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WHEN SILENCE SCREAMS

*Reed Elizabeth Loder**

Loneliness may curse the professional of today. Occasionally a situation reveals a gaping fault-line between a professional's specialized thinking and the more holistic and intuitive responses of other people, even other professionals. At these moments it becomes especially evident why people feel estranged from those who serve them.

The hypothetical situation that is the subject of this Symposium arouses horror in most people in part just because the professionals have to pause to contemplate a best course of action. The client has confessed to committing a murder for which another man is soon to be executed. The resolution seems self-evident even to people accustomed to seeing fuzzy edges around their moral standards. Not many harms, after all, are worse than death, and the imminent victim is innocent of the crime even if he is not a generally appealing person. How could professional silence ever be justified in such circumstances?

Although I am an attorney who teaches in a law school, I have been asked to consider the hypothetical in my dual capacity as lawyer and moral philosopher. Given that my work is steeped in legal ethics, my remarks will focus on the lawyer's deliberations. Yet I hope that much of what I have to say will also ring somewhat true for each of the other professionals placed in this most unenviable of quandaries.

Not to skirt the point, I conclude that the layperson's instincts are right. No moral argument does justify professional silence, although the reasoning that leads me to this secure conclusion undoubtedly is more complicated than a nonprofessional would think necessary or palatable. In my view no general type of moral reasoning, or particular array of professional arguments, overrides the obligation to prevent severe and imminent harm to an innocent person. Assuming the lawyer is quite convinced that the client is confessing truthfully, as the hypothetical suggests, that knowledge gives the lawyer almost

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exclusive power to prevent the impending harm and creates a strong moral obligation to prevent it.

One philosophical approach to analyzing this case is to separate moral reasoning about the problem into two broad categories. Under that dichotomy, consequentialist reasoning evaluates the morality of possible options from the point of view of the predicted results of alternative courses of action. In contrast, deontological, or duty-based, reasoning assesses the inherent morality of options and the moral rights of the individuals involved. I shall maintain first that silence cannot be justified within either a consequentialist or deontological framework. Second, I shall argue that these categories are somewhat impoverished in that they do not explain all of what is wrong with invoking professional confidentiality in this situation.

The quick-take of a consequentialist analysis might vindicate the professional who leaves the decision ultimately to the client and honors silence if that is the client's final choice. Most who would accept this resolution probably would agree that the public defender may converse with the client and facilitate his deliberations, although some would say that moral discussions, and certainly moral advice, are outside the scope of the professional relationship.¹ The overall consequentialist reasoning for this position is that a lawyer plays an essential role within our established system of justice, and confidentiality is a centerpiece of that justifiable systemic role. Consequentialists generally measure the morality of an act according to whether the act promotes certain goods defined as desirable. The overarching good governing this particular consequentialist judgment is justice. A system that binds a lawyer to strong confidentiality best serves justice overall, so the reluctant argument goes, even if this wrongfully convicted person concededly suffers a particular injustice.

Ethical justifications for professional guidelines are most typically consequentialist in their focus on institutions and systemic effects. This is certainly true in the area of confidentiality. The most common rationales for strong protection hinge on the overall effectiveness of professional service.² First, a client will tend to trust a lawyer who

1. Both of the primary ethical codes governing lawyers' conduct allow the lawyer to raise moral considerations, although the codes do not require this. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1981) [hereinafter MODEL CODE]; MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1983) (amended 1994) [hereinafter MODEL RULES].

2. See MODEL CODE, *supra* note 1, EC 4-1; MODEL RULES, *supra* note 1, Rule 1.6 cmt., paras. 1-5.

must keep information secret, and thus will disclose the kind of detailed and nuanced information that permits the lawyer to craft a solid case using professional expertise. Second, the client who does not fear that the lawyer will broadcast information will seek timely legal advice more readily. Third, the professional sworn to silence is more likely to receive a client's confessions and has more opportunities to convince a client not to carry out intended harmful acts. Thus, confidentiality serves social interests besides effective representation. Nonetheless, others within the legal system, such as prosecutors and police, are charged directly with protecting the larger society's interests, and the lawyer's unique role as advocate best remains distinct. The advocate's mission is especially clear within the criminal justice system, where defense lawyers protect the liberty interests of those accused against abuses of authority by the state. Indirectly, this tempers government power for all members of society.

