in his essay "My Station and Its Duties."²⁷ He saw the human world as an organic whole, and history as the "working out of the true human nature through various incomplete stages towards completion. . . ."²⁸ Meanwhile, each individual and each profession has a "station" that prescribes certain duties. We cannot and should not hold ourselves uniquely responsible for promoting the good of what lies outside of our domain. Bradley did not go so far as to claim that there could be no argument about these duties, however, or that they could never collide with common moral standards. In a corrupt society, for example, professional duties might be so twisted that they have to be overridden. But ordinarily, "a man who does his work in the world is good, notwithstanding his faults, if his faults do not prevent him from fulfilling his station."²⁹

Such a view offers a rationale for overriding the conflict between one's conscience and one's professional or other group role. But it rests on two assumptions, neither of which is as self-evident today as when nineteenth century theorists posited "my station and its duties," the "invisible hand," or "the march of history." The assumptions are, first, that an underlying order capable of setting all to rights does in fact prevail; and second, that it will persist—that the story, in a sense, has no foreseeable end.

These assumptions about order and continuity are now increasingly questioned. Economists agree, for example, that markets cannot always be expected to operate flawlessly in all circumstances and that intervention is therefore required at times if financial catastrophe is to be avoided. Observers of international relations warn that we cannot count on continuity even with respect to human survival, given the nuclear threat. And when it comes to the natural environ-

²⁷ F.H. BRADLEY, *Essay V*, in *ETHICAL STUDIES* 160 (1927); see also D. LUBAN, *supra* note 4, at 57 (discussion of this view in the context of legal ethics).

²⁸ F.H. BRADLEY, *supra* note 27, at 192.

²⁹ *Id.* at 181.

ment, the folly of past assumptions about order and continuity is becoming increasingly clear; these assumptions have prevented past generations from seeing the proportions of man-made threats to our common natural resources and, now, to human survival. As a result, many of the scientists and industrial leaders who not long ago adhered to the view that all they needed to do was their job have now come to accept a much greater sense of responsibility for how their actions affect human prospects.

Lawyers and other professionals are also increasingly examining their role in contributing to such developments. There is every reason for professionals to ask about the risks of damage not only to the natural environment, but also to the social environment. Even as the legal profession performs an indispensable role in society, its practitioners must consider how best to avoid functioning as free riders with respect to the scarce resource of trust without which fragile social institutions cannot flourish. In any such examination, the conflicts lawyers experience concerning the moral constraints on deception and excessive secrecy should occupy a central place, given their damage to trust.

It is at this point, however, that yet a third argument arises. Proponents of this argument might grant, at least for the sake of discussion, the inadequacy of both the empirical and the metaphysical arguments against enlarging the scope of legal ethics. Even so, they might caution against the changes that such a broadening of perspective would require by warning of the slippery slope on which the legal profession might then have embarked.

Arguments that warn of a slippery slope, or the entering edge of the wedge, or the camel's nose under the tent are in constant use in advocacy. They oppose a proposed change by pointing to potential future risks.³⁰ For example, opponents of legalizing abortion have argued that, little by little, such a change will make possible infanticide and large-scale euthanasia.³¹ Likewise, advocates of holding the line on confidentiality in the lawyer-client relationship argue that it keeps lawyers from having to reveal more and more about their clients and, in the end, coming to serve as informers. Holding the line more generally on a narrow interpretation of the role for lawyers in society, the argument goes, will protect them from the temptation to

³⁰ See Bok, *The Leading Edge of the Wedge*, in THE HASTINGS CENTER REPORT 9 (Dec. 1971).

³¹ See THE MORALITY OF ABORTION (J. Noonan ed. 1970). For a discussion of such arguments with respect to abortion see Bok, *Ethical Problems of Abortion*, in THE HASTINGS CENTER STUDIES IN ETHICS 50-51 (1974).

sacrifice the interests of a client whenever doing so might thereby advance whatever religious or political ideology the attorney happens to espouse.

