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# DAMNED AND DAMNABLE: A LAWYER'S MORAL DUTIES WITH LIFE ON THE LINE

*Robert P. Lawry\**

## I. INTRODUCTION

Less than three days before the scheduled execution of Frank Smith for first-degree murder, a public defender, Claire Hopewell, learns from her client, Ben Jones, that it was Jones who actually killed the police officer Smith was convicted of murdering. Hopewell is defending Jones on a drug charge, made more serious by the fact that the state has recently enacted a "three strikes and you're out" law. If convicted, presumably, Jones will face a sentence of life imprisonment.

Although not germane to the drug charge, Jones blurts out information about the wrongful conviction of Smith for two reasons. First, Jones thinks it might help Hopewell to cut a plea-bargaining deal with the prosecutor. He says, "[t]he more you have to deal with, the more dealing you can do." Second, Jones is feeling the prick of his own conscience. He says that Smith does not "deserve[] to die." Hopewell is surprised and confused by what she hears. All she can think to do is to tell Jones that he has a Fifth Amendment right to keep silent about killing the police officer, and that she, as his lawyer, cannot be forced to testify about it either, due to the lawyer-client privilege. Defensive at the end of their conversation, Jones repeats his reasons for telling her about the killing, but emphasizes that she is not to use his name "yet" in any negotiation. He first wants to know what he can get in return before disclosing too much information. Hopewell and Jones agree to talk more the next day.

Hopewell has to think fast; she also has to think carefully. The nature of the moral dilemma is complex. She has special responsibilities to her client, not to betray his trust in her, and, indeed, to console and assist him in his time of real need. She also has information that

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could save an innocent man from being executed. Finally, she has continuing duties to the system of justice of which she is an officer. The latter duty may be more attenuated than the other two, but it has bite. In situations like this it is not useful to try to decide priorities at the outset. There may come a time when hard choices will have to be made. But not yet.

## II. MORAL DECISION MAKING

Hopewell should begin her moral journey by following the exemplar of moral decision making in Western thought: Socrates.<sup>1</sup> After he had been condemned to death by a jury of his peers, Socrates refused to accept the offer of escape his friends made to him—at least until he had thought about it, and discussed it rationally. He said he had to have a clear head and a good grip on the facts. The moral decision would be his to make ultimately, but he would consider all the arguments for choosing one path or another before committing himself. Following Socrates is Hopewell's first moral task: with humility, to think and talk the matter through to the depths. This approach is practical too. There may not only be wisdom in a confidant, but also connections.

With whom Hopewell chooses to discuss the matter is important. Because of the immediate issue of client confidentiality, a colleague in the public defender's office or the head of the office are the logical choices, as she may only talk to an affiliated lawyer without first obtaining client consent. Does someone know whom to approach in the prosecutor's office or in the governor's office? The immediate need is to effectuate a stay of execution. Why? Because an innocent man is to die in three days. Also, if information on the real killer is to be effective for plea bargaining or humanitarian purposes, the innocent man must be kept alive. What information does the prosecutor need or the governor want before appropriate wheels can be turned to postpone the upcoming execution? Longer range considerations must be addressed simultaneously. The awful bottom line must be discussed. If strategies fail, will the name of the client be delivered, if that seems the only way to save the innocent man, even against the client's will?

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1. The discussion of Socrates is indebted to WILLIAM K. FRANKENA, *ETHICS* 1-5 (2d ed. 1973).

After talking it out with her colleagues, Hopewell may want to discuss generalities with someone from the prosecutor's office or even the governor's office. She must be careful, however, not to disclose her client's identity as she tries to get a feel for the government's position. Her most important next step is to engage her client, Jones, in a moral conversation. To say this is to say nothing unusual but only something serious that lawyers are sometimes loath to acknowledge. Tom Shaffer and Bob Cochran state matter-of-factly that conversations between lawyers and clients "are almost always moral" because "when clients or their lawyers take advantage of the rules, they have decided that they ought to take advantage. They might have decided that they ought not to."<sup>2</sup> Shaffer and Cochran illuminate their position further by pointing out that lawyer-client decisions usually "benefit some people at the expense of others."<sup>3</sup> Moral issues are nearly always embedded in such equations. Moreover,

moral decisions during legal representation are important for the sake of the client and [the] lawyer who make them. For most, the obligation to act morally is a matter of obedience to their conscience and to their God. . . . Legal representation provides lawyer and client the opportunity to become better people.<sup>4</sup>

It is not only a question of right and wrong in a complex factual situation, it is also a question of character, of persons becoming "better people."

