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Three Models of Legal Ethics

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Three Models of Legal Ethics, by Anthony D'Amato* and Edward J. Eberle**
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Abstract: This article presents a picture of each of the three theoretical models—autonomy, socialist, and deontological—and indicates how they differ from one another in their application to some aspects of attorney-client confidentiality, one of the most hotly debated topics of professional ethics.

Tags: legal ethics, ethical theory, attorney-client confidentiality, professional ethics, Model Rules of Professional Conduct, Model Code, Lawyers' Code of Conduct

[pg761]“Any occupation or profession is unworthy if it requires of us that we do as a functionary what we would be ashamed to do as a private person.”—*Sydney J. Harris*

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I. INTRODUCTION

After extensive debate, the American Bar Association adopted the new *Model Rules of Professional Conduct* (hereinafter *Model Rules*) at its annual meeting in August 1983 [FN1] As scholars, attorneys, and the public peruse the new ethical guidelines for lawyers, they will probably conceptualize the *Model Rules* in terms of the two antagonistic philosophical positions that heretofore have characterized scholarly analysis of legal ethics. Those philosophical positions are dichotomous: there is an "autonomy" model and an opposing "socialist" model of professional responsibility. Writers such as Professors Monroe H. Freedman and Charles Fried seem to have in mind a theoretical model that places prime importance on the [pg763] "autonomy" of the client and views any deviation therefrom as a move toward a socialist conception of the role of the lawyer.FN2 The autonomy model has not been spelled out in detail, and the supposedly contrasting socialist model even less so. But even in their relatively amorphous state in the current discussion of legal ethics, these two models provide a rough utilitarian theory for those who would fashion standards of conduct for attorneys. What is missing is a nonutilitarian, or deontological, model which may help explain some of the anomalies in current positions and serve as a heuristic guide for further scholarly inquiry. It is the purpose of this article to present a picture of each of the three theoretical models—autonomy, socialist, and deontological—and to indicate how they differ from one another in their application to some aspects of attorney-client confidentiality, one of the most hotly debated topics of professional ethics.

We argue that the three models represent vertices on an equilateral triangle: each is equal to the other two. Thus, a move away from the autonomy model is not necessarily a move in the direction of the socialist model; it might equally be a move in the direction of the deontological model. In the second section of this article we shall present a triptych of the three models from a theoretical standpoint; in the third section we shall try to show how they differ from one another in their application to aspects of the debate over attorney-client confidentiality. These differences make each model a criticism of the other two, and suggest a more rigorous way of conceptualizing problems of professional responsibility than many of the intuitivist writings in this field.

The autonomy model espoused by Fried and Freedman is the mainstream position of the practicing bar. We will attempt to show that it is not ultimately an ethical model at all, but a self-serving professional attitude that in some areas parallels ethical standards. Our own preferred theoretical position is that of the deontological model. [pg764] We do not regard ourselves as anticapitalistic or antientrepreneurial, but rather we decline to accept the dichotomy implicit in the writings of others that whatever is not entrepreneurial is socialist.FN3 Instead, we contend that a dimension exists for a responsible view of the adversary system in a capitalist context.

II. THREE MODELS OF LEGAL ETHICS

A. *The Autonomy Model*

1. Description

The Fried-Freedman view of legal ethics is that of the lawyer as a facilitator of his client's autonomy within the legal system. Personal autonomy, they believe, is the key to human dignity. Thus, the attorney, as a professional, serves a vital role in helping legally unknowledgeable persons attain their human dignity. Those writers give three reasons why lawyers should play that precise role.

The first is a moral reason. As Fried writes, "it is not only legally but also morally right that a lawyer adopt as his dominant purpose the furthering of his client's interests—. . . it is right that a professional put the interests of his client above some idea, however valid, of the collective interest."FN4 In this view, the lawyer becomes a "friend" to the client, making "his client's interests his own insofar as this is necessary to preserve and foster the client's autonomy within the law."FN5 For "to assist others in understanding and realizing their legal rights is always morally worthy."FN6 Because the lawyer's role is grounded now in a moral conception of friendship, Fried concludes that "the individual lawyer does a morally worthy thing whomever he serves."FN7

Secondly, it is suggested that the autonomy model facilitates and preserves the adversary system of justice. In Freedman's view, a clash of adversaries is necessary if truth is to emerge.FN8 A lawyer, being wholly partisan on her client's behalf, nevertheless contributes to ultimate truth because she must face an equally partisan attorney on the other side. Of course, this picture obtains, if at all, in the litigation and appeal process. But the bulk of legal business involves advising and helping clients outside the confines of a case filed in court. Yet Freedman extends the picture by simple sleight of hand: a lawyer is [pg765] her client's "champion" because the client must face the enormous legal resources of society and the awesome police and military power of the state.FN9 In other words, even if the "other side" is not represented by a definable partisan attorney, nevertheless the adversary paradigm is appropriate because the "other side" is always society, with its overwhelming resources and power. The client's attorney is presumably the client's equalizer in this otherwise unfair battle; with the equalizer in tow, the client's fight against society may also allow truth to emerge.FN10 Or, perhaps, once we get to the client-vs.-society level, it is not so important that truth emerge. Thus, in Fried's somewhat amended view of the adversarial clash, a lawyer, as a matter of ethics, should actively promote the "interests" or "needs" of her client *at the expense of* third parties or the public at large.FN11

Thirdly, and somewhat inconsistently, the Fried-Freedman view urges us to adopt the autonomy model because in the long run it best serves the interests of society.FN12 Perhaps the notion is that of the "invisible hand" theory, popularized by Adam Smith, that individual entrepreneurs acting selfishly will nevertheless in the aggregate promote maximum economic wellbeing for all through a competitive market.FN13 Thus, by "championing" a client's interests "against" society, a lawyer, perhaps unwittingly, is serving the true interests of society as a whole.

2. Critique

Professor Fried's notion of the attorney as "friend" has been the subject of a sharp critique by Professors Dauer and Leff.^{FN14} There is certainly something strange about an instant friend whose friendship is purchased by paying a retainer. Yet, apart from its strangeness, the idea of a lawyer as "friend" imparts to the autonomy model a certain feeling of moral warmth; one might picture Sacco and Vanzetti, persecuted and friendless immigrants whose only real "friend" was young attorney Felix Frankfurter. More practically, if a potential [pg766] client feels that he can obtain a friend by retaining an attorney, he will be more inclined to do so. Certainly the idea of lawyer as friend aids the attorney in maximizing her own income.

We will not recapitulate here the critique of Dauer and Leff, nor the rejoinder by Freedman.^{FN15} Rather, let us assume that the lawyer is, in some sense, a "friend" of the client. We only ask: Is there a moral value in "friendship"?

A "friend" is not only someone who will help you out or lend you a hand, but is also someone who will defend you even if you are not wholly in the right. A friend is a partisan who does not subject you to moral criticism. The notion is quite universal. A "family" is often regarded as a small group of friends in that one family member will come to the aid of another against third parties or society as a whole, regardless of the morality of the situation. A "nation" is also conceptualized in the same sense: "my country right or wrong." The relationships of family, friend, or nation thus transcend moral considerations that individuals might have. This accounts for the attractiveness of such relationships, but also exposes their amorality.

There was nothing "moral" in the blind patriotism of numerous German citizens who followed Hitler. There is nothing "moral" in the friendship of the Cosa Nostra or Sicilian Mafia.^{FN16} The long list of lawyers involved in the "dirty tricks" of Watergate may have been "friends" of President Nixon, but there was nothing moral in their activities.^{FN17} Of course, we "understand" people who act out of family loyalty, friendship, or patriotism. In criminal cases we do not require a spouse to testify against the accused, because we realize that the bonds of matrimony may override any concern for truth. But although we understand these motives, occasionally forgive them, or even label them "virtues," it is incoherent to equate friendship with morality. Rather, when morality is at stake, a friend is just a coconspirator.

But we do not have to conjure up extreme cases, such as Nazi Germany or the Mafia, to see why the idea of "friendship," if applied to the lawyer-client relationship, would conflict with the dictates of morality. Suppose a client, accused of a bank robbery, asks [pg767] his attorney to safeguard the guns the client used in the robbery, and the lawyer, as "friend," takes the weapons and hides them in a safe deposit box. That would be an act of friendship, but the *In re Ryder* court disciplined and suspended an attorney for that very act.^{FN18} Or suppose an attorney, visiting her client who is in a small county jail awaiting trial, notices that the outside door is unlocked and the guard is asleep. Should she not, as a "friend," notify the client of these facts so that the client may escape? Or suppose a client asks his "friendly" attorney to sign a tax return that contains materially false statements. If the attorney were a "friend" in any ordinary sense of that word—and it is the ordinary sense of the word that Fried apparently relies upon

and employs—she would do these things, and more, for her client. Surely, therefore, the notion of "friendship" does not add any moral component to the autonomy model.FN19

Nor is the autonomy model made any more praiseworthy by associating it with the ideal of the adversary system. To be sure, the adversary system requires vigorous and zealous advocacy of all cases by both sides in order to illuminate the legal issues for the judge or decision maker and to help ensure that the truth will emerge. In this sense, a lawyer who does a halfhearted and lazy job for his client is acting immorally. He is thwarting the emergence of truth, as well as violating his implicit promise to his client to defend the client's cause zealously—a promise held out by the very image of an attorney in an adversary system. But we still must define "zealous." Zealous advocacy should not mean slipping a drug into the opposing counsel's cup of coffee to make that counsel drowsy during the trial. It should not include stealing key books from the opposing counsel's library. It should not mean attempting to bribe the judge. It should not mean suborning perjury, or concealing evidence, or threatening jurors. These are instances of "not playing the game fairly," but then the question is: "What is the game?" The "game" is an artificial contest for determining the truth within the limits of fair debate, and those limits are both defined and implied.FN20 The idea of slipping a drug into the opponent's coffee cup may never have been mentioned, or even considered, before our articulation of it here. Nevertheless, any attorney would instinctively know that this specific act is strictly forbidden by the spirit of the implied rules of the adversary system.

But in addition to these boundary rules, whether express (*e.g.*, it is a crime to attempt to bribe a judge or suborn perjury), or implied (*e.g.*, it is forbidden to slip a drug into the opposing counsel's cup of [pg768] coffee), there are many other rules that define the adversary system and make it highly artificial. Most prominent are the rules of evidence. A zealous attorney might have a strong desire to present hearsay evidence that will favor her client's cause, but the rules of the system disallow it because experience shows that hearsay evidence is more likely to thwart than to further the quest for truth. Or consider the rules of discovery: suppose it is in a client's interest to shred documents that the other side seeks to discover. A zealous attorney might be tempted to advise the shredding of the documents, which would certainly help her "champion" her client against a hostile world (as well as befriend her client). But the rules limiting the adversary system provide otherwise.

