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Confidentiality and Common Sense: Insights from Philosophy

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Confidentiality and Common Sense: Insights from Philosophy

THOMAS MORAWETZ*

TABLE OF CONTENTS

I.	INTRODUCTION	357
II.	EMPIRICISM	362
III.	RULES AND MORALITY	368
	A. <i>The Poles of Debate</i>	368
	B. <i>Between the Poles</i>	370
IV.	CONCLUSION	376

I. INTRODUCTION

It is easy to understand the mandate of confidentiality under which lawyers work.¹ It is similarly easy to understand why the parameters of

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1. Rule 1.6 of the *Model Rules of Professional Conduct* says that lawyers “shall not reveal information relating to representation of a client unless the client gives informed consent.” MODEL RULES OF PROF’L CONDUCT R. 1.6(a) (2010). However, “[a] lawyer may reveal such information . . . to prevent reasonably certain death or substantial bodily harm.” *Id.* R. 1.6(b)(1). In addition, the lawyer may reveal information to establish a defense to a criminal charge or civil claim against the lawyer “based upon conduct in which the client was involved” or “to respond to allegations . . . concerning the lawyer’s representation of the client.” *Id.* R. 1.6(b)(5). The lawyer must disclose “material fact[s] to a tribunal when . . . necessary to avoid assisting a criminal or fraudulent act by the client.” *Id.* R. 3.3(a)(2). Rule 1.6(b)(2) also affirms that a lawyer may reveal confidences when doing so is necessary to collect fees. *Id.* R. 1.6(b)(5) & cmt. 11.

The *Model Rules* carry forward similar provisions from the 1969 *Code of Professional Responsibility*, DR 5-101. To the extent that some states have deviated from the *Model Rules*, perhaps the most significant change is that some states have made it mandatory rather than discretionary for the lawyer to reveal information to prevent criminal acts by

that mandate are controversial. These controversies have little to do with the fact that, as Fred Zacharias² and many others have pointed out, confidentiality is poorly understood by clients and other laypersons. Rather, the controversies focus on the justifications and limits of the confidentiality rules, familiar to lawyers both from their early training in professional responsibility³ and from the ongoing application of such norms in practice.

Controversies can be static in the sense that the examples, arguments, rebuttals, and conclusions that are characteristic of each side of the controversy are generally known exhaustively to all without gaining new persuasive power. Each side adheres to its own assessment of what it finds convincing and of what should be done and why. With regard to the confidentiality rules, the practicing bar has shown little inclination to change and little sympathy with the argument that change is needed.⁴ Confidentiality continues to provide fodder for eager academics,⁵ but they seem to be talking in a bubble.

In this Article, I will consider two aspects of the controversy that help explain why it is static. I will consider the significance of empirical evidence that lawyers and clients find the rules morally troubling. Zacharias plausibly assumes that such evidence carries compelling weight.⁶ I will also look at the nature of morality itself and the extent to which professional rules should be expected to conform to morality.

the client that are likely to involve death or serious harm. See, e.g., ARIZ. RULES OF PROF'L CONDUCT R. 1.6(b) (2010); CONN. RULES OF PROF'L CONDUCT R. 1.6(b) (2010).

2. Fred Zacharias's most sustained and influential discussion of confidentiality appeared in two articles in 1989 and 1990. See Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989) [hereinafter Zacharias, *Rethinking Confidentiality*]; Fred C. Zacharias, *Rethinking Confidentiality II: Is Confidentiality Constitutional?*, 75 IOWA L. REV. 601 (1990). See, e.g., Zacharias, *Rethinking Confidentiality*, *supra*, at 382–86 (discussing client perceptions).

3. Professional responsibility courses have been a required part of the law curriculum for thirty years, and confidentiality is an essential topic on the syllabus of virtually all such courses and all relevant course materials.

4. Several states have relaxed and modified their confidentiality rules in the last decade. Iowa's changes are discussed in Gregory C. Sisk, *Change and Continuity in Attorney-Client Confidentiality: The New Iowa Rules of Professional Conduct*, 55 DRAKE L. REV. 347 (2007), and Massachusetts's revisions are mentioned by Ken Strutin, *Wrongful Conviction and Attorney-Client Confidentiality*, LLRX.COM (Jan. 9, 2010), <http://www.llrx.com/features/wrongfulconvictionconfidentiality.htm>.

5. In addition to the discussions cited in note 4, recent commentary appears in Peter A. Joy & Kevin C. McMunigal, *Confidentiality and Wrongful Incarceration*, CRIM. JUST., Summer 2008, at 46; Stanley Z. Fisher, *Convictions of Innocent Persons in Massachusetts: An Overview*, 12 B.U. PUB. INT. L.J. 1 (2002); and Colin Miller, *Ordeal by Innocence: Why There Should Be a Wrongful Incarceration/Execution Exception to Attorney-Client Confidentiality*, 102 NW. U. L. REV. 391 (2008).

6. See Zacharias, *Rethinking Confidentiality*, *supra* note 2, at 379–98. The main purpose of the article is to present and assess the trailblazing research in Zacharias's Tompkins County Study of lawyers and clients in New York State.