Formulating the moral issues in this way implicitly rejects what is commonly known as "role-differentiated morality," at least as that phrase has been widely understood in the literature of professional ethics. So understood, role-differentiated morality means that lawyers are not morally accountable for decisions they make to aid clients, so long as those decisions do not run afoul of the law or the relevant lawyer code of conduct. I recognize and embrace the perfectly sensible moral notion that facts and circumstances—and roles are part of circumstances—do change the moral landscape, making it sometimes necessary to alter decisions, but I reject the commonly understood notion of role-differentiated behavior that simply puts

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2. THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* 1 (1994).

3. *Id.*

4. *Id.*

moral blinders on lawyers and “excuses” conduct that cannot be defended except by a retreat to an abstract definition of “role.” So a lawyer’s character and a client’s character are always part of the moral analysis regarding decisions made within the context of a lawyer-client relationship.

In the case at hand we have both points that Shaffer and Cochran made starkly in front of us. First, decisions usually “benefit some people at the expense of others.”<sup>5</sup> Absolute silence on the part of the lawyer and client in accordance with Jones’s Fifth Amendment right and the lawyer-client privilege means an innocent man will die. Second, “[l]egal representation provides lawyer and client the opportunity to become better people.”<sup>6</sup> We know from the facts given that, not only does lawyer Hopewell feel the moral pinch—“I don’t know what I’m going to do”—but the client, Jones, does too—“It isn’t right.” Too many lawyers fail to hear the voice of their client’s conscience in matters such as these. What they hear is the streetwise recidivist suggesting the callous use of horrific information merely to cut a better deal for himself. Respecting client autonomy, they try to find a way to effectuate what the client has directed them to do.

Of course, the plea-bargaining option should be explored. Frankly, however, it does not seem too promising a gambit on the facts we have. Putting a three-time loser away is what the public seems to want and what the new law is about. If the prosecutors have good facts, they may not be willing to deal on the drug charge standing by itself. If they do not have a good case, should Jones take his chance with a jury on the drug charge alone? Or admit to murder? In exchange for what? Life imprisonment? I do not know enough to predict Jones’s chances in the variety of scenarios that could occur. Even without the murder charge, life imprisonment seems a strong possibility. With the murder charge, it is a near certainty, and that only because escaping the death penalty may be the only bone the prosecutor is willing to throw Hopewell’s way.

How does Hopewell proceed in her conversation with Jones? From his past criminal conduct, she can discern that Jones has a bad drug habit he has been unable to kick. His criminal offenses have been “drug offenses or small-time robberies perpetrated to secure

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5. *Id.*

6. *Id.*

money for the purchase of drugs.” Hopewell now knows that Jones has also murdered someone else in committing a bank robbery. Was he “high” when he committed the robbery? Is there some way to get Jones treatment, instead of, or in addition to, incarceration? Maybe not, but these plea-bargaining options ought to be explored with the client. There is a human being suffering under the appearance of a hard-bitten recidivist. He may well be a “bad” human being, but at least there is a foreign demon—drugs—that is part of who he is. Maybe that demon can be exorcised and Jones can become a “better” person.

Hopewell knows something else about Jones. She knows he has a conscience. It may be weak or ineffectual, but it is there. Jones feels sorry for Smith. He acknowledges that Smith should not die for a crime he did not commit. “It isn’t right,” Jones says. Hopewell should listen carefully to the voice of her client’s conscience. I am talking now about the moral conversation that Hopewell is to have with Jones. Although she may be unable to help him become a “better person,” all options should be explored, including the ultimate one: If plea bargaining cannot help, if no “benefit” can enure to Jones, is he nevertheless ready to “confess” to the killing in order to spare Smith? I am not naive. There may be no great likelihood that Jones would do so. Still, Dostoyevsky powerfully reminds us that there is often a need to “confess,”<sup>7</sup> and some empirical data on the effect of Miranda warnings on arrested persons<sup>8</sup> suggests the need is not a figment of a fevered Russian novelist’s imagination. Be that as it may, the crucial issue for us is the lawyer’s moral obligation in the case at hand. To explore the moral as well as the legal possibilities with the client is one such obligation. The lawyer is a better person when exploring the possibilities of a client becoming a better person.