To be sure, a proponent of the autonomy model might reply that an attorney's task is to do everything she can for her client within the rules of the adversary system. But this neat formulation does not really finesse the problem. The rules must be interpreted, and if one takes a strict constructionist view, one might very well do things to "harass" the opposing counsel in ways similar to, though perhaps not so overtly wrong as, the drugged coffee example. Various "harassment" techniques might include calling the opposing counsel on the telephone in the middle of the night, letting the air out of his automobile tire, or sending him a phony client to waste his time. Or, one might take an unwarrantably restrictive view of the other side's discovery requests—which apparently has already become "good adversary practice" among practitioners, showing how the word "good" can be perverted. FN21 An attorney may also, as many trial attorneys these days in fact do, try to slip in hearsay evidence for its prejudicial impact upon the jury—again, in disregard of the spirit behind restrictive rules of evidence. All of these attorneys want to "win" for their clients, and the goal of winning seems to require

sidestepping the restrictive rules. But this kind of winning is incompatible with the goal of the adversary system: discovery of the truth. Hence we may conclude that there is no necessary connection between the adversary system and the autonomy model, between "winning" and "discovering the truth." (There is of course an overlap: trying to win for the client roughly coincides with being a zealous advocate within the rules, but the autonomy model cannot claim a necessary connection with the adversary system.)

Finally, let us consider that the autonomy model serves societal interests by positing the primacy of the client against society. It is [pg769] hard to criticize the "invisible hand" theory of Adam Smith, since in the process society is redefined; society's ultimate interest, then, is not ascertainable apart from the "society" that is the result of the "invisible hand" process. Nevertheless, Smith's economic model has parallels to our present topic. When it appeared in the nineteenth century that unbridled capitalism would lead to increasingly big business combinations and "trusts," the Sherman Act and later the Clayton Act were passed to check the tendency of business to consolidate and combine.FN22 Smith's paradigm thus required reformulation: single-minded pursuit of profit by each entrepreneur was permitted while competitive forces were kept in place; but when entrepreneurs sought to increase their profits by combinations that would diminish competition, the government had to intervene with new rules. The logic of Smith's original position would have led to oligopolistic control of all American business by a handful of giant corporations and trusts; hence restraining rules had to be introduced. Similarly, trying to "win" for the client, if pressed too far, can subvert the adversary nature of the system and led to injustice. Since it is the goal of society to seek justice, one cannot conclude that there is a necessary connection between society's goal and going all out for an individual client. "Winning" for the client, like maximizing profit for the entrepreneur, serves perhaps as a stimulant for zeal and effort, but should not be elevated to the primary goal. The client himself may want to win whatever the cost to society, but if the advocate adopts that goal as her own, then it is not clear that society will be the ultimate beneficiary. Restraints upon the zealousness of advocacy, like restraints upon "unfair" competition in business, may be necessary to save the system.

The autonomy model, whatever it does for the client, seems to be in the best economic self-interest of lawyers. The fullest expression of the autonomy model is found in *The American Lawyer's Code of Conduct* (hereinafter *Lawyer's Code*),FN23 primarily written by Freedman; it reflects the wishes of practical, practicing attorneys. FN24 As we shall see later in this article,FN25 the autonomy model places an extremely high value on total confidentiality in the attorney-client relationship. Clearly, if the clients believe that whatever they tell their attorneys will be kept in strict confidence, clients will be more encouraged to utilize the services of attorneys.FN26 No practicing [pg770] attorney would want to scare away a client by informing the client that if he tells her certain things she will "blow the whistle" on him—if the practicing attorney wants to maximize her own income. Moreover, Fried's notion of "friendship" adds to the client's feeling of security. If the lawyer is truly his "friend" as well as his "champion" against everyone else, the client will more likely seek legal services and more willingly pay for them. Crudely put, the more an attorney is a "hired gun," the more likely she will be hired.

B. *The Socialist Model*

1. Description

If the autonomy model elevates the client's interests above those of the state, the socialist model does the reverse. Law in a socialist state is an expediency designed to carry out state objectives, and even legal theory is evaluated from the standpoint of its utility in serving state and public interests.FN27 As applied to the citizen, the law is a method of discipline, guidance, and education; the citizen is instructed to conform his conduct to desirable social objectives. The ultimate purpose is to refashion and remake man according to the vision of the state. FN28 It comes as no surprise, therefore, that the role of an attorney in a socialist system is that of an agent for the collectivity.FN29 Her role as agent for the state transcends her duty to her client. However, the attorney would probably perceive no conflict of duties, since the client should by definition harmonize his conduct with that prescribed by the state. Hence, the attorney is acting in the best interests of both the state and the client if she undertakes to reeducate the client who has deviated from the path prescribed by law.

Thus, a person who may have broken the law may expect that his attorney will notify the state authorities of the transgression. The attorney cannot be expected to keep the matter confidential, since in so doing she would be conspiring with the client's deviationism. Even if the client does not reveal everything to his attorney, the attorney may be expected to assist the prosecutor in finding the objective truth; indeed, as Freedman puts it, in a socialist system "there is no division of duty between the judge, prosecutor, and defense counsel."FN30 The socialist attorney is a "friend" of her client in that she will encourage the client to confess everything and then be rehabilitated, [pg.771] since rehabilitation, the only cure for deviationism, is in the best interest of the client as defined by the state.

2. Critique

The socialist model is obviously opposed to the autonomy model, but it is also in opposition to that model we will call the "deontological" model. Just as the socialist model elevates the interests of the state above those of the client, it elevates the state above the dictates of morality. There can be no moral norms other than those imposed by the collectivity. Thus, if the state decides to persecute a minority group or political dissidents, no countervailing morality in favor of these groups will be entertained by the state. The Aryan philosophy of Nazi Germany held that certain minority groups should be eliminated to purify the Aryan stock; this was an imposition of a collective judgment against individual moral rights. Of course one is free to decide that collective morality is correct; indeed, Rousseau attempted a justification of the "general will" along these lines.FN31 But the extent that one is unpersuaded that moral standards are ultimately defined by a collectivity, the socialist model is at variance with any model of legal ethics that builds upon individual moral standards.

But apart from any judgment one might want to make about the desirability of the socialist model, for present purposes it suffices to point out that eliminating confidentiality will greatly reduce the role of the attorney in the system. As Freedman and others have often observed, accused persons will not tend to seek the services of attorneys if the latter are, like the prosecutors, agents of the state. That does not mean that there will be no role for attorneys; an attorney, after all, may usefully present her client's cases to the tribunal in a sympathetic

fashion. But a client is not assured in advance of his attorney's sympathy; indeed, if the attorney is convinced that the client is a willful deviationist, the attorney will not want to endanger her own standing with the tribunal by appearing to be sympathetic to such an enemy of the state. In any event, it is clear that the role of an attorney is substantially reduced in a socialist system. China, the most populous nation in the world today, seems to have very few attorneys and no guaranteed right to counsel.FN32 Perhaps from the standpoint of the collectivity, this is no serious loss. But we argue that there is a moral value in providing access to the law—in any system—to those who have not studied the law and who cannot [pg.772] be expected to know its content or to predict the behavior of state officials on the basis of that content. Without attorneys to explain what the law is and to translate it, people will act at their peril and will be subjected to unchecked official tyranny.FN33 We argue that freedom from this subjection to arbitrary official tyranny is a moral value, a value that is diminished by the socialist model of legal ethics.

C. The Deontological Model

1. Description

"Deontology" is, unfortunately, a cumbersome word; it is derived from Greek words meaning "science of duty." However, it best expresses a view of ethics that is opposed to utilitarianism. A deontological theory of ethics says that some acts are morally obligatory regardless of their consequences for human happiness.FN34 For example, a bank would have no moral right to take the assets of its richest depositor and distribute them to all the other depositors; even though the latter group might be happy at the expense of "only" one person, the act itself is wrong. A prosecutor would similarly disobey the moral law if he were to secure the conviction of an alleged mass murderer he knows is innocent in order to calm the public that is agitated because of fear that the mass murderer might still be at large. It would also be wrong for a student to cheat on an exam even though the student needs the educational degree to pursue a lifetime of selfless dedication to the poor and downtrodden of the world. The leading philosopher of deontological ethics, Immanuel Kant, argued that a moral duty could not be transgressed even if obeying it would lead to harm to others. His famous example was that a person could not tell a lie to a would-be murderer even to save the life of an intended victim.FN35 But Kant's position is too rigid. It would appear from his example that a person has a moral duty to an innocent third party not to facilitate one who would harm that party, and indeed to intercede to stop the harm. Hence, a conflict arises between the moral duty not to tell a lie and the moral duty to prevent harm to an innocent third party.

W. D. Ross has accordingly argued that moral conflicts can arise [pg773] in deontological theory, and that it is incoherent to insist upon universal validity of anyone moral rule to the exclusion of all others.FN36 We will follow Ross' approach in this article, taking the deontological model to mean that moral rules cannot be eclipsed by nonmoral considerations (*e.g.*, the client's "interests" or "autonomy," or the "interests of the state"), but that they may conflict with other moral rules. When they do conflict, we shall try to analyze that conflict and indicate how it may be resolved in a way that hopefully is intellectually and ethically satisfactory.

The specific deontological rules of ethics that shall concern us in this article will become evident as we discuss the models in the third section. For the moment, summarily stated, we shall argue that the following, among others, constitute relevant deontological rules: (1) If A intends to harm B and the harm is serious either physically or financially, and if C discovers A's intention, then C is charged with the ethical duty to act to prevent the harm to B, such as by warning B; (2) any person is under a moral obligation not to commit fraud or perjury, perjury being defined as a material falsehood; (3) if C elicits information from A "in confidence," then unless there is a conflict with another moral obligation, C has a duty to keep the information confidential; (4) there is a moral value in some people becoming professional attorneys, so as to give others access to the content of the law and access to informed predictions about the probable behavior of officials. In the third section of this article, we will examine conflicts between rules (1) and (2) on the one hand, and rules (3) and (4) on the other.

2. Critique

The deontological model is best criticized by comparison with the other two models. There are costs associated with using the deontological model, not the least of which is that it requires some inroads, as we shall see, into attorney-client confidentiality. To the extent of these inroads, the legal profession might suffer a diminution of business, for clearly the value of attorneys to clients varies directly with the degree of confidentiality on which the client may rely. On the other hand, there may be benefits from adopting the deontological model, benefits which may be inferred from the previously discussed criticisms of the other two models. Since the deontological model is our preferred model for legal ethics, we may be too close to it to appraise it critically. We think that the criticisms will be apparent enough, however, if either of the other two models are contrasted with it.

[pg774] III. APPLYING THE THREE MODELS

A. *The Problem of Confidentiality: General Considerations*

In subsection B of this section we will discuss several examples of attorney-client confidentiality with respect to the specific application of the autonomy, socialist, and deontological models. Before doing so, it is appropriate here to consider in a more general way what is involved in confidentiality and how it is viewed by the differing philosophies of the three models.

