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## LIMITS TO ATTORNEY-CLIENT CONFIDENTIALITY: A “PHILOSOPHICALLY INFORMED”\* AND COMPARATIVE APPROACH TO LEGAL AND MEDICAL ETHICS

*Nancy J. Moore\*\**

*The proper limits to attorney-client confidentiality are hotly debated by lawyers and legal scholars. Various drafts of the proposed Model Rules of Professional Conduct have included controversial provisions which call for the disclosure of adverse evidence and client perjury, as well as more liberal disclosure of completed and intended client wrongdoing than is currently permitted under the Model Code of Professional Responsibility. This Article takes a comparative approach to the problem, utilizing a body of philosophical literature which explores the principle of confidentiality in the physician-patient context. This “philosophically informed” approach sets out an analytical framework in which the controversies surrounding attorney-client confidentiality can be critically evaluated and provides new insights into a continuing debate.*

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\* Luban, *Calming the Hearsed Horse: A Philosophical Research Program for Legal Ethics*, 40 MD. L. REV. 451, 452 (1981).

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## INTRODUCTION

FOR CENTURIES lawyers have debated the proper limits of attorney-client confidentiality.<sup>1</sup> The debates have intensified as a result of recent efforts to replace the American Bar Association's Model Code of Professional Responsibility (Model Code)<sup>2</sup> with an entirely new ethics code for lawyers—the Model Rules of Professional Conduct (Model Rules).<sup>3</sup> Various drafts of the proposed Model Rules have included such controversial provisions as the disclosure of adverse evidence<sup>4</sup> and client perjury<sup>5</sup> in litigation, and in nonlitigation, the disclosure of completed and intended client wrongdoing beyond that presently permitted under the Model Code.<sup>6</sup> With the sole exception of client perjury,<sup>7</sup> the ABA House of Delegates decisively rejected the efforts of its Commission on Evaluation of Professional Standards (Kutak Commission) to expand both required and permissive disclosure of client confidences.<sup>8</sup>

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1. The earliest debates concerned the *legal* rule of the attorney-client evidentiary privilege rather than the *ethical* standard for lawyers' conduct. See *infra* notes 97-111 and accompanying text. Perhaps the most famous debate was that between Jeremy Bentham and Dean Wigmore. See 8 J. WIGMORE, EVIDENCE IN TRIALS OF COMMON LAW §§ 3196-3204 (1905) (including excerpts from Bentham's RATIONALE OF JUDICIAL EVIDENCE and Wigmore's own rebuttal). For a summary of the various legal arguments made during the formative years of the testimonial privilege, see Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061 (1978).

2. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1983).

3. MODEL RULES OF PROFESSIONAL CONDUCT (1983). After specific amendments were adopted in August, 1982 and February, 1983, the Model Rules were adopted by the ABA House of Delegates on August 2, 1983. As of October, 1985, seven states (Arizona, New Jersey, Montana, Minnesota, Missouri, Washington and Delaware) had formally adopted the Model Rules with some amendments. See LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, CURRENT REPORTS (BNA) 905 (Aug. 21, 1985); *id.* at 901 (Sept. 18, 1985).

4. See *infra* note 165 and accompanying text.

5. See *infra* note 189 and accompanying text.

6. See *infra* notes 229-98 and accompanying text.

7. See *infra* note 165 and accompanying text.

8. Compare MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983) (disclosure permissible only to prevent imminent death or substantial bodily harm) with MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (Proposed Final Draft 1981) (disclosure permissible to prevent future crime or fraud when threatened harm is substantial). Earlier versions of the Model Rules had provided for even more expansive disclosure than would have been permitted under the Proposed Final Draft submitted to the ABA House of Delegates. See *infra* notes 165, 217-19, 286, 289 and accompanying text.

In some minor respects, the disclosure of otherwise confidential information was more restrictive under the Proposed Final Draft than under the Model Code. See *infra* note 216. Nonetheless, the thrust of the Proposed Final Draft was clearly to expand both required and permissive disclosure.

For a discussion of an extremely important instance in which the Model Rules, as adopted by the ABA House of Delegates, permits substantially *less* disclosure than is permitted under the Model Code, see *infra* notes 211-21 and accompanying text.

Nonetheless, the ABA's action is not binding on individual jurisdictions, and the various confidentiality and disclosure provisions continue to be hotly debated.<sup>9</sup>

Numerous arguments have been presented for and against disclosure in the particular situations in which the problem arises. In essence, the disagreement between proponents and opponents of disclosure is a result of differing assumptions of fact<sup>10</sup> and differing judgments regarding the lawyer's primary function in the Anglo-American legal system.<sup>11</sup> As to the former, the facts are often unproved and perhaps unprovable.<sup>12</sup> As to the latter, given that the lawyer historically has been thought to have dual functions—as “officer of the court” and as individual client representative<sup>13</sup>—it is not surprising that lawyers fail to agree whenever these functions appear to conflict.

In an effort to break the deadlock of “arguments that do not meet each other,”<sup>14</sup> one commentator—a philosopher—has begun to explore “the moral limits, complexity and limits of confidentiality,”<sup>15</sup> first in ordinary, non-professional contexts and then in the professional context of the attorney-client relationship. This work and other recent works by philosophers in legal ethics<sup>16</sup> are interesting and provocative. Not only do the moral philosophers offer a fresh perspective on age-old problems, but they also provide valua-

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9. Indeed, of the seven states which have formally adopted the Model Rules, four have amended the confidentiality provision. See *LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, CURRENT REPORTS* (BNA) 905 (Aug. 21, 1985); *id.* at 961 (Sept. 18, 1985). In addition, most state bar associations that have recommended adoption of the Model Rules have proposed amending the confidentiality provisions. *Id.* at 835 (June 26, 1985). The formally adopted and proposed amendments, however, are by no means uniform. *Id.*

10. See *infra* notes 176-81, 223-25 and accompanying text.

11. See *infra* notes 153-63, 167-68 and accompanying text.

12. See *infra* notes 223-24 and accompanying text.

13. See, e.g., Callan & David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System*, 29 RUTGERS L. REV. 332, 335 (1976) (discussing the role of the advocate in adversary litigation).

14. Landesman, *Confidentiality and the Lawyer-Client Relationship*, in *THE GOOD LAWYER* 191, 194 (D. Luban ed. 1983).

15. *Id.* at 193.

16. See *THE GOOD LAWYER* (D. Luban ed. 1983) (includes chapters by a number of philosophers, including Alan Donagan, Virginia Held, Gerald Postema, Richard Wasserstrom and Bernard Williams); M. BAYLES, *PROFESSIONAL ETHICS* (1981); A. GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* 90-155 (1980). For one explanation of the recent emergence of philosophical interest in professional ethics generally and, more recently, in legal ethics, see Luban, *Introduction*, in *THE GOOD LAWYER* 4-8 (D. Luban ed. 1983).

The recent work by philosophers in the field of legal ethics is not without its critics. See, e.g., Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529.

ble expertise in analyzing the broader ethical framework in which professional norms ultimately must be justified. Thus, other professions and occupations—most notably medicine, business and engineering—have already profited from an ongoing dialogue with moral philosophers in areas of common concern.<sup>17</sup> Similarly, the introduction of an explicit “philosophically informed”<sup>18</sup> approach to legal ethics may be of assistance in moving the legal profession beyond the current confines of the confidentiality and disclosure debate.

Rather than beginning with philosophical literature, which deals with the principle of confidentiality in ordinary morality, and then attempting to apply the principle directly to the legal profession, this Article proposes to take a comparative approach, utilizing a body of philosophical literature which explores the principle of confidentiality in another professional context—the physician-patient relationship. The benefit of the comparison is two-fold. First, the philosophical literature on medical ethics suggests a useful methodology for approaching similar problems in legal ethics. Second, the comparison of confidentiality in medical and legal ethics is designed to confront directly the differences between the two professions, but to do so in a way that emphasizes the need for a common moral framework—that is, a framework in which the significance of these

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17. See K. CLOUSER, *TEACHING BIOETHICS: STRATEGIES, PROBLEMS, AND RESOURCES* 73-77 (1980) (partial bibliography on recent literature in biomedical ethics); T. BEAUCHAMP & N. BOWIE, *ETHICAL THEORY AND BUSINESS* (2d ed. 1983) (cases and materials on general business ethics, with extensive references to other recent writings); CENTER FOR THE STUDY OF ETHICS IN THE PROFESSIONS, *A SELECTED BIBLIOGRAPHY OF PROFESSIONAL ETHICS AND SOCIAL RESPONSIBILITY IN ENGINEERING* (1980).

18. Luban, *Calming the Hearse Horse: A Philosophical Research Program for Legal Ethics*, 40 MD. L. REV. 451, 452 (1981). By “philosophically informed,” Luban means “a literature that is philosophically sophisticated but specific to the legal context.” *Id.* at 475-76. For some good examples of “philosophically informed” literature, see *supra* note 16; Flynn, *Professional Ethics and the Lawyer's Duty to Self*, 1976 WASH. U.L.Q. 429; Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relationship*, 85 YALE L.J. 1060 (1976); Greenebaum, *Attorneys' Problems in Making Ethical Decisions*, 52 IND. L.J. 627 (1977); Rosenfeld, *Between Rights and Consequences: A Philosophical Inquiry into the Foundations of Legal Ethics in the Changing World of Securities Regulation*, 49 GEO. WASH. L. REV. 462 (1981).

Thus, the author does not purport to initiate an entirely new approach to legal ethics, but rather to continue an exploration that has become increasingly popular among both lawyers and philosophers. Moreover, lacking any formal training in moral philosophy, the author is reluctant to characterize the Article as “philosophically sophisticated.” However, the purpose of a dialogue between lawyers and philosophers is to take advantage of the expertise that is unique to each profession. Unless lawyers are willing to venture beyond the “familiar public-policy approach utilized in traditional legal analysis,” Luban, *supra*, at 475, there will be no common ground upon which lawyers and philosophers can meet.

differences can be critically evaluated.<sup>19</sup>

Part I of the Article sets forth a brief history and synopsis of the principle of confidentiality as it has been applied to the physician-patient relationship, by physicians themselves and, more recently, by moral philosophers. As will be seen, the primary contribution by the philosophers in this area has been the analysis of the initial justification of the confidentiality principle and the delineation of its limitations, within the framework of those ethical theories presently dominant in the field of moral philosophy. Part II demonstrates how this philosophical literature on medical ethics can be used to resolve (or at least reformulate) some of the dilemmas now confronting the legal profession. Part II(A) notes briefly how differences in historical development have affected the treatment of confidentiality in the two professions and considers the limited significance of some obvious differences in function and circumstance. Part II(B) examines in detail several specific problem areas: in litigation, the nondisclosure of adverse evidence and client perjury and, in nonlitigation, the significance of such factors as the nature of the harm threatened, the legal status of the client's conduct, and the distinction between completed and intended wrongs.

As will be seen, the author has reached her own conclusions on many (if not all) of the specific confidentiality dilemmas addressed. Nonetheless, the primary purpose of the Article is not to persuade the reader that these conclusions are correct, but rather to point out some of the difficulties of much of the current thinking on these problems and, in so doing, to redirect the ongoing debates in a different and more fruitful direction. It is hoped that the Article will make a significant contribution to the continuing search for a principled resolution of the perennial and seemingly intractable problem of the proper limits to attorney-client confidentiality.

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19. Despite the recent popularity of a philosophical approach to professional ethics, there is very little work being done of a comparative nature. *But see* M. BAYLES, *supra* note 16; A. GOLDMAN, *supra* note 16. The author has found such comparisons to be extremely useful as a teaching device; law students find it far easier to take the viewpoint of a consumer of medical services than of legal services.

## I. THE PRINCIPLE OF CONFIDENTIALITY IN THE PHYSICIAN-PATIENT RELATIONSHIP: JUSTIFICATION AND LIMITATIONS

### A. *Historical Development: Codes of Ethics and Ethical Traditions of the Medical Profession*

Within the Western tradition of medical ethics, the fundamental tenet of medical confidentiality originated some twenty-three hundred years ago by a physicians' guild on the island of Cos in ancient Greece.<sup>20</sup> The Hippocratic Oath contains the following pledge:

What I may see or hear in the course of treatment or even outside the treatment in regard to the life of men, which on no account one must spread abroad, I will keep to myself, holding such things shameful to be spoken about.<sup>21</sup>

Although this statement has been characterized as amounting to "little more than a general declaration against gossiping,"<sup>22</sup> it constitutes the core of the Hippocratic tradition of professional confidentiality, a tradition which has greatly influenced the development of more modern medical ethics codes.<sup>23</sup> Strong echoes of the Hippocratic Oath with its urgings toward gentlemanly conduct appear in the first modern textbook of physicians' ethics, Thomas Percival's famous *MEDICAL ETHICS*, published in England in 1803:

Secrecy and delicacy, when required by peculiar circumstances, should be strictly observed. And the familiar and confidential intercourse, to which the faculty are admitted in their professional visits, should be used with discretion and with the most scrupulous regard to fidelity and honour.<sup>24</sup>

Percival's statement appeared almost verbatim in the first *Principles of Medical Ethics* adopted by the American Medical Association in 1847.<sup>25</sup>

Modern codes of medical ethics have dropped the language of gentlemanly honor; however, two aspects of the Hippocratic tradition continue to have a profound effect on the manner in which most physicians view the obligation of confidentiality. The first is the recognition that the obligation is not absolute. The Hippocratic Oath clearly implies that there are some things that "may be spoken

20. See R. VEATCH, *A THEORY OF MEDICAL ETHICS* 18-19 (1981); Walters, *Ethical Aspects of Medical Confidentiality*, in *CONTEMPORARY ISSUES IN BIOETHICS* 169 (1978).

21. Walters, *supra* note 20, at 169.

22. Riddell, *The Law and Ethics of Medical Confidences*, [1927] 2 *LANCET* 4-5.

23. See Sidel, *Confidential Information and the Physician*, 264 *NEW ENG. J. MED.* 1133, 1133-34 (1961); Walters, *supra* note 20, at 169.

24. Walters, *supra* note 20, at 169.

25. *Id.*

abroad."<sup>26</sup> While a few international medical codes appear to endorse an absolute obligation,<sup>27</sup> the vast majority of modern codes recognize some limitation on the principle of confidentiality, although the precise limits vary from code to code.<sup>28</sup>

The second aspect of the Hippocratic tradition, prominent in Percival's statement, is an emphasis on the "discretion" of the physician to determine for himself what moral conduct is required in individual cases. In its most recent version of the Principles of Medical Ethics, the American Medical Association (AMA) reaffirmed the historic status of the Principles not as "laws, but standards of conduct which define the essentials of honorable behavior for the physician."<sup>29</sup> In addition, the rider habitually attached by the British Medical Association when giving "advice" to its members explicitly states that it is open to the doctor to act in accordance with the dictates of his conscience.<sup>30</sup>

Despite this strong tradition of individual conscience,<sup>31</sup> modern codes and medical commentators do attempt to provide guidance to physicians for determining when disclosure of patient confidences is ethically permissible. For example, the code of the British Medical Association is highly restrictive. It limits disclosure of patient con-

26. T. McCONNELL, *MORAL ISSUES IN HEALTH CARE: AN INTRODUCTION TO MEDICAL ETHICS* 31 (1982).

27. See World Medical Association, Declaration of Geneva (1948) in T. McCONNELL, *supra* note 26, at 30 ("I will hold in confidence *all* that my patient confides in me."); World Medical Association, International Code of Medical Ethics (1949) in T. McCONNELL, *supra* note 26, at 30 ("A doctor owes to his patient *absolute* secrecy on *all* which has been confided to him or which he knows because of the confidence entrusted to him."). While these codes appear to permit no exceptions, they have been interpreted to allow for disclosure in a few specific situations, such as reporting the incidence of epidemic or communicable diseases. See Sidel, *supra* note 23, at 1134 (reporting interpretive statement by Eighth General Assembly in Rome, 1954).

28. See *infra* notes 31-36, 44 and accompanying text.

29. American Med. News, Aug. 18, 1980, at 172, *quoted in* R. VEATCH, *supra* note 20, at 311.

30. See Dawson, *The Duties of the Doctor as a Citizen*, [1954] 2 BRIT. MED. J. 1474, 1478.

31. This tradition appears to reflect what Veatch characterizes as the dominant characteristic of professional medical ethics—"the conviction that cases are unique" and "that every patient presents his or her own unique set of problems that cannot be resolved by rigid application of some legalistically formulated rule." R. VEATCH, *supra* note 20, at 307-08. See also *New Horizons in Medical Ethics—Confidentiality*, [1973] 2 BRIT. MED. J. 700, 702 (statement of Dr. Ronald Gibson) ("It's often forgotten that every situation is different from every other one, and has to be treated on its merits.") [hereinafter cited as *New Horizons*]. Perhaps this tradition of individual conscience explains the notable lack of deference given to ethics codes in many physician discussions of ethical dilemmas. See, e.g., Sidel, *Medical Ethics and the Cold War*, 191 NATION 325 (1960) (no mention of applicable code provision in extensive discussion of confidentiality and its limits).



fidences to situations in which absent such disclosure, "statutory sanction would be imposed."<sup>32</sup> Thus, disclosure is permissible under public health laws designed to prevent the spread of contagious disease and, in some jurisdictions, under laws requiring the reporting of gunshot wounds or other evidence that a serious crime has been committed.<sup>33</sup> In addition, physicians may disclose to avoid being held in contempt of court for failure to give testimony that is not protected by the physician-patient privilege.<sup>34</sup>

The most recent version of the AMA Principles of Medical Ethics is also highly restrictive, although less so than its British counterpart. The AMA Principles state: "A physician shall respect the rights of patients, of colleagues, and of other health professionals, and shall safeguard patient confidences within the constraints of the law."<sup>35</sup> Like the British Code, the AMA Principles tie disclosure of patient confidences to legal considerations and permit disclosure to avoid statutory sanctions. In addition, the AMA Principles permit disclosure to avoid civil liability, particularly in the form of negligence actions for failure to warn others of some danger posed by the patient.<sup>36</sup>

The restrictive view of these codes does not have uniform support among their respective constituents. Even prior to the recent collaboration between physicians and philosophers, many medical commentators recognized a broader moral duty to breach confidentiality in some circumstances,<sup>37</sup> particularly when necessary to avoid serious physical harm to others. Typical examples given in-

32. See T. McCONNELL, *supra* note 26, at 31.

33. See *id.* at 36.

34. Most, but not all, jurisdictions recognize an evidentiary privilege for patient-physician communications. MCCORMICK ON EVIDENCE § 98 n.5 (3d ed. 1984). For a discussion of the scope of the privilege, as well as some of the issues raised in its application, see generally *id.* at §§ 98-105.

35. AMERICAN MEDICAL ASSOCIATION, PRINCIPLES OF MEDICAL ETHICS, IV *quoted in* T. McCONNELL, *supra* note 26, at 269.

36. See *Tarasoff v. Regents of the Univ. of Calif.*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (defendant psychotherapists held to have a legal duty to inform plaintiff's daughter that an outpatient had threatened to kill her). *Tarasoff* is discussed more fully in *infra* notes 71-75 and accompanying text.

Indeed, one might speculate that the AMA's decision to narrow its disclosure provision was at least partially a response to the *Tarasoff* decision, in which the court cited the more liberal disclosure provision in the prior version of the AMA Principles as a factor in its determination that disclosure was legally required. *Tarasoff*, 17 Cal. 3d at 441-42, 551 P.2d at 347, 131 Cal. Rptr. at 27. For a discussion of the possible significance of *Tarasoff* in recent decisions by the American Bar Association to narrow the range of permissive disclosure for lawyers, see *infra* note 249.

37. See, e.g., Dawson, *Professional Secrecy*, [1922] 1 LANCET 619, 621-22; Riddell, *supra* note 22, at 5-8; Sidel, *supra* note 23, at 1137.

clude the epileptic patient who is a railway engine driver<sup>38</sup> and the patient who is planning to commit a violent crime.<sup>39</sup> This moral duty to disclose is commonly perceived both as a professional duty, arising from the physician's central function of preventing sickness and other physical harm,<sup>40</sup> and as a personal or social duty, arising from the physician's role as a citizen in society.<sup>41</sup> Moreover, the physician's moral duty is typically viewed as encompassing not only disclosures beyond those required by law, but also occasional refusals to disclose in defiance of the law—in explicit recognition of the distinction between law and ethics.<sup>42</sup>

It is clear that the highly restrictive codes do not reflect any consensus among physicians regarding the relative importance of confidentiality in relation to other interests.<sup>43</sup> However, the prior version of the AMA Principles, which permitted disclosure whenever necessary "to protect the welfare of the individual or the community,"<sup>44</sup> was equally unrepresentative. Even aside from the

38. See *New Horizons*, *supra* note 31, at 701. See also Dawson, *supra* note 30, at 1476 (84% of physicians responding to survey stated that physician has duty to report patient's epilepsy to railway authorities, contrary to restrictive disclosure provision in official code); T. MCCONNELL, *supra* note 26, at 37-38 (duty to report epileptic driver or bus driver with a heart condition).

39. See, e.g., Sidel, *supra* note 31, at 326. Of course, as a result of *Tarasoff*, physicians now have a legal duty to protect victims in at least some of these cases. See *infra* note 71. Prior to *Tarasoff*, however, the obligation was strictly moral.

40. See, e.g., Sidel, *supra* note 23, at 1135 (physician should report food handler with typhoid fever because of professional duty to prevent disease).

41. See, e.g., *id.* (doctor's role as citizen may require him to report patient with gunshot wounds); Dawson, *supra* note 37, at 622 ("We regard the protection of the confidences of our patients as vital [but in] what we consider a sacred trust we are not unmindful of our duties as citizens."); Riddell, *supra* note 22, at 5-6 ("A doctor shares with other citizens the duty to assist in the detection and arrest of a person who has committed a serious crime."); *id.* ("there are occasions in which the duty imposed by a professional relationship should be subordinated to the higher duties of common humanity").

42. See, e.g., Sidel, *supra* note 23, at 1136-37 (psychiatrist should have refused to give evidence against patient, even if not privileged, because "conscience and ethics take precedence over law"); *id.* at 1136 (citing with approval oath taken by German physicians in Western Zones in 1947: "I shall not recognize any other laws than those of humanity, of love of my fellow man and of unselfish readiness to help."); cf. Dawson, *supra* note 37, at 621 ("occasions occur in which other considerations properly override those of the law").

43. See Dawson, *supra* note 30, at 1475, 1478 (survey found that a large percentage of British doctors favored disclosure in confidentiality dilemmas, despite BMA's official position that disclosure is prohibited except when required by statute).

44. AMERICAN MEDICAL ASSOCIATION, PRINCIPLES OF MEDICAL ETHICS § 9 (1957). A physician may not reveal the confidences entrusted to him in the course of medical attendance, or the deficiencies he may observe in the character of patients, unless he is required to do so by law or unless it becomes necessary in order to protect the welfare of the individual or of the community.