The first three consequentialist arguments have a common form: *X* (confidentiality) is good because it leads to *P* (full disclosure), *Q* (early advice), and *R* (opportunities for the lawyer to dissuade misconduct). These are causal assertions (*X* causes *P*, *Q*, and *R*), subject at least in principle to empirical verification. Someone could study the legal system and attempt to gather data to answer empirical questions like the following: Does confidentiality cause clients to disclose factual information more fully than they otherwise would? Does it cause them to seek more timely legal advice? If confidentiality does increase willingness to disclose or seek early advice, how much of a role does it play? Are other factors more, equally, or less important, such as apprehension about the future, awareness of the need for technical expertise, a desire to vent emotions, or even a need to confess? How much do clients even know about confidentiality? Do lawyers volunteer information to clients? Is information that lawyers do provide complete and accurate? Do clients ask about confidentiality if their lawyers do not offer this information? What other sources of information—for example, television, movies, or popular novels—might supplant information from a professional?

No doubt, such data are difficult to gather. Perhaps that is why we have very little empirical information available about the causal assumptions made about confidentiality. Or, perhaps professionals have been so accustomed to accepting facile assumptions that they fail even to notice how fragile these assumptions may be and how much they accept on faith. The sparse empirical work that adventuresome scholars have done is too preliminary to wrench lawyers away from

their comfortable attitudes.³ Nonetheless, the early and rough results of such research suggest at least that the link between stringent confidentiality protection and the desired goods may be more tenuous than the consequentialist arguments suggest.⁴

Surely, a problem like the one this hypothetical presents shows that further research is needed. Even the barest hint of a weak relationship between confidentiality and systemic goods is enough to upset a lawyer's reliance on standard consequentialist arguments in this case, where the consequences to the imminent victim of wrongful execution are grave. One need not know the empirical subtleties of precisely how strong confidentiality must be to achieve desirable social ends to conclude that this case is a candidate for relaxation of the protection.⁵ If impending death is not enough of a consideration to counterbalance absolute confidentiality, other negative consequences loom in terms of gross public disrespect for both lawyers and the legal system that could countenance such an outcome.

"Wait one moment!" someone might interject. Our lawyer would not even have received this deadly information had the client felt inhibited in his disclosure. Now the lawyer has a fighting chance to work something out with the client that will save the person wrongfully accused. This chance for professional influence is one of the strongest arguments for confidentiality in this case, the objector might conclude.

The problem with this rejoinder is that it begs the crucial empirical questions posed here about the client's reasons for confessing to the public defender. Even if confidentiality did encourage his disclosure, other influences also may be operating, such as a psychological need to "unload" or a moral and religious need to confess. The facts actually suggest the strong possibility that the

3. Law Professor Fred Zacharias has undertaken such a preliminary study of lawyers and clients in Tompkins County, New York. Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989).

4. *Id.* at 394-96 (discussing clients' misunderstandings of confidentiality and clients' possible independent reasons for seeking legal advice and disclosing).

5. Codes governing lawyers' conduct already do create exceptions to confidentiality. For example, they allow lawyers to reveal future criminal acts. MODEL CODE, *supra* note 1, DR 4-101(C)(3) (permitting revelation of intended crimes to crimes involving bodily harm); MODEL RULES, *supra* note 1, Rule 1.6(b)(1) (limiting revelation to criminal acts "likely to result in imminent death or substantial bodily harm"). The codes also permit lawyers to reveal information as necessary to collect their fees or defend against charges of misconduct. MODEL CODE, *supra* note 1, DR 4-101(C)(4); MODEL RULES, *supra* note 1, Rule 1.6(b)(2).

client is having last minute pangs when he blurts out this information to the lawyer and then visits his religious adviser and therapist, depositing the same information with them. If some sense of moral urgency and guilt were not motivating this client, it is hard to fathom why he would release this particular information since this is not a situation where the information in question would help the lawyer to defend him in the central matter of the representation.