Let us start with a simple ethical precept: A has a moral obligation not to cause serious physical harm to B. We exclude those cases in which A may be "justified" in doing so: A and B are soldiers in opposite warring armies, A is the public executioner and B has committed a capital offense, or B has attacked A and A, in self-defense, has no choice but to seriously injure B. Instead, we will assume that A simply has a grudge against B (*e.g.*, from prior financial dealings), or A dislikes B for some other reason, or perhaps B has rejected A's amatory advances.FN37

Now, to introduce the problem of confidentiality, let us assume that C learns of A's intent to cause serious physical harm to B. C has a moral obligation to do something to prevent

A from harming B. C may call the police (assuming that will be effective),^{FN38} try to talk A out of it, threaten A that C will disclose the intention to B unless A effectively calls it off, or warn B directly. Even though B is a stranger to C, C has a moral duty to B to try to prevent the harm.

Does anything change depending upon how C learned of A's intent to harm B? Suppose C is in a restaurant and happens to overhear A mentioning her intention to her friends at another table. In this case, C of course has no obligation to anyone, including A, that might conflict with his obligation to warn B of the impending harm. This is the easy case, but now let us consider the hard one. A and C are friends, and A asks C: "If I tell you something, will you keep it confidential?" C agrees and A then reveals her intent to harm B. C's obligation to B is, *prima facie*, the same as it was in the "easy" case, but now he is faced with the question of whether he has an overriding obligation of confidentiality to A. Can C rationalize to himself that he would never have learned of A's intent to harm B but for his promise to keep what A was about to tell him confidential, and thus having learned of A's intent, C must now proceed "as if" he had never heard A tell him the plan to harm B? A promise is, after all, something that the promisor becomes morally obliged to [pg775] fulfill.^[FN39] The "consideration" (if one were needed) for C's promise was A's revelation to C of A's otherwise secret intent. A relied on C's promise not to reveal her intent. Thus, C may reason, C is under a moral obligation not to reveal A's confidence. C is "shielded" by the promise to A. Hence, C must stand by and do nothing while A proceeds to effectuate her plan to harm B. Is C's moral conclusion accurate?

C's promise to keep confidential what A will tell him might be analyzed against a common background of morality that gives effect not only to promises but also to implied understandings regarding the immorality of causing serious harm to other people. C might say to A: "It is true that I agreed to hold what you were about to tell me in confidence, but I did not expect that you would tell me something that, in good conscience, considering my moral obligation to others, I am morally bound to reveal." Or C might say: "You had no right to bind me to a confidence when you knew that you were going to tell me something that I would be morally bound to reveal." Or C could put it this way: "Now that you have told me your intention, I see that you have tricked me into promising to remain silent. But if I remain silent, then I will be as morally guilty as you. If I do nothing and you harm B, it will be the same as if I had harmed B myself. Surely you did not expect me to share in an immoral act, or if you did, it would be inconsistent of you to enforce against me the morality of keeping promises to enable you to proceed with an immoral act against B." On this reasoning C could conclude that if A cannot be dissuaded, C may proceed to warn B, despite C's promise of confidentiality to A.

These preliminary considerations were necessary to set the stage for a discussion of attorney-client confidentiality. Assuming the same hypothetical situation as above, we now assume further that C is an attorney. What do the three model philosophies of legal ethics say that C should do?

The autonomy model places an extremely high value upon confidentiality. Either C is A's very close "friend" and hence would not reveal A's intent to B, or indeed C is an extension of A's personality, and since A would not warn B, neither should C. This philosophy finds expression in Alternative B of Rule 1.2 of the *Lawyer's Code*, which requires an attorney both

to keep a confidence and not to "use it in any way detrimental to the interests of the client, as the client perceives them, or as the lawyer reasonably understands the client to perceive them”FN40

In contrast, the socialist model places an extremely low value [pg.776] upon confidentiality. C may be A's attorney, but C is an agent of the state first and foremost. A's intent to cause serious physical harm to B is contrary to law, and hence C must reveal the confidence in order to protect society against a breach of one of its laws. It is not so much the harm to B which must be prevented, but rather the harm to the state, which in this case is represented by laws protecting B against this kind of assault.

In contrast to both of the foregoing models, the deontological model is reflected in the *Model Rules*, which would allow C to disclose the confidence if that is the only way to prevent harm to B.FN41 Indeed, despite the impression that a deontological model of legal ethics would mandate the disclosure in order to prevent harm to B,FN42 we argue that the deontological model of legal ethics should only allow, but not require, the attorney to reveal the confidence. By "allowing" the attorney to reveal the confidence, a deontological model of legal ethics would simply destroy any barrier that attorney-client confidentiality would pose against the disclosure. In other words, there would then exist no professional reason why a lawyer is under any disability to disclose a confidence. The attorney would thus be "taken out" of the attorney-client relationship for this purpose, and placed back in the role of any person (C), who would *then* have a *moral* obligation to make the disclosure if our previous analysis is correct.FN43

An important variant on the attorney-client confidentiality problem is advance disclosure to the client of the exception to confidentiality. Would disclosure make the situation different? Let us consider our earlier example in which A asked her friend C if C would keep a confidence. Suppose C were to reply: "I will, unless the secret you tell me places me in a morally untenable position, such as requiring me not to take action when an innocent person might suffer harm." Such a reply would fully disclose the parameters of Cs view of confidentiality, and if A were to proceed anyway to tell C her plans to harm B, A should not be surprised if C reveals the confidence, nor would C be under a promissory moral obligation not to reveal it.

To the extent, therefore, that an enacted code of ethics recapitulates the requirements of morality in its exceptions to the confidentiality principle, clients will be on notice that confidentiality is limited [pg777] by other moral norms. Thus, to take an example from the *Model Rules*, clients are put on notice, if they read or hear about the *Model Rules*, that revealing an intent to cause serious physical harm to another person will place upon the attorney the power to breach the confidence if necessary to prevent the harm."FN44 However, problems arise with respect to each of the three models when we consider this question of notice to the client.

The deontological model presents what is perhaps the least serious problem. Suppose that one provision of a code constructed on this model contains an exception to the confidentiality rule if a client reveals an intent to cause serious physical harm to a third party. While this certainly gives full notice to the client, in fact it may deter him from revealing his

intention to his attorney. If the attorney hears nothing, then the attorney has no moral obligation. Yet the result is that A harms B. To make the picture morally compelling, assume that B is a child and A, a sadist, intends to violently attack the child sexually. Surely the important consideration is preventing the harm to B. If the code of ethics puts A on notice, he might not reveal his intent to C. Thus, morally speaking, it would have been better for A to assume, erroneously, that C would keep the confidence, for in that event C would be in a position to stop the planned attack on B. A similar dilemma is faced by psychotherapists as a result of the *Tarasoff*^{FN45} decision in California; the feeling is that violence-prone clients will not disclose their intentions to their psychotherapists if the latter are not strictly bound by confidentiality.^{FN46} However, the dilemma may be more real in theory than in practice. Neither lawyers nor psychotherapists tend to reveal the limits of confidentiality at the outset of their professional relationships with a new client; they are after all trying to instill confidence in their clients. Moreover, many persons who are seriously disturbed and intend to commit crimes of violence—if they disclose their intent at all—often make their disclosures with some partial sense that they want the listener to intercede and stop them. If the lawyer or psychotherapist does nothing, the client may feel that society does not care, and thus he proceeds. Perhaps we may conclude that it is not too important whether an enacted code of legal ethics contains an explicit "moral harm" exception to confidentiality in the deontological model.

A more serious problem is presented by the autonomy model. Suppose Alternative B of the *Lawyers' Code* is adopted by a state supreme court as the rule for attorneys in that state. Then disclosure [pg.778] by C of A's intent to harm B would be grounds for C's disbarment.^{FN47} But what happens if B is the child in our previous example? A is secure in revealing his intent to C to harm B because he knows that C would be disbarred if the confidence were breached. But surely this presents C with an intolerable moral dilemma. C may rely on a prediction that the attorney discipline committee of his state will not disbar him for revealing this confidence. But then we only have to imagine a series of progressively less egregious cases; at some point, although the person in B's position will suffer serious harm, C will not breach the confidence (*e.g.*, B is not a child, but is a rather tough individual who might be able to "take care of himself" even if suddenly assaulted by A). The very ruling out of exceptions to confidentiality for moral transgressions will notify the client that just about anything he tells his attorney will be kept in confidence, and that in turn may cause serious moral dilemmas for attorneys. Naturally, if keeping confidences were the most important moral obligation in the world, then it would not matter what harm might befall B. Even if a client revealed an intent to detonate a bomb in a crowded store or hotel lobby, an attorney would still keep the confidence as a matter of high morality. But merely noting this possibility demonstrates its absurdity. Keeping a confidence is a value but not the most important value, and if it is treated as the most important, as in the autonomy model, it may place attorneys in a morally untenable position when countervailing moral values seem to call for disclosure.

At the other extreme, the socialist model, if enacted in a code of legal ethics, might operate to destroy the legal profession. Clients would be afraid to tell their attorneys anything, and hence might give up going to their attorneys. Suppose a client did something and is unsure if it was legal. Typically, a client asks an attorney about the legality of a past act. But he does not ask an attorney about the risk that the attorney will blow the whistle if the past act was contrary to law. Moreover, what is contrary to law is not necessarily contrary to morality,

which we shall see as we now turn to an examination of the differences among the three models with respect to specific questions of confidentiality versus disclosure.

B. *The Mutual Exclusivity of the Three Models*

In this subsection we shall attempt to show that the three Models—autonomy, socialist, and deontological—are conceptually distinct from each other and, equally important, attempt to [pg779] demonstrate the usefulness of applying these models to some specific topics of the current debate over confidentiality. Not only do we believe that each of the models throws a distinct light on these questions, but also that each of them usefully criticizes the other two. Finally, we hope to indicate that the deontological model offers the most satisfactory means for bringing a code of professional ethics into congruence with underlying morality—an answer to Fried's question: "Can a good lawyer be a good person?"FN48 With respect to most topics, two models appear to line up on one side while the third takes the opposite position, even though there are slight differences between the paired models. Therefore, we organize this section under three headings. Each heading lists one of the models in opposition to the other two. The aggregation of the three headings proves as a matter of formal logic that each individual model is conceptually distinct from the others.FN49

1. Autonomy and Deontological Models vs. Socialist Model

Under the current *Model Code of Professional Responsibility* (hereinafter *Model Code*), *Model Rules*, and *Lawyer's Code*, attorney-client confidentiality is to be maintained in all but exceptional circumstances.FN50 The rationale for this general rule of confidentiality, as we have previously argued in subsection A of this section, lies in the asserted importance of confidentiality to the promotion of the positive attorney-client relationship, and in the significance that relationship has in the provision of zealous legal representation. Given confidentiality's asserted value, it is hardly surprising that exceptions to the general rule have been recognized under the codes only in the face of truly compelling countervailing concerns.FN51

[pg780] a) *Completed Conduct: Client's Admission of Guilt*

Let us consider the representation of a client who has admitted to his lawyer that he is guilty of a crime. This situation leads to a clash between the rules of confidentiality generated by the autonomy and deontological models on the one hand, and the socialist model on the other, and hence provides a clear distinction for our analysis.