*Id.*, quoted in T. MCCONNELL, *supra* note 26, at 269. For a discussion of the evolution of the 1957 AMA Principles, see Sidel, *supra* note 23, at 1134.

obvious question of paternalism,<sup>45</sup> physicians did not agree that disclosure was appropriate whenever it might marginally enhance the welfare of society.<sup>46</sup> Nonetheless, the medical community has been unable, or unwilling,<sup>47</sup> to formulate relatively specific standards governing the permissibility of disclosure which address such controversial questions as the role of physicians in law enforcement,<sup>48</sup> the prevention of injury other than serious physical harm or death,<sup>49</sup> and the extent to which the possibility of physical harm to others overrides the confidentiality principle.<sup>50</sup> While philosophers have by no means solved the practitioner's dilemma in these cases, they have begun a systematic effort to delineate the boundaries of

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45. In 1971, the British Medical Association eliminated its prior provision which permitted disclosure when in the patient's best interest. This change was made in response to an infamous case in which a physician reported to the parents of a teenager that she was taking birth control pills. See T. MCCONNELL, *supra* note 26, at 31. For philosophical discussions of the broad question of paternalism in medical ethics, see generally T. BEAUCHAMP & J. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 168-79 (2d ed. 1983); T. MCCONNELL, *supra* note 26, at 63-89; R. VEATCH, *supra* note 20, at 190-213.

46. Aside from their obvious concern for the ethical principle of confidentiality, doctors were also aware that they could be sued in tort for breach of a fiduciary relationship. While the fact that an overriding social obligation necessitated the disclosure is a defense to such an action, not all social interests are found to be more important than the patient's interest in privacy. Unfortunately, courts have been no more successful than doctors in setting out useful guidelines for determining when disclosure in the public interest is justified. See Note, *Action for Breach of Medical Secrecy Outside the Courtroom*, 36 U. CIN. L. REV. 103, 104-15 (1967); Note, *Legal Protection of the Confidential Nature of the Physician-Patient Relationship*, 52 COLUM. L. REV. 383, 397-98 (1952); Note, *Medical Practice and the Right to Privacy*, 43 MINN. L. REV. 943, 954-60 (1959).

47. The apparent unwillingness of physicians to adopt specific guidelines is clearly a function of their strong tradition of individual conscience, see *supra* notes 30-32 and accompanying text, and their equally strong conviction that "every situation is different from every other one, and has to be treated on its merits." *New Horizons*, *supra* note 31, at 702.

48. Compare Riddell, *supra* note 22, at 7-8 (doctor has same duty as every other citizen to aid in the detection and arrest of persons who have committed serious crimes) with Gaylin, *What's an FBI Poster Doing in a Nice Journal Like That*, in *MORAL PROBLEMS IN MEDICINE* 90 (1976) (criticizing the extension of medicine into police functions) and Chayet, *From Confidentiality and Privileged Communications*, in *MORAL PROBLEMS IN MEDICINE* 1009 (1976) (assistance in arrest of alleged killer may be justified only to prevent future danger to the community).

49. Compare, e.g., Dawson, *supra* note 37, at 622 (physician should disclose if he knows a "cruel wrong is to be inflicted on an innocent party, whether it be in ordinary civil life, or during legal proceedings") with Sidel, *supra* note 23, at 1137 (physician should not disclose confidences "except under very special circumstances such as the prevention of communicable diseases or prevention of a specific criminal act"). Of those physicians who favored disclosure, significantly fewer favored disclosure to prevent fraudulent claims for industrial injury benefits than favored disclosure to prevent serious bodily harm. Dawson, *supra* note 30, at 1477-78. The important factor may have been that the resulting injury was to the state, not to an individual person.

50. See *infra* notes 71-75 and accompanying text.

confidentiality, utilizing the initial justification for the physician's obligation of confidentiality as their focal point.

B. *The Philosophically Informed Approach to Medical Confidentiality*

1. *Initial Justifications for the Principle of Confidentiality*

There are two primary philosophical approaches to justifying the principle of confidentiality in the physician-patient relationship.<sup>51</sup> The first, utilitarian, is concerned with the probable long-term consequences to society when confidentiality is not observed. The second, deontological, is based on the principle that respect for a patient's right to privacy justifies confidentiality.

a. *Utilitarian Theory.* There is no single, commonly accepted definition of the ethical theory of utilitarianism, which is itself one of several teleological (or consequentialist) theories. Teleological theories (as distinguished from deontological theories) measure the worth of actions solely by their ends and consequences; in other words, the "right" is subordinate to the "good."<sup>52</sup> The term "utilitarianism" refers to the particular teleological theory which holds that there is one and only one basic principle in ethics—the principle of utility. That principle holds "that an action or practice is right (when compared with any alternative action or practice) if it leads to the greatest balance of good consequences or the least possible balance of bad consequences in the world as a whole."<sup>53</sup>

There are several varieties of utilitarian theory.<sup>54</sup> For purposes of this Article, the term "utilitarianism" refers to "rule utilitarianism" (as opposed to "act utilitarianism"), in which the principle of utility is applied not to individual acts, but rather to rules of conduct that are used as guidelines to determine which acts are right or

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51. A third approach currently popular in medical ethics is discussed *infra* note 61 (a form of social contract theory based on the work of John Rawls). Yet a fourth approach focuses on the moral worth of persons rather than on correct actions and policies. This approach is commonly referred to as "virtue ethics" and has its origin in the classical tradition of Plato and Aristotle. See T. BEAUCHAMP & J. CHILDRESS, *supra* note 45, at 260-68. For an interesting application of this approach in legal ethics, see Williams, *Professional Morality and Its Dispositions*, in THE GOOD LAWYER, *supra* note 16, at 259.

52. T. BEAUCHAMP & J. CHILDRESS, *supra* note 45, at 20.

53. T. BEAUCHAMP, PHILOSOPHICAL ETHICS 73 (1982).

54. The earliest influential utilitarians were David Hume and Jeremy Bentham; however, the major exposition of utilitarian theory is generally attributed to John Stuart Mill. See J. MILL, UTILITARIANISM (1863). For a comprehensive summary of the varieties of utilitarian theory, including an extensive bibliography, see T. BEAUCHAMP, *supra* note 53, at 71-106.

wrong.<sup>55</sup> This Article will assume that the "good" is to be measured in terms of individual preferences determined by each individual's actual behavior, as opposed to happiness, pleasure or some other experience assumed to have intrinsic value to the individual.<sup>56</sup>

The utilitarian justification for the principle of medical confidentiality is that confidentiality encourages patients to fully disclose their symptoms and causes so that they may receive effective diagnosis and treatment.<sup>57</sup> There is no empirical proof that, absent a professional principle of confidentiality, large numbers of patients would fail to make sufficient disclosure. However, given the intimate and embarrassing nature of many conditions for which patients seek treatment, philosophers using the utilitarian approach generally agree that the possibility of deterrence is sufficient to justify the confidentiality principle.<sup>58</sup> Because health is a relatively uncontroversial "good" to be maximized, and because the harm that might result from protecting certain confidences can be eliminated by subsequent limitations on the principle, the initial justification of medical confidentiality has not been a problem for utilitarian theorists.<sup>59</sup>

b. *Deontological Theories.* Deontological theories hold that "some features of acts other than, or in addition to, their conse-

55. T. BEAUCHAMP & J. CHILDRESS, *supra* note 45, at 25-32.

Act utilitarians justify actions by direct appeal to the principle of utility. For an argument in favor of act utilitarianism over both rule utilitarianism and deontological theory, see Smart, *An Outline of a System of Utilitarian Ethics*, in UTILITARIANISM: FOR AND AGAINST (1973). Act utilitarianism is generally rejected because it appears to sanction acts commonly thought to be unjust and in violation of individual rights, e.g., enslaving a small portion of society in order to solve major social problems. See T. BEAUCHAMP, *supra* note 53, at 90-91. Rule utilitarianism, however, is criticized on the grounds that consistency with ordinary moral convictions is an inadequate test of a moral theory and that, in any event, when applied to concrete moral dilemmas, it cannot be distinguished from act utilitarianism. See *id.* at 91, 96.

56. T. BEAUCHAMP & J. CHILDRESS, *supra* note 45, at 23-25.

57. *Id.* at 230. The utilitarian justification is deemed to be of special significance to the psychotherapist. According to one psychiatrist, the "patient in analysis must learn to free associate and to break down resistance to deal [sic] with unconscious threatening thoughts and feelings. To revoke secrecy after encouraging such risk-taking is to threaten all further interaction." Walters, *supra* note 20, at 171 (citing to Ruben, *Confidentiality and Privileged Communications: The Psychotherapeutic Relationship Revisited*, 41(6) MED. ANNUALS OF THE DIST. OF COLUM. 365 (1972)). For a more extensive discussion of the application of utilitarian theory to the psychotherapist whose patient threatens physical harm to another, see *infra* notes 71-75, 77-78 and accompanying text.

58. See Walters, *supra* note 20, at 170-71.

59. As will be seen, however, the lack of empirical proof as to the level of expected deterrence does pose problems for utilitarians in determining when the principle of confidentiality ought to be overridden by interests other than those of the patient. See *infra* notes 72-73 and accompanying text.

quences make them right or wrong.”<sup>60</sup> Deontologists believe that it is possible for an action or rule of action to be the morally right one even if it does not lead to the greatest balance of good over evil. There are many different deontological theories, including “act deontology” and “rule deontology.”<sup>61</sup> Most of the medical ethics literature and this Article focus on rules rather than acts and are “pluralistic” in that they “affirm more than one basic rule or principle.”<sup>62</sup> Both deontological theories commonly refer to respect for

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60. T. BEAUCHAMP & J. CHILDRESS, *supra* note 45, at 33. The most influential deontological thinker was clearly Immanuel Kant. See I. KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* (Lewis White Beck trans. 1959).

61. T. BEAUCHAMP & J. CHILDRESS, *supra* note 45, at 36-37. See generally T. BEAUCHAMP, *supra* note 53, at 107-45 (including an extensive bibliography of major works on deontological theories).

A third philosophical approach to medical ethics is based on what many consider to be a form of deontological theory—the social contract theory of John Rawls. See *id.* at 112-15. Rawls postulates hypothetical contractors, in what he calls the “original position,” who must agree to a set of principles of justice. J. RAWLS, *A THEORY OF JUSTICE* 17-22 (1971). The restrictions on the original position are that no one should be advantaged or disadvantaged in the choice of principles by natural fortune or social circumstances; thus, he imposes a “veil of ignorance” under which “no one knows his place in society, his class, position or social status; nor does he know his fortune in the distribution of natural assets and abilities.” *Id.* at 137. While Rawls himself uses this hypothetical contract approach for the specific purpose of deriving principles of justice, other philosophers have borrowed the concept to derive a broader set of principles providing the moral foundations of society. See, e.g., A. GOLDMAN, *supra* note 16, at 29-31; R. VEATCH, *supra* note 20, at 110-26, 141-290. Indeed, some philosophers have extended this concept even further to envision a second hypothetical contract in which members of society and members of the medical profession must agree to principles governing their relationship. See, e.g., R. VEATCH, *supra* note 20, at 127-34. This second contract is generated within the context of the more basic social contract and is, therefore, limited by the principles of that contract. *Id.*

As with other deontological theories and with utilitarianism, social contract theory presents certain difficulties both in theory and in application. See generally READING RAWLS (N. Daniels ed. 1975). These difficulties alone should not eliminate social contract theory as a useful philosophical approach to professional ethics. Nonetheless, because its application in professional ethics often yields conclusions which appear to either mimic or incorporate the conclusions of the two more traditional approaches, see *infra* note 67, the author has chosen not to use social contract theory as a third basic approach in the body of the text. There are, however, certain points at which social contract theory may offer unique insights, and thus references to the theory will be made at numerous points in the footnotes. Hopefully, philosophers more conversant than the author in social contract theory will continue to further develop its application to problems in legal and other professional ethics.

62. See T. BEAUCHAMP & J. CHILDRESS, *supra* note 45, at 35-36. The most famous attempt by a philosopher to articulate a single supreme principle of moral theory is Kant’s “categorical imperative,” which states “I should never act in such a way that I could not also will that my maxim should be a universal law.” I. KANT, *supra* note 60, at 24. A later formulation states: “One must act to treat every person as an end and never as a means only.” *Id.* at 54-55. However, most philosophers agree that Kant’s single principle is simply inadequate to resolve apparent conflicts of duties. See T. BEAUCHAMP, *supra* note 53, at 124.

The pluralistic approach in rule deontological theory was developed by a twentieth century British philosopher, W.D. Ross. According to Ross, there are several moral duties, none

a person's "rights." While rights can be justified under either utilitarian or deontological theory, rights which are based on respect for persons, for autonomy or some other nonutilitarian principle are clearly deontological.<sup>63</sup>

With respect to medical confidentiality, the basic deontological rule or principle places great emphasis on respect for a patient's right to privacy. While philosophers using this approach do not agree on either the source or the precise nature of this right,<sup>64</sup> the most common view is that it is derived from an even more basic right to autonomy (or, as some put it, "respect for persons") and thus "[expresses] the right to self-determination in contexts involving personal information, giving moral authority to the individual's interest in determining what will be known about him or her."<sup>65</sup>

To illustrate the value of privacy in the physician-patient relationship, philosophers in medical ethics commonly employ a model of concentric circles:

In the center is the "core self," which shelters the individual's

of which derive from each other or from any other supreme moral principle (such as Kant's categorical imperative). These duties include fidelity, reparation, gratitude, non-maleficence, beneficence and justice. Conflicts between these duties are resolved by finding the greatest balance of right over wrong in a particular situation. W. ROSS, *THE RIGHT AND THE GOOD* (1930). See also *infra* notes 68, 76 and accompanying text.

63. See T. BEAUCHAMP & J. CHILDRESS, *supra* note 45, at 49-55. For an expanded discussion of rights under both utilitarian and deontological theories, see generally T. BEAUCHAMP, *supra* note 53, at 185-218 (including extensive bibliography).

64. See, e.g., Rachels, *Why Privacy is Important*, 4 PHIL. & PUB. AFFAIRS 323 (1975) (privacy protects social relationships); Reiman, *Privacy, Intimacy and Personhood*, 6 PHIL. & PUB. AFFAIRS 26 (1976) (privacy protects individual's interest in "personhood"); Scanlon, *Thomson on Privacy*, 4 PHIL. & PUB. AFFAIRS 315 (1975) (privacy protects interests in freedom from offensive intrusions); Thomson, *The Right to Privacy*, 4 PHIL. & PUB. AFFAIRS 295 (1975) (privacy is not an independent right but can only be explained by reference to other rights over person and property). See generally PRIVACY (J. Pennock & J. Chapman ed. 1971).

65. T. BEAUCHAMP & J. CHILDRESS, *supra* note 45, at 230-31. For an expanded (and more detailed) discussion of this view, see Benn, *Privacy, Freedom and Respect for Persons*, in *TODAY'S MORAL PROBLEMS* 8 (R. Wasserstrom ed. 1975). Another view is that rather than being derived from an even more basic and comprehensive principle, privacy has its own fundamental nature and importance. T. BEAUCHAMP & J. CHILDRESS, *supra* note 45, at 230. According to this view, "privacy itself is a basic human need," and thus "the moral right to privacy is superior to other rights grounded in less basic ethical claims." *Id.*

In addition to disagreements regarding the source of the right to privacy, there are disagreements regarding its scope. Thus, some would limit privacy to control of whether and how private information about oneself is communicated, while others would include other aspects of personal autonomy, including the ability to determine whether or not to perform a particular act or undergo a particular experience. PRIVACY, *supra* note 64, at xi.

These debates aside, the concept of privacy does appear to have a "commonly accepted core of meaning," *id.*, which clearly includes the desire to control access to the type of intimate facts about one's body or mind that are typically revealed to a physician.

ultimate secrets—those hopes, fears, and prayers that are beyond sharing with anyone unless the individual comes under such stress that he must pour out these ultimate secrets to secure emotional release . . . . [T]he next largest circle contains intimate secrets which can be shared with close relatives or confessors of various kinds. Successively larger circles are open to intimate friends, to casual acquaintances, and finally to all observers.

The principle of medical confidentiality can be based squarely on this general right of privacy. The patient, in distress, shares with the physician detailed information concerning problems of body or mind. To employ the imagery of concentric circles, the patient admits the physician to an inner circle. If the physician, in turn, were to make public the information imparted by the patient—that is, if he were to invite scores or thousands of other persons into the same inner circle—we would be justified in charging that he had violated the patient's right of privacy and that he had shown disrespect to the patient as a human being.<sup>66</sup>

Because of this obvious connection between privacy and the physician-patient relationship, many philosophers have identified respect for the patient's right of privacy as the most appropriate source of the obligation of medical confidentiality.<sup>67</sup>

## 2. *Limitations on the Obligation of Confidentiality*

Once the philosopher establishes an initial justification for the professional obligation of confidentiality, the next step is to determine the stringency or weight of this duty. The consensus among philosophers is that the obligation of confidentiality is neither absolute nor a mere "rule of thumb," but rather a "prima facie obligation"—that is, one that can be overridden, but only by other,

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66. Walters, *supra* note 20, at 171. See also T. BEAUCHAMP & J. CHILDRESS, *supra* note 45, at 231-32. For the argument that the very *significance* of the right to privacy relates to the ability to form personal relationships by sharing different levels of information about oneself, see C. FRIED, *AN ANATOMY OF VALUES: PROBLEMS OF PERSONAL & SOCIAL CHOICE* 140-44 (1975); Rachels, *supra* note 64, at 323. This argument is criticized in Reiman, *supra* note 64.

Obviously not all patients admit to the physician their "core self." As a result, some efforts have been made to determine relative degrees of sensitivity of confidential information as an aid to determining when disclosure might be morally appropriate. See *infra* note 86 and accompanying text.

67. See, e.g., S. BOK, *SECRETS* 116-31 (1982); H. BRODY, *ETHICAL DECISIONS IN MEDICINE* 53 (2d ed. 1981); see also AMERICAN HOSPITAL ASSOCIATION, *PATIENT'S BILL OF RIGHTS* ¶ 5 (1973), reprinted in T. MCCONNELL, *supra* note 26, at 272.

Under social contract theory, see *supra* note 61, patients promise to disclose highly personal information in return for their physician's promise to keep that information confidential. Physicians agree to this contract because they need such information to perform their work. Patients agree either because they fear unless they disclose the information to their physician they will receive inadequate treatment (utility) or because they desire to keep such information private (privacy). See R. VEATCH, *supra* note 20, at 185-89.



weightier considerations.<sup>68</sup> Like physicians, however, philosophers do not always agree whether and when various other "considerations" will be sufficiently weighty to override the duty to preserve a patient's secrets. Nonetheless, to the extent that the philosophers have begun to systematically articulate the nature and scope of these legitimate considerations, their arguments may prove fruitful not only to the physician but to the attorney as well.

Under the utilitarian approach, there are two fundamental questions which must be answered in order to determine the limits of the obligation of confidentiality. The first is to what extent the possibility of disclosure will in fact deter patients from divulging sufficient information to obtain adequate treatment. The second is whether the harm done by disclosure, both short-term and in the long-run, outweighs or is outweighed by the harm thereby prevented, both in the particular case and in potential future cases. Neither question appears to pose any serious difficulty for utilitarians in situations typically encountered by physicians, including the legally required reporting of serious contagious diseases, child abuse, or gunshot wounds, and, even absent any legal obligations, those cases in which a patient's medical problem presents a clear and substantial danger to the lives or health of many other individuals, by virtue of the patient's occupation.<sup>69</sup> Perhaps this is so because the risk of harm to society is great in these cases and, in addition, because there is little reason to believe that disclosure will result in substantial deterrence, either among the relatively small group of patients whose confidentiality will be breached or among the larger group of patients outside the scope of these limited and well-defined exceptions

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68. See T. BEAUCHAMP & J. CHILDRESS, *supra* note 45, at 232-33; Walters, *supra* note 20, at 173. Kant's categorical imperative was an absolute duty, i.e., one not subject to being overridden by apparently conflicting duties. See *supra* note 62. The concept of "prima facie duties" originated in the pluralistic rule-deontological moral theory articulated by philosopher W.D. Ross. See *id.*

While most philosophers agree that confidentiality may be breached in at least some instances, usually involving threats of serious harm to others, there may be some support for a nearly absolute obligation, at least in the case of fully autonomous patients. See Englehardt & McCullough, *Confidentiality in the Consultation-Liason Process: Ethical Dimensions and Conflicts*, 2 PSYCH. CLINICS OF N. AM. 403 (1979) (disclosures of confidential information probably unwarranted absent fully informed consent). Ironically, in seeking support for their extreme position, the authors refer to the tradition of nearly absolute protection of client confidences by the legal profession. *Id.* at 406-07.

For a fictional account of the absurdity of a confidentiality obligation which gives no recognition at all to the interests of anyone other than the patient, see B. FRIEDMAN, *Mr. Pinzo's Breakthrough*, in FAR FROM THE CITY OF CLASS 88 (1963) (in order to test psychiatrist's vow of absolute secrecy patient murders psychiatrist's wife).

69. See *supra* note 38.

to the obligation of confidentiality.<sup>70</sup>

A more difficult case for utilitarians, one which exposes some of the weaknesses of utilitarian theory in general, involves the psychotherapist who believes that his patient may commit a violent act.<sup>71</sup> Here, there is serious disagreement regarding both of the questions posed above. First, it is by no means clear how many patients will be deterred from entering treatment by the possibility of disclosure, or, having entered treatment, will be deterred from disclosing their violent fantasies.<sup>72</sup> Second, even assuming that some degree of deterrence could be shown, it is unclear whether more lives will be saved by permitting the physician to disclose in the present case or by requiring him to maintain confidentiality, thereby increasing the likelihood that potentially dangerous patients will seek treatment in future cases.<sup>73</sup> Moreover, utilitarians face the perennial problem of comparing harms of entirely different natures. For example, it has been said that psychiatrists have a tendency to over-predict dangerousness.<sup>74</sup> If so, the psychological and perhaps economic harm done to a potentially large number of patients who, in fact, pose no real threat must be balanced against the potential loss of life in the far smaller number of cases in which a threat is actually carried out.<sup>75</sup>

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70. Cf. T. McCONNELL, *supra* note 26, at 34 (arguing against absolute duty of confidentiality on ground that clearly defined exceptions can avert, for the most part, bad consequences such as patients losing confidence in doctors).

71. This controversy was generated by the decision in *Tarasoff v. Regents of Univ. of Calif.*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976). *Tarasoff* held that the defendant psychotherapists had a legal duty to inform the plaintiff's daughter that an outpatient (Poddar) had threatened to kill her. The defendants decided that Poddar should be committed for observation in a mental hospital and notified the police requesting assistance. However, the police, believing Poddar to be rational, released him. The defendants made no further effort to confine Poddar or to notify the girl or her parents. For a discussion of the legal aspects of this decision, see Stone, *The Tarasoff Decisions: Suing Psychotherapists to Safeguard Society*, 90 HARV. L. REV. 358 (1976) (concluding the duty of a physician to disclose sensitive information is incompatible with effective treatment and would deter both patients and therapists from undertaking treatment, thereby increasing the risk of violence to society). See generally Fleming & Maximov, *The Patient or His Victim: The Therapist's Dilemma*, 62 CALIF. L. REV. 1025 (1974) (concluding that the question of whether the physician should disclose information, although based on the medical findings of the physician, is one ultimately for judges and juries to make).