So far I have suggested that Hopewell should attempt to avoid the moral quandary that lies beneath the surface of this problem. It seems elementary that one should not choose between two things, either one of which will lead to at least a partially bad result, unless one must. This is true in moral as well as other matters. No less a

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7. This is one of the themes of *Crime and Punishment*. Remember, Raskolnikov confesses “at the very moment when the case was hopelessly muddled . . . and . . . there were no proofs against the real criminal—no suspicions even . . .” FEODOR M. DOSTOYEVSKY, *CRIME AND PUNISHMENT* 519 (Modern Library ed. 1950).

8. Evelle J. Younger, *Results of a Survey Conducted in the District Attorney’s Office of Los Angeles County Regarding the Effect of the Miranda Decision Upon the Prosecution of Felony Cases*, 5 AM. CRIM. L.Q. 32, 34 (1966).

moral master than Sir Thomas More, patron saint of lawyers, is shown to be of the same mind repeatedly in Robert Bolt's magnificent play, *A Man for All Seasons*.<sup>9</sup> The paradigm example is when More learns that Parliament has passed a new law concerning Henry VIII's succession problem. As a matter of More's conscience, he cannot agree that the king may replace the pope as head of the church. But, if it is merely a matter of succession to the crown of England, even if More thinks the policy unwise and the king's actions regarding marriage and divorce morally wrong, he recognizes the civil law's authority in such matters. So, when More hears of the new law, and the necessity to sign something to acknowledge its bindingness, he pleads to be shown the words immediately. Despite what is commonly understood as the intent of Parliament's actions, More is a lawyer. He will construe according to the law, and escape if possible. Just so with Hopewell.

Hopewell should like to save Smith, an innocent man, from wrongful death. She should like to be able to do so without betraying the confidence of her client. Moreover, she should like to help her client become a better person or, at least, to suffer less. Initially, I want to claim that Hopewell should want to do all these things, simply as a moral matter, regardless of the specific rules of professional conduct. Those rules and the lawyer's professional role are "circumstances" that eventually must be considered. First, however, are general moral considerations.

### III. MORAL ANALYSIS

It is a commonplace moral notion that killing an innocent person is among the greatest of moral wrongs. Allowing an innocent person to die when you have the power to save him is also a serious moral wrong. It may be as serious as killing an innocent, especially when you have a duty to protect the innocent person, as in criminal law, when a parent stands by and lets another beat the child to death. Mitigating circumstances arise when helping another jeopardizes your own life or health, but such circumstances are stringent. These principles are fairly straightforward, and not likely, on their face, to stir much debate. The debate begins in earnest when the duty to another arguably overrides the moral obligation to save an innocent from death when you are able to do so without untoward risk. What

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9. ROBERT BOLT, *A MAN FOR ALL SEASONS* (1960).

about the risk of loss of life or health of another? Arguably, the life or health of your client may be jeopardized by your action. He could suffer life in prison or the death penalty. Of course, these are contingent and indirect consequences. As such, they would have to be carefully examined to see if and how they matter.

In the case at hand, however, we need not worry about these consequences because Jones is not an innocent. Smith is. But for special duties we might owe to Jones, this is an easy case: Hopewell must tell the authorities that Smith is innocent and Jones is guilty of the officer's murder. The argument for special duties to Jones arises both from general moral considerations regarding confidentiality, and from unique moral considerations emanating from the lawyer's role in our legal system and the place confidentiality has in that system. First let us examine the general moral considerations surrounding confidentiality.

In her penetrating book *Secrets*,<sup>10</sup> Sissela Bok sets forth four good reasons why confidentiality has prima facie moral bite. First, it protects the moral autonomy of people.<sup>11</sup> We all have need for secrets in our lives.<sup>12</sup> Being able to exercise control over some secrets is necessary for privacy reasons and to protect ourselves against dangers.<sup>13</sup> This does not take us too far, however, because there are some matters we cannot hide—a broken leg—and there are inevitably conflicts with the rights of others—having a contagious disease.<sup>14</sup>

Second, not only do we need to have secrets, we also need to share them with some other people.<sup>15</sup> Respect for relationships between human beings demands that, again, at least some information be protected in order that trust be maintained, help and succor obtained, and intimacy grow.<sup>16</sup> Like the first argument, this one sometimes conflicts with other duties.<sup>17</sup>

Third, promising confidentiality may also be an independent moral reason for its maintenance.<sup>18</sup> Here too, some promises may

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10. SISSELA BOK, *SECRETS* (1982).

