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To Betray Once: To Betray Twice: Reflections on Confidentiality, A Guilty Client, an Innocent Condemned Man, and an Ethics-Seeking Defense Counsel

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TO BETRAY ONCE? TO BETRAY TWICE?:
REFLECTIONS ON CONFIDENTIALITY, A
GUILTY CLIENT, AN INNOCENT
CONDEMNED MAN, AND AN ETHICS-
SEEKING DEFENSE COUNSEL

Mary C. Daly*

I. INTRODUCTION

Congratulations are in order to the editors of the Loyola of Los Angeles Law Review for creating a single hypothetical that so precisely and dramatically captures the dilemma of role for each of the three learned professions. Only the most obtuse of readers would fail to comprehend the editors’ intent. Their invitation requires much more than a simple exegesis of professional standards. It challenges the Symposium’s essayists to steer between the Scylla and Charybdis of professional role and personal morality or to forsake one for the other.

Because such a difficult journey should not be undertaken alone, I would like to expand the hypothetical by imagining that Ms. Hopewell is a former student who has consulted me for advice. The writing of this Essay thus becomes both a professional and personal exercise, forcing me to explore the boundary between role and identity. It tests the strength of my commitment to the distinction and the wisdom of the distinction itself.

"Let me make myself clear," I would tell Ms. Hopewell at the beginning of our conversation, "I regard the execution of an innocent man as immoral." "But," I would hastily add in my most professorial voice, "it is when our passions run the highest that we should pause for reflection." If Ms. Hopewell’s hearing was extremely keen,

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however, she might decipher the simultaneous whisperings of a more personal voice, "Why didn't she enroll in the other section? Whatever I advise her is likely to get both of us in trouble and in the newspaper. The judgeship seemed so promising . . . . Why me?"

Because I am conservative by nature, a sympathizer of Creon as much as an admirer of Antigone, my instinctual reaction to Ms. Hopewell's inquiry would be to ransack the texts and history of the professional standards of confidentiality for guidance.1

To Ms. Hopewell's plaintive response, "What if text and history fail? What if they prove unhelpful or morally dissatisfying?" I would retreat in grand professorial style to the fortress of "core values."2 Admittedly, I would stumble a bit, tripped by the riposte of my personal voice, "But what if they don't fail? After all, you teach that professional rules enhance the lawyer-client relationship precisely because they restrain a lawyer's discretion. In their absence, clients would have to inventory a lawyer's value system before every engagement."

By this point in our conversation, Ms. Hopewell's character would undoubtedly be quite evident. I imagine that she is impatient by nature and persistent by professional training. Not surprisingly, she remains unsatisfied. "What if there are too many core values? What if none is clearly superior to the others?" I would undoubtedly lapse into grand professorial silence at her questions, banishing my own suspicion of doubt. Responding as most lawyers do to client pain and anguish, I would pretend not to see them, anxiously hoping that my professorial self will prescribe a solution acceptable to my personal self.

And if it does not? My conscience does not permit me to linger long over the response. Death is different. It is final and irreversible. The physical and psychological accoutrements of execution are so painful that they are hidden from view.3 Thus, I am confident of my

1. See infra part II.
2. See infra part III.
response. The boundary between role and identity must crumble. My conscience will not permit confidentiality to trump justice. An innocent man cannot be allowed to die.

There is no certainty that Ms. Hopewell’s conscience and mine will agree, however. I do not fear being pilloried for supporting or encouraging Ms. Hopewell to betray her client. It is most unlikely that the press, the public, or a regulatory authority will penalize my conduct or hers. The prospect that inflicts the greatest anguish on my conscience is the betrayal of her confidence. To respect the dictates of my conscience I must first violate her trust and afterwards her client’s. The moral damage I wreak may well injure her more than Mr. Jones.

II. A TABULA NON RAZA: THE CONTEMPORARY UNDERSTANDING OF THE LEGAL PROFESSION REGARDING CONFIDENTIALITY

The duty not to disclose the substance of a client’s communication is probably the oldest professional responsibility known to the legal profession. Because of its historical roots in the law of both evidence and agency, confidentiality is traditionally analyzed as an evidentiary privilege, for example, the attorney-client privilege, and as an ethical obligation, for example, a duty expressed in the professional standards adopted by a court or state bar association to govern the conduct of lawyers admitted to practice in a particular jurisdiction.