"Wait!" the objector says again. Now you are making empirical assumptions about other factors that encourage full revelation. *You* are begging the question! The objector has rightly noticed the uncertainty surrounding causal assumptions, reinforcing the need for more research. Given an empirical standoff, however, is it better to defer in this case to preventing imminent death or to the systemic value of confidentiality? I think the answer is clear in this extreme context, even if deference to confidentiality seems sound overall. The stakes mean that the lawyer cannot afford to rely glibly on unexamined assumptions or facile appeals to social policy concerns. The goods from disclosure that the consequentialist argument poses may not be sufficient values in this situation.

None of this discussion suggests that either the causal or value arguments for confidentiality are baseless. Intuitively, at least, it seems pretty likely that a belief in confidentiality does lead some clients to disclose some things they otherwise would not. It is probably even a safer assumption that fuller factual disclosure enhances a professional's ability to analyze a situation demanding technical expertise. Surely confidentiality protects clients from unscrupulous professionals who would use sensitive information for their own advantage or that of other clients.⁶ These seem to be acceptable, even good, arguments for professional secrecy in general. The corrosive effects on client trust and willingness to disclose even may justify deferring to confidentiality in more marginal cases where some harm may result. Nonetheless, the standard value and causal arguments pale in the stark situation here.

Confidentiality arguments may even break down in consequentialist terms when lawyers accept the effectiveness of representation as the strongest value. Expert effectiveness cannot be measured in full factual knowledge alone, and the instrumental client trust that

6. Existing ethical codes forbid this. MODEL RULES, *supra* note 1, Rule 1.9; see MODEL CODE, *supra* note 1, DR 4-101(B)(2).

confidentiality potentially promotes may not result in the kind of professional relationship that facilitates the highest quality service. It strikes me that this client is imploring his lawyer for more. Minimally, he has opened the door to thoughtful moral dialogue about what to do. For the lawyer to overlook this is to make an unspeakably insulting judgment about this client's character—that he wants his freedom at the ultimate price of another's death. It is to stereotype the client as an unfeeling criminal. It is to disregard the client's probable moral anguish and to assume that he cares little about himself as a moral being. Surely, the client perceives this level of disrespect.

Instrumentally, the lawyer's narrow appraisal of the client is not likely to foster better representation, if "better" means more respectful and sensitive to the client's overall situation. If the state carries out the execution, the client may face a "free" future of tortured guilt. His desperate, albeit belated, efforts to "deal" may suggest that he rejects this future on some level. By ignoring the client's cues, the public defender will facilitate the client's deepest moral deformation.

At the same time, it is a stretch to see how the client could respect a professional who could turn a blind eye. Surely, the public defender would not seem to be a person who cared about others if she could be a silent conspirator in death. The client may wonder how genuine, after all, is her concern or compassion for him. This is not a person with a moral center, the client may conclude.

This reciprocal disrespect could stunt a full and productive professional relationship. It might even cause the client to withhold the very kind of full disclosure that purportedly justified strong confidentiality in the first place. Of course, this itself is unverified causal speculation, but it is not significantly less plausible than the standard empirical arguments.

Of course, what really is at stake here cannot be cast in purely consequentialist terms. Arguments based on trust in the professional relationship and respect for the basic human dignity of lawyer and client also have a distinctively moral quality. The issue is not merely whether respect fosters professional effectiveness. The lawyer and client relationship has moral value in its own right. The damage to human respect is moral damage. Thus, consequentialist arguments spill over into "deontological" terrain.

Typically, deontological arguments evaluate actions and judgments according to their intrinsic morality, apart from their conse-

quences. A deontologist could insist that the public defender simply has a moral duty to stop this severe harm to another individual, no matter how detrimental the exercise of this duty may be to confidentiality, effectiveness, or the functioning of the legal system. Some deontologists would cast this reasoning in the language of individual rights, arguing that the rights of the wrongfully accused man have moral priority over the institutional goods confidentiality promotes. Already, this reasoning seems to provide a more straightforward path to a decision against secrecy.

