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THE LIFE-SAVING EXCEPTION TO CONFIDENTIALITY: RESTATING LAW WITHOUT THE WAS, THE WILL BE, OR THE OUGHT TO BE

Monroe H. Freedman*

When I was a first-year law student in 1951, Professor Lon Fuller shocked his Contracts class by announcing that all Restatements of the Law should be put in a pile and burned. The shock was on three levels. World War II and the Nazi book burnings were only five years behind us. Fuller was an extremely gentle and soft-spoken man. And we were first-year students, believing in, and anxiously seeking, “the rule” that would resolve each legal issue that we confronted.

Fuller’s point, of course, was that a restatement of what the rule *was* yesterday tended to blunt the lawyer’s real concerns about legal rules. In counseling clients we strive to predict what the rule *will be* tomorrow, and the answer to that question is inseparable from the lawyer’s ultimate inquiry of what the rule *ought to be*.¹ In particular, it is the *ought* that tends to get overlooked in the backward-looking exercise of restating the law.

An extreme—indeed, bizarre—example of this tendency to overlook the *ought* can be found in the American Law Institute’s (ALI) current effort to draft a *Restatement of the Law Governing Lawyers*. The issue is whether a lawyer is required to maintain a client’s confidences even at the sacrifice of innocent human life. My own answer, argued for more than two decades, is that human life should take precedence over confidentiality.² The answer of the ALI

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1. Oliver Wendell Holmes, considered by many to be the archetype legal positivist, said that “[t]he law can ask no better justification than the deepest instincts of man.” OLIVER WENDELL HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 200 (1897).

2. See, e.g., THE AMERICAN LAWYER’S CODE OF CONDUCT Rule 1.4 (Alternative A) (Public Discussion Draft, 1980); MONROE H. FREEDMAN, LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM 6 (1975); MONROE H. FREEDMAN, UNDERSTANDING LAWYERS’ ETHICS 102-04 (1990) [hereinafter FREEDMAN, LAWYERS’ ETHICS]; Monroe H. Freedman,

Reporter, Professor Charles Wolfram, is that, except in very limited circumstances, confidentiality is more precious than human life. Yet Wolfram has had no qualms about permitting lawyers to abandon confidentiality to collect their own fees or to defend themselves against charges of wrongdoing, and he goes so far as to require the betrayal of client confidences to prevent or remedy a client's fraud on the court.

There are three cases that have been used over the years to illustrate the life-and-death issue. The first involves an innocent person on death row. The client confesses to his lawyer that he committed the murder for which another man is about to be executed. The lawyer is unable to persuade the client to reveal the truth. Is the lawyer permitted to reveal information reasonably believed to be necessary to stop the execution?³

In the second case defense counsel is informed by the defense's medical expert that the plaintiff has a life-threatening aortic aneurism. The aneurism is readily operable but the plaintiff does not know about it. It may have been caused by the accident that is at issue in the litigation and therefore raises a serious risk of increasing the damages. If the lawyer is unable to persuade the defendant to inform the plaintiff, is the lawyer permitted to do so?⁴

The third case involves a bomb in Pennsylvania Station, planted by the client's brother and set to go off at rush hour. The client, seeking advice about his own potential liability for his brother's crime, tells the lawyer that he has been unsuccessful in dissuading his brother from committing the crime, but he forbids the lawyer to reveal the information to prevent the crime. Is the lawyer nevertheless permitted to reveal the information necessary to prevent the bomb from going off?⁵

The fact that the questions posed in these cases are seriously debated within the legal profession is itself a kind of sick lawyer joke. Consider the *Restatement*. In May of 1989 the members of the ALI

Are There Public Interest Limits on Lawyers' Advocacy?, 2 J. LEGAL PROF. 47, 51 (1977); Monroe H. Freedman, *Lawyer-Client Confidences Under the A.B.A. Model Rules: Ethical Rules Without Ethical Reason*, CRIM. JUST. ETHICS, Summer/Fall 1984, at 3, 6-7.

3. See *Arizona v. Macumber*, 582 P.2d 162 (Ariz. 1978) (refusing to allow alleged confession by third party in a murder trial on the grounds of privilege).

4. See *Spaulding v. Zimmerman*, 116 N.W.2d 704 (Minn. 1962).

5. See FREEDMAN, *LAWYERS' ETHICS*, *supra* note 2, at 103.

addressed a variation of the innocent person on death row dilemma.⁶ The conclusion expressed in Illustration 4, consistent with the text of the proposed rules on confidentiality, was that the lawyer was forbidden to reveal the information in order to save the life of the innocent person.⁷

Professor Wolfram, as Reporter for the *Restatement*, presented the rules and described them as “very important” and “squeaky traditional.” Professor Carl A. Auerbach protested:

I am horrified by Illustration 4. . . . When we regard the whole range of exceptions to the privilege, both in these sections and in the preceding sections that deal with confidences—that is, secrets—not covered by the attorney-client privilege, I can’t think of the policy behind one exception that would amount to and is as grave as . . . prevent[ing] innocent people from going to their death.