The attorney-client privilege has a distinguished historical lineage and has achieved an almost mythic standing in the collective psyche

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4. See infra part IV.
5. Other lawyers, after all, have accepted the moral responsibility of nondisclosure in similar circumstances. See infra note 44.
6. Although I am hardly looking forward to it. Remember the judgeship?
7. The possibility that I will betray Ms. Hopewell and her client raises a whole host of ethical questions that need to be addressed in a separate essay. For example, what is the legal character of my relationship with Ms. Hopewell? If we stand in a lawyer-client relationship, I am bound by the same ethical rule of confidentiality with respect to her communication to me as she is with respect to Mr. Jones’s communication to her. Since my moral conviction against permitting the death of an innocent man is so strongly held, the conflict of interest rules are likely to require me to disclose this “personal interest” because it will effect the exercise of my independent judgement. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(A) (1969); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1983). My failure to advise her may well constitute an independent violation of the jurisdiction’s professional standards.
of litigants, lawyers, and judges. References to it can be found as early as 1580 in *Elizabethan Law Reports.* Great debates have raged about its utility and its undeniable capacity to obstruct the search for truth. Jeremy Bentham assailed it for benefitting only the “guilty person,” and demanded “let the law adviser say everything he has heard . . . the [innocent] client cannot have anything to fear from [disclosure].” But the Supreme Court has just as ardently championed its cause,

to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy . . . depends upon the lawyer's being fully informed by the client . . . “The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out.”

The privilege can be invoked only in the context of a proceeding conducted by a court or by a legislative or administrative body in which testimony is being taken. The facts outlined in the Symposium's hypothetical foreclose an extended discussion of the attorney-client privilege, however, because there is no hearing in which either Ms. Hopewell or her client, Mr. Jones, are being examined about their communications. Of course, any disclosure is certain to lead to such a hearing, a result that accounts for much of the analytical confusion and muddled opinion writing in this area. Nor is there any need to

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8. Dennis v. Codrington, 21 Eng. Rep. 53 (Ch. 1580). See generally 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290, at 542 & n.1 (John T. McNaughton ed., 1961) (citing cases wherein attorneys were afforded a privilege from testifying about or otherwise revealing information obtained in their capacity as attorneys). The leading historical analysis is Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege,* 66 CAL. L. REV. 1061 (1978). The impact of the privilege has even captured the imagination of popular entertainment. At least two episodes of the popular television show, *L.A. Law,* portrayed lawyers as personally distraught by their inability to disclose privileged information.


discuss the limited exceptions to the privilege since none is even arguably applicable.11

The infamous Macumber12 case dramatically illustrates the enormous respect accorded the privilege by the courts and society’s willingness to subordinate truth seeking “to encourage full and frank communications between attorneys and their clients.”13 The defendant was indicted for murder14 and risked the imposition of a death sentence. Two attorneys were prepared to testify that their client, now deceased, had confessed to the murder.15 The trial court prohibited their testimony, concluding its admission would violate the attorney-client privilege.16 The Arizona Supreme Court held that the testimony was properly excluded.17 Similarly, in a recent much publicized case, the Massachusetts Supreme Court refused to compel an attorney to answer a grand jury’s questions concerning a conversation he had with his client, a prime suspect in the grizzly murder of his own wife and child, on the day before the client committed

11. Ms. Hopewell obviously paid close attention in her professional responsibility course. She is 100% correct in her observation, “I’m not even supposed to tell anyone about this conversation, so nobody would know enough to try to make either of us testify anyway.”

While there is debate about the scope and interpretation of each exception, almost all jurisdictions permit a lawyer to reveal otherwise protected communications (1) to prove services rendered in an action to collect the lawyer’s fee; (2) to defend against accusations of wrongdoing; and (3) when the client has used the lawyer’s services to perpetrate a crime or fraud. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1995).

No criminal penalty attaches to Mr. Jones’s failure to confess to the murder. Indeed, the “failure” is constitutionally protected by the Fifth Amendment right against self-incrimination. Misprison of felony is not a crime in most states, and there is no general obligation to bring wrongdoing to the attention of law enforcement authorities. Thus, Ms. Hopewell and Mr. Jones are legally free to maintain their silence.

12. State v. Macumber, 544 P.2d 1084 (Ariz. 1976) (en banc), cert. denied, 439 U.S. 1006 (1978). Similar fact patterns can be found in Herrera v. Collins, 954 F.2d 1029, 1032-33 (5th Cir. 1992), aff’d, 506 U.S. 390 (1993); State v. Valdez, 618 P.2d 1234, 1235 (N.M. 1980). The Court of Appeals for the Fifth Circuit in Herrera did not address the privilege issue. The New Mexico Supreme Court in Valdez refused to permit a lawyer to testify that his client had confessed to a robbery for which the defendant had been convicted.