Could a deontologist possibly justify professional silence in any circumstances where the result may be harm to another? If not, a rights-based approach would seem to rule out much of what lawyers do since the results of winning cases and planning business transactions are often that someone suffers somewhere. Indeed, someone might object, even a tax lawyer wreaks some harm to others by helping a client to maneuver around loopholes in the law to minimize taxes owed.

Some arguments favoring confidentiality are actually deontological. The intrinsic dignity of every human being means that even a grievous criminal offender deserves adequate legal representation. The trust in the lawyer and client relationship has moral value for its own sake, which weighs against treachery or exploitation. Like the consequentialist arguments, however, claims of intrinsic morality in the professional relationship are not absolute. In fact, they yield more quickly to considerations like preventing avoidable harm to innocent individuals who also possess dignity and deserve respect.

Any inherent moral quality of the lawyer and client confederation can yield to subsequent developments. By confessing, the client has enlisted the professional's involvement in his decisions. Once he bestows nearly exclusive knowledge on his lawyer, he has thrust that attorney into a morally-charged field. At that moment, the professional acquires some duties. She is no longer a bystander, but must make moral decisions and act upon them. This is not a situation where harms are past and the client's reparation to society is the only concern. Passivity will just not do.

The first professional obligation is to investigate as far as possible, within timing and other constraints, the reliability of the information obtained. On these facts, further inquiries have convinced the lawyer that the client is being truthful. Let us assume that

questioning the client is enough to assuage doubts under the circumstances.⁷ The lawyer has another clear duty to compare the morality of following any natural inclinations to disclose to the moral implications of professional silence. A further moral demand is that the professional confer with the client, encouraging him to take steps to prevent the death. If feasible within the time remaining, it would be desirable for the lawyer to consult with trusted colleagues, as this dialogue might provide helpful insights.

Despite careful moral analysis, both the consequentialist and deontologist miss the full wrongs contemplated here. The moral character of both lawyer and client are squarely on the line. It is not bare duty that should give the lawyer pause, thus inviting conflict between the general moral duties of a human being and the specialized duties of a professional, or conflict between duties to the client and innocent third parties. Nor is it enough to measure the terrible consequences of inaction against the consequences to the criminal justice system of professionals stepping out of role. Also at stake is the moral personhood of both lawyer and client. The lawyer who disregards the moral sirens blaring in this case is not moved by the most basic of moral injunctions against knowingly contributing to acute harm. This may show grave lack of moral integrity, if integrity involves honoring fundamental moral principles in the face of adversity.

Someone might respond that our public defender is doing just that—she is standing by her professional oath of advocacy. Indeed, adversity is nowhere more clear. This lawyer must sacrifice her own moral comfort, and perhaps her public image, to serve her client and her professional vows. The problem with this response is that pledges of professional loyalty are not self-justifying. A license to practice does not grant moral license. Each day professionals remake the institutions that predated their entry into the profession. Both their acts and inaction constitute part of those institutional frameworks. Thus, professionals have the responsibility to evaluate each contribution they make. They must avoid directions that do not withstand minimal moral scrutiny.

Could she appeal to the moral value of client autonomy to justify secrecy to her own satisfaction? While autonomy is important to

7. If time and circumstances allow, a professional might have to do more than consult with a client to corroborate information.

human dignity, it is not valuable under all circumstances and implies an evaluative dimension. Safeguarding the client's autonomy to do manifest evil is hardly a good reason to justify professional silence. Autonomy is also a relational idea since personal identity does not develop in isolation. The client's autonomy cannot be judged apart from its impacts on those he touches.

A legitimate objection to this rich notion of autonomy is that its elasticity allows professionals to make dangerous personal judgments about their clients that reflect prejudice and cultural biases. Professionals abuse their power when they regularly second guess their clients by making paternalistic judgments about what the client "really" wants or needs. The professional relationship is ripe for such abuses because of inherent disparities between the professional and client in relevant knowledge, experience, and emotional vulnerability. Only the professional has command of the magic words that can relieve the client's distress.