11. *Id.* at 120.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*



have to give way to a competing claim. Moreover, we ought to be careful what we promise. Some things are probably out-of-moral-bounds from the beginning, and should never be promised in the first place—for example, promising to cover up a heinous crime.<sup>19</sup>

Fourth, social utility in the form of allowing certain helping professions to maintain confidences is an added argument for confidentiality.<sup>20</sup> Here the lawyer, the doctor, the social worker, and the religious professional each offer a unique opportunity for those in special need to seek aid without an untoward fear of having information about them disclosed.<sup>21</sup> Exceptions exist in this arena too;<sup>22</sup> it is necessary to identify the “professional secret” as a separate ground of justification for confidentiality, particularly because of its special power in the modern world.<sup>23</sup> This is especially so in the case at hand.

Bok points out that these arguments are not always separately considered.<sup>24</sup> In fact, they tend to blur together quite naturally to provide an overall rationale that often seems compelling in a variety of circumstances.<sup>25</sup> Nevertheless, there are also general exceptions to this four-fold knot of argument. These exceptions hold with as much force as do the general, positive arguments in favor of confidentiality. Bok lists three such exceptions: (1) incompetency, whether by dint, age/maturity, or mental condition; (2) self-injury; and (3) injury to others.<sup>26</sup> Only the third exception is relevant to the case at hand, but I will defer an examination of that exception until later. In summary, although lines have to be drawn in close cases, the overall outline that Bok presents is not only generally sound but has echoes in the professional literature as well. With this background it is time now to turn to the professional literature, particularly that of the profession of law.

#### IV. LEGAL APPROACH

As commonly understood, the ethical prohibition against disclosing client confidences grew out of, and along side of, the

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19. *Id.* at 121.

20. *Id.* at 121-22.

21. *Id.* at 122.

22. *Id.*

23. *Id.* at 120-23.

24. *Id.* at 123.

25. *Id.*

26. *See id.* at 124-31.

lawyer-client privilege in the law of evidence. Although originally the lawyer's privilege was based on the gentleman's code—a gentleman does not disclose the confidences of another—by the nineteenth century, the privilege was clearly that of the client.<sup>27</sup> Its justification was grounded in social utility or Bok's fourth argument, the "professional secret." The argument is simple enough. People need help negotiating the complexities of the law. Lawyers are trained and licensed by the state to provide that help in a unique way. People do not always know what information is in their own best interest to convey to their lawyers. Moreover, they may be reticent for a host of reasons, from shyness to shame, to reveal certain important facts to their lawyers. Lawyers can only help clients if they know as much as they can about the matter at hand and the relevant background. Therefore, clients must be assured confidentiality by their lawyers, or they will not be able to be helped.

Although based in utilitarian arguments, the founding father of utilitarianism, Jeremy Bentham, did not think it a good idea to allow the privilege at all.<sup>28</sup> He argued that it only helps the guilty, and the innocent do not need it.<sup>29</sup> Although a bit naive about the black and white categories of guilt and innocence, and perhaps a tad confused when it comes to the vagaries of human psychology and human need, nevertheless, Bentham voiced a concern that has remained constant in the legal system regarding the testimonial privilege: It must be carefully limited. The list of exceptions enumerated by Bok plays a leading role in how that limitation is to be managed.

Hornbook law of the lawyer-client privilege stresses the social utility policy before all else. In Wigmore's classic formulation, the privilege is as follows:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.<sup>30</sup>

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27. Here I follow 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 2290-2291, at 544 (John T. McNaughton rev. ed., 1961).

28. 7 JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM 473-75 (John Bowring ed., 1962).

29. *Id.* at 473.

30. 8 WIGMORE, *supra* note 27, § 2292, at 554.

Presumably under this rule the lawyer in the case at hand cannot be forced to reveal the information given to her by her client. The client disclosed the information in order to have his lawyer help him plea bargain in a weighty criminal matter. The most significant exception to the privilege is the crime/fraud exception.<sup>31</sup> However, it does not apply here since the client did not communicate the information to the lawyer for the purpose of having the lawyer aid him in perpetrating a crime or a fraud. Undoubtedly, it is morally wrong to allow an innocent person to pay with his or her life for a crime that you committed, but it is not a crime to do so, nor is it a fraud as that word is used in the law.