Is there no basis on which we could temporize this horrible consequence that I think outrages a sense of justice and outrages lay persons about lawyers’ ethics? Furthermore, I doubt that there is a bar in the country that would take steps to discipline a lawyer who violated . . . the confidence of a client and revealed a secret that was necessary to save an innocent life.⁸

The “whole range of exceptions” to which Auerbach referred includes disclosing client information to defend the lawyer against “a charge by any person that the lawyer . . . acted wrongfully during the course of representing a client,”⁹ and disclosing client information to collect the lawyer’s fee.¹⁰ In addition, section 118 *requires* the lawyer to “take reasonable remedial measures” to correct false testimony given by the client, which may include disclosure of confidential client information.¹¹

One would think that the issue would have ended right there, with the Reporter confessing error—even relief—at having the rule

6. ALI, 66TH ANNUAL MEETING, THE AMERICAN LAW INSTITUTE: PROCEEDINGS 1989, at 332-339 (1990) [hereinafter PROCEEDINGS] (addressing RESTATEMENT OF THE LAW: THE LAW GOVERNING LAWYERS § 132, illus. 4 (Tentative Draft No. 2, 1989)).

7. RESTATEMENT OF THE LAW: THE LAW GOVERNING LAWYERS § 132, illus. 4 (Tentative Draft No. 2, 1989) [hereinafter LAW GOVERNING LAWYERS].

8. PROCEEDINGS, *supra* note 6 at 332-33.

9. LAW GOVERNING LAWYERS, *supra* note 7, § 116.

10. *Id.* § 117.

11. *Id.* § 118.

and its illustration so effectively challenged. Indeed, Wolfram expressed agreement with "most of the sentiment."¹² But mere sentiment was not enough. "This is law," he explained, incorrectly, "at its most logical and I think supportable as a matter of restatement."¹³ He went on to acknowledge that an exception could be made, but protested that such an exception would have to be made "out of the whole cloth."¹⁴

The whole-cloth argument is, of course, nonsense. Wolfram was relying on a single case, *Arizona v. Macumber*,¹⁵ in which, as Professor Hodes points out, the state bar ethics committee had in fact held that the lawyers could ethically reveal the information.¹⁶ In addition, Wolfram conceded that in England Illustration 4 would be decided "in a diametrically opposite manner."¹⁷ As a matter of logic, as well as morality, an exception to save innocent human life is far more compelling than those exceptions already accepted by the Reporter.

Professors Geoffrey C. Hazard, Jr. and W. William Hodes argue that the lawyer in a life-or-death case could, under "moral compulsion," engage in "conscientious civil disobedience" against a rule imposing silence on the lawyer.¹⁸ Moreover, they, along with Professor Auerbach, recognize that "most bar authorities would probably share [the lawyer's] moral revulsion [against a rule forbidding disclosure to save life], and would elect not to press forward with a disciplinary charge, should one be filed by the client."¹⁹ That authoritative view is itself part of the *was* that a Restatement should be seeking to restate.²⁰

12. PROCEEDINGS, *supra* note 6, at 333.

13. *Id.*

14. *Id.* Professor Wolfram also expressed a "sense of outrage . . . in an undifferentiated justice sense" [*sic*], but again protested that "the law" doesn't allow the exception. *Id.*

15. 582 P.2d 162 (Ariz. 1978).

16. See W. William Hodes, *What Can Be Done?*, 29 LOY. L.A. L. REV. 1547, 1575-76 (1996).

17. PROCEEDINGS, *supra* note 6, at 333.

18. GEOFFREY C. HAZARD & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* § 1.6:304 (2d ed. Supp. 1993).

19. *Id.* It is certainly true that the problem of bad drafting can be solved with civil disobedience. But civil disobedience is necessary only if we insist upon drafting admittedly outrageous rules. It would be preferable to simply rewrite the rule to avoid the outrageous result.