These background conditions of professional practice do present moral risks. Professionals need to be vigilant about casual impositions of expert authority. These cautions hardly justify complete deference to a client's stated wants, however. Even assuming the public defender confers further with her client and concludes that he prefers inaction after all, she cannot permit this exercise of his autonomy simply out of fear of imposing her will. She needs to explain to the client that this is not a moral possibility open to her.⁸

Intermediate measures are available short of simply proclaiming her moral rectitude and intention to turn the client in at once. The client has invited a wonderful opportunity for moral conversation by his confession and mention of moral and religious concerns. He has portrayed himself as someone larger than a seeker of narrow legal advice. Moreover, he already has yielded some autonomy by involving another person in his moral decision. Now the lawyer's own moral autonomy is at stake.

Although it is not my primary aim to explore practical options exhaustively, the existence of alternatives is relevant to the lawyer's moral obligations. She cannot ignore the client's interests even

8. The public defender should have explained that her duty of confidentiality has narrow limits at the outset of the relationship. This is necessary to avoid deceiving the client and tricking him into saying prejudicial things he might otherwise withhold. Even if the result of her explanation is to inhibit the client somewhat from providing this kind of guilty information, I believe that is a necessary cost of fairness and truthfulness.

though she cannot comply if the client decides upon secrecy. One possibility is that the client will agree to reveal his own deed in a timely manner. It is not altogether foolish to explore this option with the client since he has expressed some distress over the impending death and has indicated some awareness that his moral integrity is on the line. Realistically, the client will probably resist this bald option, especially given his precarious "three strikes" status. In fact, the client broached confession in the context of seeking a "deal."

Thus the lawyer should prepare to counsel the client on middle-ground possibilities. She might consider pursuing immunity for this client if he agrees to come forward with the information that would exculpate the condemned man. She might try negotiating with the prosecutor handling her client's current case. She might offer to provide highly significant information only on condition of an advance promise of full immunity for any criminal prosecutions related to that information.⁹ Or, she might petition to present this information *in camera* directly to an appropriate court, so that only the court would have access to the information for purposes of deciding how to proceed. She might avail herself of the state's executive pardon process, offering the exculpating information in exchange for an agreement that protects her client. Of course, any of these moves carries practical risks, which she must reveal to her client when she seeks his input. For example, the prosecution could refuse to

9. A famous legal ethics case, sometimes called the "Lake Pleasant" case after the site of a murder, involved such an attempt at bargaining. The court appointed a Syracuse, New York attorney, Frank Armani, to represent Robert Garrow, a man accused of murdering a teenager in upstate New York. Armani engaged the assistance of attorney Francis Belge, and the two men received a startling confession from Garrow. Their client admitted to two other murders and informed the lawyers of the location of the bodies. The lawyers went to the sites to corroborate the client's story and discovered the decomposing bodies. For six months they told no one about their discovery, although they anguished over this decision. Prior to trial they contacted the district attorney and attempted to negotiate with him for the additional information in exchange for an agreement to incarcerate Garrow in a mental health facility for the criminally insane. Information about this case is available from a variety of sources but is collected in a book. TOM ALIBRANDI & FRANK H. ARMANI, *PRIVILEGED INFORMATION* (1984); see, e.g., Bryce Nelson, *Ethical Dilemma: Should Lawyers Turn in Clients?*, L.A. TIMES, July 2, 1974, at 1, reprinted in ANDREW L. KAUFMAN, *PROBLEMS IN PROFESSIONAL RESPONSIBILITY* 221-24 (3d ed. 1989); see also *People v. Garrow*, 379 N.Y.S.2d 185 (App. Div. 1976) (holding that lawyer's disclosure of the whereabouts of defendant's murder victims did not violate lawyer-client privilege after defendant's voluntary confession at trial); *In re Armani*, 359 N.Y.S.2d 231 (Onondaga County Ct. 1974) (granting motion to allow investigation of lawyer who withheld evidence of murder obtained under lawyer-client privilege in order to determine presence of wrongdoing).

negotiate on such terms.¹⁰ If so, the public defender might have endangered her client by arousing suspicions that further criminal actions are possible against him.