Although the ethical rules of confidentiality grew out of the lawyer-client privilege, they currently have a life of their own. However, neither the 1969 ABA *Model Code of Professional Responsibility (Code)* nor the 1983 ABA *Model Rules of Professional Conduct (Model Rules)* mentions an exception to confidentiality that would allow disclosure of this information. The 1969 *Code's* exceptions are: (1) when the client consents;<sup>32</sup> (2) when otherwise decreed by rule, law, or court order;<sup>33</sup> (3) when the client intends to commit a future crime;<sup>34</sup> and (4) when the lawyer needs defense from an accusation of wrongful conduct or to collect his fee.<sup>35</sup> These exceptions are not mandatory—the lawyer *may* disclose but does not have to. Under the 1969 *Code* as originally drafted, and *still* in effect in a handfull of states, there is also one mandatory exception: for fraud perpetrated by the client during the course of the representation.<sup>36</sup> The fraud exception addresses the traditional issue of the lawyer's obligation to disclose client perjury. It also addresses what I have elsewhere called "lawyer abuse," such as the misuse of the lawyer's professional services through fraud, and the lawyer's silent

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31. For a discussion of the exception, see *id.* §§ 2298-2299.

32. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(1) (1969).

33. *Id.* DR 4-101(C)(2).

34. *Id.* DR 4-101(C)(3).

35. *Id.* DR 4-101(C)(4).

36. *Id.* DR 7-102(B)(1). The state in which I teach, Ohio, still has the mandatory provision. It was given real effect by the Supreme Court of Ohio in *Office of Disciplinary Counsel v. Heffernan*, 569 N.E.2d 1027 (Ohio 1991). There, a client lied to his lawyer and to the court about his real identity. *Id.* at 1027. The lawyer did not learn of this fraud until months after a plea bargain had taken place on behalf of the client and did not disclose it. *Id.* The court suspended the lawyer from practice for six months for failing to disclose the fraud committed in the course of the lawyer's representation. *Id.* at 1028.

acceptance of the misuse.<sup>37</sup> It would clearly be an exception under the lawyer-client privilege as well. No matter. Whatever the wisdom of these exceptions, there is little doubt that none of the explicit exceptions in the 1969 *Code* would allow divulging the information about the murder in the facts before us.

Nor would the *Model Rules* allow it. The exceptions to confidentiality under the *Model Rules* are more narrow than those under the *Code*. There is one mandatory exception for client perjury in a civil case, which endures until "the conclusion of the proceeding."<sup>38</sup> Otherwise, aside from client authorization, there are only two explicit exceptions to strict confidentiality under the *Model Rules*. The first is for a future crime "likely to result in imminent death or substantial bodily harm."<sup>39</sup> The second is to establish a claim or defense in a lawyer-client dispute or to defend or respond to alleged bad conduct in representing a client or "based upon conduct in which the client was involved."<sup>40</sup> For the matter at hand, there is no stated exception. In the words of Professor Andrew Kaufman: "It is not as if the drafters never thought of the issue."<sup>41</sup> An early, unofficial draft of the *Model Rules* contained the following explicit and quite mandatory exception: "to prevent the client from committing an act that would seriously endanger the life or safety of a person, result in wrongful detention or incarceration of a person. . . ."<sup>42</sup> Discussing a case identical to the one at hand in all relevant particulars, Professor Kaufman went on to say:

Presumably the failure to mention [the word] "execution" in the second clause is explained by the fact that the drafters must have believed that that most serious consequence was covered by the first clause (although the first clause is certainly not well drafted to accomplish that result). Subsequently, however, the second clause was removed entirely and the word "criminal" was inserted before the word "act" in the first clause. However reprehensible it may

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37. Robert P. Lawry, *The Central Moral Tradition of Lawyering*, 19 HOFSTRA L. REV. 311, 331 n.141 (1990).

38. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(b) (1983).

39. *Id.* Rule 1.6(b)(1).

40. *Id.* Rule 1.6(b)(2).