The critique of the confidentiality rules rests on the claim that they require lawyers to retain confidences even when doing so contravenes common standards of morality and even when innocent persons are irreparably damaged as a result of the lawyer's silence—and when the lawyer is fully aware of the likelihood of these consequences. The examples are familiar. They are likely to be discussed in any introductory course on legal ethics and any theoretical article on confidentiality. Here are three examples, adapted from Fred Zacharias's discussion in his seminal article:

- (1) The client tells the lawyer the location at which a kidnapping victim is being held. The client had no role in the kidnapping but is reluctant to be involved and prohibits the lawyer from disclosing the information.⁷
- (2) The lawyer has information from the client that would exonerate another person falsely convicted of a serious crime. The attorney could disclose the information without revealing the client's involvement, but the client refuses to allow this.⁸
- (3) The defendant's doctor examines the injured plaintiff in a serious car accident, discovering that the plaintiff has a life-threatening aneurism. Plaintiff's own physician has not discovered it. The condition, which is treatable, may or may not have been caused by the accident. The defendant does not allow the lawyer to reveal the doctor's discovery.⁹

The confidentiality rules bind the lawyer in all these cases. According to the *Model Rules of Professional Conduct*, a lawyer may reveal information only “to the extent the lawyer reasonably believes necessary (1) to prevent reasonably certain death or substantial bodily harm; . . . [or] (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client,”¹⁰ or as necessary for the lawyer to defend against a legal claim based on lawyer's conduct, or to respond to claims made concerning the lawyer's representation of the client.¹¹

7. *See id.* at 409.

8. *See id.*

9. *See id.*

10. MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2010).

11. *Id.* *See supra* note 1 and accompanying text.

The rules and criticisms have long been discussed in textbooks, articles, and classrooms.¹² Fred Zacharias's contributions to the debate in the *Iowa Law Review* were particularly well considered and judicious.¹³ He took note of the absence of empirical information, both about the actual likelihood of the occurrence of problematic situations and, more importantly, the actual attitudes of lawyers and laypersons to the examples. And he set about to study and document the latter.¹⁴

The examples cited above sustain two different kinds of criticisms. The first kind concerns the moral situation of the lawyer and says that the rules require the lawyer to act in ways that are morally indefensible. The second considers the views and expectations of third parties and suggests that lawyers' roles in maintaining confidences may contribute to and explain the low esteem in which the profession is held. Lawyers may be seen as reprehensible whether or not they themselves are convinced of the moral defensibility of their conduct.

The common responses to these critiques of confidentiality are as familiar as the criticisms themselves. It is said that the likely occurrence of morally difficult dilemmas is *de minimis* and that, were such situations to occur, other actors in the situation would probably take remedial action.¹⁵ From a practical standpoint, it is said that clients will repose confidence in lawyers and speak candidly and honestly only if they understand that confidentiality is nearly absolute.¹⁶ From a theoretical standpoint, it is said that the effective performance of the lawyer's role requires absolute respect for and deference to the wishes of the client and that any other posture shows insufficient respect for the client.¹⁷

Zacharias argued that we have insufficient information about these arguments, that their persuasiveness can be measured by determining whether they in fact persuade, whether they are widely believed and

12. For some unusually interesting discussions, see, for example, DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 177–205 (1988); DEBORAH L. RHODE & GEOFFREY C. HAZARD, JR., *PROFESSIONAL RESPONSIBILITY AND REGULATION* 64–78 (2d ed. 2007); WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 54–62 (1998); Roger C. Cramton, *Spaulding v. Zimmerman: Confidentiality and Its Exceptions*, in *LEGAL ETHICS: LAW STORIES* 175–201 (Deborah L. Rhode & David Luban eds., 2006); Bruce M. Landesman, *Confidentiality and the Lawyer-Client Relationship*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 191–213 (David Luban ed., 1983).

13. See *supra* note 2 and accompanying text.

14. See Zacharias, *Rethinking Confidentiality*, *supra* note 2, at 352–53, 379–407.

15. See *id.* at 372–75.

16. See *id.* at 363–66, 382–86; see also LUBAN, *supra* note 12, at 185–92; SIMON, *supra* note 12, at 54–57.

17. See Zacharias, *Rethinking Confidentiality*, *supra* note 2, at 367–69, 386–89; see also LUBAN, *supra* note 12, at 192–97.

truly form a foundation of professional practice. His Tompkins County surveys were designed to elicit such knowledge.¹⁸ He investigated how well clients and the general public understand the rules of confidentiality and how their attitudes and conduct are affected by that understanding. He considered how well-grounded the familiar justifications for the confidentiality rules are, for example how significant a role the rules really play in assuring the candor and cooperation of clients. And he looked into the extent to which attorneys in fact are willing and able to follow the rules in their own practices.

In the rest of this Article, I shall consider two questions about the role of empiricism and the moral controversy over confidentiality in general. Each question interposes some of the methods and assumptions of philosophy. The questions do not necessarily have determinate answers, but they are helpful in shaping the parameters of discussion.

The first set of questions considers why empirical answers matter. Are the rules less objectionable if the troubling hypotheticals hardly ever occur—or is a morally disturbing rule undesirable even if it is never instantiated? Why does it matter whether 30% or 70% of attorneys feel that client candor is secured only by the existing rules of confidentiality rather more nuanced alternatives? Does it matter, for the task of writing the rules, whether clients have, or are ever likely to have, a fairly accurate understanding of the rules?

The second set of questions deals with the link between rules of legal conduct and morality. Is congruence with morality a necessary aspect of such rules? Is it simply one of many considerations that may be weighed one against another in crafting such rules? Are there limits to the ways in which such rules can reflect morality? And to what extent can we assume there is a relevant moral consensus about the underlying situations?