In this situation, the autonomy and deontological models would both require confidentiality and nondisclosure of the client's confession. Echoing the autonomy view, Fried has said that our legal system assures the liberty of each citizen by entitling him to zealous legal representation.FN52 If Freedman asserts without qualification that zealous representation in this situation entitles the client to the preservation of his confidences and promotion of his interests before the legal tribunal.FN53 Thus, an ultimate determination of guilt or innocence will be made by judge or jury, but not by individual attorneys.FN54

In concurring with the result reached by the autonomy model, the deontological model focuses upon the fact that an accused individual faces deprivation of life or liberty by the state. Justice as a branch of morality dictates that such an individual should be so deprived only if he in fact committed a crime under the generally applicable laws of a fundamentally just society.FN55 This formulation, however, raises an immediate question for an attorney under the deontological model: "Should the attorney represent such a client?"

If the attorney is wholly convinced that the client is guilty (because, *e.g.*, she believes the client's admission of guilt is truthful), we see no overriding moral reasons why the attorney must take the case. But suppose she is the "last lawyer in town." Even though the client might have a constitutional right to an attorney, the deontological model is not necessarily coextensive with the Bill of Rights. Rather, the Constitution presents a dilemma for the state; the State cannot convict the accused person without an attorney and yet the [pg781] attorney is the "last lawyer in town." Yet this alone does not mean that the attorney has a moral obligation to defend the accused person. Indeed, many practicing attorneys refuse to represent persons the attorneys believe are guilty of a crime. These attorneys are exercising a moral choice. Under a deontological view, it would be immoral to compel them to defend guilty clients. Yet much mythology and many "codes of ethics" suggest that an attorney has an ethical obligation to defend a guilty client. Clarity would be promoted if it were recognized that although an attorney may represent a guilty client, she is under no ethical obligation to do so.FN56

But beyond the immediate question of representation, let us suppose that the attorney believes the client's admission of guilt. Should she now disclose that admission to the authorities, and perhaps even appear as a witness to the confession in the subsequent trial? Under the socialist model, this would be the mandated result. Upon discovering that the client is guilty, the socialist attorney would make sure that the state was informed so that the state might take appropriate rehabilitative, or perhaps punitive, measures.

In contrast, the deontological model would not favor disclosure. In considering the precise interests involved, the case under discussion does not present a threat of ongoing or future harm to other persons; if it did, as we will discuss later in this article,FN57 the disclosure outcome would be different. The harm to the victim of the crime in this case occurred in the past; the client himself is the only one who is now at risk (the risk of suffering the state's sanction).FN58 If the client is innocent, then he has a vitally important interest in legal representation to prove his innocence. If he is guilty, concededly he does not have this interest under the deontological model. If our attorney does not know whether the client is innocent or guilty, then on the *chance* that the client is innocent the attorney should consider representing the client and should certainly not disclose confidences. Given the importance of the client's interest at stake, even a fractional probability of innocence is enough to tip the moral scales, in the absence of countervailing interests.

But there is inevitably a fractional probability of innocence. Even the client's admission of guilt does not reduce to zero the likelihood of innocence. Many people have been self-deluded for all kinds of psychological reasons; they may be pathological confessors masochistically seeking punishment at the hands of the state, they may have [pg782] been tricked by others (*e.g.*, hypnotists) into believing their own guilt, or they may be trying to

protect friends by "taking the rap." Any possibility of innocence should enable an attorney to mount a vigorous defense in clear conscience and leave the ultimate question of guilt to a jury. Thus, under the deontological model, it follows that there should be no breach of confidentiality.

In addition to the interest of the deontological model in protecting an innocent person from unjust conviction, there is a further interest to be vindicated under this model. Preservation of the integrity of society and its judicial institutions demands that even a guilty client be represented by an attorney. Lon Fuller argued that equal access to the judicial system by all citizens helps ensure that the processes used by society to condemn and punish erring members will remain "sound and wholesome. Indeed, denying access to guilty clients seals their fate and renders the fairness of the judicial system suspect. No just society can convict a citizen summarily by foreclosing entry to legal processes. Thus, in representing a guilty client, the attorney "represents a vital interest of society itself, [and] plays an essential role in one of the fundamental processes" of a just society. FN60

b) *Contemplated Conduct: Intent to Commit a Minor Violation*

In contrast to the example just discussed where the crime was committed in the past, how do the three models differ with respect to whether an attorney should disclose her client's admitted intent to commit a crime in the future? As we shall see later in this article, FN61 much depends on the kind of crime intended. Here, let us consider a nonviolent "violation" or "minor misdemeanor" type of offense that causes no significant harm to other persons (*e.g.*, leaving one's car parked beyond the meter limit, driving a car that has no license plate, smoking a marijuana cigarette, or a minor purchasing and drinking a bottle of beer).

Under the socialist model the assumption would be that society enacted all of its criminal legislation to prohibit the proscribed conduct [pg783] and hence society benefits whenever any criminal action, major or minor, is deterred. Thus the socialist model would require the attorney to disclose a client's intent to commit any crime. Interestingly, the present *Model Code* on its face allows the same disclosure: "A lawyer may reveal ... [t]he intention of his client to commit a crime and the information necessary to prevent the crime." FN62 To be sure, some commentators read this provision as allowing disclosure only for serious crimes. FN63 On the other hand, the way one reads the *Model Code* may depend upon which of the three models of legal ethics the reader consciously or subconsciously has in mind. Under the socialist model, the reader would be impelled not only to draw no distinctions between serious and nonserious crimes, but also to read "may reveal" as "must reveal."

The autonomy model, on the other hand, would not allow disclosure of a client's intention to commit a minor violation, an *a fortiori* consequence of that model's emphasis upon the value of confidentiality. Only in the most egregious circumstances would a breach of confidentiality be permissible to those who adopt the autonomy model, and even then (*e.g.*, where a client announces an intent to commit murder) it appears to be a grudging ad hoc exception to the general rule of confidentiality. FN64

The deontological model, grounded in morality and not in any one particular legal system, would draw a distinction not between major and minor "crimes" but rather between substantial and insubstantial harms to third persons, for any criminal enactment by a [pg784] state does not make the proscribed conduct immoral any more than it would make it harmful to other persons. For example, parking beyond the time on the parking meter would cause some inconvenience to others who might want to park in that spot, but this harm is normally insubstantial, unless a person parks in a proscribed zone that might block an ambulance or fire truck. Of course this is an example of a minor violation, but we can imagine a society where even a major crime might be neither harmful or immoral (*e.g.*, laws making it a major crime in Nazi Germany for Aryans to marry non-Aryans, or laws in South Africa making it a crime for blacks to marry whites). However, in the United States today, the distinction between major crimes and minor violations generally tracks the distinction between immoral and moral conduct. To the extent that this is true, the deontological model would generally line up with the autonomy model regarding nondisclosure of a client's intent to commit a minor violation, given our previous argument that the deontological model finds *prima facie* moral value in preserving confidentiality. FN65

c) *Continuing Conduct*

A celebrated final example that tests the position of the three models involves representing a guilty client when the consequences of that client's past conduct may have continuing or future implications to third persons. In *People v. Belge* the court and an ethics committee found that a lawyer acted properly by not disclosing the location of the buried bodies of his client's victims.FN66 The autonomy model would clearly concur in the result reached by the court and ethics [pg785]committee. The socialist model would just as clearly dissent on the grounds of rehabilitating the defendant and preventing continuing harm to the victims' families and society.

The deontological model is a harder case, although it would ultimately preserve confidentiality. While the outraged public's reaction to the attorney's failure to inform police in *Belge* may suggest a value more important than confidentiality,FN67 we agree with the result reached by the New York court. However, it does test our notion of what constitutes "substantial" harms to third persons. In *Belge*, the third persons affected were the parents of the victims. The students had been missing for several months, and because the attorneys did not disclose the whereabouts of the bodies, the parents did not discover that their children were dead for nine additional months. Is this added measure of uncertainty a "substantial" harm to the parents? We do not think so in this case, though of course a more aggravated situation might call for a different result. The case has been sharply debated,FN68 and differences of opinion are surely possible as to whether the harm to the parents was "substantial." The deontological model only requires that the question of substantial harm be addressed and compared to the value in preserving confidences.FN69

2. Socialist and Deontological Models vs. Autonomy Model

Contrasting the socialist and deontological models against the autonomy model will produce further distinctions. As a first area of comparison, let us consider the problem of disclosure of perjury.

a) *Completed Conduct: Does Perjury Constitute Harm to the Justice System?*

Let us suppose that a client, called to testify in his own case, [pg786] makes a material statement his lawyer knows to be false. Should the attorney thereupon disclose the perjury to the judge, breaking his client's confidence? In a criminal case, the answer may be negative solely for constitutional reasons.FN70 But what about a civil case?

The autonomy model would answer negatively in the civil case as well. Freedman has frequently stated his belief that confidentiality is the overriding value in the attorney-client relationship.FN71 Given this philosophy, when all private remedial efforts have failed and a client still insists on giving perjured testimony, a lawyer's obligation of confidentiality "apparently allows the attorney no alternative to putting a perjurious witness on the stand without explicit or implicit disclosure of the attorney's knowledge to either the judge or the jury."FN72

Further buttressing Freedman's position is the *Lawyer's Code*, which appears to be the baldest statement of the autonomy model:

A lawyer representing the wife in a divorce and custody case learns from his client that she had sexual relations with a man other than her husband during the time of separation. [T]he wife testifies falsely on deposition that she has not had sexual relations with anyone other than her husband during the marriage. The lawyer would commit a disciplinary violation by revealing the perjury."FN73

The excerpt clearly demonstrates the extraordinary value placed upon confidentiality by the autonomy model. In contrast, the socialist model, valuing the administration of justice, attempting to deter any crime (including perjury) and placing a high value on truth (in part because of the goal of rehabilitating persons who act contrary to the expressed and legislated values of society), would require the attorney to reveal the perjury.

The present *Model Code* requires the attorney—when other means, such as persuading the client to rectify the fraud fail,—to "reveal the fraud to the affected person or tribunal."FN74 Some states, however, have adopted an amendment that seems to eviscerate this requirement. FN75 The *Model Rules* reaffirm and perhaps even [pg787] strengthen the *Model Code* on this issue, though they clearly except, in limited instances, criminal cases for constitutional reasons.FN76

The deontological model approaches but does not replicate the socialist model, while it differs substantially from the autonomy model. We must first investigate the problem of attorney participation in the perjury.

Although most people would agree that an attorney may not sign a tax return which she knows contains materially false statements, a much harder case is presented when an attorney is surprised by her client's perjurious testimony at trial. Merely by sitting there and saying

nothing, the attorney may be giving the impression to judge and jury that the client's testimony is true. By so acquiescing in the false testimony, she may be participating in the perjury.

While a code of professional conduct may be fashioned to define an attorney's conduct in this situation as not endorsing the truth of what her client is saying, and thereby avoid any attorney "participation" in the perjury, the question remains whether a code of ethics *should* exempt attorneys from participating in such perjury. We believe not. Perjury is itself a wrong; it is a deliberate injury to the mind of the listener who has a right to expect that the speaker will utter the truth.FN77 Moreover, we believe it would be debilitating for the legal profession over the long run to feel that it has no moral duty to object when perjury is committed because of a casuistic exemption promulgated in, of all places, a code of professional ethics.FN78 Thus, with nothing more, acquiescing in a perjury is tantamount to participating in it.