72. See, e.g., Fleming & Maximov, *supra* note 71, at 1039-44. At least one post-*Tarasoff* article indicates that the deterrent effect feared by psychiatrists has not in fact materialized. See Wulsin, *Unexpected Clinical Features of the Tarasoff Decision: The Therapeutic Alliance and the "Duty to Warn,"* 140 AM. J. PSYCHIATRY 601 (1983).

73. See, e.g., T. McCONNELL, *supra* note 26, at 39.

74. See, e.g., Fleming & Maximov, *supra* note 71, at 1044.

75. For an example of one post-*Tarasoff* attempt to compare dissimilar values and interests, see *infra* note 88.

Under the deontological, nonutilitarian approach, the limits to confidentiality are derived by determining when the patient's right to privacy is overridden by some other equal or more basic right or duty.<sup>76</sup> Thus, with respect to the foregoing psychiatrist's dilemma, one deontologist has stated that "a person's life counts for more than the doctor-patient relationship."<sup>77</sup> Another has similarly concluded that "[i]t is not right . . . to risk one person's life in order to help patients and reduce the violence in society."<sup>78</sup>

In situations involving contagious diseases and occupational hazards, deontologists appear to agree with utilitarians that disclosure may be justified when the danger is both clear and direct. The reason usually given is that the duty to prevent serious bodily harm overrides a patient's right to privacy.<sup>79</sup> Another rationale for disclosure, suggested by a moral theologian, is that a patient who intentionally subjects others to unwarranted risks or harms is an "unjust aggressor" who thereby forfeits his right to privacy.<sup>80</sup> This argument has not gained much explicit recognition in the recent philosophical literature.<sup>81</sup> However, it may explain why a more difficult dilemma is thought to exist in a case where the patient is not the source of potential harm to others, for example, when a patient with a diagnosed genetic defect refuses to notify other family members who are at risk.<sup>82</sup> In any event, those who derive the right to

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76. See, e.g., T. BEAUCHAMP & J. CHILDRESS, *supra* note 45, at 233; Walters, *supra* note 20, at 171-73; cf. H. BRODY, *supra* note 67, at 22-23 ("the only thing that is strong enough to override a right is an equal or more basic right of another"). While the concept of an "equal" right or duty sounds very much like a utilitarian measure, some deontological theories resolve conflicts between various rights and duties by seeking the "greatest balance of right over wrong." T. BEAUCHAMP, *supra* note 53, at 125 (discussing deontological theory of W.D. Ross).

77. H. BRODY, *supra* note 67, at 54.

78. S. BOK, *supra* note 67, at 129.

79. See, e.g., H. BRODY, *supra* note 67, at 57.

80. R. REGAN, PROFESSIONAL SECRECY IN THE LIGHT OF MORAL PRINCIPLES 104-06 (1943). According to Regan, the professional is obligated to keep a client's secret only so long as "the client retains the right to his secret." *Id.* at 97. Moreover, "[w]hen a person is planning to use his right of professional secrecy as a sword rather than a shield and becomes the formal cause of evil to others, his aggression may be resisted." *Id.* at 106. To illustrate this principle in the medical context, Regan cites the example of a syphilitic patient who refuses to inform his fiancé of his medical condition. *Id.* at 148.

81. *But see* T. MCCONNELL, *supra* note 26, at 38 (approving physician who assisted in apprehension of mass murder suspect). According to McConnell, murderers forfeit some individual rights. They pose a threat to innocent people, and the fact that it is not an innocent threat makes the case for breach of confidentiality even stronger than the case involving a patient with a contagious disease. *Id.* Cf. C. FRIED, RIGHT AND WRONG 42-49 (1978) (defenses to intentional harms based on forfeiture of "victim's" right to personal respect).

82. See, e.g., Murray, *Genetic Counseling*, in 2 ENCYCLOPEDIA OF BIOETHICS 559 (1978).

privacy from the more fundamental right to autonomy, or self-determination, would clearly limit a patient's range of choices when he intentionally subjects others to unjustified risks of serious bodily harm.<sup>83</sup>

To a large extent, the second approach avoids the empirical problems of utilitarianism. However, it does encounter similar problems of conflicting values, particularly when the patient cannot clearly be characterized as an "unjust aggressor." There are no generally agreed upon criteria for establishing priorities among the various rights and duties arising out of the physician-patient relationship; nor do such criteria exist for determining when generally accepted priorities must give way to extreme interests. For example, while it is generally agreed that the duty to prevent harm is more compelling than the duty to confer benefits, a clear distinction between the two is not always possible,<sup>84</sup> as is perhaps the difficulty in the case of the patient with genetic defects who refuses to notify other family members. Moreover, the duty to prevent a "trivial harm" may not be as compelling as the duty to confer a major benefit,<sup>85</sup> as might be argued in the case of certain areas of medical research and education.

There may be resistance to the suggestion that violations of confidentiality may be characterized as "trivial" or perhaps even as less than substantial harms. Nonetheless, efforts have been made to assign relative degrees of sensitivity to different types of information.<sup>86</sup> These efforts accord with the notion of concentric circles of privacy so popular with proponents of the nonutilitarian approach.<sup>87</sup> This "grading" of information is not intended to be determinative. Nevertheless, it may provide some basis for determining when the abstract "right to privacy" may be overridden by other abstract rights and duties, within the context of a specific case.<sup>88</sup>

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83. Cf., e.g., S. BOK, *supra* note 67, at 129 ("The autonomy we grant individuals over personal secrets . . . cannot reasonably be thought to extend to plans of violence against innocent persons.").

84. See T. BEAUCHAMP & J. CHILDRESS, *supra* note 45, at 235.

85. *Id.*

86. See, e.g., Walters, *supra* note 20, at 174 (discussing an information grading system used by several Swedish hospitals).

87. See *id.*

88. Under the social contract approach to confidentiality, the limits of the physician's obligation are determined by reference to the hypothetical promise-keeping agreement between members of society and the profession itself. See *supra* note 61. Exceptions to confidentiality are then postulated in light of social concerns arguably more important than those underlying the initial agreement to have some rule of confidentiality. The leading proponent

Given the difficulties in applying both utilitarian and deontological theories, it is obvious that philosophers have by no means solved the confidentiality problems now confronting the medical profession. Nonetheless, their attempts to systemize the initial obligation and to delineate its appropriate limits—within the framework of the two most widely accepted theories of normative ethics—may prove useful to the legal profession in evaluating the quality of moral reasoning now being offered on both sides of the various confidentiality debates. The application of the “philosophically informed” approach to some of these debates is the subject of the remainder of this Article.

## II. CONFIDENTIALITY IN THE ATTORNEY-CLIENT RELATIONSHIP

### A. *Introduction: The Prima Facie Obligation and Some Initial Comparisons of the Medical and Legal Professions*

There is a two-fold benefit to exploring new approaches to legal ethics by way of recent developments in medical ethics.<sup>89</sup> First, the philosophical literature on confidentiality in the medical profession provides a useful methodology for application of the “philosophically informed” approach in the legal profession. Second, the discussion of the confidentiality principle in the medical and legal

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of this approach, Robert Veatch, argues that many of the traditional exceptions would be agreed to because they involve “conditions in which the public might have an overwhelming interest.” R. VEATCH, *supra* note 20, at 186. On the other hand, Veatch argues that reasonable people would reject any rule that permitted disclosure whenever the information might benefit society, because of the possible adverse effects of too much disclosure and because of the value of privacy. Thus, Veatch concludes that although reasonable contractors would probably not agree on the precise wording, the contractual pledge might well protect confidentiality “except when there is a clearly identified, direct, immediate threat to life or grave bodily harm to another.” *Id.* at 187.

Treating the issue in an abstract manner, as Veatch does, it is difficult to consider how interests which are less than substantial threats to life or grave bodily harm might outweigh confidentiality in a particular case. However, by further specifying the reasoning process by which the hypothetical contractors would determine the scope of permissible exceptions, and by more closely examining the more concrete context within which such reasoning would take place, harm which is substantial, but not immediately life-threatening, might fit within an exception, particularly when the information to be revealed is not close to the “core self.” Cf. M. BAYLES, *supra* note 16, at 100-01 (to examine specific categories of cases, we should identify all of the interests involved, and then consider how reasonable people imagining themselves in each role would determine that some interests are worth sacrificing for the sake of others). Bayles’ approach has the advantage of considering patient interests other than privacy—for example, financial security in the case of occupational hazards—as well as the strength and intensity of both the patient’s privacy interests and the various interests of others which might be at stake.

89. See *supra* notes 14-19 and accompanying text.

professions provides the basis for a potentially useful comparison of the two professions and the role that confidentiality plays in each.

There is no apparent reason to distinguish lawyers from doctors at the first stage of analysis—the initial justification for the obligation of confidentiality. Using either a utilitarian or a deontological approach, it should be obvious that lawyers have, as do physicians, at least a *prima facie* obligation to maintain client confidentiality. Without such an obligation, clients might be deterred from the full disclosure necessary for effective legal representation.<sup>90</sup> Moreover, the subject matter of lawyer-client communications (and other information) is just as private as those involved in the physician-patient relationship.<sup>91</sup> Because the very nature of a *prima facie*

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90. See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1 (1983); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 comment (1983).

The utilitarian justification for the *prima facie* obligation of confidentiality in medical ethics is discussed *supra* notes 52-59 and accompanying text.

91. See *supra* notes 60-67 and accompanying text (deontological justification for *prima facie* obligation of confidentiality in medical ethics). Obviously, communications relating to shameful criminal or tortious acts and all aspects of domestic relations are highly personal in nature and thus very close to the "core self." See *supra* note 66 and accompanying text. The strong privacy interest Americans typically assert in matters relating to income and other financial matters is, perhaps, less obvious. See, e.g., A. WESTIN, *PRIVACY AND FREEDOM* 53 (1967) (areas of highest resistance to survey questioning include "income and money"). As with information about patients, see *supra* note 66 and accompanying text, not all information about clients is at or close to the "core self." The strength of the various privacy interests at stake may well be a factor in determining when disclosure is morally appropriate. See *id.*; *infra* notes 188, 258-59, 269-71 and accompanying text.

While the recognition of a *prima facie* obligation of confidentiality to individual clients appears to be unproblematic, the recognition of a similar obligation to corporate clients raises some troublesome questions. For example, using utilitarian theory, some commentators suggest that given the realities of corporate existence (at least those of large corporations), it is unlikely that the absence of a duty of confidentiality would have any substantial effect on lawyer-client communications. See, e.g., D. Luban, *Corporate Counsel and Confidentiality* 31-32 (1981) (unpublished manuscript) (on file with the Case Western Reserve Law Review); cf. Note, *The Attorney-Client Privilege: Fixed Rules, Balancing and Constitutional Entitlement*, 91 HARV. L. REV. 464, 473-77 (1977) (more flexible balancing of interests would disfavor absolute rule of evidentiary privilege for corporations, in part because corporations are unlikely to stop using lawyers even if their communications are not afforded stringent protection). Even more problematic is how a deontological theory of privacy rights—grounded in respect for human dignity—can apply to corporations and other abstract entities which are not human. See, e.g., D. Luban, *supra*, at 33-34 (finding additional support in the Supreme Court's decision that corporations have no fifth amendment privilege against self-incrimination); Gardner, *A Personal Privilege for Communications of Corporate Clients—Paradox or Public Policy?*, 40 U. DET. L.J. 299, 312 (1963) (corporate evidentiary privilege cannot be justified by social interest in individual life, as in case of individual clients); see also Lowell, *Corporate Privacy: A Remedy for the Victim of Industrial Espionage*, 1971 DUKE L.J. 391 (summary of legal rules recognizing and denying various asserted privacy interests of corporations). Perhaps the most fruitful approach would be to invoke social contract theory, see *supra* note 61, under which the extraction of corporate promises to recognize moral duties to others (including society, employees and even the lawyers themselves) would require recogni-

obligation is that it is not absolute, but may give way in light of other substantial interests,<sup>92</sup> the recognition of such an obligation in the lawyer-client relationship should be uncontroversial.

Differences between the legal and medical professions begin to assume a greater significance at the second stage of the analysis—defining the limits of the professional obligation of confidentiality. For example, there are objective differences in both function and circumstance which cannot be ignored, including the lawyer's unique role in adversary litigation<sup>93</sup> and the frequency with which client interests conflict with the interests of others.<sup>94</sup> In addition, there are more subtle differences in professional attitudes toward confidentiality, including the lawyers' heavy reliance on what they see as a strong "tradition" of confidentiality,<sup>95</sup> embodied in the testimonial privilege for attorney-client communications.<sup>96</sup> These differences may present obstacles to the success of the philosophical approach. Consequently, they need to be briefly discussed at the outset, beginning with some unique and unfortunate aspects of the historical development of confidentiality within the legal profession.

### 1. *Differences in Historical Development: The Influence of the Testimonial Privilege*

Like the principle of physician-patient confidentiality,<sup>97</sup> the concept of attorney-client confidentiality had its origins in the obligations of honor among gentlemen.<sup>98</sup> However, unlike the medical

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tion by others of certain rights of the corporation, including some right to corporate confidentiality. Cf. Bowie, *The Moral Contract Between Employer and Employee*, in *ETHICAL THEORY AND BUSINESS* 150 (2d ed. 1983) (recognition of contractual rights and duties presupposes recognition of all contractual parties as responsible, autonomous moral agents with rights that can be pressed as claims against others). Of course, even assuming that a prima facie obligation toward corporate clients can be justified, there may be reasons for distinguishing between corporations and individuals in determining the limits to that obligation in various situations. Cf. S. BOK, *supra* note 67, at 150-51 (in case of individual's personal affairs, presumption should be in favor of maintaining privacy; in case of corporate and other collective secrets, presumption should be reversed). Given the complexities of the problem, this Article will not attempt to address the particular issues raised by corporate clients but will instead treat all clients as if they were individuals. Obviously, the problem of corporate clients needs to be addressed further, and additional philosophical analysis may help do so.

92. See *supra* note 68 and accompanying text.

93. See *infra* notes 121-43 and accompanying text.

94. See *infra* notes 144-45 and accompanying text.

95. Hazard, *supra* note 1, at 1069.

96. See *infra* notes 97-120 and accompanying text. As Professor Hazard convincingly demonstrates, this strong "tradition" is not nearly so strong as attorneys generally believe, even with respect to the evidentiary privilege itself. See Hazard, *supra* note 1.

97. See *supra* notes 20-25 and accompanying text.

98. See 8 J. WIGMORE, *supra* note 1, § 2290 (the theory of the attorney-client privilege

principle, the legal principle did not originate in a professional code of ethics, but rather in a rule of law: the testimonial privilege for confidential communications between attorney and client.<sup>99</sup> The attorney-client privilege, first recognized in late sixteenth century England,<sup>100</sup> subsequently became the foundation for the confidentiality provisions of the various ethics codes, which originated at a much later date.<sup>101</sup> Of course, the evidentiary rule applies only to testimonial disclosures in judicial proceedings,<sup>102</sup> whereas the code provisions clearly intend the rule of confidentiality to apply to all phases of legal representation.<sup>103</sup> Moreover, the evidentiary rule protects only confidential communications,<sup>104</sup> whereas the code provisions address both confidential communications and other

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"was very different from modern times. It was . . . a consideration for the oath and the honor of the attorney rather than for the apprehensions of his client.")

99. See generally 8 J. WIGMORE, *supra* note 1, §§ 2290-2329.

100. See *id.* § 2290. Under Roman law, the attorney was also excluded from giving testimony. This exclusion, which also applied to family members and servants, was based on the duty of loyalty. Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CALIF. L. REV. 487, 488 (1928). The influence of the Roman tradition on the early English doctrine of attorney-client privilege is unclear. *Id.* at 489.

101. The first codification of standards of ethics in the United States was adopted by the Alabama State Bar in 1887. H. DRINKER, *LEGAL ETHICS* 23 (1953). The original Canons of Ethics of the American Bar Association, adopted in 1908, contained but a passing reference to confidentiality. *Id.* at 24. Canon 6 provided that the obligation of the attorney not to reveal a client's confidences and secrets also forbade accepting a subsequent retainer in adverse matters. CANONS OF ETHICS Canon 6 (1908). The first full-blown provision on confidentiality, Canon 37, was not adopted until 1928, H. DRINKER, *supra*, at 309 n.1, 322 n.12, and even then was viewed as embodying the testimonial privilege under common law. See ABA Comm. on Professional Ethics and Grievances, Formal Op. 287 (1953); see also H. DRINKER, *supra*, at 131-32 (rule of Canon 37 "has long been a rule of the common law" and thus "its application is usually a question of law rather than of ethics").

102. See 8 J. WIGMORE, *supra* note 1, § 2324. Some commentators argue that the attorney-client privilege extends to non-testimonial situations. *E.g.*, Callan & David, *supra* note 13, at 340 n.40. However, these commentators base their arguments on a line of cases which involves fraudulent activity by the attorney rather than the client. See Note, *Client Fraud and the Lawyer—An Ethical Analysis*, 62 MINN. L. REV. 89, 112-13 n.104 (1977).

103. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(B) (1983) ("a lawyer shall not knowingly . . . reveal a confidence or secret of his client"); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1983) ("[a] lawyer shall not reveal information relating to representation of a client"); The Model Code further provides:

"Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

*Id.* DR 4-101(A). The earlier Canons also applied the ethical rule of confidentiality to all phases of legal representation. See H. DRINKER, *supra* note 101, at 131-39. Canon 37 applied only to confidential communications; however, Canon 6 imposed an additional duty not to divulge other client secrets. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 287 (1953).

104. See 8 J. WIGMORE, *supra* note 1, §§ 2306-2320.



“secrets.”<sup>105</sup> Nonetheless, even the broader scope of the code provisions was not derived from ethics, but from another rule of law: the law of agency and the confidentiality obligations which arise from fiduciary relationships generally.<sup>106</sup>

It is not surprising that lawyers have turned to law as a source for defining their professional obligations. However, it is surprising, as well as unfortunate, that it was the narrow rule of testimonial privilege, and not the broader, more flexible law of agency,<sup>107</sup> that had the dominant influence on the development of confidentiality in the legal profession. Moreover, what is unfortunate is not that the code provisions track the attorney-client privilege—indeed, they do not—but rather that after extending the prima facie obligation well beyond the scope of the testimonial privilege,<sup>108</sup> the profession continues to look to the law of evidence as a primary source for defining the limits of that obligation.

A recent opinion of the American Bar Association's Committee on Ethics and Professional Responsibility offers a good illustration of the dangers of attempting to transfer the narrow law of evidence to the extended universe of ethics. In this opinion,<sup>109</sup> the Commit-

105. See *supra* note 103.

106. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 legal background (Proposed Final Draft 1981).

107. Compare 8 J. WIGMORE, *supra* note 1, § 2298 (primary evidentiary exception limited to communications intended to further a future crime or fraud) with RESTATEMENT (SECOND) OF AGENCY § 395 comment f (agent may reveal confidential information to protect a superior interest of himself or of a third person). The scope of permissible disclosure under agency law is by no means clear. Compare D. Luban, *supra* note 91, at 44 & n.67 (comment f would have supported Ford Motor Co.'s lawyer disclosing dangerous design of Pinto gas tank, regardless whether or not criminal conduct was involved) with Blumberg, *Corporate Responsibility and the Employee's Duty of Loyalty and Obedience: A Preliminary Inquiry*, 24 OKLA. L. REV. 279, 286-87 (1971) (comment f refers only to commission of a crime). There are precedents in related areas which suggest that disclosure beyond intended crimes or frauds might well be permitted. See generally Note, *Action for Breach of Medical Secrecy Outside the Courtroom*, 36 U. CINN. L. REV. 103, 114-15 (1967) (discussion of cases denying recovery against physician for breach of confidentiality when disclosure justified by general public health and welfare). See also Luban, *supra* note 16, at 11 (“agency theory in its modern form imposes more ethical limitations on the ‘rule of undivided loyalty’ than does [procedural theory focusing on the lawyer’s role in the adversary system]”).

Interestingly, while lawyers tend to rely on law in fashioning their own ethical obligations, they sometimes defer to professional ethics in determining the application of law to other professionals. See RESTATEMENT (SECOND) OF AGENCY § 385(1) comment a (“[i]n determining whether or not the orders of the principal to the agent are reasonable [and, therefore, must be obeyed] . . . business or professional ethics . . . are considered”); see also *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 74-76, 417 A.2d 505, 513-14 (1980) (employer may not fire employee at will on basis of refusal to engage in conduct that would constitute a clear violation of a code of professional ethics).

108. See *supra* notes 102-05 and accompanying text.

109. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975).

tee refused to permit the disclosure of nonprivileged matter which established past client fraud. In reaching its conclusion, the Committee reasoned that the evidentiary privilege reflects a "tradition" in which the value of confidentiality "should take precedence" over other interests in "all but the most serious cases";<sup>110</sup> for example, those cases involving communications in furtherance of a future crime or fraud, which fall under an exception to the evidentiary privilege.<sup>111</sup> This opinion reflects a serious failure to understand precisely what narrow "values" are embodied in the evidentiary privilege, and, more particularly, in its most significant exception, the future crime or fraud exception.

First, the sole question with respect to the testimonial privilege is whether to receive the relevant testimony of a lawyer, thereby furthering the interest of courts and litigants in promoting an accurate verdict. Since the future crime or fraud exception applies even in nonrelated proceedings,<sup>112</sup> it is clear that under the law of evidence it was not designed to prevent the occurrence of the crime or fraud in question, nor to ensure redress for the innocent victim. In fact, the future crime or fraud exception to the attorney-client privilege does not represent the product of any balancing of a client's interest in confidentiality against other possible interests, despite the Committee's suggestion of such a "tradition." Rather, the underlying rationale is that communications in furtherance of a crime or fraud are not made to a lawyer acting in his professional capacity, and thus are not even within the ambit of the privilege.<sup>113</sup>

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110. *Id.*

111. *See id.* The Committee refers to DR 4-101(C)(3) of the ABA Model Code, however, it is clear that DR 4-101(C)(3) is itself based on the law of attorney-client privilege. *See* ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 178 (Am. B. Found. 1979).

Under the laws of evidence, the traditional exception clearly includes both crimes and frauds. *See generally* 8 J. WIGMORE, *supra* note 1, § 2298; Gardner, *The Crime or Fraud Exception to the Attorney-Client Privilege*, 47 A.B.A. J. 708 (1961); Note, *The Future Crime or Tort Exception to Communications Privilege*, 77 HARV. L. REV. 730 (1964). While DR 4-101(C)(3) refers only to crimes, there is good reason to believe that the term "crime" was intended as a term of art, taken from former Canon 37, which includes both crimes and frauds. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 legal background (Proposed Final Draft 1981).

112. *See, e.g.*, Gardner, *supra* note 111, at 709.