At the end of the Article I will also raise questions about the psychological posture of lawyers. When and why does it matter that lawyers be comfortable with the rules that constrain them? When lawyers have reasons to violate rules because of psychological discomfort, when do these reasons justify such violations? What is the link between such reasons and morality?

My discussion of these issues will be exploratory. I hope to advance the dialogue about the similarities and divergences between a philosophical

18. See *supra* note 6.

way of asking these questions about confidentiality and the approaches, however they are characterized, used by many of its discussants.

II. EMPIRICISM

Philosophers talk about empiricism, especially when they are doing epistemology, but philosophy does not rest on polls, on surveys of what persons say and think.¹⁹ For example, the notion that a good person is altruistic and even, at times, self-sacrificing is derived from conceptual arguments and not from surveys of usage or belief. It is irrelevant to the conceptual argument that perhaps 8% of individuals surveyed may claim that goodness and altruism are unrelated. One might conclude from such data not that the conceptual argument is flawed but that the minority of respondents misuse the concept or have special unarticulated arguments about goodness in mind.

Some empirical data are essential to the task of philosophers, at least in the way in which philosophy has been conceived over the last half century. Information about language use and discourse is always relevant to conceptual questions because how we think reveals itself in what we say. Language is the public face of concepts.²⁰

But philosophy does not proceed by documenting and counting examples of language use. Rather it works by way of hypothesis and counterexample.²¹ If it is said that moral goodness has altruism as an important component, a relevant hypothesis is that we do not attribute moral goodness to persons who are incapable of altruism. The business of philosophy is to test, by way of example and counterexample, whether this is so. Moreover, the question can be refined and elaborated. One can test by hypothesis whether altruism is *essential*, not simply important, for moral goodness. One can ask whether the relevant personal characteristic is the *capacity* for altruism or the exercise of it.²²

19. See, e.g., IAN HACKING, WHY DOES LANGUAGE MATTER TO PHILOSOPHY? 2 (1975); Richard Rorty, *Metaphilosophical Difficulties of Linguistic Philosophy*, in THE LINGUISTIC TURN: RECENT ESSAYS IN PHILOSOPHICAL METHOD 1, 2 (Richard Rorty ed., 1967).

20. See HACKING, *supra* note 19, at 4.

21. The method is hardly an innovation of the twentieth century movement called Oxford linguistic philosophy. Rather, it is a distinctive part of philosophy since its inception, and it characterizes the method displayed in Plato's dialogues and Kant's critiques.

22. The relationship between the capacity and exercise of altruism is obviously complex. It is idle to attribute altruism to a person who never practices it; it is not clear that there would be any ground for such an attribution. On the other hand, no person is altruistic on every occasion; it seems sensible to attribute altruism to persons who act accordingly only in some circumstances. The difficult conceptual question here is what pattern of action justifies calling someone an "altruist."

And how often or dependably will a good person be altruistic? Can we even agree what sorts of choices and actions count as altruistic?

The method of hypothesis and counterexample is not limited to philosophy. Science often proceeds in an analogous way. Medical researchers may hypothesize that particular enzyme levels mark certain cancers. The hypothesis is testable and falsifiable, again by counterexample, by finding that the predicted levels are not present. A difference between much scientific research and much philosophy is that the former depends on data from experiments and the latter on reflection on what we are disposed to say and think. But in both domains the power of hypotheticals and counterexamples is central.²³

How is this relevant to controversies over the rules of confidentiality for lawyers? Just as it is a decisive objection to a philosophical or scientific claim that the evidence—respectively, from what we say or from experiments—does not support it, it is also an important, perhaps decisive, objection to a legal rule that it anticipates situations that are plainly unjust. Imagine a drug that is dangerously addictive and harmful but that is also the only known cure for a rare but fatal condition of the blood. Imagine we are deciding between an absolute ban of the drug and a more limited prohibition that allows a medical board to approve administering the drug to those very rare patients who need it to survive. Arguably the second option is preferable—and its merits are independent of the fact that the exceptions are very rare.²⁴

In other words, the injustice of a law that has morally disturbing applications depends not so much on the incidence of such applications as it does on whether the law can be reformulated to avoid such applications. The method of hypothetical and counterexample is relevant here as elsewhere. If this is so, it allows us to criticize the first aspect of surveys about the confidentiality rules, inquiries into whether there will be relatively many or relatively few instances in which great harm will befall innocent persons as a result of lawyers' unwillingness to

23. In *A Theory of Justice*, John Rawls repeatedly uses the felicitous phrase "reflective equilibrium" to address the philosophical method of tacking back-and-forth between conceptual descriptions and hypotheticals that test those descriptions. See JOHN RAWLS, *A THEORY OF JUSTICE* 48–51 (1971). Accordingly, any account of the nature of justice must be tested and refined against intuitions about just and unjust circumstances and decisions. See *id.*

24. Of course, other assumptions have to be made, for example, that limited use of the drug can be controlled by a trustworthy administrative process, that appropriately deserving cases can be identified and segregated, and so on.

reveal confidences. The argument that there will be relatively few or de minimis cases is arguably not irrelevant, but it is, I would argue, outweighed by the straightforward awareness that such cases are easily imagined and deeply troubling. Moreover, by their very nature, these cases are usually invisible. By protecting confidences, the lawyer not only harms the innocent person who would benefit from exposure of the information, but the lawyer also ensures that the choice to remain silent and the consequences of that choice will most likely never be known.