We are therefore compelled to draw an initial distinction that, in fact, is found in many draft codes of legal ethics: the attorney may not actively participate in perjury, such as signing a fraudulent tax return. The additional question arises, however, whether she may passively participate by remaining silent when she knows that her client is lying. In the absence of any further considerations, we believe that the attorney may not remain silent in this situation, because by doing so she would participate in the perjury.

[pg788] But there can be further considerations. Suppose an attorney is given the task of defending a guilty client (the attorney is the public defender, or is perhaps the "last lawyer in town"). The client insists upon taking the stand and tells the attorney that he will try to lie his way out of a conviction. From what we said previously, the attorney should not participate actively in the perjury by, for instance, endorsing its truthfulness to the court. But in order to conduct the defense, the attorney will have to ask the client questions knowing that the client's answers will be false and yet not betray that falsity to the jury. How can this level of acquiescence in the perjury be tolerated? The deontological model would build upon its answer to the previously discussed problem of not disclosing a client's guilt. The reason we gave in that example is that there is always a possibility that the client may be lying to his attorney in stating his guilt or may genuinely be mistaken as to that fact.FN79 But if those were possibilities in our hypothetical, it follows that it is possible in our perjury case that the attorney may be mistaken in her belief that her client is lying. The moral interest at stake in both of these cases is that an innocent person should not be subjected to criminal punishment. This moral interest appears sufficiently strong to overcome the passive participation by the attorney in the perjury. Moreover, the previous fears of "contamination" by the attorney in the perjury is least likely in the criminal case, since "everyone knows" that a guilty person is entitled to a vigorous defense—a defense that might proceed even though the defense attorney knows that the client is guilty and hence is lying. And even if everyone does not know this fact, at the outset of any criminal case a judge may easily apprise the jury that the defense attorney, in order to conduct a vigorous defense which is the client's right, may have to condone perjurious statements. (Query: Is this prejudicial? Perhaps it depends upon how the judge words it.)

But there is another moral interest that we must take into account in assessing whether an attorney should passively acquiesce in perjury. If the result of the perjury is to threaten harm to a third person (*e.g.*, to cheat that person out of property), then the attorney should disclose

the perjury. In a criminal case it could come up this way: A client has robbed a bank, pleads not guilty, but tells his attorney where the loot is stashed. The perjury here (which may indeed be the plea of "not guilty" as well as any positive statements the accused might make on the witness stand) has the effect of depriving the bank of its property. The attorney should inform the client that there is no attorney-client confidentiality with respect to the location of the loot, that the best thing is for the attorney to phone in an "anonymous tip" to the bank or the police describing where the money can be found and recovered, but if that is not done, then the [pg789] attorney must reveal the perjury in court. As the latter course of action would impair the client's constitutional right to counsel, the former "anonymous tip" approach seems ethically required. Then at trial, if the client says that he never knew where the loot was located (as part of his defense that he did not rob the bank), that perjury would have no future effect upon the bank (since the loot has been recovered after the "anonymous tip"), and hence can be condoned under the principles we have advocated.

In any civil case, on the other hand, where a sum of money is involved as potential damages, perjury by either side would tend to cheat the other side of its property interest. In these cases, our position is that the deontological model would require disclosure of the perjury to the court if the attorney is unable (by pretrial coaching) to talk the client out of committing the perjury. The attorney in this case cannot remain passive by allowing the perjury to take place. The combination of perjury plus harm to another's interest is enough to overcome whatever value is assigned to confidentiality.

Why wouldn't the deontological model simply hold that all perjury is excluded from the rules protecting confidentiality, with a simple exception that a defense attorney not reveal her knowledge that her client is guilty or is lying? The answer is threefold. First, even in a criminal case, if the result of the perjury is to harm a third party's substantial interest (*e.g.*, our bank loot case), the perjury should not be privileged. Second, if a client makes a statement that is immaterial, the attorney should not be required to reveal the perjury to the court, even if it is held to be perjurious.FN80 Third, suppose the substantive law itself is immoral; in that event the perjury would not be immoral. For instance, if a person were accused in Nazi Germany of being a Jew, and he denied that fact with the knowledge that admission would probably mean being transported to a death camp, then his attorney should not be required to reveal the perjury to the tribunal. This example admittedly is a rarity, but it does show the sharp distinction between the socialist model, which would require disclosure, and the deontological model.

b) *Contemplated Conduct: Intent to Commit Serious Harm to a Third Party*

We have previously discussed the client's intention to commit a minor violation;FN81 there the autonomy and deontological models concluded that the attorney should not disclose the confidence, whereas the socialist model would require disclosure. Turning now to [pg790] examples of rules of attorney conduct that distinguish the autonomy model from the other two, let us examine a client's intention to commit acts that would cause serious harm to third parties.FN82 We will consider two different kinds of acts: first, a client's intention to commit an act of fraud that could cause serious financial harm to a third party, and second, a client's intention to unleash a dangerous product on the market.

i) Client's Intent to Commit Fraud

The autonomy model requires nondisclosure in the case of a client's intent to commit a fraudulent act. Relying on the general justification for confidentiality from the autonomy perspective, Freedman asserts that only with an assurance of confidentiality will the client fully disclose his affairs to his attorney.^{FN83} But for confidentiality, the attorney would not even know of the client's intention.

Of course, upon learning of the client's intention, the attorney may privately try to dissuade the client from undertaking the contemplated conduct. However, the client may not accept the attorney's advice and may proceed with the conduct anyway. If this happens the attorney has no right under the autonomy model to blow the whistle on her client. Indeed, the autonomy model has been criticized because the attorney's inability to blow the whistle makes it difficult for her to convince the client to change his mind.^{FN84} Nevertheless, the autonomy model insists on confidentiality even if the act of fraud is a crime and, as we have seen, even for other crimes that would result in serious harms to third parties.^{FN85}

The new *Model Rules* omit any intended-fraud exception to confidentiality, even though all the drafts of the *Model Rules* up to the final document contained such an exception.^{FN86} Clearly the new *Model* [pg791] *Rules* draw a sharp distinction between physical and financial harm. A cynic might speculate that lawyers see no harm in a client's intent to defraud a third person because the legal profession itself charges unconscionably high fees for its services. But on a more serious level of criticism, the distinction between physical and financial harms is ultimately problematic. A person who is defrauded and financially ruined could thus be deprived of essential shelter or nutrition that could have serious health consequences; his or her dependents could suffer physically from the financial ruination. Even in moral theory it may be said that a person's earned wealth is as close or closer to personhood than a person's physical health; one has to work hard to make money.

Thus, the deontological model would differ sharply from the new *Model Rules*. Under the former, the intent to cause serious financial harm to a third party would morally outweigh the interest in preserving confidentiality. The question of what is "serious" in this formulation, like any moral standard, would have to depend upon a reasonable and disinterested assessment. The problem is no different in assessing what is "serious" when physical harm is at stake. Under the *Model Rules*, there is an exception to confidentiality for intended criminal acts that are likely to result in "substantial bodily harm."^{FN87} Perhaps ethical standards cannot be made more specific than sentences using terms such as "serious" or "substantial."

In contrast to the new *Model Rules* which adopt the autonomy model, both the socialist and the deontological models clearly would allow disclosure of a client's intent to defraud a third party. As we have seen, the deontological model would require serious financial harm, whereas the sociological model probably would be satisfied with considerably less than serious harm.

ii) Client's Intent to Distribute Adulterated Food

Turning to a consideration of general harms to the public, let us now examine the case of a client's intention to distribute adulterated food on the market. This case poses difficult and troubling concerns for the rules of attorney conduct under the three models. It is unclear, for example, whether the intended conduct actually constitutes a criminal act. Furthermore, the threatened harm is not directed to any specific individual; rather, the harm threatens the public as a whole. Yet although the victims may not be identifiable, the harm is clear and foreseeable.

Many attorneys would surely be uncomfortable in this situation. Disclosure of a client's intention to distribute the contaminated product might prompt the client to censure or remove the attorney from [pg792] any sphere of influence over the client's affairs. Such a result could cripple the attorney's immediate economic welfare. On the other hand, failure to disclose may be morally intolerable. Let us consider the resolution of this case under each model's rules of attorney conduct.

To make our case more realistic, suppose an attorney represents a food company which intends to adulterate one of its food products with a coloring additive in order to enhance the food's appearance. Before the food product is actually distributed, however, the company receives a report from its laboratory that the additive causes cancer in laboratory mice. Moreover, the findings of the experiments are conclusive; the additive significantly increases the risk that laboratory mice will contract cancer.

Upon learning this information, the company consults its attorney and requests her advice about marketing the food product. Despite her advice not to distribute it, however, the company concludes that it must distribute the adulterated food product in order to recoup its investment. The company explains that it has invested a substantial amount of money in the preparation of the food product, and that at this late date it cannot afford to change the composition or appearance of the product. For this reason, the company informs the attorney that it does not want her to disclose the presence of the additive in the food, or any of the company's actions regarding its distribution of the product. Instead, the company states that it is prepared to pay damages in tort which may arise from consumption of the food product, believing that this alternative will be less costly than disclosure. Indeed, it asks the attorney to begin research on defending such cases in the event that they arise. What value should the lawyer place on confidentiality in this situation?

Under the autonomy model confidentiality would again prevail, as the lawyer would give primacy to client interests. She might not personally agree with the client's decision, and may even privately advise disclosure, but she should not disclose on her own. As in the hypothetical involving fraud,^{FN88} confidentiality would prevail over moral concerns. We suspect most lawyers would concur with the result reached under the autonomy model. Under the socialist model, however, the lawyer would disclose the impending harm in order to protect the public.

The deontological model would suggest, of course, that the lawyer first privately urge the client to disclose. In the event that action failed, however, disclosure would be permissible and preferable. Distributing carcinogenic food is too substantial and foreseeable a harm to be ignored. The ethical concern in preventing serious physical harm supersedes confidentiality.

Indeed, any person, [pg793] not just a lawyer, who learns of this hidden threat should disclose the imminent harm in order to safeguard life. Fundamental ethical principles should apply alike to nonlawyers. Under the deontological model, we argue that confidentiality should not serve as a barrier to disclosure in cases involving substantial and foreseeable harms to the public.

3. Autonomy and Socialist Models vs. Deontological Model

a) *General Considerations*

From what has been said so far in this article, the autonomy and socialist models would clearly make strange bedfellows, and indeed it is not easy to find examples where they align together against the deontological model. However, there are situations in which this strange line-up emerges, ultimately revealing the ethical poverty of the autonomy perspective.