15. Id.
16. Id.
17. Id.
suicide. Courts have honored the privilege in other notorious civil and criminal proceedings as well.

If any doubts linger about the unavailability of an exception to the attorney-client privilege, a brief recounting of a heated discussion at the 1989 meeting of the American Law Institute (ALI) will certainly dispel them. For the past ten years, the ALI has been laboriously drafting a Restatement of the Law Governing Lawyers. In that year it considered, inter alia, section 132 of Tentative Draft No. 2, a provision which the reporters represented accurately reflected the current state of the law concerning the crime-fraud exception to the attorney-client privilege. The debate erupted not over section 132 but rather over proposed Illustration 4. The drafters modeled the Illustration on the Macumber case but added the twist that the client who confessed to the murder was still alive. Illustration 4 thus corresponds almost precisely to the Symposium's hypothetical. The discussants raised multiple objections. To some, the execution of an innocent man was a morally intolerable result and the Illustration should have affirmatively rejected such an outcome; to others, any departure from a rule of absolute protection for such communications represented a slippery slope descent, leading to the ultimate disintegration of the attorney-client relationship; to still others, the Illustration accurately represented the state of the law, but should have been dropped from the Restatement or modified because of its starkness. At the conclusion of the discussion, the members voted to delete


In rare, isolated instances, the courts have disregarded the privilege. See, e.g., Cohen v. Jenkintown Cab Co., 357 A.2d 689 (Pa. Super. Ct. 1976) (stating that under the facts of this particular case, the interests of justice require the disclosure of the client's communications to his attorney).

Illustration 4 but left the Reporter free to seek approval for a new draft at a future meeting, which he did not do. In nonevidentiary settings, it is the ethical obligation of confidentiality, as expressed in each jurisdiction's professional standards governing the conduct of lawyers, that will either permit or prohibit the disclosure of a client's communications. This obligation is rooted in the fiduciary duties that an agent owes to a principal. Because this ethical obligation will determine the extent to which Ms. Hopewell may reveal her client's confession—an issue analytically distinct from whether she may testify to it—its history and pertinent interpretations are explored below in limited detail.

A. A Historical Overview

At a point yet to be determined with any precision by historians of the legal profession, lawyers, scholars, and academics acknowledged the existence of an ethical obligation of confidentiality distinct from the attorney-client privilege. Its historical development cannot be traced with the same precision as that of the attorney-client privilege. For example, George Sharswood, whose writings on legal ethics significantly influenced the drafting of codes of lawyer conduct, associated the duty of confidentiality with the attorney-client privilege. He clearly expressed the view that a lawyer could not reveal a client's past criminal behavior.

Despite Sharswood's influence on the drafting process, when the American Bar Association (ABA) adopted the Canons of Professional Ethics in 1908, it slighted confidentiality as an independent ethical value, associating it in passing with the avoidance of conflicts of

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23. Id. at 105-07. For an insightful analysis of Sharswood's contribution to the development of modern legal ethics, see Russell G. Pearce, Rediscovering the Republican Origins of the Legal Ethics Codes, 6 GEO. J. LEGAL ETHICS 241 (1992).
interest. Over the course of the next twenty years, the legal profession gradually accepted the notion of a distinct ethical obligation of confidentiality; and when the ABA amended the Canons in 1928, it devoted a separate Canon to it. Entitled “Confidences of a Client,” Canon 37 affirmatively stated “[i]t is the duty of a lawyer to preserve his client’s confidences.” The duty was not absolute, however. Canon 37 permitted disclosure “[i]f a lawyer is [falsely] accused by his client” of a wrongdoing or to prevent “[t]he announced intention of a client to commit a crime.” In the latter event the Canon permitted the lawyer to “make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened.” Apart from the self-defense exception, the ethical duty of confidentiality as articulated in Canon 37 prevented a lawyer from revealing a client’s past wrongdoing.

Canon 37 should not be read in isolation, however. Two other Canons suggested possible exceptions to the prohibition against disclosure of past wrongdoing. The first was Canon 29: “The counsel upon the trial of a cause in which perjury has been committed owes it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities.” The second was Canon 41. Entitled “Discovery of Imposition and Deception,” it provided:

When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps.