Thus, when lawyers who defend the confidentiality rules argue that the troubling counterexamples are unlikely to arise, they offer what amounts to a weak argument against bad rules in this and other domains, rules for which unacceptable applications are easily imagined. Furthermore, the actual incidence of such applications can never be known. The approach of empirically determining how often lawyers' silences have these harmful external consequences is thus doubly misconceived: it assumes that the objection is empirical when in fact it is conceptual,²⁵ and the empirical evidence for the rebuttal is largely speculative.

The most imaginative empirical research in Fred Zacharias's examination of confidentiality concerns the attitudes of lawyers and clients toward the rules, problematic applications of the rules, and potential revisions of the rules. In the Tompkins County surveys, a substantial majority of lawyers—over 65%—concluded that lawyers should disclose confidential information to prevent harm to kidnap victims, innocent defendants, and fatally ill adversaries, as in the examples described above.²⁶ A smaller percentage was willing to endorse disclosure when the anticipated harm was financial, smaller still when the harm was speculative.²⁷ And most lawyers were unwilling to disclose when the projected harm would affect the state rather than individuals directly, for example the system of justice in a case in which the lawyer has confidential information that reveals that perjury was suborned or is aware that his client has been involved in spying.²⁸

Clients were more inclined to support disclosure across the board. Around 80% believed lawyers should be allowed to disclose in the three dire situations described in the examples.²⁹ And an equally substantial

25. To say that the objection is conceptual is to say that the requirements of confidentiality conflict with the concept of minimally defensible moral conduct. The merits of this objection are independent of whether morally indefensible choices in fact occur.

26. See *supra* text accompanying notes 7–9.

27. See Zacharias, *Rethinking Confidentiality*, *supra* note 2, at 389–92.

28. See *id.* at 391–93.

29. See *id.* at 400–02.

majority felt that taking action was appropriate even when the results were speculative, such as situations in which the lawyer had reason to think his client was a spy or was aware that a material used in airplane construction was likely cause danger.³⁰ Zacharias concludes that the data suggested that “clients worry [more] about the degree of possible harm while lawyers are more concerned with being sure harm will result.”³¹

Zacharias’s survey also looks into attitudes toward discretionary and mandatory disclosure in these various situations and asks about different procedures and mechanisms of disclosure.³² Beyond that, it examines the probable effects of disclosure in light of the most widely accepted justifications for the current restrictive rules.³³ Accordingly, it considers whether lawyers dependably communicate the confidentiality rules to clients, whether clients have an accurate understanding of the scope of confidentiality, and whether clients can be said to depend on the rules in communicating candidly with their attorneys.³⁴ The evidence for all of these conventional justifications is equivocal: lawyers often do not discuss the rules and certainly do not do so as a rule in their first meeting with clients; clients generally have vague and mistaken ideas about the scope of confidentiality, gleaned from many sources other than the lawyer’s communications; and clients’ willingness to be open and honest are affected by many considerations and beliefs other than the confidentiality rules.³⁵

How should these findings affect our attitude toward reform of the confidentiality rules? There seem to be at least three implications. The first is that the findings are largely predictable from common sense. This is in no way a criticism. In fact, the findings might be suspect if they deviated from common sense. At the same time, however, what we learn from predictable findings is limited. Thus, the finding that lawyers say that they would be more likely to reveal confidences when the anticipated harm is physical, dire, and certain than when it is financial, less serious, and speculative is hardly surprising, nor is it surprising that there is a sliding scale with regard to each factor and variations thereof.

30. *See id.* at 401.

31. *Id.*

32. *See id.* at 404–07.

33. *Id.* at 404–09.

34. *See id.* at 382–86.

35. *See id.* at 382–88.

Because lawyers are more likely to have a vested interest in familiar ways of proceedings, they are more likely than clients to favor the existing rules and rationalize adhering to them. They also see themselves more readily in the role of agent for the client's interests and preferences, come what may. Having been schooled in the standard justifications for the existing rules, they would fall more readily into the habit of citing and perhaps believing them. The survey bears out all of these expectations.

Moreover, lawyers are likely to be disposed to minimize the array of cases that would require special deviations for the rules. They would therefore favor disclosure only in the cases of extreme and certain harm and be reluctant to disclose in other sorts of cases. Clients, on the other hand, may be expected to engage in a rough kind of utilitarian calculation, favoring disclosure in cases in which the foreseeable harm of whatever kind outweighs the benefits of silence. In these cases, lawyers and not clients will take into account the burdens of conscience and the guilt associated with rule violations; both factors will make lawyers less ready to support exceptions to the rules.

It is also unsurprising that lawyers will vary in their communications to clients about confidentiality and that clients will vary in their understanding of the relevant rules. Some lawyers may believe, as the standard justification maintains, that addressing the issue of confidentiality early in the relationship and making certain that clients understand the breadth of the rules ensures candor and trust on the part of clients. Others may reasonably believe the opposite, that any such discussion will make clients self-conscious about the relationship and put them on their guard. Still others may expect clients to believe that, notwithstanding the rules, in situations of danger to third parties, lawyers will breach the rules and disclose. The rules will lead to openness only if they are clearly understood and only if reliance on confidentiality really outbalances other reasons for circumspection on the part of clients.

A second implication is that we must be skeptical about such surveys, about whether they can be trusted. There is always a gap between what persons predict they would or will do and what they do once circumstances call for action. With regard to breaching confidentiality, the gap is likely to be unusually wide. For one thing, lawyers may overstate their readiness to reveal information to save third parties from harm, either because they want to demonstrate a responsive moral conscience or because they want to believe that they have such a conscience. On the other hand, lawyers may understate their likelihood of breaching; they may underestimate how troubling the rules will be in practice and may suffer erosion of their faith in the rules and the underlying justifications when actual situations arise.