41. ANDREW L. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 221 (3d ed. 1989).

42. *Id.* (quoting MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(b)(1) (Unofficial Draft of Aug. 20, 1979 and Sept. 21, 1979)).

be for a murderer to let an innocent person be executed for his or her crime, keeping silent (or exercising one's Fifth Amendment privilege against incrimination if called to testify) would not appear to be "murder."<sup>43</sup>

In discussing the exceptions to confidentiality in the *Code* and the *Model Rules*, I wrote there were no *explicit* exceptions that would cover the case at hand. Is there, perhaps, an implicit exception? Monroe Freedman, one of the staunchest advocates of a confidentiality rule with almost no exceptions, has argued that "[t]he most compelling reason for a lawyer to divulge a client's confidence is to save a human life."<sup>44</sup> I suspect very few people would disagree, especially when innocent lives are involved. If I can save an innocent life with no risk to my own life or the life of another innocent, do I not have a moral obligation to do so? To deny the obligation is to show an almost callous disregard for the most fundamental human value: life itself. As H.L.A. Hart argued in another context: Whatever other natural or moral arguments that can be made to support basic values, at least it is clear we want to live and we need each other to support that most basic desire.<sup>45</sup> Nevertheless, are there any obligations that do rank still higher? I can think of only one: religious freedom. Bentham, who opposed testimonial privileges for professionals, was in favor of "excluding . . . the evidence of a Catholic priest respecting the confessions intrusted to him."<sup>46</sup> He thought that freedom of religion outweighed social costs regarding such practices. If religion deals with matters beyond this world, then it is the only value that is more important than the most fundamental value of this world: life. In this world a life may be taken to protect another life or in retribution for the taking of life—but for no other reason. So if there is a higher value than innocent life, it must be beyond this life.

Thus, on the "bottom line" issue if or when it comes to that, I think Claire Hopewell would be morally justified in disclosing Jones's confidence if there was no other way to save the life of the innocent Frank Smith. In fact, I believe it to be a moral imperative. If even Monroe Freedman agrees with me, there is probably not much of an argument for the other side. Indeed, as I write this, I have spoken to

43. *Id.*

44. MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 102 (1990).

45. H.L.A. HART, THE CONCEPT OF LAW 187 (1961).

46. BOK, *supra* note 10, at 299 n.11 (quoting 7 BENTHAM, *supra* note 28, at 366-68).

no other contributors to the Symposium issue; yet, I am confident that the vast majority will advocate at least allowing, if not mandating, that Claire Hopewell breach her client's confidence in order to save Smith's life.

However, such a breach would not be easy. It is a serious moral matter to betray Jones, even though he is not innocent of the crime to be disclosed. Jones trusts Hopewell, and he had good reason to do so. Sessila Bok's first two policy considerations have full power here: both moral autonomy and the need for special relationships argue for silence. Since she did not promise not to disclose, the third policy reason is not relevant. Nevertheless, after he told her the damaging information, she seemed to confirm what he, no doubt, assumed to be the case. She said the lawyer-client privilege forbade her from testifying. Thus, the "professional secret" argument is clearly applicable. Hopewell added that she is not "even supposed to tell anyone about this conversation." But she also said: "[Y]ou hit me with this so suddenly that I don't even know myself what I'm going to do." Still, Jones has been around lawyers and he knows these matters are protected under the rules. He knows they are the kind of things you tell your lawyer to help with plea bargaining. Jones has probably never heard about the exceptions to the confidentiality rules. Even if he had, he may not have distinguished this situation. In fact, Jones told Hopewell: "Nobody tells nobody anything until I find out what I get in return. You're my attorney; you work for me." Whatever the ambiguities, Jones, at least, had reasonable grounds for believing that the information he imparted to his lawyer would remain confidential unless he said otherwise. So, at least three of Sessila Bok's four justifications for confidentiality are implicated here: client autonomy, the bond of relationship, and the social utility of the professional secret.

Disclosure is not only morally serious, but disclosure alone may not even accomplish the desired end. Without the active cooperation of Jones, there is probably not enough evidence to overturn the conviction of Smith. Would the governor order a stay of execution on the basis of the lawyer's story without further corroboration? Would the prosecutor even enter into serious plea negotiations without more? With only three days to halt the execution of Smith, Hopewell may not be able to pull it off. That would be an unenviable result for Hopewell: to breach the confidence and still see Smith executed. Nevertheless, as a last resort, I would take the chance, and the consequences too, if I were in her shoes. I would do so in the

same spirit as others have done who have engaged in civil disobedience. I think it would be wrong of me to allow an innocent man to die, if I might act to save him. I would even be tempted to deceive and manipulate Jones, causing him to disclose damaging information which I could then use to save Smith. However, I hope I would not succumb to that temptation. As I said earlier, one of the moral imperatives involved in counselling a client is to try to make both lawyer and client better people. If I had to betray Jones's trust, I should do so frankly, with a final appeal to his conscience. That would be treating Jones with respect. Lying and manipulation only degrade the actor. Some things cannot and should not be done, however important the result. I think lying to and manipulating one with whom you have a trust relationship is morally wrong. It would be morally akin to torture, an act universally condemned even under international law.