Aside from the practical risks, however, the idea of bargaining over the life of another intuitively seems reprehensible.¹¹ In addition to offering the state a Faustian choice, a successful bargain could relieve the client of punishment for his crime. On the other hand, this result will occur anyway if events proceed on schedule and the client guards his secret. Although assisting the client in escaping a murder charge would give him an unjust windfall, this strategy might be the best way for the public defender to resolve a difficult moral dilemma. She does owe a strong obligation of loyalty to her client even though she does not owe him silence in the face of impending death. In her efforts to save an innocent man, she is not entirely free of a duty to avoid unnecessary prejudice to her client. Thus, she may be forced to pursue a reluctant bargain toward ambivalent success. She may regret this course of action, but she need not feel guilty if this is the best she can do under the circumstances.

A more serious concern may complicate her approach, however. This client might repeat his crime. Conceivably, the client would be free eventually to perpetrate violence, and if a bargain works on the killing issue and the client escapes the "three strikes" status, or prevails in the underlying drug offense, his freedom will come relatively soon. On the other hand, the probability of the client committing another murder is far less clear than the near certainty of the impending execution. If time permits, the public defender might try to gauge the likelihood of a repeated violent crime by insisting that the client submit himself to a private psychiatric examination designed to evaluate his propensities for violence. Such predictions are notoriously unreliable, however. Besides, then the lawyer would have involved still another professional who has duties of her own. The specter of future violence should at least drive the public defender back to the moral drawing board before deciding to seek complete immunity. If appropriate to the client's mental condition, she might ask the client to agree to incarceration in a facility for the criminally insane, and make this the condition of providing the state

10. This did happen in the Lake Pleasant case.

11. The public understandably was deeply offended by Armani's and Belge's attempts to bargain for their client. *See* *People v. Belge*, 372 N.Y.S.2d 798, 801 (Onondaga County Ct. 1975).

with information.¹² She would need to explain to the client, however, that such institutions are sometimes more dreadful than prisons, and that his chances for eventual release would be more open-ended. He may well refuse this alternative, or something close to it.

If the public defender explores each reasonable option and the client rejects each, she is not off the hook. She is right to explore ways to mitigate harm to the client within the constraints of feasibility and time. In the end, however, she may have no choice but to violate the client's preferences. She needs to make it starkly clear to the client that she will work on his behalf, but that she has an independent moral duty to forestall the execution.

This may be a time when she is simply unable to do anything else because of the kind of person she is. She is not being self-indulgent to rely on her core sense of self. Moral integrity is not a luxury or its loss a price of becoming a professional. Even assessed consequentially, such a cost would not be wise. Those who lack integrity do not strive to become better. They lose or never acquire the motivation to care about the kind of person they are or will become. Professionals need integrity to serve their clients and professions well. Without a moral center a person cannot develop an abiding self-respect that, in turn, feeds the capacity to respect others. Professions cannot survive on sanctions and rules. They require ideals and professional commitment to those ideals. Such allegiance springs from personal integrity.

Those who formalize the rules and ideals of a profession need to leave room for integrity to thrive. This means that no rule should thwart the most basic moral judgments of those bound by the rules. The legal profession has known for years about the wrenching facts posed in this Symposium.¹³ Yet the lawyers who shape regulatory policy have repeatedly ducked opportunities to address this type of situation. This omission leads most lawyers to the conclusion that the

12. This was the strategy selected by Armani and Belge. According to Armani, they never sought complete liberty for their client. *See id.*

13. I have in mind the real case of Leo Frank. In 1915 Frank was convicted for the murder of a young girl. He received a death sentence. Before Frank was executed another man revealed to his lawyer that he had committed the murder. Then the governor of Georgia commuted Frank's sentence to life imprisonment. Because death was no longer at stake, the attorney who had received the confession decided to remain silent. An angry mob then lynched Leo Frank. *See KAUFMAN, supra* note 9, at 215-16 (describing the case facts); Arthur G. Powell, *Privilege of Counsel and Confidential Communications*, 6 GA. B.J. 333 (1944) (providing an analysis of the case by the lawyer who had received the murderer's confession).

existing rules mandate silence in this situation. This is because so-called "past crimes" are candidates for the strongest confidentiality protection. Without this priority, criminals who confessed to their lawyers could not receive an adequate defense.