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24. Canon 6 prohibited a lawyer from accepting employment that might entail the disclosure of a client’s “secrets or confidences” and affirmed a lawyer’s “obligation to represent the client with undivided fidelity.” CANONS OF PROFESSIONAL ETHICS Canon 6 (1908). See generally HENRY S. DRINKER, LEGAL ETHICS (1953) (including a general discussion of the purpose, scope, and application of the duty of a lawyer to preserve a client’s confidences); Edward L. Wright, The Code of Professional Responsibility: Its History and Objectives, 24 ARK. L. REv. 1 (1970) (referring generally to works of Henry S. Drinker).

25. CANONS OF PROFESSIONAL ETHICS Canon 37 (1928).

26. Id.

27. Id.

28. Id. Canon 29.

29. Id. Canon 41.
While the language of both provisions suggested that disclosure trumped confidentiality at least in instances of perjury, fraud, or deception, that interpretation was never accepted.\textsuperscript{30} In sum, this initial foray into the historical origins of the ethical obligation of confidentiality clearly establishes the primacy of the principle of nondisclosure.\textsuperscript{31}

The \textit{Model Code of Professional Responsibility}, adopted in 1969 by the ABA, reaffirmed that primacy. It also formalized the distinction between the evidentiary privilege and the ethical obligation of confidentiality. Borrowing from the language of the 1908 \textit{Canons}, Disciplinary Rule (DR) 4-101 distinguished between a “confidence” and a “secret.”\textsuperscript{32} It defined the former as “information protected by the attorney-client privilege under applicable law”\textsuperscript{33} and the latter as “other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.”\textsuperscript{34} The Code’s protection was hardly absolute, however. It vested a lawyer with discretion to reveal a client’s confidences or secrets to prevent the client from committing a future crime, to collect the lawyer’s fee, and to defend against charges of wrongdoing.\textsuperscript{35} Past crimes remained off limits, however, with one possible tortured exception. The Model Code’s DR 7-102(B) mandated the disclosure

\begin{itemize}
\item \textsuperscript{31} That Sharswood’s interpretation corresponded to the actual understanding of the bar finds tragic confirmation in the trial of Leo Frank. Frank, a Jew, was convicted of the murder of a young woman. His arrest and conviction were the product of systemic anti-Semitism. Another individual confessed his responsibility for the crime to his lawyer. The lawyer concluded that he was ethically precluded from revealing his client’s confession. Frank was subsequently lynched by a mob when the governor commuted his death sentence. \textit{See} ARTHUR G. POWELL, \textit{I CAN Go HOME AGAIN} 287-92 (1943); \textit{see also} Arthur G. Powell, \textit{Privilege of Counsel and Confidential Communications}, 6 GA. B.J. 333 (1943) (arguing that under the Sixth and Fourteenth Amendments the confidential communications between the accused and his counsel must be kept inviolate).
\item \textsuperscript{32} \textit{MODEL CODE OF PROFESSIONAL RESPONSIBILITY} DR 4-101(A) (1983).
\item \textsuperscript{33} \textit{Id.}
\item \textsuperscript{34} \textit{Id.}
\item \textsuperscript{35} \textit{Id.} DR 4-101(C)(3)-(4). DR 4-101(C) also permitted disclosure with the client’s consent and when permitted by the Code, or required by law or court order. \textit{Id.} DR 4-101(C)(1)-(2). Because these exceptions are irrelevant to Ms. Hopewell’s dilemma, they are not discussed.
\end{itemize}
of a fraud perpetrated by a client on a person or tribunal. Its force, however, was dissipated by two conditions. First, the fraud had to occur "in the course of the representation." This condition guaranteed that a client who consulted a lawyer about prior wrongful conduct would not risk disclosure. Second, it prohibited disclosure when "the information [about the fraud] is protected as a privileged communication." Because the likelihood of learning of a client's fraud in a nonprivileged context is extremely small, DR 7-102(B) actually exalted confidentiality to the detriment of disclosure by its formal inclusion in the Model Code. Thus, the Model Code continues and even expands the Canons' enchantment with the ethical obligation of confidentiality.

In 1983, the ABA voted to replace the Model Code with the Model Rules of Professional Conduct. Much of the debate surrounding the adoption of the Model Rules revolved around proposals to expand and contract disclosure obligations. In the end the proponents of nondisclosure were victorious. The final draft significantly cut back on the discretion that the Model Code gave a lawyer to disclose future client wrongdoing.