If the state or the legal profession punished me for disclosing the information to save Smith, despite a contrary admonition from Jones, then so be it. Do not misunderstand me. I do not think it is the easy thing to do. However, if I failed to do it, it would be because I lacked the virtue of courage, not because I doubted it was the right thing to do.

#### V. HOPEWELL'S DISCLOSURE

Assuming Jones would not consent to a disclosure, what would happen if Hopewell were to disclose? If she were to disclose only to the prosecutor or to the governor's office, perhaps nothing would come of it, especially if the government authorities would not budge unless the client were more forthcoming. Hopewell's best chance of moving the issue to a better resolution would then be to tell the press. Remember, there are only three days until the execution. Something has to happen quickly. So, suppose Hopewell disclosed to the press too. Would the bar try to discipline her for breach of confidentiality? Could Jones win a malpractice case if he brought one against Hopewell? My guess is that the bar would not discipline her. My guess is that no jury would find in favor of Jones in a malpractice suit.

Perhaps paradoxically, I base these guesses on the outcome of the infamous "Buried Bodies" case of the mid-1970s.<sup>47</sup> In that case

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47. *People v. Belge*, 359 N.E.2d 377 (N.Y. 1976). The case was widely reported. See Bryce Nelson, *Ethical Dilemma: Should Lawyers Turn in Clients?*, L.A. TIMES, July 2,

lawyers knew of the whereabouts of two dead bodies, having been told by their client, the killer of the two, who was then on trial for the killing of a third person. The lawyers were appointed to represent the defendant in the trial. They tried to plea bargain with the information, but were unsuccessful. At trial the killer admitted to the other killings, apparently as part of an unsuccessful trial strategy to have the jury find him not guilty by reason of insanity. The defendant was convicted and sentenced to the maximum penalty of twenty-five years to life.

Afterward, when the lawyers admitted they had previous knowledge of the location of the unburied bodies, there was great public outrage. The parents of one of the victims had unsuccessfully attempted to obtain information about their missing child. The lawyers believed the rules of professional ethics forbade them to tell. The lawyers clearly were right about the rules, but they were not spared both a disciplinary charge as well as a criminal indictment, for one of them, before legal vindication. Were they morally justified in keeping their silence? I think the answer is "yes," and that a comparison of the Buried Bodies case with the case at hand is instructive.

As Sissela Bok points out, the most common exception to confidentiality is to prevent harm to others. *The Code of Professional Responsibility* has codified that exception into a more limiting one covering future or ongoing crime. Confidentiality does not bind the lawyer when his client evidences an intention to commit some harm to another. However, the *Code* says the harm must be "criminal." Why? Presumably because crimes are reasonably well defined, and this both aids the lawyer in knowing when the exception applies and in limiting the lawyer's discretion. Historically, lawyers tended to limit exceptions to confidentiality. In addition, crimes represent society's judgment about harms that are most serious. Under the *Code* the lawyer decides whether or not to disclose. This allows flexibility in counselling; it also allows the exercise of some discretion. Although all crime is considered serious in the abstract, there may be cases where, on balance, it is better for all concerned not to disclose. Nevertheless, cases involving death are clear.

Twice in my career as a teacher of professional responsibility, lawyers have called me and asked my advice about what to do when



a client threatens death to another. Neither lawyer knew what the professional rules allow, so I began by assuring each that they were permitted to breach confidences to thwart a criminal homicide. Next, my advice was to stop the act by warning the victim; or calling the police; trying once more to rein in the client; or all of the above. I cannot imagine anyone giving any other advice. Although the *Model Rules* whittle down the future crime exception to one where the result is likely to be "imminent death or substantial bodily harm," the fundamental value of life remains dominant. In both the *Code* and the *Model Rules*, the harm-to-others exception is for future or ongoing crime. Whenever criminal harm or life threatening criminal harm may be prevented, the lawyers' professional codes create an exception to confidentiality. Thus, in the comparison of values, innocent life largely wins hands down against confidentiality. So it should. Why doesn't it win clearly in the case at hand?