The profession could create an exception to confidentiality for past crimes in situations where subsequent harm to another is imminent and grave. In fact, lawyers' ethical codes already contain such exceptions for future acts.¹⁴ The reason for treating past and future crimes differently is that the lawyer has the ability to prevent future harm, whereas the injuries from past acts have already unfolded. Yet this is not the case here. Grave harm from this past act is still imminent and preventable.

One might hesitate about a specific exception that would require revelation of a past act to prevent serious harm. Such an exception might be inflexible. Lawyers might feel compelled to reveal confidences about past acts even when they have serious doubts about the accuracy of a client's confessions, for example. Yet language in the existing codes already might address this concern fairly well. One rule employs the words "reasonably believes" to give the lawyer discretion to reveal a client's future intentions, for example.¹⁵ A discretionary rule might function quite well in this context because a lawyer could evaluate the unique circumstances in deciding whether to violate a confidence. Without some latitude, many lawyers might even risk "ethical disobedience" by violating the code to save a life. If so, this plight could hardly inspire their respect for the codes that govern them. On the other hand, some lawyers might rush to judgment to obtain emotional relief. Discretionary language such as "reasonably believes" may be overly broad for lawyers seeking a quick resolution to an agonizing problem.

Another concern is with allowing discretion at all. Perhaps the revelation should be mandatory in a case like this one, where the lawyer has little doubt about the truthfulness of the client's confession, and the severest of harms is virtually certain to occur without timely intervention. A rule could mandate disclosure, using stronger language like "reasonably certain" or "certain beyond a reasonable doubt" that the revelation is "necessary to prevent imminent death." Such tighter language would pare the cases requiring inflexible

14. MODEL CODE, *supra* note 1, DR 4-101(C)(3); MODEL RULES, *supra* note 1, Rule 1.6(b)(1).

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

disclosure to few. At the same time this mandate may discourage lawyers from grappling with this problem in a way that reveals its complexities. A ready remedy lets lawyers off the hook too easily to allow them to grow from the situation. It also discourages them from thinking of creative solutions that might best serve their remaining loyalties to the client and the particularities of the case at hand.

Some imprecision would inevitably result from applying even the clearest words to messy cases, but this kind of haziness is eminently familiar to lawyers. The profession has not hesitated to regulate with copious imperfection in other areas of ethics, so it is difficult to see insurmountable obstacles here. Interpretive and personal development problems are inevitable any time a profession attempts to translate complex moral judgments into rules. No code should spare a professional the moral anguish that permeates this situation. A code that promises this result through false specificity, on the one hand, or conscious evasion, on the other, does not serve those it governs very well.

A criminal defense lawyer, psychiatrist, or member of the clergy who has chosen the right vocation could not fail to experience pangs of conscience in considering how to proceed in this case. That is as it should be. Professionals need to struggle with painful and complex matters to develop as morally wise. Moral wisdom is a professional ideal that fosters respectful relationships, thoughtful execution of institutional duties, legal reform, and appreciation of the role of lawyers in serving the community. The moral wisdom that produces the finest professionals is not imposed from without. It cannot come entirely from sizing up either consequences or duties. Neither can it come from glibly following an ethical code. Moral wisdom germinates, instead, in the inward motivation to become a better person.

This has been a long, perhaps convoluted, but I hope not tortured trail to what most people might conclude in a snap. Is it worthwhile to follow the rougher path? I think so. Consensus on moral matters is useful, to be sure. Teachers of ethics who spend much of their time discussing ambiguous cases know how unsettling it can be for students to leave every discussion with more uncertainty than before. Sometimes a fairly stark case can produce the kind of strong consensus that relieves people of debilitating moral skepticism. Yet even a fairly clear case has more complexities than a hasty glance reveals. Furthermore, that something seems morally clear certainly does not mean that it is easy. Lonely or not, it is the lot of every professional to wrestle with these realities.