Clients may also not quite know their own minds when responding to a survey. Some may be inclined by habit to perform a utilitarian calculation and endorse disclosure whenever it is favored by a balance of interests. Others may instinctively perform a self-interested analysis and support nondisclosure whenever they imagine themselves affected adversely. And generally respondents may not know or be able to articulate their own habits of thought, may spontaneously camouflage utilitarianism as self-interest, and vice versa.

Zacharias ends the 1996 article in which he discusses the Tompkins County survey with an invitation to other researchers to assess the opinions of lawyers and laypersons in greater depth.³⁶ In the last decade and a half, the invitation has not been taken up. I have grappled in this section with two reasons why this may be so. The first is that common sense may tell us more about how lawyers and clients respond to the rules than a survey; the second is that responses may not be a reliable measure of how individuals would act but rather a measure of how they would like to see themselves and to be seen.

A third implication, discussed above, is that the relevance of empirical data, even if it can be trusted to reflect probable choices and actions, is problematic. In weighing the merits of a set of rules, we may consider, on the one hand, the substantive arguments for or against those rules or, on the other hand, whether those substantive arguments happen to be persuasive to those who encounter them. The latter is arguably a secondary consideration and inferior to the first. An argument that is said to be persuasive by 70% of respondents is not necessarily a better argument than one accepted by 50%. A bad argument can gain acquiescence, and a good argument can be widely rejected. History, politics, and the sciences are full of examples.³⁷

A survey of the claimed persuasiveness of the confidentiality rules is hardly a good measure of the merits of the rules. A survey can, however, successfully refute idealized justificatory stories. For example, the confidentiality rules are sometimes justified in the belief that clients are generally made aware of the rules by lawyers, that they understand

36. See *id.* at 353 n.7, 400–09.

37. In contention here is, on one hand, confidence that the free competition of ideas will yield truth and progress, and on the other hand, the pessimistic view that bad arguments and erroneous facts can be as compelling and effective as good arguments and truth. Wherever one stands on this debate, it is clearly a fallacy that, other things being equal, the more widely a belief is held the more likely it is to be true.

them, and that the rules are crucial in facilitating candid communication, enabling lawyers to provide effective representation. Empirical evidence, as we have seen, effectively casts doubt on every part of this generalized scenario.³⁸

If the merits rather than the persuasive power of the rules are most significant in determining whether they should be changed, how do we determine their merits? In the next section, I will consider the role of morality in assessing the rules. In particular, I will ask not only what it means to demand that the rules conform to morality and whether they can be justified morally but also whether and to what extent such rules need to pass a moral test.

III. RULES AND MORALITY

Critics of the confidentiality rules take for granted that the more closely the rules reflect common morality the more satisfactory they are. This assumption is *prima facie* plausible. But the extent to which rules of professional conduct can and *should* accord with morality is a briar patch of issues.

A. *The Poles of Debate*

Imagine a spectrum of views on this question of the place of morality in framing and assessing the confidentiality rules. At the poles of spectrum would be, on one hand, the view that morality has nothing to do with such rules, that a conflict of such rules with morality is not a serious objection to them. On the other hand, one might argue that the rules are imperfect and defective unless they always generate the best moral results. Let us examine both of these positions before looking at more nuanced views of the relationship.

The suggestion that rules need not reflect moral considerations is appropriate when morality plays no part in the underlying domain of activity. Morality is irrelevant to rules of road—on whether to drive on the left or right, on whether stop signs should be hexagonal or octagonal. Morality is relevant but marginal to other kinds of rules. Rules of etiquette are arguably framed by the moral desideratum of making individuals feel comfortable socially by using shared rules of respect and civility, but the particulars of etiquette, for example proper placement of plates and cutlery, are arbitrary from a moral standpoint.³⁹ Even the

38. See Zacharias, *Rethinking Confidentiality*, *supra* note 2, at 382–88.

39. Readers will probably note that, in the real world, rules of etiquette are as likely to make persons uncomfortable as they are to provide a secure and safe ground for social interaction.

details of legal rules of procedure governing the filing of motions or the criteria of valid wills are not of moral concern as long as they are fairly conceived and administered.

Can this be said of the rules of confidentiality? Unlike rules of driving or rules of etiquette, the rules governing professional conduct in general and governing confidentiality in particular are drafted in anticipation of ethical conflict in the particular cases. To be sure, some potentially embarrassing information shared by clients is morally innocuous, for example the revelation that the client always wears black. But most information that may require the attorney to reflect on the mandate of protecting confidences has moral implications. The client may admit and describe fraudulent acts, infidelity, or abusive behavior. In the absence of the rule of confidentiality, strong moral reasons may support disclosure of the information because of risks to others. At the very least, moral considerations are hardly irrelevant as lawyers consider the impact of confidentiality on their choices. This is true even if they conclude that the familiar boundaries of confidentiality resolve such moral issues in a satisfactory way. Therefore, the claim that rules of professional conduct have nothing to do with morality must be rejected.