The present *Model Code*, the *Model Rules*, and the *Lawyer's Code* each contain an exception to confidentiality when disclosure is required by law. The *Model Code* permits disclosure "when required by law or court order,"FN89 the *Lawyer's Code* when "required to do so by law, rule of court, or court order,"FN90 and the *Model Rules* when there are "final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client."FN91 These provisions clearly accord with the socialist model of legal ethics, in which the confidentiality rule itself is extremely weak. Any "law" or "court order" would by definition reflect the public will, and hence there can be no confidentiality barrier to disclosure that is legally mandated. More interestingly, the "required by law" exception is accepted by all advocates of the autonomy model.FN92

In contrast, the deontological model would find it difficult to allow the "law" or the "court order" to trump the moral value in confidentiality, a value which, as we have seen, includes the implicit promise to the client to remain silent coupled with the value of providing everyone with access to attorneys. One moral value can only be overcome, in deontological theory, by a more compelling moral [pg794] value that conflicts with it. Thus the question must arise in each case: "What is the moral content of the 'law' or 'court order' that requires disclosure?"

One might have thought that the autonomy model, which places such a high value upon attorney-client confidentiality, would not give way so readily to *any* law or court order that requires breach of a confidence. To inquire why this is so goes to the heart of the autonomy model enterprise. A clue is found in Professor Hodes' comment that a court order to an attorney to reveal a confidence "extinguishes one horn of the dilemma, the originally valid duty of silence."FN93 A code of professional ethics is thus inferentially viewed by Hodes as similar to any other legal code, subject to displacement by another law or court order. Undoubtedly, many attorneys regard the *Model Code* as rules that they must cope with in practice, and if the rules are changed or overridden, that fact is of no more moment than the ordinary occurrence of a legislature passing a new statute. A practicing attorney once remarked to one of the authors: "I make it my business to know what it is in the *Code of Professional Responsibility*, because I want to know how much I can get away with." The ultimate import of this reasoning finds expression in a statement quoted with approval by Hodes from a source he was unable to

locate: "If it comes down to a situation in which either you or your client *must* go to jail, make sure it's your client."FN94

The autonomy model, we conclude, is not really a set of ethical requirements so much as it is legislation reflecting the self-interest of practicing attorneys. It overlaps with ethical rules here and there, but is not necessarily an ethical vision of legal practice. Most fundamentally, if the client's "autonomy" is the desideratum, there is certainly no moral component to that; it would be like saying that anything a client wants, however immoral it might be, is moral, a clearly incoherent position. To be sure, there is an element of selflessness for the attorney that has a "moral" appearance; the attorney is acting in the interests of someone else. But if that person is acting immorally, the attorney, by aiding and abetting that conduct for a price, cannot be said to be acting ethically. Thus, the rules of attorney-client confidentiality foster the profession of law, but not necessarily because there is any moral value in confidentiality. Under the current *Model Code*, a lawyer may reveal a confidence if necessary to collect a fee from a client,FN95 certainly a strange exception if we are talking about a moral value for confidentiality. Additionally, advertising for legal services, until the recent Supreme Court [pg795] decision that approved lawyer advertising, FN96 was prohibited by the *Model Code*—not for any *moral* reason in the "advertising age"—but probably for the very self-serving, monopolistic reasons that the Supreme Court found offensive under the antitrust laws. Of course, if the autonomy model is not grounded in ethical considerations, nevertheless it may serve as a legislative expression of professional self-interest that helps define the profession and police deviationists. To that extent, at least, it deserves equal consideration with the other two models presented in this article.

b) *Examples*

Suppose in the pre-Civil War era a fugitive slave in a southern state finds a lawyer and asks for advice concerning his legal rights. Suppose further that there is a law in that state requiring anyone who knows the whereabouts of a fugitive slave to notify the police immediately. The lawyer satisfies herself after a few questions that her new client is indeed a fugitive slave and that there are no defenses available to him. The lawyer has a one hundred percent degree of confidence that the police will return the slave to the slave's owner, who will severely beat the slave for attempting to escape. Under the autonomy and the socialist models, as well as under all three codes of ethics that we have been examining, the law requiring disclosure is an exception to the rule of confidentiality, and hence the lawyer has no confidentiality barrier to the disclosure. Indeed, a careful examination by Hodes of all three codes in a similar context (a fugitive from justice or a military deserter) concludes that the codes *command*, rather than simply *allow*, voluntary disclosure by the attorney.FN97

The deontological model, in contrast, views a code of professional responsibility as containing ethical standards. Surely a code of professional ethics cannot ethically require that an attorney obey any and all laws, since a law may itself be immoral (*e.g.*, fugitive slave law).FN98 Nor should the confidentiality barrier, which has moral value, be overcome by any law, including an immoral law. Confidentiality may only be trumped by a value higher than confidentiality, such as the examples we have previously considered (*e.g.*, preventing serious physical or financial harm to a third party).FN99

[pg796] Proponents of the autonomy model might object to the foregoing fugitive-slave example as not being what they had in mind when they accepted the "required by law" exception to confidentiality. Fried, for example, might say that the goal of maximizing client autonomy does not apply to unjust laws. In his analysis he states, "I am not considering at all the moral dilemmas of a lawyer in Nazi Germany or Soviet Russia."FN100 But is this exclusion defensible or is it an ad hoc dismissal of an argument that would damage his autonomy thesis? Surely at some point in their evolution the legal systems of Nazi Germany, South Africa, Soviet Russia, or pre-Civil War United States did not seem pathological to attorneys working within them. The morality of such systems goes through many shades of gray before reaching black. More importantly, if a legal system is on its way toward becoming generally immoral, the only chance to upset the trend is in the early days when resistance to unjust laws is still possible. Hitler, after all, came to power "legally"; despite the early signs of what his regime would be like, most lawyers and judges went about their business, refusing to question the laws. Professor Cover has delineated the moral dilemmas of pre-Civil War judges who applied the fugitive slave laws,FN101 judges who believed that the legal system was "generally just and decent" (to use Fried's phrase).FN102

But perhaps a different objection may be adduced for proponents of the autonomy model. They might argue that the "autonomy" of the fugitive slave clearly cannot be promoted by turning him in, and therefore the three codes should contain an exception to the "required by law" exception that in some sense preserves client autonomy. Of course, any such exception would be extremely difficult to put into words, and any attempt to do so would probably have to be drafted in overly inclusive terms that would, of necessity, include any case in which a client wants to preserve his "autonomy" by avoiding prison—cases not only of bail jumpers and prison escapees, but also of persons who want to hide incriminating evidence to avoid conviction.FN103 But let us assume for the moment that such an exception to the exception can be drafted. A moral problem still arises if we consider the following variation on the fugitive-slave hypothetical. Suppose the fugitive slave escapes to a northern state [pg797] by means of the "underground railroad," and a prosecutor, learning that the attorney has contacted the fugitive, obtains a court order compelling the attorney to disclose the fugitive's whereabouts. The prosecutor, in reality, is interested in exposing and destroying the underground railroad system. The prosecutor obtains a counter-order guaranteeing immunity to the slave if his present location is revealed. In this variation, the "autonomy" of the client will be preserved since the slave will not be prosecuted or sent back. Thus, the attorney's moral obligation is to other fugitive slaves using the underground railroad, and no longer particularly to her client. Under the deontological model, but not under the other two models, the moral value in preserving confidentiality has not been overcome by the "law" since the law in this case is itself an immoral component of the slavery system.

Finally, the autonomist might object that the slavery example is, after all, from a different era, and that unjust laws are harder to find today. However, with a few changes, the example can be modified to a present day situation of a foreigner who seeks legal advice to avoid extradition. Suppose a dictatorial regime that is a military ally of the United States seeks extradition of a political opponent of that regime who is accused of the political crime of publishing a newspaper critical of the regime. Suppose further that there is either no "political

offense" exception to the particular treaty between the United States and the dictatorship, or that the State Department is given final authority to determine the offense and has wrongly concluded that it is not a "political offense." In short, the client has done nothing other than politically oppose an oppressive regime with friendly ties to the United States, and if he is extradited, he will probably be imprisoned, and perhaps tortured and killed. Again, assume that the law requires that the attorney disclose the client's whereabouts. In this case, it is harder to say that the international law of extradition is immoral; indeed, one can always assume that the person extradited will get a fair trial in his home country and thus we can wash our hands of the matter. The autonomy and socialist models clearly would require disclosure, and the three codes allow, if not compel, disclosure in this case. But under the deontological model, the moral value in confidentiality has not been eclipsed by the law requiring disclosure. To be sure, the law itself is not part of an immoral system (as was the fugitive slave law), but the result of obeying it will be unjust harm to the political-dissident client at the hands of the dictatorship.

Under the socialist model, the phrase "immoral system" has no meaning, because the interests of society as a whole, expressed through the legal system, define the content of morality. In theory it is a utilitarian conception; the aggregate social good is realized through legislation regardless of the "morality" of its impact upon [pg798] an individual.FN104 From a deontological point of view, it is inconsistent to be able to generate an immoral result (impact upon the individual) from a moral premise (the good of society), but the socialist would answer that whatever society wants cannot by definition be deemed immoral at the individual level. Hence, under the socialist model, disclosure in the fugitive-slave or extradition examples would be defined as moral if the social system condones slavery FN105 or extradition of the type we have posited.

The morality of utilitarianism has been widely disputed, FN106 but on its own premises it has not seemed incoherent to many philosophers or to many nations living under that system today. What of the converse of utilitarianism? Imagine a philosophy holding that the good of the individual, as defined by the individual, is the paramount goal. Such a philosophy is called "egotism" and most philosophers would agree that egotism that allows unrestrained behavior by any individual cannot be "moral."FN107 We have concluded that surrogate egotism, in which one person acts on behalf of another's unbridled egotism, constitutes the "autonomy" model of professional responsibility.

IV. Conclusion

We have attempted in this article to present and describe three models of legal ethics—the autonomy model that gives primacy to the desires or interests of the client, the socialist model that places overriding value on the interests of the state or society, and the deontological model that elevates the dictates of morality above both the client and society. Each of these models opposes the other two; each is a criticism of the others. Thus the models serve a critical function in the ongoing analysis of proposals for a new code of professional ethics for lawyers.

The models may be applied to the new *Model Rules*. We have applied them in this article only to controversies concerning attorney-client confidentiality, because confidentiality presents some of the hardest and most heavily debated issues in professional ethics, and

because the moral values in the confidentiality problem illustrate well the differences among the three models. Although our preferred position [pg799] is to apply the deontological model critically and heuristically to the issue of confidentiality, we will be quite satisfied if our discussion of this topic at least contributes a third alternative to the debate that so far has been conducted upon the assumption that any deviation from the autonomy model is a move toward the socialist model of professional responsibility.

Footnotes

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FN1. MODEL RULES OF PROFESSIONAL CONDUCT (1983) [hereinafter also cited as *Model Rules*]. A copy of the final edition of the *Model Rules* can be found in 52 U.S.L.W. 1, 1-27 (Aug. 16, 1983). According to Lennine Occhino of the American Bar Association Center for Professional Responsibility, the *Model Rules* will be published in October of 1983.