20. See also Maura Strassberg, *Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics*, 80 IOWA L. REV. 901, 949 (1995) (noting that "codifications such

The ALI debate returned again to the anomalous nature of the exceptions with the following observation by Professor Douglas R. Heidenreich:

If it becomes important for the lawyer to disclose the very same information because the lawyer is charged with malpractice or because the lawyer has been charged with a possible disciplinary violation or indeed if it is necessary to disclose that information for the lawyer to collect her fee, then it's okay. So, for the lawyer to save her own skin, or indeed her pocketbook, it's all right to disclose that information.²¹

Heidenreich added, "I would like to see us express Carl's sense of outrage and suggest that this is a really grotesque . . . situation It seems to me that if that is indeed the law, we ought to say, in the strongest terms, that it is a terrible law."²²

The absurdity among the exceptions was further highlighted by Richard B. Allen. What if the guilty client were called as a witness in the prosecution of the innocent defendant, Allen asked, and the client gave false testimony incriminating the defendant? Wouldn't the lawyer be required to take remedial measures to correct the false testimony, which could include revealing the client's guilt?²³ Wolfram evaded the question, but Allen's point was obvious: the *Restatement* would forbid the lawyer to reveal the truth to save an innocent life, but would require the lawyer to do so to correct false testimony.

The upshot of the debate was the adoption of the position taken by Professor Paul Carrington, who said: "[W]e don't need this illustration. This is more clarity than we really need."²⁴ By a vote of 164 to 65, the members agreed, voting to eliminate the illustration. At the same time, though, they left standing the underlying rules and exceptions relating to confidentiality and lawyer-client privilege that compel the result that had provoked the widespread sense of injustice and outrage.²⁵

as the Model Code or Model Rules must be interpreted in light of embedded moral and political principles").

21. PROCEEDINGS, *supra* note 6, at 334.

22. *Id.*

23. *Id.* at 338.

24. *Id.* at 336.

25. *Id.* at 339.

As of May of 1995 the status of the rules on confidentiality was as follows: Section 111 defined confidential client information broadly as "information relating to representation of a client acquired by a lawyer."²⁶ Section 112 forbade the lawyer to disclose such information if doing so would "adversely affect a material interest of the client" or if the client instructed the lawyer to maintain confidentiality.²⁷ Then, an exception in section 117A permitted the lawyer to disclose client information if "[t]he client intends to commit a crime or fraud that threatens to cause death or serious bodily injury."²⁸

As a member of the Members Consultative Group,²⁹ I argued that the May 1995 draft of section 117A was deficient in two important respects. First, the exception applied only if the client "intends to commit a crime or fraud."³⁰ Thus, in the case of the aneurism and in the case of the innocent person on death row, the lawyer would be forbidden to reveal the life-saving information.

The reason is two-fold—the client has no intention of committing any act at all, and his silence is not a crime or fraud. Second, the exception applies only if the act is one to be done *by the client*. Thus, in the case of the bomb planted by the client's brother, the lawyer would be forbidden to give the information necessary to prevent the disaster. Even if the explosion itself would complete a crime, the crime would not be the client's.³¹

The exception to save human life is far more compelling than the other exceptions to confidentiality that the *Restatement* has already recognized. Death is indeed different and the value at stake therefore outweighs the financial interests of the lawyer or of third parties. As observed by Justice Sandra Day O'Connor, "[t]he [Supreme] Court . . . has recognized . . . the qualitative difference of death from all other punishments."³² Ironically, Professor Wolfram's priorities are otherwise; while rejecting an exception for human life, he has

26. RESTATEMENT OF THE LAW GOVERNING LAWYERS § 111 (Preliminary Draft No. 11, 1995).

27. *Id.* § 112.

28. *Id.* § 117A(1).

29. I was not a member of the ALI at the time of the 1989 debate.

30. RESTATEMENT OF THE LAW GOVERNING LAWYERS, *supra* note 26, § 117A.

31. In some jurisdictions the client's silence might constitute misprision of a felony and § 117A could be construed to include that crime. But the ethical rule should not turn on whether there is or is not a criminal misprision statute and whether the crime of misprision would include mere silence.

32. *California v. Ramos*, 463 U.S. 992, 998 (1983).

repeatedly pushed for an exception that would permit divulgence of client confidences to protect third parties from client fraud.

Moreover, an exception to save life would pose no significant systemic threat to lawyer-client confidentiality. Unlike cases of client perjury, fraud, or nonpayment of fees, which are all too common, cases involving human life are scant. Thus, Wolfram is willing to accept divulgence of confidences in the more common situations, yet balks at allowing it in the truly extraordinary case—extraordinary both in importance and in occurrence.