At the other pole of debate is the position that optimal rules of professional conduct must always lead to morally best results. One obvious objection to this view is the notion that a morally best result is vacuous because such results are often indeterminate. Fools, or simplistic utilitarians, may rush in to offer a moral calculus for all occasions and situations, but common sense suggests limitations. A client admits that his infidelities and the psychological torment he heaps on his spouse and children are facts of his life that he feels incapable of changing; he admits that the family situation remains volatile and destructive. Should an attorney use this information—not known to anyone in a position to help—to intervene, or should she help the client resolve his legal problems—to which the family information may be irrelevant—and do nothing with her special knowledge? The moral dilemma is real; putting professional considerations aside, one may justifiably argue that the lawyer bears responsibility when the family situation explodes in violence. But the legal decision is straightforward. The attorney cannot use the information, cannot intervene except by discussing the predicament and exploring aspects of it with the client.

It matters here that the moral posture of the situation itself is uncertain. A nonlawyer, a friend for example, with the same information is in a moral

bind. This kind of dilemma can be generalized. It is likely that the consequences of many, if not most, interventions in morally complex situations are unforeseeable. But it is also the case that some interventions may produce better results than abstention. The beginnings of any moral resolution lie not in rules but in the potential actor's knowledge and understanding of the individuals, in her capacity for empathy and her respect for others' autonomy.

When the rules of confidentiality are criticized, examples in which the constraint of silence is seen as morally problematic are generally examples in which the consequences of nonintervention involve serious harm. Critics seem to concede that anything short of the most dire harms does not justify breach of the confidentiality rules. One way of saying this is that the rules of confidentiality and the constraints of effective legal representation shift the center of gravity for moral debate. Relatively minor harms are taken out of the equation: either they are not factored into the weighing at all or they are so obviously overridden by the benefits of maintaining confidentiality that are unworthy of notice. In the course of the next section, I will consider the issue of partiality, which colors these situations. Friendship involves partiality as a moral claim, and the rules of confidentiality formalize the notion of partiality with regard to clients.

If our two initial polar positions—on one hand that morality is no more relevant to professional rules than it is to rules of etiquette and on the other hand that morality transparently determines the optimal choice for the attorney in every situation—are nonstarters, what is left is the indefinite concession that the rules must accommodate moral sentiments and reasons in some manner. The ultimate way of addressing this will have to embrace both the ways in which morality plays a role in making rules necessary in the first place and the practical limits of moral understanding and consensus in discrete situations.

B. Between the Poles

Morality enters the discussion of professional rules in general and rules of confidentiality in particular at two points. My discussion in this paper is about the second of these points: the application of the rules to specific cases. But it is important to acknowledge the general relationship of law's institutions to morality.

At the most general and abstract level, lawyering itself—the institutions of legal representation—has a fairly transparent moral justification. Persons who are able to use legal resources effectively to achieve their ends are likely to be better off. Given the complexity of these resources and institutions, persons need guidance. Lawyers exist to provide that

guidance, whether the matter is a commercial agreement or criminal defense. Thus, the institution as a whole has moral standing; given the complexity of modern society, one is likely to suffer disadvantage and adversity if one lacks access to lawyers. It follows that the rules of professional conduct spell out how lawyers can best effect that role, how they shall govern their legal representation to benefit clients maximally.

Lawyers of any degree of naïveté or sophistication are likely to apprehend the confidentiality mandates in similar ways that reflect their moral justification. First of all, the general contours of the rules will be unsurprising. Lawyers understand that competent representation presupposes more or less open communication between client and lawyer, that clients will not openly share information, attitudes, feelings, or plans unless they expect that the lawyers will keep these disclosures to themselves, and that rules rather than mere reliance on the lawyer's discretion will be needed to establish such interactions.

Second, lawyers will also understand that the confidentiality rules document a tectonic shift in the lawyer's moral posture. Ordinary morality, as seen by most philosophers and reflected by much ordinary thinking, sees moral action as involving efforts to bring about well-being, efforts that have well-being as their aim. The greater the anticipated well-being—either in result or in purpose—the greater the positive moral value of the act.⁴⁰ A preference for one person's well-being over another's requires some justification. Of course, moral action presupposes concern for the well-being of others, not merely oneself, and indeed moral action requires discounting oneself and considering the well-being of others. In that sense, it is altruistic.

The issue of partiality is the interface between the first point in this section, the general moral justification for the practice of legal representation, and the second point, the moral scrutiny of how partiality is carried out in particular situations of representation. Partiality is a familiar topic to moral philosophers, who have debates over the extent to which family, friends, and colleagues may—in a morally justifiable

40. This notion captures, I think, the essence of many different moral theories. Accordingly, it does not specify the nature of well-being, a matter about which there is much disagreement—what is the role of happiness, productivity, health, wealth, love, or spirituality in one's well-being? It does not choose between the views that moral action is largely a matter of one's intentions as opposed to the view that the morality of action is determined by its results. And it does not say anything about the comparative well-being of different individuals in any moral calculus.

way—be preferred over others.⁴¹ Views on this question range from arguments defending strict impartiality, to arguments that conclude that partiality is justifiable, and finally arguments to the effect that partiality is in some circumstances required. One hears, therefore, both the claim that “in the moral calculus, everyone counts for one and no one counts for more than one,” and the claim that moral action is always relational and depends on the relationship between the actor and those affected by the action.⁴²

One can make sense of the relevance of partiality only by looking to context. For example, when actions involve nurture and protection, favoring one’s own children and family is entirely appropriate and doing otherwise might be indefensible. On the other hand, when actions involve, say, the prevention of a catastrophe, such as a plane crash or a series of killings, having equal regard for all possible victims seems the appropriate moral stance.