The Model Rules did away with the distinction between confidences and secrets and even strengthened the ethical obligation of confidentiality by adopting a more encompassing prohibition. Model Rule 1.6 provides: "A lawyer shall not reveal information relating to representation of a client." Reflecting an increased concern for the protection of client communications, Model Rule 1.6 cut back significantly on the disclosure previously allowed by DR 4-101 by eliminating the discretion to disclose future economic crimes. While the Model Rules permitted the disclosure of client fraud, the circumstances under which it was allowed were far more restrictive

36. Id. DR 7-102(B)(1).
37. Id.
38. Id. The exclusion was not included in the original draft adopted in 1969 by the ABA. It has been suggested that the drafters did not appreciate that disclosure pursuant to the authority of DR 7-102(B) would be interpreted as a limited exception to DR 4-101's general norm of confidentiality. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 668-70 (1986). The exclusion was added in 1974, but not all states adopted it. Id. at 670.
40. Id. Rule 1.6.
than those contemplated by the Model Code. Despite the increased solicitude for the confidentiality of client communications that these changes evidence, the drafters did not disturb the fee-collection or self-defense exceptions. This inconsistency and the self-interest it represented did not escape the critical attention of members of the public and the bar. Since 1983, the ABA has unwaveringly supported confidentiality, vigorously beating back all attempts to liberalize the Model Rules' nondisclosure provisions.

In short, my first recommendation to Ms. Hopewell—to seek guidance in the text and the history of the codes of lawyer-conduct—is a professorial success. We have reached an unambiguous


42. For example, in 1991, the ABA House of Delegates defeated a proposed amendment that would have permitted disclosure "to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used." See ABA, STANDING COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, REPORT TO THE HOUSE OF DELEGATES, No. 108B (1991). Despite the ABA's hostility toward disclosure, many of the states have continued the Model Code's tradition of vesting a lawyer with discretion to disclose future economic crimes. Some states have even gone so far as to mandate disclosure. E.g., N.J. R. GEN. APPLICATION pt. I app., RULES OF PROFESSIONAL CONDUCT Rule 1.6(b), reprinted in NEW JERSEY RULES OF COURT: STATE AND FEDERAL 124 (1995); see generally THOMAS D. MORGAN & RONALD D. ROTOUNDA, 1995 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 132-38 (1995). Ironically, the ABA's Committee on Ethics and Professional Responsibility has been more sympathetic to disclosure, but always in circumstances unrelated to Ms. Hopewell's dilemma. See, e.g., ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-366 (1992); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-375 (1993); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-376 (1993). But see ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94-380 (1994) (finding no exceptions to the Model Rule regarding confidentiality for lawyers representing a fiduciary).

43. Characterizing the search through text and history as my "first" recommendation is not entirely accurate. I would have initially urged Ms. Hopewell: (1) to explore the possibility of alternative legal action short of disclosure that might simultaneously protect her client and avoid Mr. Smith's execution; and (2) to consult again with Mr. Jones concerning his commitment to nondisclosure. I have been unable to divine a satisfactory alternative. Some of Mr. Jones's remarks in their last meeting suggest that he has not entirely foreclosed the possibility, for example, "he [Smith] doesn't deserve to die. It's not right .... If I can get a deal out of this and it helps Frank too, fine. But don't use my name, not yet." (emphasis added). Mr. Jones is a moral agent and may not escape his ethical responsibility by attempting to transfer it to his lawyer, mental health therapist, or clergyperson.
and consistent resolution of a difficult issue of professional responsibility. It makes no difference whether her inquiry is filtered through the prism of the attorney-client privilege or that of the ethical obligation of confidentiality; whether it is analyzed historically under the Canons or the Model Code; or whether it is examined newly under the Model Rules. The answer is the same: Ms. Hopewell may not disclose her client’s communication over his objection not even to save the life of an innocent man.

My intellectual satisfaction is short-lived, however. Even before Ms. Hopewell can comment on my professional astuteness, my professorial and personal voices both shout out in unison, “But wait a minute. Are you endorsing the proposition that the application of black-letter principles ends all analysis? Aren’t you always telling

Of course, Ms. Hopewell’s advocacy of disclosure or—the more likely scenario—her manipulation of Mr. Jones, raises its own set of moral issues. Mr. Jones’s confession is likely to insure a life sentence, perhaps even a capital sentence. It is difficult to characterize such a result as being in her client’s best legal interest. While a lawyer is free to refer to “moral, economic, social and political factors” in giving a client advice, is Ms. Hopewell providing the kind of independent professional judgment that a criminal defendant has a right to expect from his lawyer? See MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 & cmt. (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1969). In the end, Ms. Hopewell’s conscience may be troubled more than her client’s, because he has so much more to lose.