113. *See Regina v. Cox*, 14 Q.B.D. 153, 168 (1884):

In order that the rule may apply there must be both professional confidence and professional employment, but if the client has a criminal object in view in his communications with his solicitor one of these elements must necessarily be absent. The client must either conspire with his solicitor or deceive him. If his criminal object is avowed, the client does not consult his adviser professionally, because it cannot be the solicitor's business to further any criminal object. If the client does not avow his object, he reposes no confidence, for the state of facts, which is the foundation of the supposed confidence, does not exist. The solicitor's advice is obtained by fraud.

Second, and perhaps more important, the limited balancing of interests that did result in the adoption of a broad testimonial privilege for confidential communications between attorney and client is not readily extended beyond the context of testimonial disclosures. The standard utilitarian justification for the privilege is that if clients fear their attorneys will be permitted or compelled to testify against them in court, they will hesitate to disclose the facts necessary for effective representation.<sup>114</sup> This rationale is applied to "innocent" as well as "guilty" clients because the former may be either unsure of the justice of their cause<sup>115</sup> or simply prone to faulty recollection in their initial presentation of the facts.<sup>116</sup> While the evidentiary privilege is not without its critics,<sup>117</sup> the possibility of routine depositions of attorneys, even if only conducted to discover inconsistencies in their clients' statements, is an appalling prospect, on both utilitarian and privacy grounds.<sup>118</sup> Moreover, because the only interest opposed to confidentiality in this context is the interest of courts and litigants in obtaining relevant evidence, the usual availability of the same information from other sources, including the client, substantially reduces the number of cases in which an attorney's testimony would be critical.<sup>119</sup>

These same considerations do not necessarily apply in other contexts. Clearly, "innocent" clients have less to fear when disclosure is permitted, or even compelled, on the basis of professional standards rather than on the whim of an adversary or the attorney himself. This is particularly true when these standards are invoked only in specific and well-defined situations and, in some cases, only after the client has been given an opportunity to avoid disclosure by correcting the underlying problem.<sup>120</sup> Even if some undesired deterrence does result in these contexts, the need to consider interests

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*See generally* 8 J. WIGMORE, *supra* note 1, § 2298; Gardner, *supra* note 111, at 709; Note, *supra* note 111, at 731.

114. *See* 8 J. WIGMORE, *supra* note 1, § 2291.

115. *See id.*

116. *Cf.* Gardner, *A Re-Evaluation of the Attorney-Client Privilege* (pt. 1), 8 VILL. L. REV. 279, 323 (1963) ("It is well recognized by those who work with factual details that the memory of man is an inaccurate instrument when it comes to the recollection of details of past events.").

117. For critical discussions of the attorney-client privilege, see Gardner, *A Re-Evaluation of the Attorney-Client Privilege* (pts. 1 & 2), 8 VILL. L. REV. 279, 447 (1963); Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464 (1977).

118. *Cf.* Gardner, *supra* note 116, at 324-26.

119. *Cf. id.* at 325 (actual results in accuracy of fact presentation would not be substantially better without the evidentiary privilege).

120. Moreover, when disclosure is permitted, rather than required, the attorney will have

other than the narrow interest of courts and litigants in obtaining relevant evidence will call for a far more sophisticated utilitarian calculus than has previously been used in the law of evidence.

None of the above is meant to suggest that there will never be situations in which the client's interest in confidentiality outweighs the interests of others in avoiding harm, perhaps even serious harm. The only conclusion to be drawn at this stage is that the historical development of the principle of confidentiality has resulted in a misguided and undue emphasis on the testimonial privilege, which has in turn led to the mistaken, but prevalent, assumption that the law itself embodies a broad tradition where confidentiality almost always takes precedence over other interests.

## 2. *Differences in Function: Limits of the "Institutional Excuse"*<sup>121</sup>

Another important, and potentially distorting, influence on the legal profession's perspective on confidentiality is the traditional focus on certain unique aspects of the lawyer's function. In response to suggestions that lawyers should reveal adverse facts in litigation, lawyers typically argue not merely that clients have a strong interest in confidentiality, but also that our adversary system of justice *requires* that the lawyer present only evidence favorable to his client.<sup>122</sup> Moreover, even in nonlitigation, any suggestion that lawyers might reveal a client's intent to commit an immoral, but entirely lawful act, will be met with the argument that, at least in a democracy, the lawyer's special function in implementing the rule of law requires strict noninterference with the exercise of client autonomy within the limits of the law.<sup>123</sup>

One way of justifying far greater disclosure than is presently permitted under the Model Code is to challenge the standard conception of the lawyer's role, which is perceived to entail at least some degree of partisan zeal as well as moral neutrality.<sup>124</sup> This approach, while raising a number of interesting questions, requires

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an opportunity to consider the need for disclosure in light of any unique circumstances of the particular case.

121. Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER* 83, 85-87 (D. Luban ed. 1983).

122. See *infra* notes 126-28 and accompanying text.

123. See *infra* notes 136-39 and accompanying text.

124. See A. GOLDMAN, *supra* note 16, at 90-92; Luban, *supra* note 121, at 87-91; Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669, 672-75 (1978); Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 34-39.

a far more radical revision of legal thought than may be necessary to resolve some of the specific confidentiality issues that are presently being debated. Perhaps more importantly, this approach appears to concede that it is the lawyer's *function* that ultimately determines the ethics of confidentiality and disclosure.<sup>125</sup> To the contrary, this section will attempt to demonstrate that *even if* the adversary system is itself justified, and *even if* the lawyer has at least a *prima facie* obligation of moral neutrality, the implications of the "institutional excuse" are far less extensive than lawyers typically assume.

a. *The Advocate in the Adversary System.* The adversary system of litigation is characterized by three essential elements: an impartial tribunal, formal rules of procedure, and parties who are assigned the responsibility for presenting their own best cases and challenging the presentation of their opponents.<sup>126</sup> The primary duty of the advocate in the adversary system is "one-sided partisan zeal,"<sup>127</sup> which is expected to produce, at least in the long run, either protection of the individual against the power of the state (in the case of criminal defendants) or factually and legally accurate verdicts (in the case of civil plaintiffs and defendants).<sup>128</sup> In this scheme, the duty of confidentiality is but a "collateral duty" designed to enhance the quality of partisan advocacy, under the

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125. *But cf.* Luban, *supra* note 121, at 118 (adversary system and the system of professional obligation it mandates may be justified, but "when professional and moral obligation conflict, moral obligation takes precedence"). This Article will not argue that personal morality may sometimes call for disobedience to generally justified professional norms, but rather that the professional norms themselves should be shaped by moral considerations other than, or in addition to, professional function. There is an additional reason why the lawyer's function in society can never be a sufficient basis for resolving confidentiality dilemmas. Unlike physicians, who generally serve the single societal goal of improving the health of individual patients, lawyers serve at least two, often conflicting goals—as individual client representatives they must maximize client values, whereas, as "officers of the court" they must ensure the proper functioning of the adversary legal system. *See supra* note 13 and accompanying text. As long as there is tension between these two *professional* goals, lawyers must necessarily look outside the profession to resolve at least those moral dilemmas which arise as a result of such tension.

126. *See* Schwartz, *supra* note 124, at 672. For a more thorough and detailed discussion of the adversary system, see generally Fuller, *The Adversary System*, in *TALKS ON AMERICAN LAW* 34 (H. Berman ed. 1961).

127. Luban, *supra* note 121, at 90. This duty of partisan zeal is modified in the case of the prosecutor, who is an "administrator of justice" as well as an advocate. *STANDARDS FOR CRIMINAL JUSTICE* § 3-1.1(b) (1979). The role of the prosecutor is "to seek justice, not merely to convict." *Id.* § 3-1.1(c).

128. *See* Luban, *supra* note 121, at 91-93. Obviously, it is the duty of the criminal defense lawyer (and not the prosecutor) to protect the defendant against the power of the state. *See infra* notes 169-70 and accompanying text (role of defense counsel in protecting constitutional rights of criminal defendant). Combining the duties of both prosecutor and defense counsel,

utilitarian assumption (borrowed from the law of evidence) that confidentiality encourages clients to give lawyers the information necessary for effective advocacy.<sup>129</sup>

Keeping in mind the subordinate position of the duty of confidentiality, it should be obvious that the critical questions under the adversary system are not what limits should be placed on *confidentiality*, but rather what limits should be placed on *partisan zeal* in order that the various goals of the adversary system may be best achieved. There are already a number of well-accepted limitations on advocacy—for example, rules which prohibit a lawyer from lying,<sup>130</sup> from counseling or assisting clients in crimes and frauds,<sup>131</sup> and, in civil cases, from violating rules requiring truthful pleading<sup>132</sup> and compliance with extensive discovery requests.<sup>133</sup> These limitations may well have the effect of deterring clients, even “innocent” clients, from full disclosure,<sup>134</sup> but they have been determined to be justifiable nonetheless.

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*supra* note 127 and accompanying text, the goal of the criminal justice system is to convict those guilty of crimes without violating their constitutional rights.

As for civil trials, there are those who disagree that the goal of the adversary system is “truth.” See, e.g., Luban, *supra* note 121, at 97-111 (summary and criticism of various alternative goals). Nonetheless, this Article will assume that “truth,” in the sense of legally and factually accurate verdicts, is at least the *primary* goal of modern civil litigation. This assumption recognizes that there are particular instances in which either the substantive law or the procedural rules themselves embody a judgment that some values are more important than truth. See Wolfram, *Client Perjury: The Kutak Commission and the Association of Trial Lawyers on Lawyers, Lying Clients, and the Adversary System*, 1980 AM. B. FOUND. RESEARCH J. 921, 976 [hereinafter cited as Wolfram, *Client Perjury II*] (value of finality overrides truth in laws prohibiting suits for libel or malicious prosecution based on allegations of perjury in prior litigation). For an argument why truth and not the preservation of “human dignity” is the primary goal of the adversary system of civil litigation, see *infra* notes 172-75 and accompanying text.

This Article will further assume that the goal of truth is sufficiently met in civil litigation to justify retention of the adversary system. This second assumption is even more controversial than the first. See Luban, *supra* note 121, at 93-97. The purpose of this Article is to demonstrate that *even if* the adversary system is justified on the grounds that it promotes truth in the vast majority of cases, the attorney’s duty of confidentiality need not be as strong as defenders of the adversary system have urged that it must be.

129. See Luban, *supra* note 121, at 90.

130. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(5) (1983); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(1) (1983).

131. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(7) (1983), MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) (1983).

132. See FED. R. CIV. P. 11 (attorney subject to possible disciplinary action for willful violation of requirement that he sign pleading certifying “that to best of his knowledge, information, and belief there is good ground to support it”).

133. See FED. R. CIV. P. 26-37; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(3) (1983); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(a),(d) (1983).

134. See *infra* note 180 and accompanying text.

Once these specific limitations on partisan zeal are accepted, lawyers can no longer automatically invoke the duty of confidentiality in every situation in which clients might be deterred from disclosure. Rather, lawyers must first consider the possibility of deterrence *beyond that which is already contemplated*, and second, the extent to which such additional deterrence would have a significant adverse impact on the values implicit in the adversary system. Similarly, under a privacy perspective, lawyers must first take into account the extent to which the client's right to privacy has already been infringed by the recognized limits on partisan zeal before concluding that further infringements are unjustified.

b. *The Nonadvocate Lawyer.* In litigation, the duty of partisan zeal exists (and for the purposes of this discussion is assumed to be justified) within the context of the adversary system itself. At least in theory, the presence of a neutral arbitrator and an equally partisan opponent is thought "to provide maximum opportunity to resolve disputes fairly, correctly, efficiently, and promptly."<sup>135</sup> In nonlitigation, however, there are no comparable assurances that partisan zeal, even in the long run, will lead to just results in most cases. Nonetheless, the standard conception of the nonadvocate lawyer's role requires, or at least permits,<sup>136</sup> partisan zeal with only minimal limitations, most significantly the prohibition on counseling or assisting clients in activities known to be criminal or fraudulent.<sup>137</sup> While there is no standard justification of partisan zeal in these circumstances, the usual argument (typically articulated by its critics) is that if lawyers were to refuse on moral grounds to pursue that to which their clients have legal rights, they "would assume the power to determine the scope of legal rights themselves"<sup>138</sup>—a re-

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135. Schwartz, *supra* note 124, at 674. See also *id.* at 677 ("faith in the ability of the arbiter to reach a correct decision [justifies putting] one's best foot forward by stepping on the feet of the other side").

136. See *id.* at 679-80. In reliance on EC 7-8 (lawyer may withdraw when "the client in a non-adjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer") and EC 7-9 (lawyer may ask his client for permission to forego an action which the lawyer regards as unjust), Professor Schwartz concludes that a non-advocate lawyer always has the option of refusing to exercise partisan zeal. See *id.* at 680. However, because DR 2-110(A)(2) forbids a lawyer from withdrawing (on permissive grounds) when to do so would prejudice the (legal) rights of his client, there may be circumstances when a lawyer is *required* to exercise partisan zeal, contrary to his personal inclinations. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(A)(2) (1983). Moreover, while a lawyer may initially decline employment for moral or any other reasons, the traditional view is that no client should fail to obtain fully partisan representation solely by reason of a morally (but not legally) objectionable claim. See *id.* EC 2-26.

137. See Schwartz, *supra* note 124, at 679 n.18.

138. A. GOLDMAN, *supra* note 16, at 111-12.

sult which is both undemocratic and in violation of the client's right to autonomy within the law.<sup>139</sup>

In a society that has a strong commitment both to the rule of law and to social and moral diversity,<sup>140</sup> perhaps lawyers ought not routinely to refuse assistance to those with whom they disagree on moral, as opposed to legal, grounds. Nonetheless, the implications of adopting a *prima facie* obligation of moral neutrality are far from clear. First, additional arguments would be needed to justify an *absolute* obligation, since the individual's moral right to autonomy outside the legal sphere is typically thought to give way to the rights of others in at least some cases.<sup>141</sup> Second, it is by no means obvious that restrictions on *confidentiality* necessarily infringe on the client's autonomy in ways that are unjustifiable, particularly when the right to privacy is seen as but one component of a broader right to self-determination.<sup>142</sup> Finally, recognition of a client's right to autonomy *within the law* only suggests that lawyers ought not interfere unless the client intends an act which he has no *legal right* to do, and such acts are by no means limited to crimes and frauds.<sup>143</sup>

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139. *Id.* at 107, 111-12. See also Fried, *supra* note 18, at 1073 (social and legal nexus is "so complex that without the assistance of an expert advisor an ordinary layman cannot exercise that autonomy which the system must allow him"); Schwartz, *supra* note 124, at 685 ("danger of imposing the standards of an elite upon segments of the population that are not fairly represented at the bar").

140. See Donagan, *Justifying Legal Practice in the Adversary System*, in *THE GOOD LAWYER* 123, 128 (D. Luban ed. 1983).

141. See J. RAWLS, *supra* note 61, at 60 (although the principle of liberty is the first principle of a contractual system, an individual has a right only to "the most extensive basic liberty compatible with a similar liberty for others") (emphasis added). If autonomy is viewed as synonymous with liberty, then clearly no one has an absolute right to autonomy, i.e., to do as he pleases. However, there is another view which treats respect for the rights of others as inherent in the autonomy principle itself. See Donagan, *supra* note 140, at 129 (principle requires "some process of rational reflection" leading to the individual's own conclusion that the proposed conduct is "morally permissible"). Under this view, respecting the dignity of autonomous human beings clearly does not require (or even permit) partisan zeal on behalf of clients whose moral opinions are either insincere or rationally indefensible. *Id.* at 129-33.

142. See *supra* note 65 and accompanying text. Disclosure of a client's intent to commit an immoral (but lawful) act does not, in itself, prevent the client from committing the act. In some cases, the lawyer may disclose or threaten to disclose simply in the expectation that adverse publicity or the threat thereof will cause the client to change his mind.

Of course, if clients have privacy rights that are entirely independent of their liberty rights, then disclosure might be morally impermissible. See Rosenfeld, *supra* note 18, at 510. If so, however, it is not because disclosure necessarily violates the client's right to "autonomy within the law." For a fuller discussion of the privacy rights of clients when the act proposed is immoral but not clearly illegal, see *infra* notes 250-61 and accompanying text.

143. For example, while a client has a legal right to will his property in accordance with the law, he has no legal right to commit an intentional tort; nor is he even legally "free" to commit such a tort, in the sense that it would be wrong for others to interfere with his liberty in order to prevent him from doing so. Cf. Rosenfeld, *supra* note 18, at 510-11 (distinction



Similarly, the obligation of moral neutrality alone cannot explain why disclosure is presently limited to *future* crimes and frauds and has not been broadened to include at least some past actions, particularly those in which the lawyer himself participated as an unwitting accomplice.<sup>144</sup>

Like the discussion in the previous section on confidentiality and the attorney-client privilege, none of the above is meant to suggest that the lawyer's unique functions, coupled with our strong commitment to law and legal institutions, will never result in special treatment of specific confidentiality issues. The point is simply that these functions, even if generally justifiable, do not necessarily resolve all, or even most, confidentiality issues without reference to the broader moral framework within which lawyers (and legal institutions) play their roles.

### 3. *Differences in Circumstances: Frequency of Conflict and Frustration of the Professional Objective*

There are additional characteristics which distinguish the legal profession from the medical (and other) professions—specifically, those pertaining to the circumstances in which confidentiality issues typically arise. These characteristics include: first, the frequency of conflict between a client's interests and the interests of others; and second, the fact that disclosure (or even withdrawal) often frustrates the very objectives of the specific legal consultation.<sup>145</sup> While the existence of these unique aspects of the legal profession is uncontroversial, their significance clearly is not.

From our initial survey of the ethics of confidentiality in the medical profession, it should be obvious that situations in which

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between "negative rights" and "negative freedoms"). For a discussion of other reasons why the ethical restraints on lawyers assisting unlawful client conduct are presently limited to crimes and frauds, see *infra* notes 234-37 and accompanying text.

144. See *infra* notes 262-65 and accompanying text.

145. See *infra* notes 147-48 and accompanying text. A third distinguishing characteristic might be the extent to which lawyers themselves are used in the course of (or make possible) harm done by their clients to others. See *infra* notes 289-98 and accompanying text (discussing propriety of disclosure when lawyer has participated in client's past wrongdoing).

One commentator suggests that the most important difference between doctors and lawyers is that lawyers "represent" (that is, act "instead of") their clients in ways that doctors do not. Rosenfeld, *supra* note 18, at 486. This distinction merely suggests that attorneys should not be subject to *legal* restraints to which their clients are not similarly subject. It by no means supports the traditional notion that attorneys can escape moral blame in all situations where their clients cannot. Attorneys can only escape moral blame in situations when such "moral neutrality" is necessary to protect the client's autonomy within the law. See *supra* notes 136-39 and accompanying text.

disclosure by a physician is necessary to prevent harm to others will be relatively rare. Thus, an ethical requirement that physicians have concern for the interests of others should not have any substantial effect on their day-to-day efforts on behalf of patients. Even in the atypical case in which a patient does pose a danger to others and disclosure is warranted, such disclosure does not necessarily prevent the physician from continuing to treat the patient just as he would have if no disclosure had been made.<sup>146</sup> The physician may feel that he has "betrayed" the patient, but not in the sense of having betrayed the very objectives of the professional consultation.

The lawyer's situation is clearly different. In litigation, there is always an opponent whose interests conflict with those of the client. In nonlitigation, even if there is not an actual or potential adversary, there is at least the likelihood that the client's proposed activity will have an adverse impact on others. As a result, an ethical requirement that lawyers have equal (or even meaningful) concern for others could significantly interfere with the ability of clients to secure effective representation, as well as put the lawyer in the unenviable position of constant stress and uncertainty.<sup>147</sup> Moreover, unlike the physician, the lawyer who discloses a client's confidence, or alternatively withdraws, almost inevitably frustrates the specific objectives of the legal consultation, thus raising the spectre of "betrayal" in its most powerful sense.<sup>148</sup>

Interestingly, there is an analogous conflict in medical ethics but it does not involve the duty of confidentiality. The issue concerns the individual physician's role in promoting distributive justice—that is, the allocation of health resources. Specifically, the question is whether physicians ought to be more conscious of cost containment for the benefit of society when they recommend particular procedures for their patients.<sup>149</sup> Many philosophers argue that physicians ought to be exempted from the duties of an ordinary citizen

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146. The most obvious exception would be the psychotherapist-patient relationship in which disclosure may threaten the success of the psychotherapist's efforts, even if the patient chooses to remain in therapy. See *supra* note 57.

147. Cf. 8 J. WIGMORE, *supra* note 1, § 2298 ("the legal adviser must not habitually be placed in the position of an informer"). Tension would result from a lawyer's understandable reluctance to take action detrimental to a client, as well as from the difficulty of knowing when disclosure would be morally appropriate, given, in many cases, the lawyer's limited knowledge of the morally relevant circumstances.

148. Cf. *id.* § 2291 (discussing considerations of "treachery" when attorney is forced to testify against his own client). Thus, while disclosure does not necessarily prevent the client from carrying out his plan, see *supra* note 141 and accompanying text, it will almost invariably prevent the lawyer from fulfilling the function for which he was employed.

149. See H. BRODY, *supra* note 67, at 213-30.

because, as Professor Veatch suggests, "if the physician routinely took it upon himself or herself to solve the problems of health resource allocation, that physician might be immobilized and might so abandon the patient perspective that patient care would suffer seriously."<sup>150</sup>

In view of the frequency of conflict between client interests and the interests of others, and the extent to which disclosure will frustrate the very objectives of the lawyer-client relationship, a similar argument can be made that if lawyers routinely considered the interests of others (or the interest of society as a whole), they would be immobilized and client care would suffer seriously. While this argument may be valid, it does not necessarily support any stronger duty of confidentiality than that already supported by the adversary system and by the concept of client autonomy within the law.<sup>151</sup> Even Professor Veatch, who argues that a physician ought to give preference to the patient's interest over those of society, concedes that there will be unavoidable "extreme situations" in which justice "overwhelmingly requires" the physician to abandon the patient perspective.<sup>152</sup>

Moreover, differences between the legal and medical professions suggest that the analogy is not entirely apposite. Arguably, one reason why physicians need not place cost containment on their agenda is because it "should be on someone else's agenda."<sup>153</sup> Thus, it is assumed that government officials and other bureaucrats will address the broader social issues and that they are more competent to do so. While there are sometimes similar checks on the individual client in the legal context—for example, when the adversary has equal resources and is represented by equally competent counsel—there are numerous situations in which, absent disclosure by the lawyer, no one is in a position to prevent or correct the harm threatened by a client.

In addition, the failure of physicians to consider cost containment or other distributional concerns does not typically have a direct and immediate effect on other individuals, and when it does, an "extreme situation" may be presented requiring the abandonment of the primary patient.<sup>154</sup> Such emergencies may arise more fre-

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150. R. VEATCH, *supra* note 20, at 281. *Accord* T. BEAUCHAMP & J. CHILDRESS, *supra* note 45, at 160-68.

151. *See supra* notes 189-210 and accompanying text.

152. R. VEATCH, *supra* note 20, at 287.

153. *Id.* at 285.