A good source for some contrasting viewpoints concerning the *Model Rules*, then in proposed form, is *Panel Discussion*. 35 U. MIAMI L. REV. 639 (1981). Among the panelists in that discussion are Professor Geoffrey C. Hazard, Jr., Reporter for the *Model Rules*, and Professor Monroe H. Freedman, Reporter for the alternative. *The American Lawyer's Code of Conduct*. See *infra* note 23. Professor Hodes provides a fuller examination of the *Model Rules* and argues that, contrary to stereotype, the *Model Rules* do not propose radical readjustment of the lawyer's role in the adversary system. See Hodes, *The Code of Professional Responsibility, The Kutak Rules, and the Trial Lawyer's Code: Surprisingly, Three Peas in a Pod*, 35 U. MIAMI L. REV. 739 (1981). *Contra* Koskoff & Lumbard, *Breach of Faith: The Kutak Rules*, 3 U. BRIDGEPORT L. REV. 1 (1981) and Lumbard, *Setting Standards: The Courts, The Bar, and the Lawyer's Code of Conduct*, 30 CATH. U.L. REV. 249 (1981) (*Model Rules* propose radical readjustment of the lawyer's role in society).

FN2. In his book, M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975) [hereinafter cited as M. FREEDMAN, *LAWYERS' ETHICS*], and in various articles Professor Freedman has argued that a lawyer is the "champion" of his client in the fight against the legal resources of society and the awesome police and military power of the state. See Freedman, *Personal Responsibility in a Professional System*, 27 CATH. V.L. REV. 191 (1978) [hereinafter cited as Freedman, *Personal Responsibility*]; Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966) [hereinafter cited as Freedman, *Three Hardest Questions*]. Similarly, Professor Fried has asserted that a lawyer should actively promote the interests or needs of his client at the expense of third parties or the public at large. See Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976). *But see* Dauer & Leff, *Correspondence: The Lawyer as Friend*, 86 YALE L.J. 573 (1977) (Fried's theory of client autonomy insulates the attorney from personal, moral responsibility).

FN3. That this dichotomy should not exist in the human rights (moral) area is argued in D'Amato, *Are Human Rights Good for International Business?*, 1 NW. J. INT'L. L. & BUS. 22 (1979).

FN4. Fried, *supra* note 2, at 1066.

FN5. *Id.* at 1073.

FN6. *Id.* at 1075.

FN7. *Id.* at 1078.

FN8. M. FREEDMAN, *LAWYER'S ETHICS*, *supra* note 2, at 2-4.

FN9. *Id.* at 4.

FN10. *See Id.* at 2-4.

FN11. Fried, *supra* note 2, at 1066.

FN12. The idea of "society" here is ill-defined in the writings of those who champion the autonomy model. They may mean that if everyone has an attorney, then everyone in society has an attorney, and hence society benefits. But obviously that defines away "society" as anything other than the individuals in it. Yet we know that "society" may take a position against certain individuals (*e.g.*, minorities), and is quite capable of deciding, in its aggregate self-interest, that if all lawyers were eliminated "society" would be better off because lawyers could no longer represent minority groups. *Cf.* I. KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* 163-207 (R. Wolff ed. 1969) (universalization of what is desirable for an individual to what is desirable for everyone).

FN13. *See* R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 18-22 (1974).

FN14. *See* Dauer & Leff, *supra* note 2.

FN15. *See* Freedman, *Personal Responsibility*, *supra* note 2, at 198-99. *See also* Fried, *Author's Reply*, 86 YALE L.J. 584 (1977) (Fried's response to criticism by Dauer and Left).

FN16. For example, note the symbols of friendship in a book like *The Godfather*: "respect" for the mafia chief, "service" performed by hired guns, "betrayal" for enemies, the "family" setting with religious overtones in such events as weddings, christenings, and funerals, and the "godfather" himself. *See* M. PUZO, *THE GODFATHER* (1969).

FN17. *See generally* Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975) for a discussion of two moral criticisms against lawyers concerning their stance in the world at large and their relationships with clients.

- FN18. *In re Ryder*, 263 F. Supp. 360 (E.D. Va. 1967), *aff'd*, 381 F.2d 713 (4th Cir. 1967).
- FN19. Of course, there are "minor virtues" in friendship. See I. KANT, LECTURES ON ETHICS 209 (L. Infield ed. 1963).
- FN20. See the discussion of side constraints in R. NOZICK, *supra* note 13, at 28-33.
- FN21. See, e.g., Becker, *Modern Discovery: Promoting Efficient Use and Preventing Abuse of Discovery in the Roscoe Pound Tradition*, 78 F.R.D. 267, 270-71, 277 (1978); Flegal & Umin, *Curbing Discovery Abuse in Civil Litigation: We're Not There Yet*, 1981 B.Y.U. L. REV. 597; Rosenberg & King, *Curbing Discovery Abuse in Civil Litigation: Enough is Enough*, 1981 B.Y.U. L. REV. 579.
- FN22. See *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).
- FN23. THE AMERICAN LAWYER'S CODE OF CONDUCT (Roscoe Pound-Am. Trial Law. Found., Comm'n on Prof. Resp., Discussion Draft 1980) [hereinafter cited as LAWYER'S CODE].
- FN24. See *id.* at ii-vi.
- FN25. See *infra* note 40 and accompanying text.
- FN26. *Contra* Burt, *Conflict and Truth Between Attorney and Client*, 69 GEO. L.J. 1015 (1981) ("truth in lawyering").
- FN27. See H. BERMAN, JUSTICE IN THE U.S.S.R. 68, 81 (rev. ed. 1963); Razi, *Legal Education and the Role of the Lawyer in the Soviet Union and the Countries of Eastern Europe*, 48 CALIF. L. REV. 776, 782, 792 (1960).
- FN28. See H. BERMAN *supra* note 27, at 228, 283, 307.
- FN29. See Razi, *supra* note 27, at 792-99.
- FN30. M. FREEDMAN, LAWYERS' ETHICS, *supra* note 2, at 2.
- FN31. J.J. ROUSSEAU, ON THE SOCIAL CONTRACT 61-62, 108-09, 124-32 (R. Masters, ed. 1978).
- FN32. See Cohen, *Reflections on the Social Process Criminal Process in China*, 68 J. CRIM. L. & CRIMINOLOGY 323, 343-44, 349 (1977); V. LI, LAW WITHOUT LAWYERS 9-10 (1977).
- FN33. See L. FULLER, THE MORALITY OF LAW 49-51 (rev. ed. 1969); Fuller, *Irrigation and Tyranny*, in THE PRINCIPLES OF SOCIAL ORDER 188-210 (K. Winston ed. 1981).
- FN34. See W. FRANKENA, ETHICS 16-17 (2d ed. 1973).

FN35. Kant's specific example was that of a person who intends to murder your sister asking you if your sister is at home. If in fact she is at home, Kant requires that you tell the truth and answer in the affirmative. Later, pressed by his students, Kant further explained that if you answer truthfully, the would-be murderer would probably not believe you!

FN36. W. ROSS, *THE RIGHT AND THE GOOD* (1930). See W. ROSS, *THE FOUNDATION OF ETHICS* (1939).

FN37. See *Riss v. City of New York*, 240 N.E.2d 860 (N.Y. 1968); M. SHOAP, *CASES AND MATERIALS ON TORT AND COMPENSATION LAW* 1102 (1976).

FN38. See, e.g., *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976) (In Bank).

FN39. See R. BRANDT, *ETHICAL THEORY* 360-64, 375-78 (1959); J. SEARLE, *SPEECH ACTS* 54-61 (1961).

FN40. *LAWYER'S CODE*, *supra* note 23, Alternative B, Rule 1.2.

FN41. See *MODEL RULES*, *supra* note 1, rule 1.6(b)(1): "A lawyer may reveal such information to the extent the lawyer reasonably believes necessary ... to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm"

FN42. The Discussion Draft of the *Model Rules* had *required* that the disclosure be made in this situation. See *MODEL RULES OF PROFESSIONAL CONDUCT* Rule 1.7 (Discussion Draft 1980).

FN43. See *supra* notes 34-40 and accompanying text.

FN44. Of course this assumes that the clients are informed of the provisions of the *Model Rules*. For a good discussion of the desirability of giving the public notice, see Hodes, *supra* note 1, at 786-90.

FN45. *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976) (In Bank).

FN46. See Stone, *The Tarasoff Decisions: Suing Psychotherapists to Safeguard Society*, 90 *HARV. L. REV.* 358 (1976).

FN47. *LAWYER'S CODE*, *supra* note 23, Alternative B, Rules 1.1 to 1.4. "Omitted entirely [from Alternative B] are the exceptions under Rules 1.4 and 1.5, [of Alternative A] permitting the lawyer to divulge a confidence in cases involving imminent danger to life" *Id.* at comment.

FN48. Fried, *supra* note 2, at 1060.

FN49. The following is offered as proof of this contention. Let *A* represent the autonomy model, *S* represent the socialist model, *D* represent the deontological model, & represent the conjunction "and," "v" represent the alternative "or," and * represent "implies." We then have $(A \ \& \ D \ v \ S) \ \& \ (S \ \& \ D \ v \ A) \ \& \ (A \ \& \ S \ v \ D) \ * \ (A \ v \ D \ v \ S)$. This is true both in the "weak" tautological case that a conjunction implies an alternative, and in the "strong" case where we may assume that a conjunction of two propositions may have a different truth value than the alternative of the two propositions. *See, e.g.* 1 H. PUTNAM, *MATHEMATICS, MATTER AND METHOD* 194-97 (2d ed. 1979).

FN50. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1981) [hereinafter cited as MODEL CODE]; MODEL RULES, *supra* note, Rule 1.6; LAWYER'S CODE, *supra* note 23. Rule 1.

FN51. *See, e.g.*, MODEL CODE, *supra* note 50, DR 4-101(C)(3) (lawyer may breach confidentiality and disclose client's intention to commit crime); MODEL RULES, *supra* note 1, Rule 1.6(b)(1) and comment (lawyer may reveal confidential information to prevent the client from committing a crime or fraudulent act); LAWYER'S CODE, *supra* note 23, Alternative A, Rule 1.4 (lawyer may reveal a client's confidence when necessary to prevent imminent danger to human life). In addition to these exceptions, the MODEL RULES, *supra* note 1, Rule 1.6(b)(2) allows a lawyer to reveal information relating to the representation of a client

to the extent the lawyer reasonably believes necessary . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

FN52. Fried, *supra* note 2, at 1075.

FN53. M. FREEDMAN, *LAWYERS' ETHICS*, *supra* note 2, at 9-15, 27.

FN54. *See id.* at 51, 53, 57.

FN55. Of course, if the rule of law is unjust, a crime alleged under that rule has no obligatory moral force. The deontological model does not favor general obedience to unjust laws or systems. *See* D'Amato, *Obligation to Obey the Law: A Study of the Death of Socrates*, 49 S. CAL. L. REV. 1079 (1976).

FN56. Indeed, we suspect that if the attorney attempted to represent the accused person despite her belief in that person's guilt, she might not be effective.

FN57. *See infra* notes 62-69, 82-88 and accompanying text.

F58. When the accused is in fact a habitual criminal, there may be an expected harm to others if he is not incarcerated. However, since the "science" of recidivism is in its infancy, this is a poor rationale for incarceration; after all, what is "habitual"?