44. A panel of prominent judges, lawyers, journalists, and ethicists discussed a hypothetical almost identical to the Symposium’s in To Defend a Killer, an episode in the distinguished public television series, Ethics in America. James W. Neal, a celebrated member of the criminal defense bar, opined with obvious deep personal conviction:

[M]y sole duty at that point in life is to stand beside the man accused of the crime because, believe me, you can be the most popular man in the world, but once you’re accused of a crime, there’s only one man who will stand up with you and that is your defense counsel. He’s the only person in the world who tries to help you … [B]efore I took that case, I had to agree that I would do anything ethical to defend that man.

When asked if “anything ethical” included allowing an innocent man to be executed, he replied, “[a]bsolutely … people die every day. It may sound harsh, but we have values to serve.” LISA H. NEWTON, ETHICS IN AMERICA: STUDY GUIDE 75 (1989).

Not all thoughtful commentators agree with Mr. Neal’s conclusion. As Professor (now Judge) Noonan has observed:

A lawyer should not impose his conscience on his client; neither can he accept his client’s decision and remain entirely free from all moral responsibility, subject only to the restraints of the criminal law. The framework of the adversary system provides only the first set of guidelines for a lawyer’s conduct. He is also a human being and cannot submerge his humanity by playing a technician’s role … [T]he lawyer must act with regard for the requirements of the adversary system and with concern for his standards as a human person, as well as with regard for the requirement of the society which the system serves.

your students that if legal judgment involves nothing more than the application of text to facts, an interactive computer program will solve their clients' problems as well as they will?" Moreover, I can distinctly hear the whisperings of my conscience over their shouting. It is most firmly reminding me that obedience to professional role cannot excuse moral imperatives.

III. THE LETTER AND THE SPIRIT: AN INQUIRY

In counseling Ms. Hopewell, I would quickly move from text and history to “core values,” still seeking in my professorial quest, either confirmation or disproof of her ethical obligation of confidentiality. After all, as every good lawyer knows, the genius of the common law was its ability to adapt to new situations and even the Supreme Court has resorted to interpretations reflecting the “spirit” of a statute when enforcing its “letter” would yield a nonsensical result or one inconsistent with the legislature’s intent.45 Thus, our conversation would turn away from text to policy.

While bar leaders and scholars have continuously and heatedly debated the wisdom of testimonial and nontestimonial confidentiality, there is remarkable agreement about the core values that animate the debate. Those who advocate an absolute or near-absolute ban on the disclosure of client communications invoke two complementary sets of values: those that enrich the individual attorney-client relationship—such as autonomy and privacy—and those that enrich the legal system and society in general—such as the securing of a more law-abiding population.

The arguments for autonomy and privacy are fairly straightforward. There is a distinguished tradition in western philosophy enshrining autonomy as a fundamental right of all human beings. This right is critically threatened by the increasing imbalance in power between the state and the individual or between private enterprises and the individual. Almost all commercial relationships and many personal ones are subject to regulation by the state, for example, the licensing of businesses and the licensing of marriages; private enterprises routinely intrude into decisions formerly considered a matter of individual choice, for example, health care.

These changes lead to the inescapable conclusion that in many important areas of life the substantive and procedural complexity of

the law make the exercise of informed autonomy in decision-making and action virtually impossible for individuals who lack legal training. Viewed from this perspective, confidentiality becomes an indispensable precondition. Autonomy can be preserved only if clients confide freely and without reservation in their lawyers.

Furthermore, the interactive process of lawyer-client communications frequently requires a client to share deeply personal information, facts that the client ordinarily considers "private" and jealously guards from disclosure. Privacy is thus inextricably linked to autonomy and confidentiality. Without an assurance of confidentiality, a client will not jeopardize the privacy of intimate details. The nondisclosure will hobble the lawyer's advice, ultimately corrupting the client's autonomy.

Finally, it is sometimes argued that confidentiality promotes virtuous conduct by lawyers, especially loyalty. In entering into a lawyer-client relationship, lawyers assume the persona of the ultimate professional "friend." Friendship is impossible without loyalty—witness the common pejorative designation, a "fickle friend." Loyalty demands that the lawyer stick through the thick-and-thin of the attorney-client relationship despite profound reservations about the wisdom or the justice of the client's cause or strategy. Thus, in the end, the lawyer's virtue—loyalty—is linked to the client's rights—autonomy and privacy.

Confidentiality does more than enhance the individual attorney-client relationship, however. Its proponents also advance a utilitarian justification. Based on arguments very similar to those discussed in the preceding paragraphs, they contend that confidentiality improves the quality of legal advice that lawyers give clients. Improved legal advice leads to more just verdicts and settlements and to more fair transactions, thus benefitting society as a whole.