Confidentiality seems to be preferred by those who draft the lawyers' professional codes in cases like the one before us because, in general, the past/future distinction has real meaning given the broad social policy involved. Using the criminal defense lawyer as the paradigm, it is difficult to imagine how lawyers can mount any defense to a past crime if confidentiality is not guaranteed for past crimes. Moreover, although there may be lingering effects, the basic harm has already occurred. The Buried Bodies case graphically depicts the pain of the lingering effects of crime. But consider the after-effects of a rape on the rape victim or the pain any family member of a murder victim must feel whether the body is buried or not. An exception for the effects of past crime would swallow the rule. It is hard to see how our present constitutional scheme of rights could survive an open-ended exception for disclosure of past crimes. Moreover, we want people to be able to seek counsel when they are in trouble. We want lawyers to be able to help people rectify wrongs, yes, but we fear they will not seek help unless the professional secret is largely kept.

Exceptions for future harms present a different equation. We might be able to dissuade here too, but, if not, definite future harm can be prevented by disclosure. Given these broadly accepted social policies, I suggest that the case at hand is not much of a stretch for another, specific exception to be made. The policy reasons for future crime and even those underlying the more limited future crime exception in the *Model Rules*—death or substantial bodily harm—push in the same direction. Of course, it is not a future crime,

but one that is past; nevertheless, the effect is death to an innocent, the most serious of future harms.

As current law and ethics rules stand, I hope a general exception would be implied, allowing lawyers to make such a disclosure to save the life of a wrongfully convicted person. In the Buried Bodies case, there was no such compelling reason to make an exception. This is so because there seems to be no principled way to take the particular lingering effects of worry about the death of some people or the existence of unburied bodies and argue the effects are worse than the effects of similar heinous crimes on others.

Moreover, the system of justice has radically failed. It is not simply a matter of a guilty person going free. We pride ourselves on a constitutional system that generously gives rights to criminal defendants because we think it better to let one guilty person go free than to convict one innocent person. But here the system has done precisely what we so abhor. In the present context, the lawyer is uniquely able to right at least the kind of wrong confidentiality and our system of justice is designed to insure. The lawyer's responsibility to that system, then, is another good argument in favor of allowing a disclosure in the circumstances before us. Consistent with all of these arguments, I also suggest we offer "use immunity" to any criminal defendant coming forth in similar circumstances.<sup>48</sup> Use immunity would be an excellent device to nudge the reluctant criminal defendant to go along with the lawyer's suggestion that the information be disclosed. In the case at hand, Hopewell should try for use immunity *ad hoc* as she proceeds in her plea bargaining.

From what has been stated, it also ought to be the case that the exception be extended to include all wrongful criminal convictions and incarcerations. The early draft of the *Model Rules* would have done the job nicely, with one small change. The proposed rule made it mandatory to disclose a confidence "to prevent the client from committing an act that would seriously endanger the life or safety of a person, result in wrongful detention or incarceration of a person."<sup>49</sup> I would say "act or omission" to make crystal clear that the rule covers the kind of case we have before us.

In an otherwise laudable attempt to propose a change in the law of confidentiality in California, Roger Cramton suggests the following

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48. For a similar argument, see Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091 (1985).

49. Kaufman, *supra* note 41, at 221.

permissive disclosure provision: "To prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, in wrongful detention or incarceration of a person, or in substantial injury to the financial interests or property of another."<sup>50</sup> This provision would not cover the case at hand. It deals only with criminal or fraudulent acts. As I argued earlier, the client commits no crime or fraud by his silence, nor by authorizing his lawyer to use particular information in plea bargaining. So I would recommend the language suggested in the early draft of the *Model Rules*. Frankly, I would make the provision permissive, not mandatory. As should be obvious, I think ethics rules ought to be less interested in punishing people than in helping them to be better people. But now that I have once more come back to the beginning of my Essay, I am content to stop without further arguing for a permissive rather than mandatory exception to confidentiality in cases where persons have been convicted of crimes they did not commit.

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50. Roger C. Cramton, *Proposed Legislation Concerning a Lawyer's Duty of Confidentiality*, 22 PEPP. L. REV. 1467, 1476 (1995).