154. *Compare* H. BRODY, *supra* note 67, at 230 (physician should not recommend against

quently in the context of the lawyer-client relationship, but perhaps they will not arise so frequently that the "relationship of personal care and trust would be radically altered."<sup>155</sup>

In summary then, the frequency of conflict between clients and others argues against any requirement that lawyers routinely be concerned with the possible adverse effects of proposed client conduct on the interests of others. Nonetheless, at least in situations in which the harm threatened is direct and immediate, and in which there is no reason to believe that the problem is sufficiently "on someone else's agenda," permitting disclosure by lawyers does not necessarily mean the destruction of the client-centered perspective. Rather, confidentiality and disclosure dilemmas should be considered in the specific context in which they arise, with reference to the broader principles of utility and privacy.

### B. *Limits on the Prima Facie Obligation: Litigation*

Having cleared away a few of the potential obstacles to the philosophical approach, it is now time to address at least some of the specific confidentiality issues which are currently confronting the legal profession. In litigation, these issues concern increased disclosure for the purpose of promoting verdicts in accordance with facts known by the lawyer. Thus, it has been proposed that lawyers be either required to, or permitted to, reveal adverse facts not known by the court or the opponent. In addition, it has been proposed that lawyers be required to report client perjury.

#### 1. *Disclosure of Adverse Facts*

The present controversy surrounding lawyer disclosure of adverse facts was sparked by an article published in 1975 by then Judge Marvin Frankel.<sup>156</sup> In that article, Judge Frankel concluded: first, the paramount objective of the adversary system is "truth," second, the search for truth fails too much of the time, and, third, the adversary system can only achieve its primary goal by requiring lawyers to directly pursue truth, as opposed to victory, for their clients.<sup>157</sup> Among the controversial provisions of Judge Frankel's "draft" proposal was one which called for the routine disclosure of

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bone marrow transplant solely because other unknown persons might be disadvantaged) with R. VEATCH, *supra* note 20, at 286 (physician should abandon patient receiving routine physical in order to assist a non-patient bleeding to death from an automobile accident).

155. T. BEAUCHAMP & J. CHILDRESS, *supra* note 45, at 213.

156. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975).

157. *Id.* at 1031-52.

relevant evidence or witnesses not being offered by the lawyer on his own client's behalf.<sup>158</sup>

If the adversary system of litigation is justified—and it is assumed here that it is—then Judge Frankel's proposal *must* be rejected. It eliminates one of the three essential elements of that system—assignment to the parties of the responsibility of presenting their own best cases and challenging the presentation of their opponents,<sup>159</sup> it also eliminates the advocate's primary duty of partisan zeal, which is clearly incompatible with Frankel's duty to directly pursue truth in all cases.<sup>160</sup> While we might agree with Judge Frankel that the search for truth fails too much of the time, we must assume (if the adversary system is justified)<sup>161</sup> that it is not the adversary model itself which is to blame, but rather improper excesses of partisan zeal.<sup>162</sup> As Professor Uviller notes, a number of abuses might be eliminated without altering the core of the adversary system—that is, “the juxtaposition of two contrary perspectives, the impact of challenge and counter-proof [that] often discloses to a neutral intelligence the most likely structure of Truth.”<sup>163</sup>

Nonetheless, even if all these abuses were eliminated, it might still happen that in a small minority of cases, the failure of a lawyer to disclose a known fact would result in an inaccurate verdict. This possibility certainly is not incompatible with the assumption that the adversary system is justified, since no system realistically could be expected to produce accurate verdicts in all cases. The question still remains whether disclosure in this small minority of cases might be justified, given that similar departure from the norms of party presentation and partisan zeal would not occur in the vast

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158. *Id.* at 1057.

159. *See supra* note 126 and accompanying text.

160. *See supra* notes 127-28 and accompanying text.

161. As noted previously, this Article is assuming that truth is indeed the primary goal of the adversary system (in civil litigation) and that the adversary system is justified on the ground that it will (or can) promote truth in the vast majority of cases, if the appropriate limits on partisan zeal are adhered to. *See supra* note 128. Of course, while truth is an important goal in criminal trials, it is not necessarily the primary goal, given the need to protect the defendant's constitutional rights. *See id.*; *infra* notes 168-71 and accompanying text.

162. *See* Uviller, *The Advocate, the Truth and Judicial Hackles: A Reaction to Judge Frankel's Idea*, 123 U. PA. L. REV. 1067 *passim* (1975). Other commentators have urged retention of the adversary system of litigation, but with reforms in civil and criminal procedure which are designed to enhance the truth-seeking function of trials while protecting the rights of the parties. *See* J. FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 80-102 (1949); Golding, *On the Adversary System and Justice*, in *PHILOSOPHICAL LAW* 98 (R. Bronaugh ed. 1978).

163. Uviller, *supra* note 162, at 1067.

majority of cases and threaten the successful functioning of the adversary system.<sup>164</sup>

An early draft of the Model Rules contained a proposal designed to cover precisely these cases. In a section entitled "Candor Toward the Tribunal," the draft provided that in a civil case a lawyer shall not "fail to disclose a fact, even if the fact is adverse," when "[d]isclosure of the fact would probably have a substantial effect on the determination of a material issue of fact."<sup>165</sup> This draft provision was eliminated prior to submission to the ABA House of Delegates, though it is not immediately clear why it was unacceptable, other than for the reason frankly given by the Commission itself—that it was contrary to the tradition of confidentiality in the legal profession.<sup>166</sup> To assess this tradition, it is necessary to examine other reasons offered in opposition to lawyer disclosure under an adversary system of litigation.

One reason, given by Professor Freedman, is that while "truth" is by no means irrelevant or unimportant, it is not the paramount objective of the adversary system.<sup>167</sup> According to Professor Freedman, that paramount objective is "respect for human dignity,"<sup>168</sup> which presumably would be violated by even occasional departures from confidentiality. As applied to our present criminal justice system, this statement is true (with the possible exception of disclosure of client perjury) and relatively uncontroversial.<sup>169</sup> Human dignity is preserved for the guilty as well as the innocent by requiring the

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164. Cf. *infra* note 180 and accompanying text (Model Rules require departure from norms in *ex parte* proceedings).

165. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.2(a)(3)(iii) (Initial Draft 1979), reprinted in *Legal Times* of Washington, Aug. 27, 1979, at 36, col. 1.

166. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 comment (Discussion Draft 1980).

The Discussion Draft did contain a provision for the *permissive* disclosure of adverse evidence (except in criminal cases). See *id.* Rule 3.1(e). However, this provision was deleted in the Proposed Final Draft submitted to the ABA House of Delegates. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(c) (Proposed Final Draft 1981) (permission limited to refusing to offer evidence believed to be false).

167. M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 3 (1975).

168. *Id.*

169. See Luban, *supra* note 121, at 91-93. As Luban notes, it is the public, not the legal profession, that finds the ethics of defending guilty criminals to be "morally dubious." Thus, the leading defenders of the adversary system often focus their justifications on criminal defense. *Id.* at 91-92. While lawyers may disagree on the ethics of particular defense tactics, it would be unusual for a lawyer to argue that "truth" is the paramount objective of the adversary criminal trial, given the undisputed authority of constitutional protections designed to maintain the dignity of the accused. See *infra* note 170 and accompanying text. For a discussion of the ethics of disclosing client perjury in a criminal trial, see *infra* notes 201-10 and accompanying text.

state to prove guilt beyond a reasonable doubt by introducing legally admissible evidence, without coercing assistance from either the defendant or his lawyer.<sup>170</sup> In light of this important objective of the criminal justice system, any disclosure of adverse facts by a criminal defendant's lawyer would be clearly unjustified, and thus was not required, or even permitted in the draft proposal.<sup>171</sup>

When applied to civil cases, however, there is little reason to accede to the suggestion that "human dignity" and not "truth" is the paramount objective of the adversary system.<sup>172</sup> One need only look at the rules of civil procedure—those "formal rules of procedure" that constitute the second essential element of the adversary system<sup>173</sup>—to recognize that "truth" is indeed the dominant goal. These rules require truthful pleading and liberal discovery of relevant information, including discovery from the client himself.<sup>174</sup> Given the explicit language of these rules, which differ so significantly from the rules of criminal procedure, it is difficult even to imagine what this concept of "human dignity" is that is supposed to be more important than truth in civil litigation.<sup>175</sup>

A second objection to lawyer disclosure is that it would violate

170. See Uviller, *supra* note 162, at 1072-74. In addition, the defense lawyer may ethically enter a plea of "not guilty," even though he knows that his client committed the crime, because the purpose of the plea is to force the state to its burden of proof. Similarly, the defense lawyer may argue the falsity of evidence known to be accurate, STANDARDS FOR CRIMINAL JUSTICE § 4-7.8(a) (1979), and cross-examine witnesses known to be telling the truth, *id.* § 4-7.6 & commentary, because these are virtually the only means available to test the state in its efforts to prove guilt beyond a reasonable doubt. Professor Freedman argues that cross-examination of a truthful witness is permissible because the lawyer's failure to do so would constitute an indirect violation of confidentiality. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1474-75 (1966). This argument raises difficult questions regarding the value of confidentiality in relation to other goals of the adversary system in both criminal and civil trials. Therefore, the better explanation is that reliance on cross-examination is an effective (sometimes the only effective) tool for implementing the defendant's right to put the state to its proof.

171. See *supra* note 165 and accompanying text.

172. See Luban, *supra* note 121 at 92 ("[In civil cases], the primary end of adversary adjudication is legal justice, the assignment of rewards and remedies on the basis of parties' behavior as prescribed by legal norms."); see also note 128 and accompanying text.

173. See *supra* note 126 and accompanying text.

174. See *supra* notes 132-33 and accompanying text.

175. After dispensing with the so-called "truth theory," Professor Donagan adopts a justification for the adversary system based on a modification of the Freedman-Fried theory of human dignity and autonomy. Donagan, *supra* note 140, at 126-33. However, in further analyzing the concept of "autonomy," Donagan ultimately concludes that it would be indefensible for a lawyer to assist a client in advancing claims which are patently false. *Id.* at 133. Thus, under Donagan's version of "human dignity," "truth" is a subordinate goal only to the extent that the client's version of the facts is "possibly true," *id.* at 131, and the attorney is obligated to assure his clients a "fair opportunity to raise questions about what is due to them under the law." *Id.* at 133. This version is by no means incompatible with the "truth

the duty of confidentiality.<sup>176</sup> However, unlike party presentation of evidence, confidentiality is not itself an essential element of the adversary system.<sup>177</sup> The standard rationale for confidentiality is utilitarian: Confidentiality encourages clients to give lawyers the information necessary for effective advocacy.<sup>178</sup> But this utilitarian reasoning ignores the already existing deterrents built into the adversary system itself—that is, those very rules of civil procedure designed to promote truthful verdicts. Given these rules and the limited protection of the attorney-client privilege,<sup>179</sup> it is difficult to see how an extended duty of confidentiality effectively promotes client disclosures, when the client already knows (or should know) that his lawyer will not countenance a false pleading or a failure to respond to proper discovery requests.<sup>180</sup> Although the criticism that under the draft proposal a lawyer “could not promise his client that his preliminary disclosures might not injure his cause” is true,<sup>181</sup> it is also true that a lawyer cannot truthfully make that promise even under the present rules.

Under a privacy analysis, it could be argued that even though the information is subject to discovery, it remains private until the opponent specifically requests its disclosure. Nonetheless, the right to privacy is not absolute, but rather it may be overridden by more important rights and duties.<sup>182</sup> The problem with the draft proposal is that it assumes that the more important duty is “Candor Toward the Tribunal.” If, however, the attorney has no general duty

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theory” which underlies this Article’s assumption that the adversary system of litigation is justified. See *supra* note 128 and accompanying text.

176. See M. FREEDMAN, *supra* note 167, at 4-5.

177. See *supra* note 129 and accompanying text.

178. See M. FREEDMAN, *supra* note 167, at 4-5; *supra* note 129 and accompanying text.

179. See *supra* notes 97-120 and accompanying text.

180. In addition, the client is (or should be) aware that, under the Model Rules, the lawyer has an affirmative duty to disclose all material adverse facts in an ex parte proceeding. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(d) (1983). At the outset of the case, neither the lawyer nor the client can be sure whether and under what circumstances ex parte proceedings may be necessary. Therefore, the prospect of occasional attorney disclosure under the rejected proposal should cause no more deterrence than that already caused by Rule 3.3(d).

Of course, knowledge that the truth may hurt will encourage some clients to lie, and some of these clients may well have had an entirely legitimate case, even were the truth known. Cf. M. FREEDMAN, *supra* note 167, at 4-5 (criminal defendant who mistakenly assumed that she had no lawful defense was reluctant to disclose facts to her attorney). Nonetheless, we assume that rules requiring truthful pleading, compliance with discovery requests, and disclosure in ex parte proceedings are justified, despite the existence of such cases, because we believe that these rules promote justice in the vast majority of cases.

181. Uviller, *supra* note 162, at 1072 (discussing the more radical Frankel proposal).

182. See *supra* note 76 and accompanying text.



to seek "truth," and if the adversary system itself can tolerate a few inaccurate verdicts, then it is difficult to see why or how this candor is owed to the court, instead of being owed directly to the opponent who will suffer harm as the result of an unjust verdict.

Recall that it is not only the adversary system, but also the frequency of conflict between client interests and the interests of others that generally permits the lawyer to be unconcerned with the effect of his actions on others.<sup>183</sup> Moreover, the assumption that the opposing counsel will effectively protect his own client's interests is an additional justification for this lack of concern in adversary litigation. Assuming that the failure of opposing counsel to discover a crucial fact represents a "breakdown" in the system<sup>184</sup>—probably attributable to either a lack of resources or a lack of diligence on the part of opposing counsel—then this additional justification is no longer available. The question then becomes whether disclosure of adverse facts under the draft proposal would have a significant adverse effect on the lawyer's ability to maintain a client-care perspective.

Under the draft proposal, a lawyer would be required to disclose an adverse fact only when it would "probably have a substantial effect in the determination of a material issue."<sup>185</sup> Given the truthful pleading requirement in the federal rules, it must be assumed that the lawyer reasonably believes good grounds exist to support his client's position,<sup>186</sup> therefore, disclosure would only be required in rare cases. If disclosure is to be required only in an exceptional case, it is difficult to justify the failure to recognize at least a limited duty on the part of a lawyer to consider the adversary's interests.

It remains unclear whether this limited duty would be strong enough to outweigh the client's right to privacy. In some cases, a client may have a strong privacy interest that clearly outweighs the potential for an insubstantial harm to the opponent.<sup>187</sup> Nonethe-

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183. See *supra* notes 144-55 and accompanying text.

184. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.2 comment (Initial Draft 1979), reprinted in *Legal Times of Washington*, Aug. 27, 1979, at 36, col. 3.

185. See *supra* note 165 and accompanying text.

186. See *supra* note 132 and accompanying text.

187. For example, disclosure by the defense attorney in a medical malpractice action might cause considerable harm to the reputation and career of the defendant-physician. If the plaintiff is wealthy or completely covered by medical insurance, the defense attorney might properly conclude that disclosure would be morally inappropriate.

There are other reasons why disclosure should not be required. First, given that the lawyer should reasonably believe that there are good grounds to support his client's position, see *supra* note 132 and accompanying text, it will be difficult to judge when particular "facts" (or other evidence, such as a change in a witness' story) are so significant that they clearly ought

less, there are presumably some cases in which the client's privacy interest is slight and would be outweighed by a substantial threat of harm to the opponent.<sup>188</sup> If there are reasons against at least *permissive* disclosure in such an exceptional case, they have yet to be sufficiently articulated by the profession.

## 2. *Disclosure of Client Perjury*

One of the few disclosure reforms proposed by the Kutak Commission that was accepted by the ABA House of Delegates is the provision for mandatory disclosure of client perjury in both civil and criminal cases.<sup>189</sup> If adopted by the states, this provision will finally resolve a long-standing controversy within the profession.<sup>190</sup>

Under the Model Code, a lawyer may not knowingly present perjured testimony.<sup>191</sup> If the lawyer learns of client perjury after the fact, he is prohibited from revealing it to either the court or the

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to be revealed. Cf. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RESEARCH J. 926, 936 (difficulties of interpreting similar language in proposal for disclosure in negotiations). Second, because of the strong tradition of client loyalty, lawyers may be unlikely to comply with rules that require disclosure in such cases, and to have a widely violated rule may be "a continuing hypocrisy that may poison the application of the remaining rules." *Id.* at 937. Finally, lawyers (and clients) will be especially reluctant to reveal adverse facts when they suspect that the other side is not prepared to be equally candid. If the duty owed is not one of candor to the court, but rather a duty of benevolence owed directly to the opponent, then this last consideration is obviously a material one.

188. For example, in *Spaulding v. Zimmerman*, 263 Minn. 346, 116 N.W.2d 704 (1962), the lawyer for the defense in a personal injury case discovered that the plaintiff had a life threatening aortic aneurism, apparently caused by the accident, that the plaintiff's doctors had not found. This information did not even relate to the client-defendant and thus was not close to the client's "core self"; moreover, the only adverse effect of disclosure would have been a judgment for damages in accordance with damages actually sustained, although well in excess of what a jury might otherwise have rendered.

189. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4) (1983). While the rule merely states that a lawyer "shall take reasonable remedial measures," the comment makes clear that if the client himself will not recant, and withdrawal will not "remedy the situation," the lawyer must make disclosure to the court. *Id.* Rule 3.3 comment. Rule 3.3 also makes it clear that when a lawyer learns in advance that his client intends to commit perjury, the lawyer may not present such testimony. See *id.* Rule 3.3(a)(4) & comment.

190. See Kramer, *Clients' Frauds and Their Lawyers' Obligations: A Study in Professional Irresponsibility*, 67 GEO. L.J. 991 (1979); Lawry, *Lying, Confidentiality and the Adversary System of Justice*, 1977 UTAH L. REV. 653, 678-80; Polster, *The Dilemma of the Perjurious Defendant: Resolution, Not Avoidance*, 28 CASE W. RES. L. REV. 3 (1977); Wolfram, *Client Perjury II*, *supra* note 128; Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809 (1977) [hereinafter cited as Wolfram, *Client Perjury I*]. As Professor Wolfram notes, "A persistent criticism of the existing Code of Professional Responsibility has been that it deals with the problem of client perjury in a confusing, obscure, and convoluted manner." Wolfram, *Client Perjury II*, *supra* note 128, at 968 n.31.

191. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(4) (1983).

opponent, except in rare cases.<sup>192</sup> However, when the lawyer learns of his client's intent to commit perjury, it is unclear whether withdrawal is sufficient, or whether the attorney may (or must) disclose the client's unlawful intent.<sup>193</sup> One commentator has argued that at least in criminal cases, the attorney is obligated not only to allow the client to take the stand and perjure himself, but also to question him and argue the truth of his testimony in the normal fashion.<sup>194</sup>

In civil cases, the present distinctions between intended and completed perjury and between withdrawal and disclosure are clearly unjustified. Presumably, the distinctions are based on the fact that a lawyer can refuse to present perjured testimony and, if necessary, withdraw (either before or after the perjury is committed) without a direct violation of confidentiality. It must be remembered, however, that the standard utilitarian justification for confidentiality is that it promotes client disclosures, and further, that full disclosure may be deterred just as effectively through indirect, as well as direct, revelation of confidences.<sup>195</sup> Moreover, it has

192. When originally adopted, DR 7-102(B)(1) read as follows:

(B) A lawyer who receives information clearly establishing that: (1) his client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal.

ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 306-07 (Am. B. Found. 1979). In 1974, the words "except when the information is protected as a privileged communication" were added, thus creating an exception to the rule requiring disclosure. *Id.* In 1975, the ABA Committee on Ethics and Professional Responsibility broadly construed the term "privileged communication" to mean both "confidences" and "secrets" under DR 4-101. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975). According to the Committee, disclosure might still be required, but only if the information was obtained from a third party and not in connection with the attorney's professional relationship with the client, or if the disclosure were required by law. *See id.*

For a discussion of the ethics of revealing client perjury in states that have not adopted the amended version of DR 7-102(B)(1), see Kramer, *supra* note 190, at 994-98.

Even when the attorney may not be permitted to disclose prior perjury, he may be required to withdraw, at least in civil cases. *See* Wolfram, *Client Perjury I*, *supra* note 190, at 854-62.

193. While DR 4-101(C)(3) (like its predecessor, Canon 37) permits disclosure of a client's intent to commit a crime, *see supra* note 111 and accompanying text, at least one ABA opinion suggests that having withdrawn, the attorney may not disclose the client's intent to commit perjury. *See* ABA Comm. on Professional Ethics and Grievances, Formal Op. 268 (1945). *But cf.* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1416 (1978) (implying that disclosure might have been required when perjury had occurred in depositions, if attorneys had not accomplished termination of fraudulent suit).

194. *See* M. FREEDMAN, *supra* note 167, at 40-41.

195. *See, e.g.*, Freedman, *supra* note 170, at 1474-75 (failure to cross-examine a truthful prosecution witness would constitute indirect violation of confidentiality and would deter criminal defendants from full disclosure to their attorneys). Thus, a lawyer's withdrawal in mid-suit may constitute a clear (if indirect) signal both to opposing counsel and to successor counsel that something is amiss.

been demonstrated<sup>196</sup> that there is a great deal of deterrence already built into the system and that society has determined through its rules of civil procedure that the potential harm of such deterrence is outweighed by the importance of truth in civil adjudication. Therefore, any additional deterrence resulting from a mandatory disclosure rule will probably be negligible and will almost certainly be outweighed by the need to achieve the more important goal of the adversary system—truth.<sup>197</sup>

Similarly, under a privacy analysis, the client who would take unfair advantage of his opponent through illegal means is clearly an “unjust aggressor” who forfeits his right to privacy.<sup>198</sup> Alternatively, even if the client retains some right to privacy, it should be overridden by his attorney’s recognition of a duty to either the court, the opponent, or both to keep the proceedings free from illegal overreaching on the part of the client.<sup>199</sup>

The utilitarian approach in criminal cases is somewhat more difficult because of the absence of significant deterrents to full disclosure under the rules of criminal procedure. Professor Freedman may be correct in his assumption that knowledge that the lawyer will refuse to put the defendant on the stand to “tell his story” may deter a significant number of defendants from the full disclosure essential to an adequate defense.<sup>200</sup> Nonetheless, it is far from clear

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196. See *supra* notes 132-33, 180 and accompanying text.

197. See, e.g., Lawry, *supra* note 190, at 675 (disclosure of perjured testimony probably “will not create widespread changes in client behavior,” and, even if it did, it is debatable “whether the positive value of increased client trust would be worth the negative results”).

198. See *supra* note 80 and accompanying text. Thus, as one court has stated, “When a prospective client approaches an attorney, he may expect that the attorney will assist him to the best of the attorney’s ability. He may not expect, however, that the attorney will tolerate lying or any other species of fraud in the process.” Committee on Professional Ethics v. Crary, 245 N.W.2d 298, 306 (Iowa 1976).

199. Cf. Lawry, *supra* note 190, at 674 (adversary system itself endangered if “lying is condoned through a mistaken assumption about the place ‘confidentiality’ has in the system”).