The most obvious difficulty with the core-values approach, however, is that the legal profession has never sworn absolute fidelity

to them. Although there is a dedicated minority holding the contrary view, an overwhelming majority of the members of the judiciary, the legal academy, and the organized bar subordinate these values to the proper and fair functioning of the criminal and civil justice systems. They draw the line at the knowing use of client perjury and false evidence.\textsuperscript{47} In such instances the administration of justice trumps autonomy and loyalty. Less noble and even more firmly established is the exception that permits disclosure to the extent necessary to collect a lawyer’s fee or to defend against an accusation of wrongdoing.\textsuperscript{48}

The leading scholars, including the principal reporter for the \textit{Restatement} who drafted Illustration 4, refuse to exalt confidentiality to the detriment of human life. Professor Wolfram abhors “the logic of the privilege” and denounces its “moral calculus.”\textsuperscript{49} Even Professor Monroe Freedman, the nation’s most prominent and ardent defender of strict confidentiality, declines to defend it in these circumstances.\textsuperscript{50}

Another and even more significant difficulty with the core-values approach is the paucity of empirical data demonstrating that a guarantee of confidentiality is an essential precondition to the “full and frank communication between attorneys and their clients [that is necessary to] promote broader public interests in the observance of law and administration of justice.”\textsuperscript{51} The vigorous theoretical debate about the relative weight of the pro-confidentiality values—autonomy, privacy, loyalty, and the securing of a more law-abiding society—and the pro-disclosure values—greater truth-finding, especially in litigation—is conducted at great length within the professional responsibility community. However, only intuition supports the fundamental assertion upon which the attorney-client privilege and ethical obligation of confidentiality rest. Empirical data are virtually nonexistent.

\footnotesize
\begin{itemize}
  \item \textsuperscript{48} \textit{See Model Code of Professional Responsibility DR 4-101(C)(4) (1981); Model Rules of Professional Conduct Rule 1.6(b)(2) (1995).}
  \item \textsuperscript{49} Wolfram, \textit{supra} note 21, at 20.
  \item \textsuperscript{50} MONROE H. FREEDMAN, UNDERSTANDING LAWYERS’ ETHICS 103 (1990).
  \item \textsuperscript{51} \textit{Upjohn Co. v. United States}, 449 U.S. 383, 389 (1981).
\end{itemize}
Even more disturbing is that the few and admittedly flawed studies that do exist suggest that lawyers and clients both misunderstand the attorney-client privilege and the ethical duty of confidentiality. Both believe that they permit significantly more disclosure than actually allowed. If the studies' conclusions are correct, they almost certainly undermine the rights-based and utilitarian justifications discussed earlier. Clients have regularly engaged in "full and frank disclosure," thinking their communications were subject to less protection than the attorney-client privilege and ethics codes promised. Lawyers have regularly counseled clients, assuming less protection for the communications. Furthermore, mathematical models based on decision theory challenge the justifications as well. Professors Kaplow and Shavell have raised serious questions about their validity.

Thus, Ms. Hopewell and I will ruminate, growing increasingly uncomfortable about the fit between the professional standards of confidentiality and the assumptions upon which they rest. Our musings may even turn to other legal observations that once examined will undermine our already shaky confidence in the standards' worth. What comfort can we take from the fact that the law of agency from which the ethical obligation of confidentiality is derived permits disclosure of a principal's wrongdoing to prevent harm to a third party? Or that a serious question exists about the constitutionality of absolute nondisclosure prohibitions, when they are applied to prevent a lawyer from testifying that a client has admitted the commission of a crime for which another person has been charged? Or that other countries whose legal systems evidence a similar solicitude for the protection of lawyer-client communications


54. See RESTATEMENT (SECOND) OF AGENCY § 395 cmt. f (1957); see also RESTATEMENT OF TORTS § 757 cmt. d (1939) (stating "a privilege to disclose may also be given by the law, independently of the other's consent, in order to promote some public interest").

would release Ms. Hopewell from that obligation under the circumstances described in the hypothetical?\textsuperscript{56}

IV. CONCLUSION

What conclusion will Ms. Hopewell and I reach in the end? To the extent that she is morally committed to preventing the execution of an innocent man it will not be difficult to justify her decision. Despite the black-letter text of the \textit{Code of Professional Responsibility}, the \textit{Model Rules of Professional Conduct}, and the \textit{Restatement of the Law of Lawyering}, a general consensus exists among the members of the practicing bar and the academic community that permits disclosure in the extreme circumstances contemplated by the hypothetical. Furthermore, regulatory officials are likely to exercise their discretion and not sanction Ms. Hopewell severely or at all. There is no reason to assume that they would not be sympathetic to her extreme predicament. There is every reason to assume that they would be sensitive to the public outcry certain to follow bar discipline.