When partiality is defended, it usually arises from one of three conditions: (1) one may be naturally situated so that responsibilities and benefits are due particular persons through special relationships, as in a family; (2) one may have chosen and built a relationship of care and intimacy in which special bonds are recognized, such as a relationship of friendship or love; or (3) one may have chosen a profession or role that entails special moral obligations to certain individuals, such as those of doctor to patient or employer to employee. The partiality with which a lawyer treats clients would fall in the third category.⁴³

If one tries to compare lawyering with other professional roles, however, the comparisons rarely support the degree of partiality required by the confidentiality rules. For example, it is clear that a doctor has obligations to work toward the patient’s health and has no comparable obligations to others. However, if the doctor’s efforts for patients knowingly and directly involve harm to others, for example the patients of other doctors or if the doctor could modify treatment of the patients to prevent dire harm to others, surely those considerations would be morally relevant. Similarly, while one may favor one’s employees, it is

41. See THOMAS NAGEL, *EQUALITY AND PARTIALITY* (1991); David Archard, *Moral Partiality*, in 20 *MIDWEST STUDIES IN PHILOSOPHY: MORAL CONCEPTS* 129–41 (Peter A. French et al. eds., 1996).

42. The latter view is often called agent-relative partiality. See NAGEL, *supra* note 41, at 40.

43. See Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 *YALE L.J.* 1060 (1976). It can be argued that Fried underestimates the problematic moral nature of the obligations and rights of friends, and that the friendship relationship is too complex and controversial to provide a useful model for the relationship of lawyer and client.

surely relevant to the special consideration one gives those employees that other persons are significantly harmed as a result.

The moral complexity and context relativity of these situations is recognized in the fact that we do not try to regulate the doctor's or the employer's judgment with strict rules.⁴⁴ No protocols like the rules of lawyer confidentiality exist to tell doctors when to disregard the welfare of patients who are not the doctor's or to tell the employer when it may harm nonemployees with impunity. The implication here seems to be that, when partiality is recognized in our moral intuitions, it never yields a moral *carte blanche* to disregard the interests of others.

Taking partiality seriously as a moral factor can at best reinforce the general conviction that lawyers are justified in favoring their clients in moral situations. It cannot give us a reason to endorse the familiar rules of confidentiality because it cannot endorse any particular degree of partiality. In fact, it casts moral doubt on the rules to the extent that reflecting on partiality implies that harmful effects on others are never irrelevant, whereas the rules, to the extent that they aspire to moral justifiability, imply the opposite.

If we focus not on the rules themselves but on the moral dilemmas facing lawyers in real situations, we recognize two distinguishable issues: *how* and *whether* to follow the rules. Critics of the confidentiality rules seem concerned more with the latter than the former. In part, the "how" question is easily answered. Following the rules typically involves

44. On its face, section 5.05 (confidentiality) of the *American Medical Association's Code of Medical Ethics* imposes similar constraints on doctors as the *Model Rules* do on lawyers. See AM. MED. ASS'N, CODE OF MEDICAL ETHICS § 5.05 (2008–2009 ed.). It says that "[t]he physician should not reveal confidential information without the express consent of the patient, subject to certain exceptions which are ethically justified because of overriding considerations." *Id.* The specific exceptions listed are the intention of the patient to inflict serious harm on others along with the capacity to do so, and the additional requirements that may be imposed on the physician by law. See *id.* The physician appears to be in less of a straitjacket than the lawyer for three reasons. First, it is not clear that "certain exceptions . . . [involving] overriding considerations" are limited only to the specified exceptions. *Id.* It is plausible to see it as open-ended. Second, it is less likely overall that protecting confidences will involve decisions about harm to others for physicians because adversarial situations occur more frequently in law than in medicine. Third, in those situations in which harm to others is likely to result from physician silence and the situation is not anticipated by the specific exceptions, for example the patient informs the physician about past sexual relations in which he has not informed his partners that he has a serious communicable condition, such as an HIV infection, or one in which he informs the physician about a friend's intention to have sex without informing his partners about a condition of this kind, the law has readily imposed reporting obligations on physicians. Lawmakers have not been disposed to create comparable reporting requirements for lawyers.

abstention from any action through which the confidential information will be disclosed. Of course, in some of the examples raised by critics, lawyers may attempt to comply with the letter of the rule and circumvent the spirit, perhaps by encouraging others to pursue investigations through which the underlying information will be revealed. For example, if the lawyer knows on the basis of confidences that an innocent person is on death row or imprisoned for life, the lawyer might act indirectly to facilitate the discovery of exculpatory evidence. Such conduct might be applauded as having one's cake while eating it too and criticized as violating the spirit of the confidentiality rule. In such examples, the "how" and "why" questions are conflated.

In a moral dilemma involving confidentiality, lawyers have three options: they may follow the rule, violate the rule, or work toward changing the rule. Zacharias, following many other commentators, focuses on the third choice, which of course does not preclude the first and second choices.⁴⁵ One may comply and seek change; one may violate the rule and seek to change it. He notes that a system in which lawyers knowingly violate such rules when the moral pressure to do so is extreme—and a system in which lawyers are expected to do so—is unstable and indefensible.⁴⁶ Presumably, a practice in which lawyers defer to the rule in any and all circumstances is, in the eyes of many critics, even more obviously indefensible.