FN59. Fuller, *The Adversary System*, in *TALKS ON AMERICAN LAW* 39 (H. Berman ed. 1971).

FN60. *Id.* at 41. Fuller's concern for the integrity of the judicial process is not necessarily tied to the deontological model. Proponents of the autonomy model would find Fuller's precepts compatible with the client's autonomy. Nor would Fuller's concerns be necessarily inconsistent with the socialist model, provided that the state formally adopts a rule calling for the primacy of procedure over substance. Under the deontological model as we have described it, an attorney should not be compelled to defend someone she believes is guilty; if the state's constitution requires that all accused persons be defended, that is a dilemma for the state, not for any individual attorney.

FN61. *See infra* notes 82-88 and accompanying text.

FN62. MODEL CODE, *supra* note 50, DR 4-101(C)(3).

FN63. *See, e.g.,* Hodes, *supra* note 1, at 754-60.

FN64. Using the autonomy model, the value of confidentiality will prevail over almost all competing concerns. Professor Freedman has stated that only in "rare and extreme" cases should the general rule of confidentiality be violated and disclosure made. *Panel Discussion*, *supra* note 1, at 646-47. An example of such a "rare and extreme" case is when a client informs his attorney of his intention to kill a named individual on a specified date in the future. Professor Freedman believes that in this case the attorney should violate the client's confidence and reveal his intent to kill the intended victim. M. FREEDMAN, *LAWYERS' ETHICS*, *supra* note 2, at 6. This result is supported in a draft of the *LAWYER'S CODE*, *supra* note 23, Alternative A, Rule 1.4, which permits the lawyer to disclose the information to prevent "imminent danger to human life." In choosing to subordinate the general rule of confidentiality to such "rare and extreme" cases, the autonomy model appears to advocate a limited kind of inconsistency. In defending the *Lawyer's Code* Professor Freedman stated as follows:

(W)hen you're writing rules in any important area, especially rules that are so full of conflicting values as those of lawyers' responsibilities, you have the problem of falling into either the trap of absolutism on the one hand or of risking inconsistency on the other. We have opted for a limited kind of inconsistency.
Panel Discussion, *supra* note I, at 646.

FN65. *See supra* notes 34-36 and accompanying text. The deontological model would employ similar reasoning in treating harms of an economic nature, preferring nondisclosure to disclosure of a client's intent to commit such harms. This result is predicated upon the assumption that the contemplated economic activity does not transgress moral values. For example, while an antitrust or SEC violation may involve aggregation or collusion of economic power or noncompliance with statutory requirements, such violations do not constitute direct moral harms to third persons. On the other hand, cheating, lying, and misrepresentations are moral wrongs, not bare exercises of economic power. Indeed, the very legitimacy of economic actions may depend on the governing laws and policies of a given society. Further discussion of this area of economic harms may be pursued in a vast literature. *See, e.g.,* Patterson, *The Limits of the Lawyer's Discretion and the Law of Legal Ethics: National Student Marketing Revisited*, 1979 DUKE L.J. 1251 (analysis of *SEC v. National Student Marketing Corp.* and the new ethics for corporate securities lawyers that the case may signal). *See also* Hoffman, *On Learning of a Corporate Client's Crime or Fraud—the Lawyer's Dilemma*, 33 BUS. LAW., 1389 (1978);

Lowenfels, *Expanding Public Responsibilities of Securities Lawyers: An Analysis of the New Trend in Standards of Care and Priorities of Duties*, 74 COLUM. L. REV. 412 (1974).

FN66. *People v. Belge*, 372 N.Y.S.2d 798, 803 (N.Y. Cty. Ct. 1975). *See also* Hodes *supra* note 1, at 756.

FN67. *People v. Belge*, 372 N.Y.S.2d at 799.

FN68. Besides Freedman's discussion of the case in his book, M. FREEDMAN, *LAWYERS' ETHICS*, *supra* note 2, at 1-2, the case has also been debated in, *e.g.*, Hodes, *supra* note 1, at 756-58, and even used in the *LAWYER'S CODE*, *supra* note 23, as illustrative case 1(e). *See also* A. KAUFMAN, *PROBLEMS IN PROFESSIONAL RESPONSIBILITY* 127-30 (1976).

FN69. *People v. Belge* deserves further comment, since it also introduces the problem of attorney participation in a wrong or harm. In *Belge*, the attorneys did not actively participate in any harm; they simply remained silent and did not disclose the location of the buried bodies. In another case, however, the attorney did participate in a wrong by helping his client hide incriminating evidence. *In re Ryder*, 263 F. Supp. 360 (E.D. Va. 1967), *aff'd*, 381 F.2d 713 (4th Cir. 1967). While the deontological model supports the assertion of confidentiality over competing values in the absence of clear moral concerns, it does not follow that the principle of confidentiality may shield wrongful or criminal actions of the attorney asserting the privilege. The assertion of confidentiality may relate only to the fair defense of the client, and not to unfair, illegal, or fraudulent activities.

FN70. The lawyer's ethical duty in defending a criminal client "may be qualified by constitutional provisions for due process and the right to counsel In some jurisdictions these provisions have been construed to require that counsel present an accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false." *MODEL RULES*, *supra* note 1, Rule 3.3 comment.

FN71. *See, e.g.*, M. FREEDMAN, *LAWYERS' ETHICS*, *supra* note 2, at 27.

FN72. Freedman, *Three Hardest Questions*, *supra* note 2, at 1477-78. While ultimately allowing the lawyer to implicitly participate in the perjury, Freedman, through private counseling efforts, would actively undertake to dissuade the client from committing perjury. *Id.* at 1478.

FN73. *LAWYER'S CODE*, *supra* note 23, illustrative cases 1(a) and 1(b).

FN74. *MODEL CODE*, *supra* note 50, DR 7-102(B)(1).

FN75. In 1974, the ABA amended the *Model Code's* unequivocal prohibition of perjured evidence by adding an exception to the general rule of rectification and disclosure for "information ... protected as a privileged communication." *MODEL CODE*, *supra* note 50, DR 7-102(B)(1). The following year, Formal Opinion 341 confirmed the turnabout by interpreting the exception very broadly. Not surprisingly, therefore, "it is virtually impossible to imagine a case

in which DR 7-102(B)(1), as amended and as interpreted, would require disclosure." Hodes, *supra* note I, at 778. However, only twelve states have adopted the 1974 amendment. *Id.* at 779.

FN76. MODEL RULES, *supra* note 1, Rule 3.3 and comment.

FN77. *See* C. FRIED, RIGHT AND WRONG 64-69 (1978).

FN78. *See supra* notes 59-60 and accompanying text for a discussion of Fuller's systemic justice and integrity concerns. *See also* Lawry, *Lying, Confidentiality, and the Adversary System of Justice*, 1977 UTAH L. REV 653 (1977).

FN79. *See supra* notes 56-59 and accompanying text.

FN80. *See* Note, *Materiality of Question and Not of Answer Given in Testimony Constitutes Test for Perjury—United States v. Siegel* (2d Cir. 1959), 73 HARV. L. REV. 599 (1960) (undisclosed author is A. D'Amato).

FN81. *See supra* notes 62-65 and accompanying text.

FN82. We exclude intent to commit murder because all models agree that in that case there should be disclosure, though, as we have previously indicated, the autonomy model seems to concede this point at the expense of consistency with its own precepts. *See supra* note 64.

FN83. *Panel Discussion, supra* note 1, at 643.

FN84. *See, e.g.,* MODEL RULES, *supra* note 1, Rule 3.3 comment:

[U]nless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

FN85. *See* LAWYER'S CODE, *supra* note 23, Alternative A, Rules 1.1 to 1.6 and Alternative B, Rules 1.1 to 1.4. The only apparent exception to confidentiality for physical harms in these rules is the "necessary to prevent imminent danger to human life" provision of Alternative A, Rule 1.4.

FN86. MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.6(b)(1) (Revised Final Draft 1982); MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.6(b)(2) (Proposed Final Draft 1981).

FN87. MODEL RULES, *supra* note I, Rule 1.6(b)(1).

FN88. *See supra* notes 83-87 and accompanying text.

FN89. MODEL CODE, *supra* note 50 DR 4-101(C)(2).

FN90. LAWYER'S CODE, *supra* note 23, Rule 1.3.

FN91. MODEL RULES, *supra* note 1, Rule 1.6 comment.

FN92. To be sure, Freedman wants the lawyer first to put up a fight; the *Lawyer's Code* allows disclosure "only after good faith efforts to test the validity of the law, rule, or order have been exhausted." LAWYER'S CODE *supra* note 23, Alternatives A and B, Rule 1.3. But this only addresses the question when not whether the lawyer should disclose the confidence. That distinction is important if we are asking whether a lawyer should *volunteer* information (*e.g.*, on the whereabouts of a fugitive); but it is not important in this article since we are examining the "law" exception to confidentiality on its own terms.

FN93. Hodes, *supra* note 1, at 760.

FN94. *Id.* at 760 n.71 (emphasis in original).

FN95. MODEL CODE, *supra* note 50, DR 4-101(C)(4).

FN96. *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

FN97. Hodes, *supra* note 1, at 760-65.

FN98. For an extended discussion of the immorality of pre-Civil War fugitive slave laws, see R. COVER, *JUSTICE ACCUSED* 8-22, 257-59 (1975); D'Amato, *Lon Fuller and Substantive Natural Law*, 26 AM.1. JURIS. 202, 214-16 (1981).

FN99. *See supra* notes 82-88 and accompanying text. In the slavery case, of course, the slave owner faces the threat of financial harm if the slave is not returned; but this harm is trumped by the far more important right of a human being not to be enslaved.

FN100. Fried, *supra* note 2, at 1085.

FN101. R. COVER, *supra* note 98, at 8-22, 257-59; *compare* D'Amato, *supra* note 98, at 215-16.

FN102. Fried, *supra* note 2, at 1085.

FN103. An escaped convict should not be able to force a doctor to dress his gunshot wound but not report him, or a bartender not to notify the police because he pays for his drink, or a lawyer not to turn him in because he pays the attorney's fees. These examples indicate that a person who is not entitled to demand confidentiality from anyone else should not be able to purchase a lawyer's "confidentiality."

FN104. *See* D'Amato, *The Speluncean Explorers—Further Proceedings*, 32 STAN. L. REV. 467, 475-80 (1980).

FN105. This is an apparent consequence of Hart's concept of "justice" in society. *See* H. HART, *THE CONCEPT OF LAW* 153-63 (1961) for a general discussion of this concept.

FN106. *See, e.g.*, J. FINNIS, NATURAL LAW AND NATURAL RIGHTS 112 (1980); D. LYONS, THE FORMS AND LIMITS OF UTILITARIANISM (1965); J. RAWLS, A THEORY OF JUSTICE 22-23 (1971).

FN107. *See* R. BRANDT, *supra* note 39, at 369-75; W. FRANKENA *supra* note 34, at 17-23; A. GEWIRTH, REASON AND MORALITY 82-89 (1978).