The prospect I find far more unsettling to contemplate is Ms. Hopewell's possible rejection of disclosure. What happens if her professional and personal value system gives greater weight to confidentiality? What if she is morally comfortable with the "lawyer's role" and with the course of conduct proscribed by the black-letter texts? In this event, I am left to my own moral musings and must decide whether to betray the confidences of both Ms. Hopewell and Mr. Jones. Betraying Ms. Hopewell seems particularly perfidious. Unlike her client, she is morally innocent of any wrongdoing. She has responded to his shocking communication in a highly restrained fashion. Rather than relying on her personal intuition or interpretation of the various codes of ethics she has sought guidance from someone possessing an expertise greater than her own in professional responsibility. She has no reason to suspect that this person might betray her confidence. Mr. Jones, in contrast, had every reason to worry about the probability of betrayal before speaking to Ms. Hopewell. In light of the horrific consequences flowing directly from nondisclosure, he certainly must have acknowledged to himself that the argument for disclosure was far more compelling in this particular instance than in most others. Of course, to the extent he surmised

\textsuperscript{56} See A. CROSS, EVIDENCE 398-400 (6th ed. 1985) (analyzing the application of the attorney-client privilege in Great Britain).
correctly that Ms. Hopewell would keep his trust, my conduct is especially hurtful.

In the end, I am prepared to betray each of them. To ease my pain I will invoke two well revered philosophical doctrines: necessity and civil disobedience. The doctrine of necessity protects an actor who deliberately violates the law, if the purpose of such violation is to avoid a "greater evil." Several of the themes about which I wrote earlier in this Essay, describing the tension between the "letter of the law" and the "spirit of the law" are also found in discussions of this doctrine. It rests on two premises: first, that it is reasonable to violate a rule if the evil caused by its observance would substantially outweigh the evil caused by disobedience; and second, that it is unjust to sanction an actor for objectively reasonable conduct.\(^5\) The execution of an innocent man, in my view, is clearly a greater evil than the betrayal of the confidences of Mr. Jones and Ms. Hopewell.

As for the doctrine of civil disobedience, its invocation is somewhat unusual. Civil disobedience is traditionally associated with acts that are "public, nonviolent, conscientious yet political . . . done with the aim of bringing about a change in the law or policies of government."\(^5\) Dissenters generally engage in civil disobedience to protest the acts of the executive or legislative branch. Although civil disobedience directed to the judicial branch is not unheard of, for example, anti-slavery, anti-segregation and anti-abortion demonstrations, I, however, have located no instances of civil disobedience directed to the judicial branch in its capacity as the regulator of the legal profession. I see no reason why the absence of precedent should be fateful to my claim. My protest is "public" in that I will reveal the protected confidences to the prosecutor's office, the court, and in all likelihood, the media. It is "political" in that it challenges a government decision—the adoption of a code of ethics prohibiting disclosure of past crimes in all circumstances. It is "conscientious" in that it springs from my moral conviction that the application of the ethical obligation of confidentiality will result in an irreparable injury to an innocent third party.\(^5\) Finally, it is being undertaken not merely to

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57. Joel Feinberg, *Civil Disobedience in the Modern World*, in *Philosophy of Law*
121, 122 (Joel Feinberg & Hyman Gross eds., 5th ed. 1995).
59. The irreparable injury that Mr. Smith will suffer actually makes my decision to reveal Ms. Hopewell's confidences easier than it would be otherwise. The dynamic of my decisionmaking would undoubtedly be different if the court had sentenced Mr. Smith to life imprisonment or a term of years. I confess to being unable to draw the line between
save Mr. Smith, but also to show the horrific lengths to which a sound principle can be stretched. If this undertaking is successful, it will act as a catalyst triggering a policy change in the conception of the ethical obligation. In invoking the distinguished tradition of civil disobedience, I draw confidence from the writing of Professor Martha Minow, who has argued:

[T]he legal system itself needs people who are willing to break the law for political reasons. . . . The legitimacy of the system itself requires confrontation with disobedience defended by individuals who view compliance as immoral or by individuals seeking to persuade lawful officials to change.60

irreparable and acceptable injury with any precision in this context. My conscience strongly argues that the conviction of an innocent defendant is so morally repulsive that disclosure should trump the ethical rule of confidentiality under almost all circumstances.