The situation paradoxically places the moral burden on the individual lawyer and exacerbates it. The paradox is that the rules exist to remove the moral burden from the lawyer insofar as they plainly instruct the lawyer to disregard the consequences to others of silence. The rules thus indulge the fiction that no intolerable moral burden is likely to result from silence. Because this is a fiction, the effect is to shift and intensify the moral burden, not to lift it. The lawyer not only deals with the responsibility for perpetuating serious harm to third parties but also the serious possibility of suffering career risks by violating the rules. The range of persons affected by the lawyer's choices is compounded.

As long as the choice rests with the individual attorney, results will be inconsistent. Attorneys confronted with identical predicaments will assess them differently and act variously. Some will remain silent and do nothing, others will try to circumvent the rule covertly, and still

45. See Zacharias, *Rethinking Confidentiality*, *supra* note 2. Zacharias's argument throughout his article is appropriately grounded in the institutional question of reforming ethical rules and not on the question of the individual choices that an attorney can and should make.

46. *Id.* at 370–76.

others will reveal information openly, risking and likely suffering significant adverse consequences to their career.

Proposals to redraft the rules of confidentiality are attempts to alleviate lawyers' burdens in such cases and bring about results that are more easily justified. The extent to which they can and would do so remains in doubt because of the inherent limits of our moral understanding and agreement. Zacharias believes, along with the majority of commentators, that empirical information about the views of lawyers and clients or laypersons is available and can guide reformers of the rules. The argument rests on the convictions that there is something like a moral consensus about these choices, that this consensus can be discovered, and that the rules can be revised to reflect that consensus. These assumptions are questionable.

If one examines any particular situation outside the small set of extreme examples usually trotted out by critics of the confidentiality rules, defenders of the rules will raise predictable doubts about a moral consensus. Suppose one's client has convincingly claimed to have committed a rape and murder for which an innocent man is on death row. And suppose that there is little possibility that the true circumstances will be discovered. The attorney with this information, and this dilemma, may respond with many concerns and rationalizations. The attorney may argue that there is only the client's word about the assertion of responsibility, and the client's story may for unknown reasons be untrue. The attorney may say that the cost of being known as one who breaches confidentiality, even in this extreme case, may cost the attorney other potential clients. The attorney may temporize that the innocent man on death row may deserve serious punishment for other crimes, ones for which that man has not been tried, and that the attorney's client has had an exemplary life except for one moment of homicidal folly. My point is not that these are sound arguments in a few or in many cases. It is rather than they are understandable ways of failing to reach resolution. The overriding point is that, whether or not the rules of confidentiality allow the lawyer to go forward, there is no certainty about when lawyers would generally believe they ought to do so or about when they would act.

There is hardly a moral consensus even about the extreme cases. Empirical surveys, we have seen, are of limited use. Suppose, as was the case in Zacharias's findings, 70% of lawyers say they would take action in one kind of case—one in which a life is at stake—and 30% say

they would act in a different kind of case—one in which serious financial harm would befall many innocent persons.⁴⁷ And suppose groups of lay clients were in both cases more ready to breach confidentiality and to believe attorneys should do so. It is hard to know what conclusions to draw. We saw that responding to a questionnaire and choosing to act are different matters. Moreover, responding to a fact pattern with limited and schematic information is different from responding to an actual situation with its array of ambiguities and complexities.

The lessons we can draw from morality are limited. It seems persuasive that the rules of confidentiality should be redrafted to accommodate the most extreme situations, those in which the lawyer has good reasons to think that maintaining silence will play a significant role in causing or allowing serious undeserved harm to others. It seems persuasive as well that lawyers should not have to fear the professional consequences of coming forward in such situations. Given the limitless capacities of persons, perhaps lawyers even more than laypersons, to see situations as uncertain and ambiguous—as fraught with unseeable possibilities—and the capacity to rationalize, it is hard to say more. Rulemakers aspire to offer clearer guidelines than morality usually can. In the case of the rules of confidentiality, clarity seems bought at too high a price to conscience and fairness.

IV. CONCLUSION

I end up with two cheers for reform. On one hand, common sense and common experience lead to misgivings about surveys of opinion designed to elicit a moral consensus. One should mistrust responses to a questionnaire for many reasons. Individuals might like to think of themselves or to be thought of by others as more responsive to morality and more interventionist than they would be in fact. Or they might want to believe they are more respectful of rules than in fact they are. Even putting these doubts aside, questionnaires on these matters reveal less a moral consensus and more moral disarray. Many persons are swayed by dramatically sketched hypotheses; many are not. Answering questions is relatively easy; intervening in a legal situation is messy and hard. Once a decision to act is made, one has to take many risks, including the risk of others' disbelief and intransigence. Finally, one might consider the possibility that, were the rules of confidentiality to change, the same lawyers would acquiesce in silence and the same lawyers would choose to come forward as under the current rules. This would be so if the

47. See *id.* at 393.

moral impact of the situation on those susceptible to responding to it far outweighs, as I suspect it does, the deterrent effect of rules. Of course, a change in the rules would mean that those who intervene would no longer risk censure or worse for their decision. That in itself might justify a change.

One of the conundrums of reform is our endless uncertainty about the psychology of lawyers. The questions are simple but not easy. To what extent do lawyers want to do right overall—to avoid serious harm to innocents or at least those who do not deserve it? To what extent will they follow rules come what may, at least when adverse consequences are not personal? What are the limits of their capacity for rationalization? How does legal education and professional culture affect attitudes and conduct in these situations?

Doubtless lawyers vary by these measures as much as any other heterogeneous group in our culture. But that does not make the questions meaningless. It is easy to find opinions, hard to find answers.