Perhaps a more difficult case involves the lawyer who does not discover his client’s perjury until after the termination of the proceeding. If disclosure by the lawyer would enable the opponent to obtain a new trial or some other form of redress, then there does not appear to be a sound reason not to require disclosure as in an ongoing proceeding. *But see* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 comment (1983) (obligation ends at conclusion of proceeding); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 comment (Proposed Final Draft 1981) (obligation ends at conclusion of proceeding, but lawyer has permission to rectify consequences). If, however, no such redress is available, then the only purpose served by disclosure is punishment of the client, and disclosure should not be required or permitted. See *infra* notes 281-86 and accompanying text (outside adversarial process, disclosure of past crimes permissible only to prevent or rectify substantial harm to others).

200. See M. FREEDMAN, *supra* note 167, at 31.

that the existence of such a substantial deterrent causes more harm than it prevents.

Part of the problem is determining what constitutes "harm," given the various goals of the criminal justice system. If an "ignorant innocent" will not confide in his attorney because of his mistaken belief that only perjury will free him,<sup>201</sup> then this is surely a harm that society would wish to avoid. But, these cases are undoubtedly rare,<sup>202</sup> and there are limits to how far society is willing to go to prevent the conviction of the innocent.

Another aspect of the problems is how to assess the "harm" that occurs when a *guilty* defendant is deterred from confiding in his attorney and, as a result, commits perjury without his attorney's knowledge. Such client perjury is not only a crime, but also an abuse of the criminal process which may result in acquittals that would not otherwise occur. On the other hand, if full disclosure is essential to an effective defense, then the combination of lack of candor to the attorney and unsophisticated perjury may in fact *reduce* the defendant's chance for acquittal or a lighter sentence. If so, then perhaps the "harm" to defendants, whether innocent or guilty, outweighs the harm of a few unjust acquittals.<sup>203</sup> Of course, the vulnerable link in this argument is the assumption that the lack of effective counsel, which occurs as a result of a guilty client's desire to commit perjury, is a "harm" that society wishes to avoid<sup>204</sup> at the expense of the integrity of the legal process and the increased acquittals that result from credible perjury.

This same problem arguably arises under a deontological approach to the disclosure of client perjury in criminal cases. It has thus been argued that to deprive a criminal defendant of an effective defense because of ethical rules, which inhibit full disclosure by the client, is to render meaningless the criminal justice system's paramount goal of respecting the dignity of the individual.<sup>205</sup> The flaw

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201. See Donagan, *supra* note 140, at 144-45 (using Professor Freedman's example of a battered wife who shot her husband in self-defense and then lied about doing so because of her ignorance of the availability of a legal defense).

202. See *id.* at 145 (competent lawyer should be able to anticipate fears and elicit the truth).

203. This argument would be strengthened if it were also true that under a rule of strict confidentiality, attorneys could persuade their clients to tell the truth in the office, as well as avoid the harm of perjury by persuading their clients that they would be better off not taking the stand.

204. Cf. Donagan, *supra* note 140, at 144 (arguing, contrary to Professor Freedman's assertion, that there is no violation of "human dignity" when a criminal defendant is deterred from full disclosure because of a belief that such disclosure will disadvantage his case).

205. See M. FREEDMAN, *supra* note 167, at 5.

in this argument is the assumption that the ineffective defense results from the ethical rules themselves, when in fact it is the defendant's own autonomous decision to withhold information that is responsible for the harm that may ensue.<sup>206</sup> To ensure that the dignity of the criminal defendant is respected, the lawyer need only inform him that while he cannot permit the client to commit perjury, he will be in a better position to make an effective defense if the client is completely candid. It is then up to the defendant to decide if he wants to risk losing the benefits of fully informed counsel in order to guarantee his ability to lie on the stand.<sup>207</sup>

The privacy analysis in criminal cases does not appear to differ significantly from the analysis in civil cases.<sup>208</sup> Of course, the criminal defendant need not take the stand at all, but if he does, he is treated in almost all respects like his civil counterpart.<sup>209</sup> By committing perjury, the criminal defendant not only unjustly takes advantage of his opponent, but also abuses his unique status under the criminal adversary system.<sup>210</sup>

206. See *supra* note 204.

207. Donagan, *supra* note 140, at 146.

208. See *supra* notes 198-99 and accompanying text.

209. See, e.g., *Harris v. New York*, 401 U.S. 222 (1971) (statement, which is rendered inadmissible against defendant in prosecution's case-in-chief because obtained in violation of *Miranda* safeguards, may be used to impeach defendant's credibility should he elect to testify). For one of several examples where criminal defendants are treated differently than other witnesses, see FED. R. EVID. 609(a)(1) (balancing process for impeachment by prior felony conviction not involving dishonesty or false statement).

210. See, e.g., *Harris v. New York*, 401 U.S. 222 (1971). In *Harris*, the Court stated:

Every criminal defendant is privileged to testify in his defense, or to refuse to do so.

But that privilege cannot be construed to include the right to commit perjury . . . .

Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process . . . .

The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.

*Id.* at 225-26. See also Polster, *supra* note 190, at 30 ("It seems particularly objectionable for the defendant to commit perjury in a system which affords the defendant the right of remaining silent."); cf. Wolfram, *Client Perjury I*, *supra* note 190, at 840 n.117 (details various ways in which unique status of criminal defendant puts him in a "particularly advantageous strategic position to commit perjury effectively").

It has been argued that criminal defendants have a constitutional right both to testify and to receive effective assistance of counsel while they testify, even if the testimony is perjured. See, e.g., Polster, *supra* note 190, at 15-29; cf. Brazil, *Unanticipated Client Perjury and the Collision of Rules of Ethics, Evidence, and Constitutional Law*, 44 MO. L. REV. 601, 633-39 (1979) (attorney disclosure would violate fifth amendment privilege against self-incrimination). The Supreme Court recently held that there was no sixth amendment violation of the right to effective assistance in a case where a defense lawyer successfully persuaded the defendant to testify truthfully by threatening to withdraw or to disclose the perjury if the defendant lied. *Nix v. Whiteside*, 106 S. Ct. 988 (1986). While the majority opinion in *Nix*

### C. *Limits on the Prima Facie Obligation: Nonlitigation*

Traditionally, the most significant limitation on the lawyer's duty of confidentiality, in the nonlitigation context, has been the exception for permissive disclosure of a client's intent to commit a crime or fraud.<sup>211</sup> This exception merely tracks the evidentiary privilege for attorney-client communications and does not represent any balancing of the relevant interests that are typically present outside of the context of attorney testimony against a client in court.<sup>212</sup> While there have been efforts to permit, or compel, disclosure of some completed client wrongs,<sup>213</sup> these efforts have been thwarted by two prevalent but mistaken beliefs. The first is that the attorney-client privilege itself forbids such disclosure,<sup>214</sup> and the second is that the privilege represents a legal tradition in which the value of confidentiality outweighs almost all other interests, including the interests of innocent victims of a rectifiable crime or fraud.<sup>215</sup>

Ironically, although the Kutak Commission set out to break with this tradition and expand the range of attorney disclosure, it ultimately was forced to include a confidentiality provision in the Model Rules that actually cuts back on the disclosure presently allowed under the Model Code.<sup>216</sup> Thus, the ABA House of Delegates not only rejected the permissive disclosure of past crimes and

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implied approval of ethical rules prohibiting lawyer-assisted client perjury, *see id.*, four justices expressed their belief that the decision in no way resolved the controversy surrounding the client perjury issue in the context of drafting state ethics codes. *Id.* (concurring opinions of Justices Brennan, Blackmun and Stevens).

211. *See supra* notes 98-111 and accompanying text.

212. *See supra* notes 110-13 and accompanying text.

213. *See infra* notes 286-90 and accompanying text.

214. *See supra* note 102 and accompanying text.

215. *See supra* notes 109-11 and accompanying text.

216. Compare MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (1983) (permissive disclosure of any intended crime) and MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (Proposed Final Draft 1981) (disclosure permissible to prevent harms "likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another") with MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1983) (permissive disclosure limited to crimes likely to result in "immediate death or substantial bodily harm"). Earlier versions of the Model Rules provided for even more expansive disclosure. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 (Initial Draft 1979), reprinted in *Legal Times of Washington*, Aug. 27, 1979, at 27, col. 1; MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (Discussion Draft 1980).

There was, however, one important instance in which the Kutak Commission itself narrowed the range of permissive disclosure, and that is the requirement that the harm sought to be prevented be substantial. Compare MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (1983) with MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (Proposed Final Draft 1981).

frauds when the attorney was an unwitting participant,<sup>217</sup> it also rejected the disclosure of intended frauds,<sup>218</sup> and limited the disclosure of intended crimes to those involving "imminent death or substantial bodily harm."<sup>219</sup>

The philosophical approach may prove helpful in evaluating the merits of both the present and traditional ABA positions, as well as some suggested alternatives. At the outset, it is readily apparent that the prospect of relatively minor injury is not sufficient to override the prima facie obligation of confidentiality. Thus, the present ABA position is clearly justified in its attempt to limit disclosure to cases involving substantial harm.<sup>220</sup> It is less clear: (1) whether the substantial harm to be prevented should be limited to death or serious bodily harm; (2) whether and how the legal nature of the intended act should affect the permissibility of disclosure; and (3) whether the fact that the client has already acted should foreclose lawyer disclosure in all cases.<sup>221</sup>

### 1. *Disclosure Preventing Substantial Injury Other Than Death or Bodily Harm*

Prior to amendment by the ABA House of Delegates, the proposed Model Rules provided for permissive disclosure when necessary "to prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm, or substantial injury to the financial interest or property of another."<sup>222</sup> Putting aside for the moment questions regarding the limitation of disclosure to crimes and/or frauds and the distinction between past and future acts, the question remains whether the ABA was justified in narrowing the range of per-

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217. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(3) (Proposed Final Draft 1981).

218. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (Proposed Final Draft 1981). As noted earlier, the present Model Code may or may not permit disclosure of intended frauds that are not also crimes. See *supra* note 111.

219. Compare MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (Proposed Final Draft 1981) (permissive disclosure includes crimes "likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another") with MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1983) (permissive disclosure limited to crimes likely to result in "imminent death or substantial bodily harm").

220. See *supra* note 216.

221. The only exceptions for disclosure of past conduct are the mandatory disclosure of client perjury, see *supra* note 189 and accompanying text, and the permissive disclosure of information necessary for the lawyer to collect a fee or defend his own conduct, see MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1983).

222. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (Proposed Final Draft 1981).



missive disclosure to cases involving only physical harm to the person. As will be demonstrated, there is no justification for attempts to distinguish future crimes involving death or substantial bodily harm from future crimes or frauds involving substantial injury to financial or property interests.

There are serious flaws in the utilitarian reasoning used to support the present distinction. The Comment to Rule 1.6 boldly asserts that, while the prohibition of attorney disclosure in most cases sacrifices the interests of potential victims in favor of preserving confidentiality, in the long run the public will be better protected, since clients will be encouraged to reveal their plans and lawyers will then dissuade the clients from carrying them out.<sup>223</sup> Aside from the fact that there is no empirical evidence that this "assumption" is true, the Comment ignores the fact that without at least the threat of disclosure, the lawyer has little means of "persuading" an otherwise recalcitrant client to comply with the law.<sup>224</sup> Moreover, the Comment fails to explain why lawyers *are* permitted to reveal intended crimes involving death or substantial bodily harm but *are not* permitted to reveal intended crimes and frauds involving substantial harm to the financial or property interests of another. Presumably the same "assumption" applies equally to all those situations, and thus more lives might be saved (in the long run) if lawyers were prohibited from disclosing even threats of murder.<sup>225</sup>

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223. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 comment (1983).

224. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment (Discussion Draft 1980) ("[t]o some extent the existence of this discretion [to disclose] inhibits disclosure by the client and yet enables the lawyer to inhibit the client from committing the wrongful act").

225. Indeed, this very point was made (unwittingly) in an earlier version of this same comment which noted that "[a]ny rule governing disclosure of threatened harm involves balancing the interests of one group of potential victims against those of another," and, further, that no basis exists for "a categorical preference . . . in favor either of immediate victims of a present client or potential victims of later clients." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment (Discussion Draft 1980). If the point is applicable to victims of crimes or frauds involving injury to their financial or property interests, it should be equally applicable to victims of crimes involving death or substantial bodily harm.

In addition, the comment fails to address the obvious discrepancy between the virtually absolute duty of confidentiality where the interests of others are concerned and the broad exception for disclosure when the interests affected are those of the lawyers themselves. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1983) (disclosure permitted in controversies between lawyer and client to establish defense to criminal or civil action against lawyer and to respond to client allegations in a disciplinary or other legal proceeding). Surely, more clients are potentially affected by breaches of confidentiality which occur during a fee dispute than by breaches which occur in the course of prevention of crimes involving death or substantial bodily harm. The explanation offered in the comment is that "the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary," *see id.* Rule 1.6 comment (1983); however, this is deontological reasoning which not only appears to

If utilitarianism does not clearly support a rule permitting disclosure of crimes involving death or substantial bodily harm, then the consensus among lawyers that disclosure *is* permissible in at least these cases must be grounded in nonutilitarian reasoning. Deontological reasoning offers a more than adequate explanation: clients threatening crimes of violence are unjust aggressors who have either entirely forfeited their right to privacy (as to that threat) or have but a slight interest in privacy that is clearly overridden by their victim's interest. Of course, this reasoning is equally applicable to clients threatening crimes or frauds involving substantial harm to the financial or property interests of others. They, too, are clearly unjust aggressors, and it is difficult to see how the nature of the harm threatened affects either the forfeiture or devaluing of their right to privacy in relation to the substantial interest of their threatened victims.

Finally, none of the "institutional" concerns regarding the proper role of lawyers in society supports the present distinction between crimes of violence and crimes or frauds threatening serious economic harm. The concept of client autonomy *within the law* in no way sanctions acts that are criminal or fraudulent. Moreover, because it is always possible for the client to prevent disclosure by renouncing his intent, there is no substantial threat to the autonomy of the "ignorant innocent,"<sup>226</sup> who is certainly entitled to a lawyer's assistance in ascertaining the legal status of an intended act. Similarly, while it may be true that clients more frequently consult lawyers prior to engaging in crimes and frauds involving financial or property interests than they do prior to engaging in crimes of violence, it is difficult to see how this fact will adversely affect the client-care perspective in most cases. The lawyer must assume that most clients do *not* want to commit a serious crime or fraud, if only to avoid detection and its consequences. Thus, in determining whether the proposed act is indeed unlawful, the lawyer's initial concern for the interests of others cannot be separated from his initial concern for the interests of the client himself.<sup>227</sup> If the prospect of disclosure undermines the lawyer-client relationship at all, it will do so only in situations where the client knows in advance that he

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conflict with the utilitarian reasoning described above, but which also ignores the fact that clients who question their lawyers' fees are not necessarily wrongdoers bent on exploiting the attorney-client relationship for their own illicit gain.

226. See *supra* note 201 and accompanying text.

227. Moreover, since lawyers may not knowingly assist in client crimes or frauds, see *infra* notes 156-210 and accompanying text, the lawyer must also consider his own interests whenever such client conduct is proposed.

will insist on an unlawful course of conduct. It is difficult to see why anyone but the most avaricious lawyer or client would argue for the preservation of the lawyer-client relationship in those cases.<sup>228</sup>

## 2. *Disclosure Preventing Substantial Injury Resulting From Intended Client Acts Other Than Those That are Criminal or Fraudulent*

Having concluded that the nature of the harm threatened does not necessarily determine the propriety of disclosure, the question arises whether disclosure should be limited to crimes and/or frauds, or broadened to include other unlawful acts, or even, in rare cases, acts that are entirely lawful. After all, our counterparts in the medical profession have not been unduly concerned with the legal status of a patient's proposed activities.<sup>229</sup> Moreover, if the concern is to prevent harm—and not unlawful acts, as such<sup>230</sup>—then perhaps the insistence on characterization of the legal status of an act is simply unwarranted legalism on the part of the lawyers.

Because of the historical linkage between the ethical duty of confidentiality and the law of attorney-client privilege, the profession has not yet articulated sound *ethical* reasons why disclosure of intended acts<sup>231</sup> ought to be limited to unlawful activity in general, or crimes and frauds in particular. An obvious, if partial, rationale for the former can be found in the previously discussed principle of client autonomy, that is, the notion that in a democratic society committed to individual autonomy and to the rule of law, lawyers ought not interfere with client acts that are clearly, or even arguably, within the law.<sup>232</sup> However, the *prima facie* obligation to

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228. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment (Discussion Draft 1980), which states:

The qualified protection of confidences . . . is extended not in the interest of the client who is determined to pursue wrongful purposes, but in the interest of encouraging clients in general to be candid with their lawyers to the end that they might be guided in complying with the law.

229. See *supra* notes 37-44 and accompanying text (while present AMA Principles restrict disclosure to that required by law, such Principles do not appear to reflect a consensus among physicians generally).

230. This assumption underlies even the very restrictive rule approved by the ABA House of Delegates, which did not permit disclosure of all "crimes" but only those resulting in a certain kind of substantial harm to others. See *supra* notes 219-20 and accompanying text; see also *infra* notes 281-84 and accompanying text (permissible purposes of possible disclosure of past client conduct).

231. For a discussion of ethical reasons for prohibiting disclosure of past conduct, see *infra* notes 262-314 and accompanying text.

232. See *supra* notes 135-43 and accompanying text.

honor client autonomy *within the law* does not itself entail either the nondisclosure of legal wrongs other than crimes or frauds, or even the nondisclosure of entirely lawful acts in extreme circumstances.<sup>233</sup>

a. *Broadening Disclosure of "Unlawful" Activity Beyond Crimes or Frauds.* The attorney-client privilege is not the only possible source of an ethical rule limiting disclosure to crimes or frauds. Proponents of the traditional approach would probably be quick to point out that there is an analogous provision in the Model Rules that is clearly derived from ethics and not from any rule of law. That provision prohibits the lawyer from counseling or assisting the client in any conduct that the lawyer knows to be either "criminal or fraudulent."<sup>234</sup> While this section narrows somewhat the range of prohibited acts under the Model Code<sup>235</sup>—and is likely for that reason to be controversial—it has at least some plausible justification.

As the Kutak Commission noted, the inclusion of intentional torts as a prohibited activity can be criticized on the ground that, at least with respect to some property rights, the commission of a legal wrong can occur as the result of a good faith effort to determine precisely what those rights are, or as simply an overzealous (and in hindsight misguided) effort to effectuate a self-help remedy.<sup>236</sup> To the extent that the parameters of tort law are less capable of ascertainment than the law of crimes or frauds, fear of possible disciplinary action may deter lawyers from pursuing the not clearly, but at least arguably, lawful objectives of their clients, to the detriment of their clients' legitimate interests. Finally, the knowing commission of a legal wrong, including even some intentional torts, is not necessarily the commission of a moral wrong, and it would be extremely difficult to specify precisely which legal wrongs (other than crimes or frauds) ought to be categorically prohibited.<sup>237</sup>

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233. *Id.*

234. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) (1983).

235. The parallel section of the Model Code prohibits lawyer assistance in conduct known to be "illegal or fraudulent." See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(7) (1983). The term "illegal" has been interpreted to encompass conduct that was neither criminal nor fraudulent, although the "precise contours" of this area are unclear. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) legal background (Proposed Final Draft 1981) (including references to cases involving intentional torts and drafting of documents containing legally prohibited terms).

236. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) legal background (Proposed Final Draft 1981).

237. An additional category, the drafting of documents containing legally prohibited terms, was proposed by the Kutak Commission but rejected by the ABA House of Delegates.

These justifications do not necessarily apply in the context of permissive disclosure of intended client acts that are clearly unlawful. Fear of possible disciplinary action will not cause a lawyer to disclose or fail to pursue an arguably lawful and good faith claim, if disclosure is not required, but merely permitted. Similarly, while it is difficult to specify *classes* of legal wrongs (other than crimes or frauds) that are typically moral wrongs as well, there will be some individual cases in which the answer will be clear. Again, the permissive nature of the rule (as well as the very strong tradition of client loyalty) makes it unlikely that a lawyer will disclose in all but the most egregious cases.<sup>238</sup>

Perhaps the Kutak Commission was responding to the weakness of these traditional rationales for limiting disclosure to crimes and fraud when it proposed a rule that permitted disclosure when necessary to prevent "the consequences of a deliberately wrongful act by the client."<sup>239</sup> The language suggests a significant expansion of the prior rule. However, the term "wrongful act" was limited by definition to "[a]n act violating a civil or penal standard *in which knowledge of the circumstances is an element of the violation.*"<sup>240</sup> Thus, while intentional torts were to be included, other torts—including negligence, strict liability, defamation and invasion of privacy—were not, nor were many other acts that would result in civil liability—for example, breach of contract—even though in the particular case the client might in fact act with full knowledge of both the circumstances and the unlawful nature of the act.<sup>241</sup>

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Compare MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) (Proposed Final Draft 1981) (prohibited "preparation of a written instrument containing terms the lawyer knows or reasonably should know are legally prohibited") with MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) (1983) (no such provision).

238. For an extensive discussion of such an egregious case—Ford Motor Co.'s decision not to recall the 1973 Pinto with its negligently designed gas tank, see D. Luban, *supra* note 91.

Because disclosure is not required, the lawyer will be free to consider all of the circumstances and unique aspects of each case which will enhance the likelihood of an accurate assessment of the moral propriety of disclosure. Such a case-by-case treatment would not be possible under a rule prohibiting lawyer assistance in client conduct that is in some sense unlawful.

239. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(c)(2) (Discussion Draft 1980). This section also would have permitted disclosure when necessary to "rectify the consequences of a deliberately wrongful act by the client, except when the lawyer has been employed after the commission of such an act to represent the client concerning the act or its consequences." *Id.* For a discussion of the ethics of disclosure of past client acts, see *infra* notes 262-314 and accompanying text.

240. MODEL RULES OF PROFESSIONAL CONDUCT Definitions (Discussion Draft 1980) (emphasis added).

241. *Cf.* D. Luban, *supra* note 91, at 2-4 (discussing memorandum of Ford Motor Co.

The Kutak Commission was apparently attempting to set out *classes* of cases in which disclosure was most likely to be an appropriate option. It did so by isolating two significant features of these cases: (1) the client's awareness that the proposed act would result in either criminal or civil liability and (2) the fact that when knowledge of the circumstances was an *element* of the unlawful activity, the deliberate legal wrong was most likely to be a moral wrong as well.<sup>242</sup>

The first feature—the client's awareness of the unlawful nature of the act—is one that, absent exceptional circumstances, would probably be justified under either utilitarian or deontological analysis.<sup>243</sup> As a matter of utility, potential clients with legitimate interests might well be deterred from seeking legal advice by the prospect of attorney disclosure in situations in which the client in good faith believes that his proposed conduct is or may be lawful.<sup>244</sup> Similarly, where a client is unaware of the unlawful nature of his proposed act, the client's right to privacy may be violated when he is not given the opportunity, prior to lawyer disclosure, to voluntarily alter the proposed conduct in response to the lawyer's advice.