The risks to which slippery slope or wedge arguments point are possible abuses which might result from the spread of a relatively narrow exception to encompass larger categories, and of the deterioration of attitudes that might then ensue. Such arguments are often rhetorical in nature, cautioning against risks that are unlikely to arise and against which safeguards exist. But there are other times when the caution is entirely justified, as in the case of experimentation with highly addictive drugs or of making inroads on human rights. Such arguments should never be dismissed out of hand. Rather, they have to be examined with a view to the specific context that they address.

At bottom, slippery slope arguments concern conflicts over where to draw a particular line: should it remain where it is or be redrawn? These arguments rely on two implicit assumptions that may or may not be warranted in specific sets of circumstances. According to the first assumption, there already exists a line that is clearer and more legitimate than the proposed new line would be. The second assumption holds that the contemplated change risks highly undesirable results because forces such as addiction, racism, zealotry, or greed will cause the process of change to continue, once it has been initiated. That is what makes the slope such a slippery one. If there is a chance that the dangerous development will be irreversible, this second assumption is strengthened.

Asking whether these assumptions are warranted helps to distinguish between the many guises of the slippery slope or wedge argument. With respect to enlarging the exceptions to attorney-client confidentiality, the first assumption—that the existing line is clearer and more legitimate than any new line would be—does not hold. The present line is far from universally accepted in different jurisdictions. It might be clearer if it allowed for no exceptions whatsoever; but in that case, it would be patently less legitimate. It would then, for instance, prevent a lawyer from revealing a client's plan to assassinate a head of state. In fact, of course, the present rules do allow for exceptions that include planned murder. There is no reason to believe that redrawing the line to give it added legitimacy need make it less clear.

With respect to the second assumption that forces will press toward highly undesirable results once the existing line has been shifted, caution is indeed called for. Efforts to increase accountability and concern on the part of lawyers regarding the potential victims

of their clients and the degree of trust directed toward their profession should also stress safeguards to prevent these shifts from becoming open-ended. But caution is equally needed, I have argued, against the forces in all professions pressing for stronger confidentiality rules, with countervailing undesirable results. In either case, the task is one of encouraging debate about professional standards, of considering how to make use of sanctions and inducements to guard against possible dangers, and of making provisions to reverse the change should early signs appear that an undesirable trend is under way.

The slippery slope argument against expanding the exceptions to rules about confidentiality is therefore not persuasive in its own right. Like the other two sets of arguments mentioned above, it is worth taking seriously; and the risks of which each warns should be kept in mind as possible changes are debated. But the debate itself, I have suggested—in law schools and professional associations as well as in the political forum—will benefit from a society-wide perspective on the role of the legal profession.

In June, 1914, President Woodrow Wilson conveyed the essence of such a perspective to a graduating class in Annapolis. He urged his listeners *not* to develop what he called “the professional point of view”:

I would ask it of you if you were lawyers; I would ask it of you if you were merchants; I would ask it of you whatever you expected to be. Do not get the professional point of view. There is nothing narrower or more unserviceable than the professional point of view, to have the attitude toward life that it centers in your profession. It does not. Your profession is only one of the many activities. . . .³²

Wilson, who was himself trained in the law, hardly meant to impugn the ideals of the different professions or their traditions of reflection about moral responsibilities. Rather, he wanted the graduates in his audience to take seriously, from the very outset of their careers, the thought that their profession “is only one of the many activities” that make up a functioning society. His injunction may sound deflating at first. But the full implications of such a view offer opportunities for lawyers to overcome some of the most difficult con-

³² Address by President Woodrow Wilson to Graduating Class of the United States Naval Academy (June 5, 1914), *reprinted in* 1 *THE NEW DEMOCRACY: PRESIDENTIAL MESSAGES, ADDRESSES, AND OTHER PAPERS (1913-1917)* BY WOODROW WILSON 126, 127 (R. Baker & W. Dodd, eds. 1926).

flicts between duties to clients and the public good—thus honoring the highest ideals of the legal profession.