Furthermore, as Bennett Boskey noted in the 1989 debate:

It [is] a great mistake to state a rule and then find that it must be applied in absolute terms under all circumstances no matter how egregiously offensive the result seems to us to be from the standpoint of justice. . . . [P]rinciples sometimes have their limits short of the infinite, and . . . this one should stop short of this case.³³

In short, to push the confidentiality rule to the mindless and immoral extreme of sacrificing innocent human life is “rigour and not law.”³⁴

In the discussion of the Consultative Group in May of 1995, it became clear that there was a consensus that section 117A should be redrafted to change those results. Accordingly, at the suggestion of the Director, Professor Hazard, I wrote to Wolfram³⁵ after the meeting and suggested the following redraft of section 117A: “A lawyer may use or disclose confidential client information to the extent the lawyer reasonably believes disclosure to be necessary to prevent death or serious bodily injury to a person.”³⁶

For whatever reason, Wolfram rejected that language. In Council Draft No. 11, Wolfram recast my proposal for amending section 117A in the following prolix, convoluted, and confusing way, which he submitted as Version One:

33. PROCEEDINGS, *supra* note 6, at 335.

34. WILLIAM SHAKESPEARE, *THE WINTER'S TALE* act 3, sc. 2, at 117 (Wilbur L. Cross & Tucker Brooke eds., Barnes & Noble 1993).

35. Letter from Monroe H. Freedman to Charles W. Wolfram (June 21, 1995) (on file with *Loyola of Los Angeles Law Review*).

36. *Id.* I added the following comment:

I don't think the prefatory, “Following a good faith attempt . . . [to dissuade the client]” is needed, because if the client can be persuaded to do the right thing, then disclosure isn't “necessary” to prevent the death. This point could be included in a comment that would emphasize that disclosure must be limited to what is “necessary.”

Id.

Following a good faith attempt by the lawyer, if feasible, to persuade the client to use or disclose the information for the same purpose or, if relevant, to dissuade the client from committing an act threatening such harm, a lawyer may use or disclose confidential client information if and to the extent the lawyer reasonably believes that such use or disclosure is necessary to prevent death or serious bodily injury to a person.³⁷

As an alternative, Wolfram proposed a Version Two of his own, which maintained the element of the client's crime or fraud:

Following a good faith attempt by the lawyer, if feasible, to dissuade the client, a lawyer may use or disclose confidential client information if and to the extent the lawyer reasonably believes that the client intends to commit or has committed a crime or fraud threatening death or serious bodily injury to a person and such use or disclosure is necessary to prevent the harm.³⁸

Oddly, Version Two, which requires more text—because of the additional notion of crime or fraud—is shorter than Wolfram's convoluted redraft of my version.

At a meeting on October 18, 1995, the ALI Council³⁹ voted to adopt Wolfram's Version Two. As a result, we are back where we started. The lawyer would be forbidden to reveal the information necessary to save life in all three of the cases that have caused so much concern—the innocent person on death row, the plaintiff who is unaware of the life-threatening aneurism, and the bomb planted by the brother in Penn Station.⁴⁰

The debate is not over. At the very least, the issue will have to return to the membership of the ALI before the *Restatement* is finally

37. RESTATEMENT OF THE LAW OF GOVERNING LAWYERS, *supra* note 26, § 117A (Version One).

38. *Id.* § 117A (Version Two).

39. I am not a member of the Council.

40. There is an argument, although strained, that the life of the innocent person on death row could be saved under Version Two. It would require interpreting and expanding the plain-meaning reach of the phrase "or has committed a crime . . . threatening death or serious bodily injury." RESTATEMENT OF THE LAW OF GOVERNING LAWYERS, *supra* note 26, § 117A (Version Two). The problem is that, in context, the language is limited to saving the person who was originally threatened by death or serious bodily injury, not the person who is wrongly accused of the act. And, of course, good drafting should avoid the need for such interpretive acrobatics.

approved. But Lon Fuller's mordant point about the misguided nature of restatements has been demonstrated to a degree of absurdity that he could never have anticipated. Even if Wolfram were right in saying that his draft "very much corresponds to current law"⁴¹—and he is not—he would still have us ignore the law that *will be* and, more important, the law that *ought to be*.

Postscript

Copies of the page proofs of this article were provided at the annual meeting of the American Law Institute, which took place in Washington, D.C., May 14-17, 1996. At that meeting, the members overwhelmingly approved an amendment to the *Restatement of the Law Governing Lawyers*, Proposed Final Draft No. 1, section 117A. The amendment eliminated the requirements that the threat to human life be the result of an act by the client and that the act be criminal. As adopted, section 117A now reads:

- § 117A. Using or Disclosing Information to Prevent Death
 [or] Serious Bodily Injury
- (1) A lawyer may use or disclose confidential client information when and to the extent the lawyer reasonably believes necessary to prevent:
- (a) death or serious bodily injury to a person;

41. PROCEEDINGS, *supra* note 6, at 332.