The second feature—the insistence on scienter as an *element* of the legal wrong—is more problematic. It may well be that, absent extraordinary circumstances, a client's knowledge of the circumstances should be required, in order to avoid a situation in which the frequency of conflicting interests significantly endangers the client-care perspective.<sup>245</sup> On the other hand, it is far from clear that

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which suggested that management knew in advance that the company would be liable in negligence for deaths and injuries attributable to unsafe design of 1973 Pinto).

242. The term "deliberately" was not defined; however, since the term "wrongful act" was defined to include knowledge of the circumstances, *see supra* note 240 and accompanying text, "deliberately" presumably referred to the client's knowledge that the proposed act would violate a civil or penal standard. *Cf.* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment (Discussion Draft 1980) (obligation of confidentiality not intended to serve interests of client "determined to pursue wrongful purposes" but rather of clients desiring to "be guided in complying with the law").

243. *See supra* notes 68-88 and accompanying text.

244. Clients would be less likely to hold back information if they knew that an attorney was required to advise a client that a proposed act was unlawful before the attorney was permitted to disclose, thereby giving the client the option of avoiding disclosure by voluntarily complying with the law.

The preceding section on adversary litigation concluded that arguments for maintaining confidentiality based on fears of deterring client candor are highly exaggerated. *See supra* notes 179-81, 195-97 and accompanying text. Of course, an important distinction between litigation and nonlitigation is that in the former there is already a great deal of deterrence built into the system, whereas in the latter there is not. *See id.*

245. *See supra* notes 147-55 and accompanying text.

disclosure should be categorically prohibited in cases in which the requisite knowledge is present, even though not technically required by law, since in either case the lawyer will have made a subjective determination of the client's mental state.

The strongest argument in favor of the requirement of scienter as an element of the legal wrong is that it tends to isolate a *class* of legal wrongs that are likely to be serious moral wrongs as well.<sup>246</sup> Nonetheless, there undoubtedly will be individual cases in which scienter is present, although not required, where it is clear that the client's failure to alter the proposed conduct is seriously immoral, given the likelihood of substantial harm to others.<sup>247</sup> The question whether disclosure ought to be permitted in these cases probably depends on how much *discretion* individual lawyers should be given to determine the "serious immorality" of the proposed client act.

Exercising broad discretion will call for extensive and often complex moral reasoning, for which most lawyers have no special training or expertise. However, both the tradition of client loyalty and important economic incentives<sup>248</sup> suggest that it is unlikely that giving lawyers *permission* to disclose in a large range of cases will, in fact, result in widespread, and inappropriate, disclosure of client confidences. If, however, it is a reasonable assumption that broader disclosure options will in fact result in only marginally increased disclosure, and that disclosure is most likely to occur in morally appropriate cases, then the argument in favor of extending permissive disclosure (in order to prevent substantial and legally unjustified harm) is difficult to rebut.<sup>249</sup>

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246. For example, a client may deliberately, and with full knowledge of the circumstances, intend to breach a contractual obligation for which he would clearly be liable for extensive damages in a civil action. Nonetheless, we would hardly think this an appropriate case for disclosure without knowing a good deal more about the particular circumstances of the case. Similarly, an intentional invasion of privacy may or may not be a serious moral wrong (for which disclosure would be an appropriate option), depending on such factors as the type of privacy interest involved (personal or commercial) and the likelihood that the injured party would be in a position to recover adequate damages to compensate for the injury. On the other hand, intentional torts such as assault, battery and false imprisonment (all of which require intent as an element of the tort), RESTATEMENT (SECOND) OF TORTS §§ 20, 21, 35 (1965), are almost always moral as well as legal wrongs.

247. See, e.g., *supra* notes 237, 241 and accompanying text.

248. See White, *supra* note 187, at 937-38.

249. One rebuttal argument that might be made here is that while attorneys may rarely make voluntary disclosures, the existence of a permissive disclosure rule in an ethics code may support the efforts of some to narrow the scope of the evidentiary privilege; thus, attorneys soon might be required to disclose previously protected confidences in judicial or administrative proceedings. See Redlich, *Disclosure Provisions of the Model Rules of Professional Conduct*, 1980 AM. B. FOUND. RESEARCH J. 921, 982-84, 987. Moreover, permissive disclo-

b. *Disclosure of Entirely Lawful (or Arguably Lawful) Activity in Extreme Circumstances Threatening Death or Substantial Bodily Harm.* If lawyers have a prima facie obligation to honor client autonomy within the law, then they have strong reasons not to disclose and thereby interfere with intended client acts that are clearly, or even arguably, lawful. Nonetheless, unless there is some justification for making this obligation absolute, then the very nature of this prima facie obligation entails that it may be overridden, albeit only by another weighty consideration.<sup>250</sup> While disclosure to prevent death or substantial bodily harm may not be the only "weighty consideration" which might override the obligation to honor client autonomy within the law, it is clearly the most plausible candidate. Indeed it has already been suggested within the profession as a possible exception to the duty of confidentiality.<sup>251</sup>

At the outset, it must be noted that, with the exception of the present disclosure rules, the obligation to honor client autonomy within the law is *not* presently accorded the status of an absolute obligation. Although the current Model Code requires a lawyer to pursue "the lawful objectives of his client through reasonably available means permitted by law,"<sup>252</sup> exceptions are recognized both for a lawyer who "exercise[s] his professional judgment to waive or fail to assert a right or position of his client"<sup>253</sup> and for a lawyer who refuses "to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal."<sup>254</sup> While the recognition of these and other<sup>255</sup> exceptions by no means entails disclosure in these circumstances, it

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sure may enhance the likelihood that attorneys who decide to maintain confidentiality will be found liable in tort for harm done by the client. *Cf. supra* note 36 (effect of permissive ethics code on tort liability of physicians). One might even speculate that the potential for tort liability was a significant factor in the ABA House of Delegates' decision to narrow substantially the range of disclosure presently permitted under the Model Code, an action analogous to the most recent post-*Tarasoff* amendment to the AMA Code. *See id.* The most obvious response to this argument is that we must trust our judges to reject *unwarranted* extensions or modifications of substantive law as a result of otherwise appropriate changes in the ethics code.

250. *See supra* note 68 and accompanying text.

251. *See* THE AMERICAN LAWYER'S CODE OF CONDUCT Rule 1.6 (American Trial Lawyer's Foundation, Revised Draft 1982). "A lawyer may reveal a client's confidence when and to the extent that the lawyer reasonably believes that divulgence is necessary to prevent imminent danger to human life." *Id.* Rule 1.6 was not approved by the Commission, but was supported by so many members that it was included as a "Supplemental Rule." *Id.* Rule 1.6 note.

252. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A) (1983).

253. *Id.* DR 7-101(B)(1).

254. *Id.* DR 7-101(B)(2).

255. *See, e.g., id.* DR 2-110(C)(1)(e) (lawyer has right to withdraw in nonlitigation when



does clearly rebut any argument against such disclosure based solely on an absolute duty to honor client autonomy within the bounds of the law. The question remains whether there are other considerations, more directly related to the *prima facie* obligation of confidentiality, that would support a refusal to permit disclosures, even to prevent death or substantial bodily harm, so long as the client intends a clearly, or even arguably, lawful act.

To some extent, the argument based on utility suffers from the same deficiencies as did the earlier argument regarding the viability of a distinction between physical and financial harm.<sup>256</sup> It is impossible to prove whether more harm would be prevented by disclosure (thus protecting immediate victims) or by maintaining confidentiality (thus potentially protecting future victims). Nonetheless, because most clients have a strong interest in determining the legal status of an intended act, it is highly questionable whether the remote possibility of attorney disclosure would, in fact, result in substantially fewer clients confiding in their attorneys.<sup>257</sup> If it is true, or even probably true, that no substantial deterrence would result, then a utilitarian analysis should favor a rule permitting disclosure in these emergency cases involving death or substantial bodily harm even when the client intends a lawful act.

The argument in favor of permissive disclosure is obviously strongest under a privacy analysis. While the client may not be an "unjust aggressor," given that the proposed conduct is at least arguably lawful, his interest in privacy may be slight in relation to the important interests of the potential victims.<sup>258</sup> Moreover, to the extent that the client's interest in privacy in a particular case is substantial—that is, at or near the center of the "core self"<sup>259</sup>—the lawyer may be persuaded to maintain confidentiality, if that privacy interest is not clearly outweighed by the more important interests of others.

As with disclosure of unlawful acts, the final resolution of this dilemma appears to depend on the desirability of allowing individual lawyers to determine when disclosure is morally appropriate.

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client insists "that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not [otherwise prohibited]").

256. See *supra* notes 223-25 and accompanying text.

257. In addition, given the traditional reluctance of lawyers to betray their clients' confidences, it is unlikely that lawyers would automatically disclose, even in cases involving imminent death or serious bodily harm. Clients who are aware of this reluctance would be even less likely to be deterred from seeking legal advice.

258. See *supra* note 76 and accompanying text.

259. See *supra* note 66 and accompanying text.

Some but not all lawful (or arguably lawful) acts threatening death or substantial bodily harm are seriously immoral acts in which disclosure would clearly be justified,<sup>260</sup> and lawyers are not necessarily well-equipped to resolve close cases. Nonetheless, if it is true that the circumstances of legal representation make it unlikely that lawyers will disclose except in rare and appropriate cases,<sup>261</sup> then there are strong reasons favoring a rule permitting disclosure to prevent death or substantial bodily harm even when the client's intended conduct is lawful, or arguably lawful.

### 3. *Disclosure of Past and Continuing Client Misconduct*

The attorney-client evidentiary privilege affords absolute protection to client communications regarding past misconduct.<sup>262</sup> While debatable,<sup>263</sup> such protection is readily explained by the need for evidence rules that are relatively easy to apply and by the fact that such consultations typically constitute an entirely proper and desirable use of the attorney-client relationship. Given the availability of other relevant evidence in most cases,<sup>264</sup> it is not difficult to see why attorneys are flatly prohibited from giving testimony concerning such legitimate communications between themselves and their clients. However, ethical rules do not necessarily require the same degree of certainty as do evidence rules.<sup>265</sup> In addition, because

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260. For example, even if properly designed, the 1973 Pinto might not have been as safe as a slightly higher-priced competitor. Yet, it would not necessarily have been immoral to put it on the market without disclosing this fact, even though a consumer might have been more likely to suffer death or serious bodily harm. See D. Luban, *supra* note 91, at 8-10. On the other hand, disclosure might well be warranted if it would bring about a change in the safety standards which the auto industry was keeping artificially low by falsely (but not unlawfully) representing that certain safety devices were not feasible. See *id.* at 12. Disclosure which forces a recall is probably also justified, despite the obvious harm to the corporation itself, when the president of a company that sells aluminum alloy for use in high-altitude airplanes, irresponsibly (but not necessarily unlawfully) disregards the advice of a majority of his engineering staff that a new alloy is dangerously defective. See Ferren, *The Corporate Lawyers' Obligation to the Public Interest*, 33 BUS. LAW. 1253 (1978).

261. See *supra* notes 229-33 and accompanying text.

262. See 8 J. WIGMORE, *supra* note 1, § 2292 (so long as legal advice is sought from a professional legal adviser in his capacity as such, communications relating to such purpose are made in confidence by clients and protection has not been waived). As noted earlier, communications relating to a future crime or fraud are not protected by this rule because the seeking of such advice is not a legitimate use of the attorney-client relationship. See *supra* note 113 and accompanying text.

263. For criticisms of the present broad scope of attorney-client privilege, see authorities cited *supra* note 117.

264. See *supra* note 119 and accompanying text.

265. Cf. R. VEATCH, *supra* note 20, at 309-10 (rejecting "radical legalism" approach, in which moral rules would track legal rules in their "rigid" application to particular cases). Of course rules embodied in a disciplinary code of ethics are legal, as well as ethical rules. None-

there are interests at stake other than the discovery of truth in litigation, insistence on an ethics rule that affords absolute protection for information concerning past misconduct may not withstand closer scrutiny, either in cases involving completed client acts or in the more troublesome cases involving ongoing client activity.

a. *Past Client Acts.* Even aside from any misplaced reliance on the evidentiary privilege itself,<sup>266</sup> it is not surprising that information concerning past client misconduct is given favored treatment under the various ethics codes. The client's interest in seeking legal advice regarding past wrongs is, at least historically, the paradigm of the important interests sought to be protected under confidentiality rules. Moreover, society in general has a strong interest in encouraging the use of the legal process to resolve individual disputes, and attorneys have a substantial and legitimate interest in avoiding the unenviable position of becoming habitual informers of their client's misdeeds.<sup>267</sup>

The traditional distinction between past and future conduct can also be justified under the two basic philosophical approaches. Under utilitarianism, the chilling effect of disclosure in the case of past misconduct will certainly be stronger than in the case of future misconduct, because clients lack the option of avoiding disclosure by renouncing their intent to commit the act in question.<sup>268</sup> Under a privacy analysis, there is at least an arguable distinction between "guilty" (past) and "dangerous" (future) information,<sup>269</sup> based on the dual needs of the client to keep secret that information closest to his "core self"<sup>270</sup> and to communicate such information to his confidential adviser.<sup>271</sup>

While the philosophical approach does support the traditionally strong distinction between past and future misconduct, it does not

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theless, rules of evidence are often viewed as requiring even more certainty than many other legal rules, because of the special demands of trial preparation. *See, e.g.,* FED. R. EVID. Article VIII advisory committee note (rejecting case-by-case approach to hearsay exceptions in favor of traditional system of class exceptions).

266. *See supra* notes 97-120 and accompanying text.

267. *See supra* note 148 and accompanying text.

268. In addition, preventing the harm of future misconduct is probably a greater benefit to society than ensuring that past misconduct results in legally proper sanctions or punishment. *See Landesman, supra* note 14, at 200-01; *Dike v. Dike*, 75 Wash. 2d 1, 16, 448 P.2d 490, 498 (1968).

269. *Landesman, supra* note 14, at 200.

270. *See supra* note 66 and accompanying text.

271. *Landesman, supra* note 14, at 200. If the right to privacy is grounded in fundamental human needs, *see supra* note 65, then the motivation for disclosure to the attorney is clearly a significant factor in assessing the strength of privacy interests in particular cases.

necessarily support the nearly absolute protection afforded past misconduct under the ethics rules. Under both the Model Rules<sup>272</sup> and the most recent interpretation of the Model Code,<sup>273</sup> the duty of confidentiality almost always prevails over any interest in disclosing past misconduct—a position which has strong support under interpretations of the former Canons.<sup>274</sup> There is some support—both historically and more recently—for an exception to this absolute protection in cases involving past “frauds.”<sup>275</sup> However, this exception is itself exceedingly narrow,<sup>276</sup> particularly when it is in-

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272. In nonlitigation contexts, the lawyer is permitted to disclose client confidences only when expressly or impliedly authorized by the client, when necessary to prevent the client from committing a criminal act likely to result in imminent death or bodily harm, or when necessary for the lawyer to resolve legal controversies with the client or defend against certain claims. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983). While there is no provision expressly permitting disclosure of past misconduct, as there is in the Model Code, see *infra* note 273, the comment to Rule 1.6 suggests that such disclosures may be permissible indirectly in the form of public “notice of the fact of withdrawal” or disaffirmation of any prior “opinion, document, affirmation or the like.” *Id.* Rule 1.6 comment. See A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 210-11 (2d ed. 1984) (probably intended for situations when lawyer’s services were used to perpetrate crime or fraud). The problem with interpreting the rule to allow public withdrawals and disaffirmations is that such an interpretation appears to contradict the principle of confidentiality that the rule seeks to protect. *Id.* For a brief discussion of the legislative history of Rule 1.6 in relation to DR 7-102(B)(1) of the Model Code, see *id.* at 209-10.

273. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1) (1983) (disclosure of past client fraud required, “except when the information is protected as a privileged communication”). See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975) (interprets DR 7-102(B)(1) to preclude disclosure of “confidences” protected by evidentiary privilege, as well as “secrets” protected under DR 4-101(A)); *supra* note 103. Opinion 341 is commonly viewed as a practical nullification of the disclosure requirements of DR 7-102(B)(1). See Wolfram, *Client Perjury I*, *supra* note 190, at 820. For a detailed discussion of the ABA’s attempts to deal with the client fraud dilemma under the Model Code, see Note, *supra* note 102, at 96-104.

274. See, e.g., ABA Comm. on Professional Ethics and Grievances, Informal Op. 778 (1964) (even when third party injured through client misconduct, no disclosure permitted, since there was no fraud upon court itself); ABA Comm. on Professional Ethics and Grievances, Formal Op. 287 (1953) (suggests that, in civil litigation, disclosure of past fraud is permissible only when client secured improper advantage over other party). For a detailed history of the ABA’s attempts to deal with the client fraud dilemma under the former Canons, see Note, *supra* note 102, at 92-96.

275. Professor Kramer notes that the recent support for a meaningful provision permitting disclosure of client fraud is not new, but rather, rests on assumptions apparently accepted at the time when both former Canon 41 and the original version of DR 7-102(B)(1) were enacted. See Kramer, *supra* note 190, at 999. Moreover, some states did not enact the 1974 amendment to DR 7-102(B), see Note, *supra* note 102, at 105, and at least one state that adopted the Model Rules provided for some disclosure of past client fraud. LAWYERS’ MANUAL ON PROFESSIONAL CONDUCT, CURRENT REPORTS (BNA) 382 (Aug. 22, 1984) (N.J. Rule 1.6 permits disclosure of information necessary to rectify consequences of client’s criminal, illegal or fraudulent act when lawyer’s services were used).

276. While the term “fraud,” as used in DR 7-102(B)(1), is not defined, it is probably

terpreted to exclude both frauds that are also crimes<sup>277</sup> and frauds committed without the participation of the lawyer contemplating disclosure.<sup>278</sup>

Recent efforts have been made to resurrect a meaningful exception for disclosure of past client fraud and even to expand that exception to include "deliberately wrongful acts," or at least criminal acts, whether or not they are also frauds.<sup>279</sup> Philosophical analysis may prove helpful in determining, first, whether any exception should be recognized; second, if so, whether it should be limited to civil frauds; and, third, whether the exception should apply only when the lawyer himself has been a participant in the past wrongdoing.

The justification for disclosure of completed wrongs will depend initially on the purpose to be served by such disclosure. If revelations are contemplated in order to ensure that proper legal sanc-

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limited to common law fraud, in which some element of both misrepresentation and scienter are required. See Note, *supra* note 102, at 106.

277. See Callan & David, *supra* note 13, at 358; cf. G. HAZARD, ETHICS IN THE PRACTICE OF LAW 26 (1978) (assumes without explanation that DR 7-102(B)(1) applies only to frauds that are not crimes). Callan and David argue that "any rule of ethics which required an attorney to disclose information concerning his client's past crimes would interfere with the client's exercise of his fifth amendment privilege against self-incrimination and seriously undermine the proper functioning of the criminal justice system." *Id.* These arguments are equally applicable to client perjury, see Brazil, *supra* note 210, at 624-39, and, yet, the disclosure of client perjury is now required under the Model Rules. See *supra* note 189 and accompanying text; cf. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-108(G) (1983) (requires disclosure of improper conduct of juror or by client toward a juror: no exception for criminal misconduct); *In re Kozlov*, 156 N.J. Super. 316, 325, 383 A.2d 1158, 1162 (1978) (resolves any conflict between DR 7-108(G) and DR 4-101(B) in favor of required disclosure under DR 7-108(G)). Moreover, even if the law forbade the use of an attorney's statements in a subsequent criminal proceeding against the client, there is no reason why an attorney should not be encouraged to make out-of-court disclosures, if necessary to protect other important interests. See *infra* notes 281-86 and accompanying text; cf. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(3) (Proposed Final Draft 1981) (permissive disclosure to rectify consequences of client's misconduct included both crimes and frauds).

278. DR 7-102(B)(1) requires only that past frauds subject to mandatory disclosure must have been committed "in the course of the representation." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1) (1983). At least one commentary has argued that DR 7-102(B)(1) was "designed to deal with situations in which the lawyer has been used to commit the fraud" and should be so interpreted. See Note, *supra* note 102, at 107 n.76; see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(3) (Proposed Final Draft 1981) (permissive disclosure to rectify past client crimes or frauds limited to situations in which lawyer's services were used).

279. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(3) (Proposed Final Draft 1981) (permitted disclosure of past client crimes or frauds in which lawyer's services were used); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(c)(2) (Discussion Draft 1980) (permitted disclosure of any "deliberately wrongful act by client," except when lawyer employed after commission of act to represent client concerning act).

tions are applied, then confidentiality should clearly prevail, given "the alarming image of an open-ended commitment by lawyers to police the legal system."<sup>280</sup> In the case of lawyer-assisted wrongs, if the only purpose served by the disclosure is, as one commentator suggests, to protect the lawyer from any "taint of falsity,"<sup>281</sup> then again confidentiality should prevail, since protecting the reputation of lawyers is not a compelling reason to expose clients to almost certain legal harm.<sup>282</sup>

Obviously, there are far more important reasons why a lawyer might want to reveal a client's past misconduct. There may be "emergencies" in which death or substantial bodily harm could be prevented.<sup>283</sup> Disclosure would almost certainly be warranted in such cases. The danger of any chilling effect on future clients is limited,<sup>284</sup> the client's right to privacy will almost always be over-

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280. Popkin, *Client-Lawyer Confidentiality*, 59 TEX. L. REV. 755, 770 (1981). While this quote was actually made in the context of arguing against disclosure in order to prevent the harm of unlawful conduct, it argues more persuasively against disclosure in order to assure compliance with the law. Under a utilitarian analysis, society does not benefit greatly from any single instance in which compliance with the law is secured, so long as legal sanctions are generally effective. See Landesman, *supra* note 14, at 200-01. Similarly, under a privacy analysis, individuals may have strong interests in preventing or rectifying the harm of a legal wrong against them, but it is by no means obvious that they have strong interests in simply having the law enforced. Finally, under social contract theory, the prospect of lawyers policing the legal system is clearly incompatible with the interests of either society or the lawyers themselves.

281. Popkin, *supra* note 280, at 766 (discussing several examples in Proposed Final Draft of Model Rules).

282. Cf. Moore, *Conflicts of Interests in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 TEX. L. REV. 211, 227-28 (1982) (approving abandonment of consideration of "appearance of impropriety" in Model Rules' treatment of conflicts of interest problems).

283. For example, an attorney who refused to reveal the whereabouts of the bodies of two girls murdered by his client later stated that if the girls had been alive he would have divulged his client's confidence "because life is primary." See Nelson, *Ethical Dilemma: Should Lawyers Turn in Clients?*, L.A. Times, July 2, 1974, at 1, col. 1, reprinted in A. KAUFMAN, *supra* note 272, at 218-21. Professor Kaufman poses a related problem in which the client confesses to the lawyer that he is guilty of a murder for which an innocent man was convicted and may be sentenced to a term of years, life imprisonment, or death. A. KAUFMAN, *supra* note 272, at 212-13 (problem based on real-life incident in which lawyer remained silent and defendant was lynched after a death sentence was commuted to life imprisonment). Cf. Spaulding v. Zimmerman, 263 Minn. 346, 116 N.W.2d 704 (1962) (lawyer for insurance company discovered that plaintiff was suffering from life-threatening aneurism of which he and his doctors were unaware).

284. While it may well be true that clients who are aware of the life-threatening aspects of their confidential information will be reluctant to confide in their attorneys, there is no reason to suspect any substantial spill-over to clients who have no reason to suspect the existence of such an "emergency." Cf. *supra* notes 38-39, 69-70, 79-80 and accompanying text (widespread acceptance by doctors and philosophers alike of physician's duty to disclose in such limited "emergency" situations). Moreover, even with regard to those clients aware of

ridden by the interests of potential victims,<sup>285</sup> and there does not appear to be any significant threat to the client-care perspective in other, non-emergency situations. Moreover, when such "emergencies" do arise, there is no apparent reason why disclosure ought to be limited to past "frauds," whether criminal or civil, or even to situations in which the lawyer participated in the client's initial wrongdoing.

Aside from these "emergencies," there are other situations in which the reasons underlying disclosure are arguably more important than the mere imposition of legal sanctions. The two most frequently mentioned are the prevention or rectification of substantial harm (not limited to personal injury) and the satisfaction of a morally appropriate urge on the part of the lawyer to rectify a wrong in which he participated, even if unwittingly. While strong arguments can be made on behalf of disclosure in both cases, there are troublesome aspects to each which have not always been recognized by the proponents of broader disclosure options.

One of the Kutak Commission's early drafts recognized the prevention or rectification of substantial harm as a sufficient reason to disclose in all cases of "deliberately wrongful" client acts, "except when the lawyer has been employed after the commission of such an act to represent the client concerning the act and its conse-

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the dangers of confiding in their attorneys, any chilling effect will be reduced by such important factors as the likelihood that the information will eventually become public and the need of the client to obtain the lawyer's advice regardless of the consequences. *See* D. Luban, *supra* note 91, at 31-32 (discussing Ford Motor Co.'s knowledge that it would be sued for injuries attributable to defectively designed Pinto and the company's inability to function effectively without legal advice). Some chilling effect will undoubtedly remain; however, utilitarian analysis would not favor maintaining confidentiality in these "emergencies" unless the harm of deterrence outweighed the harm prevented in other cases. For a discussion of some of the difficulties in using the utilitarian approach in an analogous medical context, see *supra* notes 71-75 and accompanying text (psychiatric patient threatening to kill an innocent third person).

285. The primary difference between disclosure of past and future misconduct is that, in the case of the former, disclosure will result not only in the publication of embarrassing information, but also in the almost inevitable harm of legal liability for the past (and unalterable) conduct. When this harm is primarily economic, it is not difficult to favor the physical interests of the innocent victim. When, however, the harm is more fundamentally related to basic human needs, as in cases where the client will be subject to lengthy imprisonment, or perhaps even death, it may not be so obvious that the interests of the victim should prevail. One commentator has proposed providing use immunity for clients whose attorneys divulge such confidences to a court. Note, *Attorney-Client Confidentiality: A New Approach*, 4 *HOFSTRA L. REV.* 685 (1976). While the promise of such immunity may not induce the guilty to come forward, see A. KAUFMAN, *supra* note 272, at 213, it may make disclosure more acceptable under a privacy analysis. In addition, it may satisfy legal objections to disclosure based on concern for a potential criminal defendant's constitutional rights. *See supra* note 277.

quences.”<sup>286</sup> At first glance, this provision appears to resolve many of the difficulties involved in lawyer disclosure of past client acts. It substantially reduces the danger of any chilling effect (and indeed may even encourage client candor) by permitting disclosure only when the client did not seek legal advice in connection with the perpetration of the past wrong. Similarly, it limits invasions of a client’s privacy by confining disclosure primarily to “secrets.”<sup>287</sup> In addition, it maintains the client-care perspective in at least the paradigm case of the “man-in-trouble”<sup>288</sup> with no one to turn to except his lawyer.

While this early draft provision makes a strong distinction between past and future conduct, there is a lingering suspicion that the distinction is not yet strong enough. For example, the client may have committed a “deliberately wrongful” act but may not have sought legal assistance for any number of reasons, including a simple inability to face the prospect of devastating consequences to himself or his family in the event that his prior act was discovered. Given that he can no longer avoid these consequences by altering his conduct, he appears to be in need of and, indeed deserving of, greater protection than a client who is contemplating future harmful conduct. Nonetheless, under this early draft provision, his past wrong is treated no differently than a similar future wrong. Indeed, he is even worse off than a client who is sophisticated enough to know that by “confessing” to his lawyer he can insure against any unwanted disclosure.

Apparently recognizing the difficulties of this early draft provision, the Kutak Commission revised it substantially in the Proposed Final Draft submitted to the ABA House of Delegates. Under the revised draft, disclosure of past conduct was to be limited to rectifying “the consequences of a client’s criminal or fraudulent act,” but

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286. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(c)(2) (Discussion Draft 1980).

287. Ordinarily, a lawyer would not learn of a client’s deliberately wrongful acts through a confidential communication unless the client had employed the lawyer to represent him concerning such misconduct. The primary exception would appear to be client confessions regarding past misconduct in which the lawyer unwittingly participated. It is unclear whether such confessions would fall within the exception to permissive disclosure in situations in which the lawyer is being “re-employed” to represent the client in connection with the past wrong. In any event, while client “secrets” are ordinarily less private than confidential communications, *see supra* note 103, there are situations in which even “secrets” may have strong privacy claims. *See infra* note 297 and accompanying text.

288. D. MELINKOFF, *THE CONSCIENCE OF A LAWYER* 270-71 (1973).



only if the lawyer's services had been used.<sup>289</sup> The official Comment to this section explained the limitation to crimes and frauds by reference to the traditional prohibition on lawyer assistance in these cases, and further explained that such disclosure satisfied the lawyer's own "legitimate interest in being able to rectify the consequences of such conduct."<sup>290</sup>

The justification for limiting the ban on lawyer assistance to situations involving crimes and frauds<sup>291</sup> does not in itself justify a similar limitation on disclosure of information harmful to a client. Even if there is some argument for limiting disclosure of *future* conduct to crimes and frauds—that is, because they tend to isolate the most likely instances in which disclosure is morally appropriate<sup>292</sup>—this argument should not apply when the client has deliberately tricked the lawyer into assisting in wrongful conduct, whatever the precise legal character. In such cases, the reasons advanced for permitting the lawyer to disclose past conduct must be further analyzed before concluding that disclosure is most likely to be appropriate, if at all, only in cases involving crimes or frauds.

The Kutak Commission reasoned that lawyers should be permitted to disclose past conduct because lawyers have a "legitimate interest in being able to rectify the consequences" of conduct for which they would have been ethically *barred* from giving any assistance had they known the circumstances.<sup>293</sup> If disclosure were then *required*, it might make sense to distinguish between lawyer conduct that is absolutely prohibited and lawyer conduct that is not. However, by merely *permitting* disclosure, the Commission appeared to attach greater significance to the lawyer's own status as a morally autonomous agent than it did to the underlying conduct. Once the lawyer's status as moral agent is recognized, it should be apparent that the autonomy of the lawyer is equally, perhaps even more fully, implicated when the lawyer had an ethical *choice* of whether or not to assist the client and the resulting choice was made on the basis of a deliberate deception. Moreover, when the client's conduct was a legal as well as a moral wrong, the lawyer's indignation at being exposed to possible, even if unwarranted, legal sanctions is just as compelling as when the possible charge is one of crime or fraud. In

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289. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(3) (Proposed Final Draft 1981).

290. *Id.* Rule 1.6 comment.

291. *See supra* notes 234-38 and accompanying text.

292. *See supra* notes 239-46 and accompanying text.

293. *See supra* note 290 and accompanying text.

*all* of these cases the lawyer has a legitimate interest in rectifying the consequences of conduct that he would not knowingly have assisted. Nonetheless, the question remains whether, and to what extent, that interest should be overridden by the client's interest in maintaining confidentiality.

Proponents of broader disclosure options typically argue that clients who knowingly deceive their lawyers do not have *any* legitimate interest in maintaining confidentiality. By choosing *not* to confide, these clients have forfeited any rights they might otherwise have had to rely on the confidentiality of the lawyer-client relationship.<sup>294</sup> This conclusion initially appears to be supported by philosophical analysis. The option of subsequent disclosure of false confidences by the lawyer should encourage, rather than discourage, *initial* client candor. Further, the right to privacy in a confidential relationship may depend on the truthfulness of the communication, or at least may be forfeited when the client "uses" the lawyer.<sup>295</sup>

Nonetheless, proponents of disclosure typically fail to consider that more legitimate concerns for confidentiality may arise as a result of the way in which the lawyer subsequently discovers the initial client deception. For example, when the client voluntarily "confesses," that communication appears to fall within the class of communications typically favored under rules of confidentiality.<sup>296</sup> Similarly, distinctions could be drawn between the situation in which a lawyer discovers the truth while examining private client papers and the situation in which a lawyer receives an unsolicited phone call from a disinterested third party.<sup>297</sup> Certainly, the man-

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294. See, e.g., Note, *supra* note 102, at 114. In addition, it is commonly agreed that there is no conflict with the evidentiary privilege, since communications made to further a crime or fraud are not included within the privilege. See *id.* at 111-12; cf. Kramer, *supra* note 190, at 994 n.14 ("not privileged under the common law").

295. Cf. Note, *supra* note 102, at 114 ("[t]hat a lawyer who attempts to rectify a fraud his client has used him to commit could be castigated for 'a gross violation of a sacred trust' is ludicrous").

Under social contract analysis, the focus would be on the *mutuality of obligation* between client and lawyer. The lawyer's promise to maintain confidentiality is made in return for the client's promise to make full disclosure. Cf. *supra* note 67 (basis of prima facie obligation in physician-patient relationship is promise-keeping). To the extent that the client's breach has significant implications for the lawyer's own sense of autonomy, i.e., the lawyer was tricked into doing what he would not otherwise have chosen to do, the lawyer would be justified in refusing to maintain confidentiality.

296. See *supra* text accompanying notes 266-67. As to the evidentiary privilege, while the initial deceptive communications would not be privileged, see *supra* note 294, the subsequent confession would be, so long as it was not itself part of an intended future crime or fraud.

297. This distinction is one which would be made under ABA Opinion 341, which inter-

ner in which the deceit is discovered appears to have relevance both to the utility of lawyer disclosure and the significance of an invasion of client privacy.<sup>298</sup>

Even so, it is unclear whether a rule that protects "confidences" but not "secrets," or "confidences and secrets" but not other information, is sufficient to resolve the lawyer's dilemma. For example, even when the client voluntarily "confesses," the lawyer still has a legitimate interest in correcting a harm that he unwittingly assisted. Must he now subordinate that interest to the client's and treat the client *just as if* the client were reporting a past wrong in which the lawyer was entirely uninvolved? What if he senses that the client's "confession" is only voluntary in the sense that the client knows that the lawyer is about to discover the deceit in any event? Perhaps the client's initial betrayal of the lawyer is a fact of sufficient importance that the lawyer ought to retain the *right* to rectify the harm done. Given that lawyers will rarely exercise this right, its recognition should not be unduly threatening to clients with legitimate interests in maintaining client confidentiality.

In summary, philosophical analysis does not necessarily resolve the lawyer's dilemma in all cases in which disclosure of past client wrongs might be morally appropriate. Nonetheless, it does clearly call for a rejection of the nearly absolute protection afforded past misconduct under both the Model Code and the Model Rules. It does so, first, because these codes make no provision for disclosure in rare "emergencies" (for example, when death or substantial bodily harm could be prevented), and, second, because those codes make insufficient provision for rectification of past client wrongs when the lawyer himself was a witting or unwitting participant.

b. *Continuing Client Conduct.* The traditional treatment of "continuing" client conduct is conflicting and ambiguous. To some extent this lack of consensus results from mere disagreement regarding the value of confidentiality (as reflected in the nearly absolute protection of information concerning wholly past wrongs) as opposed to the value of preventing future harm (as reflected in the lack of such extensive protection for information concerning wholly

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preted amended DR 7-102(B)(1) to preclude disclosure of past fraud when discovered through either "confidences" or "secrets" under DR 4-101(A)(1). ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975).

298. Obviously, the utility of confidentiality is greatest when it applies to information obtained directly from the client. Similarly, the betrayal of a client's privacy is greatest when the client himself grants the lawyer access to the "inner circle" of the client's self. Cf. *supra* note 66 and accompanying text (analogous discussion in the patient-physician context).

future wrongs). However, the conceptual confusion surrounding the term itself and the resulting failure to distinguish among varying types of continuing wrongs and the differing contexts in which they arise may be even more important.

A "continuing" wrong is typically defined as "one which, though committed in the past has ramifications or effects that continue into the future."<sup>299</sup> This definition appears to be both overinclusive and underinclusive. For example, since almost every past wrong has continuing consequences, a literal application would seem to obliterate any meaningful distinction between past and future conduct.<sup>300</sup> In addition, the definition appears to exclude cases in which the client is engaging in a series of separate but related acts or omissions, some of which are completed and some of which are merely intended. If disclosure of the client's intent to commit a future wrong will necessarily or inevitably reveal related past wrongs,<sup>301</sup> then the client's conduct is neither wholly "past" nor wholly "future" and is perhaps best analyzed as but one of several forms of continuing wrongdoing.

Aside from the lack of conceptual clarity, the failure to consider the varying contexts in which continuing wrongs occur has clearly contributed to the confusion in this area. Most authorities have considered the problem in the contexts of the fugitive from justice (jumping bail)<sup>302</sup> and the continuing violation of a court order.<sup>303</sup> However, these examples involve the attorney as an advocate and thus raise a host of problems—for example, the scope of the attorney-client privilege and the attorney's responsibilities to the court—which are rarely present in a nonlitigation setting. Moreover, even in nonlitigation, the differing contexts in which the problem arises

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299. Callan & David, *supra* note 13, at 363. See also A. KAUFMAN, *supra* note 272, at 217 ("In the continuing crime case, the criminal act has already been committed; its consequences continue.").

300. G. BELLOW & B. MOULTON, *THE LAWYERING PROCESS* 260 (1978).

301. This was precisely the dilemma the Singer Hutner lawyers found themselves in when they became suspicious that their most important client, O.P.M. Leasing Services, Inc., was in the midst of one of the biggest white-collar crimes in history. See *O.P.M. Fraud Raises Questions About Role of a Criminal's Lawyer*, Wall St. J., Dec. 31, 1982, at 1, col. 6.

302. See, e.g., ABA Comm. on Professional Ethics and Grievances, Formal Op. 156 (1936) (attorney must notify authorities of location of client who has left jurisdiction in violation of his parole); ABA Comm. on Professional Ethics and Grievances, Formal Op. 155 (1936) (attorney must reveal location of fugitive client with whom he has been in communication); ABA Comm. on Professional Ethics and Grievances, Formal Op. 23 (1930) (attorney need not disclose location of fugitive client obtained by confidential communication with client's family).

303. See, e.g., *Brennan v. Brennan*, 281 Pa. Super. 362, 422 A.2d 510 (1980); *Dike v. Dike*, 75 Wash. 2d 1, 448 P.2d 490 (1968).

(e.g. securities, antitrust, tax, domestic relations law) require sensitivity to such relevant factors as the specific purpose of attorney disclosure (law enforcement versus prevention of substantial harm) and the extent of attorney participation in various stages of the client's continuing conduct.

Initially, some clarification of the problem might be achieved by eliminating from consideration those cases that appear to be adequately treated elsewhere. For example, the mere continuation of the harmful effects of an otherwise completed client wrong does not appear to call for ethical analysis separate from wholly past conduct. As long as there is provision for disclosure in rare "emergencies"—such as the threat of death or substantial bodily harm—protection of legitimate client interests suggests that confidentiality must be maintained.<sup>304</sup> Similarly, when an attorney has been a participant in past client wrongdoing, disclosure may be warranted even in the absence of ongoing or intended future conduct, and thus the "continuing" aspects of such conduct are but additional reasons favoring disclosure in particular cases.<sup>305</sup> Finally, continuing wrongs in a litigation context rarely pose the threat of substantial harm which are encountered in nonlitigation. Of course, an attorney may not assist his client in remaining a fugitive from justice<sup>306</sup> or otherwise violating a court order<sup>307</sup> and may be forced to withdraw<sup>308</sup> (or perhaps even disclose in compelled testimony)<sup>309</sup> in order to avoid doing so. Nonetheless, whether his unique role as "officer of the court" requires an advocate to voluntarily reveal any continuing misconduct toward the court is a question best considered separately from continuing harms in a nonlitigation setting.<sup>310</sup>

As to what remains of "continuing" client conduct, perhaps the most fruitful analysis may be to examine those factors that best characterize the conduct as closer to either wholly past or wholly future conduct and then apply the standards that have already been developed for such conduct. For example, if a client who has com-

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304. See *supra* notes 281-85 and accompanying text.

305. See *supra* notes 289-98 and accompanying text.

306. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(7) (1983); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) (1983).

307. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(A) (1983); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(c) (1983).

308. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(a)(1) (1983).

309. Cf. *Dike v. Dike*, 75 Wash. 2d 1, 14, 448 P.2d 490, 498 (1968) (attorney not privileged to withhold testimony regarding whereabouts of wife who may have been in violation of temporary child custody order).

310. For a brief summary of the ABA Ethics Committee opinions addressing this question, see A. KAUFMAN, *supra* note 272, at 214-16.

mitted larceny continues to commit the additional crime of concealing stolen property,<sup>311</sup> and his continuing crime cannot be terminated without implicating himself in either or both crimes, then the essentially "unalterable" nature of the client's conduct suggests that it is best treated as if it were already completed. On the other hand, if disclosure of a client's intent to make an illegal bribe will necessarily reveal past bribes of a similar nature, but the client retains the option of avoiding disclosure by renouncing his wrongful intent, then the continuing conduct is probably best treated as if it were wholly future.

There are, of course, cases that appear to fall somewhere in between these two extremes. For example, in the securities field the client may be under a legal obligation to make affirmative disclosure of completed events of an incriminating nature.<sup>312</sup> Theoretically, there is an event yet to take place (the legally significant nondisclosure), which suggests that the client still retains the option of avoiding liability for a future wrong. Yet, compliance necessarily entails the disclosure of a completed, unalterable, illegal event.<sup>313</sup> The mandatory disclosure of a past wrong suggests an important distinction between this continuing wrong and a wholly future wrong. Nonetheless, it appears that this case is still more appropriately treated as a future and not a past event, since the harmful consequences of conduct yet to occur can be prevented. Here, it is the substantive law and not the lawyer's conduct that limits the client's right to avoid implicating himself in a completed legal wrong.<sup>314</sup>

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311. See Callan & David, *supra* note 13, at 363. Similar examples include continued possession of an illegal weapon, a still undetected fraudulent tax return and the retention of embezzled funds. *Id.*

312. See, e.g., Hoffman, *On Learning of a Corporate Client's Crime or Fraud—The Lawyer's Dilemma*, 33 BUS. LAW. 1389, 1411-18 (1978).

313. Prior to the filing of the preliminary registration statement, the client can avoid liability for a future wrong and disclosure of a past wrong by refusing to file the statement. See *id.* at 1413. Once the preliminary registration is filed, however, the client may not withdraw it without obtaining SEC approval stating fully the grounds for such withdrawal. *Id.* at 1413-14.

314. Cf. Rosenfeld, *supra* note 18, at 516-24 (extent to which ethical dilemmas of corporate attorney are attributable to substantive corporate and securities laws which create positive duties on part of client to disclose past crimes and other wrongs).

The position I am advocating here is different from the position sometimes advocated by members of the SEC, which is that lawyers have a duty to disclose in order to assist the SEC in its enforcement efforts. See, e.g., Sommer, *The Emerging Responsibilities of the Securities Lawyer* [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 79, at 631 (Jan., 1974). First, the suggestion here is that disclosure be permissive, not mandatory. Second, as noted above, the justification for such permissive disclosure is not to prevent violations of the law, but rather to protect against substantial harm to others. If the harm to be prevented is minimal, or if the victims will have adequate recourse in a subsequent lawsuit against the client

### III. CONCLUSION

As in the physician-patient relationship, the principle of confidentiality in the attorney-client relationship is well-grounded in both utilitarian and deontological moral theory. At least with respect to individual clients,<sup>315</sup> the attorney is clearly under a prima facie duty not to disclose information relating to the subject of the representation without the client's consent. Just as in medical ethics, however, difficult questions do arise in determining when this prima facie duty ought to be overridden by other, more weighty considerations. Under utilitarian theory, the answer lies in attempts to make realistic assumptions regarding, first, the extent to which clients would actually be deterred from confiding in their attorneys and, second, the net balance of benefit over harm, both to present and potential victims. Under deontological theory, the answer lies in determining whether the client's right to privacy is forfeited entirely by an act of unjust aggression or simply overridden by other, more important rights and duties. While neither approach results in easy solutions to all of the perennial problems of confidentiality and disclosure, the "philosophically informed" approach can be useful, both in evaluating various provisions of current and proposed ethics codes for lawyers and in suggesting areas for future exploration by lawyers and philosophers alike.

The philosophically informed approach suggests that many of the present provisions of the Model Code and the Model Rules are not adequately justified. Moreover, the preceding discussion implicitly suggests a number of questions needing far more extensive analysis than has yet been provided. For example, in civil litigation, it is not clear whether a "breakdown" in the adversary system, as a result of either inadequate resources or incompetent counsel, mandates recognition of at least some limited duty of benevolence toward opponents and, if so, what the limits of that duty might be.<sup>316</sup> Moreover, in criminal cases, the justification for a duty to report client perjury depends, in part, on a clearer understanding of what autonomy or human dignity means in the context of our criminal justice system.<sup>317</sup> Finally, in nonlitigation, the resolution of a number of disclosure dilemmas appears to depend on the desirability of allowing lawyers to exercise fairly broad discretion in deter-

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(assuming they will have knowledge of the violation), then there is probably no moral obligation to disclose.

315. See *supra* note 91.

316. See *supra* notes 184-88 and accompanying text.

317. See *supra* notes 201-10 and accompanying text.

mining when disclosure is morally appropriate.<sup>318</sup> A related question, of potentially even broader scope, concerns the function of ethics codes in general and the extent to which such codes, as a form of legal regulation, can ever be coextensive with the requirements of morality—whether ordinary or professional.<sup>319</sup>

From the outset, my primary purpose has been to stimulate and extend the discussion of legal ethics in relation to recent philosophical work. Obviously there is a great deal more to be done in order to reap the potential benefits of a meaningful collaboration between lawyers and philosophers. In addition, collaboration among the different professions, with the assistance of philosophers, is an ideal that has yet to be realized. Just as physicians and lawyers gain insights from philosophical analysis, each of these professions, and others as well, will benefit from further exploration of both their similarities and their differences. The coming decade will undoubtedly witness a great deal more of the philosophically informed and comparative approaches to problems in professional ethics.

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318. See *supra* notes 246-49, 260-61 and accompanying text.

319. See Ladd, *The Quest for a Professional Code of Ethics: An Intellectual and Moral Confusion*, in PROFESSIONAL ETHICS ACTIVITIES IN THE SCIENTIFIC AND ENGINEERING SOCIETIES 154 (